

**Connery v Sultan**

2010 NY Slip Op 33398(U)

December 7, 2010

Supreme Court, New York County

Docket Number: 401336/05

Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN  
*Justice*

PART 57

CONNERY

INDEX NO.

401336/05

MOTION DATE

- v -

MOTION SEQ. NO.

015

SULTAN

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for approve receiver's final report  
PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion and cross-motion are  
determined as per accompanying decision/order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**

**DEC 13 2010**

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 12-7-10

Marcy Friedman  
MARCY S. FRIEDMAN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

STEPHANE COSMAN CONNERY and  
MICHELINE CONNERY,

*Plaintiff,*

- against -

BURTON S. SULTAN,

*Defendants.*

Index No.: 401336/05

DECISION/ORDER

**FILED**

**DEC 13 2010**

**NEW YORK  
COUNTY CLERK'S OFFICE**

Receiver, Robert Sikorski, moves for an order confirming his final accounting. Plaintiffs Stephan Cosman Connery and Micheline Connery (Connery plaintiffs) cross-move for an order declaring void a stipulation of settlement (Stipulation), between the Connery plaintiffs and defendant Dr. Burton S. Sultan, set forth on the record on April 9, 2008, which provided for specified repair work to be performed at the premises and for discontinuance of various lawsuits between the parties. This cross-motion also seeks attorney's fees and costs incurred by the Connerys in responding to Dr. Sultan's allegedly frivolous opposition to the Receiver's final accounting.

In their cross-motion, the Connery plaintiffs claim that the stipulation of settlement should be declared void on the ground that "Dr. Sultan's opposition to the Receiver's final accounting seeks to disclaim and challenge each and every stipulated item of work performed by the Receiver in order to avoid Sultan's share of the expense." (Lynn Aff. in Support of Cross-Motion, ¶ 2.) Plaintiffs further argue that Dr. Sultan's opposition "demonstrates that he has

repudiated the stipulation of settlement.” (Id., ¶ 8.)

This contention is without merit. Dr. Sultan objects to many of the items of work that the Receiver performed at the premises, claiming primarily that such items were beyond the scope of the stipulation, had in fact been performed prior to the stipulation, or were for the Connerys’ sole benefit. However, he acknowledges that he is liable for his share of at least \$393,126.97 in expenses for work performed on the roof and south facade of the building. (See Sultan Aff. in Opp. to Cross-Motion, ¶ 10; Ex. 3.) This is therefore clearly not a case in which Dr. Sultan has repudiated the stipulation.<sup>1</sup> The Connerys’ cross-motion will accordingly be denied.

The court turns to the Receiver’s motion for approval of his final accounting. The Connerys do not raise any objections to the Receiver’s account, and support his request for approval of his final accounting and payment of commissions in the amount he seeks. Dr. Sultan raises numerous objections to the account. The vast majority of these objections amount to an attempt to relitigate the necessity of repairs that Dr. Sultan agreed to in the April 9, 2008 stipulation of settlement or that were otherwise approved by the court. For example, Dr. Sultan objects to work on the north facade of the premises, claiming that this work had already been done and did not need to be “redone.” (Sultan Affidavit Response to Final Account of Receiver [Sultan Aff.], ¶¶ 137, et seq.) However, this work was part of the Phase I work of the

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<sup>1</sup>This is the second time the Connerys have claimed that Dr. Sultan repudiated the agreement, and that they were therefore not obligated to discontinue a malicious prosecution action that the Connerys had brought against Dr. Sultan in Nassau County. On the prior occasion, the Connerys argued that Dr. Sultan had repudiated the agreement by obstructing the roof work in the four months after the stipulation was entered into. In a decision dated February 9, 2010, this court rejected the argument, finding that the Connerys had repeatedly sought enforcement of the repair obligations under the stipulation and had waited until after the work at the premises was substantially complete to claim that Dr. Sultan was not entitled to enforce the stipulation.

Schnellbacher-Senden Group Report (Court's Ex. I to Stipulation) and was expressly agreed to in the stipulation. (Stipulation at 29.) Shortly after the entry into the stipulation, Dr. Sultan claimed that the north facade work had in fact already been performed. The court directed the Receiver to meet informally with Dr. Sultan's expert to review Dr. Sultan's claim, and to notify the court in the event the Receiver agreed with Dr. Sultan that the north facade work was unnecessary. (July 29, 2008 Transcript at 39-41.) However, the Receiver did not agree with Dr. Sultan's contention and did not notify the court that the Phase I work in the Schnellbacher Report should be reconsidered. The court repeatedly emphasized on the record that the stipulation remained in effect and would be enforced absent an order of the court granting a motion by Dr. Sultan for relief from the stipulation, upon a showing of legally sufficient grounds. (*Id.* at 41-43; Aug. 6, 2008 Transcript at 15-16.) Dr. Sultan never brought such a motion. The Receiver effectuated the work provided for in the stipulation. Dr. Sultan's objections to such work, made under the guise of objections to the Receiver's final account, amount to another attempt to litigate the necessity for repairs to which Dr. Sultan agreed in the stipulation. This attempt will not be countenanced by the court.

Dr. Sultan's objection to the elevator repairs, on the ground that they were unnecessary, must be rejected for similar reasons. The stipulation provided for replacement of interior elevator mechanisms. (Stipulation at 44-45.) While Dr. Sultan subsequently claimed at conferences in this matter that the elevator work was unnecessary, he never moved for relief from the stipulation. (Oct. 2, 2008 Transcript at 18, 20-21.)

Dr. Sultan also objects to the installation of north facade scaffolding, on the ground that the scaffolding was put up for the sole purpose of effectuating repairs to the Connerys' winter

garden rather than to common elements. (Sultan Aff., ¶ 135.) This claim was previously rejected, the court having found that the scaffolding was necessary for the north facade work. (See July 29, 2008 Transcript at 19, 23, 26.)

Dr. Sultan's further objection to the drain work (Sultan Aff., ¶¶ 119-133) was also the subject of prior complaints. The court finds that Dr. Sultan fails to raise a triable issue of fact on his claim that repair of drainage problems was Phase II work and therefore exceeded the scope of the stipulation. The record also demonstrates that the repair of drainage problems was work required in the ordinary maintenance of the building, and to deal with a potential safety hazard that the Receiver ultimately determined to be turpentine trapped in a blocked drain. (See Aug. 13, 2009 Transcript at 27-28; Oct. 7, 2009 Transcript at 6-8.) Indeed, Dr. Sultan's own plumbing inspection substantiates that there was a blocked drain at the premises. (See Ex. 19 to Sultan Aff., Manhattan Sewer & Drain report dated July 20, 2009.)

Dr. Sultan's related claim for repayment of his bills for sewer inspections or plumbing services is rejected. He voluntarily incurred these expenses in an effort to show that the drain work was unnecessary.

To the extent that Dr. Sultan objects to payment of Mr. Schickler's fees as construction manager for all of the work performed, this objection is also without merit. Given the extent of the work, the services of a construction manager were required. More importantly, the stipulation expressly provided for Mr. Schickler's supervision of the construction, stating: "The Receiver, with the assistance of his consultant, Mr. Schickler is authorized to do all of the work set forth in phase one of the Schnellbacher Senden Group" Report. (Stipulation at 29 [emphasis supplied].) At the oral argument of the Receiver's motion, Dr. Sultan acknowledged that Mr.

Schickler should have been paid 15 percent of the Phase I work plus 15 percent of the elevator work. (May 20, 2010 Transcript at 20-21.) As found above, the drain work was necessary for the maintenance of the premises and was not part of Phase II work. It was properly included in the work subject to a construction management fee. Dr. Sultan also fails to show that other incidental work, such as replacement of cracked glass (see id. at 22-23), was Phase II work. Dr. Sultan's bare assertion that there was collusion between Mr. Schickler, Mr. Sikorski, the Connerys, and their attorney, Mr. Lynn, has no support in the record and is summarily rejected by the court.

The court also rejects Dr. Sultan's claim that he should not be responsible for fees for violations placed on the premises by the Department of Buildings (DOB). The Connerys charge that Dr. Sultan himself lodged complaints with the DOB that resulted in the placement of the violations. However, the court need not make findings on this issue as, whatever the source of the complaints, the fees for the violations are an incidental cost of the construction for which Dr. Sultan must bear his respective share.

While Dr. Sultan claims that he sustained damages to his backyard in the amount of approximately \$19,000 (Sultan Aff., ¶¶ 88, 89), he fails to submit any evidence that the damages were caused by the repairs performed during the receivership or that he notified the Receiver at the time the damages allegedly occurred. He also fails to submit any legal authority that the cost of the repairs should be charged to the Receiver under these circumstances.

The court finds that there is an issue as to amount of common charges outstanding from the Connerys and from Dr. Sultan as of the inception of the receivership, and as to the amount of common charges paid to the Receiver since the inception of the receivership. This issue shall be

the sole issue to heard by a Special Referee prior to final discharge of the Receiver.

The court has considered Dr. Sultan's remaining contentions and finds them to be without merit.

The sole claim made by the Connerys is that Dr. Sultan should be charged with cost overruns on the ground that he delayed the work, and that a hearing should be held on the amount of such costs. (May 20, 2010 Transcript at 34-36.) The Connerys in effect ask this court to re-write the parties' April 9, 2008 stipulation of settlement, which did not make any provision for damages for delays. In any event, this claim is not properly determined on the Receiver's motion for approval of his final account or in the context of this receivership proceeding generally.

The court accordingly holds, in accordance with the by-laws and the arbitrator's award which underlies this action, that Dr. Sultan is liable for 65% and the Connery plaintiffs are liable for 35% of the expenses incurred by the Receiver in connection with the receivership of the premises. (See Connery v Sultan, American Arbitration Assn, Case No. 13 115 00105 2, Award dated Aug. 1, 2002 at 10.) This amount shall be subject to a set-off in Dr. Sultan's favor of \$25,000 for damages awarded to him by the arbitrator. (Id. at 15.)

The court further finds that there are minor discrepancies in the Receiver's account which must be corrected before the account is approved. For example, the Summary of Receiver's Account (prior to the Supplement period) shows a balance of \$16,265.81, although the difference between the deposits of \$855,691.17 and the disbursements of \$834,931.24 is \$20,759.93. The balance reported on the Supplement is less than the amount computed using the Receiver's ending balance on the final account, although the difference may be attributable to the gap in time between the date of the final account (November 11, 2009) and the start of the Supplement



period (January 1, 2010). In addition, some of the categories of deposits and disbursements do not completely match up. Also, statements for two different Chase accounts have been submitted, although it appears that Account 987048404965 may relate to a different matter and that statements for that account may have been submitted in error. The final account should include a separate line item, with supporting documentation, for Mr. Schickler's construction management services. The Receiver should also calculate his commissions.

While the discrepancies in the account appear to be minor, if not de minimis, the final account must be revised and re-submitted for approval. If there is a sufficient balance in the Receiver's account, the Receiver may make an application, on notice, for leave to hire an accountant to prepare the final account. The application shall set forth the name of the accountant to be hired and include documentation of the amount of the fee to be charged for preparation of the final account.

A date for the hearing before a Special Referee on the common charges issue discussed above will be set upon re-submission of the final account. While the Receiver will not be formally discharged until the final account is approved, the Receiver has not performed any services at the premises since at least May 20, 2010, and remains under the directive of the court to perform no further services.

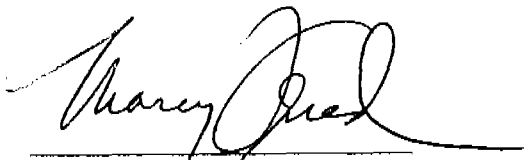
It is hereby ORDERED that the motion of Receiver Robert Sikorski for an order confirming his final accounting is denied without prejudice to re-submission by Mr. Sikorski of a final account. Said final account shall be filed with the Clerk of Part 57 of this Court by January 31, 2011, and a copy of the final account shall be served on the Connery plaintiffs and defendant Sultan; and it is further

ORDERED that pending his formal discharge, Receiver Sikorski shall not perform any further services at the premises; and it is further

ORDERED that the cross-motion of plaintiffs Stephane Connery and Micheline Connery to set aside the parties' stipulation dated April 9, 2008, and for other relief, is denied.

This constitutes the decision and order of the court.

Dated: New York, New York  
December 7, 2010



MARCY FRIEDMAN, J.S.C.

**FILED**

**DEC 13 2010**

**NEW YORK  
COUNTY CLERK'S OFFICE**