SUPREME COURT, STATE OF NEW YORK
COUNTY OF NASSAU

**PRESENT: MARIE F. McCORMACK, ESQ.**
**COURT ATTORNEY REFEREE**

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**A.R.,**

Plaintiff,

**Index No.: XXXXXX/09**

*-against-*

**DECISION AND ORDER AFTER HEARING**

**G.R.,**

Defendant.

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## PROCEDURAL HISTORY

Before the Court is a post-judgment hearing. The plaintiff/former wife ("plaintiff") filed an order to show cause for contempt and/or for a money judgment against the defendant/former husband ("defendant") for alleged failure of the defendant to comply with certain provisions of the parties' stipulation of settlement ("stipulation"), dated October 1, 2012, which was incorporated, without merger, into the parties' judgment of divorce (Bennett, J.), entered on March 12, 2013. The issues raised in the order to show cause were referred to a hearing, and the parties consented to the undersigned Referee hearing and determining this matter. The matter was referred to the undersigned Referee by order (Zimmerman, J.) dated August 5, 2014. A hearing was held on the following dates: 9/30/14, 10/9/14, 2/10/15, 4/28/15, 8/19/15, 11/13/15, 12/4/15, and 12/14/15. The parties agreed to waive a hearing regarding counsel fees and agreed to have counsel fees determined on papers. Additionally, the parties agreed to have the issue of the apportionment of college expenses determined on papers. Post-trial memoranda and counsel fee submissions were submitted on February 19, 2016. The Court requested two additional submissions, regarding the tax impact of personal property loss and insurance reimbursement for personal property loss, and such documents were submitted on 4/20/16. The plaintiff is represented by Brancato, Brancato § Brancato, by Joseph A. Brancato, Jr., and the defendant is represented by Richman & Levine, P.C. by Keith H. Richman, Esq.

## BACKGROUND

The parties were married in 1991, and this divorce action was commenced on March 30, 2009. The parties were married approximately seventeen years at the time of

commencement, and the judgment of divorce was entered on March 12, 2013. As a result of an order of protection, the defendant was ordered to vacate the marital residence in June of 2009, and the plaintiff had exclusive use and occupancy of the marital residence until its sale in November of 2014. There are two children of the marriage, J., who was born in 1993, and is now twenty-two years old, and G., who was born in 1995, and is now twenty years old. The parties' children have been residing with the defendant since prior to the start of the school year in 2009.

The parties signed the stipulation on October 1, 2012. At the time of the signing of the stipulation, the martial residence, which was located on the canal in Massapequa, New York, had already been listed for sale at a price of $1,399,000.00. Unfortunately, on October 29, 2012, less than one month after signing the stipulation, Super Storm Sandy ("Sandy") occurred, causing widespread devastation to Long Island, and particularly to homes near the water. The marital residence sustained extensive damage due to Sandy, and this was the primary genesis of the parties' post-judgment legal disputes.

The parties could not agree on a listing price for the marital residence, post-Sandy. The plaintiff claims that she acted reasonably as to the repair and sale of the marital residence after Sandy. She asserted that she reduced the listing price, post-Sandy, to reflect the changed circumstances and that she otherwise complied with the stipulation. In view of this, she claims that she is entitled to certain reimbursements for carrying charges and repairs to the marital residence.

In contrast, the defendant claims that the vast majority of the aforesaid expenses incurred by the plaintiff were the result of the plaintiff's breach of certain provisions of the stipulation, in failing to reduce, reasonably, the listing price of the marital residence, given the devastation caused by Sandy, and in failing to sell the marital residence "as is." He further claims that the plaintiff did not prepare, in a proper manner, the marital residence for the impending storm. He claims that the plaintiff's own actions caused her to incur unnecessary expenses in relation to the marital residence, and thus, she is not entitled to reimbursement for the aforesaid expenses.

Ultimately, the marital residence was sold on November 25, 2014, with a sales price $500,000.00. The parties also received $250,000.00 in insurance proceeds. The proceeds of the sale were placed in escrow and are being held by the plaintiff's attorney. There is currently $317,072.03 being held in escrow pending the decision and order of this Court. The central focus of the instant hearing was the division of these proceeds. The plaintiff seeks reimbursement for: carrying charges on the marital residence up until the time it was sold, one-half the cost of repairs to the marital residence due to Sandy, foreclosure fees, one-half the fee for the public adjuster, college expenses and the legal fees she incurred in bringing this application. Additionally, she seeks enforcement of the stipulation with regard to preparation of a Qualified Domestic Relations Order ("QDRO"). The defendant is claiming that the plaintiff is not entitled to the reimbursements which she seeks, and further, he is claiming that he is entitled to reimbursements for his personal property, which was left in the marital residence.

## THE TESTIMONY

Both the plaintiff and the defendant testified. In addition, Nicholas B., a public adjuster, Carolyn S., one of the listing brokers for the marital residence, Robert L., the co-listing broker for the marital residence, and R.A., who is the son of the former wife from a previous marriage, also testified. The relevant portions of the testimony will be discussed below. As to credibility, the Court had the opportunity to assess the credibility of all witnesses. The Court found both parties to be fairly credible; however, there were some portions of the testimony where the plaintiff was vague, particularly relating to the pricing of the home and the status of the personal property.

### The Plaintiff's Testimony

The plaintiff testified that she is entitled to reimbursement for one-half the carrying charges of the marital residence for the period July 1, 2012 through January 1, 2013[1], as set forth in the parties' stipulation. The plaintiff presented evidence of those carrying charges at the hearing. The defendant does not dispute that he owes the plaintiff this reimbursement. Accordingly, the plaintiff is entitled to credit of $11,849.18 (one-half of $23,968.36) from the proceeds.

The plaintiff further testified that she is entitled to reimbursement for one-half the carrying charges for the marital residence for the period commencing January 1, 2013.

Article XI, ¶6 of the parties' stipulation states:

> Commencing January 1, 2013, the Husband shall contribute his fifty (50%) share of said expenses on a monthly basis through the date of closing.

The "said expenses" are delineated in the stipulation and consist of the mortgage payment, real estate tax, homeowners insurance obligations, and landscaping charges. She asserted that she is entitled to this reimbursement in that she was compliant with the terms of the stipulation. She stated that she acted reasonably with regard to the sale of the marital residence, post-Sandy. The plaintiff claimed that she agreed to even greater reductions than were required by the stipulation. The plaintiff asserted that she was required to make certain repairs to the marital residence (for example, heating and electrical repairs) in order that she could live in home pending a sale, and additionally, the repairs were necessary in order for a potential buyer to obtain a mortgage. The marital residence sustained severe damage due to Sandy, and she submitted an engineer's report detailing the damage. She also provided detailed bills regarding the repairs made.

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[1] The stipulation states January 1, 2012, as opposed to January 1, 2013, however, at the hearing, both parties acknowledged this was a typographical error.

The plaintiff continued to pay one-half (her share) of the monthly payment on the primary mortgage, as the defendant was not contributing to these payments. She continued to do so until September 2013, when the lender refused to accept partial payments. The total amount she paid on the primary mortgage after January 1, 2013 was $7,839.63. She continued to pay one-half (her share) of the monthly payment on the home equity loan until February 2013, when the lender refused to accept partial payment. The total amount she paid after January 1, 2013 on the home equity loan was $378.66. She thus claimed that the defendant owes her $4,109.14 (one-half the amount that she paid). The plaintiff further asserted that the defendant also owes her 50% of the insurance premiums for the post-January 1, 2013 period, which equal $1,153.74 (defendant's 50% share). She claimed that as a result of the defendant's failure to make mortgage and home equity payments post January 1, 2013, the lenders initiated foreclosure proceedings, resulting in foreclosure fees totaling $7,823.64 ($2,534.59 for the primary mortgage and $5,289.05 for the home equity loan); and thus, she claims, she should be reimbursed for these charges from the proceeds in escrow.

**The Defendant's Testimony**

The marital residence was already listed for sale at the time the stipulation was signed, and the stipulation provided for periodic reductions in the purchase price, if needed to effectuate a sale. The defendant claimed that the problem arose, however, when Sandy caused substantial damage to the marital residence, and consequently substantially reduced its market value. Not only did Sandy damage the marital residence itself, but it also wreaked havoc on the waterfront real estate market. These assertions were confirmed by the testimony of the real estate broker, Carolyn S., in that she testified that there was great uncertainty regarding the pricing of waterfront homes. Obvious concerns for buyers were potential flood damage and the cost of flood insurance for such waterfront homes. Sandy thus caused a dispute between the parties regarding an appropriate listing price for the home. The defendant claimed that Sandy was a catastrophic event that made performance of the stipulation with regard to the sales price impossible to implement. The stipulation states, in pertinent part,

> The parties acknowledge that the residence is on the market for sale at a listing price of $1,399,000.00. which listing price shall be reduced by five (5%) percent every thirty (30) days until the price is listed at $1.1M, unless otherwise agreed upon by the parties in writing. After 1 full year of a listing price at $1.1, the house will be decreased by 5% every 3 months until sold.

(Stipulation, Article XI, ¶3 [punctuation as in original]). The defendant claimed that it was impossible to follow the terms of the stipulation as to sales price, as Sandy greatly reduced the market value of the residence. According to his testimony, the defendant wanted to list the home "as is" for a greatly reduced price, immediately after Sandy. In November of 2012, six days after Sandy, the defendant wrote an email, which is in evidence, to Carolyn S., the real estate broker, stating that "I want this house sold as is. Look at the house and call me with a price." The

defendant testified that he wanted the house sold for $500,000.00 and additionally he anticipated $250,000.00 in insurance proceeds. The defendant claimed that he does not owe the plaintiff for carrying charges incurred after January 1, 2013 because the marital residence should have been sold immediately after Sandy (October 29, 2012). He argued that if the marital residence was listed immediately at a substantially reduced price, it would have been sold by January 1, 2013, and there would not have been carrying charges after this date. The defendant further asserted that if the marital residence was sold "as is", the $39,276.74 in repair expenses incurred by the plaintiff would have been unnecessary, and therefore, his position was that he does not have to reimburse her for one-half of the cost of these repairs.

The defendant further claimed that if the martial residence was sold in late 2012, the wife would not have incurred foreclosure expenses, as the residence would have been sold prior to the incurring of such expenses.

Additionally, the defendant claimed that he should not be responsible for the charges of the public adjuster. He testified that he did not sign the agreement with the public adjuster, and further, he was not consulted with regard to the hiring of the adjuster. Moreover, he claimed that there was no proof offered that the public adjuster was necessary. Further he asserted hat the parties would have received the full $250,000.00 in insurance proceeds, even if the public adjuster had not been hired.

The defendant also asserted that the plaintiff did not prepare, properly and in a reasonable manner, the marital residence for the impending storm. He claimed that as a result, the residence sustained damage that would have been preventable. Moreover, he testified that this lack of preparation also caused destruction to his personal property, which he valued at $55,000.00, according to his 2012 tax return, which is in evidence.

**DISCUSSION**

It is well settled that a stipulation of settlement in a matrimonial action is an enforceable contract between the parties (*Petrovovich v Obradovic*, 40 AD3d 1063,1065 [2d Dept 2007]). In *Etzion v Etzion*, 84 AD3d 1015, 1016 (2d Dept 2011), the Court stated,

> [p]arties are free to enter into agreements that 'not only bind [ ]them, but which the courts are bound to enforce' (Greve v Aetna Live-Stock Ins. Co., 30 NYS 668, 670 [1894]). Marital contracts are 'subject to principles of contract [construction and] interpetation' (*Rainbow v Swisher*, 72 NY2d 106,109 [1988]; *see Matter of Meccico v Meccico*, 76 NY2d 822, 823-824 [1990]; *Girardin v Girardin*, 281 AD2d 457, 457 [2001]).

"Where such an agreement is clear and unambiguous on its face, the parties' intent must be construed within the four corners of the agreement and not from extrinsic evidence" *Khorshad v Khorshad*, 121 AD3d 857, 857 [2d Dept 2014][internal quotation marks

omitted][citations omitted]). "[C]ontract language is unambiguous where it 'has a definite and precise meaning, unattended by danger of misconception in the purport of [contract] itself, and concerning which there is no reasonable basis for difference of opinion'" (*Chase Manhattan Bank v Traffic Stream (BVI)*, 86 F.Supp.2d 244, 256 (S.D.N.Y. 2000) quoting *Seiden Assocs., Inc. v ANC Holdings, Inc.,* 959 F.2d 425, 428 [2d Cir 1992] [alteration in original]). "Nor does ambiguity exist where one party's view strain[s] the contract language beyond its reasonable and ordinary meaning" (*Chase Manhattan* at 257 quoting *Seiden Assocs., Inc.* at 428 [internal quotations omitted][alteration in original].

The defendant argues that the clause of the contract regarding the initial listing price of $1,399,000.00 was impossible to perform due to Sandy and the resultant destruction to the marital residence and the waterfront real estate market. The doctrine of impossibility of performance has been described as follows:

> Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must have been produced by an unanticipated event that could not have been foreseen or guarded against in the contract.

(*Chase Manhattan* at 255 quoting *Kel Kim Corp. v Central Markets, Inc*., 70 NY2d 900, 902 (1987). Furthermore, "[u]nder New York law, where 'the risk which causes the alleged impossibility of performance is foreseen, accounted for, and allocated in the contract, failure to perform cannot be excused." *Chase Manhattan* at 255 quoting *Bank of Am. Nat'l Trust & Savings Assoc. v Envases Venezolanos, S.A.*, 740 F.Supp. 260, 267 (S.D.N.Y. 1990).

Here, the husband claims that the following provision of the stipulation was impossible to perform:

> 3. The parties acknowledge that the residence is on the market for sale at a listing price of $1,399,000.00. which listing price shall be reduced by five (5%) percent every thirty (30) days until the price is listed at $1.1M, unless otherwise agreed upon by the parties in writing. After 1 full year of a listing price at $1.1, the house will be decreased by 5% every 3 months until sold.

(Stipulation, Article XI, ¶3 [punctuation in original]). The husband asserts that due to the damage caused by Sandy to both the marital residence itself and the waterfront real estate market, it was impossible to sell the marital residence at $1,399,000.00 or even at 1.1 million. He argues that, therefore, the parties were bound by other provisions of the stipulation to act reasonably and to cooperate with each other to list and to sell the martial residence. He points to pertinent

language from the parties' stipulation to support his position. The stipulation states, "[t]he parties shall use their best efforts and work together to sign a contract of sale with prospective purchaser as soon as possible." (Stipulation, Article XI, ¶3). The stipulation further states,

> 4. Both parties shall cooperate with each other on a timely basis to use their best efforts to maximize the sales price of said premises available in the market and mutually agree upon a gross offering price. They shall list said premises with a broker that they mutually agree upon and shall proceed in a cooperative manner in all respects in dealing with each other, the real estate broker and/or brokers and prospective purchasers in connection with the selling of the marital residence...

(Stipulation, Article XI, ¶4).

The defendant argues that the above provisions of the stipulation required both parties to have cooperated and to have reduced the listing price in a reasonable manner in light of the circumstances. The testimony of both brokers indicated that there was a great reduction in market value in waterfront property, and, in particular, the area in which the marital residence was located. The broker, Ms. S., testified that it was a very erratic market after Sandy and there was a lack of sales after Sandy. There were "bottom feeders" –buyers looking for people in a desperate situation. Mr. L., the co-listing broker, wrote an email dated April 27, 2013 supporting this position. He wrote, "[the highest sale price for a damaged home has been $850,000.00 and it only had exterior damage-the house was elevated." It should be noted that the marital residence had interior and exterior damage and it was not elevated. The defendant provided evidence that he wanted the marital residence sold "as is." He desired to list the house at $500,000 and collect the insurance proceeds of $250,000.00. His position on the price was supported by Ms. S., who wrote, "[i]mmediately after Sandy in its damaged condition the property would have sold max $500,000." Had the marital residence been sold immediately after Sandy, the parties would not have had to spend any money on repairs or incur mortgage costs. He argues that the plaintiff refused to cooperate with him, she did not consult him before hiring the public adjuster, and she did not consult him before making repairs. He indicated that she would not even grant him access to the house to inspect it until late April of 2013 (nearly six months after Sandy), and that was the one and only time she granted him access to the house.[2] The defendant further argues that the plaintiff had exclusive use and occupancy and that she benefitted from delaying the sale. In addition, the defendant claims that the plaintiff did not prepare, properly, the house for the impending storm, thus the house and its contents sustained damage that could have been, to a large extent, avoidable. In this regard, he claims that she violated the following provision of the stipulation: "6. Until such time as the house is sold, the parties shall maintain the premises in good and reasonable care..." (Stipulation, Article XI, ¶6).

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[2] Correspondence indicates she offered him access in late April; the actual access occurred in May, due to the availability of all involved.

In contrast, the plaintiff asserts that the doctrine of impossibility of performance does not apply in that the risk was foreseen and addressed in the stipulation, as follows: "11. In the event of a fire or major destruction at the premises prior to closing of title, the parties agree to utilize the insurance recovery toward the repair of the home..." (Stipulation, Article XI, ¶11). She claims that, even though she was not required to do so, she reduced the purchase price at reasonable intervals, at the suggestion of the brokers. She stated that the divorce was acrimonious, and cooperation between the parties was not possible. The plaintiff further claims that the repairs were necessary in order to attract potential buyers and also to make the home habitable. She claims that she required the services of the public adjuster in order to obtain the full insurance proceeds.

The evidence regarding the listing price history of the marital residence was not entirely clear. The full real estate file was not available because it was maintained by the company for which the broker had previously worked. At the time of Sandy (October 29, 2012), the listing price was $1,399,000.00. There is an email which demonstrates that the plaintiff approved a reduction to $899,990.00 on April 28, 2013. The evidence did establish that on April 11, 2014, Mr. L., the co-listing broker recommended a listing price of $699,000.00, and that sometime in April of 2014, the listing price was reduced to $599,000.00. After this reduction, a contract of sale was signed on May 21, 2014, about one month after the reduction to $599,000, according to the testimony. The house sold for $500,000.00, and the closing took place on November 25, 2014, over two years after Sandy.

This Court finds that the doctrine of impossibility of performance is applicable herein. Sandy was an extraordinary weather event that could not have been foreseen and that caused mass devastation to homes on Long Island, particularly waterfront homes. Additionally, Sandy caused damage to the market for waterfront homes. Although the contract anticipated that insurance proceeds would be used if "major destruction" of the home occurred, this clause did not anticipate the devastation to the waterfront home market which resulted from Sandy. In other words, even if the home was repaired, fully, with insurance proceeds, its value was substantially reduced due to the occurrence of Sandy. The testimony of the real estate brokers, and other evidence revealed that there was a great reluctance to purchase waterfront property, particularly homes that were not raised, such as the marital residence.

As it was impossible to list and sell the marital residence pursuant to initial portion of Article XI, ¶3 of the stipulation, this Court now turns to other applicable provisions of the stipulation.[3] The stipulation states, "[t]he parties shall utilize their best efforts and work together to sign a contract of sale with a prospective purchaser as soon as possible." (Stipulation, Article XI, ¶3). The stipulation further requires that the parties "shall proceed in a cooperative manner in all respects in dealing with each other, the real estate broker and/or

[3] This Court notes that the plaintiff did not insist upon the strict application of the listing price of $1,399,000.00, thus, she implicitly accepted the applicability of the doctrine of impossibility of performance.

brokers and prospective purchasers in connection with the selling of the marital residence..." (Stipulation, Article XI, ¶4). This language is clear and unambiguous. It requires the parties to cooperate and to work together to sell the marital residence as soon as possible. The stipulation also requires the parties "to use their best efforts to maximize the sales price of said premises available in the market and mutually agree upon a gross offering price." (Stipulation, Article XI, ¶4). The stipulation therefore required the parties to cooperate and to sell the marital residence as soon as possible, given the market conditions. The stipulation did not require that the marital residence shall be sold for any price, but rather, a reasonable price, given the market conditions. The evidence will thus be evaluated in light of the aforesaid requirements of the stipulation.

**Carrying Charges from July 1, 2012 through January 1, 2013**

As set forth above, the defendant does not dispute that he was responsible for one-half the carrying charges for the period from July 1, 2012 through January 1, 2013. Accordingly, the plaintiff is entitled to credit of **$11,849.18** (one-half of $23,968.36) from the escrow funds.

**Carrying Charges Post-January 1, 2013**

Before the Court can address this issue, it must determine whether the plaintiff cooperated with the defendant in the sale of the marital residence. This Court finds that she did not. She did not communicate with him regarding the listing price of the residence. She did not permit him access to the home, despite his requests, until late April of 2013, nearly six months after Sandy. She did not consult with him regarding the repairs made to the martial residence. She did not consult with him regarding the hiring of the public adjuster. The evidence established that there was no contact with the defendant prior to the hiring of the public adjuster. The evidence further demonstrated that the plaintiff did not even discuss or consider the defendant's desire to sell the marital residence, "as is", immediately after Sandy. His expressed intent was to sell the marital residence for $500,000.00 and additionally obtain the insurance proceeds of $250,000.00, which would yield gross proceeds from the sale in the amount of $750,000.00. The contract of sale was not entered into until May of 2014. An email from one of the co-listing brokers indicated that as late as December 5, 2013, over thirteen months post-Sandy, the house was still listed at $899,000.00. The plaintiff was not acting reasonably with regard to the listing price of the marital residence. The evidence demonstrates that, due to the plaintiff, it was listed for an unreasonable price for an unreasonable period of time. The Court notes that the plaintiff benefitted from the delay in sale, as she had exclusive use and occupancy of the marital residence pending the sale, and the defendant was responsible for one-half the carrying charges. The email from the broker suggesting the $899,000.00 listing price was sent on April 27, 2013. The Court infers that this suggestion did not take into consideration the input of the defendant, but rather, it reflected the plaintiff's position. It would have been reasonable to list the home at this price for one month. By May 31, 2013, the house should have been listed at $550,000.00, the price suggested by the defendant plus enough to cover the price of the repairs. This would have given the plaintiff seven months to sell the home at the price that she had chosen. By that time, it was clear that the listing price was too high, and the defendant's desired

listing price, or a price within a reasonable range of it, should have been implemented. Had that occurred, the house likely would have been sold by August 31, 2013 (allowing for the house being listed for one month and sixty days to close), and there would have been no mortgage payment required in September. Accordingly, for the Chase mortgage the former wife is entitled to a credit of **$3,484.28.** For the Bank of America home equity loan ("BOA"), the former wife is entitled to a credit of **$189.33.** As to foreclosure fees for Chase mortgage, those were incurred after September of 2013, and thus the former wife is **not** entitled to a credit for these fees ($2,534.59), as the home would have been sold by then, had it been listed for a reasonable price. As to the BOA home equity loan, as the last payment that BOA would accept was in February of 2013, which was well prior to the August 31, 2013 date, the plaintiff is entitled a credit of **$5,289.05.**

**Payments for Insurance**

The evidence submitted demonstrated that insurance payments (homeowners and flood) made by the plaintiff in 2013 totaled $1,689.60, therefore the former wife is owed a credit of **$844.80.**

**Public Adjuster**

The public adjuster reduced his fee from $25,000.00 to $12,500.00. As stated above, the plaintiff did not contact the defendant before she hired the public adjuster. The defendant did not sign the contract with the public adjuster, which was dated, November 4, 2012. Moreover, phone records of the public adjuster, in evidence, demonstrate that there was a minimal number of phone calls made to and from the defendant and the public adjuster, and some were of such short duration that they were likely just messages left and not actual conversations. The first of these calls took place on January 28, 2013, well after the public adjuster was hired. There was also no evidence in the record that the hiring of the public adjuster was necessary, or that the parties would have received a lesser amount of insurance proceeds had the public adjuster not been hired. Therefore, the claim that the defendant incurred benefits from the hiring of the public adjuster does not have merit. In light of the foregoing, the plaintiff will not receive a credit for the money spent to hire the public adjuster.

**Repairs to the Marital Residence**

The defendant wanted to sell the home "as is", and thus, he argued that repairs were not necessary. The evidence demonstrated, however, that in order for any potential buyers to obtain a mortgage, some repairs would have been necessary. Moreover, the plaintiff was living in the home and some repairs were necessary to make it habitable. Contrary to the assertions of the defendant, there was insufficient evidence that the damage to the home itself could have been prevented by the plaintiff. The engineer's report, in evidence, indicates that there was a surge of water which entered the home and did damage to the residence, including, the rear windows, the gas boiler, the hot water heater, and the radiant heating system.

Notwithstanding the aforesaid, this Court finds that the plaintiff is not entitled to reimbursement for the total cost of the repairs, as she did not consult the husband prior to making these repairs. The plaintiff did not even allow the defendant to inspect the damage until late April of 2013. There was credible evidence that the defendant, who has been a transportation supervisor/mechanic for years and owned various tools and equipment, was quite handy, and would have been capable of making some of the repairs himself. The plaintiff claims that the contract provided for payment directly to the contractors for anticipated repairs in the amount of $4,500.00, and argues that this implies that the parties intended to use contractors for all repairs. The devastation of Sandy, however, was not anticipated. The stipulation requires the parties to cooperate. This Court finds that the plaintiff did not cooperate with the defendant in making the repairs to the marital residence. Even assuming that the defendant was not able to make the repairs himself, at the very least, the plaintiff should have allowed him access to the home and consulted him regarding the repairs. In light of the foregoing, it is not equitable that the defendant pay for one-half the repairs. The defendant thus will be responsible for 25% of the repairs. The plaintiff is therefore entitled to a credit of **$9,819.19** (.25 x $39,276.74)).

**College Expenses**

Article VI of the stipulation provides that the defendant is responsible for 60% of the college expenses of the children, and the plaintiff is responsible for 40% of such expenses (including, but not limited to, tuition, books, room, board, transportation, supplies, SAT preparation courses, laboratory fees and student activity fees). These expenses were capped at the cost of such expenses at a SUNY college/university. The stipulation further required the defendant to open a 529 College account for the benefit of the children in the collective sum of $50,000.00. Such $50,000.00 was to be applied toward the expenses, and when this sum was utilized fully, then the parties would become responsible for their pro-rata share. The plaintiff alleges that the defendant never opened the 529 College account as required by the stipulation. Furthermore, the plaintiff produced evidence that she paid $46,859.74 toward the children's college expenses. She argues that the defendant did not provide sufficient proof that he paid $98,947.69 in college expenses. Moreover, she claims that he allegedly paid $34,605.11 for the period prior to October 1, 2012 (the date that the parties signed the stipulation), and he is not entitled to reimbursement for such sum, as the stipulation does not apply to sums paid before the stipulation was signed. The plaintiff thus claims that she is entitled to a credit of $46,859.74 in college expenses, as this is less than the $50,000.00 that was to come from a 529 College account. In contrast, the defendant claims that both parties have already paid their full pro-rata share for college expenses. He provides a detailed schedule of the expenses that he paid, and this Court finds that the expenses listed are reasonable.

This Court finds, contrary to the argument of the plaintiff, that the parties intended to pay the pro-rata share for college for the children from the date the older child entered college (2011-2012 school year). The stipulation explicitly discussed payment of college expenses by both parties, and did not limit the responsibility of the parties to prospective college expenses. It is true that the defendant failed to open a 529 account as required by the stipulation, but this did not

cause any harm, as the parties' older child was already in college when the stipulation was signed, and the younger child was to commence college the following year; therefore, any loss in interest on the savings would have been negligible. Moreover, no proof regarding loss of interest or loss of tax benefits was offered. The evidence established that the older child completed a two year program at Suffolk Community College (2011-2012 and 2012-2013). The younger child is about to complete her third year of college (2013-2014, 2014-2015, and 2015-2016) at the University of Arizona. This amounts to five years of college at a SUNY cap of $20,000.00 per year, or $100,000.00. The defendant paid the first $50,000.00 in the children's college expenses. The balance subject to pro rata is $50,000.00. The defendant's obligation is 60% of $50,000.00, which equals $30,000.00. He has already paid $98,947.69, which is more than the $80,000.00 ($50,000.00 plus $30,000.00) that he was required to pay pursuant to the stipulation. The plaintiff's obligation is 40% of $50,000.00, which equals $20,000.00. She has already paid $46,859.74, which is more than the $20,000.00 she was required to pay pursuant to the stipulation. Accordingly, both parties have met their college expense obligations, and neither party shall receive a credit from the other party for college expenses.

**Preparation of a QDRO**

Article XIV of the stipulation required the defendant to pay all fees and prepare all documents necessary, for the plaintiff's attorney to review, in relation to the preparation of a Qualified Domestic Relations Order (QDRO) regarding the defendant's pension. The judgment of divorce was entered on March 12, 2013, and to date, the defendant has failed to comply with the stipulation in regard to the QDRO. Accordingly, the defendant shall be ordered to comply, as set forth below, with the provisions of the stipulation regarding preparation of a QDRO.

**The Defendant's Personal Property**

The plaintiff argues that the following terms of the contract are ambiguous:

> At the time of sale of the marital residence, the parties shall divide their personal effects, household furnishings and furnishings, and all other articles of personal property, tangible and intangible.

(Stipulation, Article XII, ¶1). Paragraph 2 of the same Article states,

> All clothing, jewelry, and personal effects of the HUSBAND shall be the sole and exclusive property of the HUSBAND and are presently in the HUSBAND's possession."

The plaintiff claims that the aforesaid paragraphs are ambiguous and do not set forth what the personal property consists of and which party is to receive which items of personal property. The parties, however, acknowledged that there was personal property in the marital residence prior to Sandy, as each of the parties took a tax deduction (loss) in the amount of $55,946.00. By their

tax returns they acknowledged that there was a total of 111,892.00 in personal property (furnishings, etc.) that was destroyed by Sandy. The parties, thus, can not take a position which contradicts their respective sworn tax returns (*Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422 [2009]). Accordingly, the defendant lost $55,946.00 in personal property as a result of Sandy. The defendant argues that he lost this property because the plaintiff failed to prepare the home, in a reasonable manner, for the impending storm. The plaintiff had exclusive occupancy of the marital residence and the stipulation states, "6. Until such time as the house is sold, the parties shall maintain the premises in good and reasonable care..." (Stipulation, Article XI, ¶6). The defendant alleges that the plaintiff's failure to prepare for Sandy was a violation of this provision in that she failed to "maintain the premises in good and reasonable care." The defendant requested access to the home to help prepare for Sandy, but the plaintiff refused to grant him access. The only precautions she took were to have the parties' son and a friend roll up the rug in the dining room and move the outdoor furniture away from the water's edge. The defendant argued that the plaintiff should have known better, particularly in light of the fact that the house incurred substantial damage from Hurricane Irene, which occurred in the Summer of 2011. The plaintiff also prevented defendant from having access to the house, after Sandy, so he could assess the damage to the personal property and salvage what he could. Instead, the plaintiff informed him that the personal property and furniture were destroyed by Sandy and discarded by her. The defendant provided a detailed list of personal items that were never returned to him. The list included various expensive tools and equipment, as well as items of sentimental value, such as a wooden sign made by his father.

The Court must address several issues in relation to the personal property. First, its value can be established by the declaration of the parties on their respective tax returns. Each party lost personal property with a value of $55,946.00. Second, the Court must determine if the plaintiff failed to act reasonably with regard to preparing the house for Sandy. This Court finds that the plaintiff did not take reasonable precautions regarding preparation for Sandy. The defendant offered assistance. She should have permitted him access so he could have moved some of the more valuable items to the second floor and/or moved them from the premises. The third issue the Court must address is the extent to which the plaintiff is responsible for the damaged personal property. It is difficult to determine with exactitude what items could have been salvaged if precautions were taken, but the plaintiff has made this assessment even more difficult in that she did not permit the defendant to have access to the home immediately after Sandy so that he could assess the damage. The plaintiff should not benefit from her wrongful conduct. The Court must thus attempt to fashion an equitable remedy. The Court finds that the plaintiff is responsible for one-third of the damage to the former husband's property, or $18,630.00 (.333 x $55,946.00). As the husband declared this a loss, the Court must tax impact this loss. According to a supplemental submission, which the Court requested from the parties, the tax impacting of the personal property would permit the husband to receive 60% of the $18,630.00 or $11,178.00. Accordingly, the defendant is entitled to a credit of **$11,178.00** for his lost personal property.

**Contempt**

"A motion to punish a party for civil contempt is addressed to the sound discretion of the court, and the movant bears the burden of proving the contempt by clear and convincing evidence" (*El-Dehdan v El-Dehdan*, 114 AD3d 4,10 [2d Dept 2013][*affirmed* 26 NY3d 19, 2015 NY Slip Op 07579 (Court of Appeals 2015)] quoting *Matter of Hughes v Kameneva*, 96AD3d 845,846 [2d Dept 2012][citation omitted]. In order to prevail on a motion for civil contempt the movant must establish by clear and convincing evidence that "1) a lawful order of the court, clearly expressing an unequivocal mandate was in effect, 2) that the order was disobeyed and the party disobeying the order had knowledge of its terms, and 3) that the movant was prejudiced by the offending conduct" (*El-Dehdan* at 16 [citations omitted]; Judiciary Law § 753[A]). "Once the movant establishes a knowing failure to comply with a clear and unequivocal mandate, the burden shifts to the alleged contemnor to refute the movant's showing, or to offer evidence of a defense, such as inability to comply with the order" (*El-Dehdan* at 17 [citations omitted). Additionally, in matrimonial actions, DRL § 245 requires that in order for the movant to prevail on a civil contempt motion for "default in paying any sum of money as required by the judgment or order" (DRL § 245), the movant must establish that "resort to other, less drastic enforcement mechanisms had been exhausted or would be ineffectual" (*El-Dehdan* at 23 quoting *Capurso v Capurso*, 61 AD3d 913, 914 [2d Dept 2009]).

As to criminal contempt, "a court may impose punishment for criminal contempt where a person is guilty of '[w]ilful disobedience to [the court's] lawful mandate' or '[r]esistence wilfully offered to [the court's] lawful mandate'" (*El-Dehdan* at 11 quoting Judiciary Law section 750[A][3],[4]). In contrast to civil contempt, the movant does not have to establish that his or her rights have been prejudiced (El-Dehdan at 11 [citations omitted]). The burden of proof in criminal contempt is beyond a reasonable doubt (*Matter of Rolon v Torres*, 121 AD3d 684 [2d Dept 2014][citation omitted]).

Here, both parties violated the terms of the stipulation that was incorporated, without merger, into the judgment of divorce. The defendant failed to open a 529 College Plan, failed to take steps necessary to prepare the QDRO, and failed to pay the pre-January 1, 2013 carrying charges. The plaintiff failed to cooperate and to act reasonably regarding the sale of the marital residence, the hiring of the public adjuster, the repairs to the marital residence, and the protection of the defendant's personal property. The relevant terms of the stipulation constituted clear and unequivocal Court mandates. The parties violated the Court mandates and had knowledge of the terms. The failure to prepare the QDRO and the failure to pay the carrying charges caused prejudice to the plaintiff. The plaintiff's violations of Court mandates caused prejudice to the defendant by causing him to incur unnecessary costs and to incur loss of his personal property. Contempt, however, is a drastic remedy, and this Court finds that there is an alternative means of enforcement available. There are sufficient funds being held in escrow to redress the parties for any harm suffered by these violations of Court mandates. The Court has ordered, herein, the distribution of the proceeds held in escrow in a manner which addresses the losses suffered by the parties. Accordingly, this Court finds that there has not been sufficient evidence presented to

establish a prima facie showing of contempt against the defendant, and therefore, the plaintiff's motion to hold the defendant in contempt is denied.

**Counsel Fees**

The parties stipulated that the Court could determine counsel fees on papers and waived a hearing as to counsel fees. Domestic Relations Law section 238 provides:

> In any action or proceeding to compel the payment of any sum of money in a judgment or order entered in an action for divorce, separation, annulment or declaration of nullity of a void marriage, or in any proceeding pursuant to section two hundred forty-three, two hundred forty-four, two-hundred forty-five, or two hundred forty-six, the court may in its discretion require either party to pay the expenses of the other in bringing, carrying on, or defending such action or proceeding. In any such action or proceeding, applications for counsel fees and expenses may be maintained by the attorney for the respective parties in counsel's own name and in counsel's own behalf.

The issue of counsel fees is "controlled by the equities and circumstances of each particular case" (*Basile v Basile,* 122 AD2d 759 [2d Dept1986] quoting *Ritz v Ritz*, 103 AD2d 802 [2d Dept 1984]). Among the factors to be considered by the court in determining whether an award is appropriate are the respective financial positions of the parties (*Borakove v Borakove,* 116 AD2d 683 [2d Dept 1986]), the financial needs of the parties and the parties' disparate incomes (*Hausman v Hausman,* 162 AD2d 590 [2d Dept 1990]), the time expended by counsel, the hourly rate for such services in the legal marketplace, the nature of the legal services rendered, the issues before the court and the professional standing of counsel (*DeCabrera v DeCabrera-Rosete,* 70 NY2d 879 [1987]). "[A]ny award of attorneys' fees should be based, inter alia, on the relative financial circumstances of the parties, the relative merit of their positions, and the tactics of a party in unnecessarily prolonging the litigation" (*Ventimiglia v Ventimiglia,* 36 AD3d 899 [2d Dept 2007] [citations omitted]). It is also well established that "in view of [a party's] obstructionist and dilatory tactics" an award of counsel fees to the opposing party is justified (*Rados v Rados,* 133 AD2d 536 [4th Dept1987][citations omitted]). For actions commenced after October 12, 2010, there is a rebuttable presumption that the less monied spouse is entitled to counsel fees (DRL § 238). This action, however, was commenced prior to October 12, 2010.

Here, both parties are seeking counsel fees in this post-judgment proceeding. The plaintiff was forced to bring this post-judgment proceeding for contempt and other relief in order to compel the defendant to comply with the provisions of stipulation, which were incorporated, without merger, into the judgment of divorce. The defendant claimed that the plaintiff also failed to comply with the stipulation. As discussed above, this Court has found that both parties have

violated the stipulation, and thus necessitated this litigation.

The Court must balance the equities herein and address the totality of the circumstances. Here, the wrongful conduct of the plaintiff outweighed the wrongful conduct of the defendant. Due to the plaintiff's conduct, the defendant incurred substantial economic loss. The plaintiff delayed the sale of the marital residence. This caused the defendant to incur thousands of dollars in the unnecessary accrual of mortgage interest (the home sold at least fifteen months later than it should have, based upon the plaintiff's unreasonable conduct), real estate taxes, homeowner's insurance, and attorney's fees. She failed to cooperate with the defendant regarding the repairs to the marital residence. She should have given him the opportunity to perform some of the services himself and/or to procure services at less cost. The plaintiff also failed to give the defendant the opportunity to prevent damage to and to salvage his personal property, which was located in the marital residence. The plaintiff benefitted from the delay in the sale of the marital residence, as she was living in the home. Overall, the plaintiff took an unreasonable position and forced an extensive hearing on this matter.

As to the relative financial position of the parties, in light of the agreed distribution of assets between the parties, each party waived spousal maintenance from the other party. Each party has sufficient assets to meet their respective needs. Moreover, there are sufficient sums being held in escrow for each party to pay their respective attorneys. The stipulation provides that "[a]ny legal fees due the attorneys shall be first paid from the proceeds of the house." (Stipulation, Article XI, ¶10[c]).

As to the legal services rendered to the parties, the affirmations, retainers, and billing records submitted and the conduct at the hearing demonstrated that both parties' counsel were highly qualified in the field of matrimonial law and the services performed were reasonable and commensurate with the issues herein. This matter was relatively complex, as it involved an extensive hearing, which took place over the course of eight days. For this post-judgment proceeding the plaintiff paid her attorney a retainer of $3,500.00 and has incurred $31,011.75 in legal fees. To date, she has paid her attorney $17,497.55, leaving a balance owed of $13,514.20. The defendant did not pay his attorney an initial retainer fee in this post-judgment proceeding and has incurred $68,159.16 in legal fees. To date, he has paid his attorney $3,397.00, leaving a balance owed of $65,159.16.

In the exercise of discretion, based upon the evidence and the credibility of the witnesses, the defendant will be awarded counsel fees in the amount of **(fifteen-thousand dollars) $15,000.00**, which shall be deducted from the plaintiff's share of the proceeds being held in escrow.

**Ordered paragraphs**

In view of the foregoing and in the exercise of discretion, based upon the evidence and the credibility of the witnesses, it is

**ORDERED** that the proceeds of $317,072.03 currently being held in escrow by the plaintiff's attorney, shall be distributed as follows:

**The plaintiff shall receive the following credits, which shall be deducted from the defendant's share of the escrow funds:**

carrying charges (pre-January 1, 2013)- $11,849.18
Chase mortgage payments- $3,484,28
BOA equity loan payments- $189.33
BOA foreclosure fees- $5,289.05
home and flood insurance- $844.80
home repairs- $9,819.19

**The defendant shall receive the following credits, which shall be deducted from the plaintiff's share of the escrow funds:**

personal property- $11,178.00
legal fee award to defendant- $15,000.00; and it is further

**ORDERED** that **$2,500.00** shall be held in escrow from the defendant' share of the escrow funds (for preparation of the QDRO); and it is further

**ORDERED** that after the aforesaid credits are distributed (including the defendant's counsel fee award), each party shall then be responsible for paying their own remaining legal fees to his/her counsel, and such fees shall be deducted from the parties's respective shares of the funds currently being held in escrow by the plaintiff's attorney; and it is further

**ORDERED** that after the aforesaid credits are distributed and the counsel fees are distributed, the remaining funds being held in escrow shall be distributed equally between the parties; and it is further

**ORDERED** that the aforesaid escrow funds shall be disbursed within thirty (30) days of the date of this decision and order; and it is further

**ORDERED** that the defendant shall pay all fees and submit all required documents to Lexington Pension Consultants for the preparation of a QDRO regarding the defendant's pension plan, and submit copies for the plaintiff's attorney to review, within 30 days of the date of this decision and order, and further, the defendant shall submit all required documentation to the defendant's pension plan administrator, as required, within 90 days of the date of this decision and order. The plaintiff shall cooperate in effectuating this order, including, but not limited to, signing all necessary documents. As set forth above, the plaintiff's attorney shall retain $2,500.00 in escrow from the defendant's share of the escrow funds, currently being held by the plaintiff's attorney, until such time that the defendant complies with this order; and it is further

**ORDERED** that if the defendant fails to comply with this order, the plaintiff is authorized to perform the defendant's obligations with respect to the QDRO, including, but not limited to, signing any necessary authorizations and documents; and further, any and all fees incurred by the plaintiff to effectuate this order, including counsel fees, shall be deducted form the $2,500.00 being retained in escrow; and further, in the event that any reasonable additional fees are incurred, the defendant is responsible for same.

Any relief requested herein, and not granted, is hereby denied.

This constitutes the decision and order of this Court.

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**Marie F. McCormack, Esq.**
**Court Attorney Referee**

DATED: Mineola, New York
May 3, 2016

To:
Joseph A. Brancato, Jr., Esq., counsel for the plaintiff
Keith H. Richman, Esq., counsel for the defendant