# NY CLS CPLR R 2104

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***New York***

***Consolidated Laws Service*** **>**

***Civil Practice Law And Rules (Arts. 1 — 100)*** **>**

***Article 21 Papers (§§ 2101 — 2106)***

## R 2104. Stipulations

An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered. With respect to stipulations of settlement and notwithstanding the form of the stipulation of settlement, the terms of such stipulation shall be filed by the defendant with the county clerk.

## History

Add, L 1962, ch 308, § 1, eff Sept 1, 1963; amd, L 2003, ch 62, § 28 (Part J), eff July 14, 2003.

Annotations

## Notes

**Prior Law:**

Earlier rules: RCP 4; Gen Rules Pr 11.

**Advisory Committee Notes:**

This rule is derived from RCP 4. The provision works well in practice and no change has been made.

CPA § 790, dealing with stipulations in supplementary proceedings, has been omitted. Its first two sentences, stating that such stipulations may be signed by either the parties or their attorneys and that approval of the court is not required, are consistent with the general provisions of this rule. Its last sentence allows “[a]n attorney” who issued a subpoena or restraining notice to vacate or modify it by “written stipulation.” It is not clear whether this means the attorney may do so by a unilateral writing or whether a true “stipulation” with the adverse party is required. Cf. Polo v Edelbrau Brewery, 185 Misc 775, 60 NYS2d 346 (Sup Ct App T 1945). If it means the latter, it adds nothing to the proposed rule; if the former, it is implicit in new CPLR §§ 5222 and 5223.

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## I. Under CPLR

### 1. In general

Where Appellate Division order provides only for execution of stipulation, that stipulation shall effectively be treated by Court of Appeals for timeliness concerns as final judgment, and appeal or motion for leave to appeal to Court of Appeals must be made within 30 days (or 35 days if served by mail) of time appellant or movant is served with stipulation with written notice of entry. Whitfield v City of New York, 90 N.Y.2d 777, 666 N.Y.S.2d 545, 689 N.E.2d 515, 1997 N.Y. LEXIS 3701 (N.Y. 1997), overruled in part, Adams v Genie Indus., Inc., 14 N.Y.3d 535, 903 N.Y.S.2d 318, 929 N.E.2d 380, 2010 N.Y. LEXIS 976 (N.Y. 2010).

A stipulation has no binding collateral estoppel effect but merely operates as an admission. Albany v State, 35 A.D.2d 881, 315 N.Y.S.2d 727, 1970 N.Y. App. Div. LEXIS 3445 (N.Y. App. Div. 3d Dep't 1970), rev'd, 28 N.Y.2d 352, 321 N.Y.S.2d 877, 270 N.E.2d 705, 1971 N.Y. LEXIS 1320 (N.Y. 1971).

Language, added by the plaintiff to a stipulation to an extension of time for the defendant to answer the complaint, which provided that the answer could not allege the statute of limitations or jurisdiction as a defense did not preclude the defendant’s motion to dismiss on statute of

limitations grounds. Carchi v Antenucci, 79 A.D.2d 981, 434 N.Y.S.2d 479, 1981 N.Y. App. Div. LEXIS 9869 (N.Y. App. Div. 2d Dep't 1981).

Plaintiff's attorney's statement in arguing against a motion to change the venue of a personal injury action that plaintiff did not claim defendant was intoxicated at the time of the accident, did not preclude plaintiff from offering evidence at trial of defendant's intoxication where the attorney's statements were made in connection with argument of the motion and were not intended to act as a stipulation. Davis v Sapa, 107 A.D.2d 1005, 484 N.Y.S.2d 568, 1985 N.Y. App. Div. LEXIS 42516 (N.Y. App. Div. 3d Dep't 1985).

Since parties submitted issue of whether action was time-barred for Supreme Court's determination, based on agreed statement of facts, plaintiffs could not argue on appeal that statute of limitations issue should have been resolved by jury at plenary trial; by stipulation, parties may shape facts to be determined at trial and thus circumscribe relevant issues for court to exclusion of disputed matters that otherwise would be available to parties. Freund v Ginsberg, 130 A.D.2d 457, 515 N.Y.S.2d 37, 1987 N.Y. App. Div. LEXIS 46427 (N.Y. App. Div. 2d Dep't 1987).

Defendant was not precluded from amending its answer to assert that plaintiff's claim was untimely under contractual provision between parties, even though defendant had stipulated that it would withdraw certain contractual defenses if plaintiff were successful on appeal pertaining to defendant's earlier motion to dismiss, since (1) defendant had not pleaded contractual time limitation in its original answer, and (2) parties, in making their stipulation, failed to anticipate that earlier appeal would not address merits of such defense. M. Kramer & Sons, Inc. v Facilities Dev. Corp., 135 A.D.2d 942, 522 N.Y.S.2d 351, 1987 N.Y. App. Div. LEXIS 52852 (N.Y. App. Div. 3d Dep't 1987).

Parties may by stipulation shape facts to be determined by court and thus circumscribe relevant issues for court to exclusion of disputed matters otherwise available to parties. Barton v Munz, 144 A.D.2d 411, 533 N.Y.S.2d 1012, 1988 N.Y. App. Div. LEXIS 11765 (N.Y. App. Div. 2d Dep't 1988).

Stipulation is contract between parties to it and is, therefore, governed by principles of contract law for interpretation and effect. Caruso v Ward, 146 A.D.2d 22, 148 A.D.2d 1015, 539 N.Y.S.2d 313, 540 N.Y.S.2d 118, 1989 N.Y. App. Div. LEXIS 3508 (N.Y. App. Div. 1st Dep't 1989).

Parties' stipulation that defendant would pay $3,500 to plaintiff, and that each party would then execute general release in favor of other, did not terminate action where stipulation reflected understanding that litigation would continue if defendant were to fail to comply with conditions set forth therein. Legum v Ruthen, 211 A.D.2d 701, 621 N.Y.S.2d 649, 1995 N.Y. App. Div. LEXIS 487 (N.Y. App. Div. 2d Dep't 1995).

Although it was technical violation of settlement in legal malpractice action for defendant's insurance company to forward plaintiff's share of settlement directly to plaintiff's counsel, instead of to defendant's counsel to be distributed to plaintiff's counsel, violation was de minimis where defendant's obligations under settlement were not conditioned on proper procedure for distribution of settlement proceeds and defendant had no interest in that portion of settlement. Wolstencroft v Sassower, 212 A.D.2d 598, 623 N.Y.S.2d 7, 1995 N.Y. App. Div. LEXIS 1552 (N.Y. App. Div. 2d Dep't 1995).

Parties are free to expedite resolution of dispute by stipulating to issue to be determined at trial. Callahan v P.J. Carlin Constr. Co., 223 A.D.2d 459, 637 N.Y.S.2d 66, 1996 N.Y. App. Div. LEXIS 511 (N.Y. App. Div. 1st Dep't), app. dismissed in part, app. denied, 88 N.Y.2d 896, 646 N.Y.S.2d 978, 670 N.E.2d 218, 1996 N.Y. LEXIS 1643 (N.Y. 1996).

IAS Court properly adopted Ukrainian court's finding that plaintiffs had complied with stipulation under which surety bond was posted, even though Ukrainian proceeding was not instituted by any of plaintiffs in their own names but by another corporation accepted by Ukrainian court as proper representative of plaintiffs. Am Don Int'l v Unlimited Brokerage Corp., 246 A.D.2d 494, 667 N.Y.S.2d 252, 1998 N.Y. App. Div. LEXIS 717 (N.Y. App. Div. 1st Dep't 1998).

In turnover proceeding under CLS CPLR §§ 5225 and 5239, petitioner was entitled to order directing assignee bank to turn over money received after 1996 under July 9, 1993, security

agreement where that agreement was beyond purview of “so ordered” stipulation dated August 12, 1992. National Union Fire Ins. Co. v State Bank of Long Island, 263 A.D.2d 490, 693 N.Y.S.2d 197, 1999 N.Y. App. Div. LEXIS 7897 (N.Y. App. Div. 2d Dep't 1999), app. dismissed, 94 N.Y.2d 899, 707 N.Y.S.2d 143, 728 N.E.2d 339, 2000 N.Y. LEXIS 109 (N.Y. 2000), app. denied, 96 N.Y.2d 714, 729 N.Y.S.2d 441, 754 N.E.2d 201, 2001 N.Y. LEXIS 1417 (N.Y. 2001).

In proceeding involving former wife’s cross petition under CLS Family Ct Act Art 4 to find former husband in violation of prior order of spousal support, former husband could not claim before Appellate Division that Family Court erred in failing to inquire into his employment history where he did not argue that he had been unemployed at any time but rather stipulated to his nonpayment of spousal support. Newkirk v Chaffin, 263 A.D.2d 634, 692 N.Y.S.2d 818, 1999 N.Y. App. Div. LEXIS 7856 (N.Y. App. Div. 3d Dep't 1999).

Public Employment Relations Board had jurisdiction over dispute under CLS Civ S § 205(5)(d) where, as parties stipulated, terminated fringe benefits were not granted under parties’ collective bargaining agreement but were extended under practice developed over time, and thus, because there was no breach of contract dispute, board’s jurisdictional limitation was not triggered. Patrolmen's Benevolent Ass'n v Kinsella, 263 A.D.2d 885, 693 N.Y.S.2d 323, 1999 N.Y. App. Div. LEXIS 8463 (N.Y. App. Div. 3d Dep't 1999).

Award of $6,728.50 in counsel fees and expenses to plaintiff in mortgage foreclosure action was reasonable where parties stipulated that court would determine amount of counsel fees due from defendant after its review of written submissions, court properly considered time and effort necessary to prosecute action, including motions, and court substantially reduced number of hours that plaintiff’s counsel attributed to matter. Bankers Trust Co. v Hoovis, 263 A.D.2d 937, 694 N.Y.S.2d 245, 1999 N.Y. App. Div. LEXIS 8452 (N.Y. App. Div. 3d Dep't 1999).

Award of $1,550,000 was reasonable for injured worker’s lifetime pain and suffering stemming from twice operated on fractured left heel and ruptured disc where worker stipulated to that sum, as reduction from $1,750,000 awarded by jury, in lieu of new trial on issue of damages. Vasquez

v Chase Manhattan Bank, N.A., 266 A.D.2d 3, 697 N.Y.S.2d 611, 1999 N.Y. App. Div. LEXIS 11176 (N.Y. App. Div. 1st Dep't 1999).

Damages caused by landlord's breach of its warranty of habitability during period from November 1988 to December 1990 were subsumed within parties' April 15, 1988, stipulation of settlement, which provided that tenant would receive 50 percent maintenance abatement from May 1988 until all repairs were completed, and $56,000 property damage award in exchange for discontinuing her causes of action. Leventritt v 520 East 86th St., Inc., 266 A.D.2d 45, 698 N.Y.S.2d 20, 1999 N.Y. App. Div. LEXIS 11380 (N.Y. App. Div. 1st Dep't 1999), app. denied, 94 N.Y.2d 760, 706 N.Y.S.2d 80, 727 N.E.2d 577, 2000 N.Y. LEXIS 105 (N.Y. 2000).

Judgment in accordance with parties' stipulation of settlement was not substantially favorable to tenant, in her action against landlord, so as to warrant award of attorney fees in her favor where she gained nothing from present litigation. Leventritt v 520 East 86th St., Inc., 266 A.D.2d 45, 698 N.Y.S.2d 20, 1999 N.Y. App. Div. LEXIS 11380 (N.Y. App. Div. 1st Dep't 1999), app. denied, 94 N.Y.2d 760, 706 N.Y.S.2d 80, 727 N.E.2d 577, 2000 N.Y. LEXIS 105 (N.Y. 2000).

Defendant in negligence action was entitled to conduct examination of particular witness before trial on 7 days' notice to plaintiff where parties' counsel had stipulated that particular witness's deposition "shall be conducted by the parties while the within action remains on the trial calendar," and although stipulation did not limit time within which deposition could be scheduled, procedural rules do not allow unfair surprise, and thus plaintiff was entitled to reasonable preparation period. Lozado v Build On Top, 266 A.D.2d 63, 700 N.Y.S.2d 98, 1999 N.Y. App. Div. LEXIS 11595 (N.Y. App. Div. 1st Dep't 1999).

Landlord's obtaining of CLS RPAPL § 749 warrant for removal of tenant's removal did not "terminate" tenancy for purposes of parties' real estate brokerage commission contract, even though contract made commission contingent on tenant's continued occupancy, and landlord obtained warrant before agreed commission payment schedule began, where landlord's so-ordered stipulation with tenant, which stayed warrant and provided for tenant's continued occupancy throughout 2-year commission payment period, revived landlord's duty to pay

commissions, and landlord accepted rent throughout that period. Morgan Barrington Assocs. of N.Y., Inc. v 175 East 74th Corp., 266 A.D.2d 106, 698 N.Y.S.2d 647, 1999 N.Y. App. Div. LEXIS 11662 (N.Y. App. Div. 1st Dep't 1999).

Medical malpractice defendant waived his right to conduct psychiatric examination of injured plaintiff where (1) motion to compel examination was made almost 3 years after service of plaintiffs' amended bill of particulars and narrative reports of injured plaintiff's treating psychotherapist, almost 2 years after service of note of issue and certificate of readiness, and beyond 45-day period set forth in stipulation for arrangement for such examination, (2) defendant did not move to vacate note of issue within 20 days as required by CLS Unif Tr Ct Rls § 202.21 (22 NYCRR § 202.21), (3) after service of plaintiffs' amended bill of particular, plaintiffs did not allege new or additional injuries or that nature and extent of existing injuries had changed dramatically, and (4) defendant failed to show that "unusual and unanticipated circumstances" developed after filing of note of issue and certificate of readiness that would require psychiatric examination. Schenk v Maloney, 266 A.D.2d 199, 697 N.Y.S.2d 332, 1999 N.Y. App. Div. LEXIS 11142 (N.Y. App. Div. 2d Dep't 1999).

Plaintiffs failed to rebut presumption of abandonment that attaches when matter has been automatically dismissed under CLS CPLR § 3404 where 1996 stipulation allowing plaintiffs to file note of issue was insufficient predicate for restoration of case to trial calendar, and there was no other activity in case between June 1996 and October 1998. Schwartz v Mandelbaum & Gluck, 266 A.D.2d 273, 698 N.Y.S.2d 252, 1999 N.Y. App. Div. LEXIS 13059 (N.Y. App. Div. 2d Dep't 1999).

Custodial mother was not entitled to upward modification of child support, even though she lost her job, where her general claim that child's needs had increased, without specific dollar amounts of increased costs, was insufficient to prove that original amount of support to which parties had stipulated at time of their divorce was inadequate to meet child's needs. Butto v Twietmeyer, 266 A.D.2d 834, 698 N.Y.S.2d 367, 1999 N.Y. App. Div. LEXIS 11758 (N.Y. App. Div. 4th Dep't 1999).

Jury's award of $11,534.76 for past pain and suffering would be vacated, and new trial on that issue would be granted unless parties stipulated to increase to $35,000, where 76-year-old plaintiff's fractured elbow required surgery and 6 pins to hold it together, pins were later removed because they were causing pain, plaintiff remained in hospital for 6 days after surgery, and she needed assistance from her family for 6 weeks while her arm was in cast. Feneck v First Union Real Estate Equity & Mortg. Invs., 266 A.D.2d 916, 698 N.Y.S.2d 206, 1999 N.Y. App. Div. LEXIS 11913 (N.Y. App. Div. 4th Dep't 1999).

Damage award of $300,000 for past pain and suffering, $340,000 for future pain and suffering, and $50,000 for loss of consortium were excessive, and new trial on issue of damages would be ordered unless parties stipulated to reduction to $130,000, $160,000, and $10,000, where plaintiff wife, who fractured her nondominant wrist in fall on defective sidewalk, was able to perform most of her usual preaccident activities and felt pain only in bad weather, and her husband presented only some evidence of changes in his life caused by his wife's diminished ability to perform household chores. Garcia v Spira, 273 A.D.2d 57, 709 N.Y.S.2d 53, 2000 N.Y. App. Div. LEXIS 6373 (N.Y. App. Div. 1st Dep't 2000).

Extreme sanction of dismissal of personal injury action would be vacated, and complaint reinstated, despite failure of plaintiffs' counsel to appear at compliance conference and their arguable lack of diligence in prosecuting case, where plaintiffs had meritorious cause of action, simple law office failure was not willful or contumacious, and neither compliance conference order nor parties' stipulation gave plaintiffs any indication that nonappearance at conference would result in dismissal of action. Salamone v Wyckoff Heights Med. Ctr., 273 A.D.2d 117, 709 N.Y.S.2d 181, 2000 N.Y. App. Div. LEXIS 7128 (N.Y. App. Div. 1st Dep't 2000).

In action under CLS Labor § 240(1) by worker who fell from ladder, third-party defendant was entitled to vacatur of default order on indemnification claims where stipulated adjournment of original motion was reasonable excuse for default, and there was meritorious defense based on triable issues of fact as to who owned ladder used by worker and who controlled work at time of

fall. Pabon v Alexander Bldg. Corp., 273 A.D.2d 130, 709 N.Y.S.2d 550, 2000 N.Y. App. Div. LEXIS 7169 (N.Y. App. Div. 1st Dep't 2000).

New trial would be granted on issues of past and future medical expenses unless personal injury plaintiff stipulated to reduced award of nothing for past medical expenses and $25,500 for future medical expenses where first $50,000 of basic economic loss is not recoverable under CLS Ins § 5104(a), amount of past medical expenses incurred did not exceed that $50,000 offset, remaining $42,000 of offset had to be applied to award of future medical expenses, that award of $200,000 was excessive, and any award above $67,500 for future medical expenses was speculative. Lloyd v Russo, 273 A.D.2d 359, 709 N.Y.S.2d 589, 2000 N.Y. App. Div. LEXIS 7068 (N.Y. App. Div. 2d Dep't 2000).

In proceeding under CLS Gen City § 20(22) to direct owner to allow city petitioners to enter his house to perform structural repairs so that work on nearby construction project could resume, court properly denied owner’s motion to compel petitioners to make further repairs under stipulation of settlement until after resolution of all causation issues in related tort action commenced by owner against petitioners where stipulation only obligated petitioners to restore house to condition that it was in before start of construction project. City of New York v Barry, 273 A.D.2d 380, 710 N.Y.S.2d 917, 2000 N.Y. App. Div. LEXIS 7044 (N.Y. App. Div. 2d Dep't 2000).

Inmate was not improperly denied right to call certain witnesses at prison disciplinary hearing where testimony of fellow inmate would have been redundant in light of prior stipulation to contents of that testimony, and testimony of fellow inmate’s employee assistant would have been irrelevant to charges. Madison v Goord, 273 A.D.2d 557, 709 N.Y.S.2d 663, 2000 N.Y. App. Div. LEXIS 6672 (N.Y. App. Div. 3d Dep't 2000).

In action by worker who sustained spinal injuries in fall from 40-foot scaffold, evidence did not support award of $100,000 over 32 years for future medical expenses where costs of worker’s required surgery, hospital stay, follow-up medical appointments, and MRIs every other year would amount to $53,400, and testimony that worker would require medication and either

physical therapy or chiropractic services for rest of his life was not supported by evidence of costs; thus, new trial on damages for future medical expenses would be granted unless parties stipulated to reduction to $53,400. Strangio v New York Power Auth., 275 A.D.2d 945, 713 N.Y.S.2d 613, 2000 N.Y. App. Div. LEXIS 9506 (N.Y. App. Div. 4th Dep't 2000).

Jury's award of $1,000,000 for future pain and suffering was unreasonable, and new trial on that issue would be ordered unless plaintiff stipulated to reduction to $500,000, where (1) 19-year-old plaintiff stepped into manhole, tearing posterior cruciate ligament in his knee and requiring surgery, (2) hardware inserted in knee in 1990 was removed in 1991, and (3) he continued to experience swelling and pain in knee and to walk with limp. Mujica v State Univ. Constr. Fund, 275 A.D.2d 976, 713 N.Y.S.2d 710, 2000 N.Y. App. Div. LEXIS 9776 (N.Y. App. Div. 4th Dep't 2000).

Award of $50,000 for past pain and suffering was inadequate, and new trial on that issue would be ordered unless parties stipulated to increase to $400,000, where plaintiff, who was hit by lowered garage door, suffered herniated disc that caused pain and loss of mobility and required surgery, physical therapy, and use of pain medication, muscle relaxants, neck brace, walker, and cane, and plaintiff was disabled from his employment as correction officer and suffered from depression and posttraumatic stress disorder. Smith v Monro Muffler Brake, Inc., 275 A.D.2d 1028, 713 N.Y.S.2d 581, 2000 N.Y. App. Div. LEXIS 9630 (N.Y. App. Div. 4th Dep't 2000), app. denied, 96 N.Y.2d 710, 726 N.Y.S.2d 373, 750 N.E.2d 75, 2001 N.Y. LEXIS 949 (N.Y. 2001).

Court properly set aside jury's findings that plaintiff did not suffer any pain and suffering as result of accident, and court properly granted new trial unless defendant stipulated to $300,000 for past, and $120,000 for future, pain and suffering, where (1) jury, by awarding past and future medical expenses and earnings, necessarily rejected view of defendant's expert that plaintiff's knee injury was preexisting, (2) plaintiff suffered tear in posterior cruciate ligament and underwent arthroscopic surgery and several months of physical therapy, (3) his knee progressively worsened and was subject to further buckling, (4) he was 33 years old at time of accident, and (5) he was no longer able to participate in strenuous sports without pain. Myers v

S. Schaffer Grocery Corp., 281 A.D.2d 156, 721 N.Y.S.2d 347, 2001 N.Y. App. Div. LEXIS 1908 (N.Y. App. Div. 1st Dep't 2001).

In action under CLS Labor §§ 240(1) and 241(6) by boiler repair worker who fell into 3-foot deep pit of scalding water, jury's award to worker's wife of $300,000 for past loss of services and $200,000 for future loss of services was excessive, and new trial on those issues would be ordered unless plaintiffs stipulated to decrease to $200,000 and $100,000 for wife's past and future loss of services, where worker, who was 59 years old at time of fall, sustained second and third degree burns to his legs and feet, was hospitalized for 28 days, and underwent excruciatingly painful debridement and skin grafting procedures resulting in permanent scarring to his legs and feet. Parris v Shared Equities Co., 281 A.D.2d 174, 721 N.Y.S.2d 634, 2001 N.Y. App. Div. LEXIS 2205 (N.Y. App. Div. 1st Dep't 2001).

In personal injury action arising from motor vehicle collision, stipulation of settlement providing that plaintiff would receive "anything the jury comes back with" between minimum of $150,000 and maximum of $900,000 was properly interpreted to mean that, on jury's award to plaintiff of preapportionment damages of $225,000 and apportionment of fault 75 percent against plaintiff and 25 percent against defendants, plaintiff was entitled to agreed minimum of $150,000, not $225,000, where plaintiff's alleged fault for accident was substantial component of defense and essential component of verdict, and stipulation contained no language indicating that defendants were waiving issue of comparative negligence. Batista v Elite Ambulette Serv., 281 A.D.2d 196, 721 N.Y.S.2d 355, 2001 N.Y. App. Div. LEXIS 2216 (N.Y. App. Div. 1st Dep't), app. denied, 96 N.Y.2d 721, 733 N.Y.S.2d 373, 759 N.E.2d 372, 2001 N.Y. LEXIS 3110 (N.Y. 2001).

In former tenant's action against former landlord for breach of stipulated settlement agreement, third-party defendant new landlords' counterclaim against former landlord for fraudulent concealment of stipulation with former tenant at time of sale of building would be dismissed where contract of sale did not assign to new landlords liability for stipulation, which was mere personal obligation that ceased as soon as building was sold, and thus concealment of stipulation could not have been damaging to new landlords. Dunham v Weissman, 281 A.D.2d

220, 722 N.Y.S.2d 10, 2001 N.Y. App. Div. LEXIS 2451 (N.Y. App. Div. 1st Dep't), app. denied, 96 N.Y.2d 851, 729 N.Y.S.2d 665, 754 N.E.2d 768, 2001 N.Y. LEXIS 1479 (N.Y. 2001).

In former tenant's action against former landlord for breach of stipulated settlement agreement, third-party defendant new landlords had no sustainable claim against former landlord for indemnification for costs of third-party litigation where disputed paragraph of contract for sale of building was limited to tort situations and thus did not provide basis for indemnification for cost of litigation engendered by former tenant's breach of contract claim. Dunham v Weissman, 281 A.D.2d 220, 722 N.Y.S.2d 10, 2001 N.Y. App. Div. LEXIS 2451 (N.Y. App. Div. 1st Dep't), app. denied, 96 N.Y.2d 851, 729 N.Y.S.2d 665, 754 N.E.2d 768, 2001 N.Y. LEXIS 1479 (N.Y. 2001).

Court properly refused to charge jury that injured plaintiff, who allegedly suffered from amnesia as result of subject accident, was subject to lesser burden of proof in establishing, inter alia, that defendant was negligent where (1) before start of trial, parties' counsel agreed that jury would not be given that instruction, and (2) no medical evidence was adduced to prove that plaintiff had amnesia or that it was result of accident. McGuire v Laier, 281 A.D.2d 401, 721 N.Y.S.2d 552, 2001 N.Y. App. Div. LEXIS 2091 (N.Y. App. Div. 2d Dep't 2001).

In action by partners for breach of purchase agreement and wrongful takeover of particular partnership office, plaintiffs were entitled to amend their complaint to assert cause of action for accounting, even though they initially asserted that defendant was employee rather than partner but later stipulated that he was partner, where (1) essential operating facts—existence of parties' purchase agreement and its alleged breach—were all set forth in initial complaint, in response to which defendant answered and asserted counterclaim for accounting, and (2) because defendant knew of pertinent factual allegations from outset, plaintiffs' delay in seeking amendment did not substantially prejudice defendant by hindering his case preparation. Morris v Crawford, 281 A.D.2d 805, 722 N.Y.S.2d 296, 2001 N.Y. App. Div. LEXIS 2511 (N.Y. App. Div. 3d Dep't 2001).

Although stipulation of liability under CLS Ins § 5102(d) was not included in record on appeal, record was sufficient to prove that defendants conceded issue of "serious injury" as part of

stipulation of liability, and thus court properly refused to charge jury that plaintiffs had burden of proving that they sustained serious injuries under § 5102(d), where (1) at start of trial, defendants submitted proposed verdict sheet addressing only issues concerning amount of damages, (2) court in its preliminary charge, and counsel for both plaintiffs and defendants in their opening statements to jury, limited subject of trial to amount of damages, and (3) defendants' failure to object when court and plaintiffs limited issue to one of money only was tacit acceptance of direction that trial would take. Simone v Niagara Falls, 281 A.D.2d 923, 721 N.Y.S.2d 892, 2001 N.Y. App. Div. LEXIS 2820 (N.Y. App. Div. 4th Dep't 2001).

Where terms of stipulation are ambiguous, court may consider extrinsic evidence of parties' intent. Laing v Laing, 282 A.D.2d 655, 723 N.Y.S.2d 710, 2001 N.Y. App. Div. LEXIS 3994 (N.Y. App. Div. 2d Dep't 2001).

Award of $2 million, as reduced by trial court from jury's award of $4 million, was not excessive compensation for plaintiff's past and future pain and suffering where plaintiff sustained serious injuries to his hip, back, and spine in construction-site accident, and he faced lifetime of constant pain and severe physical limitations only partially relievable by future medical procedures, such as spinal fusion surgery and hip replacement; thus, court properly ordered new trial unless plaintiff stipulated to reduction to $2 million. Kirby v Turner Constr. Co., 286 A.D.2d 618, 730 N.Y.S.2d 314, 2001 N.Y. App. Div. LEXIS 8571 (N.Y. App. Div. 1st Dep't 2001).

Judgment for plaintiff would be modified by vacating award of damages for future medical expenses, and new trial on sole issue of such damages would be granted unless plaintiff stipulated to reduce verdict for future medical expenses to $1,733,439, where expert economist testified that cost of plaintiff's future medical care was $1,733,439, and record did not support award of any greater amount. Hersh v Przydatek, 286 A.D.2d 984, 730 N.Y.S.2d 916, 2001 N.Y. App. Div. LEXIS 8893 (N.Y. App. Div. 4th Dep't 2001).

Trial court properly adhered to its prior order dismissing a decedent's personal injury complaint pursuant to N.Y. C.P.L.R. 1021 for failure to timely substitute a representative, and properly denied the decedent's representative's motion to be substituted as the plaintiff because the

decedent's representative did not demonstrate a reasonable excuse for failing to seek substitution "within a reasonable time" after the death of his decedent; the decedent died five days after the commencement of the action, and the decedent's representative failed to demonstrate that the decedent authorized an alleged settlement, which was never reduced to writing, and was reached more than a year after the decedent died. Thompson v Clearway Automotive, Inc., 50 A.D.3d 1014, 858 N.Y.S.2d 191, 2008 N.Y. App. Div. LEXIS 3571 (N.Y. App. Div. 2d Dep't 2008).

An oral agreement by a doctor to accept service of summons by ordinary mail to his office was not a stipulation subject to the requirements of CPLR 2104 so that it would have to be reduced to writing, since neither the CPLR in general nor § 2104 in particular have application to the conduct of prospective litigants before a proceeding commences. Cohen v Coleman, 110 Misc. 2d 419, 442 N.Y.S.2d 834, 1981 N.Y. Misc. LEXIS 3102 (N.Y. Sup. Ct. 1981).

Stipulation wherein parties agreed that plaintiff's federal action (removed from New Jersey court by defendant) would be dismissed "without prejudice as to actions pending in any jurisdiction outside the State of New Jersey," did not preclude or equitably estop defendant from raising defense of statute of limitations in New York action since stipulation contained no language barring assertion of valid affirmative defenses and there was no evidence that any conduct of defendant misled plaintiff into executing stipulation. Allen v Handszer, 148 Misc. 2d 334, 560 N.Y.S.2d 593, 1990 N.Y. Misc. LEXIS 451 (N.Y. Sup. Ct. 1990).

Trial court erred in granting plaintiffs' motion to enforce a purported settlement in a medical malpractice action; the purported settlement was made definite and complete in open court, nor was there a definite agreement in writing as required by N.Y. C.P.L.R. 2014, and the death of a decedent before the settlement was finalized altered the status quo and impacted upon the future damages payable under the proposed structured settlement. Bonnette v Long Island College Hosp., 307 A.D.2d 902, 762 N.Y.S.2d 910, 2003 N.Y. App. Div. LEXIS 8553 (N.Y. App. Div. 2d Dep't 2003), aff'd, 3 N.Y.3d 281, 785 N.Y.S.2d 738, 819 N.E.2d 206, 2004 N.Y. LEXIS 2443 (N.Y. 2004).

**2. Applicability to particular proceedings**

In actions to foreclose a mortgage and for injunctive relief, dismissal of plaintiff's second foreclosure action on the ground that there was a prior existing foreclosure action, and the enforcement of a stipulation calling for negotiation of all "outstanding issues" between the parties, was in error, where the purpose of the stipulation was to effect the negotiation of a solution to the landlord-tenant dispute central to the first foreclosure action, and there was no basis in the record for a finding that, in entering that stipulation, plaintiff agreed to submit any other claims of mortgage default to negotiation without the ability to later seek foreclosure. New York Bank for Sav. v Howard Cortlandt St., Inc., 106 A.D.2d 496, 482 N.Y.S.2d 836, 1984 N.Y. App. Div. LEXIS 21527 (N.Y. App. Div. 2d Dep't 1984).

Civil service applicants were not entitled to order and judgment directing city personnel director to permanently appoint them to position of police sergeant with retroactive seniority where they and personnel department had stipulated in federal civil rights action that applicants would accrue seniority from later date. Childs v Levitt, 151 A.D.2d 318, 543 N.Y.S.2d 51, 1989 N.Y. App. Div. LEXIS 7902 (N.Y. App. Div. 1st Dep't), app. denied, 74 N.Y.2d 613, 547 N.Y.S.2d 847, 547 N.E.2d 102, 1989 N.Y. LEXIS 3029 (N.Y. 1989).

Stipulation of settlement entered into by parties in prior action did not bar action for damages and injunctive relief based on flooding which occurred after stipulation was entered into since stipulation expressly acknowledged that it was "without prejudice to any legal rights [the plaintiffs] may have as a result of subsequent damages as the result of flooding." Adelstein v New York, 188 A.D.2d 442, 591 N.Y.S.2d 186, 1992 N.Y. App. Div. LEXIS 13567 (N.Y. App. Div. 2d Dep't 1992).

Trade school, which originally had been enjoined from certain allegedly improper business practices under CLS Exec § 63(12), but later entered into open-court stipulation modifying terms of temporary restraining order in exchange for its posting of $300,000 bond, was properly denied reduction of bond to $50,000, which was sought on ground of mutual mistake regarding

necessity of its providing full collateral for bond, where mitigation of some onerous terms of order was based in part on its agreement to post $300,000 bond, and terms of stipulation did not suggest that cost of such bond to school was significant consideration. People v Court Reporting Inst., 240 A.D.2d 413, 658 N.Y.S.2d 399, 1997 N.Y. App. Div. LEXIS 5933 (N.Y. App. Div. 2d Dep't 1997).

In proceeding under CLS Men Hyg Art 81 to have respondent declared incapacitated person, in which matter was resolved by stipulation of settlement before Supreme Court, amount of counsel fees ($32,264.67, including disbursements) awarded to respondent's attorneys was not abuse of discretion where court made reasonable assessment after considering time expended by counsel, nature of proceedings, 2 court appearances required of counsel, and absence of evidentiary hearing or protracted discovery. In re Elmer Q., 250 A.D.2d 256, 681 N.Y.S.2d 637, 1998 N.Y. App. Div. LEXIS 13312 (N.Y. App. Div. 3d Dep't 1998).

Conservatee failed to show existence of any triable issues of fact regarding her claims against conservator for breach of fiduciary duty and breach of parties' stipulation of settlement where record clearly revealed that conservator did not act improperly in failing to rent conservatee's cooperative apartment and did not pay excessive salaries to conservatee's hired companions. In re Winger, 251 A.D.2d 56, 672 N.Y.S.2d 724, 1998 N.Y. App. Div. LEXIS 6432 (N.Y. App. Div. 1st Dep't 1998).

In guardian's proceeding under CLS EPTL § 7-1.12 to establish supplemental needs trust for paraplegic, county social services department's lien on proceeds of any future recovery against state by paraplegic was properly ordered to be paid from full amount of proceeds of settlement of paraplegic's personal injury claims against state, rather than from smaller sum expended by county for paraplegic's Medicaid costs, where stipulation of settlement provided only that Office of Mental Health waived its right to collect amount owed to it for certain unpaid medical bills, there was no blanket waiver, and Medicaid lien was for amounts other than those waived in stipulation. Towne v County of Saratoga, 255 A.D.2d 650, 680 N.Y.S.2d 129, 1998 N.Y. App. Div. LEXIS 11664 (N.Y. App. Div. 3d Dep't 1998).

In a personal injury action, a high-low agreement between the parties on the issue of damages was a settlement subject to N.Y. C.P.L.R. 5003-a that was triggered when the jury returned a verdict above the agreement's upper limit because (1) courts had treated high-low agreements as settlements, both incidentally or by reference; (2) consistent with the concept of settlement, the trial court stated that upon the settlement, there would be no appeals or post-trial motions without objection from the parties, and the terms of the high-low agreement were expressed on the record by counsel in open court and were therefore valid and enforceable under N.Y. C.P.L.R. 2104; and (3) the high-low agreement was consistent with courts' understanding of what settlements were designed to accomplish - to settle disputes such as damages. Cunha v Shapiro, 42 A.D.3d 95, 837 N.Y.S.2d 160, 2007 N.Y. App. Div. LEXIS 5614 (N.Y. App. Div. 2d Dep't), app. dismissed, 9 N.Y.3d 885, 842 N.Y.S.2d 764, 874 N.E.2d 728, 2007 N.Y. LEXIS 2352 (N.Y. 2007).

Stipulation whereby petitioner agreed not to commence any other action or proceeding "based on the grounds alleged in the petition" did not bar petitioner, low bidder for city contract, from bringing second proceeding to prohibit city board of responsibility from conducting hearing into whether petitioner was "responsible" bidder, since petitioner in prior proceeding had sought to prohibit board from conducting hearing based on contract that petitioner executed after city accepted its original bid, whereas basis for instant proceeding concerned petitioner's allegation that board had no authority to conduct hearing after petitioner withdrew its bid, which occurred subsequent to discontinuance of prior proceeding. Mars Associates, Inc. v Palmer, 140 Misc. 2d 1005, 531 N.Y.S.2d 1017, 1988 N.Y. Misc. LEXIS 528 (N.Y. Sup. Ct. 1988).

Court would refuse to approve terms of settlement of tax certiorari proceedings on ground that settlement violated public policy requiring assessor to "use his own judgment" each year to set assessments, where settlement provided for reduced assessments for next 5 years, gave taxpayers right to seek specific performance of settlement, and stipulated that taxpayers' properties had been overassessed in prior 5 years. Snowpine Village Condominium Bd. of

Managers v Great Valley, 144 Misc. 2d 1049, 545 N.Y.S.2d 1004, 1989 N.Y. Misc. LEXIS 560 (N.Y. Sup. Ct. 1989).

**3. —Administrative proceedings**

Given the sensitive nature of the work of the police department and the importance of maintaining both discipline and morale within the city's chosen mode of organization for its police force, policy impediments preclude enforcement of plea arrangements negotiated by a trial commissioner during a police department disciplinary proceeding, absent express prior delegation of that authority by the police commissioner or subsequent express approval of the particular bargain made in an individual case; CPLR 2104, which makes an oral stipulation in open court binding on the parties to it, is not applicable in an administrative proceeding, and the relevant portions of the Administrative Code of the City of New York appear to leave ultimate discipline to the commissioner and do not speak to the extent to which a trial commissioner can make an agreement binding upon the commissioner. Silverman v McGuire, 51 N.Y.2d 228, 433 N.Y.S.2d 1002, 414 N.E.2d 383, 1980 N.Y. LEXIS 2702 (N.Y. 1980).

CPLR § 2104, which made an oral stipulation in open court binding on the parties to the stipulation, did not render a plea bargain negotiated by the trial commissioner with a police officer during the officer's departmental disciplinary hearing binding upon the police commissioner since police department disciplinary hearings did not come within the meaning of the term "open court." Silverman v McGuire, 51 N.Y.2d 228, 433 N.Y.S.2d 1002, 414 N.E.2d 383, 1980 N.Y. LEXIS 2702 (N.Y. 1980).

School district should have been granted summary judgment dismissing teacher's causes of action for, inter alia, breach of contract and infliction of mental and emotional distress where stipulation settling grievance as to teacher's transfer was pronounced by parties' attorneys while parties were present before arbitrator and was immediately transcribed by stenographer, and teacher specifically consented on record to terms thereof, including transfer in question and release of district "from any claims that she may have as a result of said transfer." Kleinmann v

Bach, 239 A.D.2d 861, 657 N.Y.S.2d 525, 1997 N.Y. App. Div. LEXIS 5540 (N.Y. App. Div. 3d Dep't 1997).

Decision of Administrative Review Board for Professional Medical Conduct suspending doctor's license to practice medicine in New York for one year was not arbitrary, affected by error of law, or abuse of discretion where doctor waived adjudication of merits of complaint by entering into stipulation of settlement, which raised inference that allegations against him had some validity. Hatfield v Department of Health, 245 A.D.2d 703, 665 N.Y.S.2d 755, 1997 N.Y. App. Div. LEXIS 12978 (N.Y. App. Div. 3d Dep't 1997).

**4. —Criminal proceedings**

Prosecutor may not be forced to accept defendant's offer to stipulate to element of charged crime at risk of precluding proof of that element since (1) stipulation does not remove element from fact finder's consideration and does not lessen prosecution's burden of proof, (2) prosecution is entitled to present picture of events relied on, and such stipulation could rob evidence of much of its fair and legitimate weight, and (3) involuntary imposition of stipulations on prosecutor would improperly interfere with prosecutor's trial strategy. People v Hills, 140 A.D.2d 71, 532 N.Y.S.2d 269, 1988 N.Y. App. Div. LEXIS 8931 (N.Y. App. Div. 2d Dep't), app. denied, 73 N.Y.2d 855, 537 N.Y.S.2d 502, 534 N.E.2d 340, 1988 N.Y. LEXIS 6283 (N.Y. 1988).

**5. —Domestic relations proceedings**

Wife's action to rescind amended stipulation of settlement in divorce action, on ground that it was induced by economic duress and fraud, was properly dismissed where she was represented by counsel at all relevant times, she understood agreement, it was read in her presence before it was executed, and she approved all changes and corrections; conclusory allegation that husband fraudulently misrepresented his financial status to procure reduction of his child support and maintenance obligations was insufficient to defeat summary judgment

motion. Carosella v Carosella, 129 A.D.2d 547, 514 N.Y.S.2d 42, 1987 N.Y. App. Div. LEXIS 45218 (N.Y. App. Div. 2d Dep't 1987).

Party seeking to set aside stipulation of settlement entered into in open court in divorce action has burden of proof to show good cause sufficient to set aside settlement. Golfinopoulos v Golfinopoulos, 144 A.D.2d 537, 534 N.Y.S.2d 407, 1988 N.Y. App. Div. LEXIS 11910 (N.Y. App. Div. 2d Dep't 1988), app. dismissed, 74 N.Y.2d 793, 545 N.Y.S.2d 108, 543 N.E.2d 751, 1989 N.Y. LEXIS 918 (N.Y. 1989).

In matrimonial matters, CLS Dom Rel § 236(B)(3) applies only to agreements entered into outside context of pending judicial proceedings, such as antenuptial agreements, and thus statute does not restrict ability of parties to terminate litigation on mutually agreeable terms, especially where court has exercised its oversight and so ordered stipulation; instead, CLS CPLR § 2104 governs agreements between parties to lawsuits or their attorneys in regard to “any matter” in suit. Sanders v Copley, 151 A.D.2d 350, 543 N.Y.S.2d 67, 1989 N.Y. App. Div. LEXIS 8009 (N.Y. App. Div. 1st Dep't 1989).

Court properly determined that husband was obligated to pay real estate transfer taxes pursuant to stipulation of settlement acknowledged in judgment of divorce, but not incorporated or merged into judgment, where stipulation required him to convey to wife all right and title in marital residence by bargain and sale deed with covenant “duly executed and acknowledged and recorded at [husband’s] expense”; deed could not be recorded without payment of transfer taxes, and construction of “expense” to exclude transfer taxes would therefore have allowed husband to defeat transfer intended by stipulation. Haskin v Mendler, 184 A.D.2d 372, 584 N.Y.S.2d 851, 1992 N.Y. App. Div. LEXIS 8130 (N.Y. App. Div. 1st Dep't 1992).

Appellate Division could not grant husband’s application for specific enforcement of stipulation of settlement in divorce action, even though terms of settlement were clearly defined in record, where some marital assets had not been valued; matter would be remitted to Supreme Court for further computation of value of assets. Morris v Morris, 205 A.D.2d 914, 613 N.Y.S.2d 465, 1994 N.Y. App. Div. LEXIS 6281 (N.Y. App. Div. 3d Dep't 1994).

Settlement agreement entered into by guardian ad litem on behalf of decedent's grandchildren, which was on record before Surrogate, was enforceable and barred grandchildren's objections to probating of decedent's will, where guardian ad litem recommended settlement and fully explained reasons for his recommendation in comprehensive report submitted to Surrogate. In re Cagney, 232 A.D.2d 481, 648 N.Y.S.2d 644, 1996 N.Y. App. Div. LEXIS 10169 (N.Y. App. Div. 2d Dep't 1996), app. denied, 89 N.Y.2d 807, 655 N.Y.S.2d 887, 678 N.E.2d 500, 1997 N.Y. LEXIS 112 (N.Y. 1997).

Stipulation in divorce case will be set aside only on demonstration of good cause such as mistake, fraud, duress or overreaching. Sippel v Sippel, 241 A.D.2d 929, 661 N.Y.S.2d 366, 1997 N.Y. App. Div. LEXIS 7865 (N.Y. App. Div. 4th Dep't 1997).

Party's conclusory statements that stipulation in divorce case was not fair and reasonable at time of its making, or is unconscionable, do not provide basis to set it aside. Sippel v Sippel, 241 A.D.2d 929, 661 N.Y.S.2d 366, 1997 N.Y. App. Div. LEXIS 7865 (N.Y. App. Div. 4th Dep't 1997).

Stipulations in marital actions are more closely scrutinized than other contracts, and thus question of whether stipulation is fair and reasonable or unconscionable is issue on which court may take proof; consequently, summary disposition is inappropriate. Sippel v Sippel, 241 A.D.2d 929, 661 N.Y.S.2d 366, 1997 N.Y. App. Div. LEXIS 7865 (N.Y. App. Div. 4th Dep't 1997).

New hearing was warranted on county child support enforcement unit's proposed adjusted child support order where it was unclear whether stipulation between parents concerning child support was incorporated in original order and, if so, whether it was valid and enforceable "opt-out" agreement and what effect, if any, it had on proceeding. Butler v Torrellas, 251 A.D.2d 326, 674 N.Y.S.2d 70, 1998 N.Y. App. Div. LEXIS 6290 (N.Y. App. Div. 2d Dep't 1998).

Mother's retention of physical custody of divorced parties' 2 minor sons would not be conditioned on her continued residence in Suffolk County where such condition would interfere with parties' stipulation of settlement requiring parties to renegotiate custody and visitation terms

in event of relocation. Mascola v Mascola, 251 A.D.2d 414, 674 N.Y.S.2d 393, 1998 N.Y. App. Div. LEXIS 6580 (N.Y. App. Div. 2d Dep't 1998).

Divorced wife was not entitled to downward modification of her child support obligations, even though she had assumed her share of child's college expenses, where parties' open-court stipulation, which was incorporated but not merged into divorce judgment, expressly required wife to assume those expenses and did not call for reduction in her child support obligations as consequence. Grobman v Grobman, 251 A.D.2d 544, 674 N.Y.S.2d 732, 1998 N.Y. App. Div. LEXIS 7518 (N.Y. App. Div. 2d Dep't 1998).

In support proceeding under CLS Family Ct Act Art 4, father was not obligated to reimburse mother for 60 percent of total amount paid for children's attendance at 2 nursery schools, even though father implicitly consented to children's attendance at first school, where mother unilaterally removed them from first school without consultation and enrolled them in second school, and parties had stipulated that they agreed to "consult and agree with each other as to the...nursery school . . . the children will attend." Citera v D'Amico, 251 A.D.2d 662, 676 N.Y.S.2d 602, 1998 N.Y. App. Div. LEXIS 7883 (N.Y. App. Div. 2d Dep't 1998).

Appellate Division would not address father's challenge to part of Family Court's order adjudicating children as abused or neglected where father stipulated to that part of order and thus was not aggrieved by it. In re Tessie W., 251 A.D.2d 1030, 672 N.Y.S.2d 1024, 1998 N.Y. App. Div. LEXIS 7071 (N.Y. App. Div. 4th Dep't 1998).

Former wife was collaterally estopped from maintaining paternity suit against former husband where, in their divorce proceeding, husband denied in his verified answer that he was father of her child, parties entered into stipulation of settlement in which wife withdrew her allegation of paternity, stipulation was incorporated in divorce decree, and thus paternity issue was resolved against wife in divorce action, in which she had full and fair opportunity to contest it. Timothy J.T. v Karen J.H., 251 A.D.2d 1036, 673 N.Y.S.2d 989, 1998 N.Y. App. Div. LEXIS 7095 (N.Y. App. Div. 4th Dep't), app. dismissed, 92 N.Y.2d 891, 678 N.Y.S.2d 590, 700 N.E.2d 1227, 1998 N.Y. LEXIS 2903 (N.Y. 1998).

Family Court, by restricting proof on issue of custody to events after parties' 1994 stipulation awarding custody to mother, did not rely unduly on that agreement where bench decision of court did not mention that agreement or suggest that it was controlling factor in decision. Lamirande v Lamirande, 251 A.D.2d 1071, 674 N.Y.S.2d 224, 1998 N.Y. App. Div. LEXIS 7173 (N.Y. App. Div. 4th Dep't), app. denied, 92 N.Y.2d 809, 678 N.Y.S.2d 595, 700 N.E.2d 1231, 1998 N.Y. LEXIS 2863 (N.Y. 1998).

Former husband's motion to vacate judgment of divorce on ground of fraud was properly denied where, on former wife's prior application for equitable distribution, he explicitly told court that he did not wish to challenge validity of divorce judgment, court relied on that statement in deciding that wife was entitled to equitable distribution, and thus validity of divorce judgment already had been decided and was law of case; in any event, husband had full opportunity to challenge judgment, explicitly declined that opportunity, and thus was equitably estopped from taking inconsistent position at late juncture. Dominguez v Dominguez, 255 A.D.2d 121, 679 N.Y.S.2d 377, 1998 N.Y. App. Div. LEXIS 11629 (N.Y. App. Div. 1st Dep't 1998).

Wife in divorce action was entitled to prejudgment interest on only those distributive awards not covered by parties' pretrial stipulation, which was controlling as to marital property covered by it. Walker v Walker, 255 A.D.2d 375, 680 N.Y.S.2d 114, 1998 N.Y. App. Div. LEXIS 11828 (N.Y. App. Div. 2d Dep't 1998).

For purposes of child support determination in divorce action, income earned by father during summer as teacher was "income" under CLS Dom Rel § 240(1-b)(b)(5) and parties' written stipulation of settlement; parol evidence rule prohibited use of evidence of any alleged oral agreement to exclude summer income from Child Support Standards Act calculations. Cohen-Davidson v Davidson, 255 A.D.2d 414, 680 N.Y.S.2d 564, 1998 N.Y. App. Div. LEXIS 11996 (N.Y. App. Div. 2d Dep't 1998).

In divorce action, father was properly required to contribute to summer camp expenses of parties' 2 children where such expenses are child care expenses under CLS Dom Rel § 240(1-b)(c)(4), which is integral part of Child Support Standards Act with which parties, in their written

stipulation of settlement, agreed to comply. Cohen-Davidson v Davidson, 255 A.D.2d 414, 680 N.Y.S.2d 564, 1998 N.Y. App. Div. LEXIS 11996 (N.Y. App. Div. 2d Dep't 1998).

Record refuted wife's claim that there was neither agreement to stipulate to mutual divorces nor meeting of minds on that point where (1) on several occasions, during and after parties' motions to dismiss, counsel for parties reiterated their clients' agreement to stipulate to mutual divorces and urged court to accept stipulation, (2) detailed stipulation was put on record, including agreement to stipulate to mutual divorces subject to receipt and review of verified complaint, and (3) on next day, wife served verified complaint, husband accepted it, and both counsel stated that they were ready to proceed with stipulation thereon. Anostario v Anostario, 255 A.D.2d 777, 680 N.Y.S.2d 279, 1998 N.Y. App. Div. LEXIS 12485 (N.Y. App. Div. 3d Dep't 1998).

Supreme Court was not required to accept parties' stipulations to mutual divorces on ground of constructive abandonment where parties and their counsel were extremely polarized and contentious, and although counsel were fleetingly united in urging court to accept stipulations, they made equally facile transitions in moving to dismiss each other's cause of action. Anostario v Anostario, 255 A.D.2d 777, 680 N.Y.S.2d 279, 1998 N.Y. App. Div. LEXIS 12485 (N.Y. App. Div. 3d Dep't 1998).

Former husband's motion to set aside oral stipulation, on ground that it was not "in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded" in accordance with CLS Dom Rel § 236(B)(3), was properly denied since statute applies only to agreements "made before or during the marriage," and subject stipulation was made under judicial supervision in context of post-marital litigation over financial issues surviving parties' divorce judgment. Hargett v Hargett, 256 A.D.2d 50, 680 N.Y.S.2d 526, 1998 N.Y. App. Div. LEXIS 13038 (N.Y. App. Div. 1st Dep't 1998), app. dismissed, 93 N.Y.2d 919, 691 N.Y.S.2d 383, 713 N.E.2d 418, 1999 N.Y. LEXIS 842 (N.Y. 1999).

Award of spousal support of indefinite duration was not against public policy and would not be set aside where husband stipulated to inclusion of that provision in divorce judgment and failed to show that he was induced by fraud, overreaching, mistake, or duress in agreeing to it.

Newkirk v Chaffin, 263 A.D.2d 634, 692 N.Y.S.2d 818, 1999 N.Y. App. Div. LEXIS 7856 (N.Y. App. Div. 3d Dep't 1999).

Assuming that father's claim—that CLS Dom Rel § 111 applies only to adoption proceedings and thus that Family Court erred in applying § 111 standard in proceeding under CLS Soc Serv § 384-b—involved Family Court's subject matter jurisdiction and thus was not waived by his stipulation to have § 111 issue decided in § 384-b proceeding, Family Court had authority to decide, as threshold issue, whether father's consent to adoption of his child was required under § 111. In re Carrie "GG", 273 A.D.2d 561, 709 N.Y.S.2d 247, 2000 N.Y. App. Div. LEXIS 6677 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 763, 716 N.Y.S.2d 38, 739 N.E.2d 294, 2000 N.Y. LEXIS 2822 (N.Y. 2000).

Under interim criteria set forth in Matter of Raquel Marie X., 76 NY2d 387, father's consent to adoption of his child was not required under CLS Dom Rel § 111, in proceeding under CLS Soc Serv § 384-b, where (1) child was born out of wedlock, (2) father was aware that mother placed child with county social services department on day of birth and that mother surrendered child for adoption within 6 months of birth, (3) father denied paternity in proceeding commenced by mother and paid no medical, nursing, or hospital expenses for child or pregnancy, (4) facts to which father stipulated showed absence of any manifestation of his ability and willingness to assume custody of child, and (5) sole manifestation of his interest in child was his contest of present proceeding by department to free child for adoption. In re Carrie "GG", 273 A.D.2d 561, 709 N.Y.S.2d 247, 2000 N.Y. App. Div. LEXIS 6677 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 763, 716 N.Y.S.2d 38, 739 N.E.2d 294, 2000 N.Y. LEXIS 2822 (N.Y. 2000).

County social services department had no duty to use diligent efforts to encourage father to have meaningful relationship with his child before it could seek to prove, in proceeding under CLS Soc Serv § 384-b, that father's consent to adoption was not required under CLS Dom Rel § 111 where, inter alia, child was born out of wedlock, father was aware that mother placed child with county social services department on day of birth and that mother surrendered child for adoption within 6 months of birth, and facts to which father stipulated showed absence of any

manifestation of his ability and willingness to assume custody of child. In re Carrie "GG", 273 A.D.2d 561, 709 N.Y.S.2d 247, 2000 N.Y. App. Div. LEXIS 6677 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 763, 716 N.Y.S.2d 38, 739 N.E.2d 294, 2000 N.Y. LEXIS 2822 (N.Y. 2000).

Court properly refused to modify judgment to provide child support for parties' oldest child where parties' stipulated during trial of divorce action that oldest child was emancipated. Lo Maglio v Lo Maglio, 273 A.D.2d 823, 709 N.Y.S.2d 762, 2000 N.Y. App. Div. LEXIS 6722 (N.Y. App. Div. 4th Dep't), app. dismissed, 95 N.Y.2d 926, 721 N.Y.S.2d 602, 744 N.E.2d 137, 2000 N.Y. LEXIS 3557 (N.Y. 2000).

Divorced wife was not entitled to upward modification of former husband's maintenance and child support obligations where (1) those obligations had been set by parties' stipulation of settlement, which was incorporated but not merged in divorce judgment, (2) although wife was partially disabled, she was not incapacitated, and she had obtained employment as paralegal, and (3) there was no evidence of extreme hardship. Steinberg v Steinberg, 275 A.D.2d 705, 713 N.Y.S.2d 197, 2000 N.Y. App. Div. LEXIS 9151 (N.Y. App. Div. 2d Dep't 2000).

Divorce judgment would be modified by requiring husband to pay child support of $2,266.66 per month, rather than $2,333, where parties had stipulated that they would follow Child Support Standards Act for first $80,000 of combined parental income and that husband would pay 10 percent of his remaining income up to $160,000, he produced pay stub reflecting income of $152,000 for year at issue, and on that basis he was required to pay $27,200 per year, amounting to $2,266.66 per month. Hohlweck v Hohlweck, 275 A.D.2d 762, 714 N.Y.S.2d 215, 2000 N.Y. App. Div. LEXIS 9400 (N.Y. App. Div. 2d Dep't 2000).

In support proceeding under CLS Family Ct Act Art 4, appeal from order setting, on stipulation of parties, amount of arrears due and owing would be dismissed where no appeal lies from order entered on consent of appealing party. Benerofe v Wechsler, 281 A.D.2d 476, 721 N.Y.S.2d 783, 2001 N.Y. App. Div. LEXIS 2388 (N.Y. App. Div. 2d Dep't 2001).

In support proceeding under CLS Family Ct Act Art 4, Family Court properly denied appellant's objections to order setting, on stipulation of parties, amount of arrears due and owing where there was no basis on which appellant could file objections to order entered on consent of parties. Benerofe v Wechsler, 281 A.D.2d 476, 721 N.Y.S.2d 783, 2001 N.Y. App. Div. LEXIS 2388 (N.Y. App. Div. 2d Dep't 2001).

Custody of parties' children could not be changed from father to mother without finding that father was unfit parent, even though original custody orders placing children with father were styled "temporary," where children were in father's custody from 1992 to 1995 under those orders, and children continued to be in father's sole custody since 1995 under divorce judgment incorporating parties' stipulation. Gary D. B. v Elizabeth C. B., 281 A.D.2d 969, 722 N.Y.S.2d 323, 2001 N.Y. App. Div. LEXIS 2721 (N.Y. App. Div. 4th Dep't 2001).

Imprisonment of father for willful violation of Florida child support order, under Uniform Interstate Family Support Act, did not violate heightened due process requirements associated with remedy of incarceration for violation of civil order, even though CLS Family Ct Act § 580-316(a) provides that physical presence of petitioner is not required for enforcement of support order, and CLS Family Ct Act § 580-316(f) allows party or witness residing in another state to testify by telephone, where mother's testimony was not needed in present proceeding, parties had stipulated that there was willful violation of support order, and although court was authorized by CLS Family Ct Act § 454(3)(a) to commit father to jail, it was also authorized by CLS Family Ct Act § 455(5) to suspend commitment on competent proof that father was unable to comply with order. Child Support Enforcement Unit ex rel. Judith S. v John M., 283 A.D.2d 40, 724 N.Y.S.2d 235, 2001 N.Y. App. Div. LEXIS 4567 (N.Y. App. Div. 4th Dep't 2001).

In divorce action, joint custodial arrangement, with primary physical custody in wife, was in best interests of parties' 3 children where (1) arrangement was in accordance with parties' stipulation, (2) arrangement allowed parents to share in responsibility for making decisions concerning children's welfare, and (3) awarding sole custody to husband was not proper method of enforcing relocation provision of stipulation; thus, judgment would be modified by deleting

provision awarding sole custody to husband until wife complied with relocation provision and by adding provision requiring wife to comply with relocation provision within 6 months. Poli v Poli, 286 A.D.2d 720, 730 N.Y.S.2d 168, 2001 N.Y. App. Div. LEXIS 8557 (N.Y. App. Div. 2d Dep't 2001).

In divorce action, wife was not entitled to have cost of private school tuition, estimated at $5,400 per month, included in husband’s child support obligation where parties had stipulated that wife would relocate and that, on her relocation, parties’ 3 children would be enrolled in public school. Poli v Poli, 286 A.D.2d 720, 730 N.Y.S.2d 168, 2001 N.Y. App. Div. LEXIS 8557 (N.Y. App. Div. 2d Dep't 2001).

In divorce action, provision of judgment directing husband to pay child support until children reached age of 22 if they were still attending college would be modified to terminate husband’s child support obligation when children reached age of 21 unless they were sooner emancipated where (1) parent is not liable for support or college expenses of child who has reached age of 21 unless there is express agreement to pay such support, and (2) parties’ stipulation did not so provide. Poli v Poli, 286 A.D.2d 720, 730 N.Y.S.2d 168, 2001 N.Y. App. Div. LEXIS 8557 (N.Y. App. Div. 2d Dep't 2001).

In a dissolution matter, the trial court properly vacated the parties' 2011 on-the-record agreement because the agreement was too incomplete and indefinite to be enforceable, lacked consideration, and was merely a non-binding agreement to agree; the parties disagreed whether the proposal included a waiver of maintenance and they did not finalize the details of the transfer of the 1999 Trust. Cohen v Cohen, 120 A.D.3d 1060, 993 N.Y.S.2d 6, 2014 N.Y. App. Div. LEXIS 6074 (N.Y. App. Div. 1st Dep't), app. denied, 24 N.Y.3d 909, 998 N.Y.S.2d 310, 23 N.E.3d 153, 2014 N.Y. LEXIS 3208 (N.Y. 2014).

Husband's claim that he did not enter into a valid stipulation in the parties' divorce action lacked merit because it was placed on the record, it arose in the context of the court proceedings, and the husband was free to enter into it without counsel because he had knowingly elected to

proceed pro se. Fulginiti v Fulginiti, 127 A.D.3d 1382, 4 N.Y.S.3d 780, 2015 N.Y. App. Div. LEXIS 2978 (N.Y. App. Div. 3d Dep't 2015).

Referee had authority to render the custody determination because the child services agency was not a party to either of the two petitions that were the subject of the stipulation of reference and the father, who along with the other parties to those petitions stipulated to the reference in the manner prescribed by this statute, consented to the scope of the stipulation. Matter of Miner v Torres, 179 A.D.3d 1490, 118 N.Y.S.3d 844, 2020 N.Y. App. Div. LEXIS 716 (N.Y. App. Div. 4th Dep't), app. dismissed, 179 A.D.3d 1492, 114 N.Y.S.3d 907, 2020 N.Y. App. Div. LEXIS 777 (N.Y. App. Div. 4th Dep't 2020).

In a matrimonial action a judgment of divorce would be entered upon the settlement agreement of the parties, which was made in open court and stipulated on the record, notwithstanding defendant husband’s refusal to acknowledge the minutes of the proceeding, where the Legislature did not intend to abrogate the provision of CPLR § 2104 that stipulations dictated into the record in the presence of the parties and their attorneys be given the same force and effect as written agreements with respect to matrimonial actions settled in open court pursuant to Dom Rel Law § 236(B)(3), and where defendant’s belief that a provision of the settlement had been violated by plaintiff would, if established, constitute a violation of the parties’ enforceable, contractual agreement for which defendant had a remedy at law. Puca v Puca, 115 Misc. 2d 457, 454 N.Y.S.2d 271, 1982 N.Y. Misc. LEXIS 3708 (N.Y. Sup. Ct. 1982).

**6. — —Property settlement**

In divorce action, court erroneously concluded that parties had stipulated to equitable distribution arrangement where so-called stipulation, purportedly made in course of colloquy between court and husband, failed to comply with “opting-out” provisions of CLS Dom Rel § 236, was not made between counsel in open court, and was not voluntarily and intelligently consented to by husband. Lynch v Lynch, 122 A.D.2d 589, 505 N.Y.S.2d 741, 1986 N.Y. App. Div. LEXIS 59867 (N.Y. App. Div. 4th Dep't 1986).

Divorce court acted in contravention of parties' on-the-record stipulation by requiring acceptance of offer to purchase marital residence made after 60-day stipulation period had expired; premises should be sold for best possible price received within confines of 60-day measuring period. Markson v Markson, 139 A.D.2d 705, 527 N.Y.S.2d 461, 1988 N.Y. App. Div. LEXIS 4427 (N.Y. App. Div. 2d Dep't 1988).

Property settlement in divorce action, made in conformance with CLS CPLR § 2104, is enforceable and need not comply with formalities "required to entitle a deed to be recorded" as provided in CLS Dom Rel § 236(B)(3). Sanders v Copley, 151 A.D.2d 350, 543 N.Y.S.2d 67, 1989 N.Y. App. Div. LEXIS 8009 (N.Y. App. Div. 1st Dep't 1989).

Court properly awarded divorced wife 60 percent of marital part of husband's pension where parties' stipulation, which survived divorce, gave court discretion to vary division of marital part of pension based on its decision as to how insurance benefiting wife would be funded, court made wife responsible for funding her own health and/or life insurance, and court considered relevant factors enumerated in CLS Family Ct Act § 236(b)(5)(d). Murphy v Murphy, 263 A.D.2d 737, 693 N.Y.S.2d 699, 1999 N.Y. App. Div. LEXIS 8036 (N.Y. App. Div. 3d Dep't 1999).

Parties' stipulation was enforceable where (1) it contained all essential elements of contract, (2) it was not too vague, (3) there was no mutual mistake of material fact or other cause sufficient to invalidate contract, such as fraud, collusion, or accident, and (4) agreement to resolve issue of liability based on results of polygraph tests does not violate public policy. Republic Painting, Sheeting & Bldg. Corp. v P.S. Bruckel, Inc., 266 A.D.2d 814, 697 N.Y.S.2d 429, 1999 N.Y. App. Div. LEXIS 11715 (N.Y. App. Div. 4th Dep't 1999), app. dismissed, 94 N.Y.2d 899, 707 N.Y.S.2d 144, 728 N.E.2d 340, 2000 N.Y. LEXIS 160 (N.Y. 2000).

Divorce judgment would not be modified to include award of interest accrued on savings plan where parties' stipulation of settlement provided that wife was to receive 50 percent of value of husband's savings plan as of October 1990 but did not provide that she was to receive 50 percent of interest that accumulated in that plan after that date. Altner v Altner, 281 A.D.2d 379, 721 N.Y.S.2d 279, 2001 N.Y. App. Div. LEXIS 5046 (N.Y. App. Div. 2d Dep't 2001).

Divorced wife was entitled to check tendered by mortgagee bank at closing of sale of marital home where (1) check was for amount that bank had held in escrow account to ensure payment of taxes and insurance premiums on home, (2) wife was entitled to receive proceeds of sale of home, (3) stipulation of settlement defined “proceeds” as “the gross figure minus the closing cost[s], minus the broker fee, minus paying the first and second mortgage,” (4) divorce judgment contained similar definition, and (5) check was part of proceeds of sale as so defined. Diener v Diener, 281 A.D.2d 385, 721 N.Y.S.2d 667, 2001 N.Y. App. Div. LEXIS 2065 (N.Y. App. Div. 2d Dep't 2001).

Even if check tendered by mortgagee bank at closing of sale of marital home, as payment for amount that bank had held in escrow account to ensure payment of taxes and insurance premiums on home, were not part of “proceeds” of sale as defined in parties’ stipulation of settlement and divorce judgment, but instead constituted item of property that parties did not consider at time of stipulation, it did not follow that husband was entitled to it; rather, proper course would be to divide it equally, in accordance with title rather than equitable distribution principles, because it would be entirely beyond scope of Domestic Relations Law. Diener v Diener, 281 A.D.2d 385, 721 N.Y.S.2d 667, 2001 N.Y. App. Div. LEXIS 2065 (N.Y. App. Div. 2d Dep't 2001).

Check tendered by mortgagee bank at closing of sale of marital home, as payment for amount that bank had held in escrow account to ensure payment of taxes and insurance premiums on home, was not divorced husband’s separate property where (1) he did not show that funds used to pay carrying costs on home during few months between stipulation of settlement and closing were derived from property that he owned before parties’ marriage or from funds that might otherwise be considered separate, and (2) transfer of separate property into joint account raises presumption that such funds are to be divided equally. Diener v Diener, 281 A.D.2d 385, 721 N.Y.S.2d 667, 2001 N.Y. App. Div. LEXIS 2065 (N.Y. App. Div. 2d Dep't 2001).

Divorced husband was entitled to reimbursement of one-half of real estate tax adjustment received as credit by wife, as seller of marital residence, from buyer where husband paid those

taxes, via escrow account, for about 9 months between parties' stipulation/agreement and sale of residence, and escrow account from which taxes were paid was marital asset. Diener v Diener, 182 Misc. 2d 128, 696 N.Y.S.2d 755, 1999 N.Y. Misc. LEXIS 427 (N.Y. Sup. Ct. 1999), aff'd, 281 A.D.2d 385, 721 N.Y.S.2d 667, 2001 N.Y. App. Div. LEXIS 2065 (N.Y. App. Div. 2d Dep't 2001).

Divorced husband was entitled to reimbursement from wife of $2,725.77 where second mortgage on marital residence required minimum monthly principal payments in addition to interest, and husband reduced mortgage principal from $93,725.77 at stipulation date to payoff balance of $91,000. Diener v Diener, 182 Misc. 2d 128, 696 N.Y.S.2d 755, 1999 N.Y. Misc. LEXIS 427 (N.Y. Sup. Ct. 1999), aff'd, 281 A.D.2d 385, 721 N.Y.S.2d 667, 2001 N.Y. App. Div. LEXIS 2065 (N.Y. App. Div. 2d Dep't 2001).

After reargument, it was held that a wife could seek to enforce, by post-judgment motion, the provisions of an agreement that had been incorporated into a judgment of divorce; as a husband never moved to vacate or appeal the judgment of divorce that incorporated the terms of the parties' agreement, he was bound by its terms, including the characterization of the separation agreement as a stipulation of settlement. Kudrov v Kudrov, 820 N.Y.S.2d 405, 12 Misc. 3d 205, 234 N.Y.L.J. 14, 2005 N.Y. Misc. LEXIS 3098 (N.Y. Sup. Ct. 2005).

**7. — —Attorneys' fees**

In divorce proceeding in which husband's attorney (as real party in interest) sought to enforce $1,000 counsel fee award against wife, attorney's offer to abandon contempt proceeding against wife if court would enter judgment against wife in sum of $1,000 was not enforceable as open-court stipulation which did not include interest, since sum due includes interest in event of willful default (CLS Family Ct Act § 460), attorney explicitly preserved charge of willfulness in making his offer, and thus there was no agreement as required by CLS CPLR § 2104. Grasso v Saidel, 150 A.D.2d 916, 541 N.Y.S.2d 623, 1989 N.Y. App. Div. LEXIS 6540 (N.Y. App. Div. 3d Dep't 1989).

In action for divorce and ancillary relief, in which wife was granted counsel fees, husband's claim that he did not agree to waive hearing on issue of counsel fees was refuted by record revealing that parties stipulated that issue would be decided without hearing. Goldstein v Shapiro, 251 A.D.2d 372, 672 N.Y.S.2d 823, 1998 N.Y. App. Div. LEXIS 6591 (N.Y. App. Div. 2d Dep't 1998).

Neither party to matrimonial action was entitled to award of counsel fees, even though stipulation of settlement provided for counsel fees to be paid to party who prevailed in attempt to enforce that party's right under stipulation, where each party prevailed on some issues and lost on others. D'Amico v D'Amico, 251 A.D.2d 616, 675 N.Y.S.2d 874, 1998 N.Y. App. Div. LEXIS 7882 (N.Y. App. Div. 2d Dep't 1998).

**8. Binding nature of stipulation**

In an action on an insurance policy in which the parties stipulated as to certain damages, it was an abuse of discretion for the reviewing court to reinstate a defense of fraudulent exaggeration that by stipulation had been withdrawn when, in response to a direct inquiry by the court, the insurance company's attorney conceded that the defense had been withdrawn. Deitsch Textiles, Inc. v New York Property Ins. Underwriting Asso., 62 N.Y.2d 999, 479 N.Y.S.2d 487, 468 N.E.2d 669, 1984 N.Y. LEXIS 4485 (N.Y. 1984).

Stipulation of settlement dictated to court reporter which did not provide that action by committee of decedent's incompetent child was thereby settled, and which merely reflected agreement that proposed settlement would be recommended by attorneys to their respective parties and then reduced to writing, was not binding on committee who, prior to final execution of agreement, withdrew her consent previously given. In re Will of Meister, 43 A.D.2d 41, 349 N.Y.S.2d 387, 1973 N.Y. App. Div. LEXIS 3054 (N.Y. App. Div. 1st Dep't 1973), app. dismissed, 34 N.Y.2d 698, 356 N.Y.S.2d 296, 312 N.E.2d 480, 1974 N.Y. LEXIS 1655 (N.Y. 1974).

Where subrogee suing to recover for loss of two jet engines which had been entrusted to defendant for overhaul was empowered to and did effectuate a settlement of the claim, by stipulation, defendant's request for an additional release from subrogor and, when release could

not be obtained, defendant’s indication it would rely solely on release of the subrogee, could not be viewed as a rejection of the settlement. Bristol Myers Co. v General Electric Co., 57 A.D.2d 750, 394 N.Y.S.2d 193, 1977 N.Y. App. Div. LEXIS 11894 (N.Y. App. Div. 1st Dep't), app. dismissed, 43 N.Y.2d 835, 1977 N.Y. LEXIS 5288 (N.Y. 1977).

The trial judge abused his discretion in setting aside, on the ground that in the absence of live testimony he was unable to determine the issues of fact presented, the stipulation entered into by the parties to retry the case on the record and the exhibits introduced at the prior trial, including the tape recording and transcript thereof, where the stipulation was not an unreasonable one, nothing contained therein contravened good morals or sound public policy, the trial court “so ordered” the stipulation, thereby indicating its willingness to be bound thereby, and the court held the action for almost a year, during which the list of witnesses was diminished by death, making necessary the reading of their testimony at any subsequent “live trial.” Tepper v Tannenbaum, 83 A.D.2d 541, 441 N.Y.S.2d 470, 1981 N.Y. App. Div. LEXIS 14828 (N.Y. App. Div. 1st Dep't 1981).

Surrogate was bound by express, unconditional stipulation of discontinuance of contempt proceedings entered into by executor and his daughter following their reconciliation, and thus it was improper for surrogate to grant award of daughter’s college expenses on motion of her attorneys and against her wishes, where there was no showing of fraud, collusion, mistake or other such factors as would undo contract. In re Kaplan, 141 A.D.2d 545, 529 N.Y.S.2d 158, 1988 N.Y. App. Div. LEXIS 6279 (N.Y. App. Div. 2d Dep't 1988).

In action to enforce terms of restrictive covenant regarding use of premises as motor vehicle service station, defendant’s contention that plaintiff was bound by stipulation agreement between parties’ predecessors in interest, which released defendant’s predecessor from certain restrictions, was without merit where terms of stipulation agreement expressly provided that restrictive covenant would remain in full force and effect and were only intended to limit plaintiff’s predecessor’s ability to enforce certain named restrictions. Meadow Run Dev. Corp. v Atlantic

Refining & Marketing Corp., 155 A.D.2d 752, 547 N.Y.S.2d 697, 1989 N.Y. App. Div. LEXIS 13822 (N.Y. App. Div. 3d Dep't 1989).

Stipulation of settlement, which provided that tenant could enter confession of judgment against landlord for $40,000 unless landlord completed repairs required by lease within one year, was supported by consideration since tenant agreed to forego from proceeding on court order which gave it right to enter default judgment on assessment of damages it had obtained. Joab Commercial Laundries, Inc. v Reeder, 159 A.D.2d 489, 552 N.Y.S.2d 361, 1990 N.Y. App. Div. LEXIS 2554 (N.Y. App. Div. 2d Dep't 1990).

Plaintiff was not entitled to order setting aside verdict in favor of defendant based on purported stipulation of settlement, where plaintiff rejected offer made by defendant’s attorney while jury was deliberating, defendant’s attorney made second settlement offer in belief that jury had not reached verdict, plaintiff accepted second offer knowing that jury had reached verdict, and defendant’s attorney withdrew second offer as soon as she learned that jury had reached verdict; purported stipulation was unenforceable because it was not in subscribed writing or made in open court. Greenidge v New York, 179 A.D.2d 386, 578 N.Y.S.2d 157, 1992 N.Y. App. Div. LEXIS 77 (N.Y. App. Div. 1st Dep't 1992).

In action by husband and wife to recover for breach of contract, wife was bound by stipulation of settlement entered into by her husband, notwithstanding that she was not present in court when stipulation was entered into, since (1) wife did not attend any of 5 days of trial which took place before settlement was entered into, and she relied on her attorney and husband to represent her interests, and (2) plaintiffs made no motion to vacate stipulation of settlement or to challenge it until nearly 5 months after it was entered into. Rapp v Briarcliff Contemporaries, 190 A.D.2d 785, 593 N.Y.S.2d 547, 1993 N.Y. App. Div. LEXIS 1520 (N.Y. App. Div. 2d Dep't), app. dismissed, app. denied, 82 N.Y.2d 683, 601 N.Y.S.2d 571, 619 N.E.2d 649, 1993 N.Y. LEXIS 2256 (N.Y. 1993).

In child protective proceeding, respondent’s stipulations (that his daughter’s sworn statement be admitted in evidence at fact-finding hearing, that his daughter was abused, and that his son was

neglected) were not unenforceable on ground that they were agreed to by respondent's attorney without respondent having personally stated his consent, since respondent was in courtroom when each stipulation was placed on record and he voiced no objection, and there was no contention that he did not understand stipulations or voluntarily consent to their terms; CLS Family Ct Act § 1051 does not require that court inquire of respondent whether he understands terms of stipulation and consents to those terms. In re Courtney B., 204 A.D.2d 1039, 612 N.Y.S.2d 535, 1994 N.Y. App. Div. LEXIS 6873 (N.Y. App. Div. 4th Dep't), app. denied, 84 N.Y.2d 808, 621 N.Y.S.2d 517, 645 N.E.2d 1217, 1994 N.Y. LEXIS 3879 (N.Y. 1994).

Although changes in "established" custody arrangement should only be made on showing of sufficient change in circumstances, court properly enforced stipulation which provided that full hearing as to best interests of children would occur if either party was unhappy with joint custody arrangement, where both parties were represented by counsel and children were presented by law guardian when stipulation was made, and stipulation covered relatively short period of time (6 months). Studenroth v Phillips, 230 A.D.2d 247, 657 N.Y.S.2d 257, 1997 N.Y. App. Div. LEXIS 5223 (N.Y. App. Div. 3d Dep't 1997).

It would be inequitable to bind residuary legatee to open-court stipulation by coexecutors of decedent's estate to seek no further surcharges from second residuary legatee if he returned $114,000 owed to estate, despite lack of evidence that stipulation was product of fraud, overreaching, mistake, or duress, where first legatee was not party to stipulation and was not fully informed of exact impact that it would have on her future rights, and she relied to her detriment on representation by attorney who probated will that she need not appear in court because he had persuaded second legatee to return $114,000 to estate. In re Estate of Graham, 238 A.D.2d 682, 656 N.Y.S.2d 434, 1997 N.Y. App. Div. LEXIS 3758 (N.Y. App. Div. 3d Dep't 1997).

Assignee of mortgage and promissory note was entitled to deficiency judgment after foreclosure sale where any defenses of mortgagors, including laches, were precluded by stipulation stating that mortgagors agreed to waive any defenses to foreclosure action, that mortgagors "shall be

jointly and severally liable for any deficiency and shall consent to the entry of judgment against them for the full amount of said deficiency," and that agreement would be binding on parties' successors and assigns. National Loan Investors, L.P. v Goertzel, 251 A.D.2d 639, 676 N.Y.S.2d 605, 1998 N.Y. App. Div. LEXIS 7891 (N.Y. App. Div. 2d Dep't 1998).

Stipulation, in absence of any showing warranting its vacatur, barred tenant's attempt to assert defenses responsive to landlord's underlying nuisance cause of action, which had been settled by stipulation. 64th Street-3rd Ave. Assocs. v Wall, 257 A.D.2d 487, 684 N.Y.S.2d 203, 1999 N.Y. App. Div. LEXIS 412 (N.Y. App. Div. 1st Dep't 1999).

Stipulation of settlement entered into in open court was not invalidated by minor variations demanded by plaintiff's sisters, for whom she was apparently acting, where variations related only to plaintiff's attorney fees (issue that was later substantially settled) and way in which money was to be divided among sisters (issue for Surrogate's Court), and it was only plaintiff, who agreed to settlement in open court, who sought to vacate it. Tooker v Castille, 260 A.D.2d 298, 689 N.Y.S.2d 56, 1999 N.Y. App. Div. LEXIS 4379 (N.Y. App. Div. 1st Dep't 1999).

In proceeding to fix fees for legal services rendered to preliminary executors, Surrogate's Court should have dismissed objectors' answer opposing award of any fee on ground that petitioner knowingly propounded invalid will and committed other alleged wrongdoing, where dispute over validity of will propounded by petitioner was disposed of by settlement, objectors did not allege that they were unaware of any material fact bearing on invalidity of disputed will when they entered into stipulated settlement, and they necessarily removed issue of will's validity by agreeing to disbursements from decedent's estate to will's beneficiaries; to adjudicate issue resolved by stipulation merely for sake of deciding collateral matters would obviate any benefits obtained from expeditious resolution of dispute by settlement. Chadbourne & Parke LLP v Warshaw (In re Will of Hofmann), 287 A.D.2d 119, 733 N.Y.S.2d 168, 2001 N.Y. App. Div. LEXIS 11114 (N.Y. App. Div. 1st Dep't 2001).

Court erred in declining to so order the transcript and denying plaintiffs' motion for judgment, because the record stipulation constituted a binding settlement, notwithstanding the parties'

dispute over finalizing the written agreement; the parties acknowledged that they agreed to memorialize the record stipulation in a written agreement and at the same time, agreed that the record stipulation was binding. Birches At Schoharie, L.P. v Schoharie Senior Gen. Partner LLC, 169 A.D.3d 1192, 94 N.Y.S.3d 412, 2019 N.Y. App. Div. LEXIS 1313 (N.Y. App. Div. 3d Dep't 2019).

Parties' settlement agreement was enforceable because the exchanged emails were subscribed by counsel, set forth the material terms of the agreement, namely, the acceptance by the beneficiary's counsel of an offer in the sum of $12,500 to settle the case in exchange for a release in favor of the insurer, and contained an expression of mutual assent, and the settlement was not conditioned on any further occurrence, such as the formal execution of the release and settlement. Herz v Transamerica Life Ins. Co., 172 A.D.3d 1336, 99 N.Y.S.3d 664, 2019 N.Y. App. Div. LEXIS 4177 (N.Y. App. Div. 2d Dep't 2019).

Because the record reflected that a mother appeared with counsel and stipulated to the imposition of the conditions of her supervision by the county department of social services in open court, the terms and conditions of the parties' stipulation were binding and enforceable regardless of the fact that the family court's dispositional order was not entered until after the department's filing of its violation petition. Matter of Hayley QQ. (Heather RR.), 176 A.D.3d 1343, 111 N.Y.S.3d 418, 2019 N.Y. App. Div. LEXIS 7507 (N.Y. App. Div. 3d Dep't 2019).

In a Family Ct Act art. 6 proceeding, the amended order was modified because amended order failed to set forth terms to which parties agreed in open court. Specifically, mother's attorney requested that all custodial exchange hours be changed to 10:00 a.m. as she would be hard pressed to make 9:00 a.m. on Sundays. Also, inclusion of provision related to third parties transporting child to exchanges was never addressed and was not part of parties' settlement agreement. Matter of Adam V. v Ashli W., 180 A.D.3d 1205, 120 N.Y.S.3d 438, 2020 N.Y. App. Div. LEXIS 1255 (N.Y. App. Div. 3d Dep't 2020).

Where court made finding of permanent neglect and parties then stipulated in open court to 6-month suspension of judgment on certain conditions, stipulation was binding on parties and

Family Court retained jurisdiction even though court directed that written order be submitted within 60 days and written order was not submitted until 8 months later. Commissioner of Social Servs. on behalf of T./C. Children v Rufelle C., 156 Misc. 2d 410, 593 N.Y.S.2d 401, 1992 N.Y. Misc. LEXIS 603 (N.Y. Fam. Ct. 1992).

No binding stipulation of settlement was reached when plaintiffs' attorney, at mediation conference, accepted defendant's settlement offer while he was on telephone with injured plaintiff, where there was no written acceptance of settlement offer and injured plaintiff subsequently changed her mind and would not sign release; informal mediation conference was not equivalent to "court convened," and letter from mediator evidencing settlement could not be equated with official court record. Bartley v Federal Express Corp., 179 Misc. 2d 164, 683 N.Y.S.2d 737, 1998 N.Y. Misc. LEXIS 621 (N.Y. Sup. Ct. 1998).

Waiver of right to bring nonprimary residence proceeding, contained in stipulation between rent-stabilized tenant and landlord's predecessor, was not binding on landlord as (1) stipulation was not made binding on respective parties' successors or assigns, (2) landlord could not reasonably be said to have had actual or constructive notice of private waiver wholly inconsistent with rent stabilization scheme, and (3) practice of permitting tenants to stockpile rent-stabilized apartments, immune from requirement of primary residence, should not be rewarded. Rocky 116 L. L. C. v Weston, 186 Misc. 2d 251, 717 N.Y.S.2d 823, 2000 N.Y. Misc. LEXIS 474 (N.Y. App. Term 2000), aff'd, 284 A.D.2d 139, 726 N.Y.S.2d 94, 2001 N.Y. App. Div. LEXIS 5669 (N.Y. App. Div. 1st Dep't 2001).

As the record disclosed no basis to set aside the parties' settlement, it was binding on the parties; the lower court should have granted the housing authority's motion to vacate a prior order, rather than directing a hearing to aid in its disposition. Davis v N.Y. City Hous. Auth., 300 A.D.2d 531, 754 N.Y.S.2d 285, 2002 N.Y. App. Div. LEXIS 12780 (N.Y. App. Div. 2d Dep't 2002).

Strict enforcement of stipulations binding 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; the appellate term erred in setting aside a stipulation agreement between a landlord and a tenant which mandated that the tenant make payments on the amount of rent that the tenant was in arrears in addition to its current rental payments. City of New York v 130/40 Essex St. Dev. Corp., 302 A.D.2d 292, 756 N.Y.S.2d 23, 2003 N.Y. App. Div. LEXIS 1723 (N.Y. App. Div. 1st Dep't 2003), app. denied, 2003 N.Y. App. Div. LEXIS 12976 (N.Y. App. Div. 1st Dep't Dec. 2, 2003).

**9. —Authority of person stipulating**

Even assuming that oral statements by counsel for defendant corporation on record in examination before trial constituted an agreement that alleged shareholder seeking to establish stock ownership was entitled to disclosure of all material requested from 1940 to present date, such agreement would not be binding on corporation. Wishman v Genesee-Monroe Racing Ass'n, 43 A.D.2d 785, 349 N.Y.S.2d 1009, 1973 N.Y. App. Div. LEXIS 2970 (N.Y. App. Div. 4th Dep't 1973).

Stipulation which was signed only by attorneys for plaintiff’s predecessor was valid and binding on plaintiff in wrongful death action where plaintiff was the party to be charged under the stipulation. Wells v Wells, 49 A.D.2d 771, 372 N.Y.S.2d 735, 1975 N.Y. App. Div. LEXIS 10778 (N.Y. App. Div. 2d Dep't), app. dismissed, 38 N.Y.2d 825, 382 N.Y.S.2d 45, 345 N.E.2d 588, 1975 N.Y. LEXIS 2415 (N.Y. 1975).

In divorce action, defendant was bound by stipulation of settlement, previously entered on record by defendant’s former attorney, since former counsel had represented defendant during litigation and had negotiated on defendant’s behalf during morning settlement discussions, and since, before defendant absented himself from afternoon negotiating session, during which stipulation was entered on record, defendant failed to reveal any limitation or restriction on authority of his then attorney; former counsel had apparent authority to enter into stipulation upon which plaintiff could reasonably and properly rely. Lynch v Lynch, 122 A.D.2d 572, 505 N.Y.S.2d 739, 1986 N.Y. App. Div. LEXIS 59854 (N.Y. App. Div. 4th Dep't 1986).

Plaintiffs were not entitled to summary judgment in action to enforce stipulation of settlement where fact issue existed as to whether defendants' attorney had authority to enter into stipulation on behalf of all defendants; even though there was close relationship between defendants, evidentiary hearing was required to determine whether or not particular defendant conferred actual authority on attorney in its communications with him, or apparent authority by words or conduct communicated to other parties. Atco Canton Corp. v Costanzi, 133 A.D.2d 949, 520 N.Y.S.2d 664, 1987 N.Y. App. Div. LEXIS 51989 (N.Y. App. Div. 3d Dep't 1987).

Attorney's authority to enter into settlement negotiations does not necessarily constitute authority to enter binding settlement under CLS CPLR § 2104, unless that settlement is entered into in open court; question as to such authorization is appropriate subject for evidentiary hearing. Suslow v Rush, 161 A.D.2d 235, 554 N.Y.S.2d 620, 1990 N.Y. App. Div. LEXIS 4917 (N.Y. App. Div. 1st Dep't 1990).

It could not be said that plaintiff's attorney had apparent authority to enter into settlement where, throughout conference at which purported settlement was reached, plaintiff's attorney maintained that he was unable to contact his client and confirm his consent to settlement. Tacktill v Ashman, 203 A.D.2d 70, 612 N.Y.S.2d 836, 1994 N.Y. App. Div. LEXIS 3603 (N.Y. App. Div. 1st Dep't 1994).

Stipulation of settlement made by counsel in open court complied with CLS CPLR § 2104 and was binding on objectants to probate of will where objectants' own papers established that attorney had actual and express authority to settle contest. In re Estate of Kanter, 209 A.D.2d 365, 618 N.Y.S.2d 794, 1994 N.Y. App. Div. LEXIS 11795 (N.Y. App. Div. 1st Dep't 1994).

Parties' stipulation to submit all further disputes to arbitration was not subject to vacatur on grounds that wife was not present when her attorney entered into stipulation and she did not consent to it where both she and her attorney were present when court first suggested that parties use mediator or arbitrator to resolve future disputes, her attorney responded "I couldn't agree with you more" and plaintiff voiced no objection, husband's counsel stated that he would have to discuss matter with his client, who was not present, and later on same day, when wife

was not present but husband was present, parties' attorneys agreed to use of mediator or arbitrator. Meyer v Meyer, 228 A.D.2d 955, 645 N.Y.S.2d 105, 1996 N.Y. App. Div. LEXIS 7230 (N.Y. App. Div. 3d Dep't), app. dismissed in part, app. denied, 88 N.Y.2d 1062, 651 N.Y.S.2d 404, 674 N.E.2d 334, 1996 N.Y. LEXIS 3351 (N.Y. 1996).

Counsel continued to represent plaintiff, and thus was able to bind him to stipulation "so ordered" by federal district court, where plaintiff never obtained federal court order removing his attorney, as required by local federal district court rule. LaVigna v Capital Cities/ABC, Inc., 245 A.D.2d 75, 665 N.Y.S.2d 410, 1997 N.Y. App. Div. LEXIS 12824 (N.Y. App. Div. 1st Dep't 1997).

Plaintiff's motion to vacate settlement of her personal injury action was properly denied where plaintiff had authorized her former counsel to settle for amount that would net her $400,000, and former counsel's firm agreed to reduce its fee to amount that would result in her recovering $400,000. Carney v Walgreen's Co., 246 A.D.2d 328, 666 N.Y.S.2d 915, 1998 N.Y. App. Div. LEXIS 49 (N.Y. App. Div. 1st Dep't), app. dismissed, 91 N.Y.2d 1002, 676 N.Y.S.2d 129, 698 N.E.2d 958, 1998 N.Y. LEXIS 1292 (N.Y. 1998).

Stipulation signed by counsel for respective parties during court appearance was binding and, since there was no legal basis for judge's refusal to sign order, mandamus was available. Martinez v Jacobson, 253 A.D.2d 521, 677 N.Y.S.2d 161, 1998 N.Y. App. Div. LEXIS 9132 (N.Y. App. Div. 2d Dep't 1998), app. denied, 93 N.Y.2d 818, 697 N.Y.S.2d 566, 719 N.E.2d 927, 1999 N.Y. LEXIS 2984 (N.Y. 1999).

In proceeding in which father sought modification of mother's visitation rights, and mother sought change of custody, mother was not bound by settlement stipulation entered into by her attorney where (1) acceptance of offered settlement was expressly conditioned on counsel's obtaining mother's approval, which she did not give, (2) without such approval, attorney lacked authority to bind her to settlement, and (3) father was aware of that limitation. Brooks v Brooks, 255 A.D.2d 382, 679 N.Y.S.2d 697, 1998 N.Y. App. Div. LEXIS 11773 (N.Y. App. Div. 2d Dep't 1998).

Defendants were not entitled to set aside stipulation on ground that they never personally consented thereto since they were not contending that their attorney lacked authority to enter into stipulation. Gritt v O'Hara, 256 A.D.2d 838, 681 N.Y.S.2d 862, 1998 N.Y. App. Div. LEXIS 13589 (N.Y. App. Div. 3d Dep't 1998).

Plaintiff was bound by stipulation of settlement entered into by his attorney at court-sponsored mediation conference, where mediator had instructed counsel to come to table with full authority to enter into settlement and, while factual dispute existed as to whether plaintiff's attorney had authority to enter into settlement on plaintiff's behalf, his participation in negotiations, with plaintiff's knowledge and authorization, was consistent with apparent authority. Stoll v Port Auth., 268 A.D.2d 379, 701 N.Y.S.2d 430, 2000 N.Y. App. Div. LEXIS 778 (N.Y. App. Div. 1st Dep't 2000).

Only those attorneys who are authorized to enter into binding stipulations may appear at pretrial conferences, and thus such appearance precludes client from thereafter arguing that attorney lacked such authority Bubeck v Main Urology Assocs., P.C., 275 A.D.2d 909, 713 N.Y.S.2d 403, 2000 N.Y. App. Div. LEXIS 9514 (N.Y. App. Div. 4th Dep't 2000).

Landlord's filing of Chapter 11 bankruptcy petition divested it of authority to act on behalf of estate and required vacatur of stipulation of settlement in landlord's summary holdover proceeding to recover possession of commercial premises since any action taken by landlord without trustee of bankruptcy estate was null and void. 151-69 Nagle Ave. Assoc. v Jiminez, 147 Misc. 2d 443, 556 N.Y.S.2d 228, 1990 N.Y. Misc. LEXIS 264 (N.Y. Civ. Ct. 1990).

Because neither the defendants nor their counsel disclosed any limitation on counsel's authority to enter a stipulation of settlement which counsel entered in the defendants' presence in open court, the trial court was not required to elicit the defendants' express assent to the stipulation and the appellate court affirmed the trial court's order requiring the defendants to comply with the stipulation. Springer v Winney, 295 A.D.2d 845, 743 N.Y.S.2d 902, 2002 N.Y. App. Div. LEXIS 6785 (N.Y. App. Div. 3d Dep't 2002).

Where the attorney, under plaintiff's direction, initiated settlement negotiations with defendants that resulted in a proposed agreement out of court, plaintiff was not bound by the agreement, which plaintiff rejected; the attorney's authority to negotiate did not constitute authority to enter into a binding settlement under N.Y. C.P.L.R. 2104. Katzen v Twin Pines Fuel Corp., 16 A.D.3d 133, 790 N.Y.S.2d 447, 2005 N.Y. App. Div. LEXIS 2174 (N.Y. App. Div. 1st Dep't 2005).

Plaintiff's attorney had apparent authority to enter into a stipulation of settlement because he had a lengthy involvement in the personal injury case, engaged in settlement negotiations, and appeared at pretrial conferences; the trial court correctly granted defendants' motion to enforce the stipulation of settlement. A later letter written by plaintiff's attorney on behalf of the party to be bound confirmed the essential terms of the oral settlement agreement reached at the pretrial conference and was a subscribed writing sufficient to satisfy the requirements of N.Y. C.P.L.R. 2104. Davidson v Metropolitan Tr. Auth., 44 A.D.3d 819, 844 N.Y.S.2d 359, 2007 N.Y. App. Div. LEXIS 10721 (N.Y. App. Div. 2d Dep't 2007).

**10. Lack of actual agreement**

In an action in which a tenant sought a declaration that a stipulation settling a prior action entered into between the president of the tenants' association and the landlord and mortgage holder was in full force and effect, an order dismissing the complaint would be modified by directing that the president of the tenants' association be joined as a party plaintiff and as so modified would be affirmed, since, when the parties announced the settlement, the draft submitted by the landlord and mortgage holder's attorney was not accepted but was returned with a number of provisions added, which provisions would be deemed a rejection of the offer, and thus the terms announced were not made "definite and complete" and there was no enforceable written agreement. Kleinberg v Ambassador Associates, 103 A.D.2d 347, 480 N.Y.S.2d 210, 1984 N.Y. App. Div. LEXIS 19286 (N.Y. App. Div. 1st Dep't), aff'd, 64 N.Y.2d 733, 485 N.Y.S.2d 748, 475 N.E.2d 119, 1984 N.Y. LEXIS 4900 (N.Y. 1984).

General rule that party is bound by stipulations made in open court may be relaxed in interest of elementary fairness when it is evident on face of record that attorney's understanding of stipulated terms differs so obviously and radically from perception of his opponent and that of court as to warrant conclusion that there was in effect no stipulation at all; plaintiffs failed to allege grounds upon which settlement could be vacated where they merely claimed that case seemed to be worth more upon re-evaluation. Muller v New York, 113 A.D.2d 877, 493 N.Y.S.2d 604, 1985 N.Y. App. Div. LEXIS 52504 (N.Y. App. Div. 2d Dep't 1985).

Court should have granted plaintiff's motion to vacate stipulation discontinuing medical malpractice action against defendant where record clearly established that plaintiff's attorney forwarded stipulation of discontinuance signed by plaintiff to defendant's attorney on express condition that parties exchange releases, and this condition was not met by defendant. Kershen v Hoffman, 209 A.D.2d 588, 619 N.Y.S.2d 656, 1994 N.Y. App. Div. LEXIS 11536 (N.Y. App. Div. 2d Dep't 1994).

Court erred in enforcing purported settlement agreement where notation in court's personal file, which stated that defendant offered $100,000 in settlement of action, did not show that settlement was reached and, in any event, was insufficient to satisfy open court requirement of CLS CPLR § 2104; further, parties were in dispute as to whether settlement offer of defendant's counsel was conditioned on his client's approval. Phillips v Pamper Decorating Serv., 228 A.D.2d 425, 643 N.Y.S.2d 666, 1996 N.Y. App. Div. LEXIS 6214 (N.Y. App. Div. 2d Dep't 1996).

Decedent's suit had never been settled where, although defendants offered to settle the case, there was no evidence that the offer preceded the decedent's death, that the decedent ever agreed to the settlement before he died, or that the proposed settlement was ever reduced to writing or made in open court, as required by N.Y. C.P.L.R. 2104; the purported settlement was not even brought to the court's attention until some 18 months after the decedent's death. Washington v Min Chung Hwan, 20 A.D.3d 303, 799 N.Y.S.2d 31, 2005 N.Y. App. Div. LEXIS 7648 (N.Y. App. Div. 1st Dep't 2005).

Trial court erred in ordering the enforcement of an alleged settlement agreement where the agreement was only in letter form, left open significant issues for further negotiations, and the letter indicated that the agreement was tentative. Sterling Fifth Assocs. v Carpentille Corp., 10 A.D.3d 282, 781 N.Y.S.2d 72, 2004 N.Y. App. Div. LEXIS 10247 (N.Y. App. Div. 1st Dep't 2004).

Because a document signed by a client was a mere settlement proposal that did not fully reflect the terms of the parties' settlement, as required by N.Y. C.P.L.R. 2104, the attorney could not enforce it. Williams v Bushman, 70 A.D.3d 679, 894 N.Y.S.2d 94, 2010 N.Y. App. Div. LEXIS 829 (N.Y. App. Div. 2d Dep't 2010).

It was error for the trial court to hold a husband had agreed to withdraw his answer as part of the stipulation in the parties' divorce proceedings because the record was essentially silent on that issue, he was proceeding pro se and indicated he had questions, and he repeatedly asserted that he had not withdrawn his answer. Fulginiti v Fulginiti, 127 A.D.3d 1382, 4 N.Y.S.3d 780, 2015 N.Y. App. Div. LEXIS 2978 (N.Y. App. Div. 3d Dep't 2015).

Supreme court erred in concluding that a properly owner and a village architectural preservation and review board (APRB) reached an enforceable settlement agreement on the issues of the mass and scale of a project because letters the supreme court found memorialized the settlement agreement did not contain all the material terms of the settlement and constituted no more than an agreement to agree. Matter of Pittsford Canalside Props., LLC v Village of Pittsford Zoning Bd. of Appeals, 181 A.D.3d 1235, 120 N.Y.S.3d 533, 2020 N.Y. App. Div. LEXIS 1854 (N.Y. App. Div. 4th Dep't 2020).

Plaintiffs' offer to withdraw certain counts of their complaint with prejudice was not binding because defendants did not accept the offer before plaintiffs withdrew the offer by requesting permission from the court to withdraw its claims without prejudice under Fed. R. Civ. P. 41(a)(2). Shaw Family Archives, Ltd. v CMG Worldwide, Inc, 2008 U.S. Dist. LEXIS 67474 (S.D.N.Y. Sept. 2, 2008).

**11. Open court**

The statutory term “open court” is a technical term, referring to a judicial proceeding in a court, whether held in public or private, and whether held in a courthouse, a courtroom, or any place else, so long as it is, in an institutional sense, a court convened, with or without a jury, to do judicial business, typically involving the attendance of a clerk who makes entries of judicial events in a docket, register or minute book and, in modern times, a court reporter who makes a record of all the proceedings, but the term does not apply to a “judge in chambers”, in the technical sense of that phrase, and it is neither a judge nor a clerk acting in his proper person anywhere, whether in the courtroom or elsewhere. In re Dolgin Eldert Corp., 31 N.Y.2d 1, 334 N.Y.S.2d 833, 286 N.E.2d 228, 1972 N.Y. LEXIS 1230 (N.Y. 1972).

Stipulation made between counsel in open court is binding on parties and should not be disturbed absent fraud, collusion, mistake, accident, or some other ground of the same nature, though court has control over stipulations and power to relieve from terms thereof when parties can be placed in “statu quo”. Ragen v New York, 45 A.D.2d 1046, 358 N.Y.S.2d 62, 1974 N.Y. App. Div. LEXIS 4311 (N.Y. App. Div. 2d Dep't 1974).

It is not vital that open court stipulation be made in courtroom or in the judge’s chambers as long as the formality of judicial proceedings are maintained. Veith v ABC Paving Co., 58 A.D.2d 257, 396 N.Y.S.2d 556, 1977 N.Y. App. Div. LEXIS 11865 (N.Y. App. Div. 4th Dep't 1977).

An open court stipulation need not be reduced in writing and signed by a party or his attorney nor reduced to the form of an order and entered for the agreement to be binding. Manning v Manning, 97 A.D.2d 910, 470 N.Y.S.2d 744, 1983 N.Y. App. Div. LEXIS 20702 (N.Y. App. Div. 3d Dep't 1983).

Plaintiff was properly directed to accept the sum of $4,005 in full settlement of his action for an attorney’s fee as per the settlement entered into by the parties in open court. The settlement stipulation had the same binding effect as a contract, and the court’s responsibility was to effectuate the parties’ true intent. Thus, where the parties agreed to add five days on to each period within which the two payments were to be made to avoid a default due to mail delay, the parties’ intention was to allow the payments to be made up to and including a passing of those

ten additional days, and plaintiff agreed to accept such late payments. Thus, where defendant made the second and final payment by a check which was dishonored due to an inadvertent failure to deposit funds to cover it, but defendant immediately upon discovery, and within the time period for both payments, attempted to cure, defendant complied with the stipulation, and plaintiff wrongfully rejected the tender of payment. Furgang v Epstein, 106 A.D.2d 609, 483 N.Y.S.2d 103, 1984 N.Y. App. Div. LEXIS 21595 (N.Y. App. Div. 2d Dep't 1984).

Oral stipulation made in open court which has definite terms is binding on parties absent fraud, collusion, mistake, accident or some other ground of similar nature. Bauer v Lygren, 113 A.D.2d 913, 493 N.Y.S.2d 815, 1985 N.Y. App. Div. LEXIS 52542 (N.Y. App. Div. 2d Dep't 1985).

In dental malpractice action brought solely in name of plaintiff adult who suffered from Down's syndrome, stipulation of settlement entered into by plaintiff's mother would be vacated since stipulation was not entered into in open court within meaning of CLS CPLR § 2104 where (1) stipulation was entered into outside of judge's presence, (2) terms of agreement were read onto record, but were never reduced to writing subscribed to by parties, and (3) settlement was not put in form of judicial order. Kushner v Mollin, 144 A.D.2d 649, 535 N.Y.S.2d 41, 1988 N.Y. App. Div. LEXIS 12357 (N.Y. App. Div. 2d Dep't 1988).

"Open court" requirement of CLS CPLR § 2104 was satisfied by stipulation of settlement in personal injury action, even though stipulation was not reduced to writing or stenographically recorded, where notation of stipulation was entered in minute book of clerk of court. Deal v Meenan Oil Co., 153 A.D.2d 665, 544 N.Y.S.2d 672, 1989 N.Y. App. Div. LEXIS 11033 (N.Y. App. Div. 2d Dep't 1989).

Alleged settlement accepted by plaintiff's attorney in open court, subject to approval of client and evidenced by card marked "settled," was ineffective in absence of compliance with CLS CPLR § 2104, which requires stipulation to be made in open court, be in writing subscribed by party or his attorney, or be reduced to order and entered. Batties v Solis, 171 A.D.2d 529, 567 N.Y.S.2d 253, 1991 N.Y. App. Div. LEXIS 3473 (N.Y. App. Div. 1st Dep't 1991).

In action to recover for breach of contract, plaintiff was bound by stipulation of settlement entered into in open court, notwithstanding contention that he was told by his attorney that stipulation would be reduced to writing and that certain changes, which he desired, would be made before he signed it. Rapp v Briarcliff Contemporaries, 190 A.D.2d 785, 593 N.Y.S.2d 547, 1993 N.Y. App. Div. LEXIS 1520 (N.Y. App. Div. 2d Dep't), app. dismissed, app. denied, 82 N.Y.2d 683, 601 N.Y.S.2d 571, 619 N.E.2d 649, 1993 N.Y. LEXIS 2256 (N.Y. 1993).

Court erred in denying wife's motion to set aside separation agreement on ground that agreement was entered into in open court with both parties present and represented by counsel where husband's counsel appeared and informed court that agreement had been reached, but neither wife nor her counsel were present, and wife was never questioned by court regarding specifics of agreement. Sheridan v Sheridan, 202 A.D.2d 749, 608 N.Y.S.2d 582, 1994 N.Y. App. Div. LEXIS 1800 (N.Y. App. Div. 3d Dep't 1994).

Court would enforce settlement agreement in action for legal malpractice where parties agreed to settlement in open court with counsel present, and although defendant was somewhat contentious during proceedings, she voluntarily agreed to essential terms of settlement and there was every indication that she understood nature and consequences of settlement. Wolstencroft v Sassower, 212 A.D.2d 598, 623 N.Y.S.2d 7, 1995 N.Y. App. Div. LEXIS 1552 (N.Y. App. Div. 2d Dep't 1995).

Stipulations agreed to in open court are binding regardless of whether they are reduced to written order and entered. In re Kim Shantae M., 221 A.D.2d 199, 633 N.Y.S.2d 151, 1995 N.Y. App. Div. LEXIS 11564 (N.Y. App. Div. 1st Dep't 1995).

Under CLS CPLR § 2104, binding effect of agreements made in open court does not extend to promise in open court by person who is not party to action. Jacobs v Jacobs, 229 A.D.2d 712, 645 N.Y.S.2d 342, 1996 N.Y. App. Div. LEXIS 7719 (N.Y. App. Div. 3d Dep't 1996).

Defendant's oral promise made in open court in divorce proceeding in which she was nonparty participant, whereby she guaranteed obligations assumed by her paramour (who married her

after divorcing plaintiff) pursuant to parties' divorce settlement, was enforceable under ordinary contract principles regardless of whether it was binding as open-court stipulation under CLS CPLR § 2104; it is formality of open-court proceeding and authenticity provided by transcript, not binding effect of stipulation, that are relevant to statute of frauds issue. Jacobs v Jacobs, 229 A.D.2d 712, 645 N.Y.S.2d 342, 1996 N.Y. App. Div. LEXIS 7719 (N.Y. App. Div. 3d Dep't 1996).

Oral stipulation resolving certain temporary issues was properly set aside where parties were not present when it was placed on record by their attorneys, and stipulation was invalid under CLS Dom Rel § 236(B)(3) because it was not reduced to writing, signed, or acknowledged by parties. Sorge v Sorge, 238 A.D.2d 890, 660 N.Y.S.2d 776, 1997 N.Y. App. Div. LEXIS 4680 (N.Y. App. Div. 4th Dep't 1997).

Parties' stipulation of child support, although placed on record at time of their divorce, was properly vacated where it failed to comport with Child Support Standards Act in that it did not specify amount that basic support obligation would have been and reason or reasons that stipulation did not provide for payment of that amount. Clark v Liska, 263 A.D.2d 640, 692 N.Y.S.2d 825, 1999 N.Y. App. Div. LEXIS 7854 (N.Y. App. Div. 3d Dep't 1999).

Father was properly required to pay accrued child support arrears, even though stipulation providing for child support was vacated for lack of compliance with Child Support Standards Act, where (1) he acted in bad faith in failing to abide by his child support obligations before 1992 stipulation, causing accumulation of $30,000 in arrears by that time, (2) he repeatedly paid child support delinquently after parties' 1992 divorce, necessitating numerous court, (3) there was thus no grievous injustice in enforcement of arrears, (4) evidence relied on by father in seeking relief under CLS CPLR § 5015(a) was not "newly discovered evidence" but mandate of Domestic Relations Law that could have been discovered with reasonable diligence, and (5) he did not allege "fraud, misrepresentation or misconduct" by mother during their apparently good-faith negotiations in which they were represented by counsel and which led to mutually acceptable agreement. Clark v Liska, 263 A.D.2d 640, 692 N.Y.S.2d 825, 1999 N.Y. App. Div. LEXIS 7854 (N.Y. App. Div. 3d Dep't 1999).

In proceeding by plaintiff, as executor of decedent's estate, seeking to recover proceeds of decedent's individual retirement account (IRA) on behalf of estate, plaintiff was entitled to summary judgment in accordance with terms of in-court stipulation which provided that sum of $235,000 together with disclosed testamentary substitutes was agreed amount of defendant's interest as decedent's surviving spouse based on assets then known to parties, where defendant previously received proceeds of decedent's IRA yet did not disclose this to plaintiff during their negotiations; decedent's IRA was statutorily defined testamentary substitute intended to be included in "net estate" subject to defendant's elective rights, and its existence was relevant to proceedings in Surrogate's Court which culminated in stipulation. Briggs v Hemstreet-Briggs, 268 A.D.2d 644, 701 N.Y.S.2d 178, 2000 N.Y. App. Div. LEXIS 127 (N.Y. App. Div. 3d Dep't 2000).

Case would be remitted for de novo determination of proper division of parties' marital property based on factors in CLS Dom Rel § 236(B)(5)(d) where order of equal distribution was based on purported stipulation of settlement allegedly made in open court during trial, and record did not show that either divorced husband or his attorney consented to equal division of assets proposed by plaintiff's attorney. Stern v Stern, 273 A.D.2d 298, 708 N.Y.S.2d 707, 2000 N.Y. App. Div. LEXIS 6471 (N.Y. App. Div. 2d Dep't 2000).

No binding stipulation of settlement was reached in personal injury action, even though parties' attorneys agreed to proposed stipulation in open court, where court's refusal to accept stipulation before proceedings had concluded in jury verdict for defendants was within court's supervisory powers. Harrington v Halpert, 273 A.D.2d 355, 709 N.Y.S.2d 202, 2000 N.Y. App. Div. LEXIS 7065 (N.Y. App. Div. 2d Dep't 2000), app. denied, 96 N.Y.2d 707, 725 N.Y.S.2d 637, 749 N.E.2d 206, 2001 N.Y. LEXIS 599 (N.Y. 2001).

Divorce judgment would be modified to award husband 50 percent, rather than 25 percent, of certain retirement accounts that he maintained where parties had stipulated in open court that those accounts were marital property and would be equally divided between them, and there

was no claim that stipulation was product of any improper conduct. Jablonski v Jablonski, 275 A.D.2d 692, 713 N.Y.S.2d 184, 2000 N.Y. App. Div. LEXIS 9148 (N.Y. App. Div. 2d Dep't 2000).

Stipulations of settlement, especially those entered into in open court, will not be lightly cast aside. 260/261 Madison Equities Corp. v 260 Operating, Inc., 281 A.D.2d 237, 722 N.Y.S.2d 19, 2001 N.Y. App. Div. LEXIS 2465 (N.Y. App. Div. 1st Dep't 2001).

Landlord was entitled to summary judgment dismissing action to rescind stipulation, entered into between parties in open court, purporting to settle amount of rent due from plaintiff where landlord made prima facie showing that stipulation was not product of mutual mistake, tenant did not respond with contrary evidence, tenant’s counsel admitted that he entered into stipulation after reviewing relevant documents and discussing situation with tenant, and even if counsel based his decision partly on interpretation of letter agreement provided by landlord’s executive, any resulting misunderstanding as to effect of clear stipulation could not be characterized as result of mutual mistake. 260/261 Madison Equities Corp. v 260 Operating, Inc., 281 A.D.2d 237, 722 N.Y.S.2d 19, 2001 N.Y. App. Div. LEXIS 2465 (N.Y. App. Div. 1st Dep't 2001).

Under January 8, 1999, stipulation of settlement of medical malpractice action providing that if payment were not made by December 7, 1999, plaintiff could enter judgment for unpaid amount under CLS CPLR § 3215 and would be entitled to costs and interest from date of settlement, plaintiff could recover costs and interest from January 8, 1999, rather than from December 7, 1999, where stipulation was made in open court and was binding contract to be strictly enforced. Overeem v Neuhoff, 281 A.D.2d 606, 722 N.Y.S.2d 580, 2001 N.Y. App. Div. LEXIS 3126 (N.Y. App. Div. 2d Dep't 2001).

Stipulation that was placed on record in parties’ presence by their respective attorneys before judge of Family Court, and was memorialized by official court stenographer, satisfied “open court” requirement of CLS CPLR § 2104, and was not invalid on ground that it did not comply with requirements of CLS Dom Rel § 236(B)(3). Public Adm'r v Wolfson, 282 A.D.2d 730, 725 N.Y.S.2d 48, 2001 N.Y. App. Div. LEXIS 4308 (N.Y. App. Div. 2d Dep't 2001).

Out-of-court transcript, taken during deposition at which parties to matrimonial action discussed terms of settlement, would not be enforced as stipulation of settlement since, pursuant to CLS CPLR § 2104, oral stipulations of settlement are enforceable only if made in open court before judge. Trapani v Trapani, 147 Misc. 2d 447, 556 N.Y.S.2d 210, 1990 N.Y. Misc. LEXIS 275 (N.Y. Sup. Ct. 1990).

Under N.Y. C.P.L.R. 2104, pro se prisoner's oral agreement with defendants' counsel to settle was not enforceable because the Rule clearly distinguished between the acts of parties and their attorneys in its first and last clause. Notably, the "open court" proviso, by its terms, did not apply to a stipulation between counsel and a party. Silas v City of New York, 536 F. Supp. 2d 353, 2007 U.S. Dist. LEXIS 96491 (S.D.N.Y. 2007).

While there remain disputed issues of material fact as to whether an insured' attorney had actual authority when a first agreement was executed, the undisputed facts established that he did have apparent authority based on his eight appearances in open court on behalf of an insured and four conference orders showing the attorney as the insured's attorney of record. Combined with the attorney's participation in the settlement discussions, these appearances demonstrated as a matter of law that he had apparent authority to enter into the first agreement on behalf of his client. Nat'l Union Fire Ins. Co. v Universal Fabricators, Inc., 713 F. Supp. 2d 206, 2010 U.S. Dist. LEXIS 38255 (S.D.N.Y. 2010), aff'd, 427 Fed. Appx. 32, 2011 U.S. App. LEXIS 12104 (2d Cir. N.Y. 2011).

**12. —Judge's chambers**

The statutory term "open court" is a technical term, referring to a judicial proceeding in a court, whether held in public or private, and whether held in a courthouse, a courtroom, or any place else, so long as it is, in an institutional sense, a court convened, with or without a jury, to do judicial business, typically involving the attendance of a clerk who makes entries of judicial events in a docket, register or minute book and, in modern times, a court reporter who makes a record of all the proceedings, but the term does not apply to a "judge in chambers", in the

technical sense of that phrase, and it is neither a judge nor a clerk acting in his proper person anywhere, whether in the courtroom or elsewhere. In re Dolgin Eldert Corp., 31 N.Y.2d 1, 334 N.Y.S.2d 833, 286 N.E.2d 228, 1972 N.Y. LEXIS 1230 (N.Y. 1972).

Informal agreement in judge's chambers to settle litigation involving numerous valuable real properties did not fall within the open court exception and was not sufficiently evidenced by a writing to be enforceable. In re Dolgin Eldert Corp., 31 N.Y.2d 1, 334 N.Y.S.2d 833, 286 N.E.2d 228, 1972 N.Y. LEXIS 1230 (N.Y. 1972).

Where there was no dispute that full agreement had been reached, nor was there any dispute as to the terms thereof, and a record was made in written notes by the Justice in his chambers, there was substantial compliance with CPLR 2104. Golden Arrow Films, Inc. v Standard Club of California, Inc., 38 A.D.2d 813, 328 N.Y.S.2d 901, 1972 N.Y. App. Div. LEXIS 5365 (N.Y. App. Div. 1st Dep't 1972).

If the agreement of settlement was complete when dictated into the record and asserted to by the parties or by their attorneys acting within the authority delegated to them, then it is binding notwithstanding the fact that the record was actually made in the judge's chambers rather than in the courtroom. Owens v Lombardi, 41 A.D.2d 438, 343 N.Y.S.2d 978, 1973 N.Y. App. Div. LEXIS 4358 (N.Y. App. Div. 4th Dep't 1973).

Settlement stipulation would not be declared null and void despite fact that it was entered into orally in judges chambers rather than in open court. Kennilwood Owners Asso. v Spanier, 42 A.D.2d 571, 344 N.Y.S.2d 194, 1973 N.Y. App. Div. LEXIS 4257 (N.Y. App. Div. 2d Dep't 1973), app. dismissed, 34 N.Y.2d 666, 355 N.Y.S.2d 583, 311 N.E.2d 653, 1974 N.Y. LEXIS 1671 (N.Y. 1974), app. dismissed, 34 N.Y.2d 668, 1974 N.Y. LEXIS 2589 (N.Y. 1974).

Oral agreement to convey marital residence, allegedly entered into by husband and wife in divorce judge's chambers, was unenforceable where it was not evidenced by stenographic transcript or other writing. Kolodziej v Kolodziej, 54 A.D.2d 228, 388 N.Y.S.2d 447, 1976 N.Y. App. Div. LEXIS 13759 (N.Y. App. Div. 4th Dep't 1976).

Oral agreements reached in a Judge's chambers are not subject to specific performance unless consummated according to the mandate of CPLR § 2104, which in the least requires entry in the minute book of an open court proceeding. Collazo v New York City Health & Hospitals Corp., 103 A.D.2d 789, 477 N.Y.S.2d 662, 1984 N.Y. App. Div. LEXIS 19414 (N.Y. App. Div. 2d Dep't 1984).

Judgment for plaintiff on its contract claim for damages against defendant was properly entered without introduction of evidence by plaintiff where defendant had stipulated in chambers that its only defense was that the contract had been terminated by notice mailed to plaintiff, and the trial court found that such notice had not been received. Defendant was estopped to rely on technical noncompliance with CPLR § 2104 where the stipulation in chambers was relied upon by the court and parties throughout the trial, defendant's counsel acknowledged in open court that the stipulation occurred, and there was no dispute as to its terms. Rhulen Agency, Inc. v Gramercy Brokerage, Inc., 106 A.D.2d 725, 484 N.Y.S.2d 156, 1984 N.Y. App. Div. LEXIS 21664 (N.Y. App. Div. 3d Dep't 1984).

Pursuant to CPLR 2104, oral stipulation is binding on parties provided that agreement is spread upon record in "open court"; "open court" requirement is satisfied by transcribed proceedings in chambers; consequently, in matrimonial action where parties entered into stipulation which was spread upon record in justices' chambers, order granting defendant husband's motion to enforce stipulation is affirmed since plaintiff wife's allegations fall considerably short of type required to afford relief from stipulation; clearly, after many conferences and full representation by counsel, change of heart is insufficient. Sontag v Sontag, 114 A.D.2d 892, 495 N.Y.S.2d 65, 1985 N.Y. App. Div. LEXIS 53921 (N.Y. App. Div. 2d Dep't), app. dismissed, 66 N.Y.2d 554, 498 N.Y.S.2d 133, 488 N.E.2d 1245, 1986 N.Y. LEXIS 21652 (N.Y. 1985).

**13. —Necessity of recording**

In a motor vehicle negligence action, Special Term erroneously denied plaintiff's unopposed motion to restore the matter to Trial Calendar, to amend the caption of the action to read that it

was pending in the Supreme Court rather than the Civil Court Kings County, and to increase the ad damnum clause from $10,000 to $50,000 on the ground that the matter had already been settled, where the court's minute book entries did not indicate that an acceptance of defendant's offer was made in open court and thus did not make out a binding and enforceable stipulation settlement pursuant to CPLR § 2104. Graffeo v Brenes, 85 A.D.2d 656, 445 N.Y.S.2d 223, 1981 N.Y. App. Div. LEXIS 16472 (N.Y. App. Div. 2d Dep't 1981).

Under CLS CPLR § 2104, oral settlement between parties or their counsel will be enforceable if made in open court, if terms of settlement are definite, and if settlement, at very least, is entered in minute book of such proceeding; mere entry on clerk's docket card indicating that case was settled was insufficient to satisfy § 2104. Kalomiris v County of Nassau, 121 A.D.2d 367, 503 N.Y.S.2d 83, 1986 N.Y. App. Div. LEXIS 58305 (N.Y. App. Div. 2d Dep't 1986).

Plaintiffs' failure to record oral stipulation rendered in open court giving them right of first refusal in real property, while relevant to third-party purchaser of property, did not affect rights and obligations of parties to stipulation. Jackson v Valvo, 179 A.D.2d 1038, 579 N.Y.S.2d 300, 1992 N.Y. App. Div. LEXIS 2379 (N.Y. App. Div. 4th Dep't 1992).

Personal injury plaintiff was not entitled to restoration of matter to trial calendar where (1) after pre-trial conference, parties agreed in presence of court to settle case, (2) court marked original note of issue to conform with agreement, and (3) clerk entered notice of settlement in court's calendar and on clerk's return, which information was entered into court's computer record system; court's documentation and entry into computer records equated to requirement of entry into clerk's minute book and complied with CLS CPLR § 2104 and 22 NYCRR § 202.26(f). Popovic v New York City Health & Hosp. Corp., 180 A.D.2d 493, 579 N.Y.S.2d 399, 1992 N.Y. App. Div. LEXIS 1285 (N.Y. App. Div. 1st Dep't 1992).

Plaintiff was not entitled to enforcement of purported settlement of foreclosure action where there was dispute as to whether full agreement had been reached and no record was made of settlement in minute book.  Marine Midland Bank, N. . v Ramleh Enters., 202 A.D.2d 403, 608 N.Y.S.2d 525, 1994 N.Y. App. Div. LEXIS 1949 (N.Y. App. Div. 2d Dep't 1994).

Medical malpractice defendants were not entitled to enforcement of purported settlement agreement where there was no written agreement or stipulation evincing purported settlement, nor any transcript of it, there were no notations in court clerk's minute book, docket, or register, and there was no documentary evidence of settlement agreement. Venuti v Booth Memorial Medical Ctr., 204 A.D.2d 715, 614 N.Y.S.2d 253, 1994 N.Y. App. Div. LEXIS 5766 (N.Y. App. Div. 2d Dep't 1994).

There was no open court settlement agreement within meaning of CLS CPLR § 2104 where purported agreement was never transcribed or entered into any court record. In re Estate of Janis, 210 A.D.2d 101, 620 N.Y.S.2d 342, 1994 N.Y. App. Div. LEXIS 12666 (N.Y. App. Div. 1st Dep't 1994).

Delay in seeking default judgment was not excused by alleged stipulation between parties extending defendant's time to answer complaint where no such stipulation appeared in record; in order for stipulation to be given effect, it must be (1) in writing and signed by parties or their attorneys, or (2) reduced to form of order and entered. Turner v Turner, 216 A.D.2d 910, 629 N.Y.S.2d 138, 1995 N.Y. App. Div. LEXIS 7235 (N.Y. App. Div. 4th Dep't 1995), reh'g denied, 1995 N.Y. App. Div. LEXIS 11102 (N.Y. App. Div. 4th Dep't Sept. 29, 1995).

Notation allegedly appearing on trial judge's trial calendar, "SBT 15,000," did not constitute sufficient memorialization of terms of alleged settlement so as to satisfy open-court requirement of CLS CPLR § 2104. Johnson v Four G's Truck Rental, 244 A.D.2d 319, 663 N.Y.S.2d 889, 1997 N.Y. App. Div. LEXIS 11002 (N.Y. App. Div. 2d Dep't 1997).

Notation "SBT" appearing on court's trial calendar, purportedly meaning "settled before trial," did not constitute sufficient memorialization of terms of alleged settlement to satisfy open court requirement for validity of oral stipulation. Avaltroni v Gancer, 260 A.D.2d 590, 688 N.Y.S.2d 650, 1999 N.Y. App. Div. LEXIS 4340 (N.Y. App. Div. 2d Dep't 1999).

Notations made by trial judge on court file, even when considered in conjunction with computer entries made by court clerk's office pursuant to some later communications by judge, did not

sufficiently memorialize terms of alleged settlement in official court records to satisfy open court requirement of CLS CPLR § 2104, and thus purported settlement of action during pretrial conference was not enforceable. Gustaf v Fink, 285 A.D.2d 625, 728 N.Y.S.2d 751, 2001 N.Y. App. Div. LEXIS 7703 (N.Y. App. Div. 2d Dep't 2001).

Because a stipulation was never actually placed on the record and the doctors never verbally agreed to the settlement, none of the requirements of the open-court exception to N.Y. C.P.L.R. 2104 were met; accordingly, the purported settlement was unenforceable. Diarassouba v Urban, 71 A.D.3d 51, 892 N.Y.S.2d 410, 2009 N.Y. App. Div. LEXIS 9234 (N.Y. App. Div. 2d Dep't 2009).

Statute’s open court requirement for an oral stipulation of settlement was not satisfied as the alleged stipulation was not entered in “open court” inasmuch as there was no dispute that the alleged settlement was reached during a pretrial conference with the court’s law clerk. Guzman-Martinez v Rosado, 236 A.D.3d 1362, 229 N.Y.S.3d 752, 2025 N.Y. App. Div. LEXIS 1484 (N.Y. App. Div. 4th Dep't 2025).

**14. Written stipulations**

Stipulations of counsel must be in writing. This means that all matters claimed to be the subject of the stipulation must be set out. The court cannot be asked to divine what was in counsel’s mind or to seek the intent from other evidence, nor to resolve disputes arising from sources other than the words of the writing. Columbia Broadcasting System, Inc. v Roskin Distributors, Inc., 31 A.D.2d 22, 294 N.Y.S.2d 804, 1968 N.Y. App. Div. LEXIS 2951 (N.Y. App. Div. 1st Dep't 1968), aff'd, 28 N.Y.2d 559, 319 N.Y.S.2d 449, 268 N.E.2d 128, 1971 N.Y. LEXIS 1575 (N.Y. 1971).

In an Article 78 proceeding by a landlord challenging a city rent control board’s determination of rent overcharge, a motion to vacate a default by the board would be granted in the exercise of the appellate court’s discretion, even though the board had received more adjournments by signed stipulation and the proceedings had been pending for more days than were permissible

under local court rules, where the default was not aggravated, where counsel for the board was present on the return date with a written stipulation of consent to another adjournment, where counsel moved promptly to vacate the default, and where the landlord could not show any prejudice if the default was opened. Glenbriar Co. v New York City Conciliation & Appeals Bd., 93 A.D.2d 510, 462 N.Y.S.2d 655, 1983 N.Y. App. Div. LEXIS 17505 (N.Y. App. Div. 1st Dep't 1983).

Personal notes of parties' attorneys relating to purported settlement agreement did not satisfy requirements of CLS CPLR § 2104 even if terms of purported agreement were not in dispute. In re Estate of Janis, 210 A.D.2d 101, 620 N.Y.S.2d 342, 1994 N.Y. App. Div. LEXIS 12666 (N.Y. App. Div. 1st Dep't 1994).

Personal notes of surrogate relating to purported settlement agreement did not satisfy requirements of CLS CPLR § 2104, even if terms of purported agreement were not in dispute. In re Estate of Janis, 210 A.D.2d 101, 620 N.Y.S.2d 342, 1994 N.Y. App. Div. LEXIS 12666 (N.Y. App. Div. 1st Dep't 1994).

Written stipulations, in which law firm representing defendants agreed to "waive the affirmative defense of lack of jurisdiction" in exchange for extensions of their time to answer complaint, were bargained for and properly based on apparent authority of defendants' attorneys, despite defendants' claim that stipulations were entered into improvidently; however, stipulation to waive defense of subject matter jurisdiction was legally inoperative. Morrison v Budget Rent A Car Sys., 230 A.D.2d 253, 657 N.Y.S.2d 721, 1997 N.Y. App. Div. LEXIS 4486 (N.Y. App. Div. 2d Dep't 1997).

Petitioners in Article 78 proceeding were entitled to order compelling cemetery to issue and register plot deeds in their names where cemetery's counsel indicated in letter that cemetery would abide by whatever direction court gave in matter, and individual respondents filed stipulation in Appellate Division indicating that they took no position on issue of requested deeds. Turkewitz v Congregation Kehilath Isr., 263 A.D.2d 371, 691 N.Y.S.2d 775, 1999 N.Y. App. Div. LEXIS 7809 (N.Y. App. Div. 1st Dep't 1999).

Res judicata doctrine barred former wife from seeking modification of divorce judgment so as to direct that she receive equitable share of former husband's pension and 401K plan where she failed to litigate issue of equitable distribution at time of divorce judgment or to include in parties' stipulation of settlement express provision as to future distribution of those items. Zollner v Zollner, 263 A.D.2d 454, 692 N.Y.S.2d 711, 1999 N.Y. App. Div. LEXIS 7787 (N.Y. App. Div. 2d Dep't 1999).

Father willfully violated 2 support orders where he failed to post required undertaking for child support arrears and failed to fund custodial account for child in accordance with stipulation incorporated into Family Court's order, and his explanation—that he thought undertaking was being deducted from his weekly pay and believed that funding of custodial account was contingent on selling his mother's house—did not satisfy his burden of showing inability to pay. Houk v Meyer, 263 A.D.2d 688, 692 N.Y.S.2d 854, 1999 N.Y. App. Div. LEXIS 7996 (N.Y. App. Div. 3d Dep't 1999).

Where written stipulation between divorcing parties was incorporated but not merged into decree, it survived judgment of divorce and was to be treated as independent contract, subject to principles of contract interpretation. Wenskoski v Wenskoski, 265 A.D.2d 635, 695 N.Y.S.2d 766, 1999 N.Y. App. Div. LEXIS 10324 (N.Y. App. Div. 3d Dep't 1999).

In light of open-court stipulation whereby all parties agreed that defendants' third-party claims would survive settlement of all other claims, defendants' appeal from trial court's dismissal of third party claims was not rendered academic by written stipulation of settlement prepared by plaintiffs' counsel, signed only by plaintiffs, which failed to reserve defendants' third-party claims, as parties clearly did not intend that written stipulation would override terms of stipulation made on record and, in any event, written stipulation was not binding on defendants because it was not signed or ratified by them. Smith v AJ Contr. Co., 277 A.D.2d 305, 716 N.Y.S.2d 77, 2000 N.Y. App. Div. LEXIS 11700 (N.Y. App. Div. 2d Dep't 2000).

Stipulation of settlement was valid, and would be enforced, where plaintiff's attorney had accepted defendants' settlement offer provided payment was made within ten days by bank or

certified check, payable to plaintiff and its attorney; statement of payment terms did not render plaintiff's acceptance counteroffer. Allstate Power-Vac, Inc. v FCE Indus., 282 A.D.2d 414, 722 N.Y.S.2d 401, 2001 N.Y. App. Div. LEXIS 3326 (N.Y. App. Div. 2d Dep't 2001).

Purported settlement made during a trial conference was unenforceable as it was never reduced to writing and signed by the parties, nor made in "open court;" a notation allegedly appearing on the trial judge's court calendar that the case was "settled" was not a sufficient memorialization so as to satisfy the open-court requirement of N.Y. C.P.L.R. 2104. Andre-Long v Verizon Corp., 31 A.D.3d 353, 819 N.Y.S.2d 56, 2006 N.Y. App. Div. LEXIS 8698 (N.Y. App. Div. 2d Dep't 2006).

In two related personal injury actions, the trial court properly denied defendants' motions to enforce a purported settlement agreement because the e-mail confirmation sent to plaintiffs' former counsel by one defendant's insurer's attorney, either alone or along with the e-mail response of plaintiffs' former counsel, did not constitute a writing sufficient to bring the purported settlement into the scope of N.Y. C.P.L.R. 2104. DeVita v Macy's East, Inc., 36 A.D.3d 751, 828 N.Y.S.2d 531, 2007 N.Y. App. Div. LEXIS 741 (N.Y. App. Div. 2d Dep't 2007).

Personal representative and her daughters' (PR) stipulation of settlement with the decedent's first wife (FW) was valid as: (1) the stipulation was freely negotiated and precluded PR from objecting to FW's right to an elective share; (2) the stipulation was signed on the date of the hearing; (3) the parties confirmed that they had discussed the stipulation with their counsel and understood its terms; (4) PR did not establish any grounds for setting aside the stipulation as her counsel did not learn of an opening in the special administrator's firm until about a week after the stipulation had been signed and no job offer was ever extended to him; and (5) the stipulation was not unconscionable. Matter of Badruddin, 152 A.D.3d 1010, 60 N.Y.S.3d 528, 2017 N.Y. App. Div. LEXIS 5711 (N.Y. App. Div. 3d Dep't 2017).

A settlement stipulation entered into at a scheduled examination before trial at defendants' attorney's office and taken down by the stenotype reporter present for the examination and subsequently transcribed, complies with CPLR 2104, pursuant to which agreements relating to

any matter in an action, other than open court stipulations, are required to be subscribed to in writing or reduced to the form of an order and entered; the examination before trial was scheduled pursuant to statute and under the aegis of the court, defendant was personally present, made no objection to the settlement stipulation, the stipulation was recorded contemporaneously, reduced to writing, is concededly accurate and is unambiguous. Hub Press, Inc. v Sun-Ray Lighting Co., 100 Misc. 2d 1055, 420 N.Y.S.2d 443, 1979 N.Y. Misc. LEXIS 2607 (N.Y. Civ. Ct. 1979).

Stipulation of settlement between insurer and injured party was enforceable, despite insurer's later discovery that amount offered exceeded policy limits, where, although stipulation was not made in open court, it was reduced to writing as required by CLS CPLR § 2104 in that insurer sent letter to injured party's attorney confirming fact that case had been settled for offered amount, and 2 months earlier had forwarded general release in that amount which injured party duly executed. Mazzola v CNA Ins. Co., 145 Misc. 2d 896, 548 N.Y.S.2d 610, 1989 N.Y. Misc. LEXIS 770 (N.Y. Civ. Ct. 1989).

Even if parties to trademark dispute reached oral settlement agreement, agreement was unenforceable under New York's statute of frauds provision requiring settlement agreements to be reduced to writing (CLS CPLR § 2104), notwithstanding defendant's contention that plaintiff should not be allowed to assert statute of frauds defense because it "conveniently lost" notes made during negotiations, where there was no evidence that plaintiff subscribed notes, and almost no evidence as to contents of notes. Sears, Roebuck & Co. v Sears Realty Co., 932 F. Supp. 392, 1996 U.S. Dist. LEXIS 10651 (N.D.N.Y. 1996).

**15. —Signature requirement**

Where settlement agreement was not signed by defendant or his attorney and was reached at conference which was not recorded and which was informal, apparently taking place in court's robing room, settlement agreement was not enforceable. Signer v Abramowitz, 45 A.D.2d 677, 356 N.Y.S.2d 301, 1974 N.Y. App. Div. LEXIS 4807 (N.Y. App. Div. 1st Dep't 1974).

Where “stipulation” as to fair market value of realty allegedly improperly assessed was not in writing and signed by property owners or their counsel but was part of package proposal to submit entire controversy to special term judge and the proposal was refused by the board of assessors of town, property owners were free to prove lower fair market value through appraisal of subject property by the board’s own assessors. Swanz v Brant, 52 A.D.2d 1071, 384 N.Y.S.2d 607, 1976 N.Y. App. Div. LEXIS 12997 (N.Y. App. Div. 4th Dep't 1976).

A personal injury action against two non-New York residents, stemming from an automobile accident in Pennsylvania, should have been dismissed for lack of personal jurisdiction, where a purported stipulation between the parties waiving personal jurisdiction was invalid, in that it was signed only by plaintiff’s attorney, not defendants, and thus did not meet the requirements of CPLR § 2104. Aytch v Yellow Freight Systems, Inc., 100 A.D.2d 757, 474 N.Y.S.2d 26, 1984 N.Y. App. Div. LEXIS 17854 (N.Y. App. Div. 1st Dep't 1984).

Surrogate’s Court properly set fee at $12,000 for attorney for administrators of New York estate, rather than $60,000 requested, despite administrators’ contention that beneficiaries under will had stipulated that attorney was to receive compensation for representing administrators individually as well as in their capacities as administrators, where stipulation provided only that Surrogate’s Court was to “set and approve the reasonable and necessary attorney’s fees”; beneficiaries could not be bound by earlier version of stipulation which they did not sign, notwithstanding testimony of attorney who drafted stipulation that he inadvertently changed wording of final version, omitting provision that fee to be paid administrators’ attorney would include compensation for representing them individually. In re Estate of Quade, 121 A.D.2d 780, 503 N.Y.S.2d 193, 1986 N.Y. App. Div. LEXIS 58753 (N.Y. App. Div. 3d Dep't 1986).

Terms of stipulation were binding on defendant despite absence of defendant’s signature or that of his attorney where stipulation was prepared by defendant’s attorney and proffered to plaintiff’s attorney who executed it and returned it to defendant’s attorney. Stefaniw v Cerrone, 130 A.D.2d 483, 515 N.Y.S.2d 66, 1987 N.Y. App. Div. LEXIS 46455 (N.Y. App. Div. 2d Dep't 1987).

Purported stipulation of discontinuance was not effective where it was filed only with plaintiff's attorney's signature and was not signed by defendants or their attorneys. Tortorello v Carlin, 162 A.D.2d 291, 556 N.Y.S.2d 879, 1990 N.Y. App. Div. LEXIS 7417 (N.Y. App. Div. 1st Dep't 1990).

Party was bound by stipulation as amended by second stipulation where its agent signed second stipulation, which amended and expressly referred to pertinent portion of first stipulation. Aetna Cas. & Sur. Co. v McCarthy, 246 A.D.2d 406, 666 N.Y.S.2d 432, 1998 N.Y. App. Div. LEXIS 287 (N.Y. App. Div. 1st Dep't 1998).

Because a cover letter signed by a general partner's attorney did not satisfy the requirement in N.Y. C.P.L.R. 2104 that an attached settlement agreement be signed by the party (or attorney) to be bound, and because the parties did not intend it to be binding upon them until it was reduced to writing and signed, the trial court erred by enforcing the agreement. Estate of Amendola v Kendzia, 48 A.D.3d 1173, 850 N.Y.S.2d 777, 2008 N.Y. App. Div. LEXIS 793 (N.Y. App. Div. 4th Dep't 2008).

Judgment in favor of appellant against members in a N.Y. Ltd. Liab. Co. Law § 702 proceeding was error because the settlement document, on which the judgment was based, provided that it would not be enforceable unless executed by all parties; having been signed by only two out of three parties, the document was unenforceable by its own terms. A letter written by the attorney for the party who did not sign the document was not sufficient to render the purported settlement enforceable. Matter of Morse Hill Assoc., LLC, 50 A.D.3d 906, 855 N.Y.S.2d 652, 2008 N.Y. App. Div. LEXIS 3433 (N.Y. App. Div. 2d Dep't 2008).

Settlement of a personal injury case was properly enforced because an email message from an insurance adjuster agreeing to the settlement was binding, as (1) the message stated the agreement's material terms, contained an expression of mutual assent, and was not conditioned on a further occurrence, (2) the adjuster had apparent authority to settle the case, and (3) the email message was "subscribed," under N.Y. C.P.L.R. 2104, and capable of enforcement, as the adjuster, in effect, signed the message, as the circumstances manifested the adjuster's

intent that the adjuster’s name be treated as a signature. Forcelli v Gelco Corp., 109 A.D.3d 244, 972 N.Y.S.2d 570, 2013 N.Y. App. Div. LEXIS 5354 (N.Y. App. Div. 2d Dep't 2013).

Where an email message contains all material terms of a settlement and a manifestation of mutual accord, and the party to be charged, or his or her agent, types his or her name under circumstances manifesting an intent that the name be treated as a signature, such an email message may be deemed a subscribed writing within the meaning of N.Y. C.P.L.R. 2104 so as to constitute an enforceable agreement. Forcelli v Gelco Corp., 109 A.D.3d 244, 972 N.Y.S.2d 570, 2013 N.Y. App. Div. LEXIS 5354 (N.Y. App. Div. 2d Dep't 2013).

After a pedestrian served notice on a city of an injury the pedestrian sustained walking across a bridge, the stipulation of settlement negotiated by the parties was not enforceable because the city did not sign the stipulation and, as such, the stipulation did not conform to the requirements of this rule. Headley v City of New York, 115 A.D.3d 804, 982 N.Y.S.2d 149, 2014 N.Y. App. Div. LEXIS 1682 (N.Y. App. Div. 2d Dep't 2014).

Trial court erred in granting a law firm’s motion for leave to enter a judgment against a client upon his failure to comply with an alleged stipulation of settlement, and denying, as untimely, the cross-motion of the other defendants to dismiss the complaint because the firm’s submission of a stipulation, which was not executed by the firm, did not constitute a valid and binding settlement agreement, the cross-motion, which was served six days before the return date was timely, and the complaint failed to allege either compliance with the notice requirements or that the matter was not covered by the Fee Dispute Resolution Program. Zisholtz & Zisholtz, LLP v Mandel, 165 A.D.3d 1312, 86 N.Y.S.3d 221, 2018 N.Y. App. Div. LEXIS 7300 (N.Y. App. Div. 2d Dep't 2018).

Settlement of an underinsured motorist arbitration claim that was effected via email was valid because the transmission of the email, and not whether the email signature could have been shown to have been retyped, was what determined that the settlement stipulation was subscribed for purposes of CPLR 2104. Matter of Phila. Ins. Indem. Co. v Kendall, 197 A.D.3d 75, 151 N.Y.S.3d 392, 2021 N.Y. App. Div. LEXIS 4393 (N.Y. App. Div. 1st Dep't 2021).

Out-of-court transcript, taken during deposition at which parties to matrimonial action discussed terms of settlement, would not be enforced as stipulation of settlement since transcript did not meet requirement of CLS Dom Rel § 236(B)(3) that agreement between parties be signed and subscribed by them. Trapani v Trapani, 147 Misc. 2d 447, 556 N.Y.S.2d 210, 1990 N.Y. Misc. LEXIS 275 (N.Y. Sup. Ct. 1990).

Although defendant's counsel did not countersign a letter from plaintiff's counsel that set out the terms of a settlement agreement, subsequent letters signed by defendant's counsel that acknowledged the existence of the settlement agreement satisfied N.Y. C.P.L.R. 2104 requirements for a subscribed writing. Gaglia v Nash, 8 A.D.3d 992, 778 N.Y.S.2d 595, 2004 N.Y. App. Div. LEXIS 8071 (N.Y. App. Div. 4th Dep't 2004).

Settlement agreement in a federal class action lawsuit was unenforceable since the agreement was not executed by the parties, there was no exception for federal court actions to the requirement for a signed agreement, and the agreement expressly stated that New York law applied. In re Idearc Inc., 442 B.R. 513, 2010 Bankr. LEXIS 4633 (Bankr. N.D. Tex. 2010).

Settlement agreement in a former employee's discrimination suit was not enforceable because (1) the provisions in the agreement, including the express provision that it did not become binding until signed, indicated an intent that the agreement did not become binding until executed; (2) there was no evidence of partial performance, as the employer had not paid any money to the employee and she had not executed a stipulation of discontinuance; and (3) such settlements were usually reduced to a signed writing under N.Y. C.P.L.R. § 2104. Gildea v Design Distribs., 378 F. Supp. 2d 158, 2005 U.S. Dist. LEXIS 18848 (E.D.N.Y. 2005).

**16. Oral stipulations**

Assertion that defense counsel agreed to extend indefinitely time to serve complaint would be rejected where defense attorneys denied that such an extension was granted and there was no written agreement to that effect as required by statute. Dobbins v County of Erie, 58 A.D.2d 733, 395 N.Y.S.2d 865, 1977 N.Y. App. Div. LEXIS 12852 (N.Y. App. Div. 4th Dep't 1977).

Motion of plaintiff to enforce an alleged agreement of settlement was properly denied, as plaintiff failed to establish that there was a definite agreement between the parties to settle; the oral agreement which plaintiff contended was definite and complete, only awaiting reduction to writing, was more obviously an agreement to “attempt” a settlement of numerous important points, and the writings which plaintiff contended confirmed a definite agreement settling the action and which were allegedly sufficient to satisfy the subscribed writing requirement supported the opposite conclusion. Medallion Chemical Corp. v Chemical Resources, Inc., 58 A.D.2d 808, 396 N.Y.S.2d 419, 1977 N.Y. App. Div. LEXIS 12972 (N.Y. App. Div. 2d Dep't 1977).

A defendant was not entitled to dismissal of an action for alleged failure of a plaintiff to carry out a settlement agreement where the agreement had been entered into among the parties in a conference before a judge with both sides represented by counsel even though a stipulation of settlement had not been stenographically recorded, and where the defendant failed to show that the parties had executed an express, unconditional stipulation of discontinuance, or had entered a judgment in accordance with the terms of settlement. Gonyea v Avis Rent A Car System, Inc., 82 A.D.2d 1011, 442 N.Y.S.2d 177, 1981 N.Y. App. Div. LEXIS 14746 (N.Y. App. Div. 3d Dep't 1981).

In an action by a law firm, which had been retained by client to represent him in a matrimonial action and which subsequently sued client for services allegedly rendered in his behalf, Special Term erred in ordering plaintiffs to accept service of a notice of appearance and to serve a complaint, where there was no validity to defendant’s contention that the notice of appearance was properly served because of an alleged granted extension of time, it being well established that such an agreement, to be binding, must be in writing and subscribed by the party charged, so that the lack of timely service was due to a law office failure which could not be excused. Kahn v Friedlander, 90 A.D.2d 868, 456 N.Y.S.2d 482, 1982 N.Y. App. Div. LEXIS 19139 (N.Y. App. Div. 3d Dep't 1982).

An order of summary judgment in favor of plaintiff, based upon a stipulation of settlement reached by the parties, in which defense counsel carried on the settlement negotiations and agreed to the settlement by telephone rather than allowing the case to proceed to inquest upon defendant’s default, order would be reversed, since the phone conversations which led to the court’s marking the case as settled were not conducted in open court, as required by CPLR Rule 2104, and were thus not binding on defendant. Henderson v Weston's, Inc., 102 A.D.2d 997, 477 N.Y.S.2d 887, 1984 N.Y. App. Div. LEXIS 19235 (N.Y. App. Div. 3d Dep't), app. dismissed, 63 N.Y.2d 952, 1984 N.Y. LEXIS 6399 (N.Y. 1984).

An oral settlement agreement between the parties to a medical malpractice action was not enforceable by defendant where both parties’ counsel stated in court that no settlement had been reached, no attempt was made to enter the agreement in the record despite invitation to do so, and defendant failed to show reliance on the terms of the agreement. Van Syckle v Powers, 106 A.D.2d 711, 483 N.Y.S.2d 756, 1984 N.Y. App. Div. LEXIS 21658 (N.Y. App. Div. 3d Dep't 1984), app. denied, 64 N.Y.2d 609, 489 N.Y.S.2d 1025, 1985 N.Y. LEXIS 18840 (N.Y. 1985).

Oral stipulation made in open court which has definite terms is binding on parties absent fraud, collusion, mistake, accident or some other ground of similar nature. Bauer v Lygren, 113 A.D.2d 913, 493 N.Y.S.2d 815, 1985 N.Y. App. Div. LEXIS 52542 (N.Y. App. Div. 2d Dep't 1985).

Pursuant to CPLR 2104 oral stipulation is binding on parties provided that agreement is spread upon record in “open court”; “open court” requirement is satisfied by transcribed proceedings in chambers; consequently, in matrimonial action where parties entered into stipulation which was spread upon record in justices’ chambers, order granting defendant husband’s motion to enforce stipulation is affirmed since plaintiff wife’s allegations fall considerably short of type required to afford relief from stipulation; clearly, after many conferences and full representation by counsel, change of heart is insufficient. Sontag v Sontag, 114 A.D.2d 892, 495 N.Y.S.2d 65, 1985 N.Y. App. Div. LEXIS 53921 (N.Y. App. Div. 2d Dep't), app. dismissed, 66 N.Y.2d 554, 498 N.Y.S.2d 133, 488 N.E.2d 1245, 1986 N.Y. LEXIS 21652 (N.Y. 1985).

In personal injury action where defendant never executed stipulation of settlement because of freeze placed on assets of his insurer, plaintiff was entitled to judgment in amount of parties' stipulated settlement in view of (1) defendant's written correspondence admitting that case had been amicably resolved, (2) absence of dispute as to settlement terms, and (3) plaintiff's execution of general release discontinuing action at time when defendant was undeniably aware of settlement amount; based on parties' unequivocal intent to settle lawsuit, defendant was estopped from claiming that their out-of-court settlement was not expressly memorialized in writing as required by CLS CPLR § 2104. Van Ness v Rite-Aid of New York Inc., 129 A.D.2d 931, 514 N.Y.S.2d 570, 1987 N.Y. App. Div. LEXIS 45594 (N.Y. App. Div. 3d Dep't 1987).

Plaintiff was not bound by stipulation of settlement which was neither reduced to writing and signed by plaintiff nor entered in open court, especially where there had been no showing of detrimental reliance. Salmi v Aetna Casualty & Surety Co., 134 A.D.2d 765, 521 N.Y.S.2d 579, 1987 N.Y. App. Div. LEXIS 50940 (N.Y. App. Div. 3d Dep't 1987).

In action for specific performance of real estate sales contract, court improperly permitted testimony about oral stipulation of settlement where seller's testimony denying any knowledge of terms of such agreement or that he had entered into stipulation was uncontroverted, and court's conclusion that parties were bound thereby because of their performance of its terms was wholly unsupported; moreover, neither party had claimed during 2 ½ years between commencement of action and trial that such stipulation existed. Gucciardo v Norman, 139 A.D.2d 562, 527 N.Y.S.2d 62, 1988 N.Y. App. Div. LEXIS 3816 (N.Y. App. Div. 2d Dep't), app. denied, 72 N.Y.2d 801, 530 N.Y.S.2d 553, 526 N.E.2d 44, 1988 N.Y. LEXIS 1037 (N.Y. 1988).

Stenographic record of oral stipulation alone, created in judicial setting outside of justice's presence in front of justice's law clerk in chambers, was insufficient under CLS CPLR § 2104; however, where transcript of agreement and affidavits of counsel and parties fully demonstrated that settlement was agreed to and relied on by all parties, plaintiff was estopped from using technical noncompliance with statue as ground to vacate settlement agreement. Conlon v

Concord Pools, Ltd., 170 A.D.2d 754, 565 N.Y.S.2d 860, 1991 N.Y. App. Div. LEXIS 1418 (N.Y. App. Div. 3d Dep't 1991).

Plaintiff was not entitled to discretionary relief from judgment of default, based on plaintiff's attorney's bare assertion that defense counsel orally agreed to withdraw obviously meritorious motion to dismiss for failure to prosecute provided that note of issue were filed, where not only was claim denied by defense counsel, but such out-of-court oral agreement in no way fulfilled demands of CLS CPLR § 2104 and thus was not binding on defendant. Wilson v Nembhardt, 180 A.D.2d 731, 580 N.Y.S.2d 70, 1992 N.Y. App. Div. LEXIS 2622 (N.Y. App. Div. 2d Dep't 1992).

Oral stipulation of settlement was properly vacated where only record of settlement was notation made by court in its personal file which read "SBT ($200,000) Disposed" (SBT apparently meant "settled before trial"); although stipulations of settlement are favored, notation made by court did not constitute sufficient or adequate memorialization of terms of settlement to satisfy "open court" requirement of CLS CPLR § 2104. Zambrana v Memnon, 181 A.D.2d 730, 581 N.Y.S.2d 83, 1992 N.Y. App. Div. LEXIS 3273 (N.Y. App. Div. 2d Dep't 1992).

Alleged settlement of action was not enforceable where it was never reduced to writing and signed by parties, and was not made in open court. Avaltroni v Gancer, 260 A.D.2d 590, 688 N.Y.S.2d 650, 1999 N.Y. App. Div. LEXIS 4340 (N.Y. App. Div. 2d Dep't 1999).

Alleged stipulation of settlement was not enforceable where pertinent discussions took place off record and there was nothing to indicate agreement by petitioner or his attorney to specific terms of settlement. Hicks v Schoetz, 261 A.D.2d 944, 691 N.Y.S.2d 219, 1999 N.Y. App. Div. LEXIS 5045 (N.Y. App. Div. 4th Dep't 1999).

In proceeding for modification of child support, $1,511.29 would be awarded for unreimbursed day care expenses where parties' had orally stipulated to reimbursement of day care expenses at time of their divorce. Butto v Twietmeyer, 266 A.D.2d 834, 698 N.Y.S.2d 367, 1999 N.Y. App. Div. LEXIS 11758 (N.Y. App. Div. 4th Dep't 1999).

In action alleging, inter alia, breach of contract and fraud in connection with cooperative conversion of apartment building, court properly denied defendants' motion to amend answer insofar as it sought to add affirmative defense/counterclaim for breach of oral settlement agreement since agreement, not having been evidenced by properly subscribed writing, much less one reduced to form of order, was unenforceable. Lex Tenants Corp. v Gramercy North Assocs., 269 A.D.2d 297, 704 N.Y.S.2d 459, 2000 N.Y. App. Div. LEXIS 2040 (N.Y. App. Div. 1st Dep't 2000).

Trial court properly granted a tenant's motion to enforce the terms of the parties' oral settlement because it was not simply an agreement to agree, the 20 months between the calculations and the settlement belied the notion that the agreed-upon sum was "manifestly unfair" to the landlord or "unconscionable," and the record showed that the landlord posted a bond in excess of the settlement amount pending appeal, such that the parties' rights would not be directly affected and the interest of the parties would not be an immediate consequence of any decision by the court to modify that time frame. Nieborak v W54-7 LLC, 203 A.D.3d 439, 163 N.Y.S.3d 526, 2022 N.Y. App. Div. LEXIS 1384 (N.Y. App. Div. 1st Dep't 2022).

The court would enforce an oral settlement of a personal injury action agreed upon between plaintiff and defendant where following settlement negotiations, plaintiff accepted defendant's offer, forwarded general releases and stipulations of discontinuances to defendant, but no monies were received by plaintiff to complete the transaction despite repeated promises by defendant to pay the settlement. Hansen v Prudential Lines, Inc., 118 Misc. 2d 568, 461 N.Y.S.2d 670, 1983 N.Y. Misc. LEXIS 3364 (N.Y. Sup. Ct. 1983).

Prosecutor's representation, made in telephone conversation to defense counsel, that People did not intend to introduce into evidence at defendant's trial on rape, sodomy, and related charges fact that police found marijuana in his residence during execution of search warrant did not constitute binding stipulation on successor prosecutor who would actually try case; telephone conversation was not tantamount to stipulation enforceable at trial since there was

insufficient formality to effectuate it. People v Boyer, 184 Misc. 2d 78, 707 N.Y.S.2d 788, 2000 N.Y. Misc. LEXIS 103 (N.Y. Sup. Ct. 2000).

Pursuant to N.Y. C.P.L.R. 2104 an oral stipulation was binding because the parties placed a valid settlement agreement on the record in open court, the insured did not submit any evidence establishing a basis to set aside the agreement, and the insured's attorney was silent while the insurer's counsel advised the trial court that the matter was settled. Caroli v Allstate Ins. Co., 100 A.D.3d 941, 955 N.Y.S.2d 128, 2012 N.Y. App. Div. LEXIS 8036 (N.Y. App. Div. 2d Dep't 2012).

CLS CPLR § 2104 (requiring signed writing for settlement agreement to be enforceable) rather than general statute of frauds (CLS Gen Oblig § 5-701) applied in determining whether oral settlement agreement was enforceable. Sears, Roebuck & Co. v Sears Realty Co., 932 F. Supp. 392, 1996 U.S. Dist. LEXIS 10651 (N.D.N.Y. 1996).

Retailer, as plaintiff in action against service station owner seeking to recover for infringement of retailer's "SEARS" trademark, was not estopped from asserting statute of frauds defense to owner's claim that parties had entered into binding oral settlement agreement, where there was no evidence that retailer made clear and unambiguous promise or intended to mislead owner when parties met to discuss settlement, and draft settlement agreement prepared after parties' single meeting suggested that binding agreement was conditioned on both parties signing final document. Sears, Roebuck & Co. v Sears Realty Co., 932 F. Supp. 392, 1996 U.S. Dist. LEXIS 10651 (N.D.N.Y. 1996).

Court enforced oral settlement agreement not made in open court, whereby employer agreed to pay injured employee $7,500 in return for release from liability and dismissal of case with prejudice, where evidence supported finding that both parties intended to be bound by agreement; agreement was exceedingly simple, and was of type made orally by attorneys for both sides in similar past cases. Sorensen v CONRAIL, 992 F. Supp. 146, 1998 U.S. Dist. LEXIS 7654 (N.D.N.Y. 1998).

Oral settlement agreement in a suit to enforce a default judgment against a corporation that had entered into an agreement with a Native American tribe to develop a casino was enforceable where the parties evidenced an intent to be bound by the settlement, particularly where the suit was voluntarily dismissed, and the requirement of N.Y. C.P.L.R. § 2104 was met by the in-court announcement of the settlement, combined with the entry of judgments of dismissal, and a nearly-complete signed stipulation and release, which functioned in a manner akin to that of a memorializing writing for purposes of § 2104. Bernstein v Harrah's Operating Co., 661 F. Supp. 2d 186, 2009 U.S. Dist. LEXIS 89172 (N.D.N.Y. 2009).

In an arrestee's 42 U.S.C.S. § 1983 civil rights suit against defendants, a city and several police officers, the arrestee's attorney's oral agreement to a Fed. R. Civ. P. 68 offer of judgment did not create a binding settlement agreement under New York law because the requirements of N.Y. C.P.L.R. 2104 were not met where the agreement was not made in open court; defendants never received a signed, written agreement from the arrestee nor was such an agreement ever filed with the court; and although defendants wrote to the court with news of the oral settlement, because the letter was not signed by the arrestee or her attorney, it was not an effective stipulation. Vesterhalt v City of New York, 667 F. Supp. 2d 292, 2009 U.S. Dist. LEXIS 99327 (S.D.N.Y. 2009).

**17. —Effect of reliance**

In an action arising out of two agreements, both of which involved plaintiff as either a real estate agent for defendants or as a purchaser of defendants' realty, defendants' excuse for delay in filing an answer was reasonable where plaintiff had changed attorneys and defendants stated that in telephone conversations with the original attorney of record they were granted an indefinite extension and reliance upon an oral agreement between attorneys did not constitute law office failure. Since no one disputed the existence of the oral agreement to extend defendants' time to answer, the requirement of CPLR § 2104 of a writing could not be used to

support a finding of law office failure. Bates Real Estate, Inc. v Marquette Land Co., 93 A.D.2d 939, 462 N.Y.S.2d 307, 1983 N.Y. App. Div. LEXIS 17833 (N.Y. App. Div. 3d Dep't 1983).

Defense counsel established that there was reasonable excuse for delay and that there existed meritorious claim or defense so as to be relieved of default judgment where defense counsel averred that 10-day delay in serving answer was due solely to his reliance upon oral assurance by plaintiff's counsel that late answer would be accepted, and acted reasonably in relying upon assurance, even though extension of time to answer, to be binding, should have been in writing and subscribed by party to charged pursuant to CPLR § 2104; although answer served by defendants 10 days after expiration of statutory answering period was defective in that it was not properly verified, defendants had informed plaintiff's counsel that, in order to expedite matters, they would forward verification separately by letter accompanying answer and properly verified answer was eventually served approximately two weeks later; in view of defendants' good-faith intention to defend action, as well as fact that they were not in default for substantial period of time, delay was excusable. Saltzman v Knockout Chemical & Equipment Co., 108 A.D.2d 908, 485 N.Y.S.2d 794, 1985 N.Y. App. Div. LEXIS 43242 (N.Y. App. Div. 2d Dep't 1985).

Default judgment should not be entered against defendant on basis of failure to file timely answer where defendant has relied upon oral stipulation extending time to answer granted by one of partners of law firm representing plaintiff and reliance is justified in view of dissolution of firm following service of complaint. La Marque v North Shore University Hospital, 120 A.D.2d 572, 502 N.Y.S.2d 219, 1986 N.Y. App. Div. LEXIS 56654 (N.Y. App. Div. 2d Dep't 1986).

In Article 78 proceeding, court would reduce, from $6,750 to $2,000, civil penalty imposed on petitioner by Department of Health for violation of CLS Pub Health § 3005 in accordance with parties' stipulation whereby department agreed to limit penalty if petitioner admitted to underlying facts since (1) evidence that department's attorney stated on record that "the department would be willing to so stipulate" established that stipulation was made, (2) department's attorney was authorized to agree to limitation of penalty pursuant to 10 NYCRR § 51.10(a), (3) petitioner relied on stipulation, and (4) department benefitted from stipulation. Able

Medical Transp., Inc. v Axelrod, 139 A.D.2d 921, 527 N.Y.S.2d 911, 1988 N.Y. App. Div. LEXIS 4266 (N.Y. App. Div. 4th Dep't 1988).

As general rule, stipulations of settlement must be in writing and subscribed by parties, reduced to form of order and entered, or made between counsel in open court; however, where there is no dispute between parties as to terms of settlement agreement, courts will refuse to permit use of rule against party who has been misled or deceived by oral agreement to his detriment or who has relied on it. Smith v Lefrak Organization, Inc., 142 A.D.2d 725, 531 N.Y.S.2d 305, 1988 N.Y. App. Div. LEXIS 8151 (N.Y. App. Div. 2d Dep't 1988).

In action to recover for personal injuries, defendants were estopped from relying on CLS CPLR § 2104 to set aside parties' oral settlement agreement where (1) according to affirmation of defendants' attorneys and affidavit of litigation specialist employed by defendants' insurance company, parties agreed to settle action for $95,000, (2) in reliance on agreement, plaintiff signed general release and stipulation of discontinuance and sent documents to defendants' attorney to be held in escrow pending receipt of funds, (3) plaintiff agreed to judgment and warrant of eviction from his residence, and purchased limousine for his new occupation, in reliance upon receiving settlement proceeds, and (4) defendants failed to remit settlement proceeds, apparently because aggregate had been reached on its primary insurance policy and its excess insurance company had not determined that it was liable under excess policy; issues between primary and excess insurance companies could not serve to deny payment to plaintiff under settlement agreement. Smith v Lefrak Organization, Inc., 142 A.D.2d 725, 531 N.Y.S.2d 305, 1988 N.Y. App. Div. LEXIS 8151 (N.Y. App. Div. 2d Dep't 1988).

Supreme Court properly enforced stipulation of settlement, entered into between parties at pre-trial examination in defense counsel's office, where (1) it was contemporaneously transcribed by court reporter and orally sworn to by parties before notary public, (2) there was no dispute as to its terms, (3) there had been significant partial performance thereunder, and (4) plaintiff had relied on stipulation by taking no further steps to enforce its rights in action. World Color, Inc. v Collectors' Guild, Ltd., 181 A.D.2d 430, 580 N.Y.S.2d 345, 1992 N.Y. App. Div. LEXIS 3080

(N.Y. App. Div. 1st Dep't), app. dismissed, 80 N.Y.2d 924, 589 N.Y.S.2d 311, 602 N.E.2d 1127, 1992 N.Y. LEXIS 3220 (N.Y. 1992).

Defendant was not in default when it served answer on September 10 where plaintiff’s attorney admitted that on July 16, prior to expiration of defendant’s time to answer, he orally agreed to grant defendant brief extension of time to answer, and it was uncontroverted that he advised defendant on September 6 that extension would expire on September 14; although CLS CPLR § 2104 requires that extension of time to answer, to be binding, must be in writing and subscribed by party to be charged, party is precluded from invoking § 2104 to avoid oral stipulation if it appears that stipulation was made and that adverse party relied on it. Leemilt's Petroleum v Public Storage, 193 A.D.2d 650, 597 N.Y.S.2d 463, 1993 N.Y. App. Div. LEXIS 4669 (N.Y. App. Div. 2d Dep't 1993).

Court improperly granted defendant’s motion to vacate order granting plaintiffs’ motion to enforce settlement agreement on defendant’s default in appearing for oral argument where there was no dispute as to terms of settlement agreement, and plaintiffs relied on agreement to their detriment by withdrawing pending appeal from order awarding defendant summary judgment; under circumstances, failure to comply with terms of CLS CPLR § 2104 did not render settlement agreement unenforceable. Lowe v Steinman, 284 A.D.2d 506, 728 N.Y.S.2d 56, 2001 N.Y. App. Div. LEXIS 6776 (N.Y. App. Div. 2d Dep't 2001).

In negligence action, defendant’s liability insurance carrier would be directed to pay injured party pursuant to terms of oral out-of-court stipulation of settlement, where settlement negotiations were carried out in good faith, settlement terms were undisputed, and injured party signed general release and stipulation of discontinuance in reliance thereon. Smith v Lefrak Organization, Inc., 137 Misc. 2d 228, 520 N.Y.S.2d 325, 1987 N.Y. Misc. LEXIS 2676 (N.Y. Sup. Ct. 1987), aff'd, 142 A.D.2d 725, 531 N.Y.S.2d 305, 1988 N.Y. App. Div. LEXIS 8151 (N.Y. App. Div. 2d Dep't 1988).

It was not abuse of discretion to enforce oral settlement agreement that did not meet technical requirements of CLS CPLR § 2104 for binding settlement where parties substantially complied

with such requirements and plaintiff reasonably relied on agreement by permitting trial date to pass, thereby foregoing her right to participate in third-party trial of defendant’s contractual indemnification claim. Monaghan v SZS 33 Assocs., L.P., 73 F.3d 1276, 1996 U.S. App. LEXIS 433 (2d Cir. N.Y. 1996).

In order to preclude opponent from asserting statute of frauds defense under doctrine of promissory estoppel, party must show clear and unambiguous promise fraudulently made, reasonable reliance on promise that was unequivocally referable to promise, and substantial injury suffered as result of reliance. Sears, Roebuck & Co. v Sears Realty Co., 932 F. Supp. 392, 1996 U.S. Dist. LEXIS 10651 (N.D.N.Y. 1996).

**18. Enforcement of stipulations**

The trial court properly enforced a stipulation of settlement entered into in open court by an estate and other parties to a real estate transaction, where the attorneys intended the stipulation to be binding, where the attorneys did not state that it was subject to client approval, and where one party authorized to bind the estate was present in court at the time of the stipulation and agreed thereto. Bella Vista Development Corp. v Estate of Birnbaum, 85 A.D.2d 891, 446 N.Y.S.2d 753, 1981 N.Y. App. Div. LEXIS 16728 (N.Y. App. Div. 4th Dep't 1981).

In an action based on an alleged misappropriation of trade secrets, the trial court properly awarded damages to defendants pursuant to a stipulation entered into by the parties providing that, in lieu of an undertaking, plaintiff would be fully responsible for payment of a judgment rendered against it for damages, if any, resulting from a temporary restraining order that had been entered pending determination of plaintiff’s ultimately unsuccessful motion for a preliminary injunction, where, though defendants were not entitled to damages under CPLR § 6315 in that no undertaking was posted as a condition for the temporary restraining order, and the stipulation could not create an undertaking obligation where none existed, the stipulation contained no condition as to plaintiff’s obligation as to plaintiff’s lack of entitlement to the temporary restraining order, and defendants had clearly proved that they had suffered damages as a result of the

temporary order. Honeywell, Inc. v Technical Bldg. Services, Inc., 103 A.D.2d 433, 480 N.Y.S.2d 627, 1984 N.Y. App. Div. LEXIS 19767 (N.Y. App. Div. 3d Dep't 1984).

In action against deceased defendant, plaintiff was entitled to enforce stipulation of settlement by seeking restoration of action to calendar where (1) plaintiff had agreed to accept and defendant's estate had agreed to pay certain sum in satisfaction of claim, on strength of defense counsel's representation that creditors' claims exceeded assets of estate, (2) trial court had stated that it would maintain jurisdiction and that it would entertain plaintiff's motion to set aside settlement and restore action to calendar if material misrepresentations had been made to plaintiff, and (3) defense counsel unjustifiably refused to accept plaintiff's release and stipulation of discontinuance even though they were in accordance with stipulation of settlement; however, order restoring action to calendar should be modified to provide that such restoration would occur unless defendant complied with stipulation of settlement by accepting release and stipulation of discontinuance and by paying amount agreed upon in settlement. Rea v Halpern, 124 A.D.2d 358, 507 N.Y.S.2d 297, 1986 N.Y. App. Div. LEXIS 61379 (N.Y. App. Div. 3d Dep't 1986).

In mortgage foreclosure action, parties' stipulation should be given full effect, and order of reference should issue, where stipulation called for defendant to withdraw his opposition to plaintiff's motion for summary judgment, to withdraw his answer and counterclaim with prejudice, to consent to order of reference to compute amount due on mortgages in accordance with plaintiff's report of computations, and to consent to "continuation of the action by plaintiff to judgment of foreclosure," since there was no evidence that stipulation was tainted by fraud, collusion, mistake, accident, or any other ground which might suffice to invalidate contract. Hirsch v Manzione, 130 A.D.2d 714, 516 N.Y.S.2d 28, 1987 N.Y. App. Div. LEXIS 46733 (N.Y. App. Div. 2d Dep't 1987).

Stipulation, which disposed of plaintiffs' cause of action regarding alleged encroachment of defendants' driveway on plaintiffs' property in exchange for defendants' agreement to remove and remediate encroachment, would not be included in order and judgment entered in action by

plaintiffs for damage to their property caused by defendants' acts on their adjoining property since stipulation did not contain any agreement for or consent to entry of judgment for agreed-upon relief or imposition of costs thereon; plaintiffs' remedy under stipulation would be to move or sue for enforcement if defendants failed to comply with their obligations thereunder. Archambault v Knost, 132 A.D.2d 909, 518 N.Y.S.2d 243, 1987 N.Y. App. Div. LEXIS 49366 (N.Y. App. Div. 3d Dep't 1987).

Transferee was entitled to specific performance of stipulation for delivery of deed, although transferee had not performed his obligations within time required by stipulation, since transferor was equitably estopped from insisting on compliance with time limit where (1) stipulation did not make time of essence, and (2) transferor took no action to enforce compliance until he learned that transferee was in position to comply. Gurino v Gabrielli, 133 A.D.2d 136, 518 N.Y.S.2d 671, 1987 N.Y. App. Div. LEXIS 49656 (N.Y. App. Div. 2d Dep't 1987).

Legal malpractice action would be remitted for entry of judgment in favor of client in principal sum of $79,750 on Appellate Division's reversal of trial court's judgment N.O.V. for attorney, even though jury had returned verdict in principal sum of $171,343, where, at trial, parties entered into enforceable stipulation "that in the event of a verdict by the jury in excess of the amount contained in the ad damnum clause in the sum of $79,750; that it is agreed that a judgment may be entered for $79,750." Corley v Miller, 133 A.D.2d 732, 520 N.Y.S.2d 21, 1987 N.Y. App. Div. LEXIS 51777 (N.Y. App. Div. 2d Dep't 1987).

Stipulation, in which parties had settled trespass action by agreeing that sign would be relocated, was not unenforceable for lack of specificity merely because it did not define "the type of property interest the sign enjoys" or specify duration of agreement; sign continued to maintain whatever property character it possessed before stipulation, and if no agreement existed as to duration, Supreme Court could supply that missing term based on circumstances and parties' intent. Atco Canton Corp. v Costanzi, 133 A.D.2d 949, 520 N.Y.S.2d 664, 1987 N.Y. App. Div. LEXIS 51989 (N.Y. App. Div. 3d Dep't 1987).

Article 78 proceeding to review superintendent's finding that inmate refused direct order, and refused to submit to urine test when he was suspected of using drugs, should not have been dismissed by court on ground that inmate, by refusing to take urine test, subjected himself to separate and distinct charges that he refused direct order and that he used drugs, since court thereby disregarded partial judgment previously entered by it on stipulation of counsel, nullifying and expunging charge of refusing direct order; parties' stipulation should have been enforced. Vidal v Kelly, 139 A.D.2d 915, 527 N.Y.S.2d 904, 1988 N.Y. App. Div. LEXIS 4261 (N.Y. App. Div. 4th Dep't 1988).

Court would order enforcement of stipulation whereby parties to divorce action agreed that husband would have custody of child, notwithstanding wife's disavowal of agreement within days of signing it, since it contained signatures of wife and her counsel; however, court would direct immediate continuation of custody hearing since that was in best interest of child. Charatan-Berger v Berger, 158 A.D.2d 426, 551 N.Y.S.2d 525, 1990 N.Y. App. Div. LEXIS 2121 (N.Y. App. Div. 1st Dep't 1990).

Executor was entitled to enforcement of stipulation of settlement entered into between executor and objectants (widow and sons of decedent) where settlement was made in open court between parties' attorneys and provided that objectants would withdraw their objections to admission of will to probate in exchange for certain payments; moreover, son—who did not appear in court on day that settlement was reached—could not bar enforcement by refusing to sign stipulation on ground that it did not expressly provide for payment to him of bequest under will since (1) his attorney had authority to enter into stipulation, and (2) provision regarding bequest was unnecessary. In re Gruntz, 168 A.D.2d 558, 562 N.Y.S.2d 779, 1990 N.Y. App. Div. LEXIS 15636 (N.Y. App. Div. 2d Dep't 1990).

Since second mortgagee was neither party to nor third-party beneficiary of stipulation between first mortgagee and mortgagor which consolidated 3 mortgages held by first mortgagee, she was properly held not to have right to seek specific enforcement of stipulation, which did not

affect her rights as second mortgagee. Esco Credit Corp. v Diamantis, 189 A.D.2d 798, 592 N.Y.S.2d 428, 1993 N.Y. App. Div. LEXIS 332 (N.Y. App. Div. 2d Dep't 1993).

Respondents were not entitled to order requiring petitioners to accept certain plans pursuant to stipulation of settlement between parties since proceeding was terminated by stipulation and respondents' sole remedy was to bring plenary action to enforce or set aside stipulation. Greenwood Lake v Mountain Lake Estates, Inc., 189 A.D.2d 987, 592 N.Y.S.2d 846, 1993 N.Y. App. Div. LEXIS 114 (N.Y. App. Div. 3d Dep't), app. dismissed, 81 N.Y.2d 1006, 599 N.Y.S.2d 805, 616 N.E.2d 160, 1993 N.Y. LEXIS 1194 (N.Y. 1993).

Court improperly enforced stipulation of settlement entered into in open court where settlement was expressly conditioned on approval by Attorney General's Office and board of directors of city agency, and approvals had not been obtained. Novak & Co. v New York Convention Ctr. Dev. Corp., 202 A.D.2d 205, 608 N.Y.S.2d 219, 1994 N.Y. App. Div. LEXIS 1855 (N.Y. App. Div. 1st Dep't 1994).

Court properly granted defendant's motion to strike personal injury action from trial calendar, and directed defendant to pay settlement amount plus interest, pursuant to parties' oral stipulation in open court that action would be settled for $2,500, where plaintiff executed general release and stipulation discontinuing action which was to be held in "escrow" pending plaintiff's receipt of proceeds of settlement, defendant failed to send settlement check to plaintiff allegedly due to clerical error, and court therefore granted plaintiff's unopposed motion to restore matter to trial calendar; stipulation was valid and binding and would not be set aside on facts less than needed to avoid contract. Gage v Jay Bee Photographers, 222 A.D.2d 648, 636 N.Y.S.2d 106, 1995 N.Y. App. Div. LEXIS 13914 (N.Y. App. Div. 2d Dep't 1995).

Court erred in not enforcing parties' stipulation, including award of money judgment for legal fees, since parties to civil dispute are free to chart their own litigation course, and enforcement of stipulation served interest of efficiency in final resolution of instant dispute. Mill Rock Plaza Assocs. v Lively, 224 A.D.2d 301, 638 N.Y.S.2d 34, 1996 N.Y. App. Div. LEXIS 1255 (N.Y. App. Div. 1st Dep't 1996).

In-court stipulation of settlement would be enforced, despite plaintiffs' claims that their attorney "misspoke" and that terms of stipulation relating to width of right-of-way were entered into under mistake of fact, where plaintiffs neither expressed any reservations nor raised any questions regarding content or effect of stipulation during their colloquy with court, even though they were provided with opportunity to do so. Doolittle v Quiggle, 238 A.D.2d 949, 661 N.Y.S.2d 171, 1997 N.Y. App. Div. LEXIS 4798 (N.Y. App. Div. 4th Dep't 1997).

Record supported damage award of $8,598,054 in medical malpractice action involving harm to infant where trial court properly reduced jury verdict pursuant to stipulation. Acevedo by Rodriguez v New York City Health & Hosps. Corp., 251 A.D.2d 21, 673 N.Y.S.2d 656, 1998 N.Y. App. Div. LEXIS 6399 (N.Y. App. Div. 1st Dep't), app. denied, 92 N.Y.2d 808, 678 N.Y.S.2d 594, 700 N.E.2d 1230, 1998 N.Y. LEXIS 2834 (N.Y. 1998).

Court properly denied motion to enforce restrictive covenant by enjoining physician from practicing medicine in county for 2 years where (1) in order to resolve proceeding to dissolve professional corporation, physician entered into stipulation of settlement by which he agreed that if he violated any of its terms, restrictive covenant would become effective, (2) physician's violation of stipulation was by his default in making payments on car leases, and (3) there was no evidence that such violation put professional corporation or its members at risk of unfair competition sufficient to justify restricting physician's practice of medicine. In re Long Island Gastrointestinal Disease Group, P.C., 251 A.D.2d 330, 673 N.Y.S.2d 738, 1998 N.Y. App. Div. LEXIS 6305 (N.Y. App. Div. 2d Dep't 1998).

Given unambiguous terms of open-court stipulation that landlord, on tenant's default, would be entitled to move for final judgment awarding it possession of premises and related relief, it was proper to enforce stipulation without reference to extrinsic evidence of parties' intent. 64th Street-3rd Ave. Assocs. v Wall, 257 A.D.2d 487, 684 N.Y.S.2d 203, 1999 N.Y. App. Div. LEXIS 412 (N.Y. App. Div. 1st Dep't 1999).

Defendant was entitled to enforcement of stipulation of settlement entered into in open court, although plaintiff's sisters had to sign releases in order for stipulation to take effect, since it was

clear that parties intended to be bound by stipulation at time it was made, and that getting sisters, for whom plaintiff was apparently acting, to sign releases was viewed by all present, particularly court, as ministerial act. Tooker v Castille, 260 A.D.2d 298, 689 N.Y.S.2d 56, 1999 N.Y. App. Div. LEXIS 4379 (N.Y. App. Div. 1st Dep't 1999).

Substantial evidence supported city housing authority's finding that tenant violated stipulation of settlement excluding her eldest son from visiting her apartment where tenant acknowledged that excluded son was in her apartment at time of authority's inspection, and her explanations for son's presence raised credibility issues that were decided against her and were not subject to judicial review. Johnson v New York City Hous. Auth., 266 A.D.2d 102, 698 N.Y.S.2d 474, 1999 N.Y. App. Div. LEXIS 11654 (N.Y. App. Div. 1st Dep't 1999).

Appellate Division's conscience was shocked by city housing authority's imposition of penalty of termination of tenancy for tenant's violation of stipulation of settlement excluding her eldest son from visiting her apartment, and matter would be remanded for lesser penalty, where (1) violation arose from isolated act of emancipated son who no longer lived with tenant, (2) tenant's record in public housing was otherwise unblemished, (3) she had 6 children, including 2 adopted and 3 foster children, and (4) she relied on her disabled son's Social Security for support. Johnson v New York City Hous. Auth., 266 A.D.2d 102, 698 N.Y.S.2d 474, 1999 N.Y. App. Div. LEXIS 11654 (N.Y. App. Div. 1st Dep't 1999).

In action against town and others for breach of ordered stipulation of settlement allowing development of certain real property, plaintiff corporation was collaterally estopped from claiming either that its rights under stipulation were violated by requirement that it proceed with review under State Environmental Quality Review Act (SEQRA) or that defendants' insistence on such review was tortious where, in prior Article 78 proceeding brought by plaintiff, Supreme Court had found that defendants properly insisted on compliance with SEQRA before allowing plaintiff's development plan to proceed, and plaintiff's appeal from that judgment had been dismissed for lack of prosecution. Honess 52 Corp. v Town of Fishkill, 266 A.D.2d 510, 698

N.Y.S.2d 718, 1999 N.Y. App. Div. LEXIS 12295 (N.Y. App. Div. 2d Dep't 1999), app. denied, 94 N.Y.2d 762, 708 N.Y.S.2d 51, 729 N.E.2d 708, 2000 N.Y. LEXIS 577 (N.Y. 2000).

In action against town and others for breach of ordered stipulation of settlement allowing development of certain real property, plaintiff had no cause of action for unjust enrichment resulting from defendants' retention of "sewer upgrade money" paid in connection with that stipulation by plaintiff's predecessor in interest where plaintiff's rights were derived from that stipulation, which was explicit contract. Honess 52 Corp. v Town of Fishkill, 266 A.D.2d 510, 698 N.Y.S.2d 718, 1999 N.Y. App. Div. LEXIS 12295 (N.Y. App. Div. 2d Dep't 1999), app. denied, 94 N.Y.2d 762, 708 N.Y.S.2d 51, 729 N.E.2d 708, 2000 N.Y. LEXIS 577 (N.Y. 2000).

Discharged county correction lieutenant was not deprived of his constitutional rights to due process and collective bargaining by enforcement of written stipulation of settlement, by which he waived any objections under contract law or any statute, rule, or regulation of any kind, where he had adequate remedies in that he could have filed grievance under collective bargaining agreement or brought Article 78 proceeding challenging his termination. Monroe v Schenectady County, 266 A.D.2d 792, 699 N.Y.S.2d 164, 1999 N.Y. App. Div. LEXIS 12120 (N.Y. App. Div. 3d Dep't 1999).

Order in child custody and visitation proceeding would be vacated, and case would be remitted to Supreme Court to accurately reflect provisions of parties' stipulation, even though preferred remedy when party alleges that order or judgment does not accurately incorporate terms of stipulation is by motion in trial court for resettlement under CLS CPLR § 5019(a) or vacatur under CLS CPLR § 5015, rather than by appeal, where Appellate Division examined stipulation and order and found that they did not conform in certain respects. Gesvantner v Dominguez, 273 A.D.2d 383, 710 N.Y.S.2d 903, 2000 N.Y. App. Div. LEXIS 7084 (N.Y. App. Div. 2d Dep't 2000).

Divorced husband was not responsible for payment of children's school transportation expenses where (1) parties entered into stipulation of settlement that was incorporated by reference in divorce judgment, and (2) before execution of stipulation, parties deleted provision that would

have required husband to pay 96 percent of children's school transportation expenses. Meeg v Meeg, 273 A.D.2d 390, 710 N.Y.S.2d 924, 2000 N.Y. App. Div. LEXIS 7060 (N.Y. App. Div. 2d Dep't 2000).

1994 tax certiorari proceedings were not abandoned, even though no notes of issue were filed, where town board of tax assessors entered into stipulation, dated March 30, 1995, which specifically provided that joint trial of 1994 proceedings, scheduled for May 8, 1995, be adjourned sine die, and CLS RPTL § 718(1) provides that "unless a note of issue is filed and the proceeding is placed on the court calendar within four years from the date of the service of petition or petition and notice, the proceeding thereon shall be deemed to have been abandoned...except where the parties otherwise stipulate." Fox Meadow Partners, Ltd. v Board of Assessment Review, 273 A.D.2d 472, 710 N.Y.S.2d 610, 2000 N.Y. App. Div. LEXIS 7358 (N.Y. App. Div. 2d Dep't 2000).

Insureds who settled their breach of contract action against their property insurer were entitled to dismissal of insurer's interpleader action against them where (1) at time of stipulation of settlement, insurer knew that other parties had potential claims on insurance proceeds, but insurer chose to settle and obtained releases only from subject insureds and their attorney, (2) insurer had not sought to vacate stipulation but merely obtained temporary restraining order in interpleader action that prevented parties to stipulation from entering judgment in breach of contract action, and (3) insurer would not be allowed to use interpleader action to circumvent stipulation. Charter Oak Fire Ins. Co. v Borrelli, 273 A.D.2d 797, 709 N.Y.S.2d 299, 2000 N.Y. App. Div. LEXIS 6702 (N.Y. App. Div. 4th Dep't 2000).

Property insurer that brought interpleader action was not entitled to order discharging it from liability to insureds and their attorney in exchange for its deposit of $323,000 with county treasurer where (1) by stipulation of settlement in insureds' breach of contract action against insurer, that sum was owed directly to insureds and their attorney, (2) any amounts disbursed to county treasurer or other possible claimants would diminish amount of proceeds that insureds and their attorney would receive, and (3) stipulation would not be altered without showing of

sufficient cause to invalidate contract, such as fraud, collusion, mistake, or accident. Charter Oak Fire Ins. Co. v Borrelli, 273 A.D.2d 797, 709 N.Y.S.2d 299, 2000 N.Y. App. Div. LEXIS 6702 (N.Y. App. Div. 4th Dep't 2000).

Property insurer that brought interpleader action was not entitled to vacatur of judgment entered in insureds' breach of contract action against it where insurer did not move to vacate stipulation of settlement entered in breach of contract action, and there was no impediment to entry of judgment on stipulation; rather, insureds were entitled to dismissal of interpleader action. Charter Oak Fire Ins. Co. v Borrelli, 273 A.D.2d 797, 709 N.Y.S.2d 299, 2000 N.Y. App. Div. LEXIS 6702 (N.Y. App. Div. 4th Dep't 2000).

In action by State Department of Environmental Conservation (DEC) to enforce consent order against operators of solid waste disposal plant, court properly directed operators to pay fines and civil penalties to which parties had stipulated in consent order where force majeure clause of order was not implicated by DEC's actions, and operators did not invoke that clause as required by order. New York State Dep't of Envtl. Conservation v O'Neill, 273 A.D.2d 852, 709 N.Y.S.2d 280, 2000 N.Y. App. Div. LEXIS 6701 (N.Y. App. Div. 4th Dep't 2000).

In action by divorced wife against former husband to enforce judgment for pendente lite arrears, there was no merit to husband's asserted defense that judgment was merely to stand as security for his obligations under stipulation of settlement incorporated into divorce judgment where he had been in default on those obligations since 1994. Rozzo v Rozzo, 274 A.D.2d 53, 712 N.Y.S.2d 137, 2000 N.Y. App. Div. LEXIS 8376 (N.Y. App. Div. 2d Dep't 2000).

Court properly granted defendant's motion to compel plaintiffs to accept late payment of money due under stipulation settling foreclosure action where neither stipulation nor parties' conduct showed that time was of essence, defendant paid $145,000 on due date, defendant obtained plaintiffs' permission for 4-day extension to pay balance, and due to circumstances beyond defendant's control, he did not obtain remaining $80,000 until 3 days later. Ciani v Georgalas, 274 A.D.2d 443, 711 N.Y.S.2d 903, 2000 N.Y. App. Div. LEXIS 7848 (N.Y. App. Div. 2d Dep't 2000).

Plaintiffs were not entitled to amend their legal malpractice complaint to add new cause of action alleging additional malpractice in defendant’s failure to file confession of judgment where that allegation was flatly contradicted by their modified stipulation of settlement, which did not provide for filing of such confession and did provide for its satisfaction by payment that plaintiffs made. Arnav Indus. v Brown Raysman, Millstein, Felder & Steiner, LLP, 275 A.D.2d 640, 713 N.Y.S.2d 175, 2000 N.Y. App. Div. LEXIS 9283 (N.Y. App. Div. 1st Dep't 2000), modified in part, dismissed, 96 N.Y.2d 300, 727 N.Y.S.2d 688, 751 N.E.2d 936, 2001 N.Y. LEXIS 1408 (N.Y. 2001).

Family Court properly admitted transcripts of hearing held under CLS Family Ct Act § 1028 in lieu of any new evidence at fact-finding hearing in child protection proceeding where all parties stipulated to that procedure, thus waiving requirement that witnesses first be shown to be unavailable. In re J. Children, 275 A.D.2d 648, 713 N.Y.S.2d 325, 2000 N.Y. App. Div. LEXIS 9966 (N.Y. App. Div. 1st Dep't 2000).

Jury’s award of damages to roofer who broke his back in fall from roof was neither excessive nor inadequate where (1) fracture required one surgery to fuse vertebrae and install metal rods along spine and another to remove rods, which had shifted and were protruding, (2) as result of accident, roofer suffered from chronic major depression and posttraumatic stress disorder, requiring psychiatric treatment, (3) he was determined by his physician to be totally disabled from work, and he had not worked during 6 years since accident, (4) he was prescribed several medications, including narcotic pain reliever and antidepressant, and (5) jury awarded $50,644 for past medical expenses (as stipulated by parties), $200,000 for future medical expenses for 25 years, $114,389 for past lost earnings, $150,000 for future lost earnings for 5 years, $240,000 for past pain and suffering, and $650,000 for future pain and suffering for 37 years. Lopez v Kenmore-Tonawanda Sch. Dist., 275 A.D.2d 894, 713 N.Y.S.2d 607, 2000 N.Y. App. Div. LEXIS 9791 (N.Y. App. Div. 4th Dep't 2000).

In former tenant’s action against former landlord for breach of stipulated settlement agreement, by which landlord agreed to pay plaintiff $10,000 for her surrender of possession of her

apartment, and if any other tenant then residing in building were paid more than $10,000 for surrendering right to possession, to pay plaintiff difference between that sum and $10,000, court properly calculated landlord's obligation to plaintiff on basis of entire $163,750 paid to other tenants where all of that amount was in consideration of their surrender of possession, and personal injury allocation of part of that amount was made solely for tax purposes. Dunham v Weissman, 281 A.D.2d 220, 722 N.Y.S.2d 10, 2001 N.Y. App. Div. LEXIS 2451 (N.Y. App. Div. 1st Dep't), app. denied, 96 N.Y.2d 851, 729 N.Y.S.2d 665, 754 N.E.2d 768, 2001 N.Y. LEXIS 1479 (N.Y. 2001).

Law firm was not required to commence separate action to enforce its charging lien but, rather, could initiate proceeding to both determine and enforce its charging lien under CLS Jud § 475; thus, court properly enforced stipulation allocating plaintiff's attorney fees between that firm and another law firm involved in settlement of action. Westfall v County of Erie, 281 A.D.2d 979, 722 N.Y.S.2d 327, 2001 N.Y. App. Div. LEXIS 2752 (N.Y. App. Div. 4th Dep't 2001).

In context of nonpayment summary proceeding, New York City Civil Court had jurisdiction to enforce stipulation of settlement which required tenant to vacate apartment that landlord had temporarily given her while repairs to her own apartment were ongoing, and to re-occupy her own apartment, where stipulation also provided for Civil Court's continuing jurisdiction for purposes of implementation. Lexington Ave. Assocs. v Kandell, 283 A.D.2d 379, 724 N.Y.S.2d 864, 2001 N.Y. App. Div. LEXIS 6580 (N.Y. App. Div. 1st Dep't 2001).

Stipulation of settlement whereby parties agreed to place marital residence on market for sale, with beginning listing price of $234,000, contemplated that sale would be accomplished in accordance with normal real estate practices, which encompassed aggressive marketing and lowering price as necessary; thus, where property remained unsold after almost 3 years, allegedly due to defendant's refusal to lower listing price and less than aggressive marketing efforts, it was within court's broad discretion to order him to comply with stipulation's terms. Townsend v Townsend, 283 A.D.2d 793, 724 N.Y.S.2d 545, 2001 N.Y. App. Div. LEXIS 5136 (N.Y. App. Div. 3d Dep't 2001).

In a boundary line dispute under N.Y. Real Prop. Acts. Law art. 15, a settlement agreement was enforced under N.Y. C.P.L.R. § 2104 because the writings subscribed to by the parties' attorneys incorporated a boundary line agreement and survey that were made part of the settlement and a purchaser of the disputed area had executed a written escrow agreement providing that plaintiff property owner was her special agent for resolving the boundary line dispute. Eastman v Steinhoff, 48 A.D.3d 738, 852 N.Y.S.2d 396, 2008 N.Y. App. Div. LEXIS 1658 (N.Y. App. Div. 2d Dep't 2008).

Because the owners set forth the elements necessary to state causes of action for enforcement of a written stipulation of settlement under N.Y. C.P.L.R. 2104 and for breach of contract, and because the city's assertion of a prerequisite to the transfer under N.Y. Real Prop. Tax Law § 1166 and the city code was only relevant to its defense, the trial court properly declined to dismiss the owners' claims. Good Samaritan Hous. & Land Corp. v City of Hudson, 50 A.D.3d 1436, 856 N.Y.S.2d 701, 2008 N.Y. App. Div. LEXIS 3675 (N.Y. App. Div. 3d Dep't 2008).

Denial of defendant's motion to vacate a default judgment in a breach of a partnership agreement action was error because defendant's reliance on the parties' written agreement which provided for a discontinuance of the action was a reasonable excuse for his default under N.Y. C.P.L.R. 5015(a)(1) regardless of the fact that the parties disagreed as to the translation of the agreement; moreover, plaintiff did not demonstrate prejudice from the delay in answering. Defendant also demonstrated that he had a potentially meritorious defense. Li Gang Ma v Hong Guang Hu, 54 A.D.3d 312, 863 N.Y.S.2d 231, 2008 N.Y. App. Div. LEXIS 6418 (N.Y. App. Div. 2d Dep't 2008).

Because neither N.Y. C.P.L.R. 2104 nor 5003-a could be invoked to seek judicial enforcement of a stipulation of settlement that was made before an action was commenced, a motion to direct the insurer to comply with the settlement was denied. State Farm Mut. Auto. Ins. Co. v Mamadou, 844 N.Y.S.2d 680, 17 Misc. 3d 600, 238 N.Y.L.J. 77, 2007 N.Y. Misc. LEXIS 6486 (N.Y. Sup. Ct. 2007).

In a personal injury action, a bicyclist could properly make a motion to set aside a jury verdict under N.Y. C.P.L.R. § 4404(a) as inconsistent because a high-low agreement entered with an automobile driver on the record pursuant to N.Y. C.P.L.R. § 2104 did not provide that no post-trial motions could be made. Doubrovinskaya v Dembitzer, 858 N.Y.S.2d 874, 20 Misc. 3d 440, 239 N.Y.L.J. 113, 2008 N.Y. Misc. LEXIS 3074 (N.Y. Sup. Ct. 2008), app. dismissed, 77 A.D.3d 608, 908 N.Y.S.2d 590, 2010 N.Y. App. Div. LEXIS 7231 (N.Y. App. Div. 2d Dep't 2010).

Where counsel engaged in settlement negotiations, and the client implicitly ratified the settlement by making no formal objection for months, counsel had apparent authority to finalize the settlement; as a result, the trial court erred in denying the manufacturer's motion to enforce the stipulation of settlement. Clark v Bristol-Myers Squibb & Co.(In re Silicone Breast Implant Litigation), 306 A.D.2d 82, 761 N.Y.S.2d 640, 2003 N.Y. App. Div. LEXIS 6437 (N.Y. App. Div. 1st Dep't 2003).

Trial court erred in agreeing that a stipulation was made in a personal injury suit that allegedly provided for plaintiff agreeing to extend defendants' time to answer the complaint where plaintiff denied such a stipulation and defendants had no writing to substantiate the same. Juseinoski v Bd. of Educ., 15 A.D.3d 353, 790 N.Y.S.2d 162, 2005 N.Y. App. Div. LEXIS 1344 (N.Y. App. Div. 2d Dep't 2005), transfer granted, 2005 N.Y. Misc. LEXIS 8507 (N.Y. Sup. Ct. Aug. 4, 2005).

When counsel for the parties in a partition action entered into a settlement in open court in the parties' presence, defendant was properly ordered to specifically perform the terms of the settlement. Defendant had not shown that the settlement was the result of fraud, collusion, mistake, or accident, and the stipulation was enforceable under the "open court exception" set forth in N.Y. C.P.L.R. 2104. Nigro v Nigro, 44 A.D.3d 831, 843 N.Y.S.2d 664, 2007 N.Y. App. Div. LEXIS 10762 (N.Y. App. Div. 2d Dep't 2007).

**19. —Motion**

Although enforcement of a stipulation agreement is normally to be sought either by way of a motion in the proceeding in which it was reached or by way of a separate action for that

purpose, the trial court in a divorce action properly granted the husband's motion for an order compelling the wife to comply with the terms of a stipulation agreement regarding the sale of a jointly owned residence which stipulation had been entered into during an earlier support proceeding initiated by the wife in Family Court, since a motion in Family Court to compel compliance would have been pointless in that the Family Court lacked the authority to compel the sale of realty, where there was no allegation of fraud or duress in connection with the execution of the stipulation, where the parties had been given a full opportunity to argue the issue before the divorce court, and where, therefore, in the interest of judicial economy, the divorce action was properly to be deemed the functional equivalent of a plenary action founded upon the stipulation. Bezio v Bezio, 79 A.D.2d 837, 435 N.Y.S.2d 137, 1980 N.Y. App. Div. LEXIS 14234 (N.Y. App. Div. 3d Dep't 1980).

In negligence action wherein parties filed general release discontinuing action but defendant never paid stipulated settlement, court properly permitted plaintiff to enforce purported settlement by way of motion rather than requiring plenary action; action had not been unreservedly terminated since plaintiff furnished release and stipulation conditionally, with clear understanding that settlement sum would be paid. Van Ness v Rite-Aid of New York Inc., 129 A.D.2d 931, 514 N.Y.S.2d 570, 1987 N.Y. App. Div. LEXIS 45594 (N.Y. App. Div. 3d Dep't 1987).

Court should have granted plaintiff's motion to enforce stipulation of settlement even though certain aspects of agreement were to be reduced to writing at later date, where (1) parties' mutual manifestation of assent to stipulation and language of stipulation demonstrated parties' unequivocal intention to grant easement by defendant to plaintiff, (2) defendant did not dispute validity of agreement, and (3) defendant's sole ground in opposition was that plaintiff had apparently opposed defendant's intended use of his property, and he insisted that plaintiff withdraw such opposition "in return" for defendant's performance of agreement. Daniels v Banks, 136 A.D.2d 675, 523 N.Y.S.2d 1013, 1988 N.Y. App. Div. LEXIS 619 (N.Y. App. Div. 2d Dep't 1988).

Court did not err in denying plaintiffs' motion to enforce settlement agreement after jury returned verdict of no cause of action where stipulation of settlement was not signed by defendants, and plaintiffs' claim that they failed to prepare for trial in reliance on purported settlement was unconvincing in that settlement offer had been withdrawn more than 3 months prior to trial. Bedrosian v McCollum, 209 A.D.2d 778, 617 N.Y.S.2d 997, 1994 N.Y. App. Div. LEXIS 10849 (N.Y. App. Div. 3d Dep't 1994).

Court should have granted plaintiff's motion to compel defendants to accept credits that plaintiffs had earned at particular school toward 32 credits which plaintiffs were required to earn in order to be certified as teacher assistants where (1) plain language of stipulation of settlement required that only new courses taken by plaintiffs toward satisfaction of their teaching assistant certification had to be from currently accredited college or university, (2) defendants' counsel expressly declared, when addressing prior-acquired credits, that those plaintiffs who already possessed course credits "won't need 32 credits in addition to those credits that they already have," (3) standard policy of Department of Eduction had been to accept coursework completed before school became accredited toward teaching assistant certification, and (4) stipulation did not specifically set forth any departure from such policy. Hild v Hicksville Union Free Sch. Dist., 213 A.D.2d 376, 623 N.Y.S.2d 318, 1995 N.Y. App. Div. LEXIS 2466 (N.Y. App. Div. 2d Dep't 1995).

Court properly granted plaintiff's motion to restore case to calendar about 17 months after parties' agreement to have it marked off calendar subject to restoration by stipulation within one year where (1) plaintiff's counsel made ongoing, diligent, and ultimately successful efforts to obtain relevant hospital records that both parties had subpoenaed, (2) hospital unduly delayed in producing records because of its own filing error, (3) plaintiff showed potentially meritorious cause of action, and (4) there was no evidence of prejudice to defendant or intent by plaintiff to abandon action. Felder v New York City Transit Auth., 238 A.D.2d 543, 657 N.Y.S.2d 83, 1997 N.Y. App. Div. LEXIS 4408 (N.Y. App. Div. 2d Dep't 1997).

Although plaintiff had already been examined by doctor chosen by defendants' insurer before case began, court should have granted defense motion to compel him to submit to another physical examination pursuant to parties' open court stipulation, which was so-ordered by court, where he did not show sufficient cause to be relieved of stipulation. Billerback v Corbin, 259 A.D.2d 457, 684 N.Y.S.2d 879, 1999 N.Y. App. Div. LEXIS 2049 (N.Y. App. Div. 2d Dep't 1999).

A motion by plaintiff for enforcement of a stipulation is granted, despite the fact that the settlement agreement was neither evidenced by a writing subscribed by the defendant or its attorney nor made between counsel in open court, as required by CPLR 2104, where there is no dispute between the parties as to the terms of the settlement and the defendant's attorney prepared documents which conformed to the oral settlement agreement, and transmitted them to plaintiff's attorney under circumstances which clearly justified the recipient's assumption that after their execution and return, an agreement would be formally consummated, and the settlement proceeds forthcoming; these facts would appear to justify a determination that upon execution by plaintiff of the settlement documents sent by the defendant there was substantial compliance with CPLR 2104, or more appropriately, that the defendant by its conduct is estopped from relying upon a technical noncompliance with the statute. A. J. Tenwood Associates, Inc. v United States Fire Ins. Co., 104 Misc. 2d 467, 428 N.Y.S.2d 606, 1980 N.Y. Misc. LEXIS 2329 (N.Y. Sup. Ct. 1980).

Court denied former wife's motion to amend divorce judgment which had been in effect for 6 years, to provide for incorporation of parties' in-court stipulation on ground that amendment would be more practical than requiring her to commence new plenary action as contemplated by denial of her prior motion to reform and enforce stipulation, where there was no showing that either party had intended stipulation to be incorporated initially, or that stipulation was fair and reasonable initially and not unconscionable now. Howard v Howard, 178 Misc. 2d 888, 681 N.Y.S.2d 460, 1998 N.Y. Misc. LEXIS 571 (N.Y. Sup. Ct. 1998).

Plaintiff in wrongful death suit was entitled to resort to motion for order compelling specific performance of settlement agreement or, alternatively, vacating settlement and restoring action

to trial calendar, rather than action for declaratory judgment or direct action after entry of judgment as proposed by nonparty insurer, so as to compel nonparty insurer, which had refused to participate in settlement on ground it was excesscoverage insurer only, to provide primary coverage once initial primary coverage insurer had become insolvent, since goal of procedure is to "secure the just, speedy and inexpensive determination" of matter (CLS CPLR § 104) and nonparty insurer's proposed procedure would only accomplish delay; plaintiff's procedure was appropriate since stipulation settling lawsuit can be enforced by court by motion until filing of stipulation of discontinuance or actual entry of judgment. Gladstone v D. W. Ritter Co., 133 Misc. 2d 922, 508 N.Y.S.2d 880, 1986 N.Y. Misc. LEXIS 3002 (N.Y. Sup. Ct. 1986).

**20. —Hearing**

Prior to entering order enforcing settlement of wrongful death action, trial court should conduct hearing on question of existence of firm agreement upon the alleged settlement figure, including deductibility of workmen's compensation lien, and upon authority of plaintiff's trial counsel to agree to settlement upon the terms alleged in defendants' motion and supporting affidavits. Veith v ABC Paving Co., 58 A.D.2d 257, 396 N.Y.S.2d 556, 1977 N.Y. App. Div. LEXIS 11865 (N.Y. App. Div. 4th Dep't 1977).

Where a trial court granted a motion to enforce a stipulation of settlement as a judgment after such stipulation was entered in action to recover damages occasioned by a fire loss, the case would be remanded for a hearing to resolve issues as to whether there had been a contract of insurance with a subrogation agreement therein entitling the insurer to a pro tanto right of subrogation or whether there was a subrogation receipt executed in favor of the insurer concerning the proper representative for the estate of an insured. Dunning v Shell Oil Co., 83 A.D.2d 676, 442 N.Y.S.2d 239, 1981 N.Y. App. Div. LEXIS 14983 (N.Y. App. Div. 3d Dep't 1981).

Hearing would be required on tenant's CLS CPLR § 2104 motion seeking to enforce stipulation of settlement under which apartment owner undertook to make certain repairs and

improvements to tenant's apartment in expeditious manner where tenant maintained that owner had not met terms and conditions of stipulation and made specific allegations as to work which had been improperly done or not done at all, and owner's response claimed that it had complied in good faith and had substantially performed its obligations, and denied most, but not all, of tenant's allegations. 288/98 West End Tenants Corp. v Mosesson, 144 A.D.2d 305, 534 N.Y.S.2d 178, 1988 N.Y. App. Div. LEXIS 11884 (N.Y. App. Div. 1st Dep't 1988).

In light of ambiguity in terms of stipulation of settlement regarding sale of marital residence in matrimonial action, hearing would be required, on motion to enforce stipulation, to determine parties' intent. Laing v Laing, 282 A.D.2d 655, 723 N.Y.S.2d 710, 2001 N.Y. App. Div. LEXIS 3994 (N.Y. App. Div. 2d Dep't 2001).

**21. —Summary judgment**

Husband was not entitled to summary judgment in his action to compel sale of marital residence pursuant to marital stipulation (which had not been conducted under court auspices and was not merged in judgment of divorce) since wife established triable issues of fact as to her defense that she was under duress at time she signed stipulation, where she established (1) that she was granted 3-month medical leave of absence from her teaching job few months prior to husband's commencement of divorce action, (2) 3 months before commencement of action, wife reported assault by husband to police, (3) husband did not deny wife's claim that he threatened to permanently remove children to Italy if she did not sign stipulation, and (4) wife was not represented by counsel at time of stipulation. Jaus v Jaus, 168 A.D.2d 487, 562 N.Y.S.2d 727, 1990 N.Y. App. Div. LEXIS 15419 (N.Y. App. Div. 2d Dep't 1990).

Plaintiff, who purchased 3 life insurance policies from defendant, should have been granted summary judgment in action to enforce stipulation of settlement, whereby defendant agreed to cancel third policy and apply proceeds to first 2 policies, and that "any loans used from the older policies will be reversed," where stipulation was drafted by defendant, defendant did not show that term "used" meant "any loans (to fund the third policy) will be reversed," nor had defendant

showed that term “used” was ambiguous. Drew v Prudential Ins. Co. of Am., 224 A.D.2d 1036, 637 N.Y.S.2d 589, 1996 N.Y. App. Div. LEXIS 1764 (N.Y. App. Div. 4th Dep't 1996).

Plaintiff was not entitled to summary judgment in breach of contract action on basis of purported settlement that did not comply with requirements of CLS CPLR § 2104. Gasparello v A. Ottavino Corp., 257 A.D.2d 601, 683 N.Y.S.2d 865, 1999 N.Y. App. Div. LEXIS 324 (N.Y. App. Div. 2d Dep't), app. dismissed, 93 N.Y.2d 1040, 697 N.Y.S.2d 568, 719 N.E.2d 929, 1999 N.Y. LEXIS 2842 (N.Y. 1999).

Court erred in setting aside mediated settlement of action that had been reached by parties and memorialized in “post mediation agreement” signed by their respective attorneys; mediated settlement constituted valid resolution of plaintiff’s claim, entitling defendant to summary judgment. Graham v New York City Hous. Auth., 260 A.D.2d 541, 688 N.Y.S.2d 591, 1999 N.Y. App. Div. LEXIS 4106 (N.Y. App. Div. 2d Dep't 1999).

In interpleader action involving proceeds of life insurance policy, decedent’s widow was entitled to summary judgment declaring that decedent’s children were entitled to entire proceeds of policy, although decedent’s mother was designated in policy as beneficiary of 50 percent of proceeds, where widow and decedent, in child support proceeding in Family Court, had stipulated that children would be named “irrevocable beneficiaries.” Massachusetts Mut. Life Ins. Co. v Thorpe, 260 A.D.2d 706, 687 N.Y.S.2d 490, 1999 N.Y. App. Div. LEXIS 3298 (N.Y. App. Div. 3d Dep't), app. denied, 93 N.Y.2d 814, 697 N.Y.S.2d 562, 719 N.E.2d 923, 1999 N.Y. LEXIS 2171 (N.Y. 1999).

General release signed by plaintiff in federal action, which was discontinued by “so ordered” stipulation of settlement, did not bar then-pending state-court action for accounting between same parties where parties continued to litigate accounting action after execution of release, indicating parties’ intent that release did not cover accounting action; thus, release did not entitle plaintiff’s law firm to summary judgment dismissing plaintiff’s subsequent legal malpractice action, because existence of release did not prove that plaintiff could not have recovered in

accounting action but for firm’s alleged negligence. Stone v Aronwald & Pykett, 275 A.D.2d 706, 713 N.Y.S.2d 198, 2000 N.Y. App. Div. LEXIS 9127 (N.Y. App. Div. 2d Dep't 2000).

By terms of settlement agreement, entered into by parties in open court in federal bankruptcy proceeding, defendants were entitled to summary judgment dismissing action against them where that agreement had not been repudiated and was still in effect, even though federal district court noted that certain defendants were “trying to weasel out of the agreement reached” in bankruptcy court. W. United Nurseries, Inc. v Beller & Keller, 281 A.D.2d 219, 721 N.Y.S.2d 531, 2001 N.Y. App. Div. LEXIS 2463 (N.Y. App. Div. 1st Dep't 2001).

Because an oral stipulation between the parties clearly and unambiguously expressed their intent that the insurance carrier prevailing in the action would be entitled to reimbursement from the non-prevailing party, the trial court properly granted the second insurer’s motion for summary judgment enforcing the oral stipulation under N.Y. C.P.L.R. 2104. American Bridge Co. v Acceptance Ins. Co., 51 A.D.3d 607, 858 N.Y.S.2d 261, 2008 N.Y. App. Div. LEXIS 4067 (N.Y. App. Div. 2d Dep't 2008).

**22. Relief from stipulations**

The power to grant relief from a stipulation is founded upon the principle that the court to which the rights of parties have been submitted will supervise all proceedings in the action, and will control such proceedings with a view to a final disposition of the case according to its merits. Central Valley Concrete Corp. v Montgomery Ward & Co., 34 A.D.2d 860, 310 N.Y.S.2d 925, 1970 N.Y. App. Div. LEXIS 4770 (N.Y. App. Div. 3d Dep't 1970).

Relief from stipulations will be granted based on general equitable considerations, particularly where, due to circumstances beyond the control of the parties, the purposes of the stipulation are frustrated or the contingencies of the settlement fail to occur. Central Valley Concrete Corp. v Montgomery Ward & Co., 34 A.D.2d 860, 310 N.Y.S.2d 925, 1970 N.Y. App. Div. LEXIS 4770 (N.Y. App. Div. 3d Dep't 1970).

In case in which, after stipulation of settlement was agreed on and dictated into the record, individual defendant told the trial justice that he understood all the terms of the settlement “perfectly” and that he had no questions that he wished to ask of his attorney or of the court concerning any aspect thereof, Special Term correctly concluded that such defendant failed to set forth any ground sufficient to warrant vacating the stipulation. Breitman Iron Works, Inc. v T. L. Rubsamen & Co., 55 A.D.2d 632, 390 N.Y.S.2d 165, 1976 N.Y. App. Div. LEXIS 15376 (N.Y. App. Div. 2d Dep't 1976), app. dismissed, 41 N.Y.2d 900, 1977 N.Y. LEXIS 3310 (N.Y. 1977), app. dismissed, 42 N.Y.2d 1050, 399 N.Y.S.2d 213, 369 N.E.2d 769, 1977 N.Y. LEXIS 2385 (N.Y. 1977).

Where defendants in written stipulation approved by referee admitted jurisdiction and acknowledged that, in event answer was not imposed within 30 days, plaintiff should have right to enter default judgment and no answer was served within the 30-day period or within one month thereafter and defendants did not present reasonable excuse for delay or show merit of defense, it was improvident exercise of discretion for special term to afford defendants opportunity to serve answer within 20 days. Bankers Trust Co. v Maidmore Realty Co., 57 A.D.2d 793, 394 N.Y.S.2d 689, 1977 N.Y. App. Div. LEXIS 11965 (N.Y. App. Div. 1st Dep't 1977).

In surplus money proceeding following foreclosure sale of home owned by defendants prior to their divorce, judgment creditors failed to establish superiority of their claims over those of defendants’ children who had preexisting claim to ½ share of property by virtue of constructive trust imposed on property pursuant to stipulation whereby father had transferred his ½ interest in home to children’s mother to provide for support payments owed by him to children; judgment creditors lacked standing to challenge stipulation, on which constructive trust was founded, on ground that father’s stipulation violated public policy because it attempted to limit his child support obligations by requiring children’s mother to indemnify him for future child support, since policy argument raised by them did not exist for their protection. First Federal Sav. & Loan Asso.

v Kasmer, 140 A.D.2d 826, 528 N.Y.S.2d 216, 1988 N.Y. App. Div. LEXIS 5005 (N.Y. App. Div. 3d Dep't 1988).

In a personal injury action trial court erred in granting a protective order to defendant regarding an engineer's report that defendant's counsel had previously stipulated to produce, which agreement was incorporated into a "pre-calendar" order where, notwithstanding the contention that the report was solely prepared for litigation, counsel was obviously aware at the time of the stipulation that the report was prepared more than three years after the commencement of the action. Saks v Ross Rodney Housing Corp., 84 A.D.2d 832, 444 N.Y.S.2d 187, 1981 N.Y. App. Div. LEXIS 16064 (N.Y. App. Div. 2d Dep't 1981).

In an action brought to enforce a judgment entered pursuant to the terms of a stipulation of settlement after defendant's check in payment of one of his installments under the settlement agreement was dishonored for insufficient funds, the judgment would be vacated and set aside where defendant had properly made all other payments, where a bank error had caused the dishonor of the check, and where plaintiff had delayed more than one year in entering judgment. Hyman Embroidery Works, Inc. v Action House, Inc., 89 A.D.2d 515, 452 N.Y.S.2d 61, 1982 N.Y. App. Div. LEXIS 17551 (N.Y. App. Div. 1st Dep't), app. dismissed, 57 N.Y.2d 955, 1982 N.Y. LEXIS 4557 (N.Y. 1982).

Defendant was not entitled to set aside stipulation of settlement on ground that plaintiff and her counsel violated provision that neither plaintiff nor anyone on her behalf would contact press as to settlement proceedings where person identifying himself as newspaper reporter telephoned plaintiff and her counsel wishing to discuss settlement, both plaintiff and her counsel refused comment, and there was no showing that terms of settlement had been disclosed. Passavanti v Pezzullo, 133 A.D.2d 75, 518 N.Y.S.2d 420, 1987 N.Y. App. Div. LEXIS 49600 (N.Y. App. Div. 2d Dep't 1987).

Court properly denied husband's motion for summary judgment in wife's action to set aside stipulation of settlement in divorce action on ground of fraud, since husband failed to address merits of wife's complaint where affidavit in support of his motion merely stated that only one of

his 3 children still benefited from child support provisions of stipulation (as other 2 children had reached age of 21) and that marital residence should be sold pursuant to stipulation due to wife's remarriage. Kaufman v Kaufman, 135 A.D.2d 786, 522 N.Y.S.2d 899, 1987 N.Y. App. Div. LEXIS 52727 (N.Y. App. Div. 2d Dep't 1987).

Party was not entitled to recover counsel fees and expenses incurred in opposing motion to set aside stipulation of settlement where stipulation's provision for counsel fees expressly limited recovery to certain specified situations (not including motion to set aside stipulation).56th Street Swim & Health Club, Inc. v 350 West 57th Street Co., 145 A.D.2d 311, 534 N.Y.S.2d 978, 1988 N.Y. App. Div. LEXIS 12901 (N.Y. App. Div. 1st Dep't 1988).

Husband was not entitled to relief from performance of his obligations under parties' stipulation of settlement due to wife's interference with his visitation rights as provided in parties' separation agreement since terms of separation agreement were not incorporated into stipulation, so that wife's alleged breach of its terms was of no legal consequence to husband's obligation under stipulation. Abady v Abady, 149 A.D.2d 448, 539 N.Y.S.2d 789, 1989 N.Y. App. Div. LEXIS 4640 (N.Y. App. Div. 2d Dep't 1989).

Defendants were not entitled to vacatur of stipulation of settlement entered into in open court where they failed to demonstrate valid grounds for vacatur and failed to repudiate settlement at time it was read in open court. Daniel D. Cole & Co. v 630 Corp., 150 A.D.2d 328, 540 N.Y.S.2d 857, 540 N.Y.S.2d 969, 1989 N.Y. App. Div. LEXIS 5657 (N.Y. App. Div. 2d Dep't 1989).

Relief from stipulation of settlement will only be granted on showing of good cause sufficient to invalidate contract. Hardenburgh v Hardenburgh, 158 A.D.2d 585, 551 N.Y.S.2d 552, 1990 N.Y. App. Div. LEXIS 1980 (N.Y. App. Div. 2d Dep't), app. dismissed, 76 N.Y.2d 982, 563 N.Y.S.2d 769, 565 N.E.2d 518, 1990 N.Y. LEXIS 3440 (N.Y. 1990).

Court properly denied defendant's motion to compel plaintiffs' attorney to accept answer containing defense of lack of personal jurisdiction since granting of motion would have vitiated stipulation whereby plaintiffs extended defendant's time to serve answer in exchange for waiver

of such defense, and thus would have irrevocably upset status quo, resulting in dismissal of complaint. Milbank v Lauersen, 188 A.D.2d 644, 592 N.Y.S.2d 261, 1992 N.Y. App. Div. LEXIS 14618 (N.Y. App. Div. 2d Dep't 1992).

One who wishes to set aside settlement made in action which has been discontinued must proceed by plenary action and not by motion. D'Amico v Nuzzo, 194 A.D.2d 761, 599 N.Y.S.2d 297, 1993 N.Y. App. Div. LEXIS 6656 (N.Y. App. Div. 2d Dep't 1993).

Court erred when it denied wife’s motion to set aside separation agreement without first conducting hearing, in light of wife’s averments regarding marital history, parties’ respective financial situations and her emotional state at time of agreement, together with other evidence regarding circumstances under which agreement was executed and terms of agreement itself. Sheridan v Sheridan, 202 A.D.2d 749, 608 N.Y.S.2d 582, 1994 N.Y. App. Div. LEXIS 1800 (N.Y. App. Div. 3d Dep't 1994).

Court lacked jurisdiction to set aside “global” stipulation of settlement where numerous necessary parties in related actions were not before it. Hotel Prince George Affiliates v Grimbilas, 241 A.D.2d 302, 659 N.Y.S.2d 473, 1997 N.Y. App. Div. LEXIS 7017 (N.Y. App. Div. 1st Dep't 1997), app. dismissed, 91 N.Y.2d 887, 668 N.Y.S.2d 564, 691 N.E.2d 636, 1998 N.Y. LEXIS 85 (N.Y. 1998).

Where stipulation of discontinuance had been filed, actions were terminated and stipulation could be set aside only in separate plenary action. Hotel Prince George Affiliates v Grimbilas, 241 A.D.2d 302, 659 N.Y.S.2d 473, 1997 N.Y. App. Div. LEXIS 7017 (N.Y. App. Div. 1st Dep't 1997), app. dismissed, 91 N.Y.2d 887, 668 N.Y.S.2d 564, 691 N.E.2d 636, 1998 N.Y. LEXIS 85 (N.Y. 1998).

Party may be relieved from consequences of stipulation made during litigation only where there is cause sufficient to invalidate contract, such as fraud, collusion, mistake, or accident. Graham v New York City Hous. Auth., 260 A.D.2d 541, 688 N.Y.S.2d 591, 1999 N.Y. App. Div. LEXIS 4106 (N.Y. App. Div. 2d Dep't 1999).

Former wife was not entitled to modification of divorce judgment so as to direct that she receive equitable share of former husband's pension and 401K plan where (1) divorce judgment did not allow equitable distribution of pension and 401K plan, (2) parties' stipulation of settlement allowed either party to apply for modification of divorce judgment if, inter alia, husband opted to exercise his rights under pension plan available through his employer before specified date, and (3) husband did not do so. Zollner v Zollner, 263 A.D.2d 454, 692 N.Y.S.2d 711, 1999 N.Y. App. Div. LEXIS 7787 (N.Y. App. Div. 2d Dep't 1999).

After parties had stipulated that mother could exercise midweek visitation with 2 children in father's custody on condition that she provide advance notice of one week, Family Court's modification of that provision by eliminating advance notice requirement was proper where it did not interfere with father's right to practice religion of his choice or undermine parties' agreement to raise children as Orthodox Jews. Orner v Orner, 263 A.D.2d 544, 694 N.Y.S.2d 683, 1999 N.Y. App. Div. LEXIS 8402 (N.Y. App. Div. 2d Dep't 1999).

Mother was entitled to upward modification of child support where parties specifically agreed that support provisions in stipulation would "be without prejudice to [mother's] application for an upward modification based upon such change," father's gross income had substantially increased, and mother was entitled to arrears for period during which father failed to comply with agreement. La Porte v La Porte, 263 A.D.2d 585, 693 N.Y.S.2d 666, 1999 N.Y. App. Div. LEXIS 7705 (N.Y. App. Div. 3d Dep't 1999).

Evidence supported modification of joint custody of parties' 3 children, with father's home as their primary residence, to sole legal custody in mother, with permission for her to relocate them to her home in Delaware, where mother was originally awarded sole custody in 1992 but stipulated to joint custody in 1995 so that she could move to Delaware in search of better job, joint custody was in effect for only about 2 years when she filed 1997 modification petition, she had been children's primary caregiver during marriage, she obtained employment in Delaware that doubled her income and acquired 3-bedroom home for herself and children, father's live-in girlfriend subjected children to ill-advised disciplinary practices, and father attempted to interfere

with mother's relationship with children. Crawson v Crawson, 263 A.D.2d 656, 692 N.Y.S.2d 799, 1999 N.Y. App. Div. LEXIS 7823 (N.Y. App. Div. 3d Dep't 1999).

Third-party defendant in personal injury action was not estopped from denying existence of stipulation adding amount of its Workers' Compensation Law lien to damages awarded by jury, absent evidence of any written stipulation or stipulation in open court. Kowalski v Fisher 40th & 3rd Co., 266 A.D.2d 514, 698 N.Y.S.2d 716, 1999 N.Y. App. Div. LEXIS 12221 (N.Y. App. Div. 2d Dep't 1999).

Divorce court properly denied former husband's motion to modify terms of stipulation of settlement entered into in open court, despite fact that he was not represented by counsel at time stipulation was placed on record, since he was admonished repeatedly to obtain counsel, and on several occasions during hearing expressly acknowledged that he waived his right to retain counsel and agreed to terms of settlement. Bruckstein v Bruckstein, 271 A.D.2d 389, 705 N.Y.S.2d 391, 2000 N.Y. App. Div. LEXIS 3807 (N.Y. App. Div. 2d Dep't 2000).

Where parties' so-ordered stipulation stated, inter alia, that plaintiff would make no claim for "psychological or emotional injuries or damages," court properly determined that waiver of right to recover damages for "psychological injuries" encompassed waiver of any right to recover damages based on plaintiff's alleged loss of enjoyment of life. Giardelli v Rainbow Apparel Distrib. Ctr. Corp., 271 A.D.2d 643, 708 N.Y.S.2d 301, 2000 N.Y. App. Div. LEXIS 4524 (N.Y. App. Div. 2d Dep't 2000).

Defendants were not excused from complying with stipulation of settlement where they entered into it in open court after ample consultation with their counsel, and there was no showing of fraud, collusion, mistake, or accident. Ashil USA Holdings Corp. v Cimerring, 273 A.D.2d 41, 708 N.Y.S.2d 865, 2000 N.Y. App. Div. LEXIS 6325 (N.Y. App. Div. 1st Dep't 2000).

Divorced husband did not have to pay expenses of second car to be used by parties' younger daughter where divorce judgment, entered on parties' stipulation, provided that he would pay 67 percent of expenses of maintaining particular car owned by defendant but used by parties' older

daughter, judgment did not require him to pay for second car, and fact that younger daughter would reach legal driving age was not unforeseen change of circumstances justifying modification of judgment. Garncarz v Garncarz, 273 A.D.2d 196, 709 N.Y.S.2d 113, 2000 N.Y. App. Div. LEXIS 6250 (N.Y. App. Div. 2d Dep't 2000).

Court properly set aside stipulation vacating defendants' default and properly denied their motion to dismiss complaint in personal injury action where they failed to answer complaint within period provided by so-ordered stipulation vacating their earlier default. Malval v Hosten, 275 A.D.2d 735, 713 N.Y.S.2d 499, 2000 N.Y. App. Div. LEXIS 9269 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff corporations, who stipulated with town to settle their civil liability for allegedly violating local law, were entitled to preliminary injunction restraining town from enforcing terms of stipulation on ground that local law was subsequently declared unconstitutional and invalid by United States Supreme Court; decisions of United States Supreme Court apply retroactively to "all events, regardless of whether such events predate or postdate" Court's announcement of new rule of law. R & R Disposal Carting v Town of Clarkstown, 163 Misc. 2d 196, 620 N.Y.S.2d 215, 1994 N.Y. Misc. LEXIS 548 (N.Y. Sup. Ct. 1994).

Appellate court rejected respondent second brother's claim that an open court settlement stipulation between himself and petitioner first brother was too vague to be enforceable because it did not specifically identify certain properties which required the execution of quit claim deeds; the second brother's own submissions of proposed quitclaim deeds for the properties at issue made clear which properties were addressed by the stipulation, and, by his actions, the second brother acquiesced in, and was bound by, the settlement stipulation. Richard BB v Louis BB, 300 A.D.2d 868, 752 N.Y.S.2d 142, 2002 N.Y. App. Div. LEXIS 12414 (N.Y. App. Div. 3d Dep't 2002).

**23. —Motion to vacate**

Issue whether stipulation, which was made between counsel in open court in negligence action and in which it was agreed to discontinue action against city, could be vacated after trial judge determined that it was impossible to charge as to applicable law without city as a party could not be determined merely on basis of conflicting affidavits; either hearing before different judge or a plenary action, equitable in nature, was required. Ragen v New York, 45 A.D.2d 1046, 358 N.Y.S.2d 62, 1974 N.Y. App. Div. LEXIS 4311 (N.Y. App. Div. 2d Dep't 1974).

In a negligence action to recover damages for personal injuries, an order granting a motion to vacate a stipulation entered into in open court would be modified to reinstate the City of New York as a party defendant and affirmed as modified, where the trial court properly relieved defendants Metropolitan Transportation Authority and New York City Transit Authority from the consequences of the stipulation on the ground of unilateral mistake, and as discontinuation of the action against the City of New York was conditioned on acceptance of the stipulation by the parties, the City of New York would be reinstated as a party defendant. Carrion v Metropolitan Transp. Authority, 92 A.D.2d 907, 460 N.Y.S.2d 117, 1983 N.Y. App. Div. LEXIS 17304 (N.Y. App. Div. 2d Dep't 1983).

In a holdover proceeding brought by a co-operative conversion association against two elderly apartment tenants, the trial court erred in vacating a stipulation of settlement between the association and the tenants, pursuant to which the tenants had agreed to vacate the subject apartment, on the asserted basis that the stipulation had been based upon a mistaken determination by the parties that the tenants were not “eligible senior citizens” within the meaning of former Gen Bus Law § 352-eeee(1)(e) in that their receipt of Social Security benefits placed them above the statutory income limitations, since there was no authoritative court decision governing the issue of whether such benefits were includible as income under the statute at the time the parties had entered into the stipulation, and since the parties had been represented by independent counsel, had been aware of the relevant facts, and had had the opportunity to explore the law on the subject prior to executing the stipulation of settlement.

Birchwood Towers # 1 Associates v Haber, 98 A.D.2d 697, 469 N.Y.S.2d 92, 1983 N.Y. App. Div. LEXIS 20999 (N.Y. App. Div. 2d Dep't 1983).

In a personal injury action in which during a pretrial conference plaintiffs' attorney accepted an offer of $4,500 in settlement of the action, which settlement was neither reduced to writing nor read upon the record in open court (CPLR § 2104), plaintiffs' motion to vacate the settlement would be granted where a medical examination conducted approximately eight months after the settlement was reached determined that the medical condition of plaintiff had deteriorated greatly and where plaintiffs made three applications to vacate the settlement and restore the action to the trial calendar, in that in view of the post settlement discovery it could hardly be said that a period of some eight months from the medical examination to the making of the initial motion to vacate constituted unreasonable delay. Campbell v New York, 99 A.D.2d 524, 471 N.Y.S.2d 303, 1984 N.Y. App. Div. LEXIS 16736 (N.Y. App. Div. 2d Dep't 1984).

In child custody proceeding, mother was not entitled to vacatur of stipulation entered into in open court where she was represented by counsel of her own choosing and voluntarily and freely agreed to stipulation. Gossett v Turner, 126 A.D.2d 724, 511 N.Y.S.2d 319, 1987 N.Y. App. Div. LEXIS 41871 (N.Y. App. Div. 2d Dep't 1987).

Court properly denied plaintiff's motion to vacate stipulation of settlement on ground that it was made without her consent where (1) she was in court throughout negotiation of settlement and dictation of its terms into record, (2) she was accompanied by her counsel and her son, who explained stipulation to her, (3) oral stipulation was made in open court and its terms were definite, and (4) she did not object until 3 months later; under circumstances, she would be held to have acquiesced in and consented to settlement, and thus was bound by it. Alfonso v Pollicino, 128 A.D.2d 576, 512 N.Y.S.2d 842, 1987 N.Y. App. Div. LEXIS 44270 (N.Y. App. Div. 2d Dep't 1987).

In divorce action, wife was not entitled to rescind stipulation settling parties' prior separation action on ground that she was under emotional strain at time and may have misunderstood whether alimony provisions could later be modified since she was represented by counsel

throughout, nothing suggested that stipulation was arrived at unfairly, and she received benefits under stipulation for several years before challenging it. Smith v Smith, 129 A.D.2d 575, 514 N.Y.S.2d 73, 1987 N.Y. App. Div. LEXIS 45240 (N.Y. App. Div. 2d Dep't 1987).

Defendant was not entitled to vacatur of stipulation where it failed to even attempt to perform its obligations under stipulation, including failure to apply for variance, and failed to establish that performance had been rendered impossible; although defendant offered proof that certain impediments might render compliance with stipulation difficult, claim of impossibility was merely speculative and unsubstantiated, falling considerably short of showing required to set aside stipulation entered in open court. HCE Associates v 3000 Watermill Lane Realty Corp., 131 A.D.2d 543, 516 N.Y.S.2d 269, 1987 N.Y. App. Div. LEXIS 48000 (N.Y. App. Div. 2d Dep't 1987).

Although plenary action is necessary to enforce or set aside express stipulation of settlement or judgment entered in accordance with terms thereof, parties may proceed by motion where settlement stipulation does not terminate lawsuit; thus, where settlement stipulation provided that underlying action for permanent injunction would not be discontinued until some time in future, on defendant’s compliance with other conditions set forth therein, action was not terminated by stipulation and plenary action was not required. HCE Associates v 3000 Watermill Lane Realty Corp., 131 A.D.2d 543, 516 N.Y.S.2d 269, 1987 N.Y. App. Div. LEXIS 48000 (N.Y. App. Div. 2d Dep't 1987).

Court properly denied motion by discharged law firm to vacate stipulation cancelling notice of pendency and stipulation of discontinuance, which had been negotiated by substituted counsel, for even if law firm could establish that its charging lien attached to same real property that was subject of notice of pendency, reinstatement of notice of pendency is not available remedy for enforcement of charging lien; firm should have commenced special proceeding under CLS Jud § 475 or plenary action in equity. Pemberton v Dolphin Dev. Corp., 134 A.D.2d 23, 522 N.Y.S.2d 740, 1987 N.Y. App. Div. LEXIS 50860 (N.Y. App. Div. 3d Dep't 1987).

Divorce court properly denied husband's motion to vacate stipulation of settlement where its terms were read into record in open court, husband was represented by competent counsel, and there was no showing that stipulation was product of fraud, overreaching, mistake or duress. Bossom v Bossom, 141 A.D.2d 794, 529 N.Y.S.2d 1022, 1988 N.Y. App. Div. LEXIS 7151 (N.Y. App. Div. 2d Dep't 1988).

Motion to vacate stipulation of settlement entered into on record in open court was properly denied where (1) movant did not allege sufficient facts to support finding of mistake or accident, as alleged mistakes of fact were within ability of movant to determine before entering into settlement, and (2) contract of settlement was clearly not unconscionable. William E. McClain Realty, Inc. v Rivers, 144 A.D.2d 216, 534 N.Y.S.2d 530, 1988 N.Y. App. Div. LEXIS 10327 (N.Y. App. Div. 3d Dep't 1988), app. dismissed, 73 N.Y.2d 995, 540 N.Y.S.2d 1006, 538 N.E.2d 358, 1989 N.Y. LEXIS 459 (N.Y. 1989).

Court properly denied plaintiff's belated motion to set aside stipulation of partial settlement on ground that it was product of his attorney's unauthorized conduct where stipulation had been placed on record in open court after extensive settlement negotiations, court recited terms of stipulation and indicated that remaining issues would be subject of additional proceedings, counsel for both sides agreed that court's statement was accurate, parties were then sworn and responded to court's inquiries with assurances that they had heard stipulation and agreed to it, and both counsel then stipulated to agreement. Yuzary v Yuzary, 223 A.D.2d 540, 635 N.Y.S.2d 701, 1996 N.Y. App. Div. LEXIS 155 (N.Y. App. Div. 2d Dep't 1996).

Court properly granted plaintiff's motion to set aside alleged settlement negotiated on his behalf by his attorney where negotiations were not transcribed, stipulation was never spread on record in open court, and plaintiff refused to sign release in accordance with negotiated terms. Margolis v New York City Transit Auth., 233 A.D.2d 483, 650 N.Y.S.2d 30, 1996 N.Y. App. Div. LEXIS 12667 (N.Y. App. Div. 2d Dep't 1996).

Court properly denied, without hearing, motion by testator's granddaughter to vacate 1979 probate decree entered pursuant to settlement agreement on ground that she was incapable of

protecting her legal rights at time of 1979 settlement because she was incapacitated by posttraumatic stress syndrome due to long-term abuse, where unrebutted affidavits of attorneys who participated in settlement demonstrated that granddaughter had effectively employed potential publicity afforded by her allegation of sexual abuse as negotiating tool. In re Estate of Bobst, 234 A.D.2d 7, 651 N.Y.S.2d 26, 1996 N.Y. App. Div. LEXIS 12270 (N.Y. App. Div. 1st Dep't 1996), app. dismissed, 90 N.Y.2d 844, 660 N.Y.S.2d 870, 683 N.E.2d 776, 1997 N.Y. LEXIS 1608 (N.Y. 1997).

Defendant was entitled to vacatur of judgment that had been entered on basis of confession of judgment that he had previously executed to be held in escrow as security against his default on payments required under stipulation of settlement where plaintiff had taken judgment after one of defendant’s checks had been dishonored, but defendant did not learn of check being dishonored until 2 months later and plaintiff deliberately failed to inform defendant that check had been dishonored or that judgment had been entered; under these circumstances, plaintiff’s conduct could be interpreted as attempt to enforce technical default to obtain unwarranted payment of additional monies beyond that agreed to in stipulation. Weitz v Murphy, 241 A.D.2d 547, 661 N.Y.S.2d 646, 1997 N.Y. App. Div. LEXIS 8132 (N.Y. App. Div. 2d Dep't 1997).

Divorced wife failed to show any basis for vacating parties’ stipulation of settlement where stipulation was made while she was represented by counsel, she voluntarily and knowingly entered into stipulation in open court, and she indicated that she was satisfied with agreement and that her judgment was not impaired on that day. Kourakos v Kourakos, 245 A.D.2d 342, 666 N.Y.S.2d 26, 1997 N.Y. App. Div. LEXIS 12812 (N.Y. App. Div. 2d Dep't 1997).

Defendant in divorce action could challenge parties’ stipulation of settlement by motion, without bringing plenary action to rescind it, where stipulation was entered in open court in course of litigation, and divorce action had not been terminated. Arguelles v Arguelles, 251 A.D.2d 611, 675 N.Y.S.2d 551, 1998 N.Y. App. Div. LEXIS 7975 (N.Y. App. Div. 2d Dep't 1998).

Medical malpractice plaintiff was not entitled to vacatur of written stipulation, entered into by her former attorney at pretrial conference, precluding plaintiff from presenting any evidence of

permanency of her injuries where (1) former attorney had long involvement in case, engaging in settlement negotiations and appearing at pretrial conferences, and thus had apparent authority to enter into stipulation, and (2) there was no evidence of fraud, collusion, mistake, or accident sufficient to invalidate contract. Bubeck v Main Urology Assocs., P.C., 275 A.D.2d 909, 713 N.Y.S.2d 403, 2000 N.Y. App. Div. LEXIS 9514 (N.Y. App. Div. 4th Dep't 2000).

Plaintiff had little or no likelihood of success on its causes of action for breach of stipulation and trade name infringement, and thus defendants were entitled to vacatur of preliminary injunction, entered on their default, barring them from using name “Simpson” in their business, where (1) plaintiff Simpson & Co. was not in existence at time of stipulation in which defendant Berson agreed not to use trade names “Simpson & Co.” or “Simpson & Co. Florist West,” (2) defendants’ use of trade name “Simpson Florist, Inc.” predated plaintiff’s use of trade name “Simpson & Co.,” and (3) defendants were not required to agree, as condition of vacatur, to court’s proposal that any use by them of name “Simpson” in their trade name be limit to “Berson & Simpson” rather than “Simpson Florist, Inc.” Simpson & Co. v Simpson Florist, Inc., 281 A.D.2d 329, 722 N.Y.S.2d 509, 2001 N.Y. App. Div. LEXIS 3149 (N.Y. App. Div. 1st Dep't 2001).

Every forbearance agreement must be filed with the clerk of the court and if a violation of the forbearance agreement occurs and the foreclosure proceeding is therefore resumed, where the mortgagor has made payments under the agreement, then plaintiff must petition the court to appoint a referee to recalculate the amount due under the mortgage taking those payments into account. Deutsche Bank Natl. Trust Co. v Williams, 842 N.Y.S.2d 338, 17 Misc. 3d 320, 238 N.Y.L.J. 42, 2007 N.Y. Misc. LEXIS 5548 (N.Y. Sup. Ct. 2007), rev'd, 62 A.D.3d 826, 879 N.Y.S.2d 552, 2009 N.Y. App. Div. LEXIS 3925 (N.Y. App. Div. 2d Dep't 2009).

**24. —Motion to reopen proceeding**

Granting of wife’s motion to reopen divorce case after stipulation of settlement had been entered into in open court and an inquest was taken was an abuse of discretion where, though wife assertedly was emotionally upset when stipulation of settlement was entered into, she was

represented by counsel and freely entered into the stipulation. Rado v Rado, 51 A.D.2d 811, 380 N.Y.S.2d 273, 1976 N.Y. App. Div. LEXIS 11400 (N.Y. App. Div. 2d Dep't 1976).

**25. —Appeal**

Party who stipulates to reduction or enhancement of damages award cannot appeal or seek leave to appeal inasmuch as that party is not aggrieved; only nonstipulating party may appeal or move for leave to appeal. Whitfield v City of New York, 90 N.Y.2d 777, 666 N.Y.S.2d 545, 689 N.E.2d 515, 1997 N.Y. LEXIS 3701 (N.Y. 1997), overruled in part, Adams v Genie Indus., Inc., 14 N.Y.3d 535, 903 N.Y.S.2d 318, 929 N.E.2d 380, 2010 N.Y. LEXIS 976 (N.Y. 2010).

On appeal from divorce judgment, wife could not challenge parties' written stipulation as to her interest in husband's dental practice on ground that it was unfair and did not include valuation of husband's dental license (as required by case law decided after stipulation, but before judgment) since she had made no motion to reopen proof and no basis to set aside stipulation appeared in record. Heuer v Heuer, 129 A.D.2d 961, 514 N.Y.S.2d 279, 1987 N.Y. App. Div. LEXIS 45615 (N.Y. App. Div. 4th Dep't 1987).

Supreme Court erred in vacating Civil Court judgment awarding damages to tenant for landlord's failure to comply with stipulation of settlement, even though stipulation contained schedule of damages which led to arguably excessive award in tenant's favor, where both parties had entered into stipulation while represented by counsel, stipulation had enabled landlord to avoid liability on tenant's claim for breach of warranty of habitability, and landlord never challenged validity of stipulation until case was appealed to Supreme Court; judgment of Civil Court would be reinstated without prejudice to application to that court by landlord for order to set aside stipulation. 1420 Concourse Corp. v Cruz, 135 A.D.2d 371, 521 N.Y.S.2d 429, 1987 N.Y. App. Div. LEXIS 52343 (N.Y. App. Div. 1st Dep't 1987), app. dismissed, 73 N.Y.2d 868, 537 N.Y.S.2d 487, 534 N.E.2d 325, 1989 N.Y. LEXIS 40 (N.Y. 1989).

Appellant was not aggrieved party entitled to appeal order denying his motion to dismiss where dismissal was based on stipulation of settlement before Supreme Court, and basis for appeal

was appellee's lack of standing to commence proceeding in Supreme Court, not lack of subject matter jurisdiction. In re Elmer Q., 250 A.D.2d 256, 681 N.Y.S.2d 637, 1998 N.Y. App. Div. LEXIS 13312 (N.Y. App. Div. 3d Dep't 1998).

**26. —Particular circumstances as affecting right to relief**

In an action brought by a tenant in a building owned by a certain corporation, seeking to compel specific performance of an alleged right of first refusal to purchase the building, an order directing the corporation and tenant to comply with their stipulated settlement agreement would be modified to delete provisions directing execution of a bond and mortgage, where the addition of provisions relating to the bond and mortgage had resulted only from a change of mind by Special Term after one of the corporation's shareholders as an afterthought, had decided that her security under the stipulated agreement was insufficient. Term Industries, Inc. v Essbee Estates, Inc., 88 A.D.2d 823, 451 N.Y.S.2d 128, 1982 N.Y. App. Div. LEXIS 17134 (N.Y. App. Div. 1st Dep't 1982).

Injured worker was not entitled to recover from workers' compensation insurance carrier proportionate share of litigation costs incurred by worker in successful third party action on basis of present value of estimated future benefits which insurance carrier would no longer have to incur because of worker's recovery in third party action, where worker had signed final and binding stipulation of settlement in third party action which constituted unlimited general release with no reservation of rights, and thus his claim was no longer in litigation process at time of decision in Matter of Kelly v State Ins. Fund, 60 NY2d 131, in which Court of Appeals construed CLS Work Comp § 29 as permitting type of apportionment now sought by worker. Ianielli v North River Ins. Co., 119 A.D.2d 317, 506 N.Y.S.2d 970, 1986 N.Y. App. Div. LEXIS 60626 (N.Y. App. Div. 2d Dep't 1986), app. denied, 69 N.Y.2d 606, 514 N.Y.S.2d 1024, 507 N.E.2d 320, 1987 N.Y. LEXIS 15836 (N.Y. 1987).

Plaintiff in personal injury action was not entitled to set aside stipulation of settlement entered into 7 months earlier in open court and in presence of counsel, on ground that she did not fully

comprehend proceedings due to her limited knowledge of English and was pressured into settling claim, where (1) her husband (coplaintiff), who spoke English fluently, had served as her translator, (2) her assertions of coercion were unsupported, and (3) settlement was not inequitable. Belchou v Atlantic & Pacific Tea Co., 126 A.D.2d 506, 510 N.Y.S.2d 625, 1987 N.Y. App. Div. LEXIS 41647 (N.Y. App. Div. 2d Dep't 1987).

Wife failed to demonstrate that she had been defrauded, and that her stipulation of settlement in action to set aside deed should therefore be vacated, where she showed only (1) that her husband (defendant) had later deeded his interest in disputed property to other family members, and (2) that husband, in separate matrimonial action, was seeking equitable distribution of sum to be received by wife pursuant to stipulation of settlement. Alfonso v Pollicino, 128 A.D.2d 576, 512 N.Y.S.2d 842, 1987 N.Y. App. Div. LEXIS 44270 (N.Y. App. Div. 2d Dep't 1987).

In matrimonial action, wife’s motion to vacate stipulation of settlement on ground that husband had fraudulently misrepresented his finances was properly denied without hearing since wife had approved stipulation in open court with advice of counsel, provisions of stipulation were not manifestly unfair, and there was no evidence of overreaching present in its inception; in any event, wife’s conduct in accepting benefits of stipulation for 4 ½ years constituted ratification. McDougall v McDougall, 129 A.D.2d 685, 514 N.Y.S.2d 447, 1987 N.Y. App. Div. LEXIS 45372 (N.Y. App. Div. 2d Dep't 1987).

Inexperience of counsel was insufficient basis for vacating stipulation by which defendant physicians in malpractice case had agreed to furnish plaintiffs with copies of their personnel records. Buys v County of Nassau, 133 A.D.2d 94, 518 N.Y.S.2d 632, 1987 N.Y. App. Div. LEXIS 49621 (N.Y. App. Div. 2d Dep't 1987).

Supreme Court properly denied, without hearing, husband’s application to vacate or modify that portion of judgment in matrimonial action which incorporated stipulation of settlement since husband, represented by counsel, had consented to stipulation in open court after judicial inquiry, and record did not support his claims of unfairness, overreaching, or mistake. Richardson v Richardson, 142 A.D.2d 563, 530 N.Y.S.2d 229, 1988 N.Y. App. Div. LEXIS 7345

(N.Y. App. Div. 2d Dep't 1988), app. dismissed, 73 N.Y.2d 872, 537 N.Y.S.2d 496, 534 N.E.2d 334, 1989 N.Y. LEXIS 100 (N.Y. 1989).

Wife was not entitled to set aside stipulation of settlement entered into in open court in divorce action since (1) wife was represented by counsel at time of settlement, was advised of her options in lieu of settlement, and knowingly and voluntarily entered into settlement, and (2) stipulation was not unconscionable where wife received substantial cash as well as income producing property, even though husband kept property which was substantially more valuable. Golfinopoulos v Golfinopoulos, 144 A.D.2d 537, 534 N.Y.S.2d 407, 1988 N.Y. App. Div. LEXIS 11910 (N.Y. App. Div. 2d Dep't 1988), app. dismissed, 74 N.Y.2d 793, 545 N.Y.S.2d 108, 543 N.E.2d 751, 1989 N.Y. LEXIS 918 (N.Y. 1989).

In mortgage foreclosure action in which parties entered into open court stipulation of settlement conditioned on mortgagors' obtaining new mortgage commitment by July 13, 1987, court did not err in declining to reform or modify stipulation after mortgagors obtained new mortgage commitment on October 20, 1987 since mortgagors did not obtain new commitment in time mandated by stipulation. Gildston v Terilli, 146 A.D.2d 738, 537 N.Y.S.2d 224, 1989 N.Y. App. Div. LEXIS 895 (N.Y. App. Div. 2d Dep't 1989).

In action arising from firing of security guard at psychiatric center, court erred in revoking prior settlement stipulation between parties simply on papers and in absence of hearing to explore disputed questions of fact where (1) settlement stipulation was entered into after security guard was served with notice of disciplinary charges relating to poor time and attendance record, (2) security guard was subsequently terminated pursuant to settlement stipulation based on additional unauthorized absences, (3) security guard contended that he was not mentally competent to enter into stipulation based on his physical and emotional condition at time he signed stipulation, and that subsequent absences were due to stroke, (4) psychiatric center answered that security guard was accompanied by union representatives at time he signed stipulation and acted rationally at that time and that no notice of stroke was ever given, and (5) security guard replied that notice of stroke was given and that, even in absence of notice,

psychiatric center should have realized that stroke occurred. McNorton v Bronx Psychiatric Center, 151 A.D.2d 448, 542 N.Y.S.2d 646, 1989 N.Y. App. Div. LEXIS 9119 (N.Y. App. Div. 1st Dep't 1989).

Personal injury plaintiff was not entitled to set aside stipulation of settlement entered into in open court where (1) she had initially refused settlement offer of $50,000, (2) during conference, judge advised her that she could lose if she went to trial, and she again rejected offer, (3) after judge left conference, defendants raised offer to $60,000, which plaintiff accepted outside judge’s presence, (4) judge carefully explained to plaintiff that she would have to pay counsel fees and medical bills from settlement sum and that she would have no further recourse for anything arising out of same suit, and (5) plaintiff clearly stated on record that settlement met with her approval and at no time stated any objection to settlement. Herzfeld v J & M Realty Associates, 151 A.D.2d 644, 542 N.Y.S.2d 374, 1989 N.Y. App. Div. LEXIS 8239 (N.Y. App. Div. 2d Dep't 1989).

Stipulation of settlement in divorce action, obligating 70-year-old husband, whose retirement income was to consist of $5,400 per month, to pay 68-year-old wife $3,800 per month, comprised of $2,000 from his pension and $1,800 in maintenance, plus $112.45 toward premium on life insurance policy with wife as beneficiary, was not unconscionable, especially where wife was in failing health. Hardenburgh v Hardenburgh, 158 A.D.2d 585, 551 N.Y.S.2d 552, 1990 N.Y. App. Div. LEXIS 1980 (N.Y. App. Div. 2d Dep't), app. dismissed, 76 N.Y.2d 982, 563 N.Y.S.2d 769, 565 N.E.2d 518, 1990 N.Y. LEXIS 3440 (N.Y. 1990).

Tenant was not entitled to vacatur of stipulated settlement with her landlord made in open court since (1) she was represented by competent counsel and specifically stated, in response to judge’s inquiries, that she had discussed settlement with her attorney and agreed with its terms, and (2) her assertions that she misunderstood implications of agreement and was pressured by her attorney to enter into it were undermined by extensive negotiations preceding stipulation, her acceptance of $9,000 settlement check, and her nearly 18-month delay in seeking vacatur.

Swanson v Bryant, 160 A.D.2d 999, 554 N.Y.S.2d 718, 1990 N.Y. App. Div. LEXIS 5013 (N.Y. App. Div. 2d Dep't 1990).

Open-court stipulation settling divorce and maintenance action and requiring husband to pay wife maintenance of $100 per week for life, although quite favorable to wife, was not subject to vacatur as either facially irregular or unconscionable where husband's annual salary was $28,862 and wife, although in good health and in possession of high school diploma and secretarial training, was on welfare with parties' son, she could not match husband's earnings, and she had performed traditional role of family homemaker during marriage while husband had gained significant job experience and seniority. Varriale v Varriale, 160 A.D.2d 1121, 553 N.Y.S.2d 904, 1990 N.Y. App. Div. LEXIS 4519 (N.Y. App. Div. 3d Dep't 1990).

Defendant was not entitled to relief from stipulation entered into in open court since (1) although defendant was somewhat contentious during proceedings, he indicated several times that he understood ramifications of stipulation and that he consented to proceedings, and (2) neither prestipulation doctor's note indicating that defendant was unable to withstand emotional stress due to heart condition nor fact that he was 81 years old was sufficient to establish mental infirmity. Privin v Landolfi, 191 A.D.2d 485, 596 N.Y.S.2d 707, 1993 N.Y. App. Div. LEXIS 2100 (N.Y. App. Div. 2d Dep't 1993).

Wife's motion to vacate judgment of divorce based on stipulation of settlement, and to modify its provisions on grounds of fraud, was properly denied without hearing where (1) claims of fraud were conclusory in nature, (2) at time stipulation was made wife was represented by counsel, knowingly and voluntarily entered into stipulation in open court, actively continued negotiations in presence of court, and indicated that she was satisfied with agreement, and (3) wife accepted benefits of stipulation for period of years before seeking to vacate it. Anthony v Anthony, 199 A.D.2d 353, 605 N.Y.S.2d 376, 1993 N.Y. App. Div. LEXIS 12134 (N.Y. App. Div. 2d Dep't 1993).

Plaintiffs failed to provide basis for setting aside stipulation of settlement in real property boundary dispute, despite their contention that they should be relieved from settlement after

concluding that their original contentions as to course of boundary line were correct and that they had been ill-advised in making settlement, where terms of settlement were clearly stated in open court, stipulation was fully explained to parties by their counsel and court, and plaintiffs assented to its terms. Griffin v Montemarano, 205 A.D.2d 863, 613 N.Y.S.2d 453, 1994 N.Y. App. Div. LEXIS 6074 (N.Y. App. Div. 3d Dep't 1994).

In contested probate proceeding in which executors sought to deny probate to codicil bequeathing $25,000 to church, court properly refused to set aside stipulation between executors and church whereby church agreed to accept reduced sum of $20,000 in exchange for executors' withdrawal of their objections to codicil, although it was discovered after parties entered into stipulation that codicil did not meet requirements of due execution, since proof failed to support executors' contention that they had agreed to stipulation in mistaken reliance on validity of codicil. In re Estate of Slaughter, 206 A.D.2d 537, 614 N.Y.S.2d 767, 1994 N.Y. App. Div. LEXIS 7587 (N.Y. App. Div. 2d Dep't 1994).

Absent showing that stipulation was product of fraud, overreaching, mistake, or duress, it will not be disturbed. Ferraiulo v Ferraiulo, 221 A.D.2d 412, 634 N.Y.S.2d 388, 1995 N.Y. App. Div. LEXIS 11983 (N.Y. App. Div. 2d Dep't 1995).

Wife failed to show existence of any ground to vacate parties' stipulation concerning husband's unsupervised visitation of their children where wife, who was represented by counsel, voluntarily and knowingly entered into stipulation despite her expressed reservations, she did not allege any specific facts constituting legal duress, and stipulation was fair, reasonable, and not in contravention of children's best interests. Conti v Conti, 238 A.D.2d 460, 657 N.Y.S.2d 922, 1997 N.Y. App. Div. LEXIS 4003 (N.Y. App. Div. 2d Dep't 1997).

Although landlords' letter setting forth new terms repudiated stipulation of settlement, tenants could not seek to rescind stipulation on basis of landlords' anticipatory breach where tenants, instead of seeking rescission, elected to hold landlords to original stipulation, demanded performance in accordance with it, and then breached it by failing to vacate premises on agreed

date. Mundinger v Clark, 240 A.D.2d 714, 660 N.Y.S.2d 27, 1997 N.Y. App. Div. LEXIS 7125 (N.Y. App. Div. 2d Dep't 1997).

Stipulation of discontinuance of traffic accident victim's personal injury action was binding on victim, despite defendants' failure to sign it or to execute their own release of victim, where (1) victim was party being held to extant release, so that his own signature, ratifying terms of settlement, was sole relevant consideration, (2) under CLS CPLR § 2104, stipulation binds signatory regardless of adversary's countersignature, (3) neither stipulation of discontinuance nor release was further conditioned on any act of any party, and (4) stipulation itself provided for filing without any further notice. Calavano v New York City Health & Hosps.Corp, 246 A.D.2d 317, 667 N.Y.S.2d 351, 1998 N.Y. App. Div. LEXIS 55 (N.Y. App. Div. 1st Dep't 1998).

Stipulation of settlement, entered into in open court, allowing fire insurer to pay insurance proceeds into court, subject to city tax lien, was not subject to vacatur on ground that subject premises was 2-family residence exempt from tax lien under CLS Gen Mun § 22(1)(e) since any evidence that premises was 2-family residence should have been presented before stipulation was entered. Mercer v New York Prop. Underwriting Ass'n, 247 A.D.2d 450, 668 N.Y.S.2d 664, 1998 N.Y. App. Div. LEXIS 1100 (N.Y. App. Div. 2d Dep't 1998).

Motion to vacate stipulation on ground of mental disorder was properly denied where (1) psychiatrist's letter stated that he had stopped seeing petitioner more than one year before date of stipulation, (2) internist's letter merely stated that he was treating petitioner for ailments that might have arisen from excessive stress, and (3) letter from petitioner's friend, who was attorney, admitted being present but doing nothing to prevent stipulation. Dinnerstein v New York State Div. of Hous. & Community Renewal, 257 A.D.2d 444, 683 N.Y.S.2d 247, 1999 N.Y. App. Div. LEXIS 235 (N.Y. App. Div. 1st Dep't 1999).

Court properly denied plaintiff's motion to set aside so-ordered stipulation granting charging lien in favor of respondent law firm that represented plaintiff in divorce action, as plaintiff's claims that her retainer agreement with respondent was invalid under 22 NYCRR §§ 1400.3(11) and 1400.5(a)(2) because it did not provide that charging lien could be obtained only on notice to

defendant, and because notice of respondent’s application for charging lien was not given to defendant, were improperly raised for first time on appeal and, in any event, were without merit in that they confused charging lien with security interest. Greenfield v Greenfield, 270 A.D.2d 57, 704 N.Y.S.2d 55, 2000 N.Y. App. Div. LEXIS 2598 (N.Y. App. Div. 1st Dep't 2000).

Action on promissory note and personal guarantees was barred by laches where plaintiff’s 4-year delay in seeking relief from stipulation of settlement entered into by plaintiff, plaintiff’s assignor, and one defendant was inexcusable, and that defendant would be prejudiced if relief were granted. Estrada v City of New York, 273 A.D.2d 194, 709 N.Y.S.2d 105, 2000 N.Y. App. Div. LEXIS 6265 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 764, 716 N.Y.S.2d 38, 739 N.E.2d 294, 2000 N.Y. LEXIS 2815 (N.Y. 2000).

Plaintiff failed to establish lack of requisite mental capacity to enter into stipulation of settlement incorporated in 1998 judgment of divorce, on ground that she suffered serious head injury in 1985 which left her permanently disabled resulting in diminished capacity to process information, where she did not substantiate her claim that she did not have sufficient time to process relevant material developed through discovery and presented to her by her attorneys, and referee engaged in sufficient colloquy regarding her understanding of nature and terms of proposed stipulation prior to allowing her to acquiesce therein. Turk v Turk, 276 A.D.2d 953, 714 N.Y.S.2d 566, 2000 N.Y. App. Div. LEXIS 10841 (N.Y. App. Div. 3d Dep't 2000).

Open court stipulation settling ongoing matrimonial action was valid and enforceable although it did not meet formalities set forth in CLS Dom Rel § 236(B)(3); traditional grounds for vacatur (fraud, duress, mistake or overreaching) applied exclusively. Rubenfeld v Rubenfeld, 279 A.D.2d 153, 720 N.Y.S.2d 29, 2001 N.Y. App. Div. LEXIS 682 (N.Y. App. Div. 1st Dep't 2001).

In action to abate homeless shelter as public nuisance, defendants were entitled to declaration of invalidity of paragraph of parties’ stipulation of settlement that limited defendants’ ability to use all available resources in effectuating their legal duty toward homeless shelter residents in assisting them in finding proper permanent housing by removing particular county as resource for such housing in violation of CLS Soc Serv §§ 20(3)(d) and 34(3)(f) and 18 NYCRR §§

352.35(c) and 491.8(e). Rampe v Giuliani, 281 A.D.2d 609, 722 N.Y.S.2d 564, 2001 N.Y. App. Div. LEXIS 3066 (N.Y. App. Div. 2d Dep't), app. denied, 96 N.Y.2d 716, 730 N.Y.S.2d 32, 754 N.E.2d 1114, 2001 N.Y. LEXIS 1883 (N.Y. 2001).

Tenant was not entitled to vacatur of stipulation on ground that amount of rent set forth therein was greater than amount stated in lease renewal form signed by tenant prior to stipulation, since renewal form expressly apprised tenant of 9 NYCRR § 2522.5, which states that if applicable Rent Guidelines rate has not been fixed by execution date of renewal lease offer, lease can provide for rent increase, and new higher rent guideline became effective between execution of renewal form and stipulation of settlement. Allerton Associates v Ortiz, 138 Misc. 2d 953, 525 N.Y.S.2d 984, 1988 N.Y. Misc. LEXIS 132 (N.Y. Civ. Ct. 1988).

Department of Housing Preservation and Development was not entitled to vacation of settlement in enforcement proceedings commenced by tenants' association by which department, in its capacity as manager of building for city, entered into stipulation providing for foundation and interior reconstruction in accordance with enumerated work schedule, notwithstanding contention that budgetary constraints had rendered agreed-to construction impracticable, since department was in possession of engineering studies and cost estimates prior to execution of stipulation. Various Tenants of 446-448 W. 167th St. v New York City Dep't of Hous. Preservation & Dev., 153 Misc. 2d 221, 588 N.Y.S.2d 840, 1992 N.Y. Misc. LEXIS 444 (N.Y. App. Term 1992), aff'd, 603 N.Y.S.2d 718 (N.Y. App. Div. 1st Dep't 1993).

Court properly exercised its discretion when it vacated stipulations executed by pro se tenant and permitted him to defend nonpayment proceeding on merits, where tenant made prima facie showing of defense under CLS Soc Serv § 143-b(5), warranting trial. Dearie v Hunter, 183 Misc. 2d 336, 705 N.Y.S.2d 519, 2000 N.Y. Misc. LEXIS 62 (N.Y. App. Term 2000).

Court properly denied husband's motion to set aside open-court stipulation which provided that his stock proceeds would not be treated as income in computing child support, that he would pay $25,000 child support for 1987 in addition to $10,400 required under parties' separation agreement, and that he would pay $14,000 child support for 1988 in accordance with separation

agreement's escalation clause (subject to review of his 1987 tax return) since (1) he failed to establish that stipulated agreement was sufficiently unfair and overreaching, (2) he was represented by counsel when stipulation was entered into and he unequivocally agreed to its terms, (3) he had ample time to review agreement with counsel, and (4) he offered no proof to support his contention that stipulation was manifestly unfair because it allowed for "more than could ever be required" to meet child's needs. Barzin v Barzin, 158 A.D.2d 769, 551 N.Y.S.2d 361, 1990 N.Y. App. Div. LEXIS 994 (N.Y. App. Div. 3d Dep't 1990), app. dismissed, 77 N.Y.2d 834, 566 N.Y.S.2d 588, 567 N.E.2d 982, 1991 N.Y. LEXIS 67 (N.Y. 1991).

**27. — —Mistake, misunderstanding, or fraud**

Petitioner would not be permitted to withdraw from her stipulation for modification of child support, or to have order incorporating stipulation set aside, based on alleged misstatements in respondent's financial statement, and respondent's failure to mention transfer of his ½ interest in marital residence was not misconduct or misrepresentation since transfer was made to petitioner. Saidel v Wolk, 122 A.D.2d 474, 504 N.Y.S.2d 862, 1986 N.Y. App. Div. LEXIS 59760 (N.Y. App. Div. 3d Dep't 1986).

Court properly vacated parties' settlement agreement in personal injury action where plaintiff did not have actual knowledge of his herniated disc and consequent need for back surgery when he accepted defendant's offer. Pokora v Albergo, 130 A.D.2d 473, 515 N.Y.S.2d 56, 1987 N.Y. App. Div. LEXIS 46446 (N.Y. App. Div. 2d Dep't 1987).

In mortgage foreclosure action, defendant should be relieved of burden of stipulation whereby plaintiff was to enter judgment for stated sum against defendant where defendant made mistake in computation of sum and parties disputed actual sum owed to plaintiff. Hirsch v Manzione, 130 A.D.2d 714, 516 N.Y.S.2d 28, 1987 N.Y. App. Div. LEXIS 46733 (N.Y. App. Div. 2d Dep't 1987).

In action by wife to set aside stipulation of settlement on ground of fraud, husband's motion to dismiss complaint, under CLS CPLR § 3211(a)(5), was properly denied since (1) stipulation was incorporated but not merged in parties' divorce judgment, and thus present action was not

barred by divorce judgment, (2) terms of stipulation were separable and were subject to independent suit, (3) claim of fraudulent inducement was not precluded either by terms of stipulation or by findings in divorce judgment, and (4) action was timely commenced in 1985, as alleged fraud was uncovered in 1983 at earliest. Kaufman v Kaufman, 135 A.D.2d 786, 522 N.Y.S.2d 899, 1987 N.Y. App. Div. LEXIS 52727 (N.Y. App. Div. 2d Dep't 1987).

Stipulation acts as binding contract, and theory of mutual mistake affords equitable relief only where parties were mistaken as to facts existing at time stipulation was entered into. Childs v Levitt, 151 A.D.2d 318, 543 N.Y.S.2d 51, 1989 N.Y. App. Div. LEXIS 7902 (N.Y. App. Div. 1st Dep't), app. denied, 74 N.Y.2d 613, 547 N.Y.S.2d 847, 547 N.E.2d 102, 1989 N.Y. LEXIS 3029 (N.Y. 1989).

Court properly denied defendant’s motion to rescind stipulations waiving defense of statute of limitations where he failed to make sufficient showing of fraud, collusion, mistake, or material misrepresentation by plaintiff or plaintiff’s counsel; moreover, in executing stipulations, defendant could not have justifiably relied on legal opinion or conclusion of adversary’s counsel that action had been timely commenced, and thus neither unilateral mistake nor fraudulent misrepresentation would provide grounds for rescission. Dousmanis v Joe Hornstein, Inc., 181 A.D.2d 592, 581 N.Y.S.2d 327, 1992 N.Y. App. Div. LEXIS 4142 (N.Y. App. Div. 1st Dep't 1992).

Petitioner was not entitled to have judicial settlement set aside on grounds of fraud, misrepresentation and bias where (1) petitioner alleged that her agreement to settlement was based on coercion, including physical assault, by her counsel on evening before she agreed to settlement, and that counsel represented to her that, after settlement, she could proceed directly to appeal and obtain reversal, (2) petitioner’s counsel denied coercion or misrepresentation, while he admitted that they had heated discussion, (3) although one of petitioner’s acquaintance’s testified that he happened to observe assault, he gave less than convincing explanation as to why he waited 4 years to intervene or reveal his observation, and (4) settlement was not so unfair or one-sided as to be unreasonable. In re Estate of Rosenhain, 193

A.D.2d 903, 597 N.Y.S.2d 782, 1993 N.Y. App. Div. LEXIS 4839 (N.Y. App. Div. 3d Dep't), app. dismissed, 82 N.Y.2d 820, 605 N.Y.S.2d 2, 625 N.E.2d 587, 1993 N.Y. LEXIS 3915 (N.Y. 1993).

Supreme Court erred in vacating divorce judgment and setting aside stipulation of settlement on ground that judgment “was granted upon the fraud of the parties inasmuch as neither obviously intended to carry out the agreed to terms of the stipulation,” where stipulation had been entered into in open court with counsel for both parties present, there was no showing that stipulation was result of overreaching or that its terms were unconscionable or were result of fraud, collusion or mistake, and both parties sought enforcement of stipulation. Morris v Morris, 205 A.D.2d 914, 613 N.Y.S.2d 465, 1994 N.Y. App. Div. LEXIS 6281 (N.Y. App. Div. 3d Dep't 1994).

Wife was not entitled to have stipulation of settlement opened on basis that annuity was inadvertently omitted from stipulation, which disposed of all matters relating to divorce, custody, and distribution of marital assets other than bank accounts, where husband asserted that annuity was part of his stock portfolio and that wife had waived any claim thereto under stipulation of settlement, and wife offered only unsubstantiated assertions of mutual mistake. Dykstra v Dykstra, 211 A.D.2d 745, 621 N.Y.S.2d 693, 1995 N.Y. App. Div. LEXIS 673 (N.Y. App. Div. 2d Dep't 1995).

Court, in reopening mortgage foreclosure action, erred by invalidating parties’ stipulation for lack of adequate consideration based on its determination that defendants made “mistake of law” because they were not aware at time of stipulation that they could have opposed foreclosure action due to plaintiff’s failure to seek deficiency judgment in connection with prior foreclosure of mortgage on different parcel of property securing same loan, as “mistake of law” is insufficient grounds for vacating stipulation. Varveris v Fisher, 229 A.D.2d 573, 645 N.Y.S.2d 853, 1996 N.Y. App. Div. LEXIS 8276 (N.Y. App. Div. 2d Dep't 1996).

Court properly denied defendant’s motion to vacate and set aside stipulation of settlement and stipulation of discontinuance between parties, where defendant made no inquiry as to status of appeal for almost 3 months preceding stipulation of settlement although it was within his ability to ascertain result of appeal before settlement was executed; defendant’s assumption that no

decision had been rendered as of date of stipulation did not constitute mistake of fact sufficient to void agreement. Hillcrest Owners v Preferred Mut. Ins. Co., 234 A.D.2d 269, 650 N.Y.S.2d 310, 1996 N.Y. App. Div. LEXIS 12732 (N.Y. App. Div. 2d Dep't 1996).

Counsel’s failure to ascertain prior to execution of stipulation of settlement, that Appellate Division had granted summary judgment in his client’s favor on appeal from prior order, did not constitute mistake for purpose of establishing entitlement to vacatur of stipulation. Perrino v Bimasco, Inc., 234 A.D.2d 281, 651 N.Y.S.2d 53, 1996 N.Y. App. Div. LEXIS 12776 (N.Y. App. Div. 2d Dep't 1996).

Stipulation of settlement whereby plaintiff resigned as officer and director of 3 corporations formerly owned by decedent, and assigned all of his shares to defendants in exchange for $50,000, was improperly vacated because parties’ alleged mistake as to applicable tax law was not mutual, but rather constituted unilateral misunderstanding on part of defendants, and there was no unjust enrichment of plaintiff at expense of defendants that should be remedied by equity. Weissman v Bondy & Schloss, 230 A.D.2d 465, 660 N.Y.S.2d 115, 1997 N.Y. App. Div. LEXIS 6751 (N.Y. App. Div. 1st Dep't 1997), app. dismissed, 91 N.Y.2d 887, 668 N.Y.S.2d 565, 691 N.E.2d 637, 1998 N.Y. LEXIS 109 (N.Y. 1998).

Court properly denied defendant’s motion to vacate stipulation of settlement setting forth agreed-upon boundary line, despite defendant’s contention that he misunderstood location of boundary line as set forth therein, since he was represented by counsel at time stipulation was prepared, he agreed to it in lieu of going to trial, his attorney had chance to review terms thereof, and he signed it indicating that it reflected parties’ mutual understanding. Robison v Borelli, 239 A.D.2d 656, 657 N.Y.S.2d 783, 1997 N.Y. App. Div. LEXIS 4503 (N.Y. App. Div. 3d Dep't 1997).

Court properly refused to rescind stipulation discontinuing personal injury action against transit authority, on grounds of unilateral mistake, where plaintiff’s counsel claimed to have entered into stipulation on mistaken belief that another defendant had offered its $10,000 policy to settle case, but it appeared that counsel’s decision was primarily based on his assessment that case would be difficult to prove in light of his client’s pre-trial testimony, and record did not support

plaintiff's claim that transit authority attorney stood silently by and took advantage of plaintiff's counsel's mistake. Pasteur v Manhattan & Bronx Surface Transit Operating Auth., 241 A.D.2d 305, 660 N.Y.S.2d 6, 1997 N.Y. App. Div. LEXIS 7025 (N.Y. App. Div. 1st Dep't 1997).

Defendants could not avoid stipulation of settlement by merely arguing that their own "surveyor" believed that survey on which stipulation was based was inaccurate and that plaintiffs' surveyor "perpetuates" inaccuracy. French v Quinn, 243 A.D.2d 792, 663 N.Y.S.2d 127, 1997 N.Y. App. Div. LEXIS 9727 (N.Y. App. Div. 3d Dep't 1997), app. dismissed, 91 N.Y.2d 1002, 676 N.Y.S.2d 128, 698 N.E.2d 957, 1998 N.Y. LEXIS 1050 (N.Y. 1998).

Plaintiff who suffered herniated disk in traffic accident would be held to his settlement agreement, even though he claimed mutual mistake because he later discovered need for surgery, where there was no mistake as to his injuries, but only as to potential result of those injuries; to give force to plaintiff's claim of mistake regarding potential for future surgery from known injury would undermine finality that settlements in personal injury cases require. Calavano v New York City Health & Hosps.Corp, 246 A.D.2d 317, 667 N.Y.S.2d 351, 1998 N.Y. App. Div. LEXIS 55 (N.Y. App. Div. 1st Dep't 1998).

Petitioner met grounds for vacatur of stipulation of settlement pursuant to which respondent was substituted as respondent-tenant and parties agreed through their attorneys that he was proper tenant because his father was deceased, where respondent's attorney affirmatively misrepresented to petitioner's new attorney in summary holdover proceeding that respondent was proper tenant of premises, although he knew when stipulation was entered into that respondent had previously been found to have created nuisance in premises and that prior action prosecuted by petitioner's former attorney had resulted in issuance of dispossess judgment against respondent. Sedgwick Ave. Assocs. v Kehaya, 250 A.D.2d 400, 673 N.Y.S.2d 9, 1998 N.Y. App. Div. LEXIS 5426 (N.Y. App. Div. 1st Dep't 1998).

Court's order relocating boundary line was invalid, even though defendants ultimately argued that boundary line was incorrectly located, since defendants simply had change of heart and decided that they no longer wish to comply with terms of stipulation or execute previously

agreed-on boundary agreement, there was nothing to reflect any subsequent “agreement” between parties as to key provisions of court’s order, and even assuming that counsel for parties negotiated terms of order, defendants asserted that their attorney was acting outside scope of his authority in doing so, and plaintiff’s did not contest that fact on appeal. Stefanovich v Boisvert, 271 A.D.2d 727, 705 N.Y.S.2d 436, 2000 N.Y. App. Div. LEXIS 3914 (N.Y. App. Div. 3d Dep't 2000).

Personal injury defendant who alleged that he had never been in automobile accident with plaintiff, and that plaintiff had staged accident in order to commit insurance fraud, made sufficient allegations to warrant hearing on his cross motion to vacate stipulation of settlement between his insurance carrier and plaintiff. Abdelatif v Elgammssy, 275 A.D.2d 432, 713 N.Y.S.2d 69, 2000 N.Y. App. Div. LEXIS 9796 (N.Y. App. Div. 2d Dep't 2000).

Plaintiffs failed to state cause of action for legal malpractice where (1) they alleged that they signed modification to CLS CPLR § 3215(i)(1) stipulation of settlement without having read it because defendant, their attorney, advised them that original stipulation contained typographical errors that needed correction when, in fact, modified stipulation contained unauthorized detrimental substantive changes, including substantial reduction in amount of judgment to be entered on default, (2) even if such misstatement were made, plaintiffs would have immediately ascertained substantive nature of changes if they had read modified stipulation, and (3) plaintiffs offered no valid excuse for their failure to read it. Arnav Indus. v Brown Raysman, Millstein, Felder & Steiner, LLP, 275 A.D.2d 640, 713 N.Y.S.2d 175, 2000 N.Y. App. Div. LEXIS 9283 (N.Y. App. Div. 1st Dep't 2000), modified in part, dismissed, 96 N.Y.2d 300, 727 N.Y.S.2d 688, 751 N.E.2d 936, 2001 N.Y. LEXIS 1408 (N.Y. 2001).

Plaintiff was not entitled to be relieved from stipulation of discontinuance of timely commenced action to collect on purchase orders issued by defendant corporation, and to estop defendant net lessees from raising statute of limitations defense in subsequently commenced action, on ground that corporation had misrepresented that owners, not net lessees, were true contracting parties until limitations period expired, where disclosure in first action gave plaintiff ample reason

to believe that corporation was acting for net lessees, obliging it to make further inquiry with respect to corporation's principals. Estate of Kandel v Helmsley-Spear, Inc., 276 A.D.2d 267, 714 N.Y.S.2d 14, 2000 N.Y. App. Div. LEXIS 9857 (N.Y. App. Div. 1st Dep't 2000).

Plaintiff's claim that stipulation of settlement had been fraudulently altered was precluded by doctrine of collateral estoppel where Civil Court's unappealed order had refused to vacate stipulation on ground that alteration was "non-substantive, ministerial and de minimus (sic) in nature." Gurvey v Lynch, 282 A.D.2d 367, 723 N.Y.S.2d 652, 2001 N.Y. App. Div. LEXIS 4151 (N.Y. App. Div. 1st Dep't 2001), dismissed, 72 Misc. 3d 1211(A), 149 N.Y.S.3d 778, 2021 N.Y. Misc. LEXIS 4113 (N.Y. Ct. Cl. 2021).

Plaintiff wife in divorce action was entitled to summary judgment dismissing husband's counterclaims seeking vacatur of parties' stipulation of settlement where husband had burden of proving that stipulation resulted from fraud or overreaching, and he did not meet that burden. Michalowski v Michalowski, 286 A.D.2d 712, 730 N.Y.S.2d 448, 2001 N.Y. App. Div. LEXIS 8554 (N.Y. App. Div. 2d Dep't 2001).

Petitioner's motion to vacate settlement stipulation, which resolved prior proceeding wherein he had sought to become guardian of his adult mentally retarded daughter, was properly denied as (1) settlement, which contemplated implementation of medical treatment plans for daughter's benefit and included retention of consulting physician to work in concert with daughter's treating physician, was not product of mutual mistake merely because it subsequently became difficult to retain consulting physician, and (2) petitioner's contention that his daughter was not complying with settlement was supported only by conjecture and surmise. In re Guardianship of Janet "L", 287 A.D.2d 865, 731 N.Y.S.2d 299, 2001 N.Y. App. Div. LEXIS 9744 (N.Y. App. Div. 3d Dep't 2001).

Trial court correctly declined to vacate a stipulation of settlement on the basis of fraud as to a material fact because plaintiff: (1) had access to what he now asserted was deficient accounting at the time he entered into the stipulation; could have exercised due diligence by making additional specific requests had he found the accounting deficient; and (3) was represented by

counsel. Myristica, LLC v Camp Myristica, Ltd., 201 A.D.3d 1078, 159 N.Y.S.3d 574, 2022 N.Y. App. Div. LEXIS 91 (N.Y. App. Div. 3d Dep't 2022).

In nonpayment proceeding, sufficient cause existed for court to vacate stipulation whereby tenant consented to issuance of judgment and warrant against her (execution of which was to be stayed for 4 months) and landlord agreed to waive all rent arrears due from tenant, where both tenant and her attorney entered into stipulation under mistaken belief that landlord's execution of W-9 form was required before Department of Social Services (DSS) would release rent payments directly to landlord, and neither was aware that landlord had DSS vendor identification number. Ciuffetelli v Meginn, 175 Misc. 2d 527, 670 N.Y.S.2d 682, 1997 N.Y. Misc. LEXIS 685 (N.Y. App. Term 1997).

If the confession of judgment that an individual gave to an oil company in the company's action to recover on certain guarantees was, as the individual argued, unenforceable because it was not filed within three years as required by N.Y. C.P.L.R. 3218(b), then the stipulation of settlement pursuant to which the confession was given had to be rescinded for a failure of consideration due to mutual mistake, returning the parties to the pre-stipulation status quo, as the stipulation reflected the parties' understanding that the confession was to be held in escrow and could be filed after a separate pending action was concluded, which benefitted the individual by allowing the individual to postpone fulfillment of the individual's obligation; rescission of the stipulation of settlement constituted "good cause" for the late settlement of an order which pre-dated the stipulation of settlement and which granted the company's motion for a default judgment against the individual. Coastal Oil N.Y., Inc. v Diversified Fuel Carriers Corp., 303 A.D.2d 251, 756 N.Y.S.2d 207, 2003 N.Y. App. Div. LEXIS 2680 (N.Y. App. Div. 1st Dep't), app. denied, 100 N.Y.2d 512, 767 N.Y.S.2d 393, 799 N.E.2d 616, 2003 N.Y. LEXIS 2408 (N.Y. 2003).

Mutual mistake existed at the time of mediation because decedent's children stated they would not have assented to a settlement if aware of the substantial Medicare lien that would severely diminish the estate's share of the settlement, and email exchanges between counsel

demonstrated neither party was aware of the lien. Nieves v Mt. Sinai Queens Hosp., 84 Misc. 3d 387, 216 N.Y.S.3d 845, 2024 N.Y. Misc. LEXIS 2022 (N.Y. Sup. Ct. 2024).

**28. — —Interests of justice; unconscionability**

Trial Term erred in summarily denying husband's motion to vacate open court stipulation of matrimonial property settlement, without holding hearing on question of unconscionability, where settlement was patently unconscionable on its face in awarding substantially all marital assets to wife while burdening husband with virtually all marital debt, and where court erroneously valued certain marital property, including shares of stock, marital residence, and business; reviewing court has power and duty to relieve party from unconscionable open court stipulation, since, in "highly charged atmosphere of a matrimonial action," litigant may stipulate to settlement that might bind litigant in unconscionable situation for which courts must provide relief. Grunfeld v Grunfeld, 123 A.D.2d 64, 509 N.Y.S.2d 928, 1986 N.Y. App. Div. LEXIS 60656 (N.Y. App. Div. 3d Dep't 1986).

In personal injury action on behalf of child who sustained serious head injuries when he was thrown from motorcycle, it was not error to vacate stipulation of settlement with owner-operator of motorcycle where (1) plaintiffs' prior attorneys failed to inform them of possible products liability cause of action against manufacturer of motorcycle helmet and of effect of settlement on recovery thereunder, (2) child's damages exceeded amount realized by initial settlement, and (3) plaintiffs made factual showing that helmet in question was defective; courts have duty to protect interests of infants. In re Yaddow, 130 A.D.2d 838, 514 N.Y.S.2d 836, 1987 N.Y. App. Div. LEXIS 46850 (N.Y. App. Div. 3d Dep't 1987).

Stipulation between parties to matrimonial action, which provided that husband would pay additional fixed sum per week for extended period of time in event of his default on his obligation to pay arrears or child support, constituted unenforceable penalty rather than liquidated damages clause since amount of damages due under stipulation was clearly disproportionate to amount of actual damages; moreover, any actual loss was readily ascertainable and therefore

not appropriate area for application of liquidated damages. Willner v Willner, 145 A.D.2d 236, 538 N.Y.S.2d 599, 1989 N.Y. App. Div. LEXIS 2471 (N.Y. App. Div. 2d Dep't 1989).

Although stipulations of settlement in matrimonial actions are favored, especially where terms are read into record in open court and party seeking to vacate stipulation was represented by competent counsel, stipulation may be set aside where it is manifestly unfair to one party because of other party's overreaching or where its terms are unconscionable or result from fraud, collusion, mistake or accident. Hunt v Hunt, 184 A.D.2d 1010, 585 N.Y.S.2d 326, 1992 N.Y. App. Div. LEXIS 8235 (N.Y. App. Div. 4th Dep't 1992).

Stipulation of settlement whereby wife received primary physical custody of parties' children, child support, and exclusive possession of marital residence (only significant marital asset) until children were emancipated, at which time it would be sold and proceeds equitably distributed, was not unconscionable, even though husband may not have negotiated best terms for himself, since it could not be said that no person in his senses and not under delusion would make agreement. Hunt v Hunt, 184 A.D.2d 1010, 585 N.Y.S.2d 326, 1992 N.Y. App. Div. LEXIS 8235 (N.Y. App. Div. 4th Dep't 1992).

Increases in cost of medical and personal necessities are insufficient grounds to set aside stipulation of settlement which has been in effect for 10 years. Prince v Great American Ins. Co., 186 A.D.2d 422, 588 N.Y.S.2d 279, 1992 N.Y. App. Div. LEXIS 11333 (N.Y. App. Div. 1st Dep't 1992).

Courts will not set aside stipulation entered into in open court on ground of unconscionability simply because it was improvident. Infosino v Infosino, 204 A.D.2d 324, 611 N.Y.S.2d 598, 1994 N.Y. App. Div. LEXIS 4502 (N.Y. App. Div. 2d Dep't 1994).

Provision of negotiated stipulation agreement, whereby husband agreed that all future-scheduled payments would become immediately due if he defaulted on his maintenance obligations, was not unconscionable where husband was sophisticated and successful businessman with history of nonpayment in parties' protracted divorce litigation, he was

represented by capable counsel in negotiating default clause, and he defaulted mere 8 months after he knowingly consented to default provision. Melnick v Melnick, 211 A.D.2d 521, 621 N.Y.S.2d 64, 1995 N.Y. App. Div. LEXIS 409 (N.Y. App. Div. 1st Dep't 1995).

Divorce court properly denied wife's motion to set aside parties' stipulation of settlement where (1) she was represented by counsel when she voluntarily and knowingly entered into stipulation, despite her suspicions that husband had converted certain marital property to personal property, (2) there was no evidence to support her contention that she was fraudulently induced or coerced into settlement, or that court compelled her to enter into settlement, and (3) provisions of settlement were fair and reasonable. Doppelt v Doppelt, 215 A.D.2d 715, 627 N.Y.S.2d 75, 1995 N.Y. App. Div. LEXIS 5748 (N.Y. App. Div. 2d Dep't 1995).

Term of lease countenanced by parties' "so ordered" stipulation of settlement, which resolved disputes in action for partition and was tantamount to agreement not to seek partition, was not unreasonable restraint on alienation of property, and thus plaintiff was not entitled to summary judgment directing partition and sale of property, where plaintiff and his mother negotiated lease term, and term was not unreasonable. Kane v Kane, 251 A.D.2d 133, 673 N.Y.S.2d 310, 1998 N.Y. App. Div. LEXIS 6942 (N.Y. App. Div. 1st Dep't 1998).

Father who stipulated in divorce proceeding that he would pay child support of $63 per week was not entitled, only 5 weeks later and before divorce judgment was signed, to downward modification of that support obligation where he had suffered from back problem for several years before date of stipulation, and although his back might worsen over time if he continued as laborer or carpenter, he was not disabled from performing that or other work in construction field for which he was qualified by experience, and he could not forego employment in order to pursue retraining program at children's expense. Weise v Weise, 255 A.D.2d 929, 680 N.Y.S.2d 382, 1998 N.Y. App. Div. LEXIS 12156 (N.Y. App. Div. 4th Dep't 1998).

Default provision in stipulation of settlement was so disproportionate to actual damages caused by delay in payment that it constituted unenforceable penalty where it would have required defendants to pay $100,000 despite fact that they had timely paid $36,000 out of $40,000 total

to be paid, and thus court properly stayed entry of plaintiff's proposed judgment and ordered plaintiff to accept final $4,000 in full satisfaction. Zervakis v Kyreakedes, 257 A.D.2d 619, 684 N.Y.S.2d 291, 1999 N.Y. App. Div. LEXIS 322 (N.Y. App. Div. 2d Dep't 1999).

Divorce court properly vacated stipulation of settlement where stipulation contemplated unlawful conduct in requiring defendant to execute W-4 form effectively certifying that she was employee of plaintiff's business in order to assist him in treating her equitable share of his business as employment income; if plaintiff or his business were to list those payments as deductions, stipulation would then effectively obligate defendant to aid and abet plaintiff in committing employment tax fraud or payroll padding by her filing of false tax document. Uhl v Uhl, 274 A.D.2d 915, 711 N.Y.S.2d 271, 2000 N.Y. App. Div. LEXIS 8283 (N.Y. App. Div. 3d Dep't 2000).

A stipulation entitling a landlord to evict a residential tenant for nonpayment of rent exceeding the amount of rent sought in the petition would be found unconscionable and violative of public policy; such a mode of coercing payment of rents not yet due impeded the tenant's ability to assert against the landlord future defenses such as a breach of the warranty of habitability, a declared public policy of the state. Ruppert House Co. v Altmann, 127 Misc. 2d 115, 485 N.Y.S.2d 472, 1985 N.Y. Misc. LEXIS 2562 (N.Y. Civ. Ct. 1985).

In summary nonpayment eviction proceeding, 2 stipulations of settlement signed by respondent tenant without benefit of counsel, which required rent payments in excess of legally regulated rent for her rent-stabilized apartment, would be vacated to prevent injustice, since good cause was demonstrated in that one-sided stipulations were unadvisedly signed by pro se litigant who lacked knowledge of defense which would have substantially defeated landlord's claim. 144 Woodruff Corp. v Lacrete, 154 Misc. 2d 301, 585 N.Y.S.2d 956, 1992 N.Y. Misc. LEXIS 194 (N.Y. Civ. Ct. 1992).

Party's lack of representation by counsel at time of entry into stipulation, although not alone sufficient to invalidate stipulation, is significant factor to be considered in determining whether good cause exists to vacate stipulation, and amounts to good cause where lack of representation results in stipulation whose terms are unduly one-sided or unfair. 144 Woodruff

Corp. v Lacrete, 154 Misc. 2d 301, 585 N.Y.S.2d 956, 1992 N.Y. Misc. LEXIS 194 (N.Y. Civ. Ct. 1992).

In nonpayment summary proceeding settled by stipulations between pro se tenant and landlord's counsel, wherein tenant subsequently retained counsel to represent him, court granted tenant's motion to vacate stipulations and judgment entered thereon on ground that tenant was initially unaware of available defenses under Spiegel Act (CLS Soc Serv § 143-b) and Federal Fair Debt Collection Practices Act, 15 USCS § 1692g (FDCPA); furthermore, court dismissed proceeding on ground that landlord's rent demand did not comply with FDCPA. Dearie v Hunter, 177 Misc. 2d 525, 676 N.Y.S.2d 896, 1998 N.Y. Misc. LEXIS 326 (N.Y. Civ. Ct. 1998), aff'd in part, modified, 183 Misc. 2d 336, 705 N.Y.S.2d 519, 2000 N.Y. Misc. LEXIS 62 (N.Y. App. Term 2000).

Vacatur of child support and maintenance provisions of the parties' stipulation was proper in their divorce action because the wife did not fully disclose her financial assets, which made the terms of the agreement inequitable and manifestly unfair to the husband. Marlinski v Marlinski, 111 A.D.3d 1268, 974 N.Y.S.2d 200, 2013 N.Y. App. Div. LEXIS 7350 (N.Y. App. Div. 4th Dep't 2013).

**29. —Duress**

In order to prove legal duress party must adduce proof that "wrongful threat precluded exercise of free will"; accordingly, in matrimonial action where plaintiff claims that presiding justice exerted undue pressure amounting to legal duress when attempting to effectuate settlement, and plaintiff fails to allege any specific facts that constitute legal duress, claim is dismissed. Sontag v Sontag, 114 A.D.2d 892, 495 N.Y.S.2d 65, 1985 N.Y. App. Div. LEXIS 53921 (N.Y. App. Div. 2d Dep't), app. dismissed, 66 N.Y.2d 554, 498 N.Y.S.2d 133, 488 N.E.2d 1245, 1986 N.Y. LEXIS 21652 (N.Y. 1985).

Court properly vacated parties' stipulation of settlement and modified divorce judgment which gave husband title to marital home (conditioned on occupancy by wife and children for one

year), and properly ordered that property should be transferred to wife (subject to payment to husband for his distributive share), where findings of inequity and duress were supported by evidence that (1) wife contributed more to family finances than husband, (2) parties' relations during divorce action were acrimonious, and order of protection against husband had to be extended several times, and (3) husband intimidated wife by chopping down trees around marital home and by threatening her life. Greer v Greer, 131 A.D.2d 321, 516 N.Y.S.2d 214, 1987 N.Y. App. Div. LEXIS 47812 (N.Y. App. Div. 1st Dep't 1987).

Wife was not entitled to set aside stipulation settling equitable distribution of marital assets and other marital concerns on grounds of duress, inequality and illegality where agreement was dictated into record by wife's attorney in her presence and in presence of husband and his attorney; moreover, court directed parties to sign "opting out" agreement which was duly executed by parties and acknowledged by wife's attorney. King v King, 132 A.D.2d 863, 518 N.Y.S.2d 213, 1987 N.Y. App. Div. LEXIS 49344 (N.Y. App. Div. 3d Dep't 1987).

Plaintiff was not entitled to vacatur of stipulation of discontinuance and general release on ground that they were entered into under duress by third party, since there was no showing that defendants and third party acted cooperatively in threatening allegedly unlawful acts; thus defendants were entitled to summary judgment dismissing action. Schwarz v Tokayer, 139 A.D.2d 640, 526 N.Y.S.2d 1017, 1988 N.Y. App. Div. LEXIS 4383 (N.Y. App. Div. 2d Dep't 1988), app. dismissed, 74 N.Y.2d 701, 543 N.Y.S.2d 389, 541 N.E.2d 418, 1989 N.Y. LEXIS 864 (N.Y. 1989).

Executor failed to establish that he was unable to understand clear and distinct terms of stipulation of settlement entered into between him and objectant daughter of decedent in contested probate proceeding, or that surrogate's chief law assistant and objectant coerced him into entering into stipulation, where executor was attorney who had practiced for 29 years. In re Kaplan, 150 A.D.2d 687, 541 N.Y.S.2d 559, 1989 N.Y. App. Div. LEXIS 6980 (N.Y. App. Div. 2d Dep't), app. dismissed, 74 N.Y.2d 791, 545 N.Y.S.2d 106, 543 N.E.2d 749, 1989 N.Y. LEXIS 923 (N.Y. 1989).

Fact that police officer may have felt financially constrained to accept stipulation of settlement, rather than risk adverse ruling after hearing on disciplinary charge, did not constitute duress, especially given that he was represented by counsel and he deliberated for more than one month before agreeing to settlement; moreover, stipulation curtailed efforts by police department to terminate his employment and gave him opportunity to continue employment until his retirement with full benefits at conclusion of his 20th year of service. Wilomovsky v Caples, 172 A.D.2d 615, 568 N.Y.S.2d 153, 1991 N.Y. App. Div. LEXIS 4643 (N.Y. App. Div. 2d Dep't), app. denied, 78 N.Y.2d 857, 574 N.Y.S.2d 939, 580 N.E.2d 411, 1991 N.Y. LEXIS 4024 (N.Y. 1991).

Respondents were entitled to summary judgment dismissing petition to set aside compromise agreement entered into by decedent’s 2 sisters in settlement of their prior petition to impose constructive trust on proceeds received by decedent’s cousins under decedent’s will where they allegedly had acquiesced to settlement agreement and executed it under threat of deportation, but surviving sister accepted substantial portion of benefits of settlement and failed to take any action toward repudiation of agreement for more than 2 years after its execution, and failed to raise triable issues as to whether alleged duress continued during period between execution of settlement agreement and repudiation, In re Guttenplan, 222 A.D.2d 255, 634 N.Y.S.2d 702, 1995 N.Y. App. Div. LEXIS 12834 (N.Y. App. Div. 1st Dep't 1995), app. denied, 88 N.Y.2d 812, 649 N.Y.S.2d 379, 672 N.E.2d 605, 1996 N.Y. LEXIS 2970 (N.Y. 1996), app. denied sub nom. In re Kulyceka, 88 N.Y.2d 812, 649 N.Y.S.2d 379, 672 N.E.2d 605 (N.Y. 1996).

Divorce court properly denied husband’s motion to set aside stipulation settling action where he failed to make requisite showings of duress, especially given that he received sole title to former marital residence in exchange for, inter alia, his durational-limited payments. Cavalli v Cavalli, 226 A.D.2d 666, 641 N.Y.S.2d 724, 1996 N.Y. App. Div. LEXIS 4693 (N.Y. App. Div. 2d Dep't 1996).

Evidence was sufficient to support finding that wife had voluntarily and knowingly entered into stipulation of settlement in divorce action where provision in question was very clear, and court had conducted allocution of wife to determine whether she willingly accepted and understood

terms and intent of stipulation. Furey v Furey, 230 A.D.2d 708, 646 N.Y.S.2d 358, 1996 N.Y. App. Div. LEXIS 8232 (N.Y. App. Div. 2d Dep't), app. dismissed, 89 N.Y.2d 916, 653 N.Y.S.2d 919, 676 N.E.2d 501, 1996 N.Y. LEXIS 4327 (N.Y. 1996).

There was no merit to claim, by discharged county correction lieutenant, that county had repudiated collective bargaining agreement by coercing him to enter into written stipulation of settlement where he and his union representative signed settlement agreement, which stated that lieutenant desired to waive any objections under contract law or any statute, rule, or regulation of any kind, and he also acknowledged that there were no other promises, representations, or agreements that induced him to agree to settlement and that settlement was voluntarily entered into after obtaining advice of counsel or union representatives. Monroe v Schenectady County, 266 A.D.2d 792, 699 N.Y.S.2d 164, 1999 N.Y. App. Div. LEXIS 12120 (N.Y. App. Div. 3d Dep't 1999).

Court properly dismissed discharged county correction lieutenant’s causes of action based on coercion, right to rescind written stipulation of settlement, and intentional infliction of emotional distress where his remedy, outside of grievance procedure under collective bargaining agreement, was under CLS CPLR Art 78. Monroe v Schenectady County, 266 A.D.2d 792, 699 N.Y.S.2d 164, 1999 N.Y. App. Div. LEXIS 12120 (N.Y. App. Div. 3d Dep't 1999).

Party’s claim that she was suffering from postpartum depression and therefore was in unstable mental and emotional state, and felt pressured overwhelmed and intimidated, was insufficient to relieve her from consequences of oral settlement agreement, where there was no evidence of intimidation or coercion, that her depression caused her to lack contractual capacity, or that her agreement was result of impulsive behavior beyond her control. Willgerodt ex rel. Majority Peoples' Fund for the 21st Century v Hohri, 953 F. Supp. 557, 1997 U.S. Dist. LEXIS 2275 (S.D.N.Y. 1997), aff'd, 159 F.3d 1347, 1998 U.S. App. LEXIS 32079 (2d Cir. N.Y. 1998).

**30. Penalties for failure to comply**

Defendant was properly found guilty of contempt for failing to comply with a stipulation which she and the other parties in a quiet title action had agreed to, notwithstanding the fact that an attorney for one of the parties challenged the fairness of the stipulation, where the defendant had proferred the stipulation and had affirmed her understanding of and consent to it, where the order directing the parties to abide by the terms of the stipulation was clear and unconditional, and where defendant’s agreement was not conditioned upon the consent of the other defendants and their attorney. Coan v Coan, 86 A.D.2d 640, 447 N.Y.S.2d 29, 1982 N.Y. App. Div. LEXIS 15182 (N.Y. App. Div. 2d Dep't), app. dismissed, 56 N.Y.2d 804, 1982 N.Y. LEXIS 5925 (N.Y. 1982), app. dismissed, 57 N.Y.2d 608, 1982 N.Y. LEXIS 7261 (N.Y. 1982), app. dismissed, 57 N.Y.2d 955, 1982 N.Y. LEXIS 4554 (N.Y. 1982).

Oral understanding to accept discovery in lieu of service of bill of particulars is not contrary to CPLR § 2104, and dismissal is inappropriate sanction where grant of conditional order of preclusion would have been sufficient. J.R. Stevenson Corp. v Dormitory Authority of State, 112 A.D.2d 113, 492 N.Y.S.2d 385, 1985 N.Y. App. Div. LEXIS 56363 (N.Y. App. Div. 1st Dep't 1985).

In action to collect fines and penalties for violations of city minimum housing standards ordinance and state Multiple Residence Law, judgment for $6,250 would be modified and increased to judgment for $50,000 where (1) parties entered into 2 court-ordered stipulations which provided that, unless defendants performed certain work, plaintiff would have right to judgment for $50,000, (2) despite time extensions, defendants failed to complete work, and (3) court granted judgment for only $6,250 on basis that defendants had substantially performed their obligations; parties’ agreements provided for strict compliance and was not satisfied by substantial performance, and defendants offered no valid excuse for their failure to fully comply with agreements. Poughkeepsie v Cavallaro, 154 A.D.2d 502, 546 N.Y.S.2d 128, 1989 N.Y. App. Div. LEXIS 12774 (N.Y. App. Div. 2d Dep't 1989).

In action to recover damages for breach of stipulation of settlement, defendant was entitled to summary judgment where (1) in 1967, defendant purchased property in plaintiff village as

proposed site for administrative headquarters, (2) property was zoned so as to require special permit for proposed use, (3) village denied special permit and, in 1971, judgment was rendered which required village to issue special permit, (4) village filed notice of appeal and, in 1971, parties entered into settlement pursuant to which village would issue special permit and defendant agreed to pay to village sums which it would have been required to pay on value of its property were it not tax exempt under CLS RPTL § 420-a, (5) in settlement agreement, defendant reserved right to review its determination to make payments at 5-year intervals, and (6) defendant ceased to make payments to village 10 years after settlement. Upper Nyack v Christian & Missionary Alliance, 155 A.D.2d 530, 547 N.Y.S.2d 388, 1989 N.Y. App. Div. LEXIS 14270 (N.Y. App. Div. 2d Dep't 1989).

Defendant’s failure to submit to examination before trial of personal injury action did not warrant striking of defendants’ answer where parties had stipulated that such failure would result in subject defendant’s being precluded from testifying at trial. Bushansky by Bushansky v Equity Transp. Co., 255 A.D.2d 480, 680 N.Y.S.2d 641, 1998 N.Y. App. Div. LEXIS 12659 (N.Y. App. Div. 2d Dep't 1998).

## II. Under Former Civil Practice Laws

### A. In General

#### 31. Generally

As to purpose of RCP 4 see Mutual Life Ins. Co. v O'Donnell, 146 N.Y. 275, 40 N.E. 787, 146 N.Y. (N.Y.S.) 275, 2 N.Y. Ann. Cas. 82, 1895 N.Y. LEXIS 660 (N.Y. 1895).

Courts favor agreements to settle disputes and put an end to litigation; reasonable and proper stipulations for such purpose should be enforced if possible. Wilder v Beach, 245 N.Y.S. 142, 137 Misc. 883, 1930 N.Y. Misc. LEXIS 1576 (N.Y. City Ct. 1930).

Where competent adult, assisted by able counsel, and dealing at arm's length, agrees to settle action, enforcement of agreement would not be so harsh as to contravene public policy. Gropper v Hammerstein, 137 N.Y.S.2d 729, 207 Misc. 188, 1954 N.Y. Misc. LEXIS 2585 (N.Y. Sup. Ct. 1954).

**32. Statements and admissions in court and before referee**

Statement of counsel on trial before referee as to value of office furniture on partnership accounting sufficient to obviate proof of value. Culver v Parsons, 200 A.D. 887, 192 N.Y.S. 345, 1922 N.Y. App. Div. LEXIS 8618 (N.Y. App. Div. 1922).

Where, during examination of defendant, plaintiff's counsel suggested that issues arising on counterclaims be deferred, and defendant's counsel acquiesced, the court erroneously dismissed the counterclaims without hearing defendant's testimony. Handal v Spechler, 201 A.D. 278, 194 N.Y.S. 216, 1922 N.Y. App. Div. LEXIS 6303 (N.Y. App. Div. 1922).

Assurance by counsel for mortgagee in open court that latter has no intention to foreclose mortgage removed any fear of loss of mortgaged property pending controversy, and so appointment of receiver was neither necessary nor provident. Alexander v A. R. Z. Corp., 283 A.D. 656, 127 N.Y.S.2d 349, 1954 N.Y. App. Div. LEXIS 4792 (N.Y. App. Div. 1954).

In consolidated claims against state by passenger and motorist for highway nuisance, passenger was bound by stipulation of his attorney in open court that he had received a sum from driver's insurer, without a general release but with an express reservation of rights. Sagan v State, 128 N.Y.S.2d 924, 205 Misc. 435, 1954 N.Y. Misc. LEXIS 2344 (N.Y. Ct. Cl. 1954).

Admission by counsel in open court during trial that time for performance of contract had been extended was binding. Chozo Yano v Ledman, 192 N.Y.S. 647, 1922 N.Y. Misc. LEXIS 1005 (N.Y. App. Term 1922).

Stipulation entered into in open court in presence of parties and their counsel, partakes of nature of contract and can be set aside only upon showing good cause such as fraud, collusion,

mistake, or accident. Schlanger v Schlanger, 129 N.Y.S.2d 760, 1954 N.Y. Misc. LEXIS 3223 (N.Y. Sup. Ct. 1954).

Body execution was barred by stipulation in open court, settling action for assault for $1,000 payable in instalments, with right to enter judgment for unpaid amount in event of default. Scharff v Scharff, 132 N.Y.S.2d 874, 1954 N.Y. Misc. LEXIS 2709 (N.Y. Sup. Ct. 1954).

**33. Statements and admissions in chambers**

Stipulation made in presence of the judge in his chambers will be deemed to have been made in open court. Gass v Arons, 227 N.Y.S. 282, 131 Misc. 502, 1928 N.Y. Misc. LEXIS 726 (N.Y. City Ct. 1928).

**34. Statements and admissions in briefs**

Defendant’s attorney’s brief, requesting that answer as amended be deemed one of pleadings with same effect as if specified in plaintiff’s notice of motion, was regarded by court as stipulation. Nassau County v Kensington Ass'n, 21 N.Y.S.2d 208, 1940 N.Y. Misc. LEXIS 1905 (N.Y. Sup. Ct. 1940).

**B. Stipulations in Writing**

**35. Generally**

It is proper to enter an order pursuant to a stipulation signed by the attorneys and signed and acknowledged by the parties. Hallow v Hallow, 200 A.D. 642, 193 N.Y.S. 460, 1922 N.Y. App. Div. LEXIS 8243 (N.Y. App. Div. 1922).

Waiver of alleged noncompliance with stipulation by failing to protest during its performance. See Peterson v Uhrlass, 272 A.D. 923, 71 N.Y.S.2d 2, 1947 N.Y. App. Div. LEXIS 4228 (N.Y. App. Div. 1947).

Attorney who concedes truth of fact set forth in statement of agreed facts may nevertheless reserve right to object to its competency, materiality or relevancy. In re James' Estate, 130 N.Y.S.2d 691, 1953 N.Y. Misc. LEXIS 2659 (N.Y. Sur. Ct. 1953).

Letter sent to New York City Transit Authority by plaintiff's counsel enclosing copy of plaintiff's own medical report and stating that in event of suit it was understood that plaintiff's counsel was to receive copy of Authority's physical examination of plaintiff, was not binding upon Authority under RCP 4 not having been subscribed by the Authority or its counsel. Redding v New York City Transit Authority, 212 N.Y.S.2d 494 (N.Y. City Ct. 1961).

**36. Subject matter of stipulation**

A stipulation that if instalment payments were not made when due the plaintiff could enforce payment of all left due under the judgment is binding, and the court cannot permit the defendant to make the instalment payment after the due date. Friedman v Such, 219 A.D. 830, 220 N.Y.S. 855, 1927 N.Y. App. Div. LEXIS 12358 (N.Y. App. Div. 1927).

Where stipulation settling action permitted judgment on default of stipulated payments, the court had jurisdiction to enter judgment, and to relieve the defendants from an inadvertent default. Goldstein v Goldsmith, 243 A.D. 268, 276 N.Y.S. 861, 1935 N.Y. App. Div. LEXIS 7051 (N.Y. App. Div. 1935).

Parties may stipulate that the question of alimony and counsel fees is to be disposed of on the trial and be made a part of the judgment. Faruolo v Faruolo, 253 A.D. 750, 300 N.Y.S. 1080, 1937 N.Y. App. Div. LEXIS 5460 (N.Y. App. Div. 1937).

Parties cannot stipulate to dispose of one contested item separately from executor's account and to enter decree thereon, where such claim was one that would ordinarily be passed upon in final accounting. In re Flanagan's Estate, 262 A.D. 903, 28 N.Y.S.2d 818 (N.Y. App. Div. 1941).

Stipulation that whether or not a certain clause of the contract sued on had been complied with was only question before the court precluded plaintiff from urging on appeal that said clause was

not binding. Kissen v American R. E. Co., 192 N.Y.S. 328, 1922 N.Y. Misc. LEXIS 976 (N.Y. App. Term 1922).

Stipulation to adjourn examination before trial, without conditions or reservations, waived defendant's right to challenge notice of examination. La Manna v Pilitz, 79 N.Y.S.2d 578, 1948 N.Y. Misc. LEXIS 2435 (N.Y. Sup. Ct. 1948).

**37. —Stipulation as to legal, statutory or constitutional rights**

If stipulation is not unreasonable, against good morals or sound public policy, a party may waive legal, statutory or constitutional rights, and make the law applicable to the action. Di Donato v Rosenberg, 230 A.D. 538, 245 N.Y.S. 675, 1930 N.Y. App. Div. LEXIS 8668 (N.Y. App. Div. 1930), aff'd, 256 N.Y. 412, 176 N.E. 822, 256 N.Y. (N.Y.S.) 412, 1931 N.Y. LEXIS 1076 (N.Y. 1931).

**38. —Violation of legislative or executive enactment**

Stipulation between landlord and tenant, in violation of Rent Regulations issued under Emergency Rent Control Act, was set aside. Siegel v Bowers, 58 N.Y.S.2d 187, 185 Misc. 684, 1945 N.Y. Misc. LEXIS 2412 (N.Y. City Ct. 1945).

**39. —Settlement of action**

A stipulation that title to furniture remained in defendant was sufficiently ambiguous so that on a motion to enforce it the court referred it to a referee to hear oral proof and report the intent. Santini Bros. v Smith, 250 A.D. 53, 293 N.Y.S. 765, 1937 N.Y. App. Div. LEXIS 8268 (N.Y. App. Div. 1937).

A motion by plaintiffs for judgment pursuant to an alleged stipulation of settlement of an action should be denied, where issues of fact were raised, including the issue as to whether or not a binding agreement had been made, and it appeared that the terms of the stipulation were not

complete as to all details and plaintiffs' position was at no time changed or prejudiced in any way. Post Institute, Inc. v Lander Co., 251 A.D. 23, 295 N.Y.S. 740, 1937 N.Y. App. Div. LEXIS 6850 (N.Y. App. Div. 1937).

Where court approved stipulation between widow electing to take under will of her deceased husband and executor settling her accounts, stipulation was upheld where no cause for relief was shown and equities had intervened. In re Shaver's Estate, 282 A.D. 816, 122 N.Y.S.2d 578, 1953 N.Y. App. Div. LEXIS 5007 (N.Y. App. Div. 1953).

Where tenant had full opportunity to answer landlord's petition in holdover proceeding, but his attorney in writing specifically waived answering and affirmatively admitted allegations of petition, such stipulation constituted complete agreement of settlement, which Municipal Court had no power to set aside. Jet Brokers, Inc. v Glickberg, 126 N.Y.S.2d 160, 204 Misc. 962, 1953 N.Y. Misc. LEXIS 2417 (N.Y. Mun. Ct. 1953).

Consent to entry of judgment implies that the terms and conditions have been agreed on by the parties and the court has no power to supply terms, provisions, or essential details not previously agreed to by the parties. Shlakman v Board of Higher Education, 5 Misc. 2d 901, 161 N.Y.S.2d 529, 1957 N.Y. Misc. LEXIS 3269 (N.Y. Sup. Ct. 1957).

Stipulation of settlement entered into between landlord and tenant and their attorneys, in presence of court upon minutes of court and filed with clerk thereof, cannot be set aside by motion made in Municipal Court wherein proceeding was pending. Furer v Paterno, 150 N.Y.S.2d 829 (N.Y. App. Term 1956).

**40. —Limitation of proof**

A referee should abide by stipulation limiting the proofs where such a stipulation is not unreasonable, nor against good morals or sound public policy. Morse v Morse Dry Dock & Repair Co., 249 A.D. 764, 291 N.Y.S. 995, 1936 N.Y. App. Div. LEXIS 5907 (N.Y. App. Div. 1936).

**41. Necessity of authorization**

Attorney cannot, by stipulation, compromise or release client's just demands without special authorization. Hallow v Hallow, 200 A.D. 642, 193 N.Y.S. 460, 1922 N.Y. App. Div. LEXIS 8243 (N.Y. App. Div. 1922).

**42. —Ratification of unauthorized stipulation**

An unauthorized stipulation by an attorney reducing temporary alimony allowed by court is not ratified by the acceptance by client of checks for the reduced amount. Hallow v Hallow, 200 A.D. 642, 193 N.Y.S. 460, 1922 N.Y. App. Div. LEXIS 8243 (N.Y. App. Div. 1922).

**43. Construction of specific agreements**

Stipulation by defendant to sell to plaintiff for appeal use 50 copies of printed record on appeal "at printer's price for second fifty copies" construed. Chelrob, Inc. v Barrett, 290 N.Y. 525, 49 N.E.2d 994, 290 N.Y. (N.Y.S.) 525, 1943 N.Y. LEXIS 1074 (N.Y. 1943).

Where there was conflict only as to inferences to be drawn from evidence received by referee and detailed in affidavits, it was not necessary to transcribe minutes of reference where defendant had stipulated to dispense therewith. Jones v Jones, 285 A.D. 869, 137 N.Y.S.2d 189, 1955 N.Y. App. Div. LEXIS 5891 (N.Y. App. Div. 1955).

Stipulation between attorneys concerning acts of defendant's agent in obtaining insurance and paying premiums held binding and construed not to justify the inference that defendant assumed the obligation of taking out insurance for benefit of plaintiff. Neilson v Ella Realty Co., 191 N.Y.S. 599, 117 Misc. 213, 1921 N.Y. Misc. LEXIS 1936 (N.Y. Sup. Ct. 1921), aff'd, 206 A.D. 616, 198 N.Y.S. 935, 1923 N.Y. App. Div. LEXIS 7473 (N.Y. App. Div. 1923).

Where in action for breach of warranty parties signed stipulation obligating defendant to give plaintiff credit of $250 toward purchase of specified items, circumstances leading to execution of stipulation supports conclusion that list price should apply, not cut price; judgment was directed

for defendant dismissing complaint without prejudice to renewal of plaintiff's original action for breach of warranty. Jay v Friedrich Bros., Inc., 140 N.Y.S.2d 405, 1954 N.Y. Misc. LEXIS 3285 (N.Y. App. Term 1954).

**44. Persons concluded**

Non-party to stipulation is not concluded or bound thereby. Bowler v Apex Builders, Inc., 259 A.D. 834, 19 N.Y.S.2d 501, 1940 N.Y. App. Div. LEXIS 6914 (N.Y. App. Div. 1940).

Plaintiff as assignee of one defendant is bound by stipulation between attorney for two defendants, where plaintiff sought no relief therefrom. Junco v La Cabana, Inc., 20 N.Y.S.2d 781, 1940 N.Y. Misc. LEXIS 1858 (N.Y. App. Term 1940), aff'd, 261 A.D. 803, 25 N.Y.S.2d 779, 1941 N.Y. App. Div. LEXIS 7459 (N.Y. App. Div. 1941).

**C. Oral Stipulations**

**45. Generally**

An oral stipulation between counsel imposing a condition upon leave to file a supplemental complaint cannot be sustained. Jamestown v Aiken, 211 A.D. 577, 206 N.Y.S. 681, 1924 N.Y. App. Div. LEXIS 9920 (N.Y. App. Div. 1924).

Oral agreement as to disbursements not binding. Lauck v Gorman, 148 N.Y.S. 933, 85 Misc. 491, 1914 N.Y. Misc. LEXIS 1126 (N.Y. County Ct. 1914).

A verbal extension of time for serving an answer was not binding, however, on the record, the court opened the default and granted leave to file an answer within 15 days. Altholtz v Altholtz, 5 Misc. 2d 647, 165 N.Y.S.2d 827, 1956 N.Y. Misc. LEXIS 1277 (N.Y. Sup. Ct. 1956).

Parties are not bound by an oral agreement to refer a cause. Morrison v Metropolitan E. R. Co., 26 N.Y.S. 858, 74 Hun 639 (N.Y. Sup. Ct. 1893).

An oral agreement is ineffective to modify a written stipulation. Schlesinger v Keene, 88 N.Y.S. 1042 (N.Y. App. Term 1904).

An oral stipulation to discontinue wife's separation proceeding, made between her attorney and respondent husband, was not binding so as to authorize court to discharge all arrears, where no claim of fraud was made. Davis v Davis, 64 N.Y.S.2d 382, 1946 N.Y. Misc. LEXIS 2632 (N.Y. Dom. Rel. Ct. 1946).

Under RCP 4 the court could not enforce a stipulation that the judgment should award the plaintiff costs, notwithstanding the recovery was less than $50, unless it was in writing. Bates v Norris (1888) 55 Super Ct (23 Jones & S) 269.

**46. —Settlement agreement**

RCP 4 did not apply to an agreement settling the controversy. Smith v Bach, 82 A.D. 608, 81 N.Y.S. 1057, 1903 N.Y. App. Div. LEXIS 1233 (N.Y. App. Div. 1903).

Any oral agreement to settle an action is not binding unless made between counsel in open court. Cook v Bianco, 226 A.D. 691, 233 N.Y.S. 729, 1929 N.Y. App. Div. LEXIS 9200 (N.Y. App. Div. 1929).

Terms of stipulation of settlement may not be later altered without assent of parties. Shapiro v Danzig, 267 A.D. 948, 267 A.D. 949, 47 N.Y.S.2d 513, 1944 N.Y. App. Div. LEXIS 5661 (N.Y. App. Div. 1944), aff'd, 273 A.D. 1000, 79 N.Y.S.2d 876, 1948 N.Y. App. Div. LEXIS 5690 (N.Y. App. Div. 1948).

Where stipulation provided for restoration of case to calendar unless settlement was completed, and settlement was never consummated, case was properly restored to calendar. Camp Ranger, Inc. v Irving-Barbara Realty Corp., 281 A.D. 1001, 120 N.Y.S.2d 590, 1953 N.Y. App. Div. LEXIS 4051 (N.Y. App. Div. 1953).

Where from language used, coupled with consideration of character and complexity of proposed settlement of issues between parties, oral stipulation settling action for injunction restraining violation of restrictive covenant was not to become binding until reduced to writing and signed by parties. Schlossberg v Schlossberg, 286 A.D. 1008, 145 N.Y.S.2d 661, 1955 N.Y. App. Div. LEXIS 4974 (N.Y. App. Div. 1955), reh'g denied, 1 A.D.2d 824, 150 N.Y.S.2d 154, 1956 N.Y. App. Div. LEXIS 6255 (N.Y. App. Div. 1st Dep't 1956).

RCP 4 (rule 2401 herein) requiring stipulations to be in writing unless made in open court was applicable only to agreements relating to matters in the action and does not apply to an agreement completely disposing of the action and of the claim on which it is based and a new note of issue filed after such settlement vacated. Langlois v Langlois, 5 A.D.2d 75, 169 N.Y.S.2d 170, 1957 N.Y. App. Div. LEXIS 3487 (N.Y. App. Div. 3d Dep't 1957).

Where an agreement has been dictated into the record which includes an unequivocal discontinuance by plaintiff of an action for divorce and marked as well as a settlement and termination of the controversy it is not requisite to its validity that a formal legal document be executed between the parties. Ariel v Ariel, 5 A.D.2d 168, 171 N.Y.S.2d 138, 1958 N.Y. App. Div. LEXIS 6900 (N.Y. App. Div. 1st Dep't), reh'g denied, 5 A.D.2d 981, 173 N.Y.S.2d 984 (N.Y. App. Div. 1st Dep't 1958).

Where an action had not been prepared for trial and had not been assigned to a party for trial, it was perfectly proper for the judge presiding to conduct conferences in chambers and where an alleged settlement was made under such circumstances it was not the equivalent of an oral stipulation made in open court and Rule 4 had no application. Accarino v Hirsch, 6 A.D.2d 795, 175 N.Y.S.2d 435, 1958 N.Y. App. Div. LEXIS 5675 (N.Y. App. Div. 2d Dep't 1958).

Settlement entered into by attorney subject to client’s approval was unenforceable where client subsequently rejected it. Mazzella v American Home Constr. Co., 12 A.D.2d 910, 211 N.Y.S.2d 131, 1961 N.Y. App. Div. LEXIS 12594 (N.Y. App. Div. 1st Dep't 1961).

Where administrator, after orally agreeing to settlement, refused to sign written stipulation and claim of person who meantime had died would seriously be prejudiced if settlement were not enforced, agreement was enforced against administrator. In re Gardiner's Estate, 126 N.Y.S.2d 121, 204 Misc. 884, 1953 N.Y. Misc. LEXIS 2411 (N.Y. Sur. Ct. 1953).

Facts must be shown to warrant judicial interference with stipulation of settlement, which did not terminate action but provided for entry of judgment in event of default. Pesner v H. M. Goldman, Inc., 23 N.Y.S.2d 698, 1940 N.Y. Misc. LEXIS 2356 (N.Y. App. Term 1940).

Oral agreement to settle action for plaintiff’s interest in joint bank account, in names of plaintiff and defendant, was unenforceable, where made out of court and not performed by either party. Macrina v Macrina, 78 N.Y.S.2d 244, 1947 N.Y. Misc. LEXIS 3743 (N.Y. Sup. Ct. 1947).

Where stipulation of settlement, in presence of parties and respective counsel, was dictated into record in open court by justice presiding, with full knowledge and understanding of parties, and case was marked settled during trial, on plaintiff’s motion defendant was directed to consummate settlement. Achtel v Lieberman, 141 N.Y.S.2d 750, 1955 N.Y. Misc. LEXIS 2738 (N.Y. Sup. Ct. 1955).

**47. —Stenographer’s transcript**

Rule applied to oral agreement relating to stenographer’s transcript of notes of evidence taken before a referee. Hesse-Schnitt, Inc. v Brahe, 234 N.Y.S. 535, 134 Misc. 67, 1929 N.Y. Misc. LEXIS 791 (N.Y. Sup. Ct. 1929).

**48. Enforcement if made in open court**

So also as to agreements made in the presence of referees relating to proceedings before them. Ballou v Parsons, 55 N.Y. 673, 55 N.Y. (N.Y.S.) 673, 1874 N.Y. LEXIS 62 (N.Y. 1874).

Stipulation in open court that if defendant was not successful on counterclaim plaintiff would be entitled to judgment on complaint, barred judgment in conflict with allegations of complaint.

Pines v Beck, 300 N.Y. 181, 90 N.E.2d 28, 300 N.Y. (N.Y.S.) 181, 1949 N.Y. LEXIS 902 (N.Y. 1949).

Where stipulation was made in presence of justice, parties and counsel authorizing judgment of separation for plaintiff and withdrawal of defendant’s answer and counterclaim, motion to vacate stipulation on ground that defendant was awed by presence of justice and others was denied. Bond v Bond, 260 A.D. 781, 24 N.Y.S.2d 169, 1940 N.Y. App. Div. LEXIS 4717 (N.Y. App. Div. 1940), reh'g denied, 261 A.D. 835, 25 N.Y.S.2d 1001, 1941 N.Y. App. Div. LEXIS 7674 (N.Y. App. Div. 1941).

Stipulation in open court, that referee should engage services of stenographer whose fees were to be added to those of referee and taxed accordingly, need not be in writing. Application of Callahan, 262 A.D. 398, 28 N.Y.S.2d 980, 1941 N.Y. App. Div. LEXIS 5376 (N.Y. App. Div. 1941), reh'g denied, 262 A.D. 978, 30 N.Y.S.2d 695, 1941 N.Y. App. Div. LEXIS 6763 (N.Y. App. Div. 1941), app. dismissed, 287 N.Y. 743, 39 N.E.2d 942, 287 N.Y. (N.Y.S.) 743, 1942 N.Y. LEXIS 1750 (N.Y. 1942), reh'g denied, 264 A.D. 812, 35 N.Y.S.2d 288, 1942 N.Y. App. Div. LEXIS 4822 (N.Y. App. Div. 1942).

Verbal stipulations by counsel in open court will be enforced if entered on the minutes. David S. Stern Corp. v Edelstone, 264 A.D. 865, 35 N.Y.S.2d 300, 1942 N.Y. App. Div. LEXIS 5162 (N.Y. App. Div. 1942).

Stipulation for withdrawal on merits of counterclaim for declaratory judgment and defenses was binding. De Puy v Miller, 273 A.D. 905, 77 N.Y.S.2d 266, 1948 N.Y. App. Div. LEXIS 5215 (N.Y. App. Div. 1948).

Agreement, proposed pursuant to stipulation in open court and fairly representing its terms, was enforceable by motion to compel its execution. Cost v Benetos, 277 A.D. 880, 97 N.Y.S.2d 799, 1950 N.Y. App. Div. LEXIS 3708 (N.Y. App. Div.), reh'g denied, 277 A.D. 900, 98 N.Y.S.2d 590, 1950 N.Y. App. Div. LEXIS 3774 (N.Y. App. Div. 1950).

Where record in action for separation indicated that parties had stipulated to settle property rights by husband depositing corporate stock as security for alimony payments but parties agreed to leave stock pledging mechanics to court, court had power to formalize and enforce agreed stipulation. Rosenfield v Rosenfield, 284 A.D. 937, 134 N.Y.S.2d 787, 1954 N.Y. App. Div. LEXIS 4138 (N.Y. App. Div. 1954), reh'g denied, 285 A.D. 872, 137 N.Y.S.2d 826, 1955 N.Y. App. Div. LEXIS 5917 (N.Y. App. Div. 1955), aff'd, 309 N.Y. 985, 132 N.E.2d 896, 309 N.Y. (N.Y.S.) 985, 1956 N.Y. LEXIS 1110 (N.Y. 1956).

Ordinarily a stipulation made in open court in the presence of parties and counsel and placed on the record is enforceable by motion but where question raised as to whether stipulation was result of mutual mistake and improvidence, matter remitted for determination of question. Anders v Anders, 6 A.D.2d 440, 179 N.Y.S.2d 274, 1958 N.Y. App. Div. LEXIS 4372 (N.Y. App. Div. 1st Dep't 1958).

Oral stipulation of settlement between counsel in open court is a nullity unless authorized by client. Moylan v Naylor, 12 A.D.2d 854, 209 N.Y.S.2d 1021, 1961 N.Y. App. Div. LEXIS 13217 (N.Y. App. Div. 3d Dep't 1961).

Oral stipulation of settlement made in open court between counsel to give written right of way for use of a “certain road” across party’s land in particular town “subject to whatever restrictions” are contained in writing to be drawn and signed by the parties, is so indefinite as to be unenforceable. Moylan v Naylor, 12 A.D.2d 854, 209 N.Y.S.2d 1021, 1961 N.Y. App. Div. LEXIS 13217 (N.Y. App. Div. 3d Dep't 1961).

Where parties to separation action validly stipulated in open court fixing husband’s liability for support, judgment setting up trust for wife which exceeded scope of stipulation was reversed and remanded for judgment in accordance with terms of stipulation. Krause v Krause, 12 A.D.2d 908, 210 N.Y.S.2d 949, 1961 N.Y. App. Div. LEXIS 12722 (N.Y. App. Div. 1st Dep't), app. denied, 13 A.D.2d 490, 214 N.Y.S.2d 648, 1961 N.Y. App. Div. LEXIS 11819 (N.Y. App. Div. 1st Dep't 1961).

A stipulation made in open court will be enforced, although it waives the statutory rights of the parties and affects the issues to be determined. Holcombe v Leavitt, 124 N.Y.S. 982, 69 Misc. 232, 1910 N.Y. Misc. LEXIS 538 (N.Y. Sup. Ct. 1910).

Enforcement of a settlement agreement made in open court and read into the record in the presence of the court is not barred by the statute of frauds. Anders v Anders, 9 Misc. 2d 1, 168 N.Y.S.2d 1000, 1957 N.Y. Misc. LEXIS 1956 (N.Y. Sup. Ct. 1957), modified, 6 A.D.2d 440, 179 N.Y.S.2d 274, 1958 N.Y. App. Div. LEXIS 4372 (N.Y. App. Div. 1st Dep't 1958).

Since an attorney cannot settle a suit and conclude his client in relation to the subject matter of the litigation without the consent of his client, the court below had no authority to direct entry of judgment on oral stipulation of attorney in view of denial by defendant that it acquiesced in the settlement. Dankner v Furness, Withy & Co., 11 Misc. 2d 487, 172 N.Y.S.2d 624, 1958 N.Y. Misc. LEXIS 3945 (N.Y. App. Term 1958).

Where action brought against owner, general contractor and subcontractor to recover damages for personal injuries sustained on construction job settled and settlement reduced to stipulation on record, such stipulation summarily enforceable and motion for order directing entry of judgment against defendant owner in accordance with stipulation granted. McManus v New York Tel. Co., 14 Misc. 2d 22, 176 N.Y.S.2d 380, 1958 N.Y. Misc. LEXIS 3322 (N.Y. Sup. Ct. 1958).

Stipulation between landlord and tenant, whereby tenant consented to entry of final order on condition that eviction be stayed for 3 months, was binding. Shermane Corp. v Susan Prince, Inc., 76 N.Y.S.2d 17, 1948 N.Y. Misc. LEXIS 2040 (N.Y. Mun. Ct. 1948).

Stipulations in open court are not to be treated lightly; they have the same force as written agreements, are contracts with the court as well as adverse party, and court may enforce them summarily. De Santolo v La Porte, 89 N.Y.S.2d 114, 1949 N.Y. Misc. LEXIS 2223 (N.Y. City Ct. 1949).

Where parties and their attorneys stipulate in open court to withdraw objections to probate of propounded instrument, and it was satisfactorily established that such instrument was duly

executed, probate was granted. In re Friedman's Will, 123 N.Y.S.2d 788, 1953 N.Y. Misc. LEXIS 2039 (N.Y. Sur. Ct. 1953).

Where annulment action is discontinued upon terms and conditions of stipulation entered into in open court, action is still pending until such terms and conditions are performed. Karpinski v Karpinski, 130 N.Y.S.2d 364, 1954 N.Y. Misc. LEXIS 2040 (N.Y. Sup. Ct. 1954).

**D. Relief From Stipulation**

**49. Generally**

A party may be relieved by the court from unjust or harsh terms of a fully authorized stipulation. Hallow v Hallow, 200 A.D. 642, 193 N.Y.S. 460, 1922 N.Y. App. Div. LEXIS 8243 (N.Y. App. Div. 1922).

Where plaintiff was not present in court when stipulation was made by her attorney who lacked authority to settle litigation, plaintiff was not bound thereby and should be relieved therefrom. Bruder v Schwartz, 260 A.D. 1048, 24 N.Y.S.2d 443, 1940 N.Y. App. Div. LEXIS 6009 (N.Y. App. Div. 1940).

Good cause must be shown to warrant relief from stipulation for reference by attorney without client’s express consent. Campbell v Bussing, 274 A.D. 893, 82 N.Y.S.2d 616, 1948 N.Y. App. Div. LEXIS 3932 (N.Y. App. Div. 1948).

Stipulation of settlement terminated causes of action and brought into being new liabilities in substitution therefor, and also terminated the litigation, and Special Term had no power to vacate stipulation and findings and judgment upon motion made in terminated action. Hegeman v Conrad, 284 A.D. 969, 134 N.Y.S.2d 845, 1954 N.Y. App. Div. LEXIS 4268 (N.Y. App. Div.), reh'g denied, 284 A.D. 1053, 137 N.Y.S.2d 627, 1954 N.Y. App. Div. LEXIS 4550 (N.Y. App. Div. 1954).

In action for specific performance of agreement to sell realty case was submitted on written stipulation of facts to trial judge who gave judgment for plaintiff, and trial court did not abuse his discretion in denying motion by defendant vendor to set aside judgment and to be relieved from stipulation on ground that her former attorney did not inform her of contents of stipulation, where his affidavit stated that he did so inform her. Raplee v Piper, 2 A.D.2d 732, 152 N.Y.S.2d 799, 1956 N.Y. App. Div. LEXIS 5036 (N.Y. App. Div. 3d Dep't 1956), aff'd, 3 N.Y.2d 179, 164 N.Y.S.2d 732, 143 N.E.2d 919, 1957 N.Y. LEXIS 876 (N.Y. 1957).

Relief will be denied where movant is guilty of laches in applying therefor. People v Syracuse Milk Dealers, Inc., 10 A.D.2d 812, 197 N.Y.S.2d 897, 1960 N.Y. App. Div. LEXIS 11266 (N.Y. App. Div. 4th Dep't 1960).

However, a reasonable and proper stipulation will not be set aside except by an action in a court of equity, upon showing of fraud, collusion, mistake, accident or surprise, or grounds not less than would justify setting aside of any other contract. Wilder v Beach, 245 N.Y.S. 142, 137 Misc. 883, 1930 N.Y. Misc. LEXIS 1576 (N.Y. City Ct. 1930).

Where stipulations settling the issues to be tried are by statute effective as verdicts, reasons for setting them aside must be as weighty as required to set aside a verdict. Wilder v Beach, 245 N.Y.S. 142, 137 Misc. 883, 1930 N.Y. Misc. LEXIS 1576 (N.Y. City Ct. 1930).

Where stipulation provided for settlement of suit and default judgment if defendant failed to pay sum agreed upon, default judgment entered pursuant to the terms could not be vacated on defendant’s motion. Wilder v Beach, 245 N.Y.S. 142, 137 Misc. 883, 1930 N.Y. Misc. LEXIS 1576 (N.Y. City Ct. 1930).

Courts may relieve parties from stipulations made in the progress of an action. La Salle Extension University v Parella, 294 N.Y.S. 146, 162 Misc. 220, 1937 N.Y. Misc. LEXIS 1558 (N.Y. Mun. Ct. 1937).

Estoppel to assert invalidity of stipulation. Ginsberg v Vanneck, 25 N.Y.S.2d 367, 1941 N.Y. Misc. LEXIS 1454 (N.Y. Mun. Ct. 1941).

**50. —To prevent injustice, wrong, or hardship**

The state should be relieved of a stipulation entered into by the attorney general because of a mistake of judgment, where such action would promote justice and prevent wrong. Foote v Adams, 232 A.D. 60, 232 A.D. 843, 248 N.Y.S. 539, 1931 N.Y. App. Div. LEXIS 13731 (N.Y. App. Div. 2d Dep't), modified, 232 A.D. 843 (N.Y. App. Div. 2d Dep't 1931).

In any case where there is evidence of some ulterior purpose the courts will permit a stipulation of discontinuance to be vacated where it is intended by furtive means to perpetrate a wrong. Bergheim v Hofstatter, 243 A.D. 568, 276 N.Y.S. 188, 1934 N.Y. App. Div. LEXIS 5926 (N.Y. App. Div. 1934).

In action by attorney to recover a fee for collecting an award under the Workmen’s Compensation Law, defendant was entitled to be relieved of a stipulation of settlement, and to a new trial on the ground of newly-discovered evidence, where it appeared that after the stipulation defendant learned that the Attorney-General had performed the services resulting in the collection of his claim, and that since the settlement there had been revealed to him the contents of a letter written by plaintiff which indicated that plaintiff had not been acting as attorney for defendant. Bregoff v Mitchell, 254 A.D. 263, 4 N.Y.S.2d 579, 1938 N.Y. App. Div. LEXIS 6395 (N.Y. App. Div. 1938).

Where stipulation of settlement obligated plaintiff to obtain release from his former wife or adjudication respecting her interest in property, court may relieve therefrom because of inequitable situation arising as a consequence. Isler v Isler, 260 A.D. 1032, 24 N.Y.S.2d 401, 1940 N.Y. App. Div. LEXIS 5948 (N.Y. App. Div. 1940).

Where record refuted assertions of defendants that plaintiff misled them to stipulate settlement of action for specific performance, and plaintiff could not be restored to his position prior to entry of judgment and action was no longer pending, defendants were denied relief from stipulation.

Wolf v Bergano, 263 A.D. 825, 31 N.Y.S.2d 309, 1941 N.Y. App. Div. LEXIS 5151 (N.Y. App. Div. 1941).

The circumstances of confusion surrounding making of stipulation substituting plaintiff's attorney on specified terms and its improvident character required, in interest of justice, that plaintiff be relieved therefrom. David S. Stern Corp. v Edelstone, 264 A.D. 865, 35 N.Y.S.2d 300, 1942 N.Y. App. Div. LEXIS 5162 (N.Y. App. Div. 1942).

Stipulation settling prior action cannot be set aside except for reason that would invalidate contract, such as fraud or overreaching. Hegeman v Conrad, 1 A.D.2d 788, 148 N.Y.S.2d 196, 1956 N.Y. App. Div. LEXIS 6516 (N.Y. App. Div. 2d Dep't 1956).

In action for injury to plaintiff's finger contacting seal affixed to kosher meat in defendant's abattoir, stipulation in lieu of defendant's examination before trial that seal was affixed by defendant's employees was vacated where seal was affixed by Rabbi and where parties could be restored to former position. Schiffman v Cudahy Packing Co., 30 N.Y.S.2d 150, 1941 N.Y. Misc. LEXIS 2235 (N.Y. City Ct. 1941).

**51. Effect of reliance**

Verbal stipulations will be enforced where a party thereto has been misled or has relied upon them to his disadvantage. People v Stephens, 52 N.Y. 306, 52 N.Y. (N.Y.S.) 306, 1873 N.Y. LEXIS 255 (N.Y. 1873).

Where oral stipulation was acted upon by the parties, defeated party will not be permitted to take advantage of omission to reduce it to writing. Schwartz v Leasehold Corp. of New York, 48 N.Y.S.2d 146, 181 Misc. 666, 1944 N.Y. Misc. LEXIS 1908 (N.Y. App. Term 1944).

Acceptance of benefits barred relief. Rosmor Realty Corp. v Caviness, 66 N.Y.S.2d 588, 187 Misc. 888, 1946 N.Y. Misc. LEXIS 3109 (N.Y. Mun. Ct. 1946).

**52. Form of remedy**

Relief from stipulation of settlement may be procured only by equitable action. Skinner, Cook & Babcock, Inc. v Fourth Church of Christ, Scientist, 238 A.D. 573, 264 N.Y.S. 812, 1933 N.Y. App. Div. LEXIS 9554 (N.Y. App. Div. 1933).

A plaintiff, who has stipulated for the settlement of his action, is not entitled on motion to be relieved of the stipulation. Snead & Co. v Brager Bros., 265 N.Y.S. 449, 148 Misc. 603, 1930 N.Y. Misc. LEXIS 1828 (N.Y. City Ct. 1930).

A case settled pursuant to stipulation is finally terminated and may not be set down for trial on motion. The remedy of the defendant is by way of action for breach of the terms of the stipulation. Lasalle Extension University v Pappace, 273 N.Y.S. 198, 152 Misc. 274, 1934 N.Y. Misc. LEXIS 1458 (N.Y. App. Term 1934).

Stipulation of settlement cannot be set aside except as result of action brought on approved grounds in court having equitable jurisdiction, and Municipal Court had no jurisdiction to submit to jury question whether defendant should be bound by terms of stipulation. Ciurana v Valier, 136 N.Y.S.2d 447, 1954 N.Y. Misc. LEXIS 3441 (N.Y. App. Term 1954).

An action, not a motion, is the proper remedy to enforce an oral agreement between attorneys as to the discharge of a judgment. Phillips v Wicks (1874) 38 Super Ct, (6 Jones & S) 74.

## Research References & Practice Aids

**Cross References:**

Motion for judgment on admissions, CPLR § 4401.

**CODES, RULES AND REGULATIONS:**

Parties and Pleadings. 8 NYCRR Part 275.

**Federal Aspects:**

Stipulations regarding discovery procedure in United States District Courts, Rule 29 of Federal Rules of Civil Procedure, USCS Court Rules.

**Jurisprudences:**

7 NY Jur 2d Attorneys at Law § 107. .

19A NY Jur 2d Compromise, Accord, and Release §§ 33., 49. .

26 NY Jur 2d Counties, Towns, and Municipal Corporations § 895. .

48 NY Jur 2d Domestic Relations § 2343. .

54 NY Jur 2d Enforcement and Execution of Judgments § 285. .

61 NY Jur 2d Frauds, Statute of § 18. .

73 NY Jur 2d Judgments § 285. .

84 NY Jur 2d Pleading § 90. .

84 NY Jur 2d Pleading § 85. .

96 NY Jur 2d Specific Performance § 41. .

105 NY Jur 2d Trial §§ 231., 234.– 237., 240., 241., 249., 259., 261., 274. .

62B Am Jur 2d, Process § 161.

23 Am Jur Pl & Pr Forms (Rev), Stipulations, Forms 7 et seq.

**Treatises**

**Matthew Bender’s New York Civil Practice:**

Weinstein, Korn & Miller,  New York Civil Practice: CPLR Ch. 2104, Stipulations.

1 Carrieri, Lansner,  New York Civil Practice: Family Court Proceedings § 13.04.

2 Lansner, Reichler, New York Civil Practice: Matrimonial Actions §§ 21.05, 34.01, 36.01; 3 Lansner, Reichler, New York Civil Practice: Matrimonial Actions § 40.01; 4 Lansner, Reichler, New York Civil Practice: Matrimonial Actions § 50.02.

1 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶209.02; 2 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶504.01, 505.01; 3 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶1409.04, 1410.05.

**Matthew Bender's New York CPLR Manual:**

CPLR Manual § 14.01. Introduction.

CPLR Manual § 14.06. Stipulations.

CPLR Manual § 20.14. Disclosure devices — demand for address.

**Matthew Bender's New York Practice Guides:**

1 New York Practice Guide: Domestic Relations § 5.05; 2 New York Practice Guide: Domestic Relations § 16.04; 4 New York Practice Guide: Domestic Relations § 54.05.

**Matthew Bender's New York AnswerGuides:**

LexisNexis AnswerGuide New York Civil Litigation § 7.13. Obtaining Voluntary Discontinuance.

LexisNexis AnswerGuide New York Negligence § 5.54. Consummating Settlement.

LexisNexis AnswerGuide New York Negligence § 5.55. Consummating Settlement.

LexisNexis AnswerGuide New York Negligence § 7.44. Reducing Settlement Agreement to Writing.

**Warren's Weed New York Real Property:**

Warren's Weed: New York Real Property § 96.220.

**Annotations:**

Effectiveness of stipulation of parties or attorneys, notwithstanding its violating form requirements. 7 A.L.R.3d 1394.

Admissibility of lie detector test taken upon stipulation that the result will be admissible in evidence. 53 ALR3d 1005.

**Forms:**

Bender's Forms for the Civil Practice Form No. CPLR 2104:1 et seq.

LexisNexis Forms FORM 75-CPLR 2104:1.—Stipulation Skeleton Form.

LexisNexis Forms FORM 75-CPLR 2104:10.—Stipulation as to Notice of Settlement of Final Judgment in ``Main'' and ``Third Party'' Actions.

LexisNexis Forms FORM 75-CPLR 2104:10A.—Stipulation Modifying Temporary Restraining Order, Extending Time to Answer, and Requiring Parties to Refrain From Defamatory Statements to Promote Attempt to Resolve Matter Informally.

LexisNexis Forms FORM 75-CPLR 2104:11.—Order Upon Written Stipulation.

LexisNexis Forms FORM 75-CPLR 2104:12.—Notice of Motion to Be Relieved from Stipulation.

LexisNexis Forms FORM 75-CPLR 2104:13.—Affidavit in Support of Motion to Be Relieved from Stipulation.

LexisNexis Forms FORM 75-CPLR 2104:14.—Order Relieving Party from Stipulation.

LexisNexis Forms FORM 75-CPLR 2104:15.—Notice of Motion to Enforce Stipulation.

LexisNexis Forms FORM 75-CPLR 2104:16.—Affidavit in Support of Motion to Enforce Stipulation.

LexisNexis Forms FORM 75-CPLR 2104:17.—Order Enforcing Stipulation.

LexisNexis Forms FORM 75-CPLR 2104:18.—Notice of Motion to Enforce Stipulation.

LexisNexis Forms FORM 75-CPLR 2104:19.—Affirmation in Support of Motion to Enforce Stipulation.

LexisNexis Forms FORM 75-CPLR 2104:2.—Stipulation Extending Time to Plead or Move With Respect to the Complaint.

LexisNexis Forms FORM 75-CPLR 2104:20.—Affidavit in Support of Motion to Enforce Stipulation.

LexisNexis Forms FORM 75-CPLR 2104:21.—Judgment Granting Motion to Enforce Stipulation.

LexisNexis Forms FORM 75-CPLR 2104:22.—Order to Show Cause Why a Money Judgment Should Not Be Entered Based on Parties' Stipulation.

LexisNexis Forms FORM 75-CPLR 2104:23.—Affidavit in Support of Motion for Judgment Based on Parties' Stipulation.

LexisNexis Forms FORM 75-CPLR 2104:24.—Affidavit in Support of Cross Motion to Enforce Oral Agreement of Settlement.

LexisNexis Forms FORM 75-CPLR 2104:25.—Notice of Motion to Enforce Stipulation in Matrimonial Action.

LexisNexis Forms FORM 75-CPLR 2104:26.—Affirmation in Support of Motion to Enforce Stipulation in Matrimonial Action.

LexisNexis Forms FORM 75-CPLR 2104:27.—Guarantee of Individual Corporate Shareholders of Payment Pursuant to Stipulation Made by Corporation.

LexisNexis Forms FORM 75-CPLR 2104:3.—Stipulation Admitting Certain Facts.

LexisNexis Forms FORM 75-CPLR 2104:4.—Stipulation as to Damages.

LexisNexis Forms FORM 75-CPLR 2104:5.—Stipulation Adjourning Hearing in a Special Proceeding.

LexisNexis Forms FORM 75-CPLR 2104:6.—Stipulation Amending Complaint.

LexisNexis Forms FORM 75-CPLR 2104:7.—Stipulation Permitting Entry of Order for Service of Supplemental Answer.

LexisNexis Forms FORM 75-CPLR 2104:8.—Stipulation Amending Title of Action.

LexisNexis Forms FORM 75-CPLR 2104:9.—Stipulation Reduced to Form of an Order.

LexisNexis Forms FORM 380-10:111.—Stipulation Waiving Certification.

LexisNexis Forms FORM 380-10:201.—Stipulation Skeleton Form.

LexisNexis Forms FORM 380-10:202.—Notice of Motion to Be Relieved From Stipulation.

LexisNexis Forms FORM 380-10:203.—Order Relieving Party From Stipulation.

LexisNexis Forms FORM 380-10:204.—Notice of Motion to Enforce Stipulation.

LexisNexis Forms FORM 380-10:205.—Order Enforcing Stipulation.

LexisNexis Forms FORM 380-10:206.—Stipulation Extending Time to Appear, Answer or Move.

LexisNexis Forms FORM 521-24-1.—General Form of Stipulation Between Parties or Their Attorneys.

LexisNexis Forms FORM 521-24-2.—Stipulation Reduced to Form of an Order.

LexisNexis Forms FORM 521-24-3.—Stipulation as to Notice of Settlement of Final Judgment in ``Main'' and ``Third-Party'' Actions.

LexisNexis Forms FORM 521-24-4.—Order Upon Written Stipulation.

LexisNexis Forms FORM 521-24-5.—Notice of Motion to Be Relieved from Stipulation.

LexisNexis Forms FORM 521-24-6.—Affidavit in Support of Motion to Be Relieved from Stipulation.

LexisNexis Forms FORM 521-24-7.—Order Relieving Party from Stipulation.

LexisNexis Forms FORM 521-24-8.—Notice of Motion to Enforce Stipulation.

LexisNexis Forms FORM 521-24-9.—Order Enforcing Stipulation.

LexisNexis Forms FORM 521-26-1.—Nonphysical Injury Settlement Forms (Settlement Agreement, Releases and Stipulation) Designed to Ensure Tax-free Treatment Under Federal Tax Law.

LexisNexis Forms FORM 1434-19383.—CPLR 2104: Stipulation - Skeleton Form.

LexisNexis Forms FORM 521-4-10.—Statement of Fees or Commission Official Form No. OCA-830.

LexisNexis Forms FORM 521-4-11.—Consent to Change Attorneys.

LexisNexis Forms FORM 521-4-12.—Notice of Change of Attorneys.

LexisNexis Forms FORM 521-4-13.—Order to Show Cause on Motion to Change Attorneys of Record.

LexisNexis Forms FORM 521-4-14.—Affidavit in Support of Motion to Change Attorneys.

LexisNexis Forms FORM 521-4-15.—Order to Change Attorneys.

LexisNexis Forms FORM 521-4-16.—Order to Show Cause Upon Motion to Withdraw as Attorney of Record.

1 Medina’s Bostwick Practice Manual (Matthew Bender), Forms 10:101 et seq .(papers; stipulations).

**Texts:**

2 Bergman on New York Mortgage Foreclosures (Matthew Bender) § 24.09.

NY Pattern Jury Instructions 3d, PJI 1:78.

1 New York Trial Guide (Matthew Bender) §§ 1.01, 7.22.

**Hierarchy Notes:**

NY CLS CPLR, Art. 21

## Forms

**Forms**

**Form 1**

**Stipulation of Settlement Whereby Respondents Agreed to Purchase Petitioner's Stock in Respondent Company and Petitioner Agreed That Action For Judicial Dissolution of Respondent Company Be Discontinued** *

[Caption]

Petitioner _____, as Administrator under the Will of _____ ("Administrator"), and individually, Respondent _____, and Respondent _____ International, Inc., hereby make this stipulation intending to settle all claims and disputes among them on the terms set forth herein.

WHEREAS respondent _____ owns 51 percent of the issued and outstanding shares of _____ International, Inc. stock, consisting of 90 shares of its Class A common stock, 210 shares of its Class B common stock and 210 shares of its preferred stock; and

_____

* This form was submitted courtesy of Guy R. Fairstein, Esq., Kurzman & Eisenberg, White Plains, New York.

WHEREAS Administrator owns 49 percent of the issued and outstanding shares of _____ International, Inc. stock, consisting of 60 shares of its class A common stock, 220 shares of its Class B common stock, and 210 shares of its preferred stock; and

WHEREAS Administrator's decedent, _____, and Administrator _____ had commenced this proceeding in _____, 20_____, pursuant to Business Corporation Law Section 1104-a, seeking the judicial dissolution of _____ International, Inc. and other relief; and

WHEREAS by a judgment entered on _____, 20_____, the Honorable _____, Justice of the Supreme Court, _____ County, adjudged that _____ International, Inc. be dissolved, but stayed enforcement of the judgment for 60 days to afford the respondents the opportunity to elect to purchase Administrator's shares of _____ International, Inc. stock, pursuant to Business Corporation Law Section 1118(a), such election conditioned upon the payment of reasonable legal fees and expenses incurred in the proceeding; and

WHEREAS such stay expired without any such election by the respondents having been made; and

WHEREAS respondents _____ and _____ International, Inc. now wish to elect to purchase the shares of _____ International, Inc. stock owned by Administrator upon the terms set forth herein,

IT IS HEREBY STIPULATED AND AGREED as follows:

1. _____, _____ International, Inc., Administrator and _____ hereby agree that the judgment entered on _____, 20_____, is hereby amended nunc pro tunc by enlarging to 11:59 P.M. on the date on which this stipulation is "So Ordered" by the Court the stay of

dissolution of _____ International, Inc. and the date by which _____ and _____ International, Inc. shall have the right to elect to purchase Administrator's shares of _____ International, Inc. stock.

2. _____ hereby elects irrevocably to purchase the shares of _____ International, Inc. Class A common stock and Class B common stock owned by Administrator.

3. _____ International, Inc. hereby elects irrevocably to purchase the shares of _____ International, Inc. preferred stock owned by Administrator.

4. _____ and _____ International, Inc. have stated their refusal to pay the legal fees and expenses upon which the Court conditioned their right to elect to purchase Administrator's shares of _____ International, Inc. stock, and Administrator hereby waives such condition and any and all interest (except that, in the event of any default hereunder, Administrator shall be entitled to interest on the amount due hereunder from the date of the default).

5.

a. The purchase price payable by _____ to Administrator for the purchase of the 60 shares of _____ International, Inc.'s Class A common stock and the 220 shares of _____ International, Inc.'s Class B common stock owned by Administrator shall be $650,000.00, which amount shall be paid at a closing to be held on _____, 20_____ ("the Closing"), such payment to be made by one or more certified or cashier's checks (if more than one check, in amounts which Administrator shall request reasonably in advance of the Closing) drawn to the order of "_____, Administrator under the Will of _____, deceased" (the "Check"). The closing date may be adjourned once, but the closing shall in all events take place not later than _____ a.m./p.m. on _____, 20_____, at the offices of _____, _____, _____, & _____, P.C.

_____ may assign his rights to purchase these shares, upon the terms and conditions set forth herein, to either _____ International, Inc. or the _____ International, Inc. Employees' Retirement Trust (the "Plan"), in which event _____ International, Inc. or the Plan, as the case may be, shall execute and deliver to counsel to Administrator a writing, in form satisfactory to counsel to Administrator (who will not unreasonably refuse to accept the form thereof), in which it shall assume and undertake to perform in accordance with the terms and conditions hereof the obligations of _____ hereunder, and in which event _____ shall nonetheless remain liable hereunder as guarantor of the obligations assumed by _____ International, Inc. or the Plan.

b. The payment by _____ or his assignee of the sum of $650,000.00 shall be secured by: (a) the personal guarantee of _____, whose obligation as guarantor shall be both her several obligation and, in the event of _____'s or _____ International, Inc.'s or the Plan's default hereunder, her joint obligation with the obligation of _____ under this stipulation and order; and (b) the guaranty of _____ International, Inc. _____ covenants that until the proceeds of the Check have been collected by Administrator, he will not permit or cause any transfers of assets of _____ International, Inc. other than in the ordinary course of its business or in accordance with this stipulation and order, and for fair consideration, and specifically will not permit or cause any mortgage or other lien or encumbrance to be recorded against or to affect the land and building situated at _____ Avenue, _____, New York. _____ and _____ covenant, jointly and severally, that until the proceeds of the Check have been collected by Administrator they will not permit or cause any transfers of their assets to be made except to pay debts in the ordinary course or otherwise for fair consideration, and, further, that they will not permit or cause any further mortgage or other lien or encumbrance to be recorded against or to affect the land and building located at _____ Avenue, _____, New York.

c. In the event _____, _____ International, Inc. or the Plan shall fail to pay when due the purchase price payable under this paragraph, Administrator (or any person to whom the right to receive such payment shall have been distributed under the Will of _____) shall have the right, without further notice, to enter judgment upon this stipulation and order, as provided in CPLR 3215(h)(1), in the amount of such payment with interest as provided in CPLR 5004 from the closing date to the date of entry of judgment, against _____, _____, as guarantor, and _____ International, Inc., as guarantor, jointly and severally. In the event of such a default (or any other default under the provisions of this stipulation), neither Administrator nor any distributee shall be entitled to seek a valuation of Administrator's shares of _____ International, Inc. stock under Business Corporation Law Section 1118(a), or attorney's fees pursuant to the judgment entered on _____, 20_____, or interest, but may enforce this stipulation in accordance with its terms (including its provisions as to interest payable hereunder in the event of a default).

6. The purchase price payable by _____ International, Inc. to Administrator for the purchase of the 210 shares of _____ International, Inc. preferred stock owned by Administrator shall be the assignment by _____ International, Inc. to Administrator, prior to or at the closing, of the policy of insurance issued by the _____ Life Insurance Company on the life of _____, which policy is owned by _____ International, Inc. (the "policy"). The assignment of the policy shall be made by _____ International, Inc.'s delivery to Administrator of a written assignment in form satisfactory to Administrator and to _____ Life Insurance Company, and shall be accompanied by the delivery to Administrator of _____ Life Insurance Company's written acceptance of or consent to the assignment; provided, however, that if _____ Life Insurance Company shall not accept or consent to the assignment, _____ International, Inc. shall surrender the Policy and shall instruct _____ Life Insurance Company in writing to pay, to Administrator

the cash surrender value of the Policy by a check drawn to the order of "_____, Administrator under the Will of _____, Deceased." Any loans now outstanding against the Policy shall have been paid in full by _____ International, Inc. prior to the delivery of the Policy or the check in the amount of its cash surrender value, and _____ and _____ International, Inc. covenant that prior to such delivery, there shall be no additional borrowings against the Policy, with the result that, at the time of such delivery, neither the face amount nor the cash surrender value of the Policy shall be reduced by any borrowings. _____ International, Inc., by _____, its President, and _____, individually, shall deliver to Administrator at the time of delivery of the Policy or the check in the amount of its cash surrender value their written representation and warranty that there are no loans then outstanding against the Policy. _____ International, Inc. and _____ hereby warrant and agree that it and he shall take all steps necessary, including such steps as may be required by _____ Life Insurance Company, to effect the delivery to Administrator, as soon after this stipulation is signed as shall be practicable but in no event later than at the Closing, in compliance with this stipulation and order, of either (a) the Policy, together with an assignment effective to make Administrator the owner of the Policy and _____ Life Insurance Company's written acceptance of or consent to the assignment of the Policy, or (b) the check in the amount of the cash surrender value of the policy. In the event _____ International, Inc. shall fail to deliver to Administrator prior to or at the closing, in compliance with this stipulation either (a) an assignment of the policy, free and clear of any borrowings, and _____ Life Insurance Company's written acceptance of or consent to the assignment, or (b) a check in the amount of the cash surrender value of the policy, Administrator shall have the right, without further notice, to enter judgment upon this stipulation as provided in CPLR 3215(h)(1), for the cash surrender value of the Policy, without regard to any borrowings, with interest at the rate provided in CPLR 5004 from the closing date to the date of entry of judgment, against

_____ International, Inc., and against _____ and _____, as guarantors, jointly and severally. For this purpose, _____, as President of _____ International, Inc., and individually, shall deliver to Administrator, within ten calendar days after the signing of this stipulation, his written certificate setting forth the cash surrender value of the policy, without regard to any borrowings.

7. Administrator shall at the closing (or prior thereto, in the case of the certificates for the preferred shares, if the consideration for their purchase shall be delivered prior to the closing) deliver in escrow to _____, Esq., as escrowee, _____ and _____ International, Inc., against his receipt of the consideration therefor set forth in paragraphs 5 and 6 hereof, certificates for the 60 shares of _____ International, Inc.'s Class A common stock, 220 shares of _____ International, Inc.'s Class B common stock, and 210 shares of _____ International, Inc.'s preferred stock, to be transferred pursuant to paragraphs 5 and 6 hereof, with stock powers annexed and the requisite stock transfer stamps affixed thereto, and his written resignation as Vice President of _____ International, Inc., all of which shall be held in escrow until such time as Administrator shall acknowledge in writing his collection of the proceeds of the Check. Administrator shall negotiate the Check promptly and shall promptly acknowledge his collection of the proceeds of the Check.

8.

a. _____ International, Inc. and _____ hereby agree that _____ shall remain an employee of _____ International, Inc. until _____, 20_____, during which period he shall receive a salary, payable monthly commencing _____, 20_____, at the rate of $20,000.00 per annum. _____ International, Inc.'s payment of this salary through _____, 20_____, is hereby guaranteed by _____.

b. _____ shall not be entitled to any benefits as an employee of _____ International, Inc. other than medical and dental insurance as hereinafter provided.

c. _____'s duties shall be those assigned to him by the President of _____ International, Inc., and _____ shall undertake no other duties on behalf of _____ International, Inc. If _____'s assigned duties require him to work on _____ International, Inc.'s premises, he shall remain in those areas as the President of _____ International, Inc. shall specify. _____ shall devote at least 30 hours per week to his employment with _____ International, Inc.

d. In the event _____ International, Inc. shall fail for any reason (including a claimed failure by _____ to perform any duties assigned to him by _____ International, Inc.) to pay when due any monthly installment of salary hereunder, and such default shall not be cured within ten calendar days after _____ International, Inc.'s receipt of written notice thereof, _____ shall have the right, without further notice, to enter judgment upon this stipulation, as provided in CPLR 3215(h)(1), in the amount of all installments remaining unpaid, with interest at the rate provided in CPLR 5004 from the closing date to the date of entry of judgment, against _____ International, Inc., and against _____ as guarantor, jointly and severally.

e. _____ International, Inc. further agrees that _____ and each of his three children, _____, _____ and _____, shall be entitled to medical and dental benefits through _____, 20_____, under _____ International, Inc.'s medical and dental plans, on the same terms of general applicability as shall pertain to members of the family of _____ under such plans. _____ International, Inc. hereby agrees that, if _____

shall cease to be an employee of _____ International, Inc., or shall be deemed by _____ Life Insurance Company to be ineligible to participate in _____ International, Inc.'s medical and, dental plans, or shall not be entitled to coverage thereunder for himself and his otherwise eligible children, it shall pay to him as additional salary, pursuant to paragraph 8(a) hereof, in equal monthly installments, an annualized amount which, after taxes, will equal the cost to _____ of providing comparable medical and dental insurance for himself and his otherwise eligible children; provided, however, that if prior to _____, 20_____, _____ shall accept other employment which shall provide for himself and his otherwise eligible children medical and dental coverage comparable to that which is being provided by _____ International, Inc. hereunder, _____ International, Inc.'s obligation to provide medical and dental coverage during such period shall be suspended; and, provided, further, that if such other coverage shall terminate prior to _____, 20_____, _____ International, Inc.'s obligation hereunder shall revive.

9.

a. _____ agrees that, for so long as _____ International, Inc. shall continue to pay on a timely basis the monthly installments of salary due him under paragraph 8(a) hereof, the benefits due him under paragraph 8(e) hereof, and, if applicable, the additional salary due under paragraph 8(e) hereof, he shall not for himself or any other person or entity solicit or do business with _____. or _____ Exports or communicate with either of them for such purpose.

b. _____ further agrees that until _____, 20_____, he shall not compete with _____ International, Inc. in its business of purchasing, distributing and selling dental supplies and equipment, directly or indirectly, or by, through, or in association or in the employ of any person, firm, corporation, association, or other entity; provided, however, that this restrictive covenant shall not prohibit _____ from accepting employment with a business (the "Employer") that

sells dental equipment, instruments or supplies so long as (i) the Employer does not sell equipment, instruments or supplies that directly compete with equipment, instruments or supplies sold or distributed by _____ International, Inc., or (ii) if the Employer is a multi-division company, one division of which sells equipment, instruments or supplies competitive with those sold or distributed by _____ International, Inc., _____ shall not work for the competing division.

10.

a. The cause of action for the judicial dissolution of _____ International, Inc. is hereby discontinued without prejudice. Upon the collection by Administrator of the proceeds of the check, in the sum of $650,000, as provided in paragraph hereof, and Administrator's receipt of either (a) the assignment of the Policy (including _____ Life Insurance Company's written acceptance of or consent to the assignment of the Policy) or (b) a check in the amount of the cash surrender value of the Policy, in either case free and clear of any borrowings, Administrator shall deliver to _____ a stipulation discontinuing with prejudice the cause of action for the judicial dissolution of _____ International, Inc. Each other cause of action asserted in this proceeding by Administrator or by _____ against _____ or _____ International, Inc., including the derivative cause of action asserted by Administrator in the right of _____ International, Inc., is hereby discontinued with prejudice; provided, however, that Administrator and _____ shall not be obliged by the terms of this stipulation to discontinue and do not discontinue any cause of action asserted against _____, all of which causes of action are hereby expressly reserved.

b. The Court shall retain jurisdiction for the purpose of further proceedings, if any, under this stipulation and order.

11.

a. Effective as of the completion of the transactions to be effected hereunder prior to or at the Closing, each of _____, _____ International, Inc.,

_____, Esq., and _____, Esq., shall be deemed to have released Administrator and _____, and Administrator and _____ Shall be deemed to have released each of _____, _____, _____ International, Inc., _____, Esq., and _____, Esq., from all claims and causes of action of any kind or nature from the beginning of the world to the date of execution hereof, irrespective of whether a cause of action thereon has accrued as of the date hereof; provided, however, that this paragraph shall not release or discharge any claim arising under or any obligation created or existing under this stipulation and order or under any agreement or instrument executed contemporaneously herewith or to implement the provisions hereof, with the result that no release provided for herein shall alter, affect or diminish in any way the rights or obligations of any party hereunder or in or under any document executed contemporaneously herewith or to implement the provisions hereof, and provided, further, that this release as made by Administrator and _____ is not intended, nor shall it be deemed, to run to the benefit of _____ or any other person or entity beyond _____ _____, _____ International, Inc., _____, Esq., and _____, Esq.

b. Upon Administrator's collection of each of the proceeds of the Check and his receipt of either (x) the assignment of the Policy (including _____ Life Insurance Company's written acceptance of or consent to the assignment of the policy) or (y) a check in the amount of the cash surrender value of the Policy, in either case free and clear of any borrowings, Administrator shall deliver to _____ an instrument releasing her obligation, as guarantor, under paragraph 5 or 6 hereof, as the case may be, as to the obligation which shall have been performed.

c. _____ agrees to deliver to each present or former employee of _____ International, Inc., other than _____, _____, and, if applicable, _____, who shall deliver a release to him, a release of commensurate breadth; provided, however, that

_____ shall not be obliged to deliver any release which shall alter, affect or diminish in any way his rights under this stipulation and order.

12. _____ and Administrator represent and warrant to _____ and _____ International, Inc. as follows, which representations and warranties shall be true and correct at the time of Closing and which shall survive the Closing:

a. _____ is the Administrator under the will of _____, deceased.

b. Administrator is, and at the Closing will be, the Owner, free and clear of any and all liens and encumbrances, of the shares of _____ International, Inc. stock to be sold and transferred hereunder, which shares are not now and at the Closing will not be subject to any voting trusts.

c. There are no judgments of record against the Estate of _____ or against Administrator or _____. If a judgment search should disclose an outstanding judgment against any person of same or similar name, Administrator will deliver at the closing an affidavit in customary form to the effect that the person referred to in said judgment or judgments is neither _____ nor _____.

d. There are no actions now pending or threatened against the Estate of _____ which encumber or restrict the sale of the shares of _____ International, Inc. stock owned by Administrator.

e. Administrator has the authority and capacity to sell the shares of _____ International, Inc. stock upon the terms set forth in this stipulation and order.

13. The parties hereto agree to execute such other and further documents as may reasonably be necessary to effect the transactions contemplated by this stipulation and order of settlement.

Dated: _____, New York

_____, 20_____

_____

_____

_____

[Verification]

**Form 2**

**Stipulation Extending Time to Plead**

[Caption]

It is hereby stipulated and agreed by and between the attorneys for the parties in the above entitled action that the time for the defendant to answer, or to make any motion addressed to the complaint herein, be and the same hereby is extended to and including the _____ day of _____, 20_____.

Dated, _____, 20_____.

_____

[Print signer's name below signature]

Attorney for plaintiff

**Form 3**

**Stipulation for Physical Examination of Plaintiff Before Trial**

[Caption]

IT IS HEREBY STIPULATED and agreed by and between the attorneys for the respective parties hereto that the plaintiff _____ submit to a physical examination as to the nature, character and extent of his injuries as set forth in his complaint by one or more physicians or surgeons selected by the defendant herein, at such place as is convenient to the plaintiff and said physician and at such time as is fixed by said physician, and it is further

STIPULATED that the plaintiff shall answer questions as to the nature and extent of such injury so far as necessary to enable the examining physician to ascertain and determine the extent and nature thereof, and it is further

STIPULATED that the plaintiff will submit himself to the taking of X-ray photographs of his _____ by a physician to be selected by the defendant.

Dated: _____, New York, _____, 20_____.

_____

[Print signer's name below signature]

Attorney for plaintiff

_____

[Print signer's name below signature]

Attorney for defendant

**Form 4**

**Stipulation of Facts**

[Caption]

IT IS HEREBY STIPULATED and agreed by and between the attorneys for the respective parties hereto:

1. That _____ at the time of his death, was the owner of certain property described as follows: _____.

2. That _____ and _____ are the heirs of the said _____ and were named by the said _____ in his last will and testament dated the _____ day of _____, 20_____ and admitted to probate in the Surrogate's Court of the County of _____ on the

_____ day of _____, 20_____, as the heirs of the aforesaid property.

This stipulation shall be valid only during the trial pending in the above entitled action and shall not be used or be effective in any subsequent trial or proceeding or in any other action or matter whatsoever.

Dated: _____, New York, _____, 20_____.

_____

[Print signer's name below signature]

Attorney for _____

_____

[Print signer's name below signature]

Attorney for _____

**Form 5**

**Stipulation Admitting Certain Facts**

[Caption]

It is hereby stipulated by and between the parties to the above entitled proceeding that for the purpose of the trial of the issues raised in the said proceeding the following facts are admitted: [state facts admitted by stipulation].

It is expressly understood and agreed that this stipulation is made without prejudice to the rights of any party hereto in any other action or proceeding, and that the admissions made herein may not be used by or against any party hereto in any other action or proceeding.

Dated, _____, 20_____.

_____

[Print signer’s name below signature]

Attorney for petitioner

_____

[Print signer’s name below signature]

Attorney for respondent

**Form 6**

**Stipulation of Settlement and Discontinuance**

[Caption]

It is hereby stipulated by and between the attorneys for the parties in the above entitled action that the said action be and it hereby is discontinued without costs to either party as against the other.

It is further stipulated and agreed that an order may be entered upon this stipulation without further notice to either party.

Dated, _____, 20_____.

_____

[Print signer’s name below signature]

Attorney for plaintiff

_____

[Print signer’s name below signature]

Attorney for defendant

**Form 7**

**General Form of Stipulation**

[Caption]

It is hereby agreed and stipulated between the parties to this action [or proceeding] that _____ [state what is stipulated].

Dated, _____, 20_____.

_____

[Signature of party or attorney,

with name printed underneath]

_____ [Address, including telephone

number, of party or attorney]

_____

[Signature of other party or attorney,

with name printed underneath]

_____ [Address, including telephone

number, of party or attorney]

**Form 8**

**Order to Show Cause why Stipulation Should not be Specifically Enforced**

[Caption]

Upon the annexed affidavit of _____, duly sworn to the _____ day of _____, 20_____, the annexed copy of the stipulation made and entered into in open court at a Motion Term [Part _____] of this court held in and for the County of _____ on the _____ day of _____, 20_____.

LET the defendant _____ show cause before this court at a Motion Term [Part _____] of this court to be held in and for the County of _____ at the County Court House in the City of _____ on the _____ day of _____ 20_____ at _____ o'clock in the _____ noon of that day or as soon thereafter as counsel can be heard why an order should not be made compelling specific performance of the stipulation made in open court at a Motion Term [Part _____] held in and for the County of _____, on the _____ day of _____, 20_____ and directing that the said defendant execute the agreement specified in the said stipulation and why the plaintiff should not have such other and further relief as to the court may seem just and proper as well as the costs of this motion.

Sufficient reason appearing therefor let service of a copy of this order, and the papers upon which it is based, upon the defendant's attorney on or before the _____ day of _____, 20_____ at _____ o'clock in the _____ noon of that day, be good and sufficient service.

Signed this _____ day of _____, 20_____ at _____, New York.

_____

[Print signer's name below signature]

Justice, Supreme Court

_____ County

**Form 9**

**Order to Show Cause Why Stipulation of Settlement Should Not Be Set Aside and Action Restored to Calendar**

[Caption]

Upon the annexed affidavit of _____, verified _____, 20_____, and of _____, verified _____, 20_____, upon the pleadings herein and upon all the proceedings heretofore had in the above-entitled action,

LET the plaintiff and its attorney show cause before _____, at _____, held in the City of _____, _____ County, New York, on _____, _____, 20_____, at _____, or as soon thereafter as counsel can be heard, why an order should not be made herein vacating and setting aside and annulling the terms of settlement heretofore arranged between the parties hereto in the above-entitled action, and why said action should not be restored to the Trial Term Calendar of this Court at Trial Term, Part [II], _____ County, and set down for trial on _____, 20_____, and why the defendant in the above-entitled action should not have such other and further relief as may seem meet and proper.

In the meantime it is ordered that all proceedings on the part of the plaintiff in this action, other than to respond to this show cause order, be and the same hereby are stayed.

Let service of a copy of this order and the accompanying affidavits be made upon the plaintiff's attorney on or before _____, 20_____, which service shall be deemed sufficient.

Dated, _____, New York, _____, 20_____.

_____

[Signature, with name printed underneath]

Justice, Supreme Court*

*Supporting affidavit must show adequate grounds, such as fraud, mutual mistake of material fact, illegality, etc.

**Form 10**

**Notice of Cross Motion for Enforcement of Defendant's Version of Stipulation**

[Caption]

PLEASE TAKE NOTICE, that upon the annexed affidavit of _____, duly sworn to this _____ day of _____, 20_____, and upon the Exhibits referred to herein, and all the pleadings and proceedings on file herein, the undersigned will crossmove this Court on the return day of the motion brought on by the plaintiff by Order to Show Cause dated _____, 20_____, for an Order settling the differences existing between the parties herein and settling the formal contract to be executed by the parties herein, all pursuant to the stipulation made before Hon. Mr. Justice _____, dated _____, 20_____, and for such other, further and different relief as to the Court may seem just and proper in the premises.

Dated _____

_____

Attorney for the defendant

_____Office and

Post Office Address,

Telephone Number

To: _____*

[Name and address of plaintiff's attorney]

*Support by appropriate affidavit setting out additional facts necessary to present merits of defendants' version of stipulation sought to be enforced by prime motion of plaintiff.

**Form 11**

**Affidavit to Obtain Order to Show Cause why Stipulation Should not be Specifically Enforced**

[Caption and introductory paragraph]

1. He is the plaintiff in the above entitled action.

2. The complaint herein sets forth a cause of action in the nature of ejectment together with a demand for damages in the amount of the reasonable value of use and occupation of the following described property _____.

3. The defendant, in and by his answer, claimed to be the owner of the said property in common with the plaintiff herein and demanded judgment to that effect.

4. On the _____ day of _____, 20_____ this action duly came on for trial in this court before Hon. _____ and a jury. After the selection of the jury was completed and the court was thereby made aware of the nature of the action, the court called counsel for both parties into chambers to attempt a compromise of the plaintiff's cause of action and the defendant's counterclaim.

5. At that time the attorneys for the respective parties entered into a stipulation, recorded upon the record in open court, in the physical presence of the court and of the plaintiff and the defendant whereby the plaintiff agreed to convey to the defendant a life interest in the said property and the defendant agreed to release any other rights which he might have had in and to the said property. The text of that stipulation as accurately recorded by the official court stenographer, is as follows: _____.

6. Thereupon the action was marked "settled" by the court clerk and was removed from the calendar.

7. Thereafter, the defendant refused to execute a quit claim deed to the plaintiff although the plaintiff was ready, willing and able to perform his part of the said stipulation.

8. No previous application has been made for the relief sought herein or for any similar relief.

9. The reason an order to show cause is sought is: _____.

WHEREFORE deponent prays that the court enforce the aforementioned stipulation of settlement by directing the defendant to execute and deliver to the plaintiff a quit claim deed to the property heretofore described.

_____

[Print signer's name below signature]

[Jurat]

**Form 12**

**Affidavit of Attorney in Support of Motion for Judgment on Stipulation of Settlement**

[Caption and introductory paragraph]

Deponent is a member of the firm of _____, _____, the attorneys for the defendant. Deponent was and is counsel to the defendant in this action and has personal knowledge of the facts hereinafter set forth.

The complaint sets forth a claim for damages allegedly resulting from [the defendant's failure to complete and properly perform a building construction contract affecting the plaintiff's house]. The answer denies the material allegations of the complaint and sets forth a counterclaim for [moneys allegedly owing from the plaintiff to the defendant upon the performance of such contract]. The reply denies the material allegations of the counterclaim.

On _____, 20_____, this action duly came on for trial in this Court before Hon. _____, [City Judge] and a jury. After the selection of the jury was completed and the Court was thereby made aware of the nature of the action, the Court called counsel for both parties into chambers and stated [that the case involved so much detail and so many problems of technical building construction] that a jury trial was an inefficient way

of resolving the dispute, and the Court suggested that the case be adjusted [by invoking the aid and assistance of an expert in building construction. The Court nominated for that purpose Mr. _____, a prominent architect of _____].

Thereupon _____, Esq., attorney for the plaintiff, and deponent as counsel for the defendant, entered into a stipulation, recorded upon the record in open court, in the physical presence of the Court and of the plaintiff and of the defendant. The text of that stipulation, as accurately recorded by the official court stenographer, is as follows:

_____ [text of stipulation]

Thereupon the action was marked “settled” by the Court Clerk upon the calendar.

Thereafter the defendant [returned to work at the plaintiff’s house].

_____ [Allege further particulars, such as filing and notice of architect’s certificate of completion, and other facts necessary to show compliance with stipulation by moving party; show refusal and failure of opposing party to abide by stipulation.]

WHEREFORE deponent prays that the Court enforce the aforementioned stipulation of settlement by directing entry of judgment in favor of the defendant and against the plaintiff for the stipulated sum of $_____, together with taxable disbursements incident to the entry and enforcement of such judgment, and with $_____ costs of this motion. Deponent believes that an award of motion costs is peculiarly appropriate under the circumstances.

No previous application has been made for the annexed or any similar order.

[Jurat]

_____

[Signature, with name printed underneath]

End of Document