

Supreme Court of the State of New York

Appellate Division, First Judicial Department

Kern, J.P., Gesmer, Kennedy, Scarpulla, Rodriguez, JJ.

16859-	MALI FUKS etc.,	Index Nos. 122768/96
16860-	Plaintiff-Respondent,	102882/02
16861-		Case Nos. 2021-03205
16862	-against-	2021-03206
		2022-01282
	RAKIA ASSOCIATES et al.,	2022-01271
	Defendants-Appellants,	

LANCASTER STUDIO ASSOCIATES et al.,  
Defendants.

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RUTH SHOMRON etc.,  
Plaintiff-Appellant,

-against-

DARYA FUKS etc., et al.,  
Defendants-Respondents.

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The Law Firm of Guy S. Halperin, PLLC, New York (Guy S. Halperin of counsel), for appellants.

Catafago Fini LLP, New York (Jacques Catafago of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Melissa A. Crane, J.), entered August 16, 2021, which denied the motion of Rakia Associates, 2701 Broadway Associates, Ruth Shomron, Estate of Howard Simon, and Larry Goldstein to reject in part and modify in part the report of Special Referee Lancelot B. Hewitt, dated May 21, 2021, and granted plaintiff Mali Fuks’s motion to confirm the Referee’s report as to the objected-to portions, unanimously reversed, on the law, without costs, and the

matter remitted for a new decision that takes into consideration the transcripts of and evidence presented at the hearing held before the Referee.

Orders, same court and Justice, entered March 3, 2021 and on or about March 23, 2022, which, insofar as appealed from, granted in part Mali Fuks's motion for an order directing equitable distribution of the assets of R&L Realty Associates to its partners in accordance with the confirmed Referee's report, unanimously reversed, on the law, without costs, and the orders vacated.

Where, as here, the Referee's factual findings are disputed, a court "may not make an order on the [referee's] report without having before it the testimony in some form or agreement by the parties as to its substance sufficient to permit the court to pass upon a challenge made to the sufficiency of the evidence" (*Matter of Shulman v Elco Constr. Corp.*, 12 AD2d 460, 460 [1st Dept 1960] [internal quotations marks omitted]; *accord Kalfus v Kalfus*, 243 AD2d 324, 325 [1st Dept 1997]). The matter should thus be remitted to the motion court for a new decision that takes into consideration the transcripts and other evidence before the Referee.

In view of our disposition of this issue, we need not reach the parties' arguments regarding compliance with CPLR 4319 and 4320(b). The remaining issues argued by the

parties involve factual disputes that the motion court could not have properly resolved without the benefit of the transcripts and exhibits that were before the Referee.

THIS CONSTITUTES THE DECISION AND ORDER  
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: December 8, 2022

A handwritten signature in black ink, appearing to read "Susanna Molina Rojas". The signature is written in a cursive, flowing style.

Susanna Molina Rojas  
Clerk of the Court