Nieborak v W54-7 LLC
2021 NY Slip Op 30381(U)
January 29, 2021
Supreme Court, New York County
Docket Number: 157084/2014
Judge: Francis A. Kahn III
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANCIS A. KAHN, III** *Justice* **PART** **IAS MOTION 32**

---X

STEFAN NIEBORAK, NATALIA LIPKINA

Plaintiff,

- v -

W54-7 LLC,

Defendant.

---X

INDEX NO. 157084/2014

MOTION DATE ______

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 245, 246, 247, 248, 249, 250, 251, 253, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289

were read on this motion to/for ENFORCEMENT.

Upon the foregoing documents the motion and cross-motion are determined as follows:

This is a consolidated action by current and former tenants of a building located at 162 West 54th Street, New York, New York to recover damages for alleged rent overcharges in violation of the Rent Stabilization Law (RSL)(Admin. Code of the City of New York §§26-501 – 26-520) and the Rent Stabilization Code (RSC)(9 NYCRR §§2520.1 – 2531.9). In addition, Plaintiffs sought a judgment determining that the premises are subject to the RSL and RSC.

This matter was originally assigned to Hon. Nancy M. Bannon who, after completion of discovery, granted a motion for partial summary judgment made by Plaintiffs. In her decision dated July 31, 2018, Justice Bannon determined that the premises were subject to the RSL and RSC since Defendant's predecessor-in-interest received tax abatements under the municipal J-51 tax abatement program (*see* Real Property Tax Law §489). Justice Bannon also held that Defendant illegally deregulated the subject apartments under the RSL's luxury decontrol provisions as well as that Plaintiffs established that the deregulation was accomplished willfully and as part of a fraudulent scheme (*see Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270 [2009]). As a result, Justice Bannon determined that Plaintiffs were entitled to recover damages under the so-called "default formula"[1]. Notice of entry of this decision was efiled on September 6, 2018.

Defendant moved to renew Justice Bannon's decision based on documents it possessed at the time but failed to proffer in opposition to Plaintiff's motion for summary judgment. In a decision dated March 25, 2019, Justice Bannon denied the motion finding Defendant failed to volunteer a viable excuse for not submitting its evidence. Defendant's appeal of this order was denied by decision of the

[1] As aptly described by Justice Bannon, the "default formula" "entitles the plaintiffs to refunds equal to three times the difference between the amount they actually paid for rental and security deposits and the 'lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building on the relevant base date . . . from the date that they executed their leases to the present.'" [internal citations omitted]

Appellate Division, First Department (*see Nieborak v W54-7 LLC*, 178 AD3d 469 [1st Dept 2019]). Defendant did not appeal Justice Bannon's underlying decision.

By order of Administrative Judge Deborah Kaplan dated August 5, 2019, this matter was assigned to this Court for a damages trial (*see* NYSCEF Doc. No. 238). Pre-trial conferences were held with the court on September 12, October 29, December 3, 2019 as well as January 21 and February 24, 2020. The parties appeared for trial on March 2, 2020. The parties indicated that there was the possibility of a settlement and the Court engaged the parties in negotiations that lasted the entire day. Eventually the parties informed the court they had reached a "disposition" of the matter. The Court went on the record and the following colloquy between the court, Jennifer Rosen, Plaintiff's counsel, and Jeffrey Steinitz, Defendant's counsel, took place:

> THE COURT: Good afternoon, counselors. This matter was placed on today for trial. I understand the parties have reached a disposition in this matter is that correct?
>
> MR. STEINITZ: Yes, we've reached a disposition of settlement in principle, the material terms of which I would like to place on the record subject to a more formal written agreement.
>
> THE COURT: Certainly. Go right ahead.
>
> MR. STEINITZ: This matter is settled for the amount of $7.5 million; that amount to be deposited in escrow with the attorney for the plaintiff and to be made in two installments. The first installment will be made in the amount of $3.75 million within 120 days of the execution of the settlement agreement. However, in the event that the defendant can show good cause for not being able to furnish that amount within 120 days, the defendant shall have one period of 30 days and an additional period of 30 days.
>
> After having conferred off the record, back on the record, the $3.75 million will be paid within 120 days of the execution of the agreement. The remaining $3.75 million will be paid within 18 months thereafter and interest shall accrue at the rate of 3.5 percent per annum straight-line.
>
> THE COURT: This is the general outline of the settlement?
>
> MR. STEINITZ: That is basically the agreement. In addition, it's also been agreed the parties shall enter into a nondisclosure agreement. The parties also agree that this agreement shall be placed under seal pursuant to court order. The agreement shall provide for general releases to be notarized by the parties. Upon the execution of the agreement, a stipulation with discontinuance with prejudice shall be filed together with a sealing order.
>
> Finally, there are -- that's the sum and substance.

MS. ROZEN: I'd like to get the rents on the record for the occupied apartments.

MR. STEINITZ: There are four apartments that are currently occupied whereas agreed that certain rents shall be paid by the tenants of those apartments. With respect to Apartment 3A, the rent shall be $864.78. With respect to Apartment 9D, the rent shall be $1,994.65. With respect to 9F, the rent shall be $1,307.27. With respect to 10A, the rent shall be $1,316.03. The leases will be prepared immediately forthwith reflecting those settlement rents within a commencement day of March 1st.

THE COURT: Is there any other salient details you would like to put on the record?

MR. STEINITZ: I have nothing else.

THE COURT: That's so stipulated, counsel?

MS. ROZEN: So stipulated.

MR. STEINITZ: So stipulated.

In December 2019, the court was informed by Administrative Judge Kaplan that this Court and Justice Arlene Bluth would be exchanging parts and respective inventories in early 2020, except for any cases that each Justice specifically retained. This Court informed Administrative Judge Kaplan on March 5, 2020 that this case, among other matters, would be retained. This Court was informed by a member of the Trial Support Office that for convenience, the inventory exchange would initially be wholesale, and that the matters each Justice retained would be clawed back later. On or about March 8, 2020, the transfer of inventories occurred. Before the claw back could be accomplished, the COVID-19 pandemic reached such levels that most court personnel began working remotely on March 17, 2020. Consequently, the claw back of this case was delayed, but eventually, completed.

After entering their open court stipulation, Plaintiff forwarded a proposed written agreement to Defendant. The parties then exchanged proposed modifications to the original agreement, but ultimately failed to enter into a written agreement as contemplated and this motion and cross-motion followed.

Plaintiff moves pursuant to CPLR §2104 for an order enforcing the terms of the parties' open court on the record settlement, directing Defendant to make payment as agreed and for an award of counsel fees. Defendant opposes the motion claiming no binding agreement was reached and cross-moves pursuant to CPLR §2221 to again renew the decision of Justice Bannon dated July 31, 2018 and, that if a stipulation is found to be enforceable, to vacate same pursuant to CPLR §5015.

At the outset, Defendant's assertion that this matter is presently assigned to Justice Bluth and must be referred to her is factually incorrect. During a conference call held with the parties May 13, 2020, the court informed the parties what had occurred with the inventory exchange and yet Defendant pressed its meritless argument here that this matter is assigned to Justice Bluth. All the court's databases currently reflect that this matter is assigned to this Court. It was assigned to this Court for trial by

express written order of Administrative Judge Kaplan and was retained by this Court. As such, both motions will rightly be determined by this Court.

With respect to the branch of Plaintiffs' motion to enforce the parties' on the record settlement as a stipulation, CPLR §2104 states that for a stipulation to be enforceable it must either be subscribed by a party or attorney or "one made between counsel in open court" (*see eg Margolis v New York City Tr. Auth.*, 233 AD2d 483 [2d Dept 1996]; *Gage v Jay Bee Photographers*, 222 AD2d 648 [2d Dept 1995]; *Public Adm'r of County of N.Y. v Bankers Trust Co.*, 182 AD2d 592 [1st Dept 1992]). Stipulations of settlement, especially ones entered into in "open court", must not be lightly cast aside (*see eg STL Rest. Corp. v Microcosmic, Inc.*, 150 AD3d 786 [2d Dept 2007]) and "strict enforcement [of same] not only serves the interest of efficient dispute resolution but also is essential to the management of court calendars and integrity of the litigation process" (*Hallock v State*, 64 NY2d 224, 230 [1984]).

Here, when read in its entirety, the parties' open court stipulation contained all the material terms of an enforceable agreement and revealed an intention to bound despite being "subject to" a written agreement (*see Wilson v Wilson*, 35 AD3d 595 [2d Dept 2006]). The amount of the settlement, the period and terms for payment and the rate of interest are all unambiguously defined. Also, specific details as to the rents on four apartments were spread on the record. In addition, it was acknowledged that the parties would consent to a nondisclosure agreement, that the settlement would be sealed by court order, that general releases and a stipulation of discontinuance would be executed. It was Defendant's counsel who spread what he described as "the material terms" of the settlement on the record. When the court inquired of Defense counsel if there were any other "salient details" he responded there was "nothing else".

Other evidence that all material terms were contained in the open court stipulation can be gleaned from the proposed written stipulations circulated by the parties which reveal the original draft created by Plaintiff's counsel and edits made by Defense counsel. Contrary to Defendant's assertion, the projected agreements accurately reflect the open court stipulation and "despite contemplating a more formal agreement on collateral issues, the parties clearly intended to be bound by [the open court stipulation] with respect to the agreed upon terms" (*see Reyes v Sequeira*, 68 AD3d 526 [1st Dept 2009]; *see Sustainable PTE Ltd. v Peak Venture Partners LLC*, 150 AD3d 554 [1st Dept 2017]). In particular, "[t]he fact that it is necessary for the parties to exchange general releases and execute a confidentiality agreement does not render the agreement invalid" (*Shah v Wilco Sys, Inc.*, 81 AD3d 454, 455 [1st Dept 2011]; *see also Ashland Management v Janien,* 82 NY2d 395, 401-402 [1993]; *Catsiapis v Giano*, Misc 3d____, 2016 NY Slip Op 30863 [Sup Ct Queens Cty 2016]).

The parties' clear intention to be bound by the open court stipulation was evident from its timing and their counsels' own words (*see Moshan v PMB, LLC*, 141 AD3d 496 [1st Dept 2016]; *Trolman v Trolman, Glaser & Lichtman, P.C.*, 114 AD3d 617 [1st Dept 2014]). This matter was on for trial on the day it was settled after months of delays. Defendant's liability and the method of calculation of the damages was determined and, based upon the extensive pre-trial conference, it was apparent that there were few factual disputes to be determined. Further, no matter the outcome of the factual issues, Defendant was virtually certain to face a multimillion-dollar judgment far in excess of the settlement amount. Based upon calculations presented by Plaintiff, Defendant faced a potential judgment, including attorney's fees, in excess of $11 million which is some $3.5 million more than the settlement. Most importantly, after placing the agreement on the record both counsels acknowledged that it was "So stipulated."

That the parties contemplated executing a "more formal written agreement" does not render their open court stipulation unenforceable (*see eg Reyes v Sequeira*, supra). "[I]t is axiomatic to note that subsequent drafting of a formal agreement is almost always necessitated where the initial stipulation is placed on the record in open court (*M.P. v. L.P.*, ____Misc3d____, 2006 NY Misc. LEXIS 4017 [Sup Ct Queens Cty 2006]). Likewise, Defendant's subsequent refusal to execute an agreement does not affect the viability of the oral stipulation (*see eg Tavolacci v Tavolacci*, 114 AD3d 759 [2d Dept 2014]; *Taormina v Taormina*, 85 AD3d 766 [2d Dept 2011]).

Defendant's assertion that since the open court stipulation was "subject to" a further written agreement it is an unenforceable "agreement to agree" is misplaced. A party who does not intend to be bound must give "forthright, reasonable signals" that it desires to only be bound by a written agreement (*see Stonehill Capital Mgt. LLC v. Bank of the W.*, 28 NY3d 439, 451; *Kowalchuk v Stroup*, 61 AD3d 118 [1st Dept 2009][Intention not to be bound is "established by a showing that a party made an explicit reservation that there would be no contract until the full formal document is completed and executed"]). The reliance on "formulaic" language like the parties are "subject to" a subsequent written agreement does not evidence an express intention not to be bound (*see Stonehill Capital Mgt. LLC v. Bank of the W., supra*; *Bed Bath & Beyond Inc. v Ibex Constr.*, LLC, 52 AD3d 413 [1st Dept 2008]; *see also Netherlands Ins. Co. v Endurance Am. Specialty Ins. Co.*, 157 AD3d 468 [1st Dept 2018]["Although the parties may have intended to execute a more formal agreement later, the proposal constitutes a binding agreement."]). Further, nothing in the oral agreement makes the settlement expressly contingent upon entry into a written agreement (*see Vega v Papaleo*, 85 AD3d 1363 [3d Dept 2011]).

Accordingly, the court finds the parties' open court stipulation is valid and enforceable.

Defendant cross-moves to vacate the stipulation on a variety of grounds including mutual mistake, unilateral mistake, an alleged change in the law post-settlement and under CPLR §5015[a].

Defendant posits that the decision of the Court of Appeals in *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332 [2020], issued approximately a month after the parties reached their settlement, supports voiding the stipulation under both theories of mutual and unilateral mistake. In *Regina*, the court, among other things, determined that the retroactive application of a "limited suite of enforcement provisions" contained in Part F (RSL §26-516) of the Housing Stability Tenant Protection Act (HTSPA)[2] violated substantive due process. As concerned the calculation of damages in the present case, Part F extended the statute of limitations for overcharge claims from 4 to 6 years and made an award of attorney's fees mandatory, rather than discretionary. The Court of Appeals also took the opportunity to "clarify that, under pre-HSTPA law, the four-year lookback rule and standard method of calculating legal regulated rent govern in Roberts overcharge cases, absent fraud" (*Regina*, supra at 361).

Defendant asserts that that based upon the "weighty consequences" of the application of HTSPA in exposing it to significantly increased damages at trial, it was "almost compelled to settle its claims". Defendant argues that the parties' understanding of the retroactivity of HTSPA when the agreement was reached meant that it was "predicated upon an unconstitutional application of the law" and justifies relieving it from the stipulation.

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[2] (L 2019, Ch 36). Enacted on June 14, 2019, which was after Justice Bannon issued her decisions, but before assignment to this court.

Generally, only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation (see *Hallock v State of New York*, supra at 230; *Matter of Frutiger*, 29 NY2d 143, 149-150 [1971]). "To 'vacate [a] stipulation of settlement on the ground of mutual mistake, [a party must] demonstrate that the mistake existed at the time the stipulation was entered into and that it was so substantial that the stipulation failed to represent a true meeting of the parties' minds'" (*Hannigan v Hannigan*, 50 AD3d 957 [2d Dept 2008], *citing Gro-Wit Capital, Ltd. v Obigor, LLC*, 33 AD3d 859, 859-860 [2d Dept 2006]).

"[A] contract may be voided for unilateral mistake of fact only where enforcement of the contract would be unconscionable, the mistake is material and was made despite the exercise of ordinary care" (see *Long v Fitzgerald*, 240 AD2d 971, 975 [3d Dept 1997]). "A unilateral mistake—in and of itself—is an insufficient basis upon which to set aside a stipulation of settlement" (*Matter of McLaughlin*, 97 AD3d 1051, 1053 [3d Dept 2012]).

Under either theory, the error must constitute a mistake of fact since "'a mistake as to the law is insufficient grounds' for vacating a stipulation" (*Varveris v Fisher*, 229 AD2d 573, 574 [2d Dept 1996][internal citations omitted]).

Here, Defendant cites no "facts" that both parties misapprehended when the settlement was reached. Indeed, based upon the Court's extensive pre-trial conference with the parties it was apparent there were limited unresolved factual matters to misinterpret. Of the 12 apartments that were the subject of this suit, Defendant could only proffer unresolved issues of fact concerning four. The "mistake" made in this case was one of law which was, contrary to Defendant's claim, readily conceivable.

The claim that Defendant reasonably failed to anticipate that the Court of Appeals would render a decision potentially favorable to its defense at trial and, therefore, could not have waived its constitutional rights in this regard misconstrues the issue to be attended. The correct question is whether Defendant *could have* raised the constitutional issue regarding HTSPA addressed in *Regina* in this case. The answer is plainly yes. Defendant could have proceeded to trial and tested the application of HTSPA to this case. That the failure to challenge the constitutionality of the retroactivity of HTSPA may have been the result of a lack of foresight rather than an affirmative choice is of no moment. Defendant, a sophisticated real estate entity, and their counsel, experienced landlord-tenant litigators, cannot seriously claim they were unaware of the Due Process Clause in the Constitution and the option to raise and preserve that constitutional argument in this case (*see American Dream Realty Grp. v Ndiaye*, NYLJ, Oct. 7, 2020 at 7, col 3 [Civ Ct NY Cty 2020]). Defendant neglected to proffer that constitutional argument and made a reasoned, reasonable and conscious decision to settle this matter and thereby abandoned those rights (*see Matter of Mercer*, 113 AD3d 772, 774-775 [2d Dept 2014]). To the extent Defendant's argument may be premised on the Court of Appeals' comment on the applicability of the fraud exception to *Roberts* overcharge claims, the *Regina* decision was expressly an attempt to "clarify" existing rules such that any mistake in Defendant's understanding of same was one of law which is not a basis to void the agreement.

In any event, the assertion that the holding in *Regina* could not have been reasonably expected is without merit. That the appeal in *Regina* was pending at the time the parties settled their case was widely known and the potential for a decision on the issue of whether HTSPA should be applied retroactively was not unforeseen. On January 8, 2020, the New York Law Journal published a front

page above the fold article titled "NY High Court Weighs Impact on New Rent Laws in Series of Tenant Overcharge Cases" (NYLJ, Jan. 20, 2020 at 1, col 3) wherein it was noted that "[t]here's now question, as evidenced [in oral arguments] before the high court Tuesday, as to whether the new law should be interpreted as retroactive". The article further recounted that the attorney representing the landlords in *Regina* argued to the court that retroactive application of HTSPA could "violate a landlord's due process rights". Defendant's claim that this issue was inconceivable is also belied by the fact that this Court raised the issue of the applicability of HTSPA to this case at a conference on October 29, 2019 and directed the parties to submit letter briefs to the Court on the issue. Both parties submitted their analyses to the Court in letters dated November 26, 2019.

Defendant also argues that this Court should relieve Defendant of its unilateral mistake through the exercise of its equitable powers relying on *Matter of Frutiger*, supra. In that case, the Court of Appeals stated that "[w]here both parties can be restored to substantially their former position the court, as a general rule, exercises such power if it appears that the stipulation was entered into inadvisably or that it would be inequitable to hold the parties to it" (*id* at 150 [internal quotation marks omitted]).

The circumstances here do not lend themselves to the application of equitable principles. First, "[a]lthough a court has control over stipulations and has the power to relieve a party from the terms of a stipulation, that power is not unlimited" (*Eastern Sav. Bank, FSB v Campbell*, 167 AD3d 712, 715 [2d Dept 2018]). Typically, the application of the principle in *Matter of Frutiger* is limited to where the agreement is "manifestly unfair to one party because of the other's overreaching or where its terms are unconscionable" (*Rogers v Malik*, 126 AD3d 874, 875 [2d Dept 2015]). On the other hand, "[c]ourts will generally not vacate agreements on the ground of unilateral mistake where the mistake was the result of negligence or the failure to exercise ordinary care" (*ATS-1 Corp. v Rodriguez*, 156 AD3d 674, 676 [2d Dept 2017]).

Here, Defendant failed to demonstrate how it was in an inferior bargaining position or at an appreciable disadvantage regarding access to the relevant facts or law. After six years of litigation, all parties were in possession of every relevant fact and were afforded the opportunity through multiple motions and an appeal to present any relevant legal theories (*see Pasteur v Manhattan & Bronx Surface Transit Operating Auth.*, 241 AD2d 305 [1st Dept 1997]["Nor does the record support plaintiff's claim that counsel for MABSTOA stood silently by and took advantage of plaintiff's counsel's mistake]). This case is also unlike those cited by Defendant which involved *pro se* litigants in Housing Court. Nor is this a case where it is later learned that one of the parties was suffering from a cognitive defect. The absence of overreaching is especially true since Defendant was represented by experienced and able counsel (*see Matter of Mercer*, supra).

There is also no proof that the within bargain is unconscionable. Defendants offer no specificity, even via estimation or speculation, what amount their liability would be if the holding in *Regina* were applied here. Even if the court accepted that the settlement may be in excess of what Defendant would have been required to pay had it proceeded to trial and sought application of *Regina* while the matter was *sub judice*, it fails to constitute a basis to vacate the settlement (*see 1420 Concourse Corp. v Cruz*, 135 AD2d 371, 372 [1st Dept 1987]). The Defendant assessed the risks evident at the time and made the prudent and reasoned decision to limit its damages and to give finality and repose to the matter. In the end, "[e]quity will not relieve a party of its obligations under a contract merely because subsequently, with the benefit of hindsight, it appears to have been a bad bargain" (*Childs v Levitt*, 151 AD2d 318, 320 [1st Dept 1989]).

Defendant also proffered no basis to set aside the stipulation under CPLR §5015[a]. The branch of the cross-motion for renewal of Justice Bannon's decision dated July 31, 2018 is denied as the matter was settled.

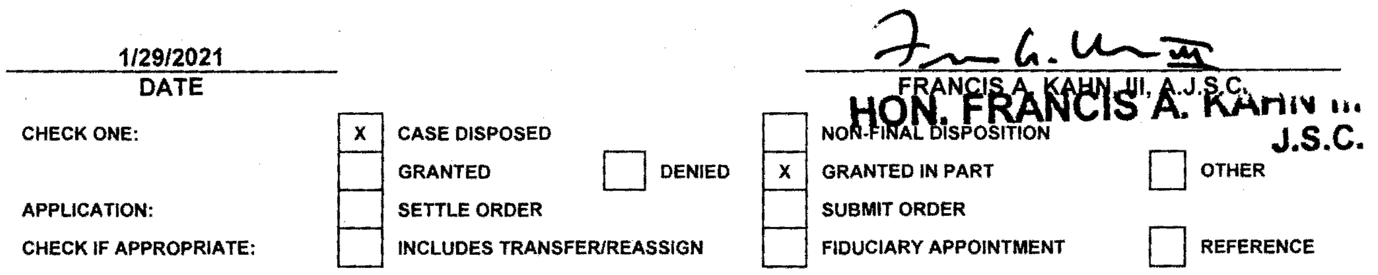
Accordingly, Plaintiff's motion, except the branch for an award of attorney's fees for making the within motion, is granted and the Defendant's cross-motion to vacate the stipulation of settlement is denied.

Based on the foregoing it is

ORDERED that in accordance with the parties' agreement Defendant shall deposit $7.5 million with its attorney to be held in escrow, and it is

ORDERED that the first payment of $3.5 million be paid to Plaintiffs' counsel shall be made with within 30 days of Plaintiffs' execution and tender of non-disclosure and sealing agreements as well as general releases, subject to the parties' "good cause" extension provision, and it is

ORDERED that the second payment of $3.5 million shall be made in accordance with the parties' stipulation.


1/29/2021
DATE

FRANCIS A. KAHN III, A.J.S.C.
HON. FRANCIS A. KAHN III
J.S.C.

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
[ ] GRANTED [ ] DENIED [X] GRANTED IN PART [ ] OTHER
APPLICATION: [ ] SETTLE ORDER [ ] SUBMIT ORDER
CHECK IF APPROPRIATE: [ ] INCLUDES TRANSFER/REASSIGN [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE