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

PRESENT: HAROLD BEELER J.S.C. PART 9

Justice

0116768/2003

CHADBOURNE & PARKE LLP
VS
AB RECUR FINANS

SEQ 1

ENFORCEMENT PROCEEDING

INDEX NO. 116768/2003

MOTION DATE

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 is granted in part, see Order annexed.

FILED

OCT 14 2004

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 9/27/04

HAROLD BEELER
J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 9

----------X

CHADBOURNE & PARKE LLP,
Petitioner,

Index No. 116768/03

- against -

AB RECUR FINANS,
Respondent,

-and-

KILPATRICK STOCKTON LLP,
Nominal Respondent.

----------X

HAROLD BEELER, J.:

Motion Sequence Numbers 001 and 002 are consolidated for disposition. In Motion Number 001, Chadbourne & Parke LLP (Chadbourne) petitions for an order and judgment: (1) determining its lien for services rendered as attorneys for respondent AB Recur Finans (ABRF), and (2) enforcing that lien as it is determined.

In Motion Number 002, Chadbourne moves, pursuant to CPLR 3211 (a) (5), for dismissal of the counterclaims, to the extent that they seek affirmative recovery, on the ground that they are barred by the statute of limitations.

BACKGROUND

The petition alleges as follows: petitioner Chadbourne is a New York limited liability partnership and law firm. Respondent ABRF is a corporation and finance company located in Stockholm, Sweden. Nominal respondent Kilpatrick Stockton LLP (Kilpatrick) is a limited liability partnership and law firm with offices in Atlanta, Georgia. Kilpatrick is named as a respondent because it is the escrow agent of escrow funds against which Chadbourne has asserted an attorney's lien.

In April 1990, ABRF's predecessor, Fortune Finans AB (Fortune), retained Chadbourne to pursue a claim against Judson Art Warehouse, Inc. (JAW) for the alleged wrongful release of a painting by Cy Twombly (the Twombly), in which ABRF claimed to have had a security interest. Chadbourne commenced the action entitled *AB Recur Finans, as Successor in Interest to the Claims of Fortune Finans AB v Lennart Andersson et al.* (Sup Ct, New York County, Index No. 9422/90 [*Andersson* Action]).[1] Following a bench trial before the Honorable Edward Greenfield, on September 15, 1995, judgment was entered in ABRF's favor against JAW in the amount of $2,988,780 (the Judgment). The petition contends that, by reason of the foregoing, Chadbourne acquired a lien under Section 475 of the Judiciary Law.

Originally, Fortune, ABRF's predecessor, had agreed to pay Chadbourne an hourly fee, plus disbursements, but, in mid-1994, ABRF and Chadbourne agreed that Chadbourne would pursue the Twombly claim on a contingency fee basis, consisting of one-third of the gross recovery, and that Chadbourne would be paid monthly for its litigation expenses and disbursements. Although ABRF paid some of those disbursements and expenses, remaining due since December 11, 1998, is a bill in the amount of $9,471.13.

Chadbourne was unable to enforce the Judgment because JAW was judgment-proof. Chadbourne learned, however, of a one-million dollar insurance policy that Nordstern Insurance Company had issued to JAW. Chadbourne entered into negotiations with Nordstern to resolve the matter without litigation, but ABRF rejected Nordstern's settlement offer as unacceptable.

While Chadbourne was prepared to commence a lawsuit against Nordstern, in 1998, ABRF advised that it had retained Kilpatrick to pursue the claim, and Kilpatrick filed the action

[1] The caption was amended to reflect Fortune's insolvency, and ABRF's emergence as its successor.

entitled *AB Recur Finans v Nordstern Ins. Co. of N. Am.* (US Dist Ct, SD NY [99 Civ. 1171] [LLS] [*Nordstern* Action]). Chadbourne assisted Kilpatrick in pursuing this action. On March 29, 1999, Chadbourne filed a Notice of Attorney's Charging Lien in the *Nordstern* Action.

ABRF obtained summary judgment against Nordstern in the *Nordstern* Action, and, on April 10, 2001, judgment was entered against Nordstern, in ABRF's favor. On June 21, 2002, Nordstern and ABRF settled the matter, and Nordstern paid ABRF $1,250,000 (the Settlement). An escrow was established with proceeds from the Nordstern payment sufficient to satisfy Chadbourne's legal fee claim, and Chadbourne's lien remains unsatisfied.

Chadbourne seeks: (1) one-third of the $1,250,000 recovered ($416,667), plus nine percent interest since June 21, 2002 (totaling $46,875 as of September 22, 2003), plus unpaid disbursements of $9,471.13, plus nine percent interest since December 11, 1998 ($4,085), for a total of $477,098.13; (2) its legal fees and expenses incurred in this proceeding; (3) costs and disbursements; and (4) an order requiring Kilpatrick to pay out of the escrowed proceeds the full amount found in this proceeding to be due it.

In its answer, ABRF asserts that Chadbourne's collection efforts were largely unsuccessful, in that it recovered less than 15% of the total amount of the loans at issue ($4,700,000), and it recovered nothing on a claim to enforce a $2,000,000 security interest in the Twombly.

The answer alleges as follows: Fortune loaned Lennart Andersson, a Swedish art dealer, $4,700,000 to purchase several masterwork paintings, including the Twombly, from Peder Bonnier, an art dealer with offices in New York. Andersson financed the purchase, in part, by obtaining a $2,000,000 loan from Fortune on February 22, 1990. At the time, the Twombly was stored at the JAW warehouse, located in Long Island City, New York. JAW signed a letter

acknowledging Fortune's security interest in the painting, and it agreed to not release the painting without Fortune's written consent.

Fortune paid the loan proceeds by wire transfer to satisfy a debt that Bonnier owed to another art dealer, the Gagosian Gallery. Both Bonnier and Andersson leased storage space for artwork at JAW. By letter dated March 26, 1990, a Bonnier representative sent instructions to JAW, requesting that the Twombly be released from storage into Andersson's account. Sometime between March 26, 1990, and April 6, 1990, Bonnier falsely claimed that he had not been paid for the Twombly, and he convinced JAW to release the Twombly into his custody. Bonnier then resold the Twombly to Gagosian for $2,900,000. Thus, Bonnier received $4,900,000 for the sale and "resale" of the Twombly to Andersson and Gagosian, respectively. Gagosian, in turn, resold the Twombly to Seibu Corp., a Japanese Corporation, for $3,100,000.

On April 25, 1990, Fortune arranged to deliver a letter to JAW, invoking the February 22, 1990 security agreement, in which JAW agreed not to release the Twombly without Fortune's written consent. That same day, Chadboune commenced the *Andersson* Action. Although Chadbourne knew, or should have known, that the Twombly had been released to Bonnier and, in turn, transferred to Gagosian, the complaint did not seek affirmative, monetary relief against Bonnier, or name Gagosian as a party.

On April 27, 1990, Chadbourne obtained an order from the late Honorable Elliot Wilk, restraining the three named defendants (Andersson, Bonnier, and JAW) from removing from New York State four paintings, including the Twombly. Chadbourne took no action, however, to ascertain the Twombly's whereabouts, impose a trust on the proceeds of its resale by Bonnier, or restrain Gagosian from shipping the painting to Seibu Corp. in Japan, which occurred on or after May 15, 1990, after issuance of the injunction on April 27, 1990.

In 1994, after having received more than $775,000, including costs, for its services, and after a dispute arose regarding fees, Chadbourne proposed that it would try the Twombly claim in the *Andersson* Action on a contingency fee basis.

The answer alleges further that Chadbourne had not discovered that JAW had obtained the warehouse insurance policy from Nordstern until post-judgment discovery. Nordstern denied coverage for the claim on the grounds of a weight limitation clause in the insurance policy, and that the policy did not cover a loss based upon breach of contact. Chadbourne did not advise ABRF of the possibility of pursuing a separate claim against Nordstern under Insurance Law § 3420 (d), and of the bench ruling denying, on statute of limitations ground, a belated conversion claim that Chadbourne attempted to assert against Bonnier and JAW. Adopting a wait and see approach, Chadbourne did not pursue any claim against Nordstern. Because Chadbourne failed to obtain any recovery, or pursue any remedy against Nordstern, ABRF terminated Chadbourne's services for cause in 1998.

The answer contains three counterclaims. The first counterclaim alleges that Chadbourne's negligent failure to: (a) discover the whereabouts of the Twombly in late April 1990; (b) prevent the transfer of the Twombly to Japan; (c) impose a trust on the $2,900,000 in proceeds received by Bonnier for the resale of the Twombly; and (d) otherwise to pursue a timely monetary claim against Bonnier, caused ABRF to lose any opportunity to enforce the full value of the $2,000,000 security interest in the Twombly, thereby causing ABRF damages in excess of the value of the services that Chadbourne rendered.

The second counterclaim alleges that Chadbourne's negligent actions, including, but not limited to, failing to pursue a timely conversion claim against JAW or Bonnier, failing to serve notice of entry of judgment upon Nordstern, and refusing to turn over the *Andersson* Action case

files to aid in pursuit of the claims against Nordstern, as requested by ABRF, significantly increased ABRF's expenses in litigating the Nordstern lawsuit.

The third counterclaim seeks declarations that: (1) Chadbourne has been discharged for cause, and is not entitled to assert a charging lien against ABRF; (2) Chadbourne failed to represent ABRF's interests in accordance with the requisite standard of care, and is not entitled to recover additional fees and costs for services rendered in the *Andersson* Action; (3) the amount of fees previously received by Chadbourne fully compensates it for the failure of the value of the services rendered on ABRF's behalf; and (4) Chadbourne is not entitled to any monetary recovery in this litigation, because it failed to serve as counsel for ABRF in the *Nordstern* Action, and failed to participate in obtaining the Settlement.

DETERMINATION

The petition is granted to the extent of referring the matter to a Special Referee to hear and report as to the reasonable value of services that Chadbourne rendered on ABRF's behalf, from the date of the contingency fee agreement to the date of discharge. Although ABRF did not discharge Chadbourne for cause, Chadbourne is not entitled to a charging lien.

The counterclaims are time-barred to the extent that they seek affirmative recovery.

DISCUSSION

Charging Lien

In New York, an attorney's charging lien is governed by statute (*Banque Indosuez v Sopwith Holdings Corp.*, 98 NY2d 34, *rearg denied* 98 NY2d 693 [2002]). Section 475 of the Judiciary Law provides that "[f]rom the commencement of an action ... the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the

proceeds thereof in whatever hands they may come .... " The charging lien does not merely give an attorney an enforceable right against the property of another, it also gives the attorney an equitable interest in the client's cause of action (*LMWT Realty Corp. v Davis Agency*, 85 NY2d 462 [1995]).

By its terms, section 475 provides that the lien can be asserted only by the attorney who appears for a party in the action or special proceeding (*Matter of Taylor, Jacoby & Campo*, 208 AD2d 400 [1st Dept 1994], *lv denied* 86 NY2d 711 [1995]). To be sure, it is not dispositive that the charging lien is not asserted against the Judgment obtained in the *Andersson* Action, in which Chadbourne acted as counsel of record, but against the Settlement proceeds obtained in the *Nordstern* Action, in which it did not act as counsel. An attorney may be entitled to assert a charging lien even though the proceeds subject to it were obtained in a different action (*Cohen v Grainger, Tesoriero & Bell*, 81 NY2d 655 [1993]).

Here, however, Chadbourne does not have a charging lien on the Nordstern proceeds, because the proceeds, resulting from an action in which Chadbourne did not appear as counsel or participate, was based upon a different cause of action from that asserted in the action in which it appeared. In those instances where the charging lien is made applicable to proceeds obtained in a different action, the cause of action remained the same in both actions (*see e.g. Klein v Eubank*, 87 NY2d 459, *rearg denied* 87 NY2d 1056 [1996]; *Cohen v Grainger, Tesoriero & Bell*, 81 NY2d 655, *supra*; *Resnick v Krasner*, 20 AD2d 773 [1st Dept 1964]).

That the two actions are not based upon the same cause of action is revealed by the fact that the Judgment obtained in the *Andersson* Action was against JAW, which was not named as a party in the *Nordstern* Action, and the gravamen of the claim in that action was that Nordstern wrongfully refused to honor its obligations under the policy of insurance issued to JAW (Exhibit

19 to Hall Reply Aff.).

Discharge

A client has an absolute right, at any time, with or without cause, to terminate the attorney-client relationship by discharging the attorney (*Campagnola v Mulholland, Minion & Roe*, 76 NY2d 38 [1990]). Where the discharge is for cause, an attorney has no right to compensation, notwithstanding a specific retainer agreement (*id.* at 43).

The record establishes that ABRF did not discharge Chadbourne for cause, and ABRF has failed to submit any evidence to support its allegation that "after three years of inaction, ABRF discharged Chadbourne as ABRF's counsel for good cause." There is no evidence in the record indicating any dissatisfaction with Chadbourne's services at the time that ABRF terminated the relationship, thereby militating against a finding of termination for cause (*Bruk v Albin*, 270 AD2d 441 [2d Dept 2000]). The letter terminating the representation stated that "[u]pon review of the status of the above-referenced collection of matters, AB Recur Finans ('AB Recur') has decided to transfer our New York representation ... thereby ending any further relationship with Chadbourne & Parke, LLP" (Exhibit 17 to Reply Affirmation of Thomas J. Hall, Esq., dated December 10, 2003 [Hall Reply Aff.]). Moreover, substitute counsel asked for Chadbourne's "thoughts and suggestions" concerning the Nordstern matter (Exhibit 14 to Hall Reply Aff.]). Of course, the fact that ABRF had not discharged Chadbourne for cause does not foreclose a subsequent complaint about the services rendered (*Campagnola v Mulholland, Minion & Roe*, 76 NY2d at 44 [where plaintiff belatedly learns of misconduct and sues for recovery, the negligent attorney is precluded from claiming credit for an unearned fee]).

Negligence

As a separate defense to the petition, ABRF contends that Chadbourne was negligent in

its representation of it, and that at least a portion of that conduct rises to the level of legal malpractice. To prevail in an action for legal malpractice, the client must show that the attorney was negligent, and that, "but for" the attorney's negligence, the client would have prevailed in the underlying action (*John Grace & Co. v Tunstead, Schecter & Torre*, 186 AD2d 15 [1st Dept 1992]).

ABRF alleges that Chadbourne failed to ascertain the whereabouts of the Twombly, or prevent it from being shipped to Japan, three weeks after Chadbourne filed the *Andersson* Action, and, therefore, it lost any opportunity to enforce its security interest in the Twombly, or against the $2.9 million in proceeds that Bonnier received from Gagosian for the Twombly after Bonnier had received a restraining order prohibiting him from reselling the painting.

ABRF has not made any specific allegations to support its conclusory assertion to indicate that, but for Chadbourne's alleged negligence, it was likely to recover the Twombly, and prevent its shipment to Japan. The record indicates that any attempt to prevent the shipment to Japan would have been futile, in that Justice Greenfield found that Bonnier was not in contempt of the April 27, 1990 restraining order, because title had passed to Gagosian, upon delivery, on April 16, 1990, and Bonnier had notice of the order only at some point thereafter (Exhibit 9 to Hall Reply Aff.). In addition, there was no indication that Gagosian purchased the painting with knowledge of ABRF's security interest, and, pursuant to UCC § 9-317 (b), a buyer who gives value and receives delivery of the collateral without knowledge of the security interest, takes free of the security interest.

Also unavailing for purposes of opposing the petition is ABRF's assertion that Chadbourne allowed the statute of limitations to expire without prosecuting a valid claim for conversion against JAW and Bonnier. In a related action entitled *Forvaltnings AB Gamlestaden*

v Andersson et al. (Sup Ct, NY County Index No. 17976/91 [*Forvaltnings* Action]), Justice Myriam J. Altman denied leave to amend the complaint to add a claim for conversion against Bonnier, because the allegations were insufficient to demonstrate that Andersson had any rights of ownership in the Twombly (Exhibit 33 to Hall Reply Aff.). The court's determination in the *Forvaltnings* Action is relevant here because plaintiff therein was a co-lender with Fortune on Andersson's purchase of the Twombly, and Andersson pledged his interest in the painting as security for the loans.

Moreover, the Nordstern insurance policy had an express exclusion for, among other things, willful conversion (Exhibit 30, at 4 [E] to Hall Reply Aff.]). Thus, according to Chadbourne, the conversion claim could have harmed the subsequent claim against Nordstern, which resulted in the $1,250,000 payment. Even if Chadbourne erred in this assertion, this error of judgment does not appear to rise to the level of professional malpractice (*Rosner v Paley*, 65 NY2d 736 [1985]; *Alter & Alter v Cannella*, 284 AD2d 138 [1st Dept 2001]). Furthermore, a judgment against JAW based upon conversion would be inconsequential, because ABRF obtained the Judgment on an alternate theory of liability, JAW was judgment proof, and ABRF was successful in obtaining an amount at least equal to the million dollar limit contained in the Nordstern insurance policy. As for ABRF's assertion that Chadbourne failed to disclose the dismissal of the conversion claim, there is no independent cause of action for concealing malpractice (*Zarin v Reid & Priest*, 184 AD2d 385 [1st Dept 1992]).

ABRF also alleges that Chadbourne failed to collect any portion of the Judgment, without discussing what action it could have taken, and why the failure to take such action, constitutes negligence. In her affidavit, Ewa Glennow, an ABRF officer, states that Chadbourne never advised her of the possibility of pursuing a bad faith claim against Nordstern, but the record

indicates that Chadbourne apprised ABRF of its enforcement strategy, and discussed this option with Glennow, as well as with ABRF's Swedish counsel (*see* Exh. 19 to Affidavit of Edmund M. Kniesel, Esq., dated November 17, 2003). An unsuccessful strategic decision is insufficient to establish malpractice (*Holmberg, Galbraith, Holmberg, Orkin and Bennett v Koury*, 176 AD2d 1045 [3d Dept 1991]). Furthermore, ABRF's claim that Chadbourne did not do enough to enforce the Judgment is inconsistent with its assertion that its expenditure of $775,000 in pursuing the claim against JAW was excessive.

ABRF also charges that Chadbourne's "actions, errors, and omissions" in the *Andersson* Action significantly increased the expenses and difficulty that it encountered in pursuing the *Nordstern* Action, including Chadbourne's refusal to turn over relevant documents. At the time of discharge, however, Chadbourne possessed a common law retaining lien on its client's files, that secured its right to the reasonable value of the services performed (*Lai Ling Cheng v Modansky Leasing Co.*, 73 NY2d 454 [1989]). A retaining lien generally lasts until the attorney is compensated (*id.* at 459) and the disbursements have been fully paid (*Schneider, Kleinick, Weitz, Damashek & Shoot v City of New York*, 302 AD2d 183 [1st Dept 2002]). In any event, Chadbourne provided substitute counsel with an index of the file, and it made the files available for review and copying. I have considered the other complaints against Chadbourne and find them equally unavailing, at least for purposes of opposing the petition.

Fee Entitlement

Where an attorney is discharged without cause, the attorney is limited to recovering in quantum meruit the reasonable value of the services rendered (*Campagnola v Mulholland, Minion & Roe*, 76 NY2d 38, *supra*). Only if the client and attorney agree may the attorney receive a fee based upon a percentage of the recovery (*Cohen v Grainger, Tesoriero & Bell*, 81

NY2d 655, *supra*; *Shalom Toy v Each and Every One of the Members of the New York Prop. Ins. Underwriting Assn.*, 239 AD2d 196 [1st Dept 1997]).

Chadbourne is entitled to the reasonable value of its services, not to the contingency fee that it seeks, because the contingency fee agreement is not applicable to the Settlement achieved in the *Nordstern* Action. The 1994 contingency fee arrangement between ABRF and Chadbourne is set forth in two letters. The first, dated September 14, 1994, is from Mats Larsson, Swedish counsel for ABRF, to Thomas J. Hall, Esq. of Chadbourne, proposing:

> "b) a fee arrangement on the Twombley [sic] by way of a straight contingency to you of 33% of the ultimate recovery, the out-of-pocket expenses and disbursements to be covered by you."

The second letter, dated October 13, 1994, is from Hall to Larsson, stating:

> "To summarize, under our new arrangement, from henceforth we will not bill the client for our fees incurred in pursuing the claims against Judson on the Twombly painting. Rather, we will be paid one-third (33-1/3%) of the gross recovery (whether by settlement, judgment or otherwise) on those claims. We will bill the client for our disbursements on a monthly basis and will expect them to be paid within thirty days of each bill.

According to Chadbourne's summary of the agreement, the parties contemplated that Chadbourne would be paid one-third of the recovery based upon the claims against Judson (i.e. JAW). The ultimate recovery was against Nordstern, not JAW, in a different action, involving different issues, something that was not contemplated at the time that the contingency fee agreement was entered into in 1994, because Chadbourne had not discovered the existence of the Nordstern policy until sometime thereafter. Even Chadbourne itself states that it assumed that ABRF hired Kilpatrick solely because of its expertise in these types of insurance matters (Hall Reply Aff, ¶ 34), thereby revealing its own belief as to the different issues presented in the two matters.

The issue of fee entitlement is referred to a Special Referee to hear and report as to the

value of the services rendered from 1994 until the date of discharge, taking into consideration the nature of the litigation (*Andersson* Action), the difficulty of the case, the actual time spent by Chadbourne, and the necessity therefor, the amount of money involved, the results achieved, the amounts customarily charged for similar services in the same locality, and Chadbourne's professional deportment (*Grutman Katz Greene & Humphrey v Goldman*, 251 AD2d 7 [1st Dept 1998]).

Dismissal of the Counterclaims

To the extent that the counterclaims seek affirmative relief, they are time-barred. Chadbourne's representation of ABRF ended on October 10, 1998, when, by letter, ABRF informed Chadbourne that it had decided to "transfer our New York representation to Shanley & Fisher, thereby ending any further relationship with Chadbourne & Parke, LLP." Chadbourne commenced this proceeding on September 22, 2003, and ABRF interposed its counterclaims on November 19, 2003. Thus, assuming, for the purposes of this motion, that the counterclaims were interposed on the date that the action was commenced – September 22, 2003 – pursuant to CPLR 214 (6), the counterclaims are time-barred, because the action was not commenced within three years from October 10, 1998, the date from which Chadbourne no longer represented ABRF (*Wells Fargo Home Mtge. v Zeichner, Ellman & Krause, LLP*, 5 AD3d 128 [1st Dept 2004]).

ABRF's contention of the existence of a factual issue as to the continuing representation doctrine is unpersuasive. ABRF itself states that Chadbourne "did not participate in any way as counsel in the *Nordstern* litigation" (Answer, ¶ 24), and "Chadbourne made the files available for review in its offices, but otherwise refused to deliver the files to counsel for ABRF and provided no assistance whatsoever in the prosecution of the *Nordstern* case" (Answer, ¶ 38). ABRF has

failed to make any showing of "continuing trust and confidence in the relationship between the parties" (*Clark v Jacobson*, 202 AD2d 466, 466 [2d Dept], *lv dismissed* 84 NY2d 850 [1994]). ABRF contends that, although it had discharged Chadbourne in 1998, it was necessary for ABRF's new counsel, Kilpatrick, to continue a relationship with Chadbourne because Chadbourne would not release ABRF's files in its possession, as directed by ABRF. Even if true a continuing *relationship* does not constitute continuing *representation*.

To the extent that ABRF asserts the counterclaims to offset Chadbourne's claims, however, they are not time-barred, pursuant to CPLR 203 (d) (*Enrico & Sons Contr. v Bridgemarket Assoc.*, 252 AD2d 429 [1st Dept 1998]), and Chadbourne itself concedes that, to this extent, they are not time barred.

Accordingly, it is

ORDERED that the issue of the reasonable value of petitioner's services (Motion Number 001) is referred to a Special Referee to hear and report with recommendations, except that, in the event of, and upon the filing of, a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that this proceeding is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403, or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Judicial Support Office to arrange a date for the reference to a Special Referee; and it is further

ORDERED that the motion (002) for dismissal of the counterclaims is granted to the

extent that the counterclaims seek affirmative relief; and it is further

ORDERED that the counterclaims, to the extent that they survive the motion to dismiss, are hereby severed and shall continue.

Dated: **September 27, 2004**

ENTER:

HAROLD B. BEELER, J.S.C.

HAROLD BEELER
J.S.C.