To be Argued by:
DOUGLAS J. MARTINO

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

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)

BRIEF FOR DEFENDANT-APPELLANT

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New York County Clerk's Index Nos.: 651834/2010 & 650048/2013

APPELLATE INNOVATIONS
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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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATUTES

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

----------X

MICHEL KADOSH, and 213 WEST 85TH STREET, LLC,

Plaintiffs-Respondents,

-against-

Index. No.
651834/10

DAVID KADOSH, 114 WEST 71ST STREET, LLC,
30 LEXINGTON AVENUE, LLC, & 3D IMAGING
CENTER CORP,

Defendants-Appellants.

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DAVID KADOSH, individually and as a member of
213 WEST 85TH STREET, LCC,

Third-Party Plaintiff,

-against-

MEK ENTERPRISES, LTD.,

Third-Party Defendant.

----------X

PRELIMINARY STATEMENT

This is an appeal from an Order of the Supreme Court, New York County, (Shirley Werner Kornreich, J.) dated November 3, 2017, after a bench trial, awarding the entirety of the sums held in escrow ($1,634,442.02) to plaintiff-respondent.

Notice of appeal was timely filed from the aforesaid Order.

QUESTIONS PRESENTED

1. Did the court err in awarding to the respondent the balance of the sums held by the receiver, including sums indisputably due to appellant?

Appellants submit that the answer to this question is "Yes".

2. Was the court's decision to award to the respondent the balance of the sums held by the receiver against the weight of the evidence adduced at trial and the terms of the stipulation entered by the parties?

Appellants submit that the answer to this question is "Yes".

3. Did the court's failure to issue findings of fact and conclusions of law in its decision after advising the parties as part of the stipulation of partial settlement, constitute reversible error?

Appellants submit that the answer to this question is "Yes".

4. Was the purported waiver of appeal valid?

Appellants submit that the answer to this question is "No".

INTRODUCTION

Defendants/third party plaintiffs-appellants David Kadosh, 114 West 71ST Street, LLC, #D imaging Center Corp., and 30 Lexington Avenue, LLC appeal from an Order of the Supreme Court, New York County, dated November 3, 2017, which, after a bench trial, awarded the entirety of the sums held in escrow ($1,634,442.02) to plaintiff/third-party defendant-respondent Michel Kadosh. Appellants contend that the Decision and Order must be set aside as it is against the weight of the evidence. Appellants further contend that the trial court committed error by failing to make findings of fact and conclusions of law to

support its determination to award all the remaining escrow funds to respondent, even though approximately $23,000, as well as interest on those funds was indisputably due to appellant David Kadosh. Finally, appellants contend that the purported waiver of appeal is invalid as it was based in part upon representations made by the court as to how it would render a decision, which, in the event, the court failed to abide by. These representations were relied on by appellant to his detriment, warranting the setting aside of the stipulation.

STATEMENT OF FACTS

The pertinent facts relating to this appeal are as follows[1]:

On December 31, 2003, 213 West 85th Street LLC (the LLC) purchased a 6-unit apartment building at 213 West 85th Street in New York County (the Building). The LLC was formed by appellant David Kadosh (David) and respondent Michel Kadosh (Michel), who were the sole members of the LLC, each owning a 50% interest (A-705). David indisputably paid more than half of the expenses related to both the purchase of the Building and the formation of the LLC (A-241,289,291). After deciding to renovate the Building, the LLC hired Michel's company, MEK Enterprises Ltd. (MEK) to perform the renovation work pursuant to a written contract (Contract) dated September 8, 2005 (A-921; Tr, Ex. Z). The agreed upon Contract price for this work was $783,000 and included all labor and

[1] References herein are to page numbers of the Appendix (A-).

materials required to complete the renovations to the Building, except for certain items that were expressly identified as "not included" in the Contract. Any additional work to be performed by MEK that was not identified in the Contract was to be presented to the LLC for approval. Once approved, additional work order changes and/or written agreements were to be completed prior to commencement of such additional work (A-932). Pursuant to the LLC's governing documents, as fifty percent owners of the LLC and consistent with their agreement with each other, David and Michel were each required to pay 50% of all costs of the LLC, including the cost of the renovations to the Building.

Prior to the commencement of construction at the Building, Michel had performed certain renovation work at two other buildings located at 114 West 71st Street and 30 Lexington Avenue. These buildings were at all times, and still are solely owned by David. Michel is not nor has ever been an owner or held any type of interest in either building (A-467,473,475,645). The agreements and documents related to the work at these premises were prepared by Michel and provided that Michel would be paid $300 per diem for his work at these two locations (A-805).

On or about December 2005, MEK began its work at the W. 85th Street building pursuant to the aforesaid Contract, which provided that MEK was to complete construction within one year from commencement of work. The Contract further provided that all work was to be insured and guaranteed as

compliant with all applicable New York State laws (A-928,929). Although Michel represented to the LLC at the time he entered into the Contract that MEK had the requisite licenses and permits to perform the work required under the Contract, he subsequently acknowledged at trial that this was not true and he did not, in fact, have the necessary licenses when work commenced (A-928,929). Additionally, as of September 2009, some three years after commencing work on the Building, Michel still had not completed the construction as required by the Contract. Because of Michel's failure to comply with the Contract, David was forced to hire and pay other contractors to complete the work that Michel contracted for and was required to do, had in fact been paid to do, but failed to complete (A-1004).

The Trial

During this extended bench trial, consisting of 23 days of testimony spanning the course of a year, a plethora of documents and exhibits (more than 10 evidence books) were admitted into evidence, none of which were referenced in the court's decision. The court gave no indication as to how it arrived at its decision. This is curious because *Michel's own expert using Michael's own information and spread sheets* testified that David paid to respondent's company, MEK, more than the full contract price for the renovations to the Building, this despite the fact that pursuant to the terms of the LLC documents and the contract

between the parties, each was liable for only one-half of those expenses. More on this issue later.

At trial, David introduced into evidence a large amount of documentary evidence, unequivocally demonstrating that he paid $1,091,144.12 in construction expenses alone for the Building. In fact, David testified that he paid an additional $300,000 for construction expenses for which he could not locate documentary support (A-1005) and hence, was not part of the $1,091,144.12. Significantly, as noted above, David was required under the LLC agreement to pay only one-half of the contract price of $783,000, plus agreed upon change orders in the amount of $151,210. David's actual payments were therefore far more than his contractual obligations, a fact that the court not only utterly failed to take into consideration, but did not even reference in its order.

David produced documentary evidence, and Michel's expert agreed at trial that David paid $781,285 directly to MEK for construction pursuant to the Contract (A-240). David further produced documentary evidence that he paid additional amounts to other vendors and contractors to complete the work to the Building that Michel failed to complete as he was required to do under the Contract, including payments made to Michel personally. Including the $781,285 noted above, David produced documentary evidence that he paid for construction of the Building an amount totaling $1,091,144.12 (A-1005).

In contrast, Michel testified he did not know the amounts spent by MEK relating to construction of the Building but had his accountants produce four "reports" concerning Michel's claimed expenses. Each of these reports purportedly identified Michel's personal and MEK's construction related expenses. Notably, each of the four accountings prepared at Michel's direction and based solely on Michel's unverified input reached different conclusions as to the amounts spent on construction of the Building by Michel and MEK (A-1005). Significantly, one of Michel's experts, Jeffrey Shlefstein, repeatedly testified at trial that the information used in preparing these reports (the Tanton Report) came solely from Michel, that the information was not independently verified by Shlefstein, and that he makes no representations as to the accuracy of the information or documents provided by Michel that went into making up the report (A-195, 196). Michel agreed during his testimony that he did, in fact, prepare and provide these documents to Shlefstein . The failure by Shlefstein to independently verify the accuracy of the data provided by Michel violated well settled law requiring experts to independently verify such data (*see Supply & Bldg. Co. v Estee Lauder Int'l. Inc.*, 2001 WL 1602976 at *4-5 [SDNY 2001]; *MTX Communications Corp. v LDDS/World Com, Inc.*, 132 F. Supp.2d 289 [SDNY 2001]).

Shlefstein also testified that MEK was, in fact, paying Michel's credit card bills (A-260). He stated that as to the personal credit card expenses contained in the Tanton report, he attributed those expenses to the West 85th Street building because "It was the procedure Michel told him to use" (R.---). Of course, during his testimony, Michel stated he didn't know why Shlefstein (his own expert) attributed expenses for pharmacy, sushi, groceries, Temple, etc. in the manner he did in the report (A-265). This is curious indeed as Shlefstein testified he reported them as Michel directed him to do.

Shlefstein also testified that he did *not* review any of David's records with respect to the building. Rather, his reports were based *solely* on records provided by Michel. These records were prepared long after litigation, depositions and other discovery had taken place.

Indeed, Shlefstein also testified, based upon the information that Michel provided to him, that if Michel was working on other projects at the same time as he was working on the Building, and if Michel deposited monies received and paid expenses relating to those other projects into the MEK account, there was no way Shlefstein would be able to separate those funds/expenses from those claimed to have been incurred in renovating W.85th Street (A-295, 296). These expenses would of course, inflate the amount Michel alleged he spent on renovations to the Building.

Significantly, at his deposition, Michel stated there were no expenses for construction at W. 85th Street from 2008 going forward. Yet the Tanton Report clearly contains such construction expenses attributed to the Building more than $125,000.00 and attributes them to Michel and MEK (A-1007). At his deposition, Michel admitted that from March 2008 through September 2008 and July 2011 through November 2011, he worked on two other projects, and the costs for those projects, as noted by Shlefstein, could not be separated from those attributed to W. 85th Street.

Notably, Michel produced no evidence to support his claims that he was made a partner in David's 3D Imaging Center Corp., 114 West 71st Street, LLC or 30 Lexington Avenue, LLC. Arguing that, in effect, he and David entered into an oral joint venture agreement, he based these claims on the work that he performed at the two separate buildings solely owned by David which were referenced above and for which work he was paid on a per diem basis. He never was an owner of either of these properties, nor did he ever have or acquire any ownership interest in either of these properties, or the dental imaging center (A-467, 473, 475, 645). He was paid by David for the work he performed on those building. It is uncontradicted that all materials and labor for this work, including amounts paid to Michel, were paid for by David (A-805, 815). In support of his claim of an oral joint venture, Michel relies on statements by his wife and brother Eli who claimed

they were present when David and Michel had discussions about forming a partnership for these properties (A-725). Admittedly, no partnership or joint venture documents were ever prepared, let alone signed (A-725). Michel made no contributions to these properties; there was no agreement to share any losses (A-881, 882). Documents submitted at trial demonstrated that both properties sustained losses totaling $301,992.00 for the period 2005-2010 (A-878, 880). Michel did not share in those losses.

The Decision Below

On November 3, 2017, the trial court issued a two and one-half page decision (A-8). The first page, save for two lines, was taken up entirely by the caption. The court, with no analysis or basis for its decision, awarded the entire remaining escrow amount[2] to Michel. Although the court told counsel and the parties on the record that it would "review, and I have a lot of transcripts, and I have notes on all the testimony, is going to review all of that. I think it is something like 10 evidence books, but what was introduced, and I am going to have to base my decision on what is coming" (A-841), there is nothing to indicate that the court ever undertook such a review.

[2]The court did not even bother to determine the exact amount being held in escrow. The decision reads the escrow balance of "$1,634,442.02, or if a different amount remains in the escrow account" to Michel.

Additionally, the court's decision is completely silent on Michel's claims that he and David entered into an oral joint venture regarding 3D Imaging Center Corp., 30 Lexington Avenue and 114 W. 71st Street. This appeal followed.

ARGUMENT

POINT I

THE DECISION IN THIS CASE IS AGAINST THE WEIGHT OF THE EVIDENCE AND MUST BE SET ASIDE

What is most disconcerting about the court's order is the fact that the court not only completely ignored all the documentary evidence submitted by David, but ignored the fact that Michel's expert *confirmed* that David paid MEK more than the total contract price, not merely the 50% required pursuant to the LLC agreement. Jeffrey Shlefstein, Michel's expert forensic accountant, testified that, using a ledger with entries *prepared solely by Michel and not verified by Shlefstein*, he (Shlefstein) was able to verify that David paid close to the full renovation contract price, not just the 50% as required under the Contract. Mr. Shlefstein testified that the ledger and entries contained therein that he used in preparing his report was prepared by Michael. Further, he testified that the ledger was not contemporaneously prepared by Michel as the expenses were incurred but was created in 2014, *9 years after work on the Building was commenced*, and several years after litigation had been commenced and discovery and depositions

of the parties had already taken place. The ledger that Shlefstein relied on was created solely by Michel at Shlefstein's office using an "off the self" QuickBooks program to assist him (Shlefstein) in creating the report that was submitted at trial (A-233,234). Mr. Shlefstein further testified that "Michel put this whole thing together (Tanton report, Trial Exhibit HHH). He put every single item in there. So yes, he selected them". (A-237). Indeed, Michel admitted during his testimony that he prepared all the documents and provided them to Shlefstein to prepare the report. It bears repeating that Shlefstein testified that he did not verify the entries that Michel entered in the ledger.

Most significantly, on page 5 of Shlefstein's summary, Shlefstein, *using the ledger created by and the entries made therein solely by Michel*, determined that David paid almost the full contract price for renovations to the Building in the amount of $781,285. Said Shlefstein: "So the number $781,285, *those are payments that David did make to MEK that we noted."* (A-240).

The four reports in evidence make it painfully obvious that the records used to prepare those reports, all of which were provided and prepared by Michel, were created with a view toward inflating Michel's alleged expenses while minimizing David's payments with respect to the renovation of the Building.[3] The

[3] It must be noted here 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 and David.

conclusions set forth in these reports, moreover, were vastly different from the amounts reported in Michel's income tax returns (A-1005, 1006). The reason for this discrepancy is that Michel could not, and definitively did not, quantify his financial contribution to the renovation of W. 85th Street.

It is, of course, axiomatic that a party to litigation may not take a position contrary to a representation made in an income tax return (*Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422 [2009]; *Stevenson-Misischia v L'Isola D'Oro SRL*, 85 AD3d 551 [1st Dept 2011]; *Peterson v Neville*, 58 AD3d 489 [1st Dept 2009]). For this reason alone, these reports should have been rejected by the trial court. Nevertheless, a review of these reports reveals the total fabrication of many documents and weakness of the "proof" submitted by Michel in support of his position at trial, all of which was ignored by the trial court in arriving at its decision.

Taking the reports in order of admission into evidence, the following appears: the Payment Analysis Report prepared by Michel claimed that Michel/MEK spent $4,313,610.05 on the Building . The May 20, 2011 Account's Report of Martin Rosenblatt, CPA stated Michel/MEK spent $4,563,058.48 . According to the August 27, 2012 Independent Account's Report of Tanton & Co. (Tanton). Michel/MEK spent $4,254,000 (A-1006). However, a second Tanton Report dated April 2, 2014, which report was repeatedly referenced during the

testimony of Michel's expert witness, Jeffrey Shlefstein, stated the Michel/MEK spent only $1,733,834 (A-185, 186). Thus, the analysis of the same or substantially the same records maintained or created by Michel and/or MEK of the expenses allegedly incurred as related to the renovation of the W. 85th Street building yielded significantly inconsistent conclusions. Again, the trial court ignored these glaring discrepancies in arriving at its decision to release the remaining escrow funds in their entirety to Michel.

Incredibly, Mr. Shlefstein, who prepared the Tanton Report, could not explain the nearly $2.5 million of purported expenditures that seemingly disappeared from Tanton's August 27, 2012 report (A-1006). As noted above, he repeatedly testified that the information he used to prepare the report *was provided solely by Michel* and only subject to, at best, a cursory verification by reference to documents that again *were provided solely by Michel* (A-234, 237). It bears repeating that Mr. Shlefstein testified that he provided space within his (Shlefstein's) office, along with a computer and several QuickBooks computer programs so that Michel could generate the spreadsheets used by Shlefstein to prepare the Tanton reports (A-234). It also bears repeating that these spreadsheets were prepared some 9 years after the expenses were allegedly incurred. It is therefore not hard to see that figures were manipulated to arrive at a predetermined result, rather than by the proper accounting method of using verified figures to

determine the actual expenses incurred in the renovation of the Building. Indeed, in his testimony, Mr. Shlefstein repeatedly declined to make any representations as to the sufficiency of the procedures used to prepare the Tanton Report, and would not render an opinion as to the accuracy of the documents and information used to prepare it (A-194, 195, 196).

Add this unorthodox accounting method to the fact that Mr. Shlefstein, as noted, testified there was no way to determine, nor could he verify, whether these claimed expenses were incurred *solely* from the W. 85th Street project or whether the information provided solely by Michel included expenses from other unrelated projects on which Michel and/or MEK was working simultaneously (A-295, 296). He repeatedly acknowledged that his conclusion was based primarily on ledgers created by Michel on an ad hoc basis in 2014, many years after the expenses were allegedly incurred and years after litigation had commenced. These ledgers were not independently verified and were accepted at face value (A-194). Mr. Shlefstein acknowledged that, other than cash transactions, Tanton did not review any invoices or receipts to confirm that such expenses were valid expenses attributed solely to the W. 85th Street project (A-196). Had proper accounting procedures been utilized, even a cursory review of the invoices and receipts upon which the Tanton Report based its conclusion would have caused many of the expenses attributed to the W. 85th Street project to be excluded. Some examples of

expenditures attributed to the renovation of W. 85th Street included pharmacy charges, take-out food charges, Temple payments, payments to Michel's attorneys, accountants and even to Tanton. Indeed, the evidence produced at trial showed that thousands of dollars paid for construction material were for deliveries to Michel's home or to other locations where MEK was engaged in other construction projects (A-207). Mr. Shlefstein admitted that he did not, nor could not, verify these expenses as being attributed to the W. 85th Street project, and that these expenses were incurred after April 2008 when the W. 85th Street project was substantially completed (as Michel testified) (A-207). Indeed, Michel conceded in his testimony that at least $45,425.70 in expenses were included in the Tanton Report for which there was no invoice or receipt to substantiate such expenditures, let alone attribute them to the W. 85th Street project. (A-355).

This testimony and documentation was completely ignored by the court in arriving at its decision and warrants the setting aside of the decision and order.

In reviewing a determination made after a nonjury trial, the power of the Appellate Division is as broad as that of the trial court and may render the judgment it finds "warranted by the facts" (*Northern Westchester Professional Park Assoc. v Town of* Bedford, 60 NY2d 492, 499 [1983]). In a nonjury case, the Appellate Division has the power to determine whether a particular factual question was resolved correctly by the finder of fact and can make new findings of

fact (*see Green v William Penn Life Ins. Co. of New York*, 74 AD3d 570, 571 [1st Dept 2010]). The standard of review is a de novo weighing of the evidence (*id.*, at 573).

To set aside the verdict as contrary to the weight of the evidence, as appellants argue here, the moving party must show that the evidence so preponderated in its favor that the verdict could not have been reached on any fair interpretation of the evidence (*see Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]; *see also Cruz v Bronx Lebanon Hospit. Ctr.*, 129 AD3d 631, 633 [1st Dept 2015]; *White v New York City Tr. Auth.*, 40 AD3d 297 [1st Dept 2007]; *McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [1st Dept 2004]). By contrast, to set aside a verdict as not supported by *sufficient evidence*, the court must find there to be 'no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). "The criteria for setting aside a [jury] verdict as against the weight of the evidence are necessarily less stringent [than for legal insufficiency]" (*Nicastro v Park*, 113 AD2d 129, 132-133 [2d Dept 1985]). If the verdict is against the weight of the evidence, the remedy is a new trial (*McDermott v Coffee Beanery, Ltd.*, 9 AD3d at 206). The weight of the evidence must support the fact-finding determination or it

will be set aside (*Ainetchi v 500 W. End LLC*, 92 AD3d 584 [1st Dept 2012), *lv denied* 19 NY3d 1003 [2012]).

Just on the basis of the testimony of respondent's own expert, Jeffrey Shlefstein, it is clear that the evidence overwhelmingly favored appellant with respect to the amounts of money David spent on creating the LLC, purchasing the building, and paying for the renovations to the building, both in terms of payments made to Michel and MEK, but also for the hiring of additional contractors to complete the work Michel and MEK did not complete. There is simply no way to square the evidence with the court's decision and therefore, it must be set aside. Although this would be sufficient to meet the standard to set aside this decision and order, when coupled with the other issues raised by respondent in this litigation to which proof was similarly lacking, the totality of the evidence favoring appellant becomes compelling.

Turning now to Michel's claims of an oral joint venture, the record demonstrates that Michel utterly failed to produce any evidence that would support his allegations or that the court could rely on to reach the conclusion that he was entitled to the remaining funds being held in escrow by the receiver on this issue. Nor did Michel produce any evidence to support his claims that he was made a partner in David's 3D Imaging Center Corp., 114 West 71st Street, LLC or 30 Lexington Avenue, LLC, entitling him to the amounts held in escrow as

compensation for these agreements. Arguing that, in effect, he and David entered into an oral joint venture agreement, he based these claims on work he performed at two separate properties solely owned by David. As was noted above, Michel never was an owner of any of these properties or entities, nor did he ever acquire an interest in them (A-467, 473, 475, 645). He was paid by David for the work he performed at a rate set by Michel pursuant to contracts prepared by Michel (A-805). All materials and labor for this work, including amounts paid to Michel, were paid for solely by David (A-805). In support of his claim of an oral joint venture, Michel used statements by his wife and brother Eli to the effect that they were present when David and Michel had discussions about forming a partnership for these properties (A-725). Admittedly, no partnership or joint venture was ever formed; at best, and viewing them most charitably to Michel, these were nothing more than general, vague discussions. The evidence showed these idle conversations did not even approach the level of being even close to an agreement to agree. Michel made no contributions to these properties; there was no agreement to share any losses (A-878, 880). Both properties sustained losses in the amount of $301,992.00 for the period 2005-2010 (A-878, 880). Michel contributed nothing to the sharing of those loses.

The application of well-settled precedent regarding partnerships and oral joint ventures were completely ignored by the court.

It is well established that the required indicia of a joint venture include (1) acts manifesting the intent of the parties to be associated as joint venturers; (2) a contribution by the coventurers to the joint undertaking through a combination of property, financial resources, effect, skill or knowledge; (3) a degree of joint proprietorship and control over the enterprise; and (4) a provision for the sharing of profits and losses (*see Mawere v* Landau, 130 AD3d 986, 988 [2d Dept 2015]; *Clarke v Sky Express, Inc.*, 118 AD3d 935, 936 [2d Dept 2014]; *Commander Terms. Holdings, LLC v* Pozanski, 84 AD3d 1005, 1009 [2d Dept 2011]; Richbell *Information Servs. v Jupiter Partners, L.P.*, 309 AD2d 288, 298 [1st Dept 2003]. The facts as adduced at trial demonstrate that none of these elements are present.

There is nothing in the record that remotely demonstrates any acts manifesting intent to create a joint venture. The vague discussions alleged by Michel (and denied by David) cannot be construed as an intent to create an oral joint venture. Michel utterly failed to meet his burden of showing that there was a meeting of the minds as to the terms of a joint venture, or even that a joint venture was contemplated (*see Matter of Steinbeck v Gerosa*, 4 NY2d 302, 317-318 [1958]; *Hecht v Helmsley-Spear, Inc.*, 65 AD3d 951 [1st Dept 2009]; *Langer v Dadabhoy*, 44 AD3d 425, 426 [1st Dept 2007]; *Gold Coast Advantage, Ltd. v* Trivedi, 105 AD3d 571 [1st Dept 2013]). Moreover, other than performing renovation work through MEK, for which he was separately paid for his labor,

Michel contributed nothing to those properties. David bought those properties with his own funds and managed them by himself. Thus, the first two elements are lacking with the result that any claims that a joint venture had been created must fail.

As to the third element of a joint venture, there is no evidence whatsoever that Michel exercised a degree of joint proprietorship and control over any of the three entities which he claimed David made him a partner of coventurer. All three entities were created, financed, owned and controlled solely by David. Michel had no input whatsoever into their operation, management, expenditures, or other management or operational decision making. Michel contributed no funds, skills or expertise toward any of these entities. Mere allegations to this effect, without sufficient proof are insufficient to warrant a finding that a joint venture was created (see *Magnum Real Estate Servs. v 133-134-135 Assocs.*, 59 AD3d 362, 363 [1st Dept 2009]; Mendelson v Feinman, 143 AD2d 76, 78 [2d Dept, 1988]).

The final element, a provision for the sharing or profits and losses is, as with the other elements of a joint venture, utterly lacking in proof. "An indispensable essential of a contract of partnership or joint venture, both under common law and statutory law, is a mutual promise or undertaking of the parties to share in the profits of the business *and submit to the burden of making good the losses*" (*Steinbeck v Gerosa*, 4 NY2d at 317) (emphasis as in original); *Mawere v* Landau,

130 AD3d at 988; *Magnum Real Estate Servs.*, 59 AD3d at 363; *see also Gold Mech. Contractors v Lloyds Bank, P.L.C.*, 197 AD2d 384 [1st Dept 1993]). Here, it is undisputed that 114 West 71st Street and 30 Lexington Avenue sustained combined losses of $301,992.00 and that there was no contribution (or even an offer of contribution) to share in those losses by Michel. Thus, the undisputed evidence points to the fact that there was no joint venture between Michel and David with respect to the three entities solely owned, operated and controlled by David.

With respect to any claims by Michel of an oral partnership, the same principles apply (*see Moses v Savedoff*, 96 AD3d 466, 470 [1st Dept 2012]). As with the allegations of a joint venture, the evidence does not support Michel's claim of an oral partnership (*Lobel v Hakami*, 134 AD3d 410 [1st Dept 2015]), particularly where, as here, there was no agreement to share in losses (*Shine & Co. LLP v* Natoli, 89 AD3d 523 [1st Dept 2011]; Bereck *v Meyer*, 222 AD2d 243, 244 [1st Dept 1995]).

Based upon the foregoing, appellants respectfully submit that the trial court's decision was clearly against the weight of the evidence and must therefore be set aside.

POINT II

THE DECISION TO AWARD THE FULL AMOUNT OF ESCROW FUNDS TO RESPONDENT, INCLUDING SUMS INDISPUTABLY BELONGING TO APPELLANT WAS ERROR AND MUST BE SET ASIDE

There is no question that that the court had no idea of the amount of funds being held in the receiver's escrow account. The decision, short as it is, mentions this fact on two separate occasions. This is clear evidence that the court failed to review the evidence submitted at trial and apply the appropriate precedents in arriving at its decision. Additionally, the court, in its decision, failed to consider certain items and/or credits belonging to David.

As noted, once a receiver was appointed, rents were paid into the escrow account. These rents clearly belonged to David, as by that point, the LLC had been judicially dissolved and David, as the owner, was entitled to such rents. This sum was never broken out because, as noted, the court never did a proper analysis of the evidence submitted in this case.

Moreover, David was entitled to the interest those rents generated. Again, this was never broken out of the escrow account. There were other items in escrow that, the evidence showed, should have been credited to David in determining the amount available for release (A-1011). For example, the evidence clearly demonstrated, and respondent's expert agreed, that David paid $457,641.21 *more* than Michel for construction expenses. This amount should also have been broken

out of the escrow funds and paid to David *before* arriving at a net figure available for distribution by the court.

As noted in Point I, Michel is not entitled to any of the escrow funds pursuant to any claims that he is a partner or joint venture in David's three other entities.

Michel is not entitled to receive any of the escrow funds included as change orders. The contract required that any work change orders be approved by the LLC prior to performing that work. There was no testimony or evidence presented showing this was ever done. To compound this error, although MEK represented in the contract that it had obtained all required licenses to perform the necessary construction work, it did not, in fact, acquire all necessary licenses and permits until July 31. 2007 (Tr. 8/17/15). Thus, a work change order dated and purportedly submitted for approval in May/June 2006 containing a license number issued on July 31, 2007, on its very face, invalid. This relates back to the fact that the "evidence" submitted in this trial by Michel as prepared by Michel and never verified by Michel's expert witness.

Additionally, the failure to obtain the required licenses and permits is, in itself, reason to deny Michel's claim to any of the escrow funds. New York City Administrative Code § 20-387(a) provides, in pertinent part: "No person shall . . . perform or obtain a home improvement contract as a contractor . . . from an owner

without a license therefor". This is a strict liability provision and obtaining a license after the fact cannot be used to validate work that was done prior to the issuance of the license (*B&F Bldg. Corp. v Liebig*, 76 NY2d 689, 694 [1990]). These provisions have been uniformly held to bar any recovery for breach of contract or in quantum meruit (*see Orchid Constr. Corp. v Gottbetter*, 89 AD3d 708, 102 [2d Dept 2011]; *Chosen Const. Corp. v Syz*, 138 AD2d 284, 285 [1st Dept 1988]; *Mortise v 55 Liberty Owners Corp.*, 102 AD2d 719 [1st Dept 1984]). Since the renovation of this building involved the renovation of the six apartments contained therein, this statute applies and precludes recovery by Michel of portions of the funds held in escrow.

Once again, it is clear from the foregoing that the court, in what was obviously an effort to dispose of a long, involved and contentious case, failed to properly consider the evidence submitted at trial. The award of the full of amount of the funds remaining in the receiver's escrow account to Michel was therefore error and must be set aside.

POINT III

THE TRIAL COURT'S FAILURE TO ISSUE FINDINGS OF FACT AND CONCLUSIONS OF LAW WAS, UNDER THE FACTS OF THIS CASE, ERROR AND MUST BE SET ASIDE

In putting the partial settlement stipulation on the record, the court, on its own, advised the parties: "Of course, the Court is going to, and I'll say this on the record, I have a lot of transcripts, and I have notes on all the testimony, is going to review all of that. I have, I think it is something like 10 evidence books, but what was introduced, and I am going to have to base my decision on what is coming. Although promising to do so, the court did not issue findings of fact and conclusions of law to support its determination. This omission is significant in several respects that, when taken as a whole constitutes reversible error. These omissions are discussed at length in Points I and II, supra, but need to be summarized here:

1. The parties, especially David, relied on this representation in deciding whether to waive his right to appeal (See Point IV infra);

2. It must be understood that the court ignored significant, uncontroverted facts in arriving at its decision (e.g., rent credits, interest, Shlefstein's identification of clearly inappropriate expenses attributed to W. 85th Street);

3. Shlefstein's conclusion that David paid almost the entirety of the Contract price;

4. Shelfstein's conclusion that David paid $457,641.21 *more* than Michel for construction expenses when the LLC agreement provided for a 50-50 sharing of such expenses;

5. The Court's failure to apply applicable precedent to Michel's claim of an oral joint venture.

The court gave absolutely no basis for its decision despite having told the parties it would consider all the evidence and testimony submitted during a lengthy trial conducted during 23 trial days over the course of a year. While Appellants understand that courts have broad discretion in issuing decisions, the decision as rendered in this complex action is wholly inadequate. Moreover, it did not address all the outstanding issues concerning the remaining escrow funds as well as those not covered by the stipulation of partial settlement.

In short, the court did not comply with its own representations to the parties regarding the decision it would render. This failure constitutes error and the decision must be set aside.

POINT IV

THE STIPULATION PURPORTEDLY PROSPECTIVELY WAIVING APPELLANT'S RIGHT TO APPEAL IS, UNDER THE FACTS OF THIS CASE, INVALID AND MUST BE SET ASIDE.

The right of appeal is one of the basic foundations of American law. It is a right that should not easily be deemed waived except under the most extraordinary circumstances. Such circumstances are notably absent in this case.

As noted in Point III above, the parties, in putting a stipulation on the record regarding the termination of the litigation and procedure to streamline the remaining testimony in this lengthy trial, were in the process of stating to the court the type of decision it was anticipated the court would render. The court, of its own accord and not by any request of the parties, interrupted counsel and stated on the record that it would "review, and I have a lot of transcripts, and I have notes on all the testimony, is going to review all of that. I think it is something like 10 evidence books, but what was introduced, and I am going to have to base my decision on what is coming" (A-841). In short, the parties, and David in particular, believed that the court would render a decision referencing the facts brought out at trial and provide findings of fact and conclusions of law. Based upon that understanding, as well as several off the record conversations between the parties, counsel and the court, David agreed to the stipulation spread on the record, part of which

purportedly waived his right to appeal. In the event, what David was led to believe did not happen. It is thus submitted that the waiver of the right to appeal was ineffective as David did not knowingly and intelligently waive this fundamental right.

"Stipulations of settlement are judicially favored and should not be lightly cast aside" (*Charlop v A.O. Smith Water Products*, 64 AD3d 486 [1st Dept 2009]). "Thus, a party will not be relieved from the consequences of a stipulation unless there was sufficient cause to invalidate it, such as fraud, mistake, collusion, accident, or some other ground" (*id.*).

The Court of Appeals has recognized that courts have "control over stipulations and power to relieve from the terms thereof" and that a stipulation may be vacated based on "unilateral mistake", when "it appears that either party had inadvertently, unadvisedly or improvidently entered into an agreement which will take the case out of the due and ordinary course of proceeding in the action, and in doing so may work to his prejudice" (*Matter of Frutiger*, 29 NY2d 143, 149-150 [1971]; *see also Hallock v State of New York*, 64 NY2d 224 [1984]).

As discussed in Point III, supra, David was told by the court that it would conduct a review of the exhibits and testimony presented in this case. He was led to believe that the court would issue a reasoned determination with respect to the funds being held in escrow as to which party was entitled to what amounts of those

funds. In point of fact, although his then counsel was stating on the record that such a reasoned determination would not be required, the court interrupted counsel and, in the language set forth above, essentially contradicted counsel and indicated such a reasoned decision would ultimately be forthcoming. Instead, the court did not even bother to determine just how much money was even being held in escrow, let alone made a reasoned distribution of those funds. This unilateral mistake is sufficient to warrant the vacatur of the stipulation in this case under the *Frutiger* standard (*see Bd. of Managers of 60 E. 88th St. Condominium Assn. v Stein*, 57 AD3d 381, 382 [1st Dept 2008]; *Carrion v Metro. Transp. Auth.*, 92 AD2d 907 [2d Dept 1983]; *see generally Weissman v Bondy & Schloss*, 230 AD2d 465, 469 [1st Dept 1997], *lv denied* 91 NY2d 887 [1998]).

This is not a situation where a party, having entered into a stipulation, has come to regret it. Rather, it is a case where a party was reasonably led to believe by the court that is would render a reasoned decision based upon the testimony and evidence submitted at a lengthy trial and, based upon that representation and several off the record discussions between the parties, counsel and court, agreed to a stipulation waiving a fundamental right. It is respectfully submitted that Appellant has met the *Frutiger* standard and the stipulation should be set aside so that this Court can determine this case on the merits.

Independent of the question of whether the trial court's failure to abide by its assurances renders the appeal ineffectual, 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*, In this regard, it is respectfully requested that this Court should exercise its interests of justice jurisdiction and review this case de novo.

David was caused to forever waive a challenge a decision without even knowing what it would be, blindly agreeing to live with a determination regarding over a million dollars irrespective of its correctness, or, in fact, its rationality. Such a scenario cannot be in keeping with any degree of fairness, compelling reconsideration by the Court.

CPLR § 5501(c) provides that the Appellate Division has the power to review both "questions of law and questions of fact", as well as questions involving the exercise of judicial discretion. It is submitted that the rulings in this case, as well as the purported waiver of appeal, constitutes a "fundamental error" that materially affected the outcome of the proceedings (*see e.g., Pivar v Graduate School of Figurative Art*, 290 AD2d 212, 213 [1st Dept 2002]).

CONCLUSION

FOR THE REASONS STATED IN POINT I, THE DECISION IN THIS CASE IS AGAINST THE WEIGHT OF THE EVIDENCE AND MUST BE SET ASIDE.

ALTERNATIVELY,
FOR THE REASONS STATED IN POINT II, THE DECISION TO AWARD THE FULL AMOUNT OF ESCROW FUNDS TO RESPONDENT, INCLUDING SUMS INDISPUTABLY BELONGING TO APPELLANT CONSTITUTES REVERSABLE ERROR AND MUST BE SET ASIDE

ALTERNATIVELY,
FOR THE REASONS STATED IN POINT III, THE TRIAL COURT'S FAILUE TO ISSUE FINDINGS OF FACT AND CONCLUSIONS OF LAW WAS, UNDER THE CIRCUMSTANCES OF THIS CASE, ERROR AND MUST BE SET ASIDE.

FINALLY,
FOR THE REASONS STATED IN POINT IV, THE STIPULATION PURPORTEDLY PROSPECTIVELY WAIVING APPELLANT'S RIGHT TO APPEAL IS, UNDER THE FACTS OF THIS CASE, INVALID AND MUST BE SET ASIDE.

Dated: August 21, 2018

Respectfully submitted,

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By: _____

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