

Stratospheric Inc. v. Kabir, 69361/16

April 13, 2017

- Civil Court, Queens County
- 69361/16
- Judge Joel Kullas
- For Plaintiff: Petitioner's counsel: Vincent Caputo, Esq., Sunnyside, NY.
- For Defendant: Respondent's counsel: Farley & Kessler, P.C., Jericho, NY.

Cite as: Stratospheric Inc. v. Kabir, 69361/16, NYLJ 1202783514294, at *1 (Civ., QU, Decided March 16, 2017)

[Read Summary of Decision](#)

Decided: March 16, 2017

ATTORNEYS

Petitioner's counsel: Vincent Caputo, Esq., Sunnyside, NY.

Respondent's counsel: Farley & Kessler, P.C., Jericho, NY.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion to vacate a stipulation and for further relief:

Papers Numbered

Notice of motion and affidavits annexed

Order to Show Cause and affidavits annexed 1

Answering affidavits 2

Replying affirmation 3

Supplemental affirmation 4

Exhibits

Stipulations

Other

*1

Petitioner commenced this summary licensee holdover proceeding seeking possession of 94-67 224th Street, Queens Village, NY 11428 (the "subject premises"). Respondents initially appeared unrepresented and did not interpose a written answer. Pursuant to a soordered stipulation that was translated by a Farsi interpreter, the parties entered into a written agreement dated November 1, 2016, whereby petitioner obtained a final judgment of possession and a warrant of eviction. Execution was stayed through January 2, 2017 for respondents to vacate. In consideration of that date as "final," petitioner waived the right to seek use and occupancy for the period of February 2, 2016 through January 2, 2017. The stipulation was signed by respondents Rahima Kabir and Mohamad N. Khan. The stipulation noted that Rahima Kabir is the former owner of the subject premises. Respondent, Rahima Kabir, has retained counsel and moves to vacate the November 1, 2016 stipulation.

It is well settled that stipulations of settlement "are favored by the courts and not lightly cast aside" (Hallock v. State of New York, 64 NY2d 224, 230 [1984]). Stipulations may be vacated

only on grounds sufficient to invalidate a contract, such as "fraud, mistake, collusion or accident" (Nash v. Yablon-Nash, 61 AD3d 832, 833 [2nd Dept 2009]). Ms. Kabir alleges fraud, but not in the stipulation dated November 1, 2016. Rather, she alleges that petitioner fraudulently induced her to transfer ownership of the subject premises to petitioner in 2016. Ms. Kabir alleges that, in exchange for transferring the property to petitioner, petitioner promised to tender respondent \$100,000.00, settle her bank debt and permit her to remain in the subject premises for up to two years. (Affirmation in Support, Exhibit E.) Assuming the truth of this allegation, it is not enforceable and violates the Statute of Frauds because it is not in writing and cannot be performed within a year. (New York General Obligations Law §5-703.) Respondent also argues that the transaction violated the Home Equity Theft Prevention Act (HETPA). According to HETPA, a "covered contract" is one which is: *2

(i) is incident to the sale of a residence in foreclosure; or
(ii) is incident to the sale of a residence in foreclosure or default where such contract, agreement or arrangement includes a reconveyance arrangement. (NY Real Property Law 265-a[2][c].)

Respondent has failed to show the property was in foreclosure or that the alleged sale included a reconveyance arrangement. Therefore, HETPA does not apply. Even if the transaction violated HETPA, that violation would render the transaction voidable, not void. (Real Property Law §265-a[8][a].) Since this court cannot set aside the transaction as fraudulent, respondent can raise her affirmative claim of title in Supreme Court. (City of New York v. Akbar's SelfHelp Inc, 25 Misc 3d 129(A) [2nd, 11th & 13th Jud Dist, 2009].) While this court can hear a defense regarding title (id.), respondent waived that defense by signing the November 1, 2016 stipulation and obtaining a waiver of twelve months of use and occupancy. (433 v. Murdock, 276 AD2d 360 [1st Dept 2000].) Only now, after obtaining the benefit of the bargain, does respondent move to vacate the stipulation. The court finds no fraud which resulted in the signing of the November 1, 2016 stipulation. The respondents had the assistance of a Farsi interpreter on that date; the court specifically explained that respondents had the opportunity to reject the settlement offer and proceed to trial. The respondents voluntarily entered into the agreement. Since respondent has not shown the stipulation was the result of fraud, there is no basis to vacate the November 1, 2016 stipulation. (See Cervera v. Bressler, 85AD3d 839, 841 [2nd Dept. 2011].) Finally, respondent argues that the transfer of the subject property from herself to petitioner was consummated without consideration. However, the deed refutes that argument, as nominal consideration is listed. (See Affirmation in Opposition, Exhibit C.) Therefore, respondent has failed to establish grounds to vacate the November 1, 2016 stipulation.

Based on the foregoing, the motion is denied. Execution of the warrant is stayed through April 17, 2017 for respondents to vacate. The warrant may execute on default following service of a marshal's notice.

This constitutes the decision and order of the court.

Date March 16, 2017