

Chananya v Spolan

2019 NY Slip Op 34201(U)

June 11, 2019

Supreme Court, Nassau County

Docket Number: 605305-16

Judge: Timothy S. Driscoll

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
**BARBARA CHANANYA, individually, and as a
shareholder of MJB Holding Corporation suing on
behalf of herself and all other shareholders of MJB
Holding Corporation similarly situated, and in the
right of MJB Holding Corporation,**

TRIAL/IAS PART: 10

NASSAU COUNTY

Index No: 605305-16

Motion Seq. No. 4

Submission Date: 4/12/19

Plaintiffs,

-against-

**PAULINE SPOLAN, MINDY SPOLAN
BEZALEL, MJB HOLDING CORPORATION,
AUDLEY STREET REALTY LLC, and BARON
SPOLAN REALTY LLC,**

Defendants.

-----X

Papers Read on these Motions:

- Memorandum of Law in Support.....X**
- Affidavits and Affirmations in Support with Exhibits.....X**
- Affidavit and Affirmation in Opposition with Exhibits.....X**
- Memorandum of Law in Opposition.....X**
- Reply Affirmation with Exhibits.....X**
- Reply Memorandum of Law.....X**

This matter is before the Court on defendants Pauline Spolan (“Pauline”), Mindy Spolan (“Mindy”), MJB Holding Corporation, Audley Street Realty LLC, and Baron Spolan Realty LLC’s (collectively, “Defendants”) motion to compel enforcement of the settlement agreement placed on the record on July 31, 2018. For the following reasons, Defendants’ motion is granted.

BACKGROUND

A. The Parties' History

The parties history is set forth in detail in the Court's prior decisions, which are incorporated as if set forth fully herein. Briefly, plaintiff Barbara Chananya ("Barbara") owns and controls the majority of the equity of MJB Holding Corporation ("MJB Corp."), which owns rental apartments and commercial properties in Kew Gardens, New York. Pauline is Barbara's mother and Mindy is Barbara's sister. Barbara and her family interests own or control 55.125% of MJB Corp. and Mindy owns or controls 43.875% of MJB Corp. After the death of Barbara's father, Leonard Spolan ("Leonard"), Pauline acquired his interest and now owns 1% of MJB Corp. Pauline is the sole shareholder with voting rights in MJB Corp.

Barbara alleged in this action that since Leonard's death, Pauline and Mindy have deliberately breached their fiduciary duties to the shareholders of MJB Corp. by conduct including engaging in self-dealing. Barbara also alleged that Pauline and Mindy intentionally excluded her from participating in the management of MJB Corp., Audley Street Realty LLC ("Audley LLC"), and Baron Spolan Realty LLC ("Baron LLC"). The Complaint alleges numerous acts of purported misconduct, and asserts twenty-one causes of action, including claims for waste and mismanagement of the relevant companies, breach of fiduciary duty by Pauline and Mindy, and a request for an accounting of the companies.

Defendants allege that Jeffrey Spolan ("Jeffrey"), Leonard's brother, has asserted claims in Queens County Surrogate's Court for fifty-percent of the Estate of Martin Spolan ("Martin") – Jeffrey and Leonard's father. Through his fifty-percent claim against Martin's Estate, Jeffrey claims a beneficial interest in fifty percent of MJB Corp. and fifty percent of Audley LLC. Jeffrey also claims an interest in fifty percent of the rental income earned by MJB Corp. and Audley LLC since the inception of Martin's Estate in 1992. On May 11, 2018, Barbara was deposed by Jeffrey's attorney in connection with the pending Surrogate's Court proceeding.

On May 21, 2018, the parties were referred to mediation before Michael Cardello, III, Esq. Defendants allege that negotiations took place from May to July 2018 against the backdrop of Jeffrey's claimed fifty-percent interest in Martin's Estate and, in fact, Mr. Cardello spoke directly with Jeffrey's counsel in an effort to understand his claims. The mediation was

successful and the parties' agreement was memorialized in an email from Mr. Cardello to counsel dated July 20, 2018, *see* Mullholland Affm. at Exh. 18, and placed on the record on July 31, 2018 (the "July 2018 Stipulation"), *see* Mulholland Affm. at Exh. 19. In particular, Mr. Cardello stated, on the record, that the parties had reached a "settlement in principle" as follows:

So Barbara will pay an agreed upon dollar amount to Mindy and Pauline in exchange for all interest held by Mindy and Pauline in the properties.

The properties are defined as such, your Honor: They're actually holding companies that own properties. So it's MJB Corporation, Audley Street Realty LLC and Baron Spolan Realty LLC. Each of those entities owns property. And I don't have the addresses before me. I don't know if counsel wants to have that articulated on the record, but what's happening here is that Barbara is going to pay a sum of money in exchange for all the interest held by Mindy and Pauline in those LLCs and properties . . .

THE COURT: We've had discussions where those properties have either been mentioned on the record or in chamber's conversations. There is no doubt about the location of those three properties?

MR. CARDELLO: No. If counsel wants me to articulate them on the record by looking and referencing my notes, I can do that . . .

[T]he parties will revise all trust agreements so there is a complete disassociation of all trust relationships between the parties, that is Barbara and her children, Mindy and her children, and Pauline, which include, but is not limited to, acting as a trustee or as an owner of a trust in this case.

Second deal point, all interested parties will exchange general releases, your Honor, for the benefit of all parties, as well as to and from Jeffrey who is a nonparty in the action. As I referenced earlier, your Honor, Jeffrey is the uncle of Barbara and Mindy and he has a Surrogate's Court action that's going on right now in Queens County, and this global settlement is going to resolve those issues as well. Jeffrey's counsel, Farrell Fritz, is not here today, but I have spoken to Mr. Penzer at length about this, and I believe the parties all understand that Jeffrey's issues will be resolved in the Surrogate's Court so the exchange of releases is going to extend to that action . . .

Next deal point, all interested parties will exchange covenants not to sue for the benefit of all parties, as well as to and from Jeffrey. Barbara will relinquish all interest and/or contingent interest in the apartment in Florida. Your Honor, there is an apartment that is owned by a trust which has parties involved in this case as

owners of the trust or have interest in the trust that Pauline resides in and . . .
Barbara is going to relinquish all of her interest, whether actual or contingent, in
that apartment.

Barbara will discontinue this action with prejudice.

Barbara agrees to a specific renunciation of any and all interest in Pauline's estate.
Barbara is not permitted to sell any or all the properties for profit for a period of
two years from the date of the transfer of interest in the properties, which would
be the closing date, your Honor, of when it happens. So the idea is that for two
years there is a lock-in period in which they could sell but it can't be for a profit.

Pauline must vacate the apartment that she maintains at MJB in Kew Gardens
within a reasonable time after the closing. So Pauline has an apartment in the
MJB building in Kew Gardens that she's agreed to vacate once the closing takes
place given a reasonable amount of time.

Barbara agrees to immediately start her due diligence of the property and Mindy
and Pauline agree to give Barbara and/or anyone retained by Barbara her complete
and unfettered access to the properties, as well as the books and records of the
properties, which necessarily includes, but is not limited to, an accounting of the
security deposits for the properties.

Mindy and Pauline agree to cooperate with Barbara for the performance of the due
diligence, which shall be completed within 60 days of the execution of the
settlement agreement. From our discussions, Barbara is going to try to do this
sooner than that, but this is a transaction, your Honor, that is going to take a
period of time to happen and their due diligence is part of that process.

Barbara agreed to assume the expense in any possible liability with regard to the
Spolini litigation. There is a third litigation, your Honor, in this case where there
is a tenant, commercial tenant at the MJB property in Kew Gardens that's
currently in litigation with MJB and Pauline at this point, and because of the
transfer of the ownership, Barbara has agreed to take on the responsibility with
regard to that litigation . . .

Mindy and Pauline agree to permit Barbara to engage a new managing agent for
the properties upon the execution of the settlement agreement. However, until the
closing, your Honor, of the deal here and the transfer of the interest of the LLCs,
Pauline is still the managing member of the LLCs and the new managing agent
shall take instruction only from Pauline at this point until the closing occurs, the
transfer.

Barbara agrees to be solely responsible for the monetary or otherwise – monetarily or otherwise all claims set forth by Jeffrey in his Surrogate’s Court matter in Queens County before Surrogate Kelly and the settlement of said claims. Any agreement reached by and between Barbara and Jeffrey shall not impact the terms and conditions of this settlement agreement, your Honor, in this case.

Those are the major deal points, your Honor, that we have hammered out over a period of time. The process, Barbara has already started the due diligence process by sending over a list of information to counsel for the defendants to start that – start the process to get an understanding of the building, its financial status and things of that nature. So that’s already underway, your Honor, to speed up the process.

THE COURT: Is there any – recognizing that there are moving parts or I think you said oars rowing in the same direction to make sure the river flows the right way, whatever trial lawyer’s metaphor we have, is there anything open we have in the relationship among the parties or is this resolving the entirety of the disputes between the parties, recognizing that everyone has to take steps forward in good faith, but this is – this is, in the view of the mediator, the neutral, resolving all of the disputes between the parties?

MR. CARDELLO: Yes, it is, your Honor.

The Court asked Barbara’s then-counsel, Mr. Acampora, if the agreement “resolves the disputes among the parties, recognizing everyone still has to take steps to make sure that the settlement is accomplished.” Mr. Acampora responded: “Yes, your Honor, and in the broadest of terms, yes, there are a lot of little details that we need to address, but, yes, it resolves every issue among these family members.” Defendants’ respective counsel concurred that their agreement resolved the disputes among the parties.

The Court also inquired of the individual defendants, after they were placed under oath, as follows:

THE COURT: Do you understand the settlement that has just been placed upon the record?

MS. BARBARA CHANANYA: Yes, your Honor, I do.

MS. PAULINE SPOLAN: Yes, I do.

MS. MINDY SPOLAN: Yes, your Honor.

THE COURT: Is this settlement the product of negotiations between your attorney and the other attorneys on this case and with the assistance of the mediator?

MS. BARBARA CHANANYA: Yes, it is.

MS. PAULINE SPOLAN: Yes, it is.

MS. MINDY SPOLAN: Yes.

THE COURT: Do you intend to abide by all the terms of the settlement as have been placed upon the record?

MS. BARBARA CHANANYA: Yes, I do.

MS. PAULINE SPOLAN: Yes, I do.

MS. MINDY SPOLAN: Absolutely, Yes.

THE COURT: Now, there's been reference to a dollar amount in the settlement, which, again, I'm not aware of, I don't need to be aware of it, but it's in an e-mail from July 20th . . . Are you aware of that dollar figure as embodied in that e-mail?

MS. BARBARA CHANANYA: Yes, I'm aware of it.

MS. PAULINE SPOLAN: Yes, I am.

MS. MINDY SPOLAN: Yes, I am.

THE COURT: Has anyone forced you or coerced you to enter into this settlement?

MS. BARBARA CHANANYA: No, your Honor.

MS. PAULINE SPOLAN: No.

MS. MINDY SPOLAN: No.

THE COURT: Okay, are you satisfied with the representation that your attorney has provided to you?

MS. BARBARA CHANANYA: Yes, I am.

MS. PAULINE SPOLAN: Yes, I am.

MS. MINDY SPOLAN: Yes.

Defendants allege that on October 18, 2018, Mr. Cardello reported that Barbara was “pulling out” of the settlement. *See* Mulholland Affm. at Exh. 20. On November 1, 2018, Barbara’s current counsel, Mr. Millman, responded to a prior letter filed by Pauline’s counsel, *see* Mulholland Affm. at Exh. 21. Mr. Millman stated, among other things, that “[w]hile defendants want to renege on the settlement agreement, the transcript, under the voir dire as administered by your Honor makes quite clear that the settlement before your Honor was and is a binding agreement upon defendants.” Mr. Millman alleged that Defendants failed to provide access to the books and records of the relevant properties, and alleged that there were “multiple title issues as to the properties and dispute as to ownership of MJB.”

B. The Parties’ Positions

Defendants argue that the July 2018 Stipulation is a binding and enforceable agreement and the key terms establish that Barbara agreed to pay Pauline and Mindy a sum certain in exchange for all of their interests in MJB Corp., Audley LLC, and Baron LLC, and that Barbara agreed to be responsible, monetarily or otherwise, for all of Jeffrey’s claims in the Martin Spolan estate proceeding pending in Queens County Surrogate’s Court. To the extent there were clouds on the corporate interests created by Jeffrey’s claims, Barbara agreed to clear them. Barbara has no basis for reneging on the settlement, and an Order compelling Barbara to comply and enforcing the settlement is necessary and appropriate. Additionally, the July 2018 Stipulation is clear and unambiguous on its face and parole evidence – in particular, what was said or known during the mediation – should be inadmissible. To the extent Barbara seeks to rely on substantive information regarding what allegedly was or was not said or known to her during the mediation, she cannot simultaneously use the mediation privilege as both a sword and a shield.

Barbara argues that Defendants must demonstrate entitlement to specific performance as a matter of law and they have failed to meet that burden. In May 2018, counsel for the parties expressly agreed in their agreement to mediate that any settlement would only be effective upon the execution of a written stipulation signed by “all Parties or their duly authorized agents.” No written stipulation has been executed to date, and the required execution by “all Parties affected”

would include, most notably Jeffrey. Accordingly, an express precondition to any settlement becoming enforceable never occurred.

Barbara further contends that the necessity of an executed formal settlement agreement evidences that the July 31, 2018 “deal points” were merely an “agreement to agree.” In fact, Pauline’s counsel, in correspondence to the Queen’s County Surrogate’s Court on July 31, 2018, characterized the “deal points” as a “settlement ‘in principle.’” The items placed on the record were only a broad outline of the terms of a settlement that contemplated the negotiation and execution of a formal agreement, which required negotiating and preparing documents with respect to the conveyance of corporate interests. The myriad terms customarily included in corporate buyout agreements were not addressed in the outline placed on the record. Moreover, even assuming that the parties believed the July 2018 Stipulation formed a binding settlement agreement, Pauline’s attorneys implicitly conceded that it was not binding by sending Barbara’s counsel their own “outline” for the real settlement agreement that attempted to not only supplement but materially revise the settlement in principle. Additionally, even if the Court grants Defendants’ motion, Defendants have offered no guidance as to the form of an order compelling enforcement of the Settlement.

Barbara argues that her right to conduct a due diligence investigation allowed her to opt-out of the alleged settlement at all relevant times. Barbara obtained an explicit acknowledgment of her due diligence rights, which included Pauline and Mindy’s express obligations to provide unfettered access to the properties and information and to cooperate with her investigation. Barbara’s right to conduct the investigation did not expire until sixty days after the execution of the settlement agreement and that time limit never began to run because no settlement agreement was executed. The mediator’s statement of the due diligence rights did not limit the types of conditions into which the due diligence investigations could be conducted, nor did it limit Barbara’s right to decline to execute a settlement agreement or to withdraw from the settlement if the results of her investigation led her to reconsider the contemplated deal. In August 2018 correspondence, Defendants also recognized that Barbara’s due diligence rights meant that she could not be compelled to close the contemplated settlement.

Barbara also argues that she did not anticipatorily repudiate the July 2018 Stipulation. Even if her communication in mid-October 2018 advising Mr. Cardello that she did not wish to proceed could be held to be an anticipatory repudiation, the parties waived it by their statements and actions. The parties' continuing communications into January 2019 reflected ongoing efforts toward a resolution. Indeed, Defendants repudiated the July 2018 Stipulation by transmitting to Barbara's then-attorney an "outline" of what they claimed were the principal terms to be included in the written agreement when many of these terms were never referred to by the mediator and would have significantly compromised Barbara's rights. During the July 31, 2018 proceedings, the parties agreed to return to Mr. Cardello, with this Court maintaining jurisdiction. However, when the parties reached an obvious impasse, Defendants did not avail themselves of that mechanism. Defendants also repudiated the July 2018 Stipulation by failing to perform their duty to provide Barbara with complete access to properly conduct her due diligence investigation. Further, Defendants failed to meet their own burden as movants to demonstrate that they remain ready, willing, and able to perform all aspects of the Settlement. Finally, Barbara argues that even if the Settlement is enforceable, she should be relieved of its terms based on fairness, equity, and lack of material prejudice.

In her affidavit, Barbara affirms that she did not receive the due diligence materials her attorneys repeatedly requested. Barbara performed the investigations she could and discovered problems that include: 1) multiple building violations, 2) grossly incorrect tax returns, 3) MJB Corp. tax returns showing in excess of \$500,000 of legal fees and expenses with many fees not being an obligation of MJB Corp., 4) gross mismanagement of the properties, 5) no accounts reflecting the location of security deposits, 6) a high probability of tax fraud, 7) management failing to bill tenants for water/sewer taxes and rent increases, 8) unpaid real estate taxes and related fines and penalties, 9) unexplained six-figure accounting and consulting fees, 10) failure to obtain a J-51 tax abatement, 11) bills paid by MJB Corp. for non-MJB Corp. properties, 12) mold reports not being furnished, 13) Defendants taking salaries and paying for cars and personal expenses through MJB Corp., continuing after July 31, 2018, 14) MJB Corp. loaning money to the management company in excess of six figures, 15) return of security deposits being paid from operating accounts, and 16) failure to provide all leases for the tenants of the three buildings and

substantial uncollected rent arrears. Barbara's understanding was that a comprehensive written agreement would need to be prepared and executed, and before executing that agreement, she would have received the due diligence materials, reviewed and discussed them with her legal and tax advisors, and exercised her option to proceed or not proceed with the contemplated settlement. None of these things happened.

On reply, Defendants argue that the settlement in principle referenced by Mr. Cardello during the July 31, 2018 hearing became a binding settlement after the principal terms were placed on the record, counsel concurred that the settlement was a binding agreement, and the parties swore to be bound by the agreement. An in-court settlement was not prohibited by the mediation agreement, and an open court stipulation is not rendered invalid because the parties contemplate a further written agreement.

Defendants assert that on August 6, 2018, they sent Barbara's then-attorney an outline of the anticipated written agreement. The parties began exchanging comments concerning the draft outline. Barbara's argument that the traditional exchange of comments between counsel demonstrates the absence of an enforceable settlement or a repudiation of the July 2018 Stipulation is without merit. Additionally, Barbara's argument that she was entitled to "pull out" of the settlement due to a lack of due diligence is misplaced because Barbara's sixty-day due diligence period was to commence after the parties signed the anticipated settlement document. Further, prior to the July 2018 Stipulation, Defendants produced to Barbara nearly 20,000 pages of discovery documents and Barbara deposed Pauline, Mindy, a representative of the managing agent for the properties from June 2014 through March 2018, and the accountant for the entity-defendants. Thus, Barbara had the information necessary to make her aware of the risks and liabilities of the transaction. To that end, many of the alleged problems with the properties outlined in Barbara's affidavit were either known to her prior to filing suit or based on information produced in discovery long before the July 2018 Stipulation.

Defendants contend that Barbara's alleged unilateral exit clause is a major material term neither stated or implied by the parties on July 31st. Barbara and her attorney acknowledged on July 31st that the settlement was binding and it would be unreasonable to interpret the parties' settlement to mean that Barbara could unilaterally abandon the deal after a "free look."

Barbara's commitment to buy Mindy and Pauline's interests in the corporate entities was not conditioned or contingent upon the outcome of due diligence. Further, while Barbara is incorrect that Pauline must establish the elements of a specific performance claim, even if that were the case, the record demonstrates that Defendants have substantially performed and are willing and able to perform their contractual obligations, which entails providing Barbara access to the relevant property records and tendering their corporate stocks and memberships.

RULING OF THE COURT

A. Open-Court Stipulations

Stipulations of settlement are favored by the courts and are not lightly cast aside, particularly where the parties are represented by counsel. *Rancanelli Const. Co., Inc. v. Tadco Const. Corp.*, 50 A.D.3d 875, 875 (2d Dept. 2008). Indeed, in the case of "open court" stipulations, "strict enforcement not only serves the interest of efficient dispute resolution but also is essential to the management of court calendars and the integrity of the litigation process." *Id.*, quoting *Hallock v. State of N.Y.*, 64 N.Y.2d 230, 230 (1984). A party will only be relieved of the consequences of a stipulation entered into during litigation where there are grounds sufficient to invalidate a contract, such as fraud, collusion, mistake, or accident. *Id.* Accordingly, "as in a matter where parties seek enforcement of a contract, the court has the responsibility of effectuating the true intent of the parties, and where the terms are unambiguous, this intent must be gleaned from the plain meaning of the words used by the parties." *Fukilman v. 31st Ave. Realty Corp.*, 39 A.D.3d 812, 813 (2d Dept. 2007).

B. Application of the Principles to the Instant Action

Defendants' motion to compel enforcement of the July 2018 Stipulation is granted. Preliminarily, to the extent Barbara argues that Defendants must demonstrate the elements of a specific performance claim as a matter of law, *see* Pl. Memo of Law at p. 5, the Court disagrees. The parties have not filed a stipulation of discontinuance and, thus, this Court continues to possess "supervisory power" over this litigation and "may lend aid to a party who had moved for enforcement of the settlement." *Church Extension Plan v. Harvest Assembly of God*, 79 A.D.3d 787, 788 (2d Dept. 2010), quoting *Teitelbaum Holdings v. Gold*, 48 N.Y.2d 51, 53 (1979). Defendants are not seeking the "functional equivalent of a motion for summary judgment" or

asserting a cause of action for specific performance -- they are merely seeking to enforce what they argue is a binding settlement agreement.

The record is abundantly clear that the July 2018 Stipulation is a binding and enforceable settlement agreement. Indeed, a plain reading of the transcript reveals that the parties were unequivocal in their intention that the July 2018 Stipulation placed on the record by Mr. Cardello was a full and complete settlement of this matter. Counsel concurred that the July 2018 Stipulation resolved the parties' dispute. Moreover, Barbara's then-counsel stated that the settlement placed on the record "resolves every issue among these family members." Were that not enough, the Court expressly asked Barbara, Pauline, and Mindy, after they were placed under oath, whether they understood the settlement placed on the record and intended to abide by it. Each of the parties answered in the affirmative. The fact that the parties desired to reduce their settlement to a written agreement and utilize Mr. Cardello to resolve any disputes regarding the implementation of the agreement does not render the July 2018 Stipulation an unenforceable "agreement to agree." The Court is also not persuaded that the provision in the parties' mediation agreement stating that "[a]ny settlement, in whole or in part, reached during the mediation process shall be effective only upon execution of a written stipulation signed by all Parties affected or their duly authorized agents," *see* Millman Affm. at Exh. A, precludes the parties from entering into an "on the record" settlement or makes the execution of a written agreement by other interested non-parties -- most notably, Jeffrey -- a precondition to the enforceability of the parties' settlement of this action.

Moreover, the July 2018 Stipulation does not provide Barbara with any discernible basis to abandon the agreement. The plain language of the parties' agreement provides that the settlement is not contingent upon the due diligence investigation. Additionally, Mindy and Pauline's alleged failure to cooperate and provide access to the relevant books and records -- while perhaps grounds for a motion to compel enforcement -- neither renders the July 2018 Stipulation unenforceable nor establishes an anticipatory repudiation.

Barbara's allegations regarding the recently discovered issues with the subject properties do not alter the Court's result. Barbara has been represented by counsel throughout this proceeding and is assumed to have been apprised of the risks associated with the July 2018

Stipulation. Furthermore, Barbara's allegations of tax fraud and other purported clouds on the subject properties do not rise to the level of fraud or mistake sufficient to invalidate the July 2018 Stipulation, and the Court sees no equitable basis for unraveling the parties' negotiated, final settlement agreement duly placed on the record.

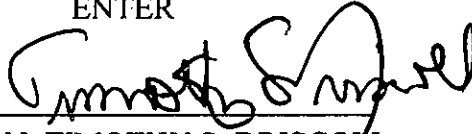
CONCLUSION

Defendants' motion to compel enforcement of the parties' settlement agreement entered on the record before this Court on July 31, 2018 is granted.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY
June 11, 2019

ENTER

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED

JUN 13 2019

NASSAU COUNTY
COUNTY CLERK'S OFFICE