

**150 Nassau Assoc. LLC v RC Dolner LLC**

2011 NY Slip Op 30337(U)

February 14, 2011

Sup Ct, New York County

Docket Number: 601879/04

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHKE

PART 10

Justice

Index Number : 601879/2004  
**150 NASSAU ASSOCIATES LLC.**  
 VS.  
**RC DOLNER LLC**  
 SEQUENCE NUMBER : 014  
 COMPEL DISCLOSURE

INDEX NO. \_\_\_\_\_  
 MOTION DATE \_\_\_\_\_  
 MOTION SEQ. NO. 014  
 MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

FEB 14 2011

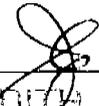
NEW YORK COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

*and status conference is scheduled for April 7 2010 & Note of Issue is extended to April 8, 2010*

FEB 09 2011

Dated: \_\_\_\_\_

  
HON. JUDITH J. GISCHKE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

150 NASSAU ASSOCIATES LLC,  
Plaintiff/Counterclaim Defendant,

-against-

RC DOLNER LLC and KENSINGTON-  
NASSAU, LLC,

Defendant/Counterclaim Plaintiff,

KENSINGTON-NASSAU, LLC,

Additional Counterclaim Plaintiff,

-against-

150 MEZZANINE LLC, YITZCHAK TESSLER,  
2 SPRUCE STREET LLC, FREMONT  
INVESTMENT & LOAN, MATRIX MECHANICAL  
CORP., MEDCO PLUMBING INC., PARAGON  
PIPING, INC., EAGLE ONE ROOFING, INC,  
TRANSEL ELEVATOR, INC., W&M  
SPRINKLER CORP., PRECISE BRICK, INC,  
EUROCRAFT TILE & MARBLE, INC., NEW  
YORK CITY ACOUSTICS, INC., DAVID  
MARCATO, KARL FISCHER ARCHITECTS,  
ATLANTIC HEYDT CORPORATION, CASEY  
SYSTEMS, INC., PATROLAND GUARD  
ENTERPRISES, INC., DWF, INC.,  
IN/EXTERIOR CORP., ONE SOURCE  
PAINTING and L. KANNER FLOORING  
SYSTEMS, INC.,

Additional Counterclaim Defendants,

Defendants.

**Decision/Order**

Index No.: 601879/04  
Seq. No. : 012, 014

Present:  
Hon. Judith J. Gische  
J.S.C.

**FILED**

**FEB 14 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

-----X

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

PAPERS	NUMBERED
<b>Motion seq. 12</b>	
150 Nassau n/m (compel, PSJ) w/FHS affirms (2) and HDS affid w/exhs . . . . .	1
RCDolner, Kensington Nassau X/M (sanctions) w/TCN affirm, exhs . . . . .	2
Fiorello affid in support (sep back) . . . . .	3
150 Nassau reply/ further support w/FHS affirm, Rose affid, exh . . . . .	4
RCDolber sur-reply w/TCN affirm, Israely affid, exhs . . . . .	5
 <b>Motions seq. 14</b>	
RCDolner n/m (compel) w/TCN affirm (sep back), exhs . . . . .	6, 7
RG affid (sep back) . . . . .	8
RCDolner proposed order (sep back) . . . . .	9
150 Nassau X/M (SJ on CC) w/FHS, RM affirms, exhs . . . . .	10
Medco opp w/BRS affirm, exhs . . . . .	11
RCDolner further support and opp to x/m w/ AJF affid . . . . .	12
RCDolner reply w/ TCN affirm, exhs . . . . .	13

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*Upon the foregoing papers, the decision and order of the court is as follows:*

The underlying action by 150 Nassau Associates, LLC ("150 Nassau") is for, among other relief, damages arising from an alleged breach of contract and for an exaggerated mechanic's lien. Defendants RCDolner, LLC ("Dolner") and Kensington-Nassau, LLC ("Kensington-Nassau") (collectively "Dolner/KN") have asserted counterclaims against 150 Nassau Mezzanine, LLC ("150 Mezzanine") and others in their answer.

Presently there are two motions and two cross motions before the court for it to decide. 150 Nassau has moved (motion sequence 12) to compel Dolner's response to its discovery demands by providing its accounting records in electronic or "raw" form. Alternatively, as a sanction, 150 Nassau seeks summary judgment, dismissing Dolner's 5<sup>th</sup> and 6<sup>th</sup> counterclaims. Dolner/KN has cross moved for sanctions. Dolner/KN has

separately moved to compel 150 Nassau to comply with its discovery demands by, among other things, providing tax returns for various entities that have invested in the project that is the subject of this action. 150 Nassau has cross moved in response to that motion for summary judgment dismissing all of Dolner's counterclaims. Both motions and cross motions are consolidated herein for decision in this order.

Since there has already been extensive motion practice in this case, the reader is presumed to be familiar with the parties' overarching dispute and the facts. They will only be set forth in a condensed form.

The court's decision and order is as follows:

### **Arguments**

This action involves a dispute between plaintiff 150 Nassau, the owner and developer of a landmarked office building at 150 Nassau Street, New York, New York ("building") and Dolner, the construction manager hired by 150 Nassau to oversee the renovation of the building. The parties entered into a Construction Management Agreement dated June 6, 2001 ("CMA") at a guaranteed maximum price of \$26,041,744, from which Dolner was required to pay all subcontractors and obtain a release for each payment it made. If a subcontractor filed a lien, RCDolner was required to discharge it.

There is also another dispute involving a membership and profits agreement ("M&PA"). That agreement, between counterclaim defendant 150 Mezzanine, LLC ("150 Mezzanine") and Kensington-Nassau, LLC ("KN"), provides that KN stands to acquire a membership interest, and share in the consequential profits of, 150 Mezzanine, provided it met certain conditions therein, including that Dolner was in compliance with the terms

of the CMA. The provision that is particularly germane to the motions before the court is Article XXIV of the CMA that requires that Dolner allow 150 Nassau access to its accounting records, for up to six years, following completion of the project (CMA, Article XXIV). 150 Mezzanine is 150 Nassau's parent company. Yitzhak Tessler ("Tessler") is a principal of those companies. He is also the principal of 2 Spruce Street, LLC ("Spruce"), the company that later acquired the building from 150 Nassau.

150 Nassau's motion (sequence 12) is to compel access to Dolner's electronic accounting records which are maintained in electronic form. According to 150 Nassau, not only is this required in discovery, it is an essential term of the CMA which should be enforced. Apparently Dolner does not maintain one comprehensive document like a general ledger which would reconcile the accounts payable and accounts receivable on the project. Dolner has, however, provided 150 Nassau with a disbursements log. The disbursements log sets forth: (i) disbursements for subcontractors or vendors that provided goods or services in connection with the project, categorized by trade code/division; (ii) requisitions or invoices submitted by subcontractors or vendors and the date of the requisition or invoice, in chronological order; (iii) the date that requisitions or invoices were approved and/or processed by Dolner; (iv) the amount approved of the requisitioned or invoiced amount; (v) the amount of retainage, if any, by Dolner; (vi) the amount that previously was paid to each subcontractor or vendor; (vii) the total amount paid to date to each subcontractor or vendor; (viii) the total balance due to each subcontractor or vendor; and (ix) the date and number of the last check provided to the subcontractor or vendor. These documents were provided in response to 150 Nassau's motion.

150 Nassau insists, however, that this information and the documents provided are difficult to use because they are provided in PDF form, not native language, and they do not indicate the dates and amounts or payments made by 150 Nassau to Dolner, nor do they show the submission of requisitions by subcontractors.

Alternatively, 150 Nassau argues that if Dolner is not ordered to provide this information, then 150 Nassau is entitled to partial summary judgment on Dolner and KN's 5<sup>th</sup> and 6<sup>th</sup> counterclaims. Those counterclaims are for KN's share of membership and profits interests under the M&PA. 150 Nassau claims that Dolner, by failing to provide access to its books and records, as required under the CMA (Article XXIV), breached the M&PA and, therefore, cannot maintain an action sounding in breach of contract when the requirements which were the very consideration for the contract have not been met.

Dolner and KN oppose 150 Nassau's motion and have cross moved for sanctions pursuant to Part 130 of the Rules of the Chief Administrator of the New York Courts. Dolner and KN assert that 150 Nassau's motion was not brought in good faith, because Dolner has made all the relevant accounting records related to the project available, producing 16 different categories of records totaling over 2,200 pages. Dolner contends that 150 Nassau's request for accounting records in "raw, electronic" (i.e. native) format is completely new and 150 Nassau has not shown any prejudice by only having PDF format documents.

Dolner states that it previously notified 150 Nassau's attorneys that the information 150 Nassau believes should be reflected in a "general ledger" is, in fact, found in four "sub-ledger" records already produced Dolner which are: Detail Payment

Approval by Trade, Detail Payment Approval by Vendor, Purchase Order Allocation by Vendor and the Cash Receipts/Monthly Deposits and Account Analyses.

Dolner's CFO ("Fiorello") provides his sworn affidavit stating that every accounting record sought by 150 Nassau has been produced, Dolner does not maintain a general ledger, all project level data is kept only on sub-ledgers and, although some accounting records are maintained in a DOS based accounting database called RAISH, there is no way to duplicate and provide in a raw, electronic form the RAISH database. The only thing that can be done is generate reports which it has done. According to Fiorello, seven of the accounting records produced are those reports it generated from the RAISH database. This is the way Dolner uses this information in the ordinary course of its business.

In a battle of the experts, 150 Nassau provides the affidavit of Bryan J. Rose, Esq. ("Rose"), a computer data specialist who is assisting 150 Nassau with electronic discovery. Rose states that Fiorello's statement about RAISH is incorrect because all that database does is store electronic data and Dolner should have the ability to produce the appropriate data from its RAISH database in an electronic form that can be used more effectively by 150 Nassau. In reply, Dolner's computer forensics expert ("Israely") states that the only way to extract project information from the RAISH company wide database is by generating reports which have been produced and provided to 150 Nassau. Israely opines that even if a full "data dump" could be performed, the information that would be produced would be exactly the same as that which can be found in the PDF formatted productions. Furthermore, since RAISH is used for many projects, there in no way that only 150 Nassau project specific information can be

singularly extracted.

Dolner's has brought its own discovery motion, to compel 150 Nassau to provide the following:

(i) verified responses to Interrogatories 101, 103(b), (d), (f), (g) and (l), 105, 107, 109, and 111; (ii) verified responses to Dolner's Supplemental Interrogatories 101 and 107 with respect to each of the following entities: 150 Nassau Manager Corp., YT Associates 150 LLC, Associated Nassau LLC, SRI Nassau LLC, Associated Spruce LLC, Linque 150 LLC, MLB Trust, BKB Trust, RB Trust, May Enterprises Partnership, 2 Spruce Mezzanine LLC, SRI Spruce LLC, YT 150 Associates LLC, 2 Spruce Manager Corp., Associated 150 LLC and Associated Flemington LLC; (iii) documents and materials in response to Dolner's Interrogatories 102, 104, 106, 108, 110, 112, and Supplemental Interrogatories 102 and 108, including (a) tax returns for 150 Mezzanine LLC and 2 Spruce Street LLC for tax year 2009; (b) tax returns for the other entities listed above for tax years 2001-2009; (c) "complete supporting financial information" for those companies and for 150 Nassau, 150 Mezzanine, and Spruce for tax and calendar years 2001-2010, including audited financial statements (including journal entries, balance sheets, statements of operations, income statements, equity schedules, general ledgers, bank statements, and cash disbursements logs).

According to Dolner, this information and documents concern the members of, capital contributions by, and distributions to the entities with ownership interests in the building that is the subject of this litigation. Dolner contends that it needs this information to prove what its 5% profit interest in the proceeds from the premises is equal to and also defend against 150 Nassau's claim for damages.

150 Nassau has provided Dolner with "entity charts" showing that 150 Nassau and Spruce are comprised of many entities. The charts show that some of the companies are inter-related. Dolner contends that these companies stand to participate in the distribution of profits derived from the premises under the M&PA and, therefore, all the requested financial information is needed to understand and verify the expenses charged against the building as income. Dolner argues that it cannot calculate and prove its profits interest without understanding and testing the expenses charged against the building. According to Dolner, the tax returns only provide a year-end snapshot, and do not present the full temporal picture of the asset value of the building.

150 Nassau opposes Dolner's motion on the basis that discovery is stayed because it cross moved for partial summary judgment. In support of its motion for summary judgment, 150 Nassau argues that Dolner, by failing to provide access to its accounting records, as required under Article XXIV of the CMA, has forfeited its entitlement to any membership or profits interest under the M&PA. Consequently, if Dolner is not entitled to profits under the M&PA, then 150 Nassau's motion for summary judgment should be granted.

Medco Plumbing, Inc. ("Medco"), one of the subcontractors named as an additional defendant on Dolner's counterclaim in the main action against 150 Nassau, is also opposed to Dolner's motion for summary judgment because 150 Nassau suggests in its motion that, according to Dolner's accounting records, Medco is owed either \$4,020.16 or possibly nothing at all. Medco filed a Mechanic's Lien against the property for \$150,000.

#### **Discussion**

CPLR § 3101(a) provides for the "full disclosure of all matter material and necessary in the prosecution or defense of an action." Under this standard, disclosure is required "of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (Allen v. Crowell-Begin Collier Publ. Co., 21 N.Y.2d 403, 406 [1968]).

### **150 Nassau's motion to compel**

There is no genuine dispute that the information contained in the RAISH database is material and relevant to the overarching disputes among the parties. This is evident from Dolner's efforts to provide all the information available once 150 Nassau brought its motion. The issue is, however, whether Dolner has to now re-provide certain information in electronic form so that 150 Nassau is satisfied that Dolner is not hiding anything and to make 150 Nassau's task of reconciling the information thus far provided easier. For the reasons that follow, the court denies 150 Nassau's motion for information in its raw, electronic or "native" language form:

Dolner has provided 150 Nassau with the information it has in the same form it uses the information. Dolner does not "dump" the raw data from its electronic database or computer, but generates reports as needed. Although 150 Nassau's expert suggests that Dolner "should" be required to produce the data from its RAISH database in an electronic form so it can be used more effectively by 150 Nassau, he does not provide any statement that this is how that information is most commonly used. Importantly, 150 Nassau has not identified any inconsistencies in the information provided that would suggest Dolner is withholding information (see, T.A. Ahern Contractors Corp. v. The Dormitory Authority, 24 Misc3d 416, 420 [Sup Ct N.Y. Co. 2009])

Although New York state courts sometimes look to the Federal Courts for guidance in handling complicated electronic discovery matters, the CPLR and Federal Rules of Civil Procedure differ. A primary difference is the cost of discovery and who bears it (Zublake v. UBS Warburg, LLC, 217 FRD 309 [SDNY 2003]). Here, neither side has addressed the cost of providing the material in raw form, but simply addressed whether one form is preferable over an other. Clearly, raw computer data or electronic documents are discoverable (T.A. Ahern Contractors Corp. v. Dormitory Authority, 24 Misc.3d 416 [N.Y.Sup. 2009]; Lipco Elec. Corp. v. ASG Consulting Corp., 4 Misc3d 1019 (A) [Sup.Ct. Nassau Cty. 2004]; see also: Wise, "*The Government to Provide 'Searchable' Documents in FOIA Request*," NYLJ 2/9/11, p. 1, c.3). This is true even in circumstances where a "hard copy" has been provided (T.A. Ahern Contractors Corp. v. Dormitory Authority, *supra*; Lipco Elec. Corp. v. ASG Consulting Corp., *supra*).

Dolner has established that it provided the information now demanded in a different form and that the information 150 Nassau continues to demand – a "general ledger" – is simply something that Dolner does not maintain in the usual course of business. Even assuming the RAISH database could be manipulated by a computer forensic expert to coax out something akin to a "general ledger," the database does not just contain information about the 150 Nassau Street project, but all of Dolner's projects. 150 Nassau does not dispute that the raw data they seek to have "dumped" from the database cannot be provided without also providing information to which 150 Nassau is clearly not entitled to and which could adversely impact persons and entities that are not parties to this action.

Claims by 150 Nassau, that Dolner maybe has something to "hide," are little more

than bald accusations and not a reason to order Dolner to provide in raw, electronic or "native" form the data it has already provided in PDF documents or hard copies just so 150 Nassau can more easily reconcile these amounts. This branch of 150 Nassau's motion is denied.

150 Nassau also contends that the deposition evidence adduced thus far reveals that Dolner's accounting department maintained an Excel spreadsheet to track when a subcontractor submitted a proposed requisition, its value, the date Dolner approved it and the final value for which Dolner gave its approval. To extent that Dolner has such a spreadsheet and it has not already been provided, Dolner shall provide it to 150 Nassau no later than Twenty (20) Days after being serve with an entered copy of this order.

150 Nassau's motion for an order granting it summary judgment on Dolner's 5<sup>th</sup> and 6<sup>th</sup> causes of action as a sanction for not complying with discovery is denied. Not only is that sanction unwarranted, a movant seeking summary judgment in its favor must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). 150 Nassau has not met its burden because the fundamental underpinning of its motion is that because Dolner did not comply with its obligations under Article XXIV of the CMA, Dolner/KN has forfeited its entitlement to any membership or profits interest under the M&PA. Having failed to prove this, 150 Nassau's motion for summary judgment on those counterclaims is denied.

#### **Dolner's Cross Motion for Sanctions**

Conduct is frivolous within the meaning of Part 130 if:

"(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false."

Although 150 Nassau did not prevail on its motion, it was supported by

reasonable arguments, albeit ones which did not persuade the court. Thus, 150

Nassau's motion was not frivolous within the meaning of the Court Rules and, therefore,

Dolner's motion for sanctions is denied.

### **Dolner's Motion to Compel**

Dolner is seeking information concerning the economic performance of the building, including extensive financial discovery about the various companies falling under the 150 Nassau, 150 Mezzanine, Spruce and Spruce Mezzanine parent umbrellas that have an interest in the building. The charts 150 Nassau produced show there are quite a few of these companies. Since the M&PA provides that KN is entitled to a 5% profit interest in the proceeds from the premises, Dolner and KN's arguments have traction. 150 Nassau's claim, that discovery is stayed because it brought a motion for summary judgment, avoids the larger issue and in any event, it is well established law that the court may consider whether a motion for summary judgment is premature because the information necessary to fully oppose the motion remains under the control of the proponent of the motion (CPLR § 3212 [f]; Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 AD3d 324 [1<sup>st</sup> Dept. 2004]). 150 Nassau's other argument in opposition, that Dolner/KN are not entitled to the information because they are in default of the CMA and M&PA is also unavailing. The issues of what information is discoverable

and the information Dolner/KN has to provide under those agreements are not identical. The issue of whether Dolner/KN has defaulted under any agreement has not been decided.

A more compelling argument by 150 Nassau is that the production of such information is unduly invasive. This argument, however, is not fully fleshed out in opposition nor does 150 Nassau propose what information – if any– it is willing to provide.

As a general matter, tax returns and financial statements are not subject to discovery, unless the party seeking them makes a strong showing of necessity (Penn York Construction Corp. v. State of New York, 92 A.D.2d 1086 [3<sup>rd</sup> Dept 1983]). Dolner has not made the requisite showing and its demand for the tax returns is stricken.

The interrogatories identified by Dolner as still being outstanding were also the subject of the court's prior order dated March 9, 2006. Those interrogatories, referred to as the "Profit Interest Interrogatories" in Dolner's motion, are still unanswered. 150 Nassau shall respond to Interrogatories 101, 103(b), (d), (f), (g) and (l), 105, 107, 109, and 111 within Twenty (20) Days of being served with an entered copy of this court's decision. 150 Nassau shall also provide responses to Dolner's Supplemental Interrogatories 101 and 107 with respect to each of the following entities: 150 Nassau Manager Corp., YT Associates 150 LLC, Associated Nassau LLC, SRI Nassau LLC, Associated Spruce LLC, Linque 150 LLC, MLB Trust, BKB Trust, RB Trust, May Enterprises Partnership, 2 Spruce Mezzanine LLC, SRI Spruce LLC, YT 150 Associates LLC, 2 Spruce Manager Corp., Associated 150 LLC and Associated Flemington LLC.

Although the court has stricken Dolner's request for tax returns, 150 Nassau

seeks other financial documents and materials in response to Dolner's Interrogatories 102, 104, 106, 108, 110, 112, and Supplemental Interrogatories 102 and 108. Dolner's motion for such documents and materials is granted as to Interrogatories 102, 104, 106 – only insofar as the documents are in response to (a), (d), (e), (g), (h) and (l) of the Interrogatory it directly applies to (i.e. 101, 103 etc.). 150 Nassau shall also respond Supplemental Interrogatory 102.

As for Interrogatories 108, 110, 112 and Supplemental Interrogatories 102 and 108, 150 Nassau already agreed to provide same subject to a mutually acceptable confidentiality agreement. The parties have signed such an agreement (in November 2008). Therefore, 150 Nassau shall respond to these interrogatories as well.

All responses to interrogatories shall be within Twenty (20) Days after service of an entered copy of this decision and order.

#### **150 Nassau's Cross Motion for Summary Judgment**

Whereas 150 Nassau's original motion (sequence number 12) was only for partial summary judgment on two of Dolner's counterclaims, the cross motion is for summary judgment on all the counterclaims. The arguments on this motion are indistinguishable for those presented on the motion for partial summary judgment. As with motion sequence number 12, 150 Nassau has not made a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (Winegrad v. New York Univ. Med. Ctr., supra). It is, therefore, denied.

#### **Conclusion**

This case was adjourned without a date. Clearly, discovery is still underway.

Therefore not only is a further compliance conference necessary, the note of issue date must be extended. A status conference is scheduled for April 7, 2010. The note of issue is extended to April 8, 2010. Plaintiff is reminded that the note of issue cannot be filed unless done in compliance with the rules of Part 10, a copy of which is available in Room 232.

In accordance with the foregoing,

*It is hereby*

**ORDERED** that 150 Nassau's motion to compel and for partial summary judgment (motion sequence no. 12) is granted in part and otherwise denied; and it is further

**ORDERED** that Dolner's cross motion for sanction is denied in its entirety; and it is further

**ORDERED** that Dolner's motion to compel is granted as provided, otherwise it is denied; and it is further

**ORDERED** that 150 Nassau's cross motion for summary judgment is denied in its entirety; and it is further

**ORDERED** that a status conference is scheduled for April 7, 2010 and the note of issue is extended to April 8, 2010; and it is

**ORDERED** that any relief requested not expressly addressed is hereby denied; and it is further

**ORDERED** that this constitutes the decision and order of the court.

Dated: New York, New York  
February 9, 2011

**FILED**

**FEB 14 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, J.S.C.