

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: Honorable LAWRENCE V. CULLEN
Justice

IAS PART 6

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ROMAN RABINOVICH and EDWARD L.
SMITH,

Index No.: 16363/97

Motion Date: 9/4/07

Plaintiffs and
Counterclaim Defendants,

Motion Cal. No.: 19

-against-

Motion Seq. No.: 6

JO ANN WOMACK, JOHN FAIELLA,
PETER GREENBERG, MARGARET
O'ROURKE, RAMONA PARNELL, and
DUNOLLY OWNERS' CORP.,

Defendants and
Counterclaim Plaintiffs,

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DUNOLLY OWNERS' CORP.,

Third-Party Plaintiff,

-against-

URBANO PINA and ALBERT HILLMAN,

Third-Party Defendants.

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The following papers numbered 1 to 10 read on this motion for a declaratory judgment that an agreement between plaintiff, Edward L. Smith, and defendant, Jo Ann Womack, terminated upon defendant, Womack's, death, and for modification of a Stipulation of Settlement.

	<u>PAPERS NUMBERED</u>
Motion to Modify Stipulation-Affidavit-Exhibits.....	1 - 3
Memorandum of Law in Support of Motion.....	4
Affirmation in Opposition-Exhibit.....	5 - 6
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Reply Memorandum of Law.....	10

Plaintiff, EDWARD L. SMITH (hereinafter referred to as “SMITH”), seeks an order modifying a Stipulation of Settlement entered into in the above captioned matter, by all of the parties, which resolved several lawsuits.

Specifically, SMITH argues that the Stipulation of Settlement was based upon an agreement that was entered into between himself and defendant, JO ANN WOMACK (hereinafter referred to as “SMITH-WOMACK AGREEMENT”), and that said SMITH-WOMACK AGREEMENT terminated upon the death of Jo Ann Womack on May 8, 2007. Defendant, DUNOLLY OWNERS’ CORP., (hereinafter referred to as “DUNOLLY”), opposes the same.¹

Plaintiff, SMITH, represents that the SMITH-WOMACK AGREEMENT is comprised of paragraphs four and five of the Stipulation of Settlement. SMITH presents myriad arguments to substantiate his position that the SMITH-WOMACK AGREEMENT terminated upon the death of Ms. Womack, and therefore the Stipulation of Settlement should be modified.

The Court shall address each argument, and opposition thereto, as follows:

First, SMITH asserts that the SMITH-WOMACK AGREEMENT is a non-competition agreement, and therefore constitutes a contract for personal services. SMITH further argues that since personal services cannot be delegated, a personal services contract automatically terminates upon the death of a party.

DUNOLLY claims that the depiction of the SMITH-WOMACK AGREEMENT as a non-competition/personal services contract is a blatant mischaracterization.

Inasmuch as this Court was not afforded the opportunity to examine the SMITH-WOMACK AGREEMENT, it has relied on the provisions of the Stipulation of Settlement. Specifically, the Stipulation of Settlement, executed by all of the parties in the above captioned matter, resolved and discontinued the matters entitled Brennand v. Womack, Index No. 10987/96; Burger and Womack v. Smith, et al, Index No. 26602/95; Hillman, et al v. Faiella, Index No. 17581/96; Wrobel v. Dunolly, etc., Index No. 19723/97. The portions of said Stipulation relevant to the issues herein are:

“2. Simultaneously with the execution of this Stipulation, Edward Smith (hereinafter “Smith”) shall resign as a member of the Board of Directors of Dunolly Owners Corp. (hereinafter “Dunolly”).

3. Simultaneously with the execution of this Stipulation, Jo Ann Womack (hereinafter “Womack”) shall resign as an officer of Dunolly.

4. Smith and Womack shall not seek or accept election or appointment as officers,

¹The Court notes that a copy of said SMITH-WOMACK AGREEMENT is conspicuously missing as an Exhibit herein.

directors, advisors, consultants or members of any committee or subcommittee of Dunolly and will permanently and forever forego and abstain from participation of any kind, direct or indirect, in the governance, operation, management or affairs of Dunolly, except that they shall retain all of their other rights as shareholders under the laws of the State of New York, including but not limited to as may relate directly to their indicate apartments; provided, however that they may attend any Board or committee meeting to which all stockholders are invited. Notwithstanding the foregoing, the Parties shall cooperate with the Board as may be reasonably required or necessary.”

A review of the pertinent portions reveal that the Smith-Womack Agreement obligated Smith and Womack to resign as officers and to abstain from any and all participation in Dunolly. The plain language of the agreement neither enjoined Smith or Womack from competing against each other, nor required Smith or Womack to provide any service to the other, or to Dunolly. Accordingly, the merits of the claim by Smith that the Smith-Womack agreement was a personal service contract which terminated upon the death of Womack are lacking, at best, and Smith’s first argument must fail.

Next, Smith attempts to argue that the Smith-Womack Agreement is terminated by invoking the doctrine of impossibility. Specifically, Smith avers that the death of Womack rendered performance under the Smith-Womack Agreement impossible. Again, Smith’s reliance on the legal doctrine of impossibility does not bear the weight afforded to same.

Impossibility excuses contracting party’s performance only when destruction of the subject matter of the contract, or the means of performance make performance objectively impossible. [Kel Kim Corp. v Central Markets, Inc., 70 NY2d 900, 519 NE2d 295 (Ct. App. 1987)]. The Court of Appeals further stated that impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract. The purpose of contract law being allocation of risks that might affect performance, and performance should only be excused in extreme circumstances.

As heretofore stated, paragraph four of the Smith-Womack Agreement did not require any express actions of the parties, but rather required inaction, that is abstinence from any participation in Dunolly. The demise of Womack does not render her obligation to abstain impossible, and therefore cannot be used as an excuse for compliance by Smith.

Furthermore, death of a natural person does not represent an unforeseen or unanticipated event. Certainly, Smith who is, self admittedly, an attorney, Graduate of Columbia University Graduate School of Journalism, and has extensive experience including Vice President and Counsel of Newsweek, Corporate Attorney for The New York Time Company and Assistant US Attorney for the Southern District of New York, and who represented himself in the execution of the Smith-Womack Agreement, had the foresight to include a force majeure clause.

Contrary to Smith's assertions, it is concluded that the demise of Ms. Womack does not invoke the doctrine of impossibility, and therefore Smith's compliance cannot be excused on this basis.

Lastly, Smith contends that although the Stipulation purportedly remained in effect "permanently and forever", that it was the intent of the parties that the Smith-Womack Agreement would only be in full force and effect for as long as Smith and Womack remained stockholders.

It is clear that the best evidence of the intentions of parties to a written agreement is what they say in writing, that is a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. [Greenfield v. Philles Records, Inc., 780 NE2d 166 (2002)].

The language set forth in paragraph four of the Stipulation states, in part, that the parties "will permanently and forever forego and abstain from participation of any kind, direct or indirect, in the governance, operation, management or affairs of Dunolly...". The language is clear and unambiguous that the parties abstinence is "permanently and forever", and the agreement shall be enforced according to the plain meaning of said terms. Consequently, Smith's endeavor to limit the agreement to an alleged intent of the parties is denied.

Next, Smith argues that DUNOLLY's directors acted unlawfully in opposing the instant motion. Inasmuch as Dunolly is a named defendant in this action, upon which Smith served the instant motion, this argument is also misplaced as a matter of fact. Arguments put forth by Smith alleging that the current Board of Directors has violated a fiduciary duty to treat all shareholders fairly and evenly, and the Board wants to prevent him from ever holding office again ring hollow in that it was Smith who knowingly entered into the Agreement to permanently and forever abstain from any and all participation in the governance, maintenance, operation or affairs of Dunolly.

Lastly, the Court notes that Smith did not establish, or even allege, any allowable ground for vacatur of the Smith-Womack Agreement, to wit: duress, illegality, fraud or mutual mistake.

Accordingly, based upon the foregoing the plaintiff's motion to modify the Stipulation of Settlement is hereby denied.

Dated: January 4, 2008

LAWRENCE V. CULLEN, J.S.C.