

Inventure Capital, LLC v AmeriAsia Partners, LLC

2010 NY Slip Op 30876(U)

April 12, 2010

Supreme Court, New York County

Docket Number: 601850/09

Judge: Carol R. Edmead

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

HON. CAROL EDMEAD

PRESENT: _____

PART 35

Index Number : 601850/2009
INVENTURE CAPITAL, LLC
 vs.
AMERIASIA PARTNERS, LLC
 SEQUENCE NUMBER : 001
 DISMISS ACTION

INDEX NO. _____

MOTION DATE 3/5/10

MOTION SEQ. NO. _____

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that defendant's motion to dismiss is granted as to plaintiff's claims for breach of contract and unjust enrichment, and denied as to plaintiff's claim for breach of the implied covenant of good faith and fair dealing; and plaintiff's claims for breach of contract and unjust enrichment are hereby severed and dismissed; and it is further

ORDERED that counsel for plaintiff and counsel for defendant appear for a Preliminary Conference before Justice Carol Edmead, 60 Center Street, Part 35, Rm. 438 on Tuesday, May 11, 2010 at 2:15 p.m.; and it is further

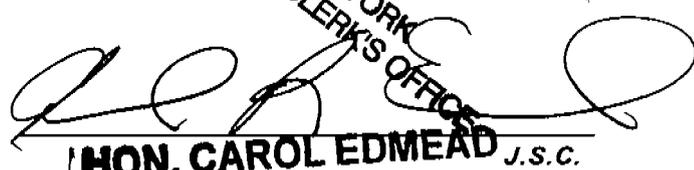
ORDERED that defendant serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: 4/12/10

FILED
 APR 16 2010
 NEW YORK
 COUNTY CLERK'S OFFICE



HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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 35

-----X
INVENTURE CAPITAL, LLC,

Plaintiff,

-against-

AMERIASIA CAPITAL PARTNERS, LLC

Defendant.
-----X

HON. CAROL ROBINSON EDMEAD, J.S.C.

Index No. 601850/09

DECISION/ORDER

FILED
APR 16 2010
NEW YORK
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

In this breach of contract action, defendant AmeriAsia Capital Partners LLC (“defendant”) moves for an order, pursuant to CPLR §3211(a)(5) and General Obligations Law (“GOL”) §5-701(a)(10), dismissing the Complaint of plaintiff InVenture Capital, LLC (“plaintiff”).

Background

Plaintiff’s Complaint alleges two cause of action: (1) breach of contract and the implied covenant of good faith and fair dealing, and (2) unjust enrichment. Plaintiff alleges that on or about April 4, 2006, a nonparty, Oncolys BioPharma (“Oncolys”), retained defendant to provide Oncolys with business development services (the “Business Development Agreement”). Pursuant to the Business Development Agreement, Oncolys was required to pay defendant a finder’s fee (“defendant’s fee”) for presenting Oncolys with entities that would ultimately sign a licensing agreement with Oncolys.

At some point, defendant and plaintiff entered into an agreement (the “Fee Agreement”) whereby defendant promised to pay plaintiff a finder’s fee for presenting defendant with potential

licensing candidates for Oncolys (“plaintiff’s fee”).

Plaintiff alleges that it substantially performed under the Fee Agreement by introducing Tacere Therapeutics (“Tacere”) to defendant as a potential licensing candidate for Oncolys. As a result of plaintiff’s efforts, Oncolys entered into a licensing agreement with Tacere. Pursuant to the Fee Agreement, defendant was required to pay plaintiff’s fee. However, defendant failed to pay plaintiff’s fee, thereby breaching the Fee Agreement and the implied covenant of good faith and fair dealing implicit in the Fee Agreement. Plaintiff further alleges that as a result of defendant’s breach, plaintiff is unable to recoup its costs and realize any remuneration for its efforts. In addition, as defendant has retained plaintiff’s fee, defendant has been unjustly enriched. Accordingly, plaintiff seeks to recover at least \$140,000, including, but not limited to, all damages chargeable and assessed against defendant, now or in the future, as a result of defendant’s actions and/or omissions, as well as plaintiff’s costs, disbursements, and reasonable attorney’s fees.

In its motion, defendant argues that the Complaint is barred by the Statute of Frauds, pursuant to GOL §5-701(a)(10), which requires that an agreement for a finder’s fee be in writing. Here, as plaintiff fails to allege that defendant subscribed to a writing containing the material terms and conditions of the purported Fee Agreement, plaintiff’s breach of contract claim must fail. Defendant further points out that the Complaint fails to allege when the Fee Agreement was reached, or identify the individuals who executed it and where it was executed. According to the affidavit of Sandesh Seth (“Mr. Seth”), a member of defendant (“Seth Affd.”), plaintiff and defendant “never entered into any contract, written or oral, with regard to either Tacere or Oncolys.” Mr. Seth attests that although he negotiated with plaintiff’s members, Lynn Parker

(“Ms. Parker”) and Steven Bailey, plaintiff and defendant never reached an agreement. Instead, “once it became apparent that [defendant] would be able to recover fees from Oncolys only by arbitration against Oncolys in Japan, Ms. Parker indicated to me that she and [plaintiff] wanted absolutely nothing to do with the matter and she terminated our prior informal relationship.”¹

Mr. Seth further attests that plaintiff failed to “contribute to any of the substantial legal expenses incurred by [defendant] in the Japanese arbitration between [defendant] and Oncolys, nor did it assist in that litigation in any way.”

Finally, as plaintiff’s claim for unjust enrichment is based on exactly the same facts as plaintiff’s contract claim, the Statute of Frauds bars that claim, as well, defendant argues.

In opposition, plaintiff first argues that the Statute of Frauds does not apply to an oral agreement to share a finder’s fee, such as the one herein. Citing caselaw, plaintiff contends that Courts have recognized a narrow exception to the Statute of Frauds for an oral agreement between co-brokers or co-finders. Therefore, a writing was not necessary.

Further, plaintiff disputes that it terminated the Fee Agreement with defendant (*see* the “Parker Affd.”). Ms. Parker attests that plaintiff only ended its “personal relationship with a company known as ‘AmeriAsia Venture Advisors LLC.’ by dissolving that company.” The Fee Agreement at issue herein was not with AmeriAsia Venture Advisors LLC, but with defendant.

Plaintiff argues that discovery will reveal communications memorializing the Fee Agreement and undermining defendant’s allegations that plaintiff terminated the Fee Agreement prior to introducing Tacere to Oncolys. Plaintiff further contends that whether the Fee

¹Mr. Seth attests that Ms. Parker expressed concern that the Japanese arbitration would jeopardize plaintiff’s relationship with its primary and longstanding client, Japan Tobacco (Seth Affd., ¶ 7).

Agreement was terminated is irrelevant to defendant's motion. At this juncture, the Court cannot assess the relative merits of the Complaint's allegations, or determine whether plaintiff has produced evidence to support its claims, plaintiff contends. The disputed allegation that plaintiff terminated the Fee Agreement involves questions of fact to be learned during discovery and determined at trial.

In reply, defendant maintains that plaintiff's claim falls squarely within the finder's fee section of §5-701(a)(10). Further, defendant distinguishes the caselaw on which plaintiff relies, arguing that the Statute of Frauds exception applies only to those parties in a relationship akin to that of a joint venture. Plaintiff has not and cannot allege such a required joint-venture relationship, defendant argues. Most significantly, plaintiff has not alleged that it agreed to bear its share of the possible liabilities of such a venture. Plaintiff did not bear any risk of loss whatsoever. Plaintiff neither joined defendant in the Japanese litigation against Oncolys, nor contributed to the legal fees, time and effort that were expended by defendant to successfully prosecute the claim. Instead, plaintiff made clear that it wanted nothing to do with the Japanese claim. It was not until after the Japanese litigation succeeded that plaintiff reappeared on the scene to try to enforce a non-existent oral contract, defendant argues. As the joint venture exception does not apply and §5-701(a)(10) clearly applies to the alleged Fee Agreement, plaintiff's failure to come forward with any writing warrants the Complaint's dismissal.

Discussion

Pursuant to CPLR §3211(a)(5), a party can move to dismiss one or more causes of action on the ground that the causes of action cannot be maintained under the Statute of Frauds. Further, on such a motion, the court "must take the allegations as true and resolve all inferences

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which reasonably flow therefrom in favor of the pleader” (*Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 [1998]). “In opposition to such a motion, a plaintiff may submit affidavits ‘to remedy defects in the complaint’ and ‘preserve inartfully pleaded, but potentially meritorious claims’” (*id.*, citing *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]). Titled “Agreements required to be in writing,” GOL §5-710 provides, in relevant part:

a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

10. Is a contract to pay compensation for services rendered in negotiating a loan, or in *negotiating* the purchase, sale, exchange, renting or leasing of any real estate or interest therein, or of a *business opportunity*, business, its good will, inventory, fixtures or an interest therein, including a majority of the voting stock interest in a corporation and including the creating of a partnership interest. “*Negotiating*” includes *procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction.*
(Emphasis added).

It is well settled that, in general, an alleged oral agreement for a finder’s fee is unenforceable under §5-701(a)(10) (*Fitz-Gerald v Donaldson, Lufkin & Jenrette, Inc.*, 294 AD2d 176 [1st Dept 2002]; *Baytree Associates, Inc. v Forster*, 240 AD2d 305, 306, [1st Dept 1997]; *Freedman v Chemical Const. Corp.*, 43 NY2d 260, 267 [1977] [holding that §5-701(a)(10) applied to such situations in which “the intermediary’s activity is so evidently that of providing ‘know-how’ or ‘know-who,’ in bringing about between principals an enterprise of some complexity or an acquisition of a significant interest in an enterprise”]).

However, in *Dura v Walker, Hart & Co.* (27 NY2d 346 [1971]), the Court of Appeals recognized an exception to the finder’s fee provision of §5-701(a)(10). The Court held that the Statute of Frauds does not apply to an agreement *between two finders* to share a commission. In

[*7]

Dura, the plaintiff was retained by Lehman Brothers *via* an oral promise of a finder's fee to find a buyer for a corporation. Subsequently, the plaintiff offered the defendant "the opportunity to 'work as a finder on a participating basis'" (*id.* at 348). The defendant agreed, and in the presence of the defendant's officials, the plaintiff called Lehman and advised Lehman's representative that the plaintiff and the defendant would work together to find a buyer. Through the defendant's efforts, a buyer was found, and pursuant to a written agreement with the buyer, the defendant received "a stipulated consideration for its services in negotiating the purchase."

Subsequently, the plaintiff sued the defendant to recover his share of the defendant's commission. The defendant moved for summary judgment, dismissing the Complaint, on the ground that it was barred by the Statute of Frauds. The Special Term granted the defendant's motion, and the First Department affirmed. In reversing, the Court of Appeals held that "[d]espite the broad wording of [§5-701(a)(10)] . . . it is clear that [the statute] was aimed at averting the evils arising from oral contracts 'between the finder and the principal or employer with whom he has assertedly contracted and from whom he seeks compensation' *and not between fellow finders or finders and other parties*"(*id.* at 348-349, quoting *Bradkin v Leverton*, 26 NY2d 192, 198 [1970]) (emphasis added). The Court of Appeals continued:

[T]here is no such danger in a case like the present and no need to protect one broker or finder against the unlikely and rare claim of another. Nor was such protection within the contemplation of the lawmakers; . . . the statute was aimed at the protection of principals or employers against claims for brokers' or finders' fees and, indirectly, at protecting brokers and finders in their dealings with principals, not with one another. Here, the plaintiff is suing not an employer or principal for a fee but a fellow finder for a portion of a fee already received by the latter, *on the strength of an agreement by the two of them that they pool their efforts and share the benefits. In so doing, the plaintiff relies on a theory closely akin to that of joint venture, with its overtones of fiduciary obligation*, in which situations, we note, there is no requirement that there be a writing to evidence the agreement.

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(*Id.* at 350) (emphasis added).

In *Haskins v Loeb Rhoades & Co.* (52 NY2d 523 [1981]), the Court of Appeals clarified its holding in *Dura*, limiting “this narrow exception to the Statute of Frauds . . . to a business enterprise ‘closely akin to that of joint venture.’” The Court affirmed the dismissal of the plaintiff’s claim to recover a finder’s fee, on the ground that the “plaintiff has come forward with no evidentiary facts which indicate the existence of any enterprise even remotely resembling a joint venture” (*Haskins* at 525-526).

Citing *Haskins*, the Court in *Sven Salen AB v Jacq. Pierot, Jr., & Sons, Inc.* (559 F Supp 503, 507 [1983]) also explained that the *Dura* exception applied only to agreements “akin to joint ventures.” In *Sven Salen*, the plaintiff sought damages for breach of an alleged co-brokerage agreement. However, the Court held that, unlike the situation in *Haskins*, the arrangement between the plaintiff and the defendant was “very much like a joint venture, even to the point of [the plaintiff’s] being required to absorb any losses caused by the cobrokers’ failure to earn a commission” (*Sven Salen* at 507). Therefore, the *Dura* exception applied, and the defendant’s motion for summary judgment was denied.

In *Jones v Whelan* (2003 WL 22327166, 4-5 [SDNY Oct 10, 2003]), the Court noted that Courts in the district had applied *Dura*’s narrow exception “in cases with similar, underlying circumstances.”² The Court denied the plaintiff’s motion to reconsider its summary judgment motion on the following ground: “[T]here is no evidence that Plaintiffs and Defendants were each other’s co-brokers or co-finders *because the agreement alleged by Plaintiff was not an*

²The Court in *Jones* specifically cited the cases of *Sven Salen supra*, *Train v Ardshiel Assocs.*, 635 F Supp 274 [SDNY 1986], and *Dietze v Patterson*, 1987 WL 28813 [SDNY Dec.14, 1987] (*see Jones* at 4).

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agreement to pool resources and share the benefits as articulated by the New York Court of Appeals in Dura” (emphasis added). The Court went on to hold that “[b]ecause the alleged agreement to pay Plaintiffs a fee was oral, it is unenforceable under the Statute of Frauds” (*id.* at 6).

Here, the Statute of Frauds contained in GOL §5-701(a)(10) bars plaintiff’s breach of contract and unjust enrichment causes of action, and the above exception to GOL §5-701(a)(10) does not apply. However, defendant failed to address plaintiff’s claim for the breach of the implied covenant of good faith and fair dealing, and thus, dismissal of the Complaint in its entirety is unwarranted.

The record demonstrates that plaintiff only alleges the existence of an oral agreement to share a finder’s fee. The Court notes that although plaintiff concedes that “[t]his case arises from the breach of *an oral contract* between” plaintiff and defendant,³ plaintiff’s counsel later argues that discovery would demonstrate communications “memorializing the agreement.” Plaintiff contends: “[T]he parties agreed to share the commission owed to [defendant] by Oncolys in the event that Oncolys entered into a licensing agreement with a third party introduced to it by [plaintiff]. [Defendant] and [plaintiff] *discussed the terms of this agreement both orally and in e-mail correspondence*, ultimately agreeing to a specific arrangement” (MOL, p. 7).⁴

It is well settled that GOL §5-701(b)(3)(d) “allows the writing requirement to be satisfied by memoranda, notes or other documentation basically establishing the agreement’s existence” (*Nausch v AON Corp.*, 2 AD3d 101, 101-102 [1st Dept 2003]). Such memoranda can be in the

³Plaintiff’s MOL, p. 1 (emphasis added).

⁴In support of its argument, plaintiff cites to Complaint, ¶¶ 15-17, 23 and 32; and Parker Affd., ¶¶ 3-5.

form of e-mails (*see e.g. Esther Creative Group, LLC v Gabel*, 2009 WL 3490942, 3 [Sup Ct New York County 2009] [holding that “summary statements, emails and checks issued by Defendants considered together in addition to other evidence that may be uncovered through discovery may well satisfy the statute’s writing requirement”]). Here, however, plaintiff relies only on the affirmation of its attorneys that such documentation exists, and an attorney’s affirmation not made on the basis of personal knowledge or supported by evidence in admissible form is insufficient (*Juseinoski v Board of Educ. of City of New York*, 15 AD3d 353, 356 [2d Dept 2005] [“the affirmation of an attorney which does not contain evidentiary facts from one having personal knowledge is insufficient to establish the merits of a claim”]; *James v Hoffman*, 551 NYS2d 519, 520 [1st Dept 1990]; *Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]). Plaintiff’s attorneys do not claim to have personal knowledge of the facts of this case. Further, neither the Complaint nor the Parker Affd. makes any mention of any such documentation. Therefore, as plaintiff fails to sufficiently allege the existence of any documentation memorializing the Fee Agreement, plaintiff’s argument is insufficient to defeat defendant’s motion.

Plaintiff also fails to allege that the parties had a relationship akin to that of a joint venture. A joint venture is defined by the following factors: “(i) acts manifesting the intent of the parties to be associated as joint venturers; (ii) mutual contribution to the joint undertaking through a combination of property, financial resources, effort, skill or knowledge; (iii) a measure of joint proprietorship and control over the enterprise; and (iv) a provision for the sharing of profits and losses” (*Dundes v Fuersich*, 6 Misc 3d 882, 885, 791 NYS2d 893, 895 [Sup Ct New York County 2004], *citing Richbell Information Services, Inc. v Jupiter Partners, L.P.*, 309

AD2d 288, 298 [1st Dept 2003]). In its Complaint, plaintiff alleges the following about the parties' relationship:

[Defendant] and [plaintiff] entered into an agreement whereby [plaintiff] agreed to identify and present [defendant] with potential licensing candidates for Oncolys that [defendant] could, in turn, introduce to Oncolys under the Business Development Agreement

Under the Fee Agreement, [defendant] promised to pay [plaintiff] a success fee for [plaintiff's] identifying and presenting [defendant] with potential licensing candidates for Oncolys

Under the Fee Agreement, [plaintiff] relied on [defendant's] promise to pay [plaintiff's fee] and engaged in efforts to identify and present [defendant] with potential licensing candidates for Oncolys including, but not limited to [Tacere].
(Complaint, ¶ 15-17)

The Parker Affd. tracks the allegations of the Complaint, adding only that plaintiff did not terminate the Fee Agreement (Parker Affd., ¶¶ 3-10). Nowhere in the Complaint or the Parker Affd. does plaintiff allege that the parties agreed to pool their property, financial resources, effort, skill or knowledge; share control over an enterprise; or share profits and losses (*Dundes* at 885). Further, plaintiff's allegations fail to demonstrate that the parties' conduct manifested their intent to be associated as joint venturers (*Id.* at 885). Plaintiff does not contest or even address defendant's allegation that plaintiff "did not contribute to any of the substantial legal expenses incurred by [defendant] in the Japanese arbitration between [defendant] and Oncolys, nor did it assist in that litigation in any way" (Seth Affd., ¶ 7). Therefore, as plaintiff fails to allege that the parties had a relationship akin to that of a joint venture, §5-701(a)(10) applies to bar plaintiff's breach of contract claim. Accordingly, the branch of defendant's motion to dismiss plaintiff's breach of contract claim is granted.

Unjust Enrichment

“To state a cause of action for unjust enrichment, a plaintiff must allege that it conferred a benefit upon the defendant, and that the defendant [obtained] the benefit without adequately compensating plaintiff therefor” (*Nakamura v Fuji*, 253 AD 2d 387 [[1st Dept 1998]). However, in *Snyder v Bronfman* (13 NY3d 504, 506 [2009]), the Court of Appeals makes clear that GOL §5-701(a)(10) also bars “*quantum meruit* and unjust enrichment claims brought to recover the value of plaintiff’s services in helping to achieve a corporate acquisition.” In *Snyder*, the plaintiff alleged an oral joint venture agreement with the defendant, unlike plaintiff herein. However, as the plaintiff failed to appeal the Supreme Court’s holding that the alleged oral joint venture agreement was “unenforceable for indefiniteness,” the Court of Appeals declined to address the issue of whether the agreement would have been barred by GOL §5-701(a)(10) (*id.* at 507-508, 509).⁵

In affirming the First Department’s dismissal of the plaintiff’s *quantum meruit* and unjust enrichment claims, the Court of Appeals explained:

The question is simply whether plaintiff is now seeking compensation for services rendered in finding and negotiating a business opportunity. He is. . . . *Dura has no application here.* In [*Freedman, supra* at 267] we remarked . . . that the plaintiffs role in a transaction was ‘limited and transitory;’ but that does not mean that every broker or finder who plays more than a ‘limited and transitory’ role in a transaction is entitled to recover. The more relevant language in *Freedman* says that “where . . . the intermediary’s activity is . . . that of providing ‘know-how’ or ‘know-who,’ in bringing about between principals an enterprise of some complexity or an acquisition of a significant interest in an enterprise,” *the statute of frauds applies (id.)*. *That describes what plaintiff did here. (Id. at 509) (emphasis added).*

⁵The Court explained: “Whether this unenforceable contract, if it had been otherwise enforceable, would have been barred by the statute of frauds is an academic question, and perhaps an unanswerable one; in any event, there is no reason to answer it here” (*Snyder* at 509).

Similarly, here, plaintiff seeks compensation for services rendered in finding a business opportunity. As plaintiff's alleged activity was that of providing "know-who" to defendant, §5-701(a)(10) applies to bar plaintiff's recovery under a theory of unjust enrichment. Accordingly, the branch of the motion seeking to dismiss plaintiff's second cause of action is granted.

Breach of the Implied Covenant of Good Faith and Fair Dealing

It is well settled that an implied covenant of good faith and fair dealing exists in every contract (*Timberline Development LLC v Kronman*, 263 AD2d 175, 178 [1st Dept 2000], citing *Wood v Lucy Lady Duff-Gordon*, 222 NY 88, 90-91 [1917]). The Court notes that, in its motion, defendant fails to raise any arguments regarding plaintiff's cause of action for the breach of the implied covenant of good faith and fair dealing. Therefore, plaintiff's claim for the breach of the implied covenant of good faith and fair dealing survives defendant's motion to dismiss.

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendant's motion to dismiss is granted as to plaintiff's claims for breach of contract and unjust enrichment, and denied as to plaintiff's claim for breach of the implied covenant of good faith and fair dealing; and plaintiff's claims for breach of contract and unjust enrichment are hereby severed and dismissed; and it is further

ORDERED that counsel for plaintiff and counsel for defendant appear for a Preliminary Conference before Justice Carol Edmead, 60 Center Street, Part 35, Rm. 438 on Tuesday, May

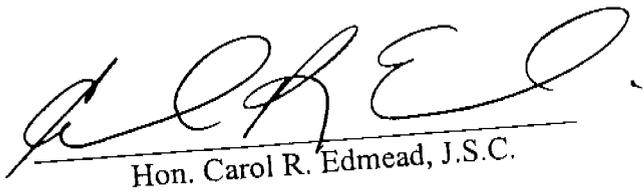
11, 2010 at 2:15 p.m.; and it is further

ORDERED that defendant serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: April 12, 2010



Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMED

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