

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES
Justice

PART 17

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ZHORIK YUSUPOV,

Plaintiff,

Index No. 18712/08
Motion Date: 9/24/08
Motion Cal. No. 52

-against-

63-95 AUSTIN OWNERS CORP., JERRY
PELLIGRINO, TERRY PATEREK, LINDA
KOEVARY, AND I. SOCKWELL-M-LIVINGSTON,

Defendants.

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The following papers numbered 1 to 11 read on this application by plaintiff for an order enjoining defendant **63-95 AUSTIN OWNERS CORP** from transferring, selling renting or encumbering the property located at 63-95 Austin Street, Apt 5C, Rego Park, N.Y.; enjoining defendant **63-95 AUSTIN OWNERS CORP** from transferring, selling renting or encumbering any proceeds received from the sale or rental of the property located at 63-95 Austin Street, Apt 5C, Rego Park, N.Y.; compelling defendant **63-95 AUSTIN OWNERS CORP** to issue an accounting of monies allegedly due and owing from plaintiff for maintenance and other charge from such defendant; compelling defendant **63-95 AUSTIN OWNERS CORP** to issue an accounting of monies accepted from the sale of property located at 63-95 Austin Street, Apt 5C, Rego Park, N.Y.; and permitting plaintiff access to the property located at 63-95 Austin Street, Apt 5C, Rego Park, N.Y. for the limited purpose of inspection and removing any personal property from this location.

PAPERS
NUMBERED

Order To Show Cause-Affirmation-Exhibits.....	1- 3
Affidavit in Opposition-Exhibits.....	4-6
Memorandum of Law	7-8
Reply Affirmation.....	9 -11

Upon the foregoing papers, it is ordered that the application by plaintiff for an order enjoining defendant **63-95 AUSTIN OWNERS CORP** from transferring, selling renting or encumbering the property located at 63-95 Austin Street, Apt 5C, Rego Park, N.Y.; enjoining defendant **63-95 AUSTIN OWNERS CORP** from transferring, selling renting or encumbering any proceeds received from the sale or rental of the property located at 63-95 Austin Street, Apt 5C, Rego Park, N.Y.; compelling defendant **63-95 AUSTIN OWNERS CORP** to issue an accounting of monies allegedly due and owing from plaintiff for maintenance and other charge from such defendant; compelling defendant **63-95 AUSTIN OWNERS CORP** to issue an accounting of monies accepted from the sale of property located at 63-95 Austin Street, Apt 5C, Rego Park, N.Y.; and permitting plaintiff access to the property located at 63-95 Austin Street, Apt 5C, Rego Park, N.Y. for the limited purpose of

inspection and removing any personal property from this location is decided as follows:

This action stems from plaintiff's ownership of stock and the proprietary lease appurtenant to the apartment located at 63-95 Austin Street, Apt 5C, Rego Park, N.Y. Due to plaintiff's unauthorized subletting of this apartment, defendant **63-95 AUSTIN OWNERS CORP**, the Co-op, terminated his lease effective January 31, 2005 and then commenced a holdover proceeding in the Housing Court. On March 16, 2005, this proceeding was resolved by stipulation and a final judgment of possession was entered in favor of the Co-op, with a warrant of eviction to issue immediately. This warrant was stayed until July 31, 2005, if plaintiff were to cease any illegal sublets, become current on the payment of maintenance, and list the apartment for sale with a broker at a reasonable market price. The term for plaintiff to find a purchaser for the apartment was extended for over two years and during that time, plaintiff introduced applicants to the Co-op board. None were accepted by the Board.

After this two year period had ended, the Co-op board executed on the warrant of eviction and evicted plaintiff from the subject apartment. In response, plaintiff commenced the action under Index number 30205/07. The Co-op began the necessary steps to foreclose on the shares of the apartment by public auction and on January 15, 2008, the sale took place. The Co-op was the purchaser of the apartment, at a sale price of \$95,000.00.

On March 19, 2008, at a motion calendar call for an application by plaintiff to void the foreclosure sale of the subject apartment, the parties entered into a stipulation, wherein the parties agreed to the following:

1. Jointly place the apartment "on market to be sold to a bona fide purchaser through a broker to be mutually agreed upon, within 14 days";
2. "All proceeds from sale (less transfer taxes and broker's fees) to be placed in escrow pending determination of expenses as discussed below;
3. "Defendant will provide plaintiff with proof of all alleged expenses within 30 days (of stip date);
4. "Plaintiff reserves right to object to any alleged expenses"
5. "If parties cannot mutually agree on amount of defendant's expenses, then parties agree to submit matter to Court for an accounting;
6. "Either upon mutual agreement or court order, net proceeds of sale minus defendant's expenses shall belong to plaintiff.";
7. "Board of defendant shall not unreasonably withhold consent to approval of prospective purchasers. However, defendant board does not waive any of its rights of approval under N.Y. Law."
8. "Parties agree that plaintiff's current attorney will represent plaintiff in sale of unit."
9. "All parties agree that they will act in good faith and expeditiously [sic] to execute all necessary documents for the sale of the unit."

On April 16, 2008, plaintiff's application was fully submitted for this Court's decision and on April 22, 2008, the application was denied. The Court found that the application was academic since the stipulation, dated March 19, 2008, resolved all the issues presented in this application. Thereafter, plaintiff brought the instant action to, *inter alia*, enforce the terms of the March stipulation and for money damages. Plaintiff now seeks the instant injunctive relief and defendant Co-op opposes, claiming injunctive relief is inappropriate since plaintiff only seeks money damages and the stipulation relied upon has no force due to it being unauthorized.

A preliminary injunction may issue only if the moving party can demonstrate (1) the likelihood of success on the merits; (2) irreparable injury if the preliminary injunction is not granted, and (3) a balancing of the equities in its favor. (Doe v Axelrod, 73 NY2d 748; Preston Corp. v Fabrication Enters., 68 NY2d 397; W.T. Grant Co. v Srogi, 52 NY2d 496.) "Preliminary injunctive relief is a drastic remedy that will not be granted unless a clear right to it is established under the law . . . and the burden of showing an undisputed right rests upon the movant." (Zanghi v State of New York, 204 AD2d 313, 314.)

Regarding the first element, the likelihood of success on the merits, as noted, this action is, in essence, one for breach of a stipulation. Defendant argues that its prior counsel was without authority to enter into this stipulation since no member of the Co-op Board or any representative of the Co-op authorized executing such.

Stipulations are favored by the courts and are not lightly cast aside. *See*, Susan McCoy, Appellant, v. Kenneth I. Feinman 99 N.Y.2d 295 (2002); Hallock v State of New York, 64 NY2d 224 (1984.) *see also*, American Bridge Co. v. Acceptance Ins. Co., 51 A.D.3d 607 (2d Dept 2007.) In Hallock v State of New York, *supra.*, the Court of Appeals held that a stipulation was binding on a client even though it exceeded the attorney's actual authority. The Court recognized that strict enforcement of stipulations "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" *Id* at 230. Thus, the Court concluded that "[o]nly 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" The courts therefore have vacated stipulations when the stipulating attorney lacked both actual and apparent authority (*see*, Matter of Dayho Motel v Assessor of Town of Orangetown, 229 AD2d 435 (2d Dept 1996), but will, however, enforce written stipulations when the attorney has apparent authority to enter into a stipulation (*see*, Cooper v. Hempstead Gen. Hosp., 2 A.D.3d 566 (2d Dept 2003.)

Here, defendant Co-op's attorney had appeared in court on plaintiff's motion on three occasions according to the Court records. On those occasions the plaintiff's application was discussed and negotiations were conducted that eventually led to the subject stipulation. This

Court's rules on motion practice clearly state that, "any attorney appearing on a case for any purpose must be familiar with the case, ready and authorized to resolve any and all issues." As such, this attorney had an extensive involvement in the case, engaged in settlement negotiations and appeared at several motion calendar calls, which gave him apparent authority to enter into stipulations as a matter of law. Hallock v State of New York, *supra*, at 231-232. The presence of the attorney at these motion calendar calls constituted "an implied representation by [the client] to defendants that [the attorney] had authority" to bind the client to the stipulation. *Id.*, at 231-232. Indeed, as the court rules make clear, only those attorneys who are authorized to enter into binding stipulations may appear at these calendar calls. *See*, 22 NYCRR 202.26 [e]; *see also*, 22 NYCRR 202.12 [b]). The appearance of an attorney at such calendar call precludes the client from thereafter arguing that the attorney lacked such authority. *See*, Cooper v. Hempstead Gen. Hosp. *supra*. *See also*, Bubeck v Main Urology Assocs, P.C., 275 AD2d 909 (4th Dept. 2000.) To allow otherwise would impose severe restrictions on the Court's ability to accept stipulations; this would unduly hinder the efficient administration of justice. Thus, in the absence of "cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident" (Hallock v State of New York, *supra*, at 230), plaintiff is entitled to enforcement of the stipulation. Since no reason is present to invalidate the stipulation, plaintiff has established the first element needed for the granting of a preliminary injunction.

Regarding the second element in procuring injunctive relief, establishing irreparable injury, in the instant case, plaintiff seeks to enforce the stipulation and for money damages. He does not seek the return of his apartment. This clearly is not an instance of recovery for a unique property and thus granting an injunction is precluded. *See*, Schrager v. Klein, 267 AD2d 296. This is especially so since there is nothing to suggest that the award to which plaintiff may be entitled would be rendered ineffectual without injunctive relief. (*See*, Holdsworth v. Doherty, 231 AD2d 930.)

In regard to the weight of the equities, the plaintiff did not demonstrate that the alleged irreparable injury to be sustained by him is more burdensome to him than the harm that will be caused to the defendants through imposition of the injunction. *See*, Reuschenberg v Town of Huntington, 16 AD3d 568 (2d Dept 2005.) As pointed out above, plaintiff has not alleged an irreparable injury. In any event, the Court is mindful of the extensive period of time in which the Co-op has already given plaintiff to sell the apartment and the time and money involved with protecting the Co-op's interest.

Consequently, plaintiff's submissions have not established the necessary elements for obtaining the requested relief and the instant application is denied. However, as the above analysis indicates, the stipulation is valid and thus enforceable. Accordingly, in an effort to expedite this matter, the Court orders the parties to adhere to the terms of the stipulation dated

March 19, 2008. The parties shall adjust the time frames set forth in the stipulation and use September 29, 2008 in place of the stipulation date. Regarding the branches of the motion seeking an accounting and various discovery, these issues shall be resolved in accordance with the terms of the stipulation.

A copy of this order is being sent to the parties by means of facsimile transmission on September 29, 2008.

Dated: September 29, 2008

ORIN R. KITZES, J.S.C.