

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN**
Justice

IA PART 27

In the matter of the Application of LOUIS D'ANGELO,
Holder of One-Half of All Outstanding Shares Entitled
to Vote in an Election of Directors

Index No. 13427/11

Motion

Date July 31, 2012

Petitioner,

Motion

- against-

Cal. No. 5

For the Dissolution of D'ANGELO FUNERAL HOME,
INC. and SENECA CHAPELS, LTD.

Motion

Seq. No. 2

Respondents.

The following papers numbered 1 to 14 read on this motion by petitioner, Louis D'Angelo (Petitioner), for entry of a judgment against D'Angelo Funeral Home, Inc. and Seneca Chapels, Ltd., and Robert D'Angelo, individually, in the sum of \$1,300,000.00, together with statutory interest, costs and reasonable disbursements, pursuant to CPLR § 5003 and the transcript of settlement dated January 10, 2012; and respondents' cross motion for an order appointing a judicial hearing officer to conduct a hearing to determine the value of D'Angelo Funeral Home, Inc. and Seneca Chapels, Ltd., so that corporate buy-outs may be effectuated pursuant to BCL § 1118, and in the alternative, for an order vacating the stipulation of settlement dated January 10, 2012.

	<u>Papers Numbered</u>
Notice of Motion-Affirmations-Exhibits.....	1-4
Notice of Cross Motion-Affirmation-Affidavits-Exhibits.....	5-9
Reply Affirmation and Opposition to Cross Motion.....	10-12
Reply Affirmation.....	13-14

On January 19, 2012, the parties to this proceeding for judicial dissolution entered into a stipulation in open court and on the record, which reads as follows:

It is hereby stipulated, consented to and agreed by and between the parties and the attorneys thereto that by and between the parties and Northeast Funeral Service Inc., and Anthony D'Angelo, that the petitioner who claims in the

proceeding herein be it the same are settled and discontinued as follows:

In the first instance, the settlement is with prejudice and without interest, cost and/or disbursements to any matter that Robert D'Angelo shall purchase the shares of stock in both corporations; that being D'Angelo Funeral Home and Seneca Chapels from Louis D'Angelo for the sum of \$1,300,000. That Robert D'Angelo shall pay the above sum by certified bank check within 90 days of the date herein. That Louis D'Angelo will not enter into a competing business for ten years and within the City of New York. That all parties shall forthwith, exchange mutual general releases each as against the other from all claims arising out of this petition and the companion related shareholders derivative action under Supreme Court, Queens County, Index 11044/2011. Said releases shall include Anthony D'Angelo against each other; that the respondent Robert D'Angelo and Anthony D'Angelo shall hold and make available the family plot for the internment of the descendant of Louis D'Angelo and spouse of Louis D'Angelo.

This court conducted an allocution of petitioner and Robert D'Angelo, and determined that they voluntarily and knowingly accepted the terms of the stipulation, discontinuing and settling this proceeding for judicial dissolution of the respondent corporations. The transcript of the January 10, 2012 stipulation of settlement was filed with the Clerk of Queens County on March 1, 2012.

Petitioner now seeks the entry of a judgment in his favor in the sum of \$1,300,000.00, together with statutory interest, and statutory costs and reasonable disbursements, pursuant to CPLR § 5003 and the terms of the January 10, 2012 settlement. Petitioner has complied with the terms and conditions of the settlement by preparing and executing general releases, and forwarding them to Robert D'Angelo and his attorney on January 23, 2012. Robert D'Angelo has defaulted in his obligations. In support of this claim, petitioner submitted a copy of a letter from counsel for Robert D'Angelo, dated April 9, 2012, in which he states his client has experienced difficulties in obtaining refinancing, and he makes a "counteroffer" purportedly in "satisfaction" of the "original offer of settlement dated January 10, 2012."

Petitioner's motion is denied. The "Mutual General Release" executed by petitioner fails to accurately reflect the stipulation of settlement entered into by the parties on January 10, 2012. The settlement requires Robert D'Angelo to purchase the shares of stock of both corporations, for the sum of \$1,300,000.00, from petitioner. The general release executed by petitioner, however, incorrectly states that the purchase price is to be paid by D'Angelo Funeral Home and Seneca Chapels.

The stipulation of settlement does not contain a provision for the entry of judgment in the event that Robert D'Angelo defaulted in paying the purchase price. Nevertheless, a stipulation of settlement that is made in open court is a contract and is governed by general contract principles for its interpretation and effect (*Town of Warwick v Black Bear Campgrounds*, 95

AD3d 1002 [2d Dept 2012]; *Lacorazza v Lacorazza*, 47 AD3d 897 [2d Dept 2008]; *Matter of Weiss v Weiss*, 289 AD2d 498 [2d Dept 2001]). Accordingly, a court "should not, under the guise of contract interpretation, 'imply a term which the parties themselves failed to insert' or otherwise rewrite the contract" (*Lui v Park Ridge at Terryville Assn.*, 196 AD2d 579, 581 [2d Dept 1993], quoting *Mitchell v Mitchell*, 82 AD2d 849 [2d Dept 1981]; *Aivaliotis v Continental Broker-Dealer Corp.*, 30 AD3d 446, 447 [2d Dept 2006]). Therefore, petitioner's sole recourse is to seek enforcement of the stipulation pursuant to CPLR § 2104.

Respondents' cross motion for an order appointing a judicial hearing officer to conduct a hearing to determine the value of D'Angelo Funeral Home Inc. and Seneca Chapels Ltd., pursuant to BCL § 1118, is denied. The parties settled and discontinued this proceeding for judicial dissolution pursuant to the January 10, 2012 stipulation, and said agreement made no provision for the reinstatement of the petition in the event that the parties did not comply with its provisions. Therefore, the relief sought is not available.

That branch of respondents' cross motion which seeks, in the alternative, to vacate the stipulation of settlement is denied. "[S]tipulations of settlement are favored by the courts and not lightly cast aside" (*Diarassouba v Urban*, 71 AD3d 51 [2d Dept 2009], leave to appeal dismissed, 15 NY3d 51 [2010]; *IDT Corp. v Tyco Group, S.A.R.L.*, 13 NY3d 209 [2009]; *Hallock v State of New York*, 64 NY2d 224, 230 [1984]). Stipulations are especially favored where the parties have been represented by counsel (*In re Estate of Stark*, 233 AD2d 450 [2d Dept 1996]; *Heimuller v Amoco Oil Corp.*, 92 AD2d 882 [2d Dept 1983]).

Stipulations will be set aside only upon a showing of good cause sufficient to invalidate a contract, such as fraud, overreaching, duress, or mistake (*Hallock v State of New York, supra*; *G & S Clam Bar v Melillo*, 302 AD2d 492 [2d Dept 2003]; *Siltan v City of New York*, 300 AD2d 298 [2d Dept 2002]). A contract may be voided on the ground of a unilateral mistake of fact only where the enforcement of the contract would be unconscionable, the mistake is material and made despite the exercise of ordinary care by the party in error (21 NY Jur 2d, Contracts, § 121, at 529; see also *Greene v M.S. Housing Associates and DHPD*, 24 Misc3d 1202A [2009]; *In the Matter of the Accounting by Judy Tray as Co-Administrator c.t.a. of the Estate of Pearl Siegel*, 5 Misc3d 1017[A] [2004], affirmed, *Matter of Siegel*, 29 AD3d 914 [2006]).

Respondents have failed to make a sufficient showing to vacate the stipulation of settlement and discontinuance based on unilateral mistake (*Kirkland v Fayne*, 78 AD3d 660 [2d Dept 2010]; *Matthews v Castro*, 35 AD3d 403, 404 [2d Dept 2006]; *El v Schertz*, 33 AD3d 585 [2d Dept 2006]; *G & S Clam Bar v Melillo, supra* at 492; *Karapetyan v Underwood*, 287 AD2d 547 [2d Dept 2001]). Clearly, it was within Robert D'Angelo's ability to know the contents of the appraisal he received in December 2011, and to communicate it to his counsel, and to petitioner. His counsel, had at the very least, apparent authority to act on his behalf (see, *Hallock v State of New York, supra*, at 231) and Robert D'Angelo personally consented to the terms of the stipulation in open court after conferencing and negotiating the terms at length before this court. The settlement placed on the record is binding on Robert D'Angelo and the

respondents, notwithstanding his alleged error as to the value of his share of the business, since his mistake, if any, was made in the absence of "ordinary care" (*McClain Realty v Rivers*, 144 AD2d 216, 218 [3d Dept 1988], citing 21 NY Jur 2d, Contracts, § 121, at 529; see *Yorker v Daniel Yorker, Ltd.*, 12 AD3d 506 [2d Dept 2004]; *Almap Holdings v Bank Leumi Trust Co. of N.Y.*, 196 AD2d 518 [2d Dept 1993]).

In view of the foregoing, petitioner's motion for an entry of judgment in the sum of \$1,300,000.00, together with statutory interest and costs, and disbursements, is denied; and respondents' cross motion for an order appointing a judicial hearing officer to conduct a hearing to determine the value of the respondent corporations, and in the alternative for an order vacating the January 10, 2012 stipulation of settlement and discontinuance is denied. Petitioner's request for sanctions against respondents is not properly before this court as it was improperly raised in the reply papers.

Dated: November 1, 2012

DARRELL L. GAVRIN, J.S.C.