

Barnes v Barnes

2019 NY Slip Op 33774(U)

December 31, 2019

Supreme Court, New York County

Docket Number: 151490/2014

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. PAUL A. GOETZ PART IAS MOTION 47EFM

Justice

-----X

BRYANT BARNES, MICHAEL BARNES,
Plaintiff,

INDEX NO. 151490/2014

MOTION DATE 12/17/2019

MOTION SEQ. NO. 004

- v -

SANDRA BARNES, JOAN BARNES-WARE, HAROLD
BARNES, JEFFREY BARNES

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 60, 61, 62, 63, 64, 65, 66

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Plaintiffs commenced this action seeking a court ordered partition and sale of real property located at 118 West 121st Street, New York, New York, which is a multi-unit residential building. By order dated July 1, 2015, this court granted plaintiffs' motion for summary judgment on the complaint. However, the sale of the property did not occur pursuant to the order and, instead, the parties engaged in discovery regarding the management of the premises. After the court granted plaintiffs' motion for a default judgment against defendant Harold Barnes on October 26, 2018, the plaintiffs and the non-defaulting defendants entered into a so-ordered stipulation dated November 14, 2018, to list the property for sale with Keller Williams Realty NYC Group initially for \$2.8 million but no less than \$2.4 million. Plaintiffs now move to vacate the so-ordered stipulation of settlement, alleging that they cannot sell the property for anywhere near this price as defendant Harold Barnes is not permitting access to the interior of the building to potential buyers. Plaintiffs also seek an order for the judicial sale of the premises and the

appointment of a referee to divide the sales proceeds among the parties. The motion is unopposed.

It is well-established that as with contracts, “courts should not disturb a valid stipulation absent a showing of good cause such as fraud, collusion, mistake or duress.” *McCoy v. Feinman*, 99 N.Y.2d 295 (2002). Although it is not specified in the moving papers, one possible reason to vacate the stipulation at issue here is on the basis of mutual mistake. In general, in order to vacate a stipulation of settlement on the basis of a mutual mistake, the moving party must show that the mistake existed at the time the stipulation was entered that was so substantial that it prevented a meeting of the minds. *See M.W. v. New York City Health and Hospitals Corp.*, 303 A.D.2d 725 (2d Dep’t 2003). Here, plaintiffs have met this burden by showing that they mistakenly assumed that they would receive a much higher price for the premises since they did not anticipate that defendant Harold Barnes, who lives in one of the apartments, would not permit potential buyers to view the interior of the building. Affidavit of Jamal Hadi sworn to on December 2, 2019. According to the parties’ broker, such refusal severely depressed the potential sale price of the building by at least \$500,000. *Id.* Accordingly, plaintiffs’ application to vacate the stipulation of settlement will be granted.

Further, pursuant to the court’s order dated July 1, 2015 granting plaintiffs’ motion for summary judgment, plaintiffs are entitled to an interlocutory judgment under Real Property and Proceedings Law § 915, determining the rights of the parties in the property and directing its sale at public auction. Accordingly, it is

ADJUDGED that the plaintiffs and defendants are tenants in common of the premises in question in this action, which is as follows: 118 West 121st Street, New York, New York 10028, designated as Borough: Manhattan (1), Block 1905, Lot 142; and it is further

ADJUDGED that the rights, interests, and shares of the plaintiffs and defendants in and to the said premises are as follows: the plaintiffs are seized of and entitled in fee to an undivided one-tenth interest each in the premises described above and the defendants are seized of and entitled in fee to an undivided one-fifth interest each in said premises; and it is further

ORDERED AND ADJUDGED that the said property cannot be physically partitioned without great prejudice to the owners and therefore shall be sold as one parcel at a public auction; and it is further

ORDERED AND ADJUDGED that the proceeds of the sale shall be utilized first to pay the costs and expenses of the sale and the balance thereof shall then be divided among the parties in accordance with the rights, interests, and shares of the parties as herein set forth; and it is further

ORDERED that the Referee named hereinafter shall hold the two amounts representing the parties' portions of the balance of the proceeds of the sale pending further order of this court; and it is further

ORDERED that the sale shall be conducted by and under the direction of Judith Constance Aarons, Esq. (Fid. Id. 647198), Cohen Hochman & Allen, 75 Maiden Lane, Suite 802, New York, New York 10038, who is hereby appointed Referee for that purpose; and it is further

ORDERED that, pursuant to Section 36.1 of Part 36 of the Rules of the Chief Judge, this appointment shall be subject to said Part 36; and it is further

ORDERED that, by accepting this appointment, the Referee certifies that he/she is in compliance with Part 36, including Section 36.2 (d) ("Limitations on appointments based upon compensation"), but if she is disqualified from receiving such appointment pursuant to the provisions of Part 36, she shall notify this court forthwith; and it is further

ORDERED that, by accepting this appointment, the Referee certifies that she is familiar with the duties and responsibilities of a Referee to Sell, has experience in such area, and is fully capable of assuming, and prepared to assume, those duties and responsibilities, which are commensurate with her abilities; and it is further

ORDERED that attorneys or support staff in the appointee's office may perform tasks under the appointee's direct supervision [unless otherwise directed by the court], but all substantive appearances and reports must be made, performed, and created by the appointee; and it is further

ORDERED that, upon receipt of this order and UCS Form 872 (Notice of Appointment and Certification of Compliance), the Referee shall complete, execute, and return the Form 872 to the Fiduciary Clerk [NOTE: do not include this paragraph in cases in which, pursuant to Section 36.4, the appointee is not required to file the Notice and Certification (e.g., referees to sell whose compensation is anticipated to be less than \$ 750)]; and it is further

ORDERED that, if it is anticipated that the Referee's fees will exceed \$750, the Referee must apply [by letter] to the court for approval of such fees and the Referee shall comply with Section 36.4 before such fees can be paid; and it is further

ORDERED that the fees of the Referee, if in excess of \$750, shall be paid only upon receipt of an order by the court authorizing such payment; and it is further

ORDERED that the closing of title shall take place at the office of the Referee, or at such other location as the Referee shall determine, within forty-five (45) days after such sale unless otherwise stipulated by all parties; that the Referee shall transfer title only to the successful bidder at the auction; and that any delay in the closing or adjournment of the closing date beyond forty-five (45) days may be stipulated among the parties, with the Referee's consent, up to ninety (90)

days from the date of sale, but any delay or adjournment beyond ninety (90) days may be set only with the approval of this court; and it is further

ORDERED that the Referee shall give public notice of the time and place scheduled for the conduct of the auction sale, according to law and the practices of this court, and that the parties hereto may purchase at the sale; and it is further

ORDERED that the sale shall be conducted on the following terms, public notice of which shall be given by the Referee in the *New York Law Journal*; and it is further

ORDERED that promptly after the conclusion of said sale, in accordance with law, the Referee shall file with the Clerk of the Court a report of the sale and all of the Referee's proceedings in connection therewith; and it is further

ORDERED that such filing with the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that, after the sale shall have been confirmed by this court and final judgment entered, the Referee shall execute and deliver a deed or deeds of the premises sold to the purchaser(s) at the sale, upon compliance with the conditions for the delivery thereof; and it is further

ORDERED AND ADJUDGED that the purchaser or purchasers of the property or any part thereof at the auction sale shall be let into possession, and each person upon whom this judgment is binding who may be in possession of the property, or any part thereof, shall deliver possession thereof to the purchaser or purchasers on production of the Referee's deed and, on demand of the purchaser or purchasers, the parties hereto shall deliver thereto all deeds, titles, or writings under

the control of such party that relate to ownership of the property purchased by the purchaser or to any part thereof.

12/31/19
DATE


PAUL A. GOETZ, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input checked="" type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					<input type="checkbox"/>
					OTHER
					REFERENCE