

**Hossain v Hossain**

2016 NY Slip Op 30855(U)

May 4, 2016

Supreme Court, Queens County

Docket Number: 17142/13

Judge: Allan B. Weiss

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This opinion is uncorrected and not selected for official publication.

**M E M O R A N D U M**

SUPREME COURT QUEENS COUNTY  
CIVIL TERM PART 2

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KHAN TANVIR HOSSAIN,

Plaintiff,

-against-

KHAN TANJIR HOSSAIN,

Defendant.

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**HON. ALLAN B. WEISS**

Index No: 17142/13

Motion Date: 12/2/15

Motion Seq. No.: 1

The plaintiff commenced this action for partition of real property located at 89-58 212th Place, Queens Village, NY 11427 which the plaintiff and defendant own as tenants in common with each having a 50% interest in the property and an accounting; to recovery of \$64,000.00 the outstanding amount due on a loan from plaintiff to defendant; and a judgment declaration that defendant is liable for the amount due on a "collection account"<sup>1</sup>.

After the plaintiff commenced this action and served the defendant, but before the defendant's time to answer had expired, the parties entered into a stipulation of settlement dated November 12, 2013. The stipulation of settlement provided in pertinent part, that the defendant acknowledged service of the summons and complaint, appeared and waived his right to answer on the grounds that he has no defense to the action, and admitted that he owes the defendant \$65,000.00. With regard to the

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<sup>1</sup>The stipulation provided that defendant has satisfied this obligation.

\$65,000.00, the defendant executed two promissory notes, to wit: \$40,000.00 and \$25,000.00, containing a payment schedule and the right to accelerate in the event defendant fails to cure a default under its terms. The stipulation further provided that the defendant, the occupant of the premises, was solely liable for the payment of the mortgage and the normal and extraordinary costs of maintaining the premises. The stipulation also provided that in the event the defendant fails to make a mortgage payment or fails to make payment due under the promissory notes within 45 days of the due date, the plaintiff has the right to elect to sell the property and the parties shall cooperate to effectuate a sale on the best terms possible, but if defendant fails to cooperate in the sale, the plaintiff has the right to recover reasonable attorney's fees incurred in connection with the enforcement of the stipulation.

Plaintiff asserts that the defendant has defaulted under the stipulation by failing to make the mortgage payments and payments under the promissory notes and now moves for an Order directing that the premises be sold under the direction of the court, and that the proceeds of the sale be used to satisfy the amounts due under the promissory notes, that any mortgage arrears be credited against the defendant, an award of attorney's fees and a judgment for any deficiency owed by defendant after the sale.

Defendant does not deny that he is in default under the stipulation. Rather, he opposes on the ground that he was not properly served with process and that he signed the stipulation without knowledge or understanding of the entirety of the stipulation and without legal counsel having been advised that he did not need an attorney.

In reply, plaintiff submitted, inter alia, e-mail communications between defendant and plaintiff evincing ongoing negotiations with respect to the terms of the stipulation to demonstrate that the defendant was actively involved in negotiating the terms of the stipulation.

"Stipulations of settlement are favored by the courts and not lightly cast aside" ( Hallock v State of New York, 64 NY2d 224, 230 [1984] ). A stipulation of settlement is a contract subject to principles of contract interpretation (see JP Morgan Chase Bank, N.A. v Cellpoint Inc., 54 AD3d 366 [2008] McCoy v. Feinman, 99 NY2d 295, 302[2002]). A court may relieve a party of the consequences of a stipulation made during litigation where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake, or accident (see Hallock v State of supra).

Defendant does not seek to set aside the stipulation and the allegations in his affidavit are, in any event, insufficient to demonstrate any basis for doing so. Insofar as defendant's claim

that he was induced by false assurances of the plaintiff and his attorney to forego obtaining an attorney, he does not assert that the plaintiff prevented him from obtaining an attorney nor demonstrate the absence of meaningful choice on his part (see King v Fox, 7 NY3d 181 [2006]; Gillman v Chase Manhattan Bank, N.A., 73 NY2d 1 [1988]).

With respect to defendant's claim that he was not properly served, defendant in the stipulation has expressly consented to the jurisdiction of the court.

With respect to his claim that he was unaware that the stipulation provided that if he defaulted plaintiff could sell the house is also unavailing. It is well settled that "[a] party is under an obligation to read a document before he or she signs it, and a party cannot generally avoid the effect of a [document] on the ground that he or she did not read it or know its contents" (Cash v Titan Fin. Servs., Inc., 58 AD3d 785, 788 [2009]). Defendant does not claim that anyone prevented him from reading the stipulation.

Accordingly, the plaintiff's motion is granted to the extent of appointing a Referee to ascertain the interests of the parties in the subject property (RPAPL 911), report whether the property is so circumstanced that a partition cannot be made without great prejudice to the owners (RPAPL 901[1]), and, should the Referee determine that a sale is necessary, ascertain the existence of

any creditor not joined as a party who may have a lien against an undivided share of any party (RPAPL 913).

An appropriate referee's fee will be determined at the time of the confirmation of the referee's report upon application of the referee, based upon, inter alia, a reasonable hourly fee and the time expended as set forth in an affirmation of services (see Majewski v Majewski, 221 AD2d 420 [1995]).

Settle Order.

Dated: May 4, 2016  
D# 54

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J. S. C.