Rose v Desy's Clam Bar
2024 NY Slip Op 31335(U)
April 12, 2024
Supreme Court, Kings County
Docket Number: Index No. 505821/2019
Judge: Wavny Toussaint
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At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 12th day of April, 2024.

P R E S E N T:
HON. WAVNY TOUSSAINT,
Justice.

---X

SHANIQUA ROSE,

Plaintiff,

-against-

DESY'S CLAM BAR, MAJRA LLC and GLOBAL LUXURY SERVICES INC.,

Defendants.

---X

GLOBAL LUXURY SERVICES, INC.,

Third-Party Plaintiff,

-against-

DESY'S CLAM BAR RESTAURANT CORP. and MARJA LLC,

Third-Party Defendants.

---X

Index No. 505821/2019

DECISION AND ORDER

The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	480-497; 498-521
Opposing Affidavits/Answer (Affirmations)	526-531, 533-547
	522-525, 548-552
Affidavits/ Affirmations in Reply	553-554; 555-559

Upon the foregoing papers in this action to recover damages for personal injuries, defendant/third-party plaintiff Global Luxury Services, Inc. (GLSI) moves (Seq. 21) for an order, pursuant to CPLR §3212, granting it summary judgment dismissing plaintiff

Shaniqua Rose's (plaintiff) complaint and any cross claims asserted against it. Defendants/third-party defendants, Desy's Clam Bar (Desy's)[1] and Marja LLC (Marja) (collectively, "the 672 defendants") move (Seq. 22) for an order, pursuant to CPLR §3212, granting them summary judgment: (1) dismissing plaintiff's complaint; (2) dismissing the cross claims and third-party claims asserted against them by GLSI; and (3) granting their cross claims against GLSI.

Background

Plaintiff commenced the instant action by filing a summons and verified complaint on March 18, 2019 (NYSCEF Doc No. 1). According to the complaint, on January 12, 2019, plaintiff was injured when she slipped and fell outside of 672 Grand Street, Brooklyn, New York (premises). Desy's occupied the ground floor restaurant location pursuant to a lease with Marja, the landlord of the subject premises (NYSCEF Doc No. 533 at ¶ 5; NYSCEF Doc No. 518). Pursuant to a work order dated January12, 2019, Desy's contracted with GLSI to remove grease and clean the filter and hood in Desy's kitchen (NYSCEF Doc No. 540). Plaintiff claims to have sustained various injuries as a result of slipping on an oily, icy, or grease like substance on the sidewalk abutting the premises (NYSCEF Doc No. 62).

On November 8, 2019, GLSI filed an answer asserting 14 affirmative defenses and one cross claim against the 672 defendants (NYSCEF Doc No. 15). The 672 defendants filed an answer denying plaintiff's allegations, asserting 10 affirmative defenses, and two

[1] Desy's Clam Bar, also denoted as Desy's Clam Bar Restaurant Corp., is the same entity. The Court notes the parties, however, only reference Desy's Clam Bar throughout the papers as both defendant and third-party defendant.

cross claims against GLSI (NYSCEF Doc No. 42). On August 17, 2020, GLSI filed a third-party verified complaint against the 672 defendants alleging that they created the defective condition and if GLSI is found liable for the accident, GLSI is entitled to contribution and indemnification from the 672 defendants (NYSCEF Doc No. 35). The 672 defendants filed an answer to the third-party complaint, asserted 9 affirmative defenses, and demanded dismissal of the third-party action (NYSCEF Doc No. 44). GLSI filed a reply to the 672 defendants' cross claims on November 11, 2020 (NYSCEF Doc No. 53).

Parties' Contentions

GLSI's Motion (Seq. 21)

GLSI moves for summary judgment dismissing plaintiff's complaint alleging that no questions of material fact exist regarding whether it was negligent or whether any alleged negligence on its part was the proximate cause of plaintiff's alleged injuries. GLSI further seeks dismissal of any cross claims asserted against it (NYSCEF Doc No. 480 at 1-2). In support of its motion, GLSI contends that it neither owns, rents, nor leases the space at the subject premises where plaintiff claims she slipped and fell (NYSCEF Doc No. 482 at ¶ 5). GLSI highlights that the evidence submitted establishes that GLSI's workers were on-site, performing maintenance or cleaning work on a commercial cooking exhaust system *inside* of Desy's restaurant (*id.* at ¶ 6). GLSI asserts that contrary to plaintiff's speculation however, GLSI's employee did not create the allegedly dangerous greasy condition on the sidewalk (*id.* at ¶ 7). In support of its motion, GLSI annexes the deposition testimony of Angel Guzman (Guzman), former team leader for GLSI performing work

inside Desy's kitchen on the date of the accident and Juan Escobar (Escobar), the owner of the company.

In opposition, plaintiff asserts that GLSI's motion should be denied as it failed to meet its prima facie burden for entitlement to summary judgment dismissing plaintiff's complaint. Plaintiff further asserts that material issues of fact exist precluding the relief sought (NYSCEF Doc No. 526 at ¶ 4). Plaintiff contends that GLSI breached its duty of care that was owed to plaintiff, which is supported with expert evidence (*id.*). Plaintiff further contends that GLSI caused and created the dangerous and defective condition which caused plaintiff's injuries (*id.*). Lastly, plaintiff notes that the conflicting witness accounts can only be reconciled by the trier of fact requiring the denial of the instant motion (*id.*).

Plaintiff asserts that GLSI performed grease cleanup outside on the sidewalk, in violation of New York City code, and in freezing temperatures, thereby causing and creating the dangerous icy/slippery condition (*id.* at ¶ 6). Specifically, plaintiff alleges that GLSI caused the dangerous and defective condition by cleaning greasy restaurant hood filters on the sidewalk abutting Desy's restaurant (*id.* at ¶ 8). In this regard, plaintiff notes that the expert affidavit of Joel Schachter, P.E., unequivocally proves that GLSI violated numerous fire and cleaning codes which directly caused the dangerous condition (*id.*). It is plaintiff's contention that GLSI improperly cleaned the kitchen hood/equipment outside, causing grease to cover the sidewalk which its workers tried to remedy by attempting to clean the grease on the sidewalk using a pressure washer (*id.* at ¶ 9). Plaintiff therefore argues that GLSI's motion should be denied as questions of fact exist.

The 672 defendants opposed the instant motion arguing that it is beyond dispute that GLSI created the icy and greasy condition (NYSCEF Doc No. 533 at ¶ 4). The 672 defendants assert that on the day of the accident, Desy's retained GLSI to remove grease from the kitchen hood and clean the hood grease filters (*id.* at ¶ 7). On the morning of the accident, the 672 defendants contend that GLSI's employees cleaned the grease filters on the sidewalk abutting Desy's thereby creating the ice and/or grease condition thereon (*id.* at ¶ 8). In support of their position, the 672 defendants refer to the deposition testimony from the plaintiff, Escobar, Guzman, and Zulma Valle (Valle).

Valle testified that she was a manager at Desy's restaurant working on the date of the accident but did not oversee or watch the work that GLSI performed and had no knowledge of any ice formation on the sidewalk in front of Desy's restaurant (*id.* at ¶ 75).[2] Valle asserted that she was informed by another Desy's worker that plaintiff was arguing about a stain on the sidewalk with GLSI's employees stating that they were not supposed to be doing this work outside.[3] Valle testified that when she went outside to inspect the sidewalk after GLSI had left, it was "already dry" but she still noticed a stain which she claimed she had her workers clean up completely (*id.* at ¶ 78).[4] Specifically, she opined that the stain or residue that was left on the sidewalk could have been grease (*id.* at ¶ 79).[5] She stated that GLSI was not supposed to be power washing outside and if any panels needed to be cleaned, GLSI would come and remove the dirty panels and bring in clean

[2] Valle EBT tr at page 10, line 22 to page 11, line 13.
[3] Valle EBT tr at page 18, line 25 to page 19, line 12.
[4] Valle EBT tr at page 19, lines 16-25.
[5] Valle EBT tr at page 25, lines 13-20.

ones (*id.* at ¶ 79).[6] Valle further highlighted that inspections were performed twice daily at the beginning of each shift, with the first shift at around 6:00 a.m. and the second shift at 5:00 p.m. (*id.* at ¶ 81). Based on the foregoing evidence, the 672 defendants submit that GLSI's summary judgment motion must be denied in its entirety.

In reply, GLSI asserts that it made a prima facie showing of its entitlement to summary judgment since it neither created the alleged hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (NYSCEF Doc No. 553 at 2). GLSI further contends that no proof in the record raises a material question of fact with respect to whether GLSI created the alleged defective condition (*id.*).

The 672 Defendants' Motion (Seq. 22)

The 672 defendants move for summary judgment dismissing plaintiff's complaint, the cross claims, and third-party claims asserted against them by GLSI, and for summary judgment on their cross claims against GLSI (NYSCEF Doc No. 499 at ¶ 2). In support of their position, the 672 defendants assert that based upon the deposition testimony, GLSI's work order, and plaintiff's two-part video recorded by her on her cell phone,[7] the grease and ice condition on the sidewalk was created by GLSI on the morning of the accident (*id.* at ¶ 94). Based on the deposition testimony, Desy's opened at 6:00 a.m. on the date of the

[6] Valle EBT tr at page 20, line 24 to page 21, line 8.

[7] In support of their motion, the 672 defendants submit a video plaintiff recorded after she returned from the deli. The video depicts plaintiff returning to the scene of the accident when she encounters a GLSI worker who is purportedly attempting to defrost the ground with water. The worker is heard saying "mommy, no ice." The video captures what plaintiff describes, and Guzman confirms, to be a power washer (NYSCEF Doc No. 499 at ¶ 74). The portion of the sidewalk next to GLSI's work truck appears to be wet and darker than the rest of the sidewalk.

accident and the plaintiff slipped and fell at approximately 6:30 a.m. Thus, the 672 defendants contend that the alleged conditions could have been present, at the most, for only one-half hour prior to plaintiff's accident (*id.* at ¶ 95). They further contend that neither Marja nor Desy's had any actual or constructive notice that GLSI would be performing grease filter cleaning services on the sidewalk prior to the occurrence (*id.* at ¶ 102). Furthermore, Valle testified that GLSI was not supposed to clean the filters on premises, as in the past, GLSI would typically replace them and take the dirty filters with them to clean off site (*id.*). Valle further testified that she was unaware that GLSI was performing work on the sidewalk and never received any complaints about the sidewalk near Desy's (*id.* at ¶¶ 103-104). Lastly, in support of its motion, the 672 defendants highlight that Valle did not oversee or watch GLSI's work and did not have any knowledge of any ice formation on the sidewalk (*id.* at ¶ 105).

In opposition, plaintiff asserts that the 672 defendants had a nondelegable duty to provide the public, including customers, employees, and pedestrians, with reasonably safe means of ingress and egress (NYSCEF Doc No. 522 at ¶ 4). Plaintiff further argues that that building owner and restaurant are vicariously liable for any negligence committed by a maintenance/cleaning contractor that caused the premises to become unsafe even if they did not have notice of the defect (*id.*). Plaintiff asserts that the testimony submitted by the parties clearly establishes that GLSI's negligent work created a dangerous icy/slippery condition and therefore the 672 defendants and GLSI breached their respective duties to plaintiff (*id.*).

In opposition, GLSI contends that it did not create the alleged icy/greasy condition on the sidewalk while it was performing work inside of Desy's kitchen on the date of the alleged accident (NYSCEF Doc No. 548 at ¶ 4). Rather, GLSI asserts that the 672 defendants each owed a separate duty to plaintiff to keep the sidewalk in a safe condition (*id*). GLSI submits that according to the U.S. Department of Commerce National Oceanic & Atmospheric Administration, National Environmental Satellite Data and Information Service, it is uncontroverted that prior to the early morning hours of January 12, 2019, it had snowed at JFK airport on each of the following dates: January 7, January 8, and January 10 (*id.* at ¶ 5; NYSCEF Doc No. 549). Moreover, GLSI asserts that during the three days prior to the accident, the temperature reached a low of 20 degrees Fahrenheit and sunrise did not occur until after the alleged accident (*id.* at ¶ 5). Thus, GLSI contends that the 672 defendants failed to establish entitlement to summary judgment and, in any event, GLSI submitted evidence that raises material questions of fact warranting the denial of their motion (NYSCEF Doc No. 550).

In reply, the 672 defendants assert that GLSI's affirmation in opposition relies on uncertificated weather records from a distant location unaccompanied by an expert affidavit, and therefore the meteorological records relied on cannot be considered by the Court (NYSCEF Doc No. 555 at ¶¶ 8-10). Further, the 672 defendants highlight that the admissible evidence established that GLSI was washing greasy commercial oven filters on the freezing sidewalk or power washing the sidewalk on the date of the accident (*id.* at ¶¶ 16-49). Additionally, they contend that even if they owed a duty to plaintiff, they did not have notice of the condition. Thus, the 672 defendants argue that their motion should be

granted as it cannot be disputed that GLSI created the alleged condition (NYSCEF Doc. No. at ¶¶ 59-61).

Discussion

"To obtain summary judgment it is necessary that the movant establish his [or her] cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his [or her] favor" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "On the other hand, to defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue of fact" (*id.*). If there are triable issues of fact as to how the alleged accident occurred, then the motion should be denied (*Lima v HY 38 Owner, LLC*, 208 AD3d 1181, 1183 [2d Dep't 2022]). "Summary judgment is a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues" (*Murray v Community House Development Fund Company, Inc.*, 223 AD3d 675, 677 [2d Dep't 2024]; *Chiara v Town of New Castle*, 126 AD3d 111, 125 [2d Dep't 2015]).

Additionally, "[i]n determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party, and where conflicting inferences may be drawn, the court must draw those most favorable to the nonmoving party" (*Chiara,* 126 AD3d at 111; *Open Door Foods, LLC v Pasta Machines, Inc.*, 136 AD3d 1002, 1005 [2d Dep't 2016]). The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist (*Khutoryanskaya v Laser & Microsurgery, P.C.*, 222

AD3d 633, 635 [2d Dep't 2023]; *Schumacher v Pucciarelli*, 161 AD3d 1205, 1205 [2d Dep't 2018]).

"In a premises liability case, a defendant moving for summary judgment has the burden of establishing, prima facie, that it did not create the allegedly dangerous condition or have actual or constructive notice of its existence for a sufficient length of time to have discovered and remedied it" (*Vella v UBM Holdings, Inc.*, 216 AD3d 1051, 1053 [2d Dep't 2023]; *Cabanas v Zou*, 215 AD3d 726, 727 [2d Dep't 2023]). "A defendant has constructive notice of a dangerous condition when the condition is visible and apparent and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it" (*Cabanas*, 215 AD3d at 727; *Gordon v American Museum of Natural History*, 67 NY2D 836, 836 [1986]). To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell (*Birnbaum v New York Racing Ass'n, Inc.*, 57 AD3d 598, 598 [2d Dep't 2008]).

"A contractor may be liable for an affirmative act of negligence that results in the creation of a dangerous condition upon a public street" or sidewalk (*Encalada v Brooklyn Union Gas Company*, 221 AD3d 860, 860 [2d Dep't 2023]; *Pizzolorusso v Metro Mechancial, LLC*, 205 AD3d 748, 750 [2d Dep't 2022]). "Whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" (*Leem v 152-24 Northern, LLC*, 201 AD3d 918, 919 [2d Dep't 2022]).

Here, GLSI failed to establish, prima facie, that it did not create the allegedly dangerous condition (*see Encalada*, 221 AD3d at 860-861 [holding that a contractor failed to conclusively establish that it did not perform the work prior to the subject accident in the area where plaintiff was injured and did not create the dangerous condition that caused plaintiff's injuries]; *see also Yuk Ping Cheng Chan v Young T. Lee & Son Realty Corp.*, 110 AD3d 637, 637-638 [1st Dep't 2013] [holding that defendant failed to establish entitlement to judgment as a matter of law as triable issues exist as to whether defendant created the greasy condition on the sidewalk by disposing of waste from its restaurant on the sidewalk]). In support of its motion, GLSI submits the deposition testimony of its owner, Escobar, and a GLSI employee, Guzman, which failed to conclusively establish that GLSI did not create the greasy and/or slippery condition that caused plaintiff's alleged fall.

Escobar, who was not present at the subject premises on the date of the accident, testified that no part of the hoods or filters would be cleaned outside. According to Escobar, GSLI does not clean or maintain filters since the filters get replaced and the old filters are maintained by another company.[8] However, Guzman, GLSI's team lead on site on the date of the accident, testified that while he had no specific recollection of the date in question, it was possible that the filters were cleaned outside rather than inside.[9]According to Guzman, filters were sometimes cleaned outside, which conflicts with Escobar's

[8] Escobar EBT tr at page 50, line 5 to page 51, line 4.
[9] Guzman EBT tr at page 27, line 24 to page 28, line 21; page 32, lines 3-13.

testimony.[10] In light of the conflicting testimony, GLSI has failed to demonstrate, as a matter of law, that it did not create the allegedly dangerous condition at issue.

In any event, assuming that GLSI did meet its initial burden, triable issues of fact exist warranting the denial of its motion. Specifically, plaintiff testified that when she slipped and fell, she believed it was on something icy or greasy because when she got up, there was grease on both of her palms which had made contact with the ground during the fall.[11] Plaintiff further testified that when she returned to the scene of the accident after going to a nearby deli, the ground appeared saturated with a greasy, oily substance and ice, and she observed a GLSI employee outside with a hose trying to clean and defrost the ground.[12]Thus, based on the foregoing testimony, triable issues of fact exist as to whether GLSI created the dangerous condition (*see Latalladi v Peter Luger Steakhouse*, 52 AD3d 475, 476 [2d Dep't 2008] [holding that questions of fact existed as to whether the defendant created the slippery and greasy condition on the sidewalk where plaintiff allegedly was caused to slip and fall on dried blood and sand]).

Turning to the 672 defendants' motion, "[i]n a slip-and-fall case, a defendant property owner moving for summary judgment has the burden of making a prima facie showing that it neither (1) affirmatively created the hazardous condition nor (2) had actual or constructive notice of the condition and a reasonable time to correct or warn about its existence" (*Scammell v Flum*, ___ AD3d ___, 2024 NY Slip Op 01327, *1 [2d Dep't 2024];

[10] Guzman EBT tr at page 17, lines 2-16.
[11] Rose EBT tr dtd 4/23/2021 at page 81, line 25 to page 84, line 19.
[12] Rose EBT tr dtd 6/7/2021 at page 21, line 19 to page 24, line 6.

Prietto v Wal-Mart Stores, Inc., 29 NY3d 1136, 1137 [2017]). "To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (*Phipps v Conifer Realty, LLC*, 220 AD3d 654, 655 [2d Dep't 2023]). "Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice" (*id.*).

Here, the 672 defendants failed to establish, prima facie, that it did not have constructive notice of the condition that allegedly caused plaintiff's fall. Valle testified that she did not know specifically what time GLSI had arrived at the premises but was informed by a Desy's coworker at around 8:00 a.m. that GLSI was on site. Although no person with personal knowledge of the facts testified as to the time GLSI arrived at the property, the testimony suggests that the earliest it could have commenced work is at 6:00 a.m., when Desy's workers would have arrived at the premises.[13]According to plaintiff, her fall occurred between 6:40 a.m. and 6:50 a.m.[14]Although Valle testified that the first inspection of the day would occur at 6:00 a.m., such testimony is insufficient to establish lack of constructive notice as Valle only testified about Desy's general inspection procedures and did not offer evidence as to when the accident site was last inspected prior to the accident (*see Armenta v AAC Cross County Mall, LLC*, 219 AD3d 790, 791 [2d Dep't 2023] [holding that defendant failed to establish that it lacked constructive notice of the oily

[13] Valle EBT tr at page 47, lines 8-12.
[14] Rose EBT dtd 4/23/2021 tr at page 16, lines 6-9.

substance on the ground of the exterior parking lot as defendant's property manager only testified about the defendant's general cleaning and inspection procedures]; *see also Phipps,* 220 AD3d at 655 [holding that defendant failed to demonstrate that it did not have constructive notice of the dangerous condition as defendant failed to proffer any evidence demonstrating when the stairwell where the plaintiff allegedly fell was last cleaned or inspected before the accident]; *Herman v Lifeplex, LLC*, 106 AD3d 1050, 1051-1052 [2d Dep't 2013]).

Accordingly, the 672 defendants' motion must be denied as they failed to eliminate triable issues of fact with regard to its claim that it lacked constructive notice of the dangerous condition and a reasonable time to correct or warn about its existence (*Armenta,* 219 AD3d at 791 [holding that defendant failed to establish that it did not have constructive notice of an oily patch as plaintiff testified that the condition existed for approximately an hour before she slipped and fell]; *see also Croake v Flushing Hosp. & Med. Ctr.,* 222 AD3d 939, 939 [2d Dep't 2023] [holding that defendant failed to establish that the condition did not exist for a sufficient length of time prior to the accident to permit defendant to remedy it where the premises was inspected more than an hour before the accident]; *Negri v Stop & Shop*, 65 NY2d 625, 625 [1985] [holding that it cannot be said, as a matter of law, that the condition, broken jars of baby food breaking 15 to 20 minutes prior to the accident and the aisle not having been cleaned or inspected for a least 50 minutes prior to the accident with other evidence suggesting it was at least two hours, was insufficient to warrant dismissal as a jury can draw the necessary inference that a slippery condition was created

for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy the condition]).

Since the 672 defendants did not sustain their prima facie burden of establishing their entitlement to judgment as a matter of law, it is not necessary to consider the sufficiency of the opposition papers (*see Phipps*, 220 AD3d at 655; *Winegrad v New York University Medical Center*, 64 NY2D 851 [1985]).

Cross claims

The portions of the respective motions seeking dismissal of the reciprocal cross claims asserted by GLSI and the 672 defendants are denied. "The predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, that is, the defendant's role in causing the plaintiff's injury is solely passive, and thus its liability is purely vicarious" (*De Heras v Avant Gardner, LLC*, 224 AD3d 883, 884 [2d Dep't 2024]). Here, GLSI and the 672 defendants failed to establish that they were not negligent, thereby failing to establish entitlement to judgment as a matter of law on the reciprocal cross claims (*Grant v 132 W. 125 Co., LLC,* 180 AD3d 1005, 1007 [2d Dep't 2020]; *Bennet v DA Associates, LLC,* 217 AD3d 650, 651 [2d Dep't 2023]). Additionally, "where a party is held liable at least partially because of its own negligence, contribution against other culpable tort-feasors is the only available remedy" (*De Heras,* 224 AD3d at 884). GLSI and the 672 defendants failed to satisfy their burden (*English v Wainco Goshen 1031, LLC*, 218 AD3d 444, 445 [2d Dep't 2023]).

Conclusion

All arguments raised on the motions and evidence submitted by the parties in connection thereto have been considered by this Court, regardless of whether they are specifically discussed herein.

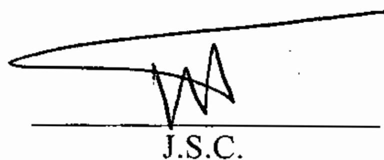
Accordingly, it is hereby

ORDERED that GLSI's motion (Seq. 21) is denied in its entirety; and it is further

ORDERED that the 672 defendants' motion (Seq. 22) is denied in its entirety.

This constitutes the decision and order of the Court.

E N T E R



J.S.C.

HON. WAVNY TOUSSAINT
J. S. C.