To be argued by: Robert W. Connolly, Esq.
Time requested: 5 minutes

New York Supreme Court
Appellate Division – Fourth Department

In the Matter of

JOHN L. YEHLE,
Petitioner-Appellant,

-against-

JON T. RICH, JR.,
Respondent-Respondent.

Index No.: 2015-1321
Docket No.: CA 19-02290

BRIEF ON BEHALF OF RESPONDENT-RESPONDENT

Costello, Cooney & Fearon, PLLC
Robert W. Connolly, Esq.
Attorneys for Respondent-Respondent
500 Plum Street, Suite 300
Syracuse, New York 13204
(315) 422-1152
rconnolly@ccf-law.com

Table of Contents

Table of Authorities

QUESTION PRESENTED

Whether Petitioner-Appellant may avoid his own Stipulated Order, in which he agreed to a sale of the LLC's assets as sought within his own petition, because he is dissatisfied with his opponent's discovery responses?

The trial court rejected Petitioner-Appellant's contentions, because it was anticipated at the time of the stipulation that further discovery would be necessary and there remained other issues within the proceeding.

COUNTER-STATEMENT OF FACTS

This is a proceeding for dissolution of a limited liability company, Wellesley Island Storage, LLC ("WIS"), liquidation of its assets and an accounting. [R. 11–15]. In Petitioner-Appellant's Verified Petition, he requested, *inter alia*, that WIS's assets "be sold in an expeditious but commercially reasonable manner," and then following an accounting, distribution of all proceeds to its members. [R. 15]. In his Response to the Petition, Respondent Jon T. Rich, Jr. also sought dissolution, an Order directing the sale of the assets, an accounting and final distribution. [R. 39–40]. The parties proceeded to conduct discovery, including depositions, related to the accounting, and their various contributions to WIS. [R. 43]. During Mr. Rich's deposition, he provided sworn testimony about the value of services his construction company had provided to build out the property where WIS's property is located. [R. 79]. He had previously provided additional accounting information, time sheets and other documentation supporting his claims. [*E.g.*, R. 80–130].

With discovery substantially completed, Mr. Rich's counsel suggested the parties could stipulate to a dissolution and judicially-sanctioned sale of the assets, thereby narrowing the issues for an ultimate hearing. [R. 43]. Eventually, Petitioner-Appellant agreed to so stipulate. [R. 43]. After discussions with two

(2) local auction houses, the parties agreed to utilize Brzostek's to conduct a public auction of the property. [R. 50]. At Petitioner-Respondent's request, a provision was added to the Stipulated Order which explicitly recognized there was "additional discovery relating to the accounting and distribution of assets still outstanding." [R. 50]. The parties further agreed "that following the sale of assets . . . , further proceedings and claims remain to determine each member's contribution and membership interests." [R. 51]. The parties each executed the stipulation, and the Court entered the fully executed Stipulated Order on November 21, 2018. [R. 50–51].

Upon receipt of the necessary documentation from Brzostek's to effectuate the auction, Mr. Rich completed as much as he could, signed where necessary, and forwarded the paperwork to Petitioner-Appellant's counsel, so Petitioner-Appellant could complete the forms. [R. 53]. Thereafter, Petitioner-Appellant refused to cooperate with Brzostek's. [R. 55–57]. Petitioner-Appellant's excuse for his willful disregard of the Stipulated Order was his assertion that certain document requests related to Mr. Rich's contributions to WIS years earlier remained outstanding. [R. 55]. Shortly thereafter, Mr. Rich served his responses to those demands, stating that he was not in possession of any responsive documentation not previously produced in the litigation. [R. 169–73].

In the absence of any cooperation by Petitioner-Appellant, Mr. Rich moved for an Order appointing a receiver, who could effectuate the auction. [R. 41]. By cross-motion, Petitioner-Appellate sought to vacate his own stipulation by Notice of Motion dated May 22, 2019. [R. 58]. Supreme Court found no merit to Petitioner-Appellant's motion, and directed him to complete the necessary documentation to proceed with the auction such that an auction could be held by August 4, 2019. [R. 6–8]. This baseless appeal ensued. [R. 1].

ARGUMENT

POINT I

PETITIONER-APPELLANT HAS NOT DEMONSTRATED ANY FRAUD TO JUSTIFY VACATING HIS STIPULATION

Petitioner-Appellant bases his entire motion upon the theory that Mr. Rich perjured himself during his deposition. [App. Br. At 5–6]. However, utterly lacking in the Record is any proof that Mr. Rich's testimony was untruthful. Instead, Petitioner-Appellant claims that simply because Mr. Rich did not maintain certain receipts or other documentation to support his claims of his contributions to WIS nearly ten (10) years ago, Mr. Rich's testimony must be false. [R. 6]. Such a claim is plainly without merit.

Petitioner-Appellant correctly recognizes that to merit vacatur of a stipulation, he must demonstrate it was the result of "fraud, collusion, mistake or accident warranting the exercise of the court's discretionary power to relieve

[Petitioner-Appellant] of the consequences of his stipulation." *Doe v. Marzolf*, 258 A.D.2d 970, 971 (4th Dep't 1999); *accord Ecogen Wind LLC v. Town of Prattsburgh Town Bd.*, 112 A.D.3d 1282, 1284 (4th Dep't 2013); *see Republic Painting, Sheeting & Bldg. Corp. v. P.S. Bruckel, Inc.*, 266 A.D.2d 814, 814 (4th Dep't 1999), *lv. dismissed*, 94 N.Y.2d 899 (2000). A party's "conclusory statements that the stipulation" was procured by fraud, collusion, mistake or accident does not provide a basis to set aside the stipulation. *Sippel v. Sippel*, 241 A.D.2d 929, 929 (4th Dep't 1997). Critically, Petitioner-Appellant's " 'change of heart provides an inadequate basis for vacating the stipulation.' " *Doe*, 258 A.D.2d at 971 (quoting *In re Kennedy v. Friedlander*, 99 A.D.2d 757, 757 (2d Dep't 1984)).

Petitioner-Appellant supports his claims that Mr. Rich's testimony was "false" or "fraudulent" with the untested and conclusory opinion of his purported accountant, who claims Mr. Rich "cannot . . . prove" certain of his claimed input into WIS. [App. Br. at 4]. Petitioner-Appellant then takes the logical leap to the extreme position that the inability to "prove" certain contributions must somehow mean that Mr. Rich perjured himself during his deposition, and that such perjury related to the contributions, thereby serving as grounds to vacate the stipulation. [App. Br. at 4–5]. Such an absurd position is wholly unsupported by the law or the facts.

Each and every premise and conclusion of Petitioner-Appellant's position is severely flawed. Whether the principles employed by Petitioner-Appellant's alleged "accountants" would preclude consideration of such contributions in a forensic accountant is irrelevant, because the Court is not held to such standards in making its ultimate determination of the parties' shares in WIS, but should consider **all** admissible evidence on legally relevant matters. Regardless of the untested conclusory opinions of Petitioner-Appellant's purported accountant, Petitioner-Appellant has not demonstrated any fraud or mistake which might warrant vacatur of the stipulation. The absence of supporting documentation does not render Mr. Rich's testimony "false," or fraudulent. The lack of citation to the Record in any portion of Petitioner-Appellant's Point I essentially concedes there is no record evidence to support his claims of fraud or unilateral mistake, or that the stipulation was in any way induced by fraudulent misrepresentation, so as to sustain his burden. Petitioner-Appellant's cross-motion was properly denied.

POINT II

THE PARTIES' STIPULATION IS NOT UNCONSCIONABLE

In a final desperate attempt to avoid his own stipulation, Petitioner-Respondent claims it would be "unjust or inequitable" to enforce the stipulation. [App. Br. at 7]. In addition to the grounds set forth in Point I, the

Court of Appeals has held only where a stipulation is "unconscionable . . . or contrary to public policy," should a stipulation be vacated. *See McCoy v. Feinman*, 99 N.Y.2d 295, 303 (2002) (internal citations omitted). An unconscionable stipulation is such that " 'no (person) in his (or her) sense and not under delusion would make on the one hand, and as no honest and fair (person) would accept on the other' . . . the inequality being 'so strong and manifest as to shock the conscience and confound the judgment of any (person) of common sense.' " *Christian v. Christian*, 42 N.Y.2d 63, 71 (1977) (alteration in original) (quoting *Hume v. United States*, 132 U.S. 406, 411 (1889) and *Mandel v. Liebman*, 303 N.Y. 88, 94 (1951)).

In support of his claim that the stipulation is unconscionable, Petitioner-Appellant begins from the unsupported and speculative assertion that "there will be no magical third party who or which will appear and bid enough funds at auction to cover both parties' claims." [App. Br. at 7]. There is no record citation or support for such a claim, as indeed, only a fortune teller would be able to divine who may participate in the Court-ordered auction. Petitioner-Appellant's further musings about how much he should bid at an ultimate auction are of no consequence and certainly do not render the stipulation "unconscionable." In the end, whoever successfully bids on WIS's assets at the auction will be responsible for placing the entire amount of the purchase plus additional fees into escrow according to the Contract with Brzostek's. [R. 181-83]. As envisioned by the parties'

stipulation, following a determination of the contributions, those escrowed funds would be disbursed by Court Order or settlement agreement of the parties. [R. 51]. Petitioner-Appellant has not and cannot demonstrate such an arrangement is unconscionable so as to "shock the conscience," as required to vacate his earlier stipulation.

Petitioner-Appellant's circular reasoning regarding Mr. Rich's purported "misrepresentation" during his deposition also does not support Petitioner-Appellant's claimed unconscionability contention any more than his claims of fraud. At base, Petitioner-Appellant's claims that Mr. Rich does not have "competent proof" of his own contributions misapprehend the basic rules of evidence and the standards by which the Court may consider admissible proof. *See Josephson v. Crane Club, Inc.*, 264 A.D.2d 359, 360 (1st Dep't 1999); *see also Butler v. Helmsley-Spear, Inc.*, 198 A.D.2d 131, 132 (1st Dep't 1993). Thus, Petitioner-Appellant did not meet his burden to establish the stipulation was unconscionable, and the stipulation must remain and be enforced. Petitioner-Appellant's appeal is wholly without merit.

CONCLUSION

Petitioner-Appellant seeks to vacate his own stipulation that the assets of the LLC be sold at auction, based upon some unidentified misrepresentation from Mr. Rich. Petitioner-Appellant has come forward with nothing demonstrating

Mr. Rich's testimony was false, as he claims, nor any other legal grounds upon which the Court should vacate the stipulation. Petitioner-Appellant's claims of "misrepresentation" similarly do not remotely support a claim the stipulation is unconscionable, so as to avoid the prior stipulation. Petitioner-Appellant entered into the stipulation, through counsel, fully aware of the circumstances and his subsequent change of heart is no grounds to vacate the Stipulated Order. There is no merit to Petitioner-Appellant's appeal, and the Order should be affirmed, with costs to Mr. Rich for defending this bad-faith appeal.

DATED: March 17, 2020

COSTELLO, COONEY & FEARON, PLLC

ROBERT W. CONNOLLY
Attorneys for Respondent, *Jon T. Rich, Jr.*
Office and Post Office Address
500 Plum Street, Suite 300
Syracuse, New York 13204
Telephone: (315) 422-1152

ROBERT W. CONNOLLY
DANIEL R. ROSE,
Of Counsel

CERTIFICATE OF COMPLIANCE
PURSUANT TO 22 NYCRR § 1250.8(b)(6), (c), (j)

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Font: Times New Roman
Point Size: 14
Line Spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the required statement pursuant to CPLR § 5531, table of contents, table of citations or certificate of compliance, etc., is 1,675.