

**Vallie v Mahmood**

2012 NY Slip Op 30636(U)

February 15, 2012

Sup Ct, Queens County

Docket Number: 29360/07

Judge: Augustus C. Agate

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MEMORANDUM

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24  
Justice

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BEBI VALLIE,

Index No.: 29360/07

Plaintiff,

Motion Dated:  
November 1, 2011

-against-

Cal. No.: 39 & 37

MOHAMED AFZAL MAHMOOD,

Defendant.

m# 1 & 2

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This is an Order to Show Cause by defendant to hold the plaintiff in contempt for failing to comply with a stipulation between the parties and requiring that plaintiff perform as per the stipulation. Plaintiff moves for an order vacating and/or modifying the subject stipulation and for a declaratory judgment in the amount of rental income defendant owes to the plaintiff.

Plaintiff commenced this action for partition of real property located at 135-36 Kew Gardens Road, Richmond Hill, New York. Plaintiff and defendant held the property as tenants in common. Subsequently, the parties entered into a stipulation of settlement on the record before Referee Elizabeth Yablon on February 4, 2010. Pursuant to the stipulation, defendant would pay the total of \$60,000 to the plaintiff. Defendant was to pay \$20,000 within 30 days and the balance of \$40,000 within five months after that. The stipulation also provided that in the event defendant failed to pay either the \$20,000 or the \$40,000

in the time required, a judgment could be entered against the defendant for the outstanding balance, and plaintiff would be entitled to collect 40 percent of the rental income from the subject property, \$1,180 per month, until the balance is paid to the plaintiff. Upon payment of the full \$60,000, ownership of the subject property would be transferred solely to the defendant.

Defendant made the initial \$20,000 payment but failed to make the \$40,000 payment by August 5, 2010 when it was due. Therefore, pursuant to the terms of the stipulation, plaintiff entered a judgment against the defendant on October 29, 2010. Subsequently, after a series of e-mail exchanges, the parties agreed to extend the defendant's time to pay the \$40,000 to the plaintiff. According to the defendant, he and the plaintiff agreed that he would pay \$10,000 to the plaintiff on December 3, 2010, an additional \$10,000 on December 7, 2010 and the balance of \$20,000 on December 31, 2010. He also states that plaintiff agreed to waive all interest and rental income for that period. Although plaintiff concedes that the parties agreed to a subsequent payment arrangement, plaintiff denies that only \$10,000 was due on December 3, 2010. Rather, plaintiff maintains that defendant was to pay \$20,000 by December 3, 2010. According to the plaintiff, defendant paid only \$10,000 on December 3, 2010 and made another \$10,000 payment on December 7, 2010. Plaintiff

states that she accepted the December 7, 2010 payment because she wanted to be made whole quickly.

Thereafter, defendant prepared the paperwork to effectuate the transfer of the property to his name but was advised by plaintiff that she would not sign the deed and transfer papers until she obtained a guarantee that she was not obligated under a home equity loan agreement the defendant entered into with Bank of New York. Plaintiff avers that she would not have agreed to the settlement had she thought she would continue to owe a debt related to the subject property. Defendant, however, asserts that this guarantee was never part of the February 4, 2010 settlement. In any event, defendant contends that plaintiff is not obligated under this mortgage since he alone signed the note, and the note clearly provides that the co-owner is not personally liable. Defendant also maintains that he has been ready, willing and able to pay the balance due under the settlement agreement, but plaintiff has refused to accept the payment.

The court will first address the branch of the plaintiff's motion to vacate and/or modify the stipulation. Stipulations of settlement, especially those made in open court, are favored by the courts and will not be lightly cast aside. (Hallock v State of New York, 64 NY2d 224, 230 [1984]; Matter of Davis, 292 AD2d 452, 452-453 [2002].) 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. (Singh v North Shore Univ. Hosp., 76 AD3d 1004, 1005 [2010]; Matter of Marquez, 299 AD2d 551, 552 [2002].)

Here, the open court stipulation of settlement was clear and unambiguous and did not provide for any guarantee that plaintiff was not obligated under the mortgage. (see Matter of Marquez, 299 AD2d at 552.) Further, the Referee conducted a proper allocution of the parties, and both parties voluntarily agreed to the settlement. Plaintiff has failed to make a sufficient showing of a mistake on her part to warrant the setting aside or modification of the stipulation. Plaintiff was aware of the existence of the home equity loan prior to the on the record settlement and did not mention it at the time nor is there any evidence that it was discussed during the settlement negotiations. Thus, the branch of plaintiff's motion to vacate or modify the stipulation is denied.

In view of the binding nature of the subject settlement, the court directs that plaintiff accept defendant's final payment of \$20,000 and within 20 days of such payment, execute all necessary documents to transfer title of the subject property to the defendant as per the February 4, 2010 stipulation.

In view of this determination, the branch of defendant's Order to Show Cause to hold plaintiff in contempt is denied at

this juncture.

The branch of the motion by the plaintiff for a declaratory judgment regarding the amount of rental income owed by the defendant is denied. Plaintiff admits that she waived the rental income for September, October and November 2010. However, in view of the parties' subsequent agreement to extend defendant's payment time and plaintiff's admission that she accepted the \$10,000 December 7, 2010 payment from the defendant, the court cannot conclude that plaintiff is entitled to the penalty for rental income.

Accordingly, the Order to Show Cause by defendant is granted solely to the extent that plaintiff shall accept defendant's final payment of \$20,000 and within 20 days of such payment, execute all necessary documents to transfer title of the subject property located at 135-36 Kew Gardens Road, Richmond Hill, New York 11418, to the defendant.

The motion by the plaintiff is denied in its entirety.

Settle Order.

Date: February 15, 2012

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AUGUSTUS C. AGATE, J.S.C.

