Fairchild v Riva Jewelry Mfg., Inc.
2007 NY Slip Op 31857(U)
June 28, 2007
Supreme Court, New York County
Docket Number: 0101169/2006
Judge: Carol R. Edmead
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[* 1]
SCANNED ON 6/28/2007

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

PRESENT: HON. CAROL EDMEAD Justice

PART 35

John Fairchild

- v -

RIVA JEWELRY MANUFACTURING

INDEX NO. 101169/06

MOTION DATE 7/17/07

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on 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 the motion by plaintiff to compel discovery, to wit: responses to interrogatories #8, 14, 18, 19 is granted to the extent that defendant shall provide responses to same within 45 days of receipt of this order with notice of entry. And it is further

ORDERED that the defendant's cross-motion for a protective order is denied. And it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 7/17/07

HON. CAROL EDMEAD J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

IF THIS 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

JOHN FAIRCHILD,

Plaintiff,

-against-

RIVA JEWELRY MANUFACTURING, INC. and TED DOUDAK, as President of Riva Jewelry Manufacturing, Inc.,

Defendants.

----------x

Index No. 101169/2006

DECISION/ORDER

FILED
JUN 28 2007
COUNTY CLERK'S OFFICE
NEW YORK

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

MEMORANDUM DECISION

In this employment discrimination action, plaintiff John Fairchild, a gay man, alleges that defendants Riva Jewelry Manufacturing, Inc. and Ted Doudak, as President of Riva Jewelry Manufacturing, Inc. fired him as a result of his sexual orientation in violation of New York State and New York City Human Rights Laws.

FACTUAL BACKGROUND

The Complaint

In May 2005, defendant Riva Jewelry Manufacturing, Inc. ("Riva") hired plaintiff as Vice President of Sales and Marketing. Riva's President, defendant Ted Doudak ("Mr. Doudak"), was plaintiff's supervisor, in charge of the terms and conditions of plaintiff's employment, including hiring and firing, and plaintiff's assignments, raises, promotions, discipline, and benefits.

During plaintiff's employment at Riva, he was an exemplary employee. Defendants, however, encouraged, fostered, and maintained a work environment of overt sexual discrimination. In particular, Mr. Doudak expressed not only his disgust with homosexuals, but repeatedly told plaintiff that he found homosexuals repulsive. Mr. Doudak even directed the plaintiff to deal with two gay representatives at Tiffany's because Mr. Doudak did not wish to have direct contact with them. Also, Mr. Doudak frequently quoted the Bible as evidence that homosexuality is a sin against God.

On the day before plaintiff was terminated, Mr. Doudak questioned the plaintiff about a

lesbian magazine that was on plaintiff's desk. When plaintiff advised Mr. Doudak that he obtained the magazine for his plaintiff's lesbian daughter, Mr. Doudak immediately began to denigrate homosexuals and lesbians. Plaintiff then admitted that he was a homosexual and that he was proud of his lesbian daughter. At this point, Mr. Doudak brought out a Bible and quoted the verses which stated that gays and lesbians were doomed to eternal damnation.

The following day, Mr. Doudak terminated the plaintiff without a legitimate business reason and as a direct consequence of learning that the plaintiff was homosexual.

Thereafter, plaintiff commenced this action against defendants for violations of New York State Executive Law § 296 and New York City Administrative Code §§ 8-107 and 8-502.

Instant Motion

During the course of this litigation, plaintiff served defendants with a set of interrogatories, calling for answers to certain questions, which have become the subject of this instant motion. Interrogatory numbers 17, 18 and 19 request the following:

> "State whether defendant Doudak believes that 'homosexuality is a sin against God.'"
>
> "State whether defendant Doudak believes that 'gays and lesbians are doomed to eternal damnation.'"
>
> "State whether defendant Doudak regards homosexuals as 'repulsive.'"[1]

In response, defendant Doudak objected to these three interrogatories, stating that each is "confusing, overly broad in scope, as well as so vague and ambiguous as to make a meaningful response impossible." When plaintiff objected to these responses, defendant Doudak asserted that numbers 17 and 18 were "improper, as they seek information pertaining to [defendant Doudak's] fundamentally protected religious beliefs." Defendant maintained that such interrogatories violated his "constitutionally guaranteed rights to privacy and freedom of religion

[1] Plaintiff's motion also sought an elaboration of defendants' response to interrogatory #8, which requested that defendants state the basis of plaintiff's termination. In response, defendants stated that plaintiff "was terminated due to performance related issues" and to be explored at defendants' deposition. Defendants also claimed that, *inter alia*, the information requested was protected under the attorney-client or work product privileges.

under both the First and Fourteenth Amendments as well as the Free Exercise Clause of the New York State Constitution . . . [A] party in a civil lawsuit has no right to inquire as to an individual's religion and/or religious beliefs; nor can a party in such a suit be compelled to disclose such information. Moreover, the disputed interrogatories are irrelevant and not reasonably calculated to lead to the discovery of admissible evidence." Defendant Doudak also asserted that interrogatory 19 was offensive, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence."

Plaintiff's instant motion to compel responses to interrogatories ensued.

In support, plaintiff submits that all three interrogatories relate directly to the allegations in plaintiff's complaint, and more importantly, defendants' discriminatory motivations. Further, defendants' assertion of Doudak's Constitutional rights is of no moment. Defendants' right to free exercise of his religion is not in any way curtailed by the plaintiff. Doudak is free to believe whatever he wishes, but he is obligated to reveal those beliefs to the extent they bear directly upon plaintiff's claims that he was terminated as a consequence of his sexual orientation.

In opposition, defendants cross move for a protective order pursuant to CPLR 3103 (a) prohibiting plaintiff from inquiring of Mr. Doudak's personal religious beliefs as reflected in Interrogatories 17-19 and at Mr. Doudak's deposition. Defendants maintain that Mr. Doudak's individual associational privacy rights under the First and Fourteenth Amendments in his individual beliefs and freedom of exercise of religion under the First Amendment of the United States Constitution and Article I, Section Three of the New York State Constitution are absolute, and that no compelling state interest exists so as to compel him to divulge those beliefs. Plaintiff seeks to equate religious membership in a particular religion as *de facto* proof of discriminatory animus by inquiring into the basic tenets (i.e., what constitutes sin) of Mr. Doudak's religion. Thus, compelling a response to such an inquiry would be a state action which would dissuade individuals from membership in certain religions, as the religious teachings themselves may be used against the member in a civil proceeding. Further, plaintiff's inquiries are contrary to the

Federal Rule of Evidence 610, which renders evidence of beliefs or opinions of a witness on matters of religion inadmissible for the purpose of showing that by reason of their nature the witness's credibility is impaired or enhanced. Defendants contend that plaintiff is improperly attempting to use Mr. Doudak's religious beliefs to attack his credibility and to establish that he discriminated against the plaintiff. Plaintiff openly admits that he seeks to ask the fact finder to circumstantially infer that Mr. Doudak is likely to have acted in conformity with his beliefs. Courts have cautioned against permitting the tenets of a particular religion to creep into a trial in a manner which might invite a personal issue between a party and the jury. Thus, if Mr. Doudak is compelled to divulge his religious beliefs, the risk of prejudice to the defendants and these entire proceedings as a whole would be significantly increased.

In reply, plaintiffs argue that Mr. Doudak's right to free exercise of religion is not absolute and that he may be compelled to testify concerning his beliefs to the extent those beliefs demonstrate defendants' bias and interest to discriminate. Indeed, the New York Constitution states that the free exercise of religion is not to be "so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state." An individual's religious beliefs do not excuse him or her from compliance with an otherwise valid law prohibiting conduct. And, where the government has a compelling interest to act and an individual's exercise of his or her religion conflicts with that interest, an individual finds no protection pursuant to the Free Exercise Clause.

In further support of defendants' cross-motion for a protective order, defendants maintain that Mr. Doudak has not placed his religion at issue. Further, to require answers to the Interrogatories would encourage a fact finder to equate certain religious belief, regardless of what they may be, with discriminatory action. And, this case does not involve religion in any way; plaintiff was terminated because of poor work performance, as reflected in the voluminous discovery documents. Plaintiff asks this Court to permit an unconstitutional inquiry with the sole purpose of influencing the fact finder to conclude that if Mr. Doudak harbors personal, private

and arguably unpopular religious beliefs, he must have discriminated against the plaintiff. The New York State and United States Constitutions are designed to protect against prejudicing a fact finder from holding against the defendants not because of any actual conduct or actions, but merely because the fact finder may find Mr. Doudak's religious beliefs unpopular or distasteful. Further, plaintiff has not posed any interrogatory regarding statements Mr. Doudak allegedly made, and nothing prevents plaintiff from asking defendant if he indeed made such statements. Since religious practice, which may be regulated, is not at issue, Mr. Doudak's absolute freedom to believe is not subject to disclosure.

Furthermore, the "bias" and "interest" exceptions to the Federal Rule of Evidence 610 are not intended to address the alleged discriminatory bias or Mr. Doudak's purported interest in terminating plaintiff, as plaintiff contends.

ANALYSIS

Essentially, the gist of the plaintiff's argument is that his sexual orientation caused his employer to terminate him based on his employer's religious beliefs concerning homosexuals. As this motion derives from the use of interrogatories, this Court's discussion begins with an analysis of the rules governing discovery, which is the framework within which the instant constitutional issues arise.

The Court is vested with broad discretion to when supervising disclosure in order to facilitate the resolution of cases (*see Alveranga-Duran v New Whitehall Apts.* LLC, 40 AD3d 287, 836 NYS2d 24, 25 [1st Dept 2007]) *citing SKR Design Group v Avidon*, 32 AD3d 697, 699 [1st Dept 2006]). However, such discretion is restricted by boundaries defined in the CPLR and caselaw. Article 31 of the CPLR permits liberal discovery of all matters that are material and necessary to the prosecution or defense of an action (NCP ex rel. NCP v. City of New York Slip Copy, 2007 WL 1775503 [Supreme Court New York County 2007]). Specifically, CPLR § 3101(a) entitles parties to "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." What is "material and necessary" is

left to the sound discretion of the lower courts and includes "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" (*Andon v 302-304 Mott Street,* 94 NY2d 740, 746 [2000]). The scope of pre-trial disclosure is not limited to matter which may be admissible upon the trial, but includes testimony that may lead to discovery of admissible evidence *(Stephen-Leedom Carpet Co., Inc. v Arkwright-Boston Mfrs. Mut. Ins. Co.*, 101 AD2d 574, 476 NYS2d 135 [1st Dept 1984] *citing Allen v Crowell-Collier Publishing Co.,* 21 NY2d 403, 406, 288 NYS2d 449; *Prink v Rockefeller Center, Inc.*, 48 NY2d 309, 314 n., 422 NYS2d 911]).

In recognizing New York's policy favoring open disclosure as a means for discovering the truth, this Court must consider a party's need for the information requested against its possible relevance, the burden of subjecting the other party to the disclosure and the potential for unfettered litigation on collateral issues (*Andon v 302-304 Mott Street, supra*). The Court must evaluate competing interests and conduct a discretionary balancing of those interests (*Andon v 302-304 Mott Street, supra*). In this instance, the interests competing with plaintiff's pursuit of his Human Rights claims are of constitutional dimensions, namely the First Amendment's and New York State's protection of association and of religious freedom.

With respect to plaintiff's claims under New York State and New York City Human Rights laws, Executive Law § 296(1)(a) provides as follows:

> It shall be an unlawful discriminatory practice: (a) For an employer . . . because of the . . . sexual orientation . . . of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

Likewise, NYC Administrative Code § 8-107 (1)(a) declares it an unlawful discriminatory practice:

> For an employer or an employee or agent thereof, because of the actual or perceived . . . . sexual orientation . . . of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms,

conditions or privileges of employment.[2]

A finding of unlawful discrimination must be based on some concrete evidence from which it can rationally be inferred that an improper motive contributed to the action in question (*New York State Dept. of Correctional Services v State Div. of Human*, 238 AD2d 704, 656 NYS2d 78 [3d Dept 1997]). As such, plaintiffs claiming discrimination under Executive Law § 296 bear the initial burden of establishing a *prima facie* case of discrimination by demonstrating, by a preponderance of the evidence, that they are members of the class protected by the statute, that they were qualified for their positions and that they were discharged or suffered other adverse employment action under circumstances giving rise to an inference of discrimination (*Mete v New York State Office of Mental Retardation and Developmental Disabilities,* 21 AD3d 288, 800 NYS2d 161 [1st Dept 2005]; *Dickerson v Health Management Corp. of America*, 21 AD3d 326, 800 NYS2d 391 [1st Dept 2005]).[3] Once plaintiff meets his or her burden, the burden shifts to the defendant to articulate, through the introduction of admissible evidence, a legitimate, nondiscriminatory reason for the adverse action (*id.*), after which the burden shifts back to the plaintiff to prove that the legitimate reason proffered by the defendant is merely a pretext for discrimination (*id.*). Essentially, plaintiff must demonstrate, through evidence, that an "improper motive," in this instance, sexual orientation, was the basis of his termination.

To establish "pretext," plaintiff must demonstrate that "(1) the articulated reasons are false, and that (2) discrimination was the real reason (*Bailey v. New York Westchester Square*

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[2] NYC Administrative Code § 8-502, entitled "Civil action by persons aggrieved by unlawful discriminatory practices"

> a. Except as otherwise provided by law, any person claiming to be aggrieved by an unlawful discriminatory practice as defined in chapter one of this title or by an act of discriminatory harassment or violence as set forth in chapter six of this title shall have a cause of action in any court of competent jurisdiction for damages, including punitive damages, and for injunctive relief and such other remedies as may be appropriate, unless such person has filed a complaint with the city commission on human rights or with the state division of human rights with respect to such alleged unlawful discriminatory practice or act of discriminatory harassment or violence.

[3] The Court notes that the standard for recovery under Executive Law § 296 "is in accord with the federal standards under Title VII, and the human rights provisions of New York City's Administrative Code mirror the provision of the Executive Law" (internal citations omitted) (*Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1st Dept 2003]).

Medical Centre, 38 AD3d 119, 829 NYS2d 30 [1st Dept 2007]; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326, 332-33 [1st Dept 2003] *citing Ferrante* at 629-630; *McDonnell Douglas Corp. v Green* at 805); *see also Olle v Columbia Univ.*, 332 F Supp2d 599, 617 [SDNY 2004]).

""[P]retext can be established by a showing that the 'asserted neutral basis was so ridden with' error that the employer obviously could not honestly have relied on it" or by showing that the reason advanced by the defendant "was unworthy of credence" (*Sinha v State University of New York at Farmingdale*, 764 F Supp 765 [EDNY 1991]). Yet, to "raise an inference of discriminatory intent, the comments and behaviors [plaintiff objected to] must be linked in some way to plaintiff's protected status" (*Ochei v Coler/Goldwater Memorial Hosp.*, 450 F Supp 2d 275 [SDNY 2006]). In the context of racial and gender discrimination cases, this linkage is typically found in the use of invidious or ethnically degrading comments" (*Id., citing Pimentel v City of New York*, 2001 WL 1579553, at *5, 2001 U.S. Dist. LEXIS 20426, at *16 [Dec. 11, 2001]). Plaintiff may also demonstrate pretext through evidence including statistics regarding heterosexual and homosexual employment, and proof of contradictory or inconsistent treatment of employees who behaved similarly to the plaintiff (*see Dais v Lane Bryant,* Inc., 168 F Supp 2d 62). Indeed, courts have long recognized that "actions or remarks made by decision-makers that could be viewed as reflecting a discriminatory animus" may "give rise to an inference of discriminatory motive" (*Gregory v Daly*, 243 F3d 687 [2d Cir 2001]). Indeed, Courts look to a "pattern of conduct" from which a jury might conclude that a discriminatory factor was considered in the making of an employment decision (*Gregory v Daly*, *supra*).

Accordingly, the parties do not dispute plaintiff's ability to question and discover whether certain statements were made by Mr. Doudak concerning plaintiff's homosexuality, including whether Mr. Doudak *made* certain statements that gays and lesbians are doomed to eternal damnation. Nor do the parties dispute plaintiff's ability to question and discover Mr. Doudak's actions toward the plaintiff, such as taking out the Bible and reading excerpts pertaining to

homosexuals.

However, whether plaintiff may question and discover whether Mr. Doudak holds the alleged statements as true or not, *i.e.*, whether Mr. Doudak *believes* the content of the purported statement is a distinction with significant difference. Arguably, the basis of Mr. Doudak's statements and actions toward the sexual orientation of the plaintiff, is tangential to the issue of whether the reasons proffered by defendant in terminating plaintiff were pretextual. However, such answers made lead to evidence establishing that the sexual orientation of the plaintiff was a factor in plaintiff's termination.

The Court acknowledges that the free exercise of religion and associational privacy is highly protected. However, such privileges are not absolute (*see La Rocca v Lane*, 37 NY2d 575 [1975]). Any burden upon one's freedom to exercise one's religion must be balanced against the State's paramount duty to insure a fair trial (*see id.*).

It has been held that a party called as a witness cannot testify to the operations of his mind which might have rendered more probable the doing of the acts which he testified were done by him (*Rimes v Carpenter*, 59 Misc 445 [Supreme Court App. Term 1908] [admission of testimony by defendant as to *why* he placed an order for an item on a particular day, and yet refused to accept a similar order from the defendant placed the previous day held in error]).

Nonetheless, in other contexts, evidence establishing whether a witness holds a certain belief is admissible in certain circumstances, such has religious discrimination cases brought under Title VII of the United States Constitution (*see e.g., Knight v Connecticut Dept. of Public Health*, 275 F3d 156 [2d Cir. 2001][to make out a *prima facie* case of religious discrimination, plaintiff must show, *inter alia*, "they held a bona fide religious belief conflicting with an employment requirement. . . ."]; *U.S. v Seeger*, 380 US 163, 85 S Ct 850 [U.S.Cal. 1965] *citing* U.S.C.A.Const. Amends. 1, 5; Universal Military Training and Service Act, § 6(j) as amended 50 U.S.C.A.App. § 456(j) ["Test of belief 'in a relation to a Supreme Being' within statute relating to exemption of conscientious objectors from combatant training and service in armed forces is

whether a given belief that is sincere and meaningful occupies a place in life of its possessor parallel to that filled by orthodox belief in God of one who clearly qualifies for the exemption'"]).

Here, the complaint alleges that the motivation for defendant's employment decision alleged as "improper" or in violation of New York State and New York City laws is plaintiff's "sexual orientation" (Complaint ¶¶27 and 30). There is no claim for religious discrimination in this action. However, while the *veracity* of the *basis or source* of defendant's motivation for its employment decision is not an issue in this action for improper sexual orientation discrimination, the belief, whether founded in religion or not, about a person falling within a category protected under New York State discrimination laws may lead to the conclusion that the decision to terminate plaintiff was based on his sexual orientation (New York State Dept. of Correctional Services v McCall, 111 AD2d 571, 489 NYS2d 633 [3d Dept 1985] [finding that there was substantial evidence to uphold the finding of sex discrimination where there was evidence that, *inter alia*, defendant told plaintiff that the job assignment "was too dangerous for a woman," and where defendant testified that "he believed that women were more easily manipulated than men . . ." Thus, it cannot be said a person's "belief" regarding a protected class member is irrelevant or has no bearing in establishing discrimination. Arguably, Mr. Doudak's "belief" that plaintiff's sexual orientation constitutes a "sin" or "will result in eternal damnation" was related to defendant's decision to terminate the plaintiff.

Defendant's contention that testimony concerning his religious beliefs is shielded from disclosure pursuant to Federal Rule of Evidence 610, which prohibits such testimony when it is used to enhance the witness' credibility and no other purpose for its admission has been suggested, does not warrant a different result. The responses sought herein are not being sought to establish the truthfulness of Mr. Doudak, nor to establish that he more likely acted in accordance with any belief he may hold. Instead, the responses sought are being explored for the limited purpose of leading to further evidence to establish that defendants' proffered reasons

were a "pretext" to plaintiff's termination.

It is the duty of every Court to guard jealously the great right and privilege of free exercise and enjoyment of religious profession and worship without discrimination or preference, with all the power that the Court possesses, but no person should be permitted to use that right as a cloak for acts of discrimination or as a justification of practices inconsistent with the protections against invidious discrimination proscribed in New York State law (*cf. People v Ballard*, 143 AD2d 919, 533 NYS2d 558 [2d Dept 1988]; *People v Brossard*, 33 NYS2d 369 [NY Co Ct 1942]).

The court recognizes that the First Amendment to the United States Constitution provides that "Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances."[4] And, the freedom of religion is guaranteed by both the state and Federal Constitutions (U.S. Const. Amend. I; N.Y. Const. Art. I § 3). However, these rights are not unfettered. Notwithstanding the above, not all burdens on religion are unconstitutional; the state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest (16A Am. Jur. 2d Constitutional Law § 427 *citing Bob Jones University v U.S.*, 461 US 574, 103 S Ct 2017, 76 L Ed 2d 157 [1983]). When it appears that one's religion is relied upon to form a basis of discrimination against a person who is a member of a protected class, *to wit*: homosexuals, an inquiry into and balancing of the competing interests favors disclosure in order to uncover evidence from which a jury may infer that the proffered reasons for plaintiff's termination was prohibited discrimination.

It must be noted that this Court's function, at this stage of the litigation, is simply to facilitate discovery in accord with the principles noted at the outset. At this juncture, this Court

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[4] The word "association" does not appear in the United States Constitution. "Yet the United States Supreme Court has concluded that a right to freedom of association exists as one of the necessary concomitants to the more specific guarantees of the First Amendment—in short, as a penumbral right, making the others more secure" (16A Am. Jur. 2d Constitutional Law § 539).

is *not* the final arbiter of whether certain evidence is admissible at trial. Indeed, the Trial Judge is the final gatekeeper in deciding which evidence shall be considered by the jury, and will be in a position to issue jury instructions to guard against any prejudice that may result from the disclosure of any evidence relating to defendant's religious beliefs.

Based on the foregoing, it is hereby

ORDERED that the motion by plaintiff to compel discovery, *i.e.*, responses to interrogatories #8, 17, 18, 19 is granted to the extent that (1) as to #8, defendant shall provide detailed responses to same and documentary support, along with a privilege log within 45 days of receipt of this order with notice of entry, and that (2) as to #17, 18, and 19, defendant shall provide responses to same. And it is further

ORDERED that the defendant's cross-motion for a protective order is denied. And it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: June 28, 2007

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

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