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BORDEN, J., dissenting. The majority's opinion rests on two premises, namely, that (1) our scope of review is limited to whether the trial court abused its discretion in denying the motion to open and set aside the stipulated judgment in question and (2) in light of that limited scope of review, there was sufficient evidence in the record to support the trial court's determination that Thomas Sansone, the attorney for the plaintiff, Yale University, had apparent authority to enter into that judgment. I disagree with both premises. I therefore dissent.

I begin with the scope of our review. As the majority opinion acknowledges, the plaintiff has expressly disavowed any challenge to the facts found by the trial court. Although the question of agency is a question of fact when the evidence is conflicting or is susceptible of more than one reasonable inference; *Maharishi School of Vedic Sciences, Inc.* (*Connecticut*) v. *Connecticut Constitution Associates Ltd. Partnership*, 260 Conn. 598, 606, 799 A.2d 1027 (2002); agency becomes a question of law when, as in the present case, the facts are undisputed. *Russo* v. *McAviney*, 96 Conn. 21, 24, 112 A. 657 (1921). Furthermore, it is a question of law when, as I will discuss, no reasonable fact finder could find agency in the circumstances of this particular case. *Hallas* v. *Boehmke & Dobosz, Inc.*, 239 Conn. 658, 674, 686 A.2d 491 (1997). Although, as the majority notes, ordinarily the scope of appellate review of a trial court's ruling on a motion to open a judgment is abuse of discretion, that scope of review does not apply when, as in the present case, the decision on that motion depends entirely on the purely legal question of whether, under the undisputed facts of the case, Sansone had apparent authority to stipulate to the judgment in question. Put another way, a trial court cannot have discretion to deny a motion that depends entirely on a question of law. See *Water Pollution Control Authority* v. *OTP Realty, LLC*, 76 Conn. App. 711, 713–14, 822 A.2d 257 (plenary review applies when purely legal question concerning standing was presented in motion to open), cert. denied, 264 Conn. 920, 828 A.2d 619 (2003). Thus, contrary to the approach of the majority, the trial court's conclusion that Sansone had apparent authority is not entitled to deference on appeal. We review that conclusion de novo.

I turn next, therefore, to the question of whether, on the undisputed facts of the present case, Sansone had apparent authority to bind the plaintiff to this stipulated judgment. I would conclude that he did not.

The law of apparent authority is well settled, particularly as it applies, as in the present case, to the apparent authority of an attorney to bind his client by way of

stipulating to a judgment. "Apparent authority must be derived not from the acts of the agent but from the acts of his principal. [T]he acts of the principal must be such that (1) the principal held the agent out as possessing sufficient authority to embrace the act in question, or knowingly permitted him to act as having such authority, and (2) in consequence thereof the person dealing with the agent, acting in good faith, reasonably believed, under all the circumstances, that the agent had the necessary authority."[1] (Internal quotation marks omitted.) *Hallas* v. *Boehmke & Dobosz, Inc.*, supra, 239 Conn. 674. It "*must appear from the principal's conduct that the principal held the agent out* as possessing sufficient authority to embrace the act in question, or knowingly permitted [the agent] to act as having such authority." (Emphasis added.) *Gordon* v. *Tobias*, 262 Conn. 844, 851, 817 A.2d 683 (2003). Thus, only a principal with actual authority can clothe an agent with apparent authority, and that clothing must appear from his conduct or his knowing permission of the agent's acting as if he had such authority.

Furthermore, it is unquestioned that the authority to settle a claim rests with the client, not the attorney. *Rodriguez* v. *State*, 76 Conn. App. 614, 623–24, 820 A.2d 1097 (2003). "An attorney who is authorized to represent a client in litigation does not automatically have either implied or apparent authority to settle or otherwise to compromise the client's cause of action." *Acheson* v. *White*, 195 Conn. 211, 213 n.4, 487 A.2d 197 (1985). The authority of an attorney to negotiate on behalf of a client does not imply actual authority or clothe him with apparent authority to settle a matter. See *Norwalk* v. *Board of Labor Relations*, 206 Conn. 449, 453, 538 A.2d 694 (1988) (counsel with authority to negotiate on behalf of client "was without authority to bind [client] to a settlement"); see also *Johnson* v. *Schmitz*, 237 F. Sup. 2d 183, 192 (D. Conn. 2002) (counsel's authority to engage in negotiations is "distinct and materially different [from his] authority to execute or agree to a specific settlement"). Application of these principles leads to the conclusion that Sansone had no apparent authority to enter into the stipulated judgment on behalf of the plaintiff.

First, it is worthy of note that, as the plaintiff explains, this judgment had at least one significant adverse effect on the plaintiff's claim to ownership of the property in question, which is located in downtown New Haven. Under the terms of the stipulation, despite the fact that the defendant, Out of the Box, LLC, did not concede the plaintiff's right to ownership or possession of the parcel in question, and despite the fact that the defendant retained the right to bring claims of adverse possession, prescriptive easement or related claims, thus creating clouds on the title, only the defendant, and not the plaintiff, could bring a quiet title action. Thus, if someone approached the plaintiff to buy the property,

the plaintiff would be at the defendant's mercy insofar as clearing the title of the clouds created by the defendant's claims is concerned.

Second, the question of whether Sansone had apparent authority to enter into this stipulation has been clarified by three appropriately candid concessions of the defendant at oral argument in this court. The defendant candidly acknowledged that (1) neither David Newton, the plaintiff's director of university properties, nor Sansone had actual authority to settle the case, (2) only Bruce Alexander, the plaintiff's vice president for New Haven and state affairs and campus development, had actual authority to settle the case and (3) therefore, to prevail, the defendant must have established that Alexander clothed Sansone with apparent authority. This is clear, moreover, from the bylaws of the plaintiff, introduced into evidence, and from the undisputed fact that throughout the lengthy negotiations, all of the proposed leases and other documents showed Alexander's signature as acting on behalf of the plaintiff. Indeed, Suzette Franco-Camacho, one of the defendant's principals, testified specifically that Alexander never told her that Sansone had authority to settle, and that she was led to believe that he had such authority solely from the fact that he had been negotiating on the plaintiff's behalf and that he appeared in court. Furthermore, the defendant's attorney testified that " 'the only people that possibly could have' " led him to believe that Sansone had authority to settle were Sansone himself and Newton.

The question, then, becomes quite simple: did Alexander do anything to clothe Sansone, the plaintiff's attorney, with apparent authority, or knowingly permit him to act as if he had actual authority, to settle this matter? The answer is clearly no. All that Alexander did was to permit Sansone to enter into a series of *negotiations* with the defendant and to send Sansone to court to *negotiate* in an effort to reach a settlement of the matter. Negotiation is precisely what attorneys are hired to do on behalf of a client, but it is the client that makes the decision on settlement. The authority of an attorney to negotiate on behalf of a client, which is unquestioned, does not and cannot clothe him with apparent authority to settle the case on the client's behalf. *Norwalk* v. *Board of Labor Relations*, supra, 206 Conn. 452; *Johnson* v. *Schmitz*, supra, 237 F. Sup. 2d 192.

The only matters that the majority relies on for the assertion that Alexander clothed Sansone with apparent authority to settle are: (1) the lack of a finding that "either the . . . defendant or [its attorney] were told or made aware that Alexander's approval was required to settle the dispute"; and (2) Alexander's response to an e-mail sent to him by Franco-Camacho, in which Franco-Camacho had asked for Alexander's involvement in what *Franco-Camacho*, not Alexander, charac-

terized as "otherwise below your concern," a characterization that, according to the majority, Alexander "did not address" in his response. From these, the majority argues that "the issue of authority was raised by Alexander, and he did not address that issue. By this omission or inadvertence, Alexander caused or allowed the members of the defendant to believe that Sansone, part of the team that had been, in effect, the 'face' of the plaintiff, possessed the authority to settle the dispute."[2] This simply cannot be.

First, the majority's reliance on the lack of a finding that either the defendant or its attorney was told that Alexander's approval was required for the settlement turns the law on its head. When the apparent authority of an attorney to settle is at issue, it is the other party's burden to establish that the principal and client—in this case, Alexander—clothed the attorney with apparent authority; it is not the principal's or client's burden to show that it told the other party that only the client, and not the attorney, has the authority to settle.

Second, the lengthy e-mail exchange between Franco-Camacho and Alexander not only is wholly bereft of support for the weight placed on it by the majority, it belies that support. The exchange began with a lengthy, unsolicited e-mail, the date of which is not indicated, from Franco-Camacho to Alexander, the full text of which is set forth in the following footnote.[3] On May 19, 2006, nearly four months before the "settlement" at issue in this case, Alexander replied at length with an e-mail of his own, the full text of which is set forth in the following footnote.[4]

Nowhere in either e-mail is Sansone even mentioned, either by name or by reference to his role as the plaintiff's attorney. Furthermore, contrary to Franco-Camacho's characterization that the matter of the dispute between the plaintiff and defendant was "otherwise below [Alexander's] concern," the fact of and the content of Alexander's reply indicates clearly that it was definitely *within* his concern.[5] Thus, the fact that Alexander did not specifically address Franco-Camacho's characterization of "the matter" between them, in the majority's phrasing—which "matter" was, by the way, not the question of Alexander's authority, as the majority suggests, but the underlying real estate dispute—in no way can be construed as confirming that characterization. Alexander had no duty specifically to address every assertion or characterization in Franco-Camacho's lengthy and, at times, very personal, e-mail. He certainly cannot be held to have clothed Sansone with apparent authority to enter into a settlement four months later merely by not specifically addressing that characterization, in the context of a response that, on its face, specifically did address the substance of her concerns and showed that he was directly concerned with those concerns on the plaintiff's behalf. Finally,

the majority's metaphorical assertion that Sansone was "part of the team that had been, in effect, the 'face' of the plaintiff," adds nothing to the analysis of apparent authority. The "team" was vested solely with the authority to negotiate, which is what attorneys and subordinates normally do on behalf of their clients and principals. Therefore, if Sansone was the "face" of the plaintiff, he was the negotiating "face," which did not, absent something from Alexander clothing him with apparent authority, give him apparent authority to settle the case. In this case, there simply was no such "something."

The wise words of the United States Court of Appeals for the Second Circuit in a similar case bear repeating here. "We realize that the rule we announce here has the potential to burden, at least occasionally, [trial] courts which must deal with constantly burgeoning calendars. A contrary rule, however, would have even more deleterious consequences. Clients should not be faced with a Hobson's choice[6] of denying their counsel all authority to explore settlement or being bound by *any* settlement to which their counsel might agree, having resort only to an action against their counsel for malpractice." (Emphasis in original.) *Fennell* v. *TLB Kent Co.*, 865 F.2d 498, 503 (2d Cir. 1989).

Whether one views this case through the prism of a total lack of evidence to support a determination of apparent authority in Sansone or through the prism that no reasonable fact finder could find apparent authority, the conclusion is the same. Sansone had no apparent authority to bind his client to this settlement, and the client should not be bound by it.

I would, therefore, reverse the judgment and remand the case with direction to grant the motion to open and set aside.

[1] In the present case, it is clear to me that the defendant has not met the first part of this two part test, namely, whether the principal held out the agent as having sufficient authority or knowingly permitted him to act as having such authority. I therefore do not discuss the second part of the test. I note, however, that the plaintiff also claims that the second part of the test was not satisfied by the evidence in the case.

[2] The majority also cites the fact that Newton, Alexander's subordinate, who, the majority recognizes, "had received the authority *to engage in settlement discussions*"; (emphasis added); was present when Sansone stipulated for the settlement and "agreed to each term," as support for "the claim that Sansone had the apparent authority to complete the settlement." This fact cannot provide any such support. First, the authority to engage in settlement discussions—which means no more than the authority to *negotiate*—does not imply the authority to *settle*. Second, it escapes me how a subordinate's authority to negotiate, along with the principal's attorney, can provide support for the assertion that his principal clothed the attorney with the apparent authority to settle. Third, it is undisputed that Newton had no authority to settle; indeed, the defendant's concession that only Alexander had such authority completely strips Newton's conduct of any support for the claim that Alexander clothed Sansone with such apparent authority.

[3] The full text of the e-mail sent by Franco-Camacho to Alexander provides as follows:

"Dear Bruce,

"I write to you at the risk of asking for your involvement on an issue that

is most certainly otherwise below your concern. I know how busy you are especially since you recently took on additional responsibilities at the university. But in the past we were incredibly appreciative of your generosity to help us resolve a very difficult situation regarding the aftermath of Franco's arrest. As we fear we are facing difficult times again, this time surrounding the easement issues from our building, I hoped it would not be considered too forward for me to reach out one last time in hopes that perhaps there is still a solution that could avoid a legal process and still put your concerns at ease.

"I should say, I know that I can be stubborn at times (though one can't really survive in our business without a little persistence) and I did resist for quite some time to understand the importance of eliminating any potential future adverse possession claims on your property. But now that we are finally in the position (for the first time) of being able to sign the license agreement as the owner rather than wait for the previous owner to sign on our behalf, I have come to understand that the agreement is about preserving the university's future growth and there are probably few parcels left for you to develop. Sometimes we restaurateurs can be stuck in the present in order to remain successful but I've come to appreciate that it must be difficult sometimes to protect the long-term interests of the university at the expense of otherwise reasonable requests that are short-term in comparison. I can only presume that this is the difficult situation in which the university stands but it requires maintaining tough lines at times.

"I hope also that you can appreciate how far we've come in complying with your initial requirements regarding the easement issues. Four years and several hundred thousand dollars later, we were able to accommodate a second means of egress inside by giving up a sizeable amount of dining space. I have come to understand now that for the university to protect its future right against all adverse possession claims, that perhaps there can be no physical structures existing on your property. I should say that I would be very grateful if there were a way to sign a waiver to any and all future claims and continue leasing the shed even with a termination clause that allows you short notice for removal. But even that is not as important to me now as simply the right for my family and only my family to be able to exit the rear of the building. Years ago, when these discussions began, David Newton had consistently told us that if we made the investment in creating a second means of egress inside the space, that he would ensure that, just for our personal use, we would be given some license to be able to exit.

"This last consideration has become so important to me because of the implications for my children. To me knowledge, we are the only family with young children that has made the commitment to pioneer in downtown living by buying a residence that is right in the middle of the downtown. As I watch all these condos go up around me and hear that the developers are struggling to recruit families into their buildings, I am eager to show that our story has been so positive in hopes that it will continue to help the revitalization of downtown. However, these past few months without access through the back have been difficult and I am very afraid of the impact opening our restaurant is going to have on our ability to continue to live above. If I can't walk my dogs or bring my children in and out of our home without taking them through the restaurant, I have to consider the substantial negative impact this will have on them. We have been proud to be a part of the downtown renaissance and we hope that the investment we've made both in our home as a model of what downtown living can be and also our newest restaurant will continue to set high standards for the downtown. That is the most important part of we have respected deeply that it is also your top priority as well. But I am also a mother and I must worry about my kids. Being a small business owner of any kind is always difficult but being a restaurateur has even far greater challenges to raising a family and I am worried that if we do not have a safe place for my children and our pets to enter and exit in the evenings when the restaurant is open then I may not be able to continue living downtown and then, after pioneering for so long, I fear we will only have proven the 'nay-sayers' right that downtown New Haven isn't a place for families to live.

"If signing the license agreement could still allow us this consideration for our family, then I would be eager to sign it. But as I see this process push down a certain path, I was wondering if there wasn't a way to step back on last time and perhaps with ten minutes of your time I could show you the issues at the building so that you could see the situation as we see it and even perhaps if you could help us see alternatives that could alleviate

the issue that perhaps we haven't seen ourselves. Again, at this point, the only issue that I see as insurmountable is the ability for my family to have a private exit and entrance into our home that does not pass through the restaurant. I suppose I am recalling these few times in the past when you have stepped in and shown us great neighborly support and I am hoping that perhaps it could be possible to trouble you once more in this way knowing you probably have the most experience with these issues and that your intentions both for the university and for downtown development are the most pure.

"I am writing this letter outside the legal process that has begun intentionally to your attention. If you find it isn't possible to meet with us briefly, I would be grateful if you could get back to me directly so that I at least know it has reached you.

"Thank you very much for your time to read this note.

"Best Regards,

"Suzette"

[4] The full text of Alexander's reply e-mail to Franco-Camacho provides as follows:

"Dear Suzette,

"Thank you for your email. After carefully reviewing the matters about which you wrote I feel University Properties has acted appropriately.

"As much as University Properties would like to be neighborly, there are now plans to develop the lot in question and it is inappropriate to use the University's property—at a substantial loss of useable land for future development—to provide an easement for the convenience of an adjacent property owner. There is also little point providing a temporary solution when a permanent one will need to be found shortly.

"With respect to the second issue of the shed on our property, my review of the correspondence indicates that University Properties has made it clear that they have always been willing to grant you a license for its use, but the University must be protected from liability. Since they are trying to accommodate you, it seemed peculiar that your lawyer should demand a series of concessions in return for your signing it. He must feel that you have property rights and the only way to resolve that matter, if the license is not signed, is through the courts, regrettable though that is.

"I now also understand that you have never signed the renewal of the Roomba lease, a matter which is well over a year old. Since this distinguishes you from our other 84 retail tenant I have asked University Properties to send you new execution copies and have requested that they resolve the matter promptly with you.

"We respect and recognize your hard work and contributions to New Haven and continue to wish you and your family well with your endeavors.

"Best regards,

"Bruce Alexander"

[5] I confess that I am baffled by the majority's reliance on the passing references in Alexander's response to the role of University Properties. Although the majority does not make clear what or who "University Properties" is, the record does so. Newton was Director of University Properties and, as such, reported directly to Alexander, and was responsible for day-to-day management of the plaintiff's apartment units, retail spaces (including the parcel at issue in this case), and office space. It is clear, therefore, that University Properties was simply the real estate arm of the plaintiff, under the authority of Alexander. Indeed, the majority's reliance on these passing references is even more inexplicable in light of the fact that both Franco-Camacho and the defendant's attorney specifically testified that nothing Alexander had said had led them to believe that Sansone had authority to settle; there was no evidence that the defendant, either by its principals or its attorney, relied on these passing references in forming their belief that Sansone had authority to settle.

[6] I note that the use of the term "Hobson's choice" was inaccurate under the circumstances in *Fennell* v. *TLB Kent Co.*, 865 F.2d 498 (2d Cir. 1989). "That term does not signify a situation in which either alternative may be unfavorable; rather, it represents an illusory choice that is, in fact, no choice at all." *State* v. *Perkins*, 271 Conn. 218, 273 n.2, 856 A.2d 917 (2004) (*Katz*, *J.*, dissenting); see also *State* v. *Messler*, 19 Conn. App. 432, 436 n.3, 562 A.2d 1138 (1989) ("The term is derived from the practice of Thomas Hobson . . . an English liveryman, of requiring each customer to take the next available horse. Thus, in modern usage a Hobson's choice is '[a]n apparent freedom of choice with no real alternative.' American Heritage Dictionary of the English Language, New College Edition, [p.] 626."). Consequently, a

Hobson's choice is not a choice between two nags; it is, instead, the "choice" to take the nag that is chosen for you. The course that the court in *Fennell* was deploring was a choice between two unfavorable alternatives, not an illusory choice that was, in fact, no choice at all.