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TO BE ARGUED BY:
DAVID J. ARONSTAM ESQ.
TIME REQUESTED: 15 MINUTES

Supreme Court of the State of New York Appellate Division: First Department

Appellate Division Case No. 2018-3037

MICHEL KADOSH, Individually and as a Managing Member of, 213 W. 85th ST., LLC,

Plaintiff-Respondent,

-against-

DAVID KADOSH,

Defendant-Appellant,

-and-

114 W. 71st ST., LLC, 30 LEXINGTON AVE., LLC and 3D IMAGING CENTER, CORP.,

Defendants.

(See inside cover for continuation of caption)

RESPONDENT'S BRIEF

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Supreme Court, New York County, Index Nos. 651834/2010 & 650048/2013

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DAVID KADOSH, Individually and as a Member of
213 W. 85th ST., LLC,

Third-Party Plaintiff,

-against-

MEK ENTERPRISES, LTD.,

Third-Party Defendant.

In the Matter of the Application of DAVID KADOSH,

Petitioner,

-against-

for the Judicial Dissolution of 213 W. 85th ST., LLC,

Respondent.

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PRELIMINARY STATEMENT

Plaintiff-Respondent Michel Kadosh (the "Respondent", "Plaintiff" or "Michel") submits this answering brief in opposition to the appeal of Defendant-Appellant David Kadosh (the "Respondent", "Defendant" or "David") which seeks to reverse the Decision and Order of the Supreme Court, New York County (Kornreich, J) dated November 3, 2017 [Appendix on appeal ("A") pages 8-10] (the "Decision" or "Order"). The Order was entered after the parties had concluded an abbreviated trial pursuant to a stipulation entered into in open court, on the record, on the advice of counsel. The stipulation included a binding provision that neither party would appeal the final decision of the Court below. The Decision directed that the sum of $1,634,442.02 being held in escrow by a receiver be turned over to Plaintiff-Respondent Michel Kadosh.

COUNTER STATEMENT OF THE QUESTIONS PRESENTED

1. Did the parties entered into a valid and binding stipulation in open court for consideration, on the advice of counsel, which included the waiver of both parties' right to appeal the final decision of the Court below?

A. Yes.

2. Did the parties agree that the decision by the Court below would not be a "reasoned one", that is, it would not contain findings of fact and conclusions of law?

A. Yes.

NATURE OF THE CASE

Counterstatement of facts

This appeal stems from two related actions in the Court below. The first action under Index No. 651834/10 is a lawsuit by Michel Kadosh, individually and derivatively on behalf of 213 W. 85th St., LLC, against David Kadosh, 114 W. 71st St., LLC, 30 Lexington Ave., LLC and 3D Imaging Center Corp.

The second action, under Index No. 650048/13 is entitled In the matter of David Kadosh for the Judicial Dissolution of 213 W. 85th St., LLC.

Michel Kadosh and David Kadosh are brothers who formed 213 W. 85th St., LLC (the "Company") to purchase, renovate and develop the building at 213 West 85th Street in Manhattan (the "Building"). Each brother owned fifty percent of the Company. The Building was purchased for $1,825,000.00 in 2004 as stated by Appellant at A666 where he acknowledged that the downpayment of $182,500 was ten percent of the purchase price. In 2014, the Building was sold for $8,750,000.00 [A976]. Although both parties contributed to the funding of the renovation, Michel was solely responsible for managing the renovation project

which greatly enhanced the value of the Building [A116-117] and resulted in the large difference between the purchase price and the selling price.

The first lawsuit (NY County Clerk Index # 651834/10) was filed by Michel in 2010 because David was failing to pay his fair share of expenses and construction at the Building had ground to a halt. The parties each claimed that they had contributed more to the Company than the other. Michel also claimed that he had entered into an oral joint venture agreement with David to renovate properties at 114 West 71st Street and 30 Lexington Avenue and the profits from the renting of these properties would be used to fund the renovations at 213 West 85th Street. Michel was to renovate the properties, manage them and the brothers would share in all the rental and other income from all three of the buildings.

In 2013, David brought the second action for the judicial dissolution of the Company (NY County Clerk Index # 650048/13) which was owned equally by Michel and David. They were at a deadlock as to the operation of the Company and the only way forward was a judicial dissolution of the Company.[1]

The Court appointed a Receiver (Robert Lewis, Esq.) in 2013 to collect the rents and then to market and sell the Building [A9]. He was to hold the sale proceeds in escrow pending the resolution or settlement of the lawsuits. After

---

1 Appellant has failed to include the pleadings in the appendix in violation of this Court rules as more fully described below.

payment of closing expenses including a mortgage of about $1,300,000 [976], broker commissions of about $320,000 [A976], Receiver's commissions of about $120,000 [A976], and other expenses [A980], there was $7,034,442.00 available for distribution to the parties [A980].

The trial of the actions started in 2014 and in the midst of the twenty-three day bench trial [A9], the parties reached an agreement on resolving the dispute. On July 21, 2016, the parties stipulated to a settlement in open court, on the advice of counsel, and were fully allocuted as to the terms of the settlement [A841-8].

Then on August 5, 2016, the parties modified the settlement [A979-991]. Again the stipulation of settlement was entered into in open court on the advice of counsel and the parties were fully allocuted as to the terms of the settlement.

The full terms of the settlement are set forth below but one of the crucial terms is that each party agreed not to appeal the final decision of the Court below [A988]. Another crucial term was that the parties stipulated that the Court below would not have to give reasons for its decision [A986]. Despite this binding stipulation made in open court, Appellant has seen fit to prosecute this appeal. In so doing, Appellant falsely claims that the Court below "promised" to give reasons for its decision whereas it never made any such promise. Appellant provides no factual or legal basis as to why the stipulation of settlement is not binding on him. Respondent seeks sanctions in this regard for the filing of this frivolous appeal.

The July 21, 2016 stipulation in open court on the record

The Trial Transcript of July 21, 2016 is contained in the appendix at A833-900. At page 4 of this transcript [A836], the then attorney for Plaintiff, Paul Sarkozi, announces to the Court below that the parties "have agreed upon an alternative proceeding that – procedure that will allow this matter and all claims and counterclaims and third-party claims and defenses on claims, counterclaims and third-party claims to all be resolved through the following procedure…"

Mr. Sarkozi went on to describe the financial terms of the settlement [A836-7]. At the time, the parties believed that the Receiver held about $7.9million in escrow. The parties stipulated that, with the exception of $700,000, they would split the remaining $7.2million. A discussion then ensued as to the mechanics of distributing the $7.2million to the parties which the Receiver held in escrow.

At page 7 of the transcript [A839], the stipulation regarding the court procedure to be followed going forward was described. From that time on, the trial evidence would only be "amplified" by the direct examination of Appellant. Respondent gave up his right to cross-examine Appellant. The parties would not put on any further witnesses and the trial would conclude at the end of the direct testimony of the Appellant. Respondent waived his right to any rebuttal case. The parties would then submit short post-trial memoranda to the Court [A839-840].

At pages 8-9 of the transcript [A840-841], the following exchange takes place (Mr. Sarkozi was Respondent's counsel at the time):

> "MR. SARKOZI: Thank you, your Honor.
>
> The parties have indicated and consented that the Court's decision does not need to be a reasoned decision or written decision. That the Court simply can, upon receiving these [written] submissions and –
>
> THE COURT: Of course, the Court is going to, and I will say this on the record, review, and I have a lot of transcripts, and I have notes on all of the testimony, is going to review all of that. I have, I think it is something like ten evidence books, and I will use – I will look at the evidence, not the entire books, but what was introduced, and I am going to have to base my decision on what is coming.
>
> MR. SARKOZI: The Court, when the Court renders its decision as to how to allocate the funds, that decision will, the parties have stipulated and agreed, will be final.
>
> That the parties are waiving all rights to appeal.
>
> That, and further, the parties have agreed to waive all claims that they have whether stated or unstated against each other, and to release each other from all claims from the beginning of the world to today's date.
>
> Is that correct, Mr. Perrone?"

Mr. Perrone, the then attorney for the Appellant, answers "Yes. Yes, on behalf of my clients." Trial Transcript 7/21/16, page 9 lines 15-17 [A841].

As set forth below, the Appellant has latched onto this portion of the transcript in claiming that the Court consented to provide "findings of fact and conclusions of law." See Appellant's brief at page 26 for example. This position is completely fabricated as it is clear from the trial transcripts that the Court agreed to nothing of the sort.

Furthermore, Appellant completely ignores the fact that he explicitly agreed under oath during a later allocution that the Court would not issue a reasoned

decision [A986]. Thus, Appellant not only makes up language by the Court that does not exist, he completely ignores the fact that he agreed under oath, in open court, on the advice of counsel, that the decision of the Court would not contain reasoning.

The Court then commented that the parties had spent "literally hours and probably days" discussing the settlement with counsel who took hours to explain the settlement to their clients as well as their client's spouses. [A842]. This is important because Appellant cannot claim that he entered into the stipulation unadvisedly or without understanding its terms.

Michel Kadosh was allocuted under oath as to the terms of settlement at A843-846 and he unequivocally agreed to all the terms of the settlement.

Appellant David Kadosh and his wife were then allocuted under oath at A847-850 and they stated that they understood the terms of the stipulation of settlement and that they accepted its terms.

The August 5, 2016 modification to the stipulation

On August 5, 2016, an amendment to the settlement agreement was made in open court on the record. The transcript of the proceedings of August 5, 2016 are found at A979-991.

Firstly, it was clarified that the sum of $7,034,442.02 was being held in escrow by the Receiver as the net proceeds from the sale of the Building [A980-1].

Mr. Sarkozi then started describing a modification to the prior stipulation of July 21, 2016 [A981]. The new stipulation provided that the Receiver would immediately disburse the sum of $2.7million to each of the parties from his escrow account [A981]. The entitlement to the balance of $1,634,442.03 would be determined by the Court by the special procedure previously agreed upon [A981], namely, that Appellant would not be cross-examined and that Respondent would put on a rebuttal case [A988].

Two modifications were made to the prior stipulation [981-2]. The parties agreed that their post-trial memoranda would be five pages instead of two and that all documents stipulated as part of pre-trial arrangement would be moved into evidence.

At A983, Mr. Sarkozi stated that he thought "it would be useful…to allocute the clients to make sure that they are clear and are fully entering into, with the advice of counsel, the modification upon which this matter will be resolved."

Michel Kadosh and David Kadosh were allocuted simultaneously [A985-990]. The allocution covered all the important terms of the stipulation of settlement to which the parties agreed and they indicated it was done of the advice of counsel.

At page 8 of the transcript of August 5, 2016 [A986], Mr. Sarkozi asked the parties as follows:

"And are you satisfied with the terms of the modification that have been put on the record as the way to resolve this matter without further opportunity to appeal or to obtain additional evidence or to obtain a detailed reason (sic) decision from the Court?"

Both Appellant and Respondent answered "Yes."

In the allocution, the parties agreed to be bound by all the terms of the stipulation of settlement. Each party would receive $2.7million from the escrow and the remaining sum of $1,634,442.02 would be the subject of the Court ruling. Respondent waived the right to cross-examine Appellant. Respondent waived the right to put on a rebuttal case after the conclusion of the Appellant's direct testimony. Documents were to be moved into evidence simply on the basis of a pre-trial stipulation.

At page 10 of the transcript of August 5, 2016 [A988], the following exchange takes place:

"Mr. Sarkozi: And do you understand that you are waiving any right to further evidence or appeal?
Mr. M. Kadosh: Yes.
Mr. D. Kadosh: Yes."

Thus, Appellant David Kadosh stated <u>twice</u> under oath that he was agreeing to waive his right to appeal – once on July 21, 2016 and again on August 5, 2016. Nonetheless, despite Respondent's request that he withdraw this appeal in light of his unequivocal agreement not to appeal, the Appellant has perfected the appeal in bad faith.

The record is also crystal clear that Appellant agreed and understood that the decision of the Court would not be detailed or reasoned [A986, lines 9-10 of the transcript]. Despite this clear agreement, Appellant argues that the Order of the Court below should be reversed because he is entitled to a reasoned decision with findings of fact. This argument is entirely without merit.

<u>The decision of the Court below</u>

The Decision and Order of the Court below dated November 3, 2017 is found at A8-10. In the Order, under a subheading entitled "*Final Decision*" [A10], the Court awarded the entire $1,634,442.02 to Michel Kadosh, the plaintiff-respondent. The Court below confirmed that the parties agreed that "the decision would not be a 'reasoned one – one containing findings of fact [A9]." The Court also stated that the claims between the parties were "released and resolved" "from the beginning of the world to today's date. [A9]."

ARGUMENT
POINT I
THE STANDARD OF REVIEW

Generally, on a bench trial, as with the case at bar, the "decision of the fact-finding court should not be disturbed on appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence…" See *Nightingale Restaurant Corp. v. Shak Food Corp.*, 155 A.D.2d 297, 547 N.Y.S.2d 61 [1st Dept. 1989].

However, in the case at bar, as set forth herein, the parties entered into a stipulation containing many terms, one of which was that the court below was not required to issue a "reason[ed] decision." [A986]. In issuing the Order, the Court stated that it "was explicitly agreed, on the record, that the decision would not be a 'reasoned one' – one containing findings of fact [A9]."

Appellant was fully allocuted under oath [A979-991] in agreeing that the Court below was not required to issue a reasoned decision [A986]. Despite this, Appellant claims, without merit and without any basis whatsoever, that the Court agreed to issue findings of fact and conclusions of law. See Appellant's brief, pages 26, 28-29.

When the Court below issued the Decision, it complied with the stipulation made by the parties and did not give any reasons for its ruling. Given the standard of review and the unequivocal stipulation by Appellant and Respondent that the Court below did not have to give reasons for its decision [A986], the Decision should not be disturbed for failing to provide reasons.

The Decision should not be disturbed for many reasons including Appellant's binding agreement not to appeal [A986]. Also, as set forth below, Appellant has filed an appendix which is so incomplete that it is impossible for any Court to determine that the Decision was not based on a fair interpretation of the evidence.

POINT II
THE STIPULATION MADE IN OPEN COURT ON THE RECORD IS BINDING UPON THE APPELLANT

The Appellant provides absolutely no factual or legal grounds for setting aside the stipulation made by the parties in open court on the record on the advice of counsel.

In *Hallock v. State*, 64 N.Y.2d 224, 230-31, 485 N.Y.S.2d 510, 512-13, 474 N.E.2d 1178, 1180-81 (1984), the Court of Appeals expressed the position that such stipulations are not lightly overturned:

> Stipulations of settlement are favored by the courts and not lightly cast aside (citation omitted). This is all the more so in the case of "open court" stipulations (citation omitted) within CPLR 2104, where strict enforcement not only serves the interest of efficient dispute resolution but also is essential to the management of court calendars and integrity of the litigation process. 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 (citation omitted).
> ***
> Phillips cannot be heard to challenge the settlement. He was in court during the entire pretrial conference. At no time during negotiation of the settlement or dictation of the agreement into the record -- or indeed during the more than two months that followed -- did Phillips voice an objection. Phillips acquiesced in, consented to, and is bound by the settlement (citation omitted).

Even more so in the case at bar, the Appellant was allocuted under oath as to the terms of the stipulation. At A985, lines 20-24 of the transcript, Appellant stated under oath that he understood the terms of the stipulation which had been explained to him by his counsel. The record is clear that he

agreed to waive his right to appeal the decision of the Court below and that he agreed that the Court below would not issue a reasoned decision [A986, 988].

The Appellant agreed that the Court would <u>not issue reasons for its decision</u>

In his brief, at Point III, Appellant argues that the Court below's "failure to issue findings of fact and conclusions of law was, under the facts of this case, error and must be set aside."

Appellant argues, without any merit or support, at page 26 of his brief, that the Court below "promised" to issue findings of fact and conclusions of law. There is nowhere on the record that the Court below said this or even remotely alluded to such a promise.

The Appellant attempts to justify his claim that the Court below would issue a reasoned decision by referring to an exchange between then counsel for Respondent and the Court which takes place at A840-841:

> "MR. SARKOZI: Thank you, your Honor.
> The parties have indicated and consented that the Court's decision does not need to be a reasoned decision or written decision. That the Court simply can, upon receiving these submissions and –
> THE COURT: Of course, the Court is going to, and I will say this on the record, review, and I have a lot of transcripts, and I have notes on all of the testimony, is going to review all of that. I have, I think it is something like ten evidence books, and I will use – I will look at the evidence, not the entire books, but what was introduced, and I am going to have to base my decision on what is coming.

> MR. SARKOZI: The Court, when the Court renders its decision as to how to allocate the funds, that decision will, the parties have stipulated and agreed, will be final.
>
> That the parties are waiving all rights to appeal."

In this exchange, the Court below never says anything about issuing a reasoned decision. It simply said that it would review all the testimony and evidence in arriving at a decision. There is not one single instance in this record where the Court below agreed to provide reasons for its final ruling.

Thus, there is absolutely no merit to Appellant's argument that it was error for the Court below to not issue a decision containing findings of fact and conclusions of law. The argument is made without any support in fact or law and is part of the reason why the Respondent seeks sanctions against Appellant.

Most importantly, the Appellant, upon being allocuted under oath, stated that he was consenting to the Court issuing a decision with no reasoning. This consent by the Appellant is found at A986, lines 6-12 of the transcript. This consent is clear and unequivocal. Appellant makes no mention of this crucial part of the trial transcript in his brief. This failure to address the fact that he consented to the final decision of the Court below not requiring any reasoning is just another example of the frivolous nature of Appellant's arguments.

POINT III
APPELLANT'S STIPULATION WAIVING HIS RIGHT TO APPEAL IS BINDING

At Point IV of his brief, Appellant makes an argument that his agreement waiving his right to appeal is not binding upon him. The argument is convoluted but it seems that Appellant is saying that because he understood that the Court would issue a reasoned decision, when he waived his right to appeal, it was a "unilateral mistake" because his waiver of his right to appeal was based on his belief that the Court would issue a reasoned decision.

This argument must be rejected because Appellant stated under oath that he agreed that the Court would not issue a reasoned decision [A986]. Again, Appellant omits the fact that he agreed under oath that the Court would not issue a reasoned decision.

<u>The waiver of his right to appeal is binding on the Appellant</u>

As the matter was stated in *People v. Ventura*, 139 A.D.2d 196, 202-03, 531 N.Y.S.2d 526, 530-31 (1st Dept. 1988):

> While the Court of Appeals in *Williams* spoke of the People's "justification" for the waiver, in civil cases the Court of Appeals has required, not dissimilarly, that an agreement not to appeal be based upon some "consideration". In *Ogdensburgh & Lake Champlain R. R. Co. v Vermont & Canada R. R. Co*. (63 NY 176, 180) the court ruled that the right to appeal, though waivable, is nevertheless "a valuable right and the agreement to surrender it must be based upon some consideration or the facts must estop the party from exercising it." In *People v Stephens* (52 NY 306, 310) the court found sufficient consideration in the fact that in exchange for his consent not to appeal,

> the State Attorney-General procured from the adverse party a waiver of all claims for costs. Likewise, in *Townsend v Masterson, Smith & Sinclair Stone Dressing Co*. (15 NY 587) the court enforced a waiver of the right to appeal where both parties to the litigation, each of whom disputed certain rulings, mutually agreed to waive appellate review *(supra*, at 589-590).

Appellant received the following consideration for agreeing not to appeal:

A. He received the sum of $2.7million from the escrow of the Building sale proceeds [A981].

B. Respondent also agreed not to appeal and if the Court ruled in Appellant's favor, Appellant would not have to face an appeal from Respondent [A988].

C. Documents were stipulated into evidence without any further testimony [A982].

D. Respondent gave up the right to cross-examine Appellant [A988].

E. Respondent gave up the right to put on a rebuttal case [A989].

The consideration received by Appellant for agreeing to the terms of the stipulation was very significant. He was entitled to receive $2.7million from the funds held by the Receiver without having to complete the trial. This meant an immediate award not subject to any further order of the Court or delays in the appeal process which could take years given the history of the case.

Respondent waived the right to cross-examine him or put on a rebuttal case. This is a major concession in litigation. Respondent had been cross-examined relentlessly by counsel for the Appellant [A1010-11] and now the Court below was

going to consider Appellant's direct testimony without any cross-examination or rebuttal.

See also *In re N.Y.,* 168 A.D. 58, 60, 151 N.Y.S. 407, 408 (1st Dept. 1915) (by accepting an award, party cannot later appeal award).

Appellant did not make a unilateral mistake in agreeing not to appeal

Appellant argues at page 29 of his brief that he is entitled to relief from the stipulation because he made some sort of "unilateral mistake." As stated above, Appellant stipulated that the court below would not issue a reasoned decision [A986] and there is no citation to the record in Appellant's brief to contradict this agreement or any evidence of this so-called mistake.

Appellant argues that the ruling in *In re Estate of Frutiger*, 29 N.Y.2d 143, 150, 324 N.Y.S.2d 36, 272 N.E.2d 543 (1971) provides grounds for relief from the stipulation based on unilateral mistake. *Frutiger* held in pertinent part:

> "But the stipulation will not be destroyed without a showing of good cause therefor, such as fraud, collusion, mistake, accident, or some other ground of the same nature (citation omitted)…' Where both parties can be restored to substantially their former position the court, as a general rule, exercises such power if it appears that the stipulation was entered into unadvisedly or that it would be inequitable to hold the parties to it.' (citation omitted.)"

Frutiger requires Appellant to show good cause to vacate the stipulation, such as fraud, collusion, mistake accident or some other ground. Appellant claims a unilateral mistake but as set forth below this claim is without merit, mainly

because it so clear that he agreed that the Court below would not issue reasons for its ruling.

Frutiger requires that the parties be in a position where they can be restored substantially to their former positions. This is impossible given that the parties received disbursements of $2.7million over a year ago.

Frutiger requires that the stipulation be entered into unadvisedly. The record is clear that Appellant was fully advised by counsel [A842]. In sum, there is nothing that Appellant can point to that would require this Court to vacate the stipulation on the basis of the *Frutiger* decision.

In *Weissman v. Bondy & Schloss*, 230 A.D.2d 465, 468, 660 N.Y.S.2d 115, 118 (1st Dept. 1997), the Court upheld a decision of the court below denying a party relief from a stipulation of settlement. First noting that stipulations of settlement made in open court are not lightly set aside, it held:

> "As noted by the IAS Court, there were 'intense negotiations between the parties,' who were represented by counsel at all times, with respect to the terms of the stipulation."

The same is true in the case at bar. The Court below expressly noted the intense negotiations resulting in the settlement [A842].

The record is clear that there was no unilateral mistake, or any mistake, on the part of Appellant. The parties agreed that the Court's decision would not be reasoned and there is nothing in the record to the contrary. Appellant was fully

allocuted and agreed to the special method of resolving the outstanding issues upon the advice of counsel [A986]. The fact that the decision would not be reasoned was specifically acknowledged by the Court below when it issued the decision [A9].

See also *Structured Asset Sales Grp. LLC v. Freeman*, 45 A.D.3d 327, 328, 844 N.Y.S.2d 699, 699-700 (1st Dept. 2007) (mistake claimed by movant to vacate stipulation not supported by the record.)

Unilateral mistake in the context of contract reformation – the stipulation is a contract - requires that the other party be aware of the mistake and do nothing to change it. See *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 29, 588 N.Y.S.2d 8, 12 (1st Dept. 1992). Nothing of the sort exists here. Both parties agreed to the special procedure upon the advice of counsel. There was no mistake by any party or by the Court. See also *Pasteur v. Manhattan & Bronx Surface Transit Operating Auth.*, 241 A.D.2d 305, 305, 660 N.Y.S.2d 6, 7 (1st Dept. 1997) (mistaken belief does not constitute unilateral mistake).

In the case at bar, there is no "fraud, collusion, mistake, accident, or some other ground of the same nature" to warrant declaring the stipulation void. Appellant entered into the stipulation on the advice of counsel. The terms of the stipulation are clear and unambiguous. Appellant's allocutions under oath [A847-

850; 984-990] are clear that he understood and agreed to be bound by the stipulation.

The case law cited by Appellant does not support
<u>his claim of "unilateral mistake"</u>

The case law cited by Appellant does not support his positions either. Not a single case is cited, which based on the content of the trial transcripts in this case, would give grounds to vacate the stipulation. Appellant cites several cases at page 30 of his brief for the proposition that "unilateral mistake" is sufficient to warrant vacatur of the stipulation.

Bd. Of Managers of 60 E. 88th St. Condominium Assn v. Stein, 57 AD3d 381 [1st Dept. 2008] involved a case where the plaintiff seeking vacatur was not allocuted, the record was confusing as to what was agreed and the defendant's attorney had told the court, without authority, that the plaintiff was waiving claims. This is very different to the case at bar where the Appellant was fully allocuted and clearly agreed to be bound by the terms of the stipulation under oath on the advice of counsel.

Carrion v. Metro. Transp. Auth, 92 AD2d 907 [2d Dept 1983] simply ruled that the defendants were entitled to relief from a stipulation based on unilateral mistake. No background facts are cited in the decision and thus it cannot be authority for the case at bar.

Weissman v. Bondy & Schloss, 230 A.D.2d 465, 469, 660 N.Y.S.2d 115, 118-19 (1st Dept. 1997) fully supports Respondent's position. The Court found the stipulation in question to be valid:

> "Applying equitable principles herein, it can readily be seen that the parties were acting in an adversarial relationship when the stipulation was entered, settling a legal dispute where both sides were represented by counsel and both were aware that there were tax consequences in their actions."

At page 31 of his brief, Appellant writes that "this Court is additionally asked to consider the more fundamental question as to the propriety of waiving an appeal from a Decision *that has yet to be made,* (sic) In this regard it is respectfully requested that this Court should exercise its interests of justice jurisdiction and review the case de novo." No case is cited in support of this claim that it is a "fundamental question."

There is no fundamental question in issue. There is, however, well-established precedent that stipulations made in open court on the record on the advice of counsel, the terms of which are clear on their face, are strictly construed and without fraud, collusion, mistake, as with the case at bar, are binding on the parties.

Appellant cites *Pivar v. Graduate Sch. of Figurative Art of the N.Y. Acad. of Art,* 290 A.D.2d 212, 213, 735 N.Y.S.2d 522, 524 (1st Dept. 2002), at page 31 of his brief, for the proposition that the Court below's decision should be reversed

"where the error is so fundamental as to preclude consideration of the central issue upon which the claim of liability is founded, the court may, in the interests of justice, proceed to review the issue even in the absence of objection or request."

Throughout his brief, Appellant seems to suffer from amnesia regarding the fact that he specifically agreed that the Court would not issue reasons for its decision [A986, lines 6-12 of the transcript]. He also suffers from amnesia regarding the significant benefits that he received from the stipulation. He received $2.7million, he was not cross-examined, Respondent waived his rebuttal case and Respondent also waived his right to appeal.

Appellant was fully advised by counsel every step of the way and entered into the stipulation knowingly and willingly and according to his allocution under oath, he fully understood the consequences of the stipulation [A985]. Every argument made by Appellant to vacate the stipulation is without merit and is made without a good faith basis in law or fact.

POINT IV
OPEN COURT STIPULATIONS ARE STRICTLY CONSTRUED; THERE IS A HEIGHTENED STANDARD OF SCRUTINY WHERE A PARTY SEEKS TO VOID A STIPULATION POST AWARD AND APPELLANT FAILED TO MOVE TO VACATE THE STIPULATION IN A TIMELY MANNER

"Stipulations of settlement, particularly those made in open court, are favored by the courts and not lightly cast aside (citations omitted)."

Matter of Drayton v. Jewish Ass'n for Servs. for the Aged, 127 A.D.3d 526, 528, 8 N.Y.S.3d 65, 67 (1st Dept. 2015).

Appellant's bogus claim that the Court below agreed to issue findings of fact and conclusions of law must be rejected as being completely without merit. Under the facts and on the law, there are no grounds to vacate the stipulation in the case at bar.

Also, there is a heightened standard of scrutiny where a party seeks to void a stipulation post-award as in the case at bar. *Frutiger, supra,* 29 NY2d at 149-50, requires that both parties must be able to be restored to their former positions, that is the "*status quo* remains." This cannot happen where large distributions of cash were made nearly two years ago.

As the matter was stated in *Hallock v. State, supra*, 64 N.Y.2d at 231:

> We need not inquire whether there was any actual loss of witnesses or evidence, for we recognize that, after five years, halting the machinery of litigation when a trial scheduled to begin that day is marked off the calendar constitutes detriment."

<u>Appellant failed to move to vacate the stipulation in a timely manner</u>

The stipulation in open court was made on July 21 and August 5 of 2016. The Court issued its decision on November 2, 2017. The efile docket of the case in the Court below shows that the current attorney for the Appellant first appeared on November 22, 2017. To date, no proceeding has been instituted to vacate the

stipulation. See *Charlop v. A.O. Smith Water Prods.*, 64 A.D.3d 486, 486, 884 N.Y.S.2d 1, 2 (1st Dept. 2009):

> The party seeking to vacate the stipulation should do so with reasonable promptness under the circumstances (*see Hallock*, 64 NY2d at 231 [parties bound by a stipulation where they voiced no objection for two months following the execution of a stipulation]).

In light of all of the above points, the arguments made by Appellant to vacate the stipulation made in open court are without merit. There is no support in the record for any of the arguments made by Appellant. In this regard, Appellant fabricates a position that the Court agreed to give a reasoned decision. This position is frivolous. It has no basis in fact or law.

POINT V
THE APPENDIX ON APPEAL IS INCOMPLETE

Firstly, it is very important to note that the Respondent's position is that the contents of the appendix filed by Appellant on this appeal is sufficient for this Court to deny the appeal on the grounds set forth in this brief. The appendix filed by Appellant contains the relevant parts of the record in the Court below which are sufficient for this Court to determine that Appellant is bound by the stipulation of settlement, that Appellant validly waived his right to appeal and this appeal should be dismissed.

Nonetheless, the Appellant has chosen to perfect this appeal with an appendix on appeal and the appendix filed by Appellant is significantly incomplete in terms of this Court making a ruling on the merits of the case.

The appendix contains excerpts of deposition transcripts of both Appellant and Respondent with large gaps in the pages. See A11 through A143. No explanation is provided as to why only these deposition excerpts are provided and there is no reference in the trial record as to whether these deposition transcripts were ever made part of the trial record.

The next item in the appendix is the trial testimony of Jeffrey Shlefstein, who performed an accounting for the plaintiff. See A144-338. Mr. Shlefstein testified on March 14 and 15, 2016.

The next item in the appendix is testimony of Respondent Michel Kadosh. See A339-450. This testimony took place on July 18, 2016. At A341, lines 9-12, then counsel for the Appellant states that he is calling Respondent to "take the stand for a certain limited purpose that [was] addressed at the bench." This is the only testimony of Michel Kadosh in the entire appendix.[2]

A review of the parties' post-trial submissions reveals that Respondent had testified many times in 2015 and at least on August 3, 4, 7 and 11 of 2015 [A995, 996, 1006]. No transcripts, or any part of these proceedings are in the appendix.

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2 Inexplicably, the appendix is duplicated. A339-513 is identical to A514-687.

We further learn from the post-trial submissions of the parties that Respondent's brother, Eli Kadosh, testified on November 12, 2015 [A1011]. Respondent's wife, Renata Kadosh, testified on November 13, 2015 [A1011]. None of these transcripts are included in the appendix.

Ed Hiney, an expert hired by Respondent, testified on March 16, 2016 as to the significant value of the work that the Respondent had put into the Building [A996, 997]. This transcript is not in the appendix.

There is not one single trial exhibit in the transcript. Appellant's post-trial submission refer to Exhibit "HHH" at A1007. Obviously, there were a large number of trial exhibits. Jeffrey Shlefstein frequently refers to Exhibit HHH in his testimony [A158 and following] and other marked exhibits [A180, 203]. None are included in this appendix to which this Court can refer.

In a footnote 3 at page 12 of his brief, Appellant claims that "the exhibits submitted at trial are in the possession of David's prior counsel who has refused to release them as there is a fee dispute and litigation between that firm." Aside from this footnote, Appellant provides no further details as to why there are no exhibits included in the appendix.

With regard to the missing trial transcripts, these are always available directly from the court stenographer who took the transcript on that day. Thus the

prior counsel's retaining lien is no excuse for the lack of the majority of the trial transcripts being included in this appendix on appeal.

Secondly, Appellant does not detail any efforts made to settle the retaining lien of the prior counsel for the Appellant or to obtain the exhibits by motion. A review of the appendix reveals that when the parties were stipulating to the settlement on the record, a discussion was held as to how Appellant's $2.7million would be dealt with because he owed attorneys' fees to his then counsel. At A837, Mr. Perrone, Appellant's former attorney, tells the Court that Appellant's share of the disbursement being made from escrow will be released by the Receiver upon receipt of "a written letter from our firm that is signed off on by both my managing partner and David Kadosh."

Obviously, Mr. Perrone's firm was owed legal fees and when the amount was determined, a joint letter would be sent to the Receiver who could then release the funds.

The efile docket of the Court below, Index No. 651834/10, reveals a flurry of litigation over the fact that the Receiver disbursed the funds to Appellant in violation of the agreement at A837 and that Appellant has been found in contempt. This Court can take judicial notice of its Slip Opinion, 2018 NYSlipOp 86164 (U) where it ruled that the order finding Appellant in contempt was stayed on condition that Appellant post a $1.5million appeal bond.

The point is that Appellant had sufficient funds from the $2.7million obtained through the stipulation to pay his prior attorney and obtain his file. The fact that the prior attorney has a retaining lien on the file of Appellant is a result of Appellant's failure to abide by the direction of the Court at A837. Thus, the failure to include any exhibits in the appendix results solely from Appellant's misconduct.

The appendix does not comply with the rules of this Court

The rules of this Court prescribe the contents of an appendix as follows:

> **§ 1250.7 Form and Content of Records and Appendices; Exhibits**
>
> (d) Appendix.
>
> (1) The appendix shall include those portions of the record necessary to permit the court to fully consider the issues which will be raised by the appellant and the respondent including, where applicable, at least the following:
>
> (i) notice of appeal or order of transfer;
> (ii) judgment, decree or order appealed from;
> (iii) decision and opinion of the court or agency, and report of a referee, if any;
> (iv) pleadings, and in a criminal case, the indictment or superior court information;
> (v) material excerpts from transcripts of testimony or from documents in connection with a motion. Such excerpts shall include all the testimony or averments upon which the appellant relies and upon which it may be reasonably assumed the respondent will rely. Such excerpts shall not be misleading or unintelligible by reason of incompleteness or lack of surrounding context;
> (vi) copies of relevant exhibits, including photographs, to the extent practicable;
> (vii) if pertinent, a statement identifying bulky, oversized or dangerous exhibits relevant to the appeal, as well as identifying the party in custody and control of each exhibit; and
> (viii) the appropriate certification, stipulation or settlement order pursuant to subdivision (g).

Appellant has failed to comply with this rule regarding the contents of an appendix in significant respects:

A. The pleadings are not included.

B. The failure to include most of Respondent's trial testimony, and the trial testimony of Renata Kadosh, Eli Kadosh and Ed Hines, all on behalf of Respondent, is violative of subdivision (v) of this rule.

C. The failure to include the aforesaid trial transcripts is expressly proscribed by subdivision (v) which states that the excerpts chosen by Appellant to include in the appendix "shall not be misleading or unintelligible by reason of incompleteness or lack of surrounding context." It is extremely misleading to omit the majority of the trial transcripts from Respondent's case and the arguments made by Appellant in his brief are rendered unintelligible as a result of the omissions from the appendix.

D. Not one single exhibit is attached in violation of subdivision (vi) of the rule. Appellant's excuse for this is that the prior attorney has a retaining lien on the file and that the exhibits are unavailable. However, Appellant does indicate that he made any effort to obtain the file. As stated above, he had the $2.7million from the settlement to pay his prior attorney. Appellant could have made a motion to the Court below to obtain the file which would require a bond to be posted. See *Sci. Dev. Corp. v. Schonberger*, 159 A.D.2d 343, 344, 552 N.Y.S.2d 620, 621 (1st Dept. 1990). Again, Appellant had funds from the settlement to post a bond.

All in all, Appellant has no excuse for failing to file a complete appendix in compliance with the rules of this Court.

In *Block v. Nelson,* 71 A.D.2d 509, 512, 423 N.Y.S.2d 34, 37 (1st Dept. 1979), this Court held that "an appellant, such as defendant, who submits an appeal on an incomplete record must abide by the consequences." The consequences should be dismissal of the appeal with prejudice. See also *UBS Sec. LLC v. Red Zone LLC*, 77 A.D.3d 575, 579, 910 N.Y.S.2d 55, 59 (1st Dept. 2010) (having failed in its obligation to assemble a proper appellate record, the cross appeal must be dismissed.) In light of the above, the appeal should be dismissed, not only because Appellant entered into a binding stipulation not to appeal, but on these grounds of an incomplete appendix also.

POINT VI
APPELLANT PROVIDES NO GROUNDS TO DISTURB THE DECISION OF THE COURT BELOW

Respondent submits that the appeal should be dismissed on the grounds that the Appellant made a binding agreement not to appeal. Also, the incomplete appendix should result in dismissal of the appeal.

Nonetheless, Respondent submits that the Decision should not be overturned because it is by no means obvious that the Court below's conclusion could not be reached under any fair interpretation of the evidence, which is the standard

required to overturn the Decision. See *Cushman & Wakefield, Inc. v. 214 E. 49th St. Corp.,* 218 A.D.2d 464, 467-68, 639 N.Y.S.2d 1012, 1015 (1st Dept. 1996).

At the time that the stipulation was revised in open court on August 5, 2016, the Receiver was holding $7,034,442.02 in escrow from the sale of the Building [A980]. Pursuant to the settlement, Appellant received the sum of $2.7million from that [981]. According to Appellant's post-trial submission [A1003-1012], he claimed that out of the $1,634,442.02 remaining, he was entitled to $757,641.21 and then half of the remainder of $876,800.81 [A1003]. Thus, Appellant was not seeking the entire $1,634,442.02 as the award from the Court below.

However, the Court below decided that the entire sum of $1,634,442.02 should be awarded to Michel. Despite the Decision containing no reasons, there were plenty of grounds to reach such a conclusion. Respondent had solely been responsible for the construction of the Building and through his "sweat equity" [A116-117], the Building was purchased for $1.825million in 2004 [A666] and was sold for $8.75million in 2014 [A976]. A mortgage of approximately $1.3million, brokers' fees of approximately $400,000 and other expenses reduced the net profit to approximately $7.034million [A976, 980].

In receiving $2.7million from the settlement, Appellant received almost forty percent of the returns from a passive investment. Given the huge amount of work that the Respondent put into overseeing the construction of the building (his

sweat equity [A116-117]), the Respondent was entitled to the remainder of the profits. This was a fair interpretation of the evidence.

Furthermore, Respondent claimed an oral joint venture agreement concerning other properties owned by Appellant. As the caption of the case under Index No. 651834/10 shows, Respondent named 114 W. 71st St., LLC and 30 Lexington Avenue, LLC as defendants. Respondent named these entities as defendants because he had an oral agreement with Appellant to manage the renovation and renting of these properties and share in the profits. The agreement provided that the parties would pool profits from all the properties and share them. When Respondent finished renovations on the properties, Appellant refused to abide by the agreement [A1000-1002]. While the parties were in strong disagreement as to the facts of this oral joint venture agreement, there is nothing in this record which shows that it was not a fair interpretation of the evidence for the Court below to consider the work done by Respondent in making the award of the entire $1,634,442.02 to Respondent.

Appellant's brief does not provide any compelling arguments to overturn the Decision. In fact, many of Appellant's cites to the appendix in support of his positions are cites to his post-trial submission [A1003-1012]. See Appellants' brief at pages 5, 6, 7, 9, 13 and 23for examples. The Appellant's post-trial submission is not evidence and provides no support for his factual positions on this appeal.

Other cites are to the direct testimony of Appellant. See pages 5, 9 and 19 for examples. However, Appellant was never cross-examined by agreement so there is no evidence to contradict to his testimony. Also, by agreement, Respondent did not put on a rebuttal case with contradictions to Appellant's testimony.

As stated above, the appendix is missing the main testimony of Respondent, his wife, his brother and his expert all in support Respondent's case. On this record and with Appellant's arguments unsupported by the evidence, there are no grounds to overturn the Decision.

In addition, it should be noted that all the terms of the parties' stipulation were fully complied with. Appellant was not cross-examined [A989], Respondent did not put on a rebuttal case [A989], the sum of $2.7million was awarded to both parties [A986] and the Court did not give reasons for its decision [A986]. Thus, Appellant cannot point to any violation of the stipulation as grounds for reversing the Order.

POINT VII
RESPONDENT IS ENTITLED TO SANCTIONS AGAINST APPELLANT

Respondent submits that this appeal is frivolous as a matter of law and seeks sanctions against the Appellant and his counsel pursuant to 22 NYCRR 130-1.1 (a) and (b) which provides in pertinent part:

> "a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part…
> ***
> (c) For purposes of this Part, conduct is frivolous if:
> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
> ***
> …In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, <u>or was brought to the attention of counsel or the party."</u> (Emphasis provided).

Respondent initially moved to dismiss the appeal and sought sanctions based on the fact that Appellant had made a binding stipulation not to appeal. This Court denied the motion in a slip opinion, *2018 NYSlipOp 83899(U),* dated September 20, 2018 ruling that plaintiff should address the issues directly on appeal.

Appellant's arguments that his agreement
<u>not to appeal is not binding are frivolous</u>

The case law is very clear that post-judgment applications to vacate stipulations made in open court upon the advice of counsel are strictly construed and the grounds to vacate them are very limited. *Matter of Drayton v. Jewish Ass'n for Servs. for the Aged, supra*, 127 A.D.3d at 528-29.

Appellant's counsel has fabricated what was said on the record to support his arguments. At Points III and IV of his brief, Appellant has fabricated a position that the Court said it would issue findings of fact and conclusions of law. The Court never said this. Also, Appellant completely ignores the fact that his client stipulated under oath that the Court below not issue a reasoned decision [A986].

Appellant argues in Points III and IV of his brief that somehow he relied upon the Court's representation that it would issue a reasoned decision in making the decision not to appeal. See pages 26 and 28-29 of Appellant's brief.

This argument is entirely frivolous because not only did the Court not agree to supply reasons in its decision but Appellant had expressly agreed that the Court did not have to give reasons [A986].

Appellant supplies no case law or any authority to support his arguments that the Court below made an error in not giving reasons in the decision. As such they are "without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law."

Similarly, in arguing that Appellant made a "unilateral mistake" when entering into the stipulation not to appeal, as fully set forth at pages 20-22 of the brief above, this position is completely without merit. Again, Appellant claims that he mistakenly believed that the Court would issue a reasoned decision. This

claim is frivolous because Appellant stated under oath on the record in open court that he was agreeing that the Court would not issue a reasoned decision [A986].

Even if the Court below issued a reasoned decision,
Appellant had still agreed not to appeal

The arguments made by Appellant's counsel are convoluted, vague and without foundation in law or fact. Appellant never explains the nexus between his alleged belief that the Court would issue a reasoned decision and his agreement not to appeal. Appellant agreed not to appeal as part of a broad stipulation where he received significant benefits – he received $2.7million, he would not be cross-examined, Respondent would not put on a rebuttal case.

Appellant's agreement not to appeal was a binding agreement and whether the Court issued reasons for its decisions or not, did not and cannot affect the agreement not to appeal. Even if the Court issued a decision with detailed findings of fact and conclusions of law, Appellant had still agreed not to appeal it.

Appellant argues at page 31 of his brief that "this Court is additionally asked to consider the more fundamental question as to the propriety of waiving an appeal from a Decision *that has yet to be made…"* No authority whatsoever is provided for this "fundamental question" of law.

Appellant has provided no authority whatsoever where a party that made a stipulation that was clear in its terms, in open court, under oath, on the advice of

counsel, was entitled to relief from such stipulation after the court rendered its decision.

In *Yenom Corp. v. 155 Wooster St., Inc.*, 33 A.D.3d 67, 70, 818 N.Y.S.2d 210, 212-13 (1st Dept. 2006) this Court ruled:

> Under part 130 of the Rules, frivolous appellate litigation may be found to exist where the appellate arguments raised are completely without merit in law or fact, where the appeal is undertaken primarily to delay or prolong the litigation or to harass or maliciously injure another, or where the party or attorney asserts material factual statements that are false (citations omitted). Additional factors a court may consider in determining whether an appeal is frivolous are whether the appellant's conduct was continued when its lack of merit was apparent or should have been apparent, and the circumstances under which the conduct took place, including the time available for investigating the factual or legal basis of the conduct (22 NYCRR 130-1.1 [c]).

The remedy for frivolous conduct was set forth in *Boye v. Rubin & Bailin, LLP*, 152 A.D.3d 1, 11-12, 56 N.Y.S.3d 57, 65 (1st Dept. 2017):

> The appropriate remedy for maintaining a frivolous appeal is the award of sanctions in the amount of the reasonable expenses and costs including attorneys' fees incurred in defending the appeal (citation omitted). Thus, we remand the matter to Supreme Court for a determination of the amount of expenses and costs including attorneys' fees incurred by defendants in defending this appeal, and for entry of an appropriate judgment as against plaintiff's attorney.

In light of the foregoing, movant is entitled to an award of sanctions in an amount to be determined by the Court below. See *Levy v. Carol Mgmt. Corp.*, 260 A.D.2d 27, 34, 698 N.Y.S.2d 226, 232 (1st Dept. 1999) (among the factors the court considers is whether the conduct was continued when it became apparent, or

should have been apparent, that the conduct was frivolous, or when such was brought to the attention of the parties or to counsel (22 NYCRR 130-1.1 [c]).

Although not part of the record, the Respondent had requested the Appellant to withdraw the appeal. By Respondent making the prior motion to dismiss the appeal, Appellant was clearly put on notice that the appeal was frivolous. Obviously, Appellant did not withdraw the appeal after being put on notice that the appeal was without merit. See *DeRosa v. Chase Manhattan Mortg. Corp.*, 15 A.D.3d 249, 250, 793 N.Y.S.2d 1, 2 (1st Dept. 2005):

> "Conduct which violates any of the three subdivisions [of Rule 130] is grounds for the imposition of sanctions. Here, counsel violated all three sections, requiring the imposition of a harsher penalty."

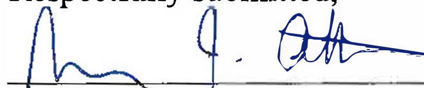
The prosecution of this appeal is clearly without merit, it is being prosecuted to harass the Respondent and it is being prosecuted despite Appellant being made aware of its frivolous nature. With respect, sanctions should be imposed upon Appellant in an amount to be determined by the Court below on a remand.

CONCLUSION

On the basis of the foregoing, it is respectfully requested that this Court deny the appeal of Appellant in all respects and affirm the Decision and Order entered in the Court on November 3, 2017. It is further respectfully requested that the Court remand proceedings to the Court below to determine the amount of sanctions to be awarded against the Appellant.

Dated: New York, New York
December 5, 2018

Respectfully submitted,



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