

CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF KINGS: HOUSING PART B

CHRISTIAN GRAY,

Petitioner-Tenant,

-against-

AMERICAN PACKAGE COMPANY, INC.,

Respondent-Owner,

THE DEPARTMENT OF HOUSING  
PRESERVATION AND DEVELOPMENT,

Respondent.

Index No. HP 6086/2020

**AFFIRMATION IN OPPOSITION  
TO PETITIONER'S MOTION TO  
RESTORE**This matter should be referred to  
Hon. J. Stoller, J.H.C.

**DAVID M. SKALLER**, an attorney duly admitted to practice before the Courts of the State of New York, hereby affirms the following to be true under the penalties for perjury pursuant to CPLR § 2106:

1. I am a member of the law firm of Belkin Burden Goldman, LLP, attorneys for Respondent-Owner, AMERICAN PACKAGE COMPANY, INC. ("Respondent"). As such, I am fully familiar with the facts and circumstances hereinafter set forth.

2. This affirmation, along with the Affidavit of Jack B. Glass, Jr. MS, CIH ("Glass Affidavit") and Candice Kowalewski, MPH ("Kowalewski Affidavit") are submitted in opposition to Petitioner-Tenant, CHRISTIAN GRAY's ("Petitioner") motion seeking to restore this matter to the calendar to determine compliance of the landlord with the stipulation of June 29, 2021.

### **RELEVANT PROCEDURAL AND BACKGROUND HISTORY**

3. This proceeding was commenced by Petitioner's Order to Show Cause, dated June 30, 2020, which was made returnable on the Court's calendar on July 20, 2020. See [NYSCEF Document No. 13](#).

4. Pursuant to an extensively negotiated three-attorney stipulation of settlement ("Stipulation"), this proceeding was settled. See [NYSCEF Document No. 10](#), paragraph 12.

5. The Stipulation provided in pertinent part that:

- Respondent would perform the scope of work annexed as Exhibit 1 of the Stipulation ("Remediation Work") in apartment G21 ("Apartment") in the building located and known as 97 Green Street, Brooklyn, New York 11222 (see [NYSCEF Document No. 10](#), page 1, second paragraph);
- Petitioner and Respondent's mold inspection companies were permitted to be present while the Remediation Work was being conducted (see [NYSCEF Document No. 10](#), paragraph 3);
- Upon completion of the Remediation Work, Respondent's mold inspection company, ALC Environmental ("ALC") was required to inspect and test the Apartment to ensure the Remediation Work was completed and prepare a written report ("ALC Post Remediation Report") and provide said report to Petitioner's counsel (see [NYSCEF Document No. 10](#), paragraph 4);
- Within 5 days of Respondent delivering the ALC Post Remediation Report to Petitioner's counsel, Petitioner's mold inspection company, Olmstead Environmental Services ("Olmstead") was required to inspect and prepare a written report to ensure the Remediation Work was completed and prepare a written report ("Olmstead Post Remediation Report") and provide said report to Respondent's counsel (see [NYSCEF Document No. 10](#), paragraph 5);
- In the event ALC and Olmstead could not agree if the Remediate Work was completed, either party could restore this proceeding to determine the issue of whether the Respondent did not comply with the Remediation Work (see [NYSCEF Document No. 10](#), paragraph 7); and

- In the event the Respondent established that the Remediation Work was completed, this proceeding shall be dismissed, with prejudice (see [NYSCEF Document No. 10](#), paragraph 7).

6. By motion dated June 14, 2022, Petitioner now seeks to restore this proceeding for a determination of whether Respondent complied with the Stipulation. See NYSCEF Document No. 11-16.

**I. PETITIONER'S MOTION TO RESTORE SHOULD BE DENIED**

**A. PETITIONER'S MOTION SHOULD BE DENIED BECAUSE IT IS UNSUPPORTED BY ANYONE WITH PERSONAL KNOWLEDGE**

7. As a preliminary matter, Petitioner's motion is supported solely by attorney affirmation, which lack any personal knowledge and should be wholly disregarded by this Court. See *JMD Holding Corp. v Congress Fin. Corp.*, 4 N.Y.3d 373, 384-385 (2005); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 563 (1980); *Palo v. Principio*, 303 A.D.2d 478, 479 (2003); *Hirsch v. Morgan Stanley & Co.*, 239 A.D.2d 466, 467 (1997)<sup>1</sup>.

8. While Petitioner's affirmation conclusory alleges that she has personal knowledge of the facts, she does not have personal knowledge of the pertinent facts relevant to the issue currently before this Court – whether Respondent completed the Remediation Work pursuant to the terms and conditions of the Stipulation.

9. Moreover, the Olmstead report annexed as Exhibit D to Petitioner's motion should also be disregarded by this Court as it is not in admissible form.

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<sup>1</sup> Petitioner should not be permitted to submit in its reply an affidavit because it would severely prejudice Respondent because Respondent is not entitled to sur-reply. See *Dannasch v. Bifulco*, 184 A.D.2d 415 (1<sup>st</sup> Dept 1992); *Ritt v. Lenox Hill Hosp.*, 182 A.D.2d 560 (1<sup>st</sup> Dept 1992); *Azzopardi v. American Blower Corp.*, 192 A.D.2d 453 (1<sup>st</sup> Dept 1993); *Schwarz v Edelman*, 2018 NY Slip Op 31735[U] (Sup Ct, NY County 2018).

10. It is well established that for the purposes of admitting a document into evidence as a business record under CPLR § 4518, a witness must establish: (1) that the document is made in the regular course of business (i.e., it reflects a regularly conducted business activity); (2) that it is the regular course of such business to make the document (i.e., the document is made pursuant to established procedures); and (3) that the document be made at or about the time of the event being recorded. *See People v. Kennedy*, 68 N.Y.2d 569 (1986); *see also* CPLR § 4518.

11. Additionally, where a record of corporate acts is authenticated by the officer in charge, the officer or the person responsible for authenticating the document must have personal knowledge of the business's record-keeping practices and procedures such that proper foundation is laid for their admission into evidence. *Ramade v. CB Contracting Corp.*, 127 A.D.2d 596, 597 (1st Dep't 2015).

12. Here, Petitioner's affirmation merely refers to the Olmstead report without establishing: (1) that the report was made in the regular course of Petitioner's business (i.e., it reflects a regularly conducted business activity); (2) that it is the regular course of Petitioner's business to make the report (i.e., the document is made pursuant to established procedures); (3) that the report be made at or about the time of the event being recorded; and (4) Petitioner has personal knowledge of the business's record-keeping practices and procedures such that proper foundation is laid for the reports admission into evidence.

13. Accordingly, Petitioner's motion is unsupported by any admissible evidence to establish that Respondent failed to comply with the Stipulation as alleged.

14. Based on the forgoing, Petitioner's motion should be denied in its entirety.

**B. PETITIONER'S MOTION SHOULD BE DENIED BECAUSE RESPONDENT  
COMPLIED WITH THE STIPULATION**

15. Notwithstanding that Petitioner's motion should be denied because it is not supported by anyone with personal knowledge or by any admissible documents, Petitioner's motion should also be denied and this proceeding dismissed because Respondent complied with the terms of the Stipulation and Petitioner's motion fails to mention nor establish how Respondent failed to comply with any specific term of the Stipulation or how ServPro failed to complete the Remediation Work.

16. Stipulations of settlement are binding, favored by the court, and not lightly cast aside. *Hallock v. State of New York and Power of Authority of the State of New York*, 64 N.Y.2d 224, 485 N.Y.S.2d 510 (1984).

17. As a general matter, the parties to a civil dispute are free to chart their own litigation course, and they may fashion the basis upon which a particular controversy will be resolved. In doing so, they may stipulate away statutory and even constitutional rights. See *Mitchell v New York Hosp.*, 61 NY2d 208 (1984); *Cullen v Naples*, 31 NY2d 818 (1972); *Astudillo v MV Transp., Inc.*, 136 AD3d 721 (2016); *Quilty v Cormier*, 115 AD3d 1229 (2014); *Durst v Grant*, 92 AD3d 1195 (2012).

18. A court shall interpret a stipulation of settlement, such as the Stipulation in this proceeding, in accordance with the plain and ordinary meaning of the terms set forth therein. *Ackermann v Ackermann*, 82 AD3d 1020 (2d Dept 2011); *Rosner v Rosner*, 143 AD3d 882 (2d Dept 2016)

19. Where a stipulation is clear and unambiguous on its face, the intent of the parties must be gleaned from the four corners of the instrument, and not from extrinsic evidence. *Rosenberger v Rosenberger*, 63 AD3d 898 (2d Dept 2009).

20. Here, this proceeding was settled pursuant to terms of the three-attorney Stipulation, which was extensively negotiated and involved the input of the respective parties and their experts. See [NYSCEF Document No. 10](#), paragraph 12.

21. The Stipulation provided in pertinent part, that Respondent would perform the Remediation Work in the Apartment. See [NYSCEF Document No. 10](#), page 1, second paragraph.

22. As established in the Stipulation, Glass Affidavit, Kowalewski Affidavit, and the ALC Post Remediation Verification Report annexed as **Exhibit A** ("ALC Post Remediation Report") there is no dispute that:

- Respondent was only required to perform the Remediation Work;
- On December 8, 2020, ALC and Olmsted were present in Apartment in the Building and conducted an inspection of the Apartment. After the inspection was completed, ALC and Olmsted agreed on the scope of the mold abatement work necessary for the Apartment, which was attached as Exhibit A to the stipulation of settlement filed in this proceeding;
- Olmstead and ALC were both permitted to be present while the Remediation Work was being conducted;
- On July 20, 2021, ALC, Olmsted, and ServPro conducted an initial inspection of the work area containment in the Apartment prior to the remediation work being commenced;
- From July 20, 2021 through July 27, 2021, ServePro conducted the Remediation Work. On each of these days, ALC was present to ensure ServPro completed the Remediation Work as set forth in the scope of work. Olmstead was not present on any of these days;
- On July 27, 2021, ServPro completed the Remediation Work as stated in the scope of work;
- On July 28, 2021, ALC completed a Post Remediation Verification. Olmstead was not present on this day;

- On August 3, 2021, ALC prepared a Post Remediation Verification Report; and
- The ALC Post Remediation Report establishes that the Remediation Work was completed and the Apartment was safe for habitation;

23. Consequently, Petitioner's motion should be denied and this proceeding should be dismissed because Respondent complied with all terms of the Stipulation.

24. Petitioner's motion incorrectly argues that this proceeding should be restored because "the evident purposes of the stipulation between the parties...was to eradicate the mold in the unit G21, and to restore the unit to a condition in which petitioner can occupy the unit." See [NYSCEF Document No. 12](#), paragraph 11.

25. Applying the cannons established in the case law cited above regarding interpretation and enforcement of stipulations to this proceeding, this Court is bound by the plain, clear, and unambiguous terms of the Stipulation and cannot look outside from the four corners of the Stipulation. Consequently, Petitioner's basis to restore this proceeding for reasons outside the terms of the Stipulation is improper and without merit.

26. Moreover, since Respondent has established that it completed the Remediation Work by admissible evidence no hearing is required to determine if Respondent complied with the Stipulation.

27. Notably, the only substantive proof that Petitioner provides in support of his motion is the Olmstead report, which as discussed above is inadmissible. Notwithstanding admissibility issues, the report fails to establish that Respondent failed to comply with the Stipulation by failing to complete the Remediation Work.

28. Instead, as more fully discussed in the Glass Affidavit, all the Olmstead post remediation report establishes is that after Olmsted **improperly** conducted a post remediation inspection of the Apartment on August 16 and 17, 2021 (which was after ALC's Post Remediation Verification) there was allegedly mold in the Apartment. More specifically, Olmsted cut holes in the ceiling, walls, and floors in the Apartment to conduct probing during his post remediation inspection. This conduct is not a standard and customary method to inspect for mold after mold remediation is completed and was not contemplated for in the Stipulation<sup>2</sup>. As established in *Bard v Mautner-Glick et al.*, Index No. 2266/2016 (Civ. Ct., NY County 2022) (Hon. Jack Stroller), which is a case identical to the case at bar, this is not a basis to restore this proceeding nor sufficient to establish that Respondent failed to comply with the Stipulation.

29. In *Bard*, the landlord and tenant stipulated that the landlord would complete mold remediation work as specified in a stipulation of settlement. Thereafter, the landlord completed the mold remediation as required by the stipulation. After the mold remediation work was completed by the landlord, the tenant's mold expert (**Olmsted**) conducted a post remediation inspection of the apartment by cutting the ceiling to conduct probing without any regulatory protections. After Olmsted improperly conducted its post remediation inspection, Olmsted alleged the Apartment had mold. The court held that the landlord complied with the stipulation and that Olmsted's improper inspection methods caused a mold condition after the mold remediation work was completed by the landlord and dismissed the proceeding. See a copy of *Bard v Mautner-Glick et al.*, Index No.

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<sup>2</sup> If the parties contemplated this type of post remediation work to occur, the parties would have included it in the Stipulation. The parties did not include this in the Stipulation.

2266/2016 (Civ. Ct., NY County 2022) annexed hereto as **Exhibit B, pages 26, 32-34, 52-53.**

30. Moreover, the court held that the tenant's argument that a subsequent finding of mold warranted denial of dismissal of the proceeding given that the condition still existed was rejected because the stipulation did not violate public policy since it required the landlord to remediate mold conditions based upon the standards of a licensed mold remediator using methods consistent with DOHMH Guidelines, which does not violate public policy. See **Exhibit B, pages 52-53.**

31. This proceeding fall squarely within the facts of *Bard*. Thus, this court should following its holding and dismiss this proceeding.

32. In the event this Court holds that Respondent complied with the terms of the Stipulation, but further remediation work is required due to the existence of mold in the Apartment, such remediation work should be conducted at Petitioner's sole cost and expense since Olmsted created the need for further mold remediation by improperly conducting its post remediation inspection.

### **CONCLUSION**

33. Based on the foregoing, it is respectfully submitted that Respondent's motion should be denied in its entirety and this proceeding be dismissed, with prejudice.

Dated: New York, New York  
July 28, 2022

*David M. Skaller*

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David M. Skaller  
(Rule 130-1.1-a)