

Marie v Altshuler

2005 NY Slip Op 30060(U)

April 25, 2005

Supreme Court, New York County

Docket Number: 0104381/3812

Judge: Karla Moskowitz

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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

LISA MARIE,

Plaintiff,

-against-

DAVID R. ALTSHULER, TIM BURTON, DIGITAL BUILDERS, INC. and GENE DOH,

Defendants.

INDEX NO. 104381/2004

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying Decision and Order.

Dated: April 15, 2005

KARLA MOSKOWITZ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

-----X
LISA MARIE,

Plaintiff,

Index No. 104381/2004

-against-

DAVID R. ALTSHULER, TIM BURTON, DIGITAL
BUILDERS, INC. and GENE DOH,

Defendants.
-----X

DECISION and ORDER

Karla Moskowitz, J.:

This action arises out of the dissolution of a romantic and business relationship between plaintiff Lisa Marie (Marie), a model and actress, and defendant Tim Burton (Burton), an internationally acclaimed movie director. In this action, Marie claims that: (1) during their cohabitation, the parties orally agreed that she would receive 50% of any earnings and assets that the couple accumulated; and (2) after their break-up in 2001, she executed three written agreements with Burton regarding the distribution of property acquired during the relationship and certain other financial matters, as a result of defendants' fraud, conspiracy to defraud, negligent rendering of advice and counsel, and breach of fiduciary duties. Marie seeks rescission of the three written agreements and specific performance of the oral agreement.

In motion sequence number 001, defendant Burton moves, pursuant to CPLR 3211 (a) (8), to dismiss the complaint as asserted against him for lack of personal jurisdiction. In motion sequence number 002, defendants David R. Altshuler (Altshuler), Digital Builders, Inc. (DBI), and Gene Doh (Doh) move, pursuant to CPLR 3211 (a) (8), to dismiss the complaint in its entirety for lack of personal jurisdiction, or, pursuant to CPLR 327, to dismiss on the ground of *forum non conveniens*.

* 3]

The court directs a traverse hearing to examine the question of personal jurisdiction over Burton and holds his motion to dismiss in abeyance. On the other hand, the court grants the motion to dismiss the complaint as to Altshuler, DBI and Doh.

BACKGROUND

The Parties

Plaintiff Marie is a model, actress, artist, writer and photographer. Defendant Burton is a film director, producer, and writer, who currently resides in the vicinity of London, England, and owns a co-op apartment at One Fifth Avenue, New York, New York (the New York Apartment). Defendant Doh is the president and principal shareholder of defendant DBI, a California corporation that provided business management and information technology services to Marie and Burton for several years. Defendant Altshuler, a California attorney, originally represented Doh and DBI. Marie subsequently hired Altshuler from September to November 2001. Altshuler maintains an office in California and is not admitted to practice in New York.

Alleged Oral Agreement

From December 1991 through August 2001, Marie and Burton engaged in a romantic and professional relationship. The complaint asserts that, at the outset of the couple's cohabitation and continuing throughout their cohabitation, Marie and Burton orally agreed that: (1) they would share equally any and all property accumulated as a result of their individual or combined efforts; (2) Burton would financially support Marie for the rest of her life; (3) Marie would manage Burton's households; (4) Marie would manage, advise and counsel Burton on his career;

and (5) Marie would render other creative services and ideas to Burton and his work.¹ Marie allegedly accepted the oral agreement while living in New York.

The Dissolution of the Relationship

On August 28, 2001, Burton called Marie and ended the relationship. Marie alleges that she received the telephone call while she resided in the New York Apartment. See Marie Affidavit, ¶ 19. In September 2001, Doh assisted Marie in retaining Altshuler. At this time, Burton's financial manager in California, Terry Bird (Bird), commenced discussions with Marie and her representatives regarding certain financial issues they needed to resolve. Bird asserts that Marie was in California during these discussions, because his telephone calls and faxes were made to a California telephone number. See Terry Bird Affidavit in Support (Bird Affidavit), ¶ 5. Burton alleges that, in late August 2001 to early October 2001, he communicated with Marie only through Bird or his California attorney, Melanie Cook. See Tim Burton Affidavit in Support (Burton Affidavit), ¶¶ 8, 9.

The October 2001 Agreements

In October 2001, Marie entered into three written agreements with Burton and his California company, Tim Burton, Inc. (TBI): (1) a "Gift Agreement" regarding certain gifts to Marie, such as a Jaguar automobile, and the New York Apartment (or the cash equivalent of the apartment's appraisal value); (2) a "Memorandum Agreement" providing for the division of personal property including furniture, fixtures, artwork, computer equipment, the New York Apartment, and an apartment and storage facilities in California; and (3) a third agreement for

¹ Marie asserts that she fully honored her obligations under the agreement from 1992 to September 2001. See Complaint, ¶ 8.

TBI payments to Marie for her managerial and creative services (collectively, the October 2001 Agreements). See Judd Burstein Affirmation in Opposition, Ex. A.

The October 2001 Agreements expressly state that California law governs any dispute arising from the agreements. Burton executed the October 2001 Agreements in London; while Marie executed them in California. Marie received payments in the sum of \$5,000,000.00 pursuant to the October 2001 Agreements. Her California representatives received these payments. In addition, on November 19, 2001, Marie sent a letter from her California address to Altshuler, stating that she had decided "to 'cash out' of the apartment and instead accept a payment in the sum of \$2.5 million on or before January 31, 2002." David R. Altshuler Affidavit in Support (Altshuler Affidavit), Ex. C. It is undisputed that Marie received the sum of \$2,500,000.00.

Alleged Conspiracy

Marie asserts that Burton conspired with Altshuler, Doh, and DBI to fraudulently induce her to execute the October 2001 Agreements, that awarded her an amount less than the sum that she would have been entitled to under California law. Marie alleges that, after the break-up, she was in a precarious emotional state, and Altshuler, Doh, and DBI repeatedly told her that she would be impoverished if she did not enter into a settlement with Burton, and that she possessed absolutely no rights under California law because Marie and Burton never married.

Marie alleges that, in or about October 2003, she located several misplaced notebooks from Burton's assistant, indicating that Altshuler, Doh and DBI secretly disclosed confidences to Burton and conspired against her, after promising to continue to represent her only. See Lisa Marie Affidavit in Opposition (Marie Affidavit), ¶ 31. Marie fails to submit any copies of these

notebooks.

Present Action

On March 24, 2004, Marie brought this action for: (1) rescission of the October 2001 Agreements because of Burton's fraudulent concealment that he was secretly communicating with Altschuler, Doh, DBI and a non-party; (2) rescission of the October 2001 agreements because of Burton's breach of fiduciary duty; (3) Burton's breach of the alleged oral contract; (4) Altschuler, Doh and DBI's tortious interference with the alleged oral contract; (5) defendants' fraud and conspiracy to defraud; (6) defendants' breach of their separate fiduciary duties to Marie; (7) defendants' intentional infliction of emotional distress; (8) Doh and DBI's negligent rendering of advice; (9) legal malpractice against Altschuler; (10) specific performance of the alleged oral agreement; and (11) a declaratory judgment that a general release contained within one of the October 2001 Agreements is unenforceable.

Present Motions

In motion sequence number 001, defendant Burton moves, pursuant to CPLR 3211 (a) (8), to dismiss the complaint as asserted against him for lack of personal jurisdiction. In motion sequence number 002, defendants Altschuler, DBI, and Doh move, pursuant to CPLR 3211 (a) (8), to dismiss the complaint in its entirety for lack of personal jurisdiction, or, pursuant to CPLR 327, to dismiss on the grounds of forum non conveniens. Marie opposes the motions, asserting personal jurisdiction exists under CPLR 302 (a) (1), (a) (2), (a) (3), and (a) (4).

The complaint contains the following references to New York: (1) Marie and Burton's ownership of the New York Apartment, and Marie's renovation of it; (2) Marie's residence in the New York Apartment when Burton ended the relationship; (3) Marie's receipt of defendants'

fraudulent advice and counsel over the telephone, while she lived in New York; (4) Marie's "intense desire" to keep the New York Apartment; (5) a reference in one of the October 2001 Agreements that Marie would receive either the fair market value of the New York Apartment or the property itself; and (6) Marie's payment to Doh, Digital and Altshuler for their assistance in disposing of the New York Apartment. See Complaint, ¶¶ 9, 10, 24, 25 (a), 26.

The amount of time the couple spent in New York during the relationship and the couple's contacts with New York remain in dispute. Marie alleges that, during their relationship, she and Burton: (1) acquired the New York Apartment in 1998, and lived there from 1999 until October 2001; (2) divided their time between California and New York, but lived in New York a majority of the time; (3) purchased a townhouse in 1996, located at 10 East 75th Street, New York, New York, where they resided for about one year; and (4) maintained several bank accounts in New York. See Marie Affidavit, ¶¶ 16, 18, 19. In his affidavit, Burton asserts that, during the relationship, he and Marie resided in California, maintained several apartments in California, and had offices and personal assistants in California. See Burton Affidavit, ¶¶ 7, 10. Burton's financial manager, Terry Bird, attests to the fact that, in 2001, Marie and Burton both resided in California, and filed tax returns separately in California. See Bird Affidavit, ¶ 6.

In support of his motion to dismiss, Burton states that he: (1) presently maintains only one bank account in New York, that is used for his business trips; (2) traveled twice to New York in the year preceding this action (each visit lasting about a week); and (3) does not derive any substantial revenue from New York. See Burton Affidavit, ¶ 6. In opposition, Marie claims that: (1) the New York apartment affords long-arm jurisdiction over Burton; (2) she resided in New York while all the negotiations were taking place; (3) she received legal counsel and advice in

New York from Altshuler Doh, and DBI, through telephone calls, faxes and emails; (4) defendants conspired against her while she was in New York; (5) this court has jurisdiction over Burton as a result of his agents' or co-conspirators' actions in New York; and (6) she performed her services under the oral contract in New York. Marie also states that "Doh came to New York several times prior to the negotiation process in or about 2000 to set up our computers in the New York Residence . . . [and that after] the execution of the agreements, [DBI] came to New York to remove [her] personal belongings from the New York Residence." Marie Affidavit, at 6, n 2. Marie alleges that she was directly injured in New York due to defendants' improper conduct, because she lost the New York Apartment.

In support of their motions to dismiss, defendants provide affidavits, asserting that they fully believed Marie was in California during all relevant times, when they called, faxed or e-mailed her, and that her cell phone number possessed a California area code. Doh attests to the following: (1) "I maintain all of my offices and business in California and I have historically had little or no contact with clients in New York" (Doh Affidavit, ¶ 3); (2) "[u]p until the date that the settlement agreement with Tim Burton was ultimately signed, however, absolutely every service that [DBI and Doh] provided for Lisa Marie was done in California" (id., ¶ 5); (3) no one from his company contacted Marie while she was in New York during the negotiations and finalizing of the settlement agreement with Burton (see id., ¶ 6); (4) the only DBI contact with New York took place after settlement-a DBI staff member was sent to New York to gather Marie's personal belongings and move them back to California (see id., ¶ 7).

Altshuler states that:

Between September and November 2001, I provided legal services to Lisa Marie

in connection with a proposed settlement agreement with Mr. Burton. . . . During the approximately four month period that I represented the Plaintiff, all of our meetings and discussions took place in California. In addition, as far as I was aware, the Plaintiff lived exclusively in California the entire time that I provided services to her. She came to my office in October 2001 to sign the final documents memorializing her agreement with Tim Burton.

Altshuler Affidavit, ¶¶ 2, 4.

DISCUSSION

Pursuant to CPLR 3211 (a) (8), a defendant may move to dismiss the complaint as asserted against him based on the court's lack of personal jurisdiction. It is undisputed that none of the defendants reside in New York and that general jurisdiction pursuant to CPLR 301 is not applicable; rather, the issue before the court is whether long-arm jurisdiction exists over the non-domiciliary defendants pursuant to CPLR 302.

Marie carries the burden of showing that personal jurisdiction exists over the defendants under CPLR 302 (a) (1), (a) (2), (a) (3), and/or (a) (4). CPLR 302 (a) specifically provides that a non-domiciliary may be subjected to personal jurisdiction in New York, with respect to a cause of action arising out of any acts enumerated below, if he, either in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
2. commits a tortious act within the state, . . . ; or
3. commits a tortious act without the state causing injury to person or property within the state, . . . , if he
 - (I) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
 - (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
4. owns, uses or possesses any real property situated within the state.

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CPLR 302 (a) (1)

Under the transaction of business prong of CPLR 302 (a) (1), the court may obtain personal jurisdiction over a non-domiciliary defendant if the defendant has “purposely availed” himself of the privilege of conducting business within New York. Plaintiff must demonstrate a connection between the defendant’s business or contracts in New York and the cause of action sued upon. See Bookstaver v Saintfort, 10 AD3d 514, 515 (1st Dept 2004). “A single transaction will suffice, as long as there is a substantial relationship between that transaction and the alleged injury.” O’Brien v Hackensack Univ. Med. Ctr., 305 AD2d 199, 200. The defendant must have certain minimum contacts with New York, such that maintaining a suit against him in this state does not offend “traditional notions of fair play and substantial justice.” Jacobson v Grindlinger, 178 AD2d 507, 508.

As to Burton, the court finds that certain factual questions exist regarding this court’s jurisdiction that cannot be resolved on the papers before the court. Marie argues that: (1) the majority of the couple’s relationship took place in New York; (2) Marie lived in Burton’s New York Apartment during the relationship and contributed to the New York Apartment for Burton’s benefit; (2) the couple entered into the alleged oral contract while Marie was living in New York; (3) Marie performed services in New York, based on the alleged oral contract, for Burton and his career; and (5) the couple accumulated assets, earnings and multiple properties in New York during their cohabitation. This alleged activity has some connection to Marie’s causes of action for Burton’s breach of the alleged oral contract, Burton’s breach of fiduciary duty and specific performance of the alleged oral agreement.

Although defendants’ affidavits contradict some of the alleged activity, Marie shows that

facts may exist which would warrant the denial of Burton's motion to dismiss. Under these circumstances, the court finds that it is appropriate to direct a traverse hearing to examine the question of personal jurisdiction over Burton, and that Burton's motion to dismiss is held in abeyance during the interim. See Peterson v Spartan Indus., Inc., 33 NY2d 463, 466-67; Manow Intl. Corp. v High Point Chair, Inc., 91 AD2d 546, 547. Should plaintiff desire discovery in and of jurisdiction, she should contact the Park Clerk to arrange a conference to schedule that discovery. If Burton deems it appropriate, while the hearing is pending, the court grants Burton leave to file a motion to dismiss the complaint, pursuant to 3211 (a) (7), for failure to state a cause of action.

As to DBI, Altshuler and Doh, the court finds that Marie fails to sufficiently allege that these defendants, who reside and have offices in California, transacted any purposeful and substantial business activity in New York pertaining to the subject matter of the action, so that it is reasonable and fair to exercise long-arm jurisdiction over them. First, the October 2001 Agreements Marie seeks to rescind, were not executed in New York. Second, Doh and DBI's alleged visits to New York, to assist in setting up computers or help Marie move, do not sufficiently relate to the subject matter of this action. Third, conclusory allegations that Doh, DBI, or Altshuler gave Marie fraudulent advice by telephone, e-mail and fax, while she was residing in New York, are not in themselves sufficient contacts to establish personal jurisdiction. See Jones v Munroe, 2 Misc 3d 24, 25; Barington Capital Group, L.P. v Arsenault, 281 AD2d 166 (dismissing complaint for lack of personal jurisdiction in favor of defendant, a California domiciliary, who made five telephone calls over three days to plaintiff's New York office to place orders for the purchase of stock); Granat v Bochner, 268 AD2d 365 (dismissing complaint,

alleging defendants transacted business in New York by sending faxes and making phone calls to New York); Paradise Prods. Corp. v Allmark Equip. Co., 138 AD2d 470, 472 (finding interstate negotiations by telephone were not in themselves sufficient to subject defendants to jurisdiction, especially where acceptance and deliver of the basic agreements between the parties was in California).

In their affidavits, defendants attest that they did not knowingly contact Marie while she was in New York, and that they called Marie's cell phone, that has a California area code. Marie fails to offer any documentary evidence, such as phone bills, copies of e-mails or fax cover sheets, to support her contentions. The cases cited by Marie for personal jurisdiction are distinguishable because they involve more active conduct or participation by the defendant in New York. See e.g. Parke-Bernet Galleries, Inc. v Franklyn, 26 NY2d 13 (involving defendant, who was not present in New York, but actively participated in New York City art auction by receiving and transmitting bids over an open telephone line and receiving direct assistance from defendant's agent in New York during auction); Liberatore v Calvino, 293 AD2d 217, 221 (finding jurisdiction over out-of-state attorney because of his numerous letters and calls to New York, and his decision to pursue a legal remedy for his client in New York); Courtroom Tel. Network v Focus Media, Inc., 264 AD2d 351, 353 (finding jurisdiction over defendant media buyer, who negotiated the sale of advertising time for 345 advertisements through telephone calls, letters and faxes to New York, created advertisement tapes for broadcast from a New York studio and sent review tapes to a New York broadcaster).

CPLR 302 (a) (2)

CPLR 302 (a) (2) provides that a court may exercise personal jurisdiction over any non-

domiciliary “who in person or through an agent” commits a tortious act within New York. Here, none of the defendants were physically present in New York to commit the alleged tortious acts. See National Union Fire Ins. Co. of Pittsburgh v Davis, Wright, Todd, Reise & Jones, 157 AD2d 571, 572; Beckett v Prudential Ins. Co. of Am., 893 F Supp 234, 239 (SD NY 1995). Marie’s efforts to reach Burton through the acts of the other defendants, as his co-conspirators or agents, fails because none of Doh, DBI, and Altshuler’s alleged tortious acts took place in New York. Defendants’ alleged phone calls, faxes and e-mails to New York were allegedly made and sent outside the state. In addition, Marie provides mere conclusions to establish conspiracy jurisdiction over Burton that defendants’ submissions contradict.² Marie fails to provide any documentary evidence (such as notebook excerpts), specifics as to who benefitted, or specifics on what was agreed between whom and where, to support her conspiracy theory.

CPLR 302 (a) (3)

CPLR 302 (a) (3) provides that a court may exercise personal jurisdiction as to a cause of action arising out of the acts of a non-domiciliary who “commits a tortious act without the state causing injury to person or property within the state” under certain circumstances. At the outset, Marie fails to establish that she sustained injury within New York to establish jurisdiction pursuant to section 302 (a) (3). Marie alleges that she was injured in New York because she lost the New York Apartment or the accretion in value of the apartment. However, “it is well established that the situs of the injury is the location where the event giving rise to the injury occurred, and not where the resultant damages occurred.” O’Brien v Hackensack Univ. Med.

² For example, in his reply affidavit, Altshuler states that “during all relevant times, I did not have any knowing contact with Plaintiff, with Burton or his representatives, or with anyone concerning this matter, in New York.” David R. Altshuler Reply Affidavit, ¶ 10.

Ctr., 305 AD2d at 201-202. The event giving rise to the injury was Marie's execution of the three agreements, that occurred in California, not New York.

CPLR 302 (a) (4)

In order to subject Burton to jurisdiction under the property provision of the long-arm statute, CPLR 302 (a) (4), Marie's claim must arise out of Burton's ownership, use or possession of New York realty. The court finds that no jurisdiction exists because the New York Apartment, contrary to Marie's assertions, did not give rise to this action. The New York Apartment remains one of many items and properties mentioned in the complaint and in the October 2001 Agreements. In addition, before commencing this action, Marie elected to accept cash for the New York co-op apartment, instead of the property itself, thereby showing that the apartment was incidental to, rather than the heart of, any dispute between the parties. The cases cited by Marie are distinguishable because they arise from the ownership, use or possession of certain real property in New York.³

Discovery in Aid of Jurisdiction

As stated above, Marie is entitled to further discovery on the jurisdictional issue as to Burton because she succeeds in showing a "sufficient start" in demonstrating that Burton was transacting business in New York and has minimum contacts with New York for personal

³ See e.g. Black River Assoc. v Newman, 218 AD2d 273, 274, 279-80 (concluding that, in action for specific performance of agreement to purchase real property in New York, defendant's entering into a contract to purchase New York realty constitutes the transaction of business in New York for personal jurisdiction); Kalichman v Beverly Holding Co., 130 AD2d 327, 328 (regarding plaintiff's alleged default on certain bond secure by defendant's ownership interest in New York property); Genesee Scrap & Tin Baling Corp. v Lake Erie Bumper Plating Corp., 57 AD2d 1068, 1069 (regarding certain rent payments in default under assigned lease of New York real property); Karrat v Merhib, 62 Misc 2d 72, 73 (finding that, in lawsuit for broker's commissions for the sale of New York realty defendants owned and sold, defendants had sufficient minimum contacts to New York for jurisdictional purposes).

jurisdiction. Edelman v Taittinger, S.A., 298 AD2d 301, 302. However, Marie is not entitled to additional discovery on the jurisdictional issue as to Doh, DBI and Altschuler because she fails “to come forward with tangible evidence sufficing to demonstrate that long-arm jurisdiction over defendants may exist.” Granat, 268 AD2d at 365. Conclusory allegations and expressions of hope that discovery, if and when conducted, might provide some factual support for her claim of long-arm jurisdiction over the defendants are insufficient. See HT Capital Advisors, L.L.C. v Optical Resources Group, Inc., 276 AD2d 420.

Forum Non Conveniens

Doh, DBI, and Altshuler (motion sequence number 002) raise a forum non conveniens argument in the alternative. It is in the court’s “discretion to dismiss an action on the ground of forum non conveniens where the action is jurisdictionally sound, but would be better adjudicated elsewhere.” Holness v Maritime Overseas Corp., 251 AD2d 220, 224. In light of Marie’s failure to set forth that this action, as asserted against Doh, DBI and Altshuler, is jurisdictionally sound, the court need not reach defendants’ alternative argument of forum non conveniens.

Accordingly, it is hereby

ORDERED, that the motion to dismiss the complaint by defendants David R. Altshuler, Digital Builders, Inc. and Gene Doh’s motion to dismiss for lack of personal jurisdiction (motion sequence number 002) is granted, and the complaint is dismissed in its entirety as to these defendants, with costs and disbursements to these defendants, as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED, that the Clerk is directed to enter judgment in favor of defendants David R. Altshuler, Digital Builders, Inc. and Gene Doh; and it is further

ORDERED, that the action as asserted against defendant Tim Burton is hereby severed and shall continue; and it is further

ORDERED, that should plaintiff desire, the parties are directed to engage in jurisdictional discovery to be completed by July 29, 2005, and it is further


ORDERED, that the issue of whether this court has jurisdiction over defendant Tim Burton 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 defendant Tim Burton's motion to dismiss the complaint for lack of personal jurisdiction (motion sequence number 001) is held in abeyance pending the 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 (Room 311) to arrange a date for the reference to a Special Referee.

Dated: April 25, 2005

ENTER:



J.S.C.

FILED
APR 27 2005
COUNTY CLERK'S OFFICE
NEW YORK