

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

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DUE PESCI INC. d/b/a
AGENT R.E.D. INTERNATIONAL,

Plaintiff,

-against-

THREADS FOR THOUGHT, LLC a/k/a
THREADS 4 THOUGHT INC., and
SUSTAINABLE APPAREL GROUP, LLC a/k/a
SUSTAINABLE APPAREL GROUP INC.,

Defendants.

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BRANSTEN, J.

Index No. 651879/10
Motion Date: 10/06/2011
Motion Seq. No.: 003

Defendants Threads for Thought, LLC a/k/a Threads 4 Thought Inc. (“TFT”) and Sustainable Apparel Group, LLC a/k/a Sustainable Apparel Group Inc. (“Sustainable,” and, with TFT, “Defendants”) move pursuant to CPLR 3211 to dismiss Plaintiff Due Pesci Inc.’s (“Plaintiff”) fourth cause of action against Sustainable for tortious interference with contract. Plaintiff opposes the motion.

PROCEDURAL HISTORY

On June 17, 2011, the court granted Plaintiff’s motion to amend the First Amended Complaint. Service of the Second Amended Complaint (“Complaint”) was deemed effective as of March 18, 2011.

Plaintiff alleges four causes of action in the Complaint. Plaintiff asserts its first three causes of action against TFT. Complaint, ¶¶ 27-50. Plaintiff asserts its fourth cause of action for tortious interference with contract against Sustainable. Complaint, ¶¶ 51-57.

On April 7, 2011, Defendants TFT and Sustainable moved to dismiss or stay the action as against TFT, to compel arbitration and to dismiss the Plaintiff's fourth cause of action for tortious interference with contract against Sustainable. Defendants filed a memorandum of law in support of their motion ("Defendants' Memo"), an affirmation in support from Wook Hwang ("Hwang Affirm.") and an affidavit in support from Jonathan Wiesner, a principal and member of both Defendants ("Wiesner Aff.").

On May 2, 2011, Plaintiff filed an affirmation in opposition by Scott Rubman ("Plaintiff's Affirm."). Defendants replied to Plaintiff's opposition on May 10, 2011, by filing a reply memorandum of law in support ("Defendants' Reply Memo"), a reply affirmation in support from Jonathan Zavin ("Defendants' Reply Affirm.") and a reply affidavit in support by Mr. Wiesner ("Wiesner Reply Aff.").

Oral argument was held on September 30, 2011. *See* Transcript of Oral Argument of September 30, 2011 (Lee Ruthen, Official Court Reporter) ("Transcript"). The case was fully submitted on October 6, 2011.

Plaintiff is currently pursuing its first three causes of action against TFT in arbitration. Transcript, p. 2, lines 10-18. These causes of action are thus not here considered. *Id.* Plaintiff's fourth cause of action against Sustainable for tortious interference with contract is therefore the sole issue of the instant motion.

FACTUAL BACKGROUND

Plaintiff is a sales agent for garment manufacturers. Complaint, ¶ 4. Plaintiff sells the manufacturers' garments to retail outlets and department stores. *Id.*

Defendant TFT designs and distributes apparel lines. Wiesner Aff., ¶ 3. Defendant Sustainable is an operating company that runs the business operations related to distribution of TFT's apparel lines, including shipping, billing and payment collection. *Id.*

In October 2009, Plaintiff and TFT signed a two year agreement for Plaintiff to sell TFT's garments to retail outlets and department stores (the "Agreement"). *Id.*, ¶ 6. Plaintiff claims that it was the exclusive sales agent for TFT's apparel within specific types of department stores and retail outlets (the "Exclusive Territory"). Complaint, Ex. A ("Agreement"), ¶ 7. The Agreement provides that TFT pay Plaintiff commissions for orders placed through Plaintiff by customers within the Exclusive Territory. Complaint, ¶ 53.

The Agreement provides for termination by either party "by giving the other party notice in writing of termination within ninety (90) days prior to the end of the current term." Agreement, § 7.

Plaintiff claims that on or about July, 2010, TFT began selling its apparel within the Exclusive Territory through Sustainable rather than through Plaintiff. Plaintiff alleges that this was in violation of the Agreement. Complaint, ¶ 18. Plaintiff alleges that Belk Department Store, one of the named department stores within the Exclusive Territory, informed Plaintiff that TFT had stated to Belk that Plaintiff was no longer representing TFT as its sales agent. *Id.*, ¶ 21. Plaintiff also submits affidavits of third party buyers in the

Exclusive Territory in support of its argument in opposition to Defendants' motion. The third party buyers state that Sustainable contacted them and informed them that, going forward, they were to place orders through Sustainable rather than through Plaintiff. Plaintiff's Affirm., Exs. B, C, D. The court further discusses the contents and reliability of these affidavits in its analysis. *See* discussion *infra* Part 3. Plaintiff further alleges that it repeatedly notified TFT that it was in violation of the Agreement. *Id.*, ¶¶ 19-22.

Plaintiff alleges that Sustainable had knowledge of and deliberately caused TFT to breach the Agreement with Plaintiff. Complaint, ¶¶ 54-56. Sustainable and TFT are affiliated entities with common ownership. Wiesner Aff., ¶ 4. Jonathan Wiesner is a principal and member of both Sustainable and TFT. *Id.*, ¶ 4. Mr. Wiesner holds a fifty-percent ownership interest in TFT. Wiesner Reply Aff., ¶ 5. Mr. Wiesner is the sole member and holds all ownership interest in Sustainable. *Id.*, ¶ 6.

On August 30, 2010, Mr. Wiesner sent an e-mail to members of Plaintiff. The e-mail stated:

We have been informed by ENK/Coterie that you have told them that you are no longer representing Threads for Thought. While this is a somewhat unusual method to submit your resignation as our sales agent...through a third party, we accept your resignation effective immediately.

Complaint, Ex. B (the "Termination E-mail").

Plaintiff filed this suit because it believes that Sustainable tortiously interfered with TFT's Agreement with Plaintiff. Complaint, ¶¶ 51-57.

ANALYSIS

Sustainable's Motion to Dismiss

In the context of a 3211 motion to dismiss¹, the court takes the facts alleged in the complaint as true and accords the non-movant the benefit of every possible favorable inference. *See AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 5 N.Y.3d 582, 591 (2005). Further, any deficiencies in the complaint may be amplified by supplemental pleadings and other evidence. *Id.*, citing *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635-36 (1976). “[T]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail.” *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1997). Under CPLR 3211(a)(1), “a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the claims as a matter of law.” *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994).

Tortious Interference with a Contract

In order to state a cause of action for tortious interference with contract, a plaintiff must allege “the existence of a valid contract between the plaintiff and a third party, defendant’s knowledge of that contract, defendant’s intentional procurement of the third-

¹ The Court notes that Plaintiff relies on the standard for a dismissal of a pro se complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiff’s Affirm., ¶ 6. Because the instant motion is a Rule 3211 motion and the Plaintiff is not pro se, the appropriate standard is that of a CPLR Rule 3211 motion to dismiss.

party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 424 (1996). The plaintiff must also allege that the contract would not have been breached "but for" the defendant's interference. *Washington Ave. Assocs., Inc. v. Euclid Equip., Inc.*, 229 A.D.2d 486, 487 (2d Dep't 1996). "Although on a motion to dismiss the allegations in a complaint should be construed liberally, to avoid dismissal of a tortious interference with contract claim a plaintiff must support his claim with more than mere speculation." *Burrowes v. Combs*, 25 A.D.3d 370, 373 (1st Dep't 2006). The allegations cannot be merely "vague and conclusory." *Washington Ave. Assocs.*, 229 A.D.2d at 487.

1. *Breach of a Valid Contract*

It is undisputed that Plaintiff entered into the Agreement with TFT and that the Agreement established Plaintiff as a sales agent for TFT's apparel. Complaint, ¶ 6.

The issue of breach of the Agreement by TFT is currently being resolved in arbitration between Plaintiff and TFT. Transcript, p. 2, lines 10-18. Plaintiff alleges that TFT has failed to comply with the terms of the Agreement and, despite that the Agreement provides for the use of Plaintiff as TFT's exclusive sales agent within the Exclusive Territory, that TFT used Sustainable as its sales agent within the Exclusive Territory during the term of the Agreement. Complaint, ¶¶ 18-21. Plaintiff alleges that it repeatedly notified TFT that it was in violation of the Agreement. *Id.*, ¶¶ 19-22. Plaintiff stated to TFT that it had been notified

that TFT was informing stores within the Exclusive Territory that Plaintiff no longer represented TFT. *Id.*, ¶¶ 19-22.

Viewing all facts in the light most favorable to the plaintiff, this court finds that plaintiff has sufficiently plead the existence of valid contract and breach of contract.

2. *Sustainable's Knowledge of the Agreement*

Plaintiff alleges that Sustainable knew of the Agreement and knew that the Agreement established Plaintiff's right to act as TFT's sole sales agent within the Exclusive Territory. Complaint, ¶ 54. Because Mr. Wiesner is the sole owner of Sustainable, (Wiesner Reply Aff. ¶¶ 5-6), and because Mr. Wiesner sent an e-mail to Plaintiff regarding TFT's agreement with Plaintiff, the court finds that Sustainable had knowledge of the Agreement and of its content.

3. *Sustainable's Intentional Procurement of the Breach*

Plaintiff alleges that Sustainable "procured or caused defendant Threads to breach the Agreement and that the procurement or causation of the breach was deliberate[.]" Complaint, ¶ 56. Defendants argue that Plaintiff has not sufficiently plead that Sustainable procured TFT's breach of the Agreement. Defendants' Memo, pp. 5-8.

A plaintiff's claim for tortious interference with contract must contain allegations that the defendant intentionally procured an actual breach by the contracting party, and that the defendant did so without economic justification. *Levine v. Yokell*, 258 A.D. 296, 296 (1st

Dep't 1999). Plaintiff provides sufficient support for its allegation that Sustainable deliberately procured the breach by TFT.

a. The Opposition Affidavits

Plaintiff attached to its Affirmation in Opposition affidavits of buyers who formerly placed orders through Plaintiff for TFT's apparel, pursuant to the Agreement. ("Opposition Affidavits"). See Plaintiff's Affirm., Exs. B, C, D.

The court notes that it appears only the affidavit in Exhibit B ("Iyamba Affidavit") has been properly executed. The affidavit in Exhibit C ("Cohen Affidavit") and the affidavit in Exhibit D ("Bortnik Affidavit") appear to have been improperly executed. The affidavits in Exhibits C and D are notarized by a Texas notary despite the fact that the affiants reside in New York and Pennsylvania respectively. Plaintiff's Affirm., Exs. C, D. No statement is made that the affiants were in Texas when they signed the documents. Additionally, in Exhibit C, the notary's original signature appears next to a photo-copy of the affiant's signature. However, Plaintiff's attorney has affirmed, under penalty of perjury, as to the validity of the papers annexed to his affirmation. Plaintiff's Affirm, ¶ 2. Thus, under Plaintiff's attorney's oath, the court will consider their contents below.

In the Cohen Affidavit, Rachel Duke Cohen avers that she is a "Store Manager/Senior Buyer at Downtown" and that she has done business with the Plaintiff since March of 2007. Plaintiff's Affirm., Ex. C, ¶¶ 4-5. Ms. Cohen states that she was introduced to TFT through

Plaintiff. *Id.*, ¶ 6. She began purchasing TFT apparel on or about March of 2009. *Id.*, ¶ 7. Ms. Cohen states that she was notified by “TFT/Sustainable Apparel” on or about September of 2009 that she should place all orders for TFT apparel through Sustainable rather than through Plaintiff. *Id.*, ¶ 8. Plaintiff and TFT entered into the Agreement in October of 2009. Complaint ¶, 6. Ms. Cohen’s affidavit speaks to a time period not covered by the Agreement. It is thus not relevant to plaintiff’s tortious interference claim. Sustainable could not interfere with an agreement that did not yet exist. The court notes that although Ms. Cohen refers to an attached e-mail in her affidavit to further evidence the alleged communications she had with Sustainable, (*id.*, ¶ 9), no such e-mail is attached.

In the Iyamba Affidavit, Ini Iyamba avers that she is an “Owner/Buyer at Ivy Boutique” and that she has done business with the Plaintiff since February of 2007. Plaintiff’s Affirm., Ex. B, ¶¶ 4-5. Ms. Iyamba states that she was introduced to TFT through Plaintiff. *Id.*, ¶ 6. She began purchasing TFT apparel around March 2009. *Id.*, ¶ 7. Ms. Iyamba states that she was contacted by Sustainable on or about September of 2009 and in March of 2011, and told that she was to place all orders for TFT apparel through Sustainable rather than through the Plaintiff. *Id.*, ¶ 8. Ms. Iyamba also refers to “attached e-mails” in her affidavit, (*id.*, ¶¶ 8-9), and again the court notes that no e-mails are attached.

In the Bortnik Affidavit, Elena Bortnik avers that she is an “Owner/Buyer at Grace Boutique” and that she has done business with Plaintiff since 2001. Plaintiff’s Affirm., Ex. D, ¶¶ 4-5. Ms. Bortnik states that she was introduced to TFT through Plaintiff. *Id.*, ¶ 6.

She began purchasing TFT apparel on or about March of 2009. *Id.*, ¶ 7. Ms. Bortnik states that she was notified by “Sustainable Apparel” on or about September of 2010 that she should place all orders for TFT apparel through Sustainable rather than through Plaintiff. *Id.*, ¶ 8. Ms. Bortnik also refers to “attached e-mails” in her affidavit. Again, no e-mails are attached.

b. Timeline

Defendants argue that the Agreement was terminated, at the latest, August 30, 2010, the date on which Jonathan Wiesner sent the Termination E-mail to TFT. Defendants’ Reply Memo, p. 5. The e-mail stated that TFT had been informed that Plaintiff had told third party buyers that Plaintiff no longer represented TFT as TFT’s sales agent. Complaint, Ex. B. TFT accepted this news as Plaintiff’s resignation, effective at the time of the Termination E-mail. Complaint, Ex. B.

Defendants argue that the communications alleged within the Opposition Affidavits by Sustainable to third party buyers within the Exclusive Territory are dated either before the commencement of the Agreement or after the Termination E-mail. Defendants’ Reply Memo, pp. 4-5. Defendants contend that the affidavits thus cannot support an inference that Sustainable caused or procured TFT’s alleged breach of the Agreement. *Id.*

Plaintiff argues that the Agreement did not terminate on August 30, 2010. Complaint, ¶ 19. Plaintiff contends that the Agreement provides for termination “by giving the other

party notice in writing of termination within ninety (90) days prior to the end of the current term.” Complaint, ¶ 12; Agreement, § 7. Plaintiff contends that TFT did not provide ninety days notice of termination as required by the Agreement. Complaint, Ex. C. Plaintiff responded to the August 30, 2010 e-mail from Jonathan Wiesner with an e-mail stating that the Agreement does not provide for an early termination, that the Plaintiff has never resigned its duties and that the Agreement is in full force and effect through October 2011. *Id.*, Ex. B. Plaintiff sent another e-mail to TFT on September 8, 2010, rejecting TFT’s termination proposal and stating that “my client has continued and will continue to uphold its contractual obligations and will expect the same of [TFT].” Complaint, Ex. C. Plaintiff sent an additional e-mail to TFT on September 20, 2010, in which Plaintiff threatened legal action if TFT continued to conduct business in contravention of the Agreement. Complaint, Ex. E. Thus, Plaintiff argues that TFT never properly provided notice of termination under the terms of the agreement. Complaint, Ex. E.

Viewing all facts in the light most favorable to the Plaintiff, the court finds that Plaintiff has sufficiently plead that the Agreement was in full force and effect during the time period in which Plaintiff alleges that Sustainable began contacting buyers within the Exclusive Territory. The court finds that Plaintiff has sufficiently alleged that Sustainable contacted buyers within the Exclusive Territory during the term of the Agreement and that Sustainable knew of the Agreement. Plaintiff has thus sufficiently plead that Sustainable deliberately procured or caused TFT to breach the Agreement.

4. “But For” Causation

Plaintiff asserts that “the Agreement would not have been breached but for Sustainable’s conduct.” Complaint, ¶ 56. Plaintiff alleges in its Opposition Affidavits that Sustainable contacted third party buyers within the Exclusive Territory and informed the buyers that they are to place orders through Sustainable rather than through Plaintiff. Plaintiff’s Affirm., ¶¶ 10-11; Exs. B, C, D. By doing so, Plaintiff alleges that Sustainable has deprived Plaintiff of its exclusive contractual right to sell TFT merchandise to customers. Complaint, ¶¶ 51-57.

At this early pleading stage, the court finds that with the facts alleged in the Complaint and Plaintiff’s Affirmation taken as true, the plaintiff has adequately supported its assertion that the Agreement would not have been breached but for Sustainable’s conduct. Plaintiff must specifically allege that TFT would not have breached the Agreement “but for” Sustainable’s conduct. *Washington Ave. Assocs.*, 229 A.D.2d at 487. Thus, Plaintiffs have sufficiently stated the essential element of causation.

5. Damages

Plaintiff must allege that it suffered damages as a result of Sustainable’s conduct. *Lama Holding Co.*, 88 N.Y.2d 413, 424. Plaintiff has alleged that, as a result of the deprivation by Sustainable of Plaintiff’s exclusive contractual right to sell TFT’s apparel, it has suffered in excess of \$150,000. Complaint, ¶¶ 51-57. Therefore, Plaintiff has sufficiently stated the damages element of a tortious interference claim.

6. *Economic Justification*

To state a cause of action for tortious interference with contract, Plaintiff must also allege that Sustainable intentionally procured TFT's breach of the Agreement without justification. *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 424 (1996).

Defendants argue that Sustainable and TFT, as affiliated entities with overlapping ownership structures, are economically justified in interfering with the contracts of one another. Defendants' Memo, pp. 8-10. Defendants cites to several cases in support of its contention.

The cases Defendants rely on differ from the instant case both in the stage of litigation as well as in the facts alleged that established the defense of economic justification.

First, in *Felsen v. Sol Cafe Mfg. Corp.*, the Court of Appeals reversed a jury finding that defendants had unjustifiably interfered with a contract. The Court of Appeals held that the evidence indicated that the defendant was reasonably concerned that plaintiff employee's conduct was damaging the internal management of the affiliated company. *Felsen v. Sol Cafe Mfg. Corp.*, 24 N.Y.2d 682, 687-88. The Court held that defendants were privileged to interfere with the employment contract to protect their economic interest, so long as they did not employ improper means. *Id.*

Here, Defendants have stated that Sustainable was justified in allegedly interfering with the Agreement because, as an affiliate of TFT, it has an economic interest in TFT's contracts. Defendants' Memo, p. 8. However, unlike in *Felsen*, Sustainable has not stated

that it was reasonably concerned that allowing the Agreement to continue would damage its economic interest. Defendants have alleged that TFT had terminated the Agreement with Plaintiff early based on hearing from third party buyers that Plaintiff was representing that it was no longer TFT's sales agent. Defendants' Reply Memo, p. 5; Wiesner Reply Aff., Ex. D. Plaintiff refutes the claim that it did so, and contends that, upon receipt of the Termination E-mail, it promptly notified TFT that this was not the case. Complaint, Ex. B. Thus, Sustainable has not conclusively established that it interfered with the Agreement because it was concerned that the Plaintiff was not selling TFT's goods as per the Agreement, and that it was therefore justified in interfering with the Agreement in order to protect its economic interest.

Second, in *Foster v. Churchill*, the Court of Appeals affirmed the Appellate Division's affirmation of the Supreme Court's trial decision. The Court of Appeals held that defendants, a group of venture capital firms that owned 75% of another company named Microband, were privileged to interfere with Microband's employment contracts. *Foster v. Churchill*, 87 N.Y.2d 744, 749-51 (1996). Similar to *Felsen*, the Court held that defendants were economically justified in interfering with Microband's contracts "[t]o the extent that [defendants] acted to preserve the financial health of an ailing Microband[.]" *Id.*, at 751.

Here, Sustainable has not established that it was acting to preserve the financial health of its affiliate, TFT. Sustainable does not plead that it was acting to preserve TFT's financial health or acting to protect another economic interest when it allegedly contacted third party

buyers within the Exclusive Territory and instructed them to place orders through Sustainable rather than through Plaintiff. Further, Plaintiff alleges that it has improved TFT's sales, and that from the time Plaintiff helped launch the TFT apparel line, TFT has gained over \$2,000,000 from sales made by Plaintiff. Complaint ¶¶ 15-17. Interfering with the Agreement therefore appears to harm TFT's economic interest, rather than to aid it. Thus, Sustainable has not established, at this stage in the pleadings, that it believed it was in its economic interest to interfere with the Agreement.

Third, Defendants cite to *Gulf Ins. Co. v. Mian Contracting, Inc.* in support of its argument that the Plaintiff must here plead "facts that would support a finding [] that defendant acted with malice or employed fraudulent or illegal means to induce the breach." *Gulf Ins. Co. V. Mian Contracting, Inc.*, 6 Misc.3d 1016(A), *2 (Sup. Ct. Kings County Dec. 2, 2004). Defendants argue that Plaintiff has failed to plead facts that would support such a finding. Defendants' Memo, pp. 8-9.

In *Gulf Ins. Co.*, the plaintiff stated that the defendant believed it was in its financial interest to obtain payment under a surety bond rather than to permit the contracting party to complete the work due under the contract at issue. *Gulf Ins. Co.*, 6 Misc.3d 1016(A), *2. Supreme Court Justice David I. Schmidt held that the plaintiff's cause of action for tortious interference with contract must be dismissed. *Id.* The court found that the plaintiff's claims amounted to no more than an allegation that the defendant's actions were economically motivated. *Id.* Plaintiff did not, however, plead facts that would support a finding that

defendant acted with malice or employed fraudulent or illegal means, as is required when a defendant conclusively establishes an economic justification defense. *Id.*

In the instant case, Defendants argue that because the Complaint alleges that Sustainable was “selling the merchandise of defendant [TFT],” Plaintiff has itself established Sustainable’s economic justification defense to its tortious interference claim. Defendants’ Memo, pp. 8-9 at Part B (quoting Complaint, ¶ 55). Defendants’ argue that because TFT and Sustainable are affiliated, it was in Sustainable’s interest to sell TFT’s merchandise. *Id.* However, acknowledging that Sustainable was selling the merchandise of TFT is not akin to stating that Sustainable did so because it believed it was in its economic interest, rather than allowing the sale through the Agreement.

At this stage in the pleadings, Sustainable has not conclusively established its economic justification defense. As a result, Plaintiff need not plead that Sustainable acted with malice or employed fraudulent or illegal means in allegedly interfering with the Agreement. The court will thus not dismiss Plaintiff’s claim on these grounds.

The court here considers a pre-answer motion to dismiss pursuant to CPLR 3211. A pre-answer dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense as a matter of law. *Leon*, 84 N.Y.2d at 88. While it may be that Plaintiff will have difficulty proving its claim, it has sufficiently plead its cause of action for tortious interference with contract. Defendants’ motion to dismiss is denied.

Finally, the court notes that the issue of TFT's alleged breach of the Agreement is an element of plaintiff's cause of action for tortious interference with contractual relations. This allegation is presently being resolved in arbitration. *See* Transcript, p. 2, lines 10-18. As a result, while discovery is to continue, dispositive motions in this action are stayed pending the results of arbitration, so as to avoid inconsistent judgments.

Accordingly, it is hereby

ORDERED that Defendants' motion to dismiss the Second Amended Complaint is DENIED; and it is further

ORDERED that dispositive motions in this action are hereby stayed pending final resolution of the arbitration between Plaintiff and TFT, and the parties hereto are directed to notify the court and arrange a status conference upon the conclusion thereof.

This constitutes the decision and order of the court.

Dated: New York, New York
February ___, 2012

ENTER:

Hon. Eileen Bransten, J.S.C.