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| <b>Matter of Harmon v Ivy Walk Incorporated</b>  |
| 2006 NY Slip Op 30018(U)   |
| October 6, 2006  |
| Supreme Court, New York County   |
| Docket Number: 0602833/2006  |
| Judge: Carol R. Edmead   |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Edmead  
Justice

PART 35

Harman, James

INDEX NO. 602833/06

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 01

Ivy Walk In Corp

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for Stay Arbitration

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 Petitioners' motion to permanently stay mediation and arbitration attempted to be had by Respondents is granted; and it is further

ORDERED that Petitioners 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.

FILED

Dated: 10/16/06

CAROL EDMEAD  
J.S.C. J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

-----X

In the Matter of the Application of

JAMES HARMON, JR. and JEANNE HARMON,

Petitioners,

Index No. 602833/2006

-against-

DECISION/ORDER

IVY WALK INCORPORATED, a purported corporation,  
and ERIC WRIGHT and WILLIAM BENNETT, both doing  
business as "IVY WALK INCORPORATED",

Respondents.

-----X

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

**MEMORANDUM OF DECISION**

Before this court is the motion of Petitioners James Harmon, Jr. and Jeanne Harmon, owners of a partially refurbished apartment in the City of New York, for an order restraining mediation and arbitration attempted to be had by the above-captioned Respondents. For the reasons set forth below, the motion is granted.

**BACKGROUND**

On August 8, 2005, Petitioners hired Ivy Walk Incorporated ("Respondent") to perform home improvement work to Petitioners' residence, an apartment located at 32 West 76<sup>th</sup> Street in the City of New York (the "Petitioners' Residence"). A dispute between the parties arose as to the quality of the work and the monies paid. Respondent, as per the terms of the home improvement agreement (the "Agreement"), served Petitioners with a demand for arbitration to

be conducted by the American Arbitration Association (the "AAA"). Petitioners contested Respondent's right to arbitrate and refused to participate in the arbitration proceedings claiming that Respondent is neither a duly formed and existing corporation in the State of New York nor properly licensed to do business as a home improvement contractor in the City of New York.<sup>1</sup> The AAA informed both parties that Respondent had met the threshold requirements for arbitration as per the terms of the Agreement. Petitioners now seek an order pursuant to CPLR 7503(b) to permanently stay the arbitration proceedings and to permit Petitioners to seek further redress as needed on the grounds that the agreement is invalid and unenforceable for the aforementioned reasons. Respondent contends that these are arbitrable issues to be determined in accordance with the arbitration clause of the agreement<sup>2</sup> and that Petitioners have not met the requirements for injunctive relief.

### DISCUSSION

In this case, the court is asked to determine whether an arbitration clause in a construction agreement between said homeowners and said home improvement contractor can be enforced despite the contractor being duly licensed by the New York City Department of Consumer Affairs ("DCA") under a name other than its incorporated name. This appears to be a matter of first impression. As such, this decision is intended to elucidate the intent of the licensing scheme

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<sup>1</sup> Although Petitioners' second defense to Respondent's demand for arbitration was not articulated in their response to the AAA, Petitioners stated the claim in the petition herein.

<sup>2</sup> The Agreement states that any claim arising out of or related to the Agreement, except those relating to aesthetic effect and those waived, shall be subject to arbitration (*see* AIA Document A201-1997 § 4.6.1).

found in NYC Admin Code, Subchpt. 22, §§ 20-385 et seq.

#### **I. RESPONDENT IS A VALID NEW YORK CORPORATION**

On August 8, 2005, Petitioners entered into the agreement with Respondent, which held itself out as “Ivy Walk Incorporated” despite the fact that Respondent’s official name is “Ivy Walk, Inc.” According to the New York State Department of State, Ivy Walk, Inc. is a corporation duly formed and existing under the laws of the State of New York since 1997. It was originally formed under the name “Ivy Walk Construction Company, Inc.” In November 2004, Ivy Walk Construction Company Inc. amended its certificate of incorporation shortening its name to Ivy Walk, Inc. Petitioners contend that Respondent is neither a duly formed nor existing corporation in the State of New York because it held itself out as “Ivy Walk Incorporated” and not “Ivy Walk, Inc.”

Pursuant to BCL § 301, the name of a domestic corporation must contain the word “corporation,” “incorporated,” or “limited,” or an abbreviation of one such word. The purpose of BCL § 301 is to establish uniform rules concerning permissible names for corporations in order to protect the public from deception and confusion (*see Helsam Realty Co., Inc. v. H.J.A Holding Corp.*, 4 Misc3d 64, 70 [N.Y.Sup.App.Term, 2004]; *Frank Boufford Co. v. Lomenzo*, 38 AD2d 986, 986, [3<sup>rd</sup> Dept. 1972]; *Matter of Jervis Corp. v. Secretary of State of N.Y.*, 43 Misc2d 185, 187 [N.Y. Sup. Ct. Nassau Co., 1964]). The statute is silent as to whether a corporation may interchange one of the aforementioned corporate identifiers with its respective abbreviation. It is generally accepted that the interpolation or variation of the corporate identifier is not likely to confuse or mislead anyone as to the identity of the corporation (*see* 18A Am. Jur. 2d

Corporations § 238 [2006]). Since “Inc.” is the generally accepted abbreviation for “Incorporated” the intent of BCL § 301 is not likely to be jeopardized and there is no legal significance when a corporation uses the terms interchangeably, so long as the identity of the corporation remains reasonably clear and ascertainable.

In the instant case, the identity of Respondent, whether as “Ivy Walk Incorporated” or as “Ivy Walk, Inc.” is reasonably clear and ascertainable. Therefore, contrary to Petitioners’ contention the Agreement is not invalid and unenforceable on this point.

## II. RESPONDENT IS NOT PROPERLY LICENSED

It is uncontested that the Agreement between the parties called for Respondent to perform home improvement work in and to Petitioners’ Residence and for any claim arising out of or related to the Agreement to be subject to arbitration (*supra*, fn 2). The second issue concerning Respondent’s name is its change of name from “Ivy Walk Construction Company, Inc.” to “Ivy Walk, Inc.” and the effect of this change. At issue is whether Respondent is duly licensed to engage in the home improvement business despite being licensed under the name “Ivy Walk Construction Company, Inc.” and being incorporated under the name “Ivy Walk, Inc.”

In New York City, the home improvement business is subject to the New York City Administrative Code (the “Code”) (*see* NYC Admin Code, Subchpt. 22, §§ 20-385 et seq). The Code defines “home improvement” as the “construction, repair, replacement, remodeling, alteration, conversion, rehabilitation, renovation, modernization, improvement, or addition to any land or building, or that portion thereof which is used or designed to be used as a residence or dwelling place...” (*see* NYC Admin Code, Subchpt. 22, § 20-386[2]; *Ayres v. Dunhill Interiors*,

138 AD2d 303, 304 [1<sup>st</sup> Dept. 1988]). A home improvement contract is defined as “an agreement, whether oral or written, or contained in one or more documents, between a contractor and an owner, or contractor and a tenant ... provided said work is to be performed in, to or upon the residence or dwelling unit ... for the performance of a home improvement” (*see* NYC Admin Code, Subchpt. 22, § 20-386[6]; *Ayres*, 138 AD2d at 304).

Among other things, the Code prohibits the solicitation or performance of a home improvement contract without a license as well as the assignment or transfer of such a license (*see* NYC Admin Code, Subchpt. 22, §§ 20-387[a] and 20-389[a]); *Matter of Heller*, 178 AD2d 195, 195 [1991]; *Chosen Const. Corp. v. Syz*, 138 AD2d 284, 286 [1<sup>st</sup> Dept. 1988]).

Additionally, a license is valid only for activities conducted under the name of the person or organization to whom such license was issued or under the trade name<sup>3</sup> stated in the application (*see* NYC Admin Code, Subchpt. 22, § 20-113). No license shall be issued for more than one trade name and no licensed activity may be carried out under more than one trade name (*see* NYC Admin Code, Subchpt. 22, § 20-113). Moreover, every licensee is required to notify DCA of any change of control in ownership, management, address or trade name within 10 days after such change (*see* NYC Admin Code, Subchpt. 22, § 20-389[c]). Failure to notify DCA of any change or conducting a home improvement business in any name other than the one in which the contractor is licensed is strictly prohibited (*see* NYC Admin Code, Subchpt. 22, § 20-393[7]-[8]).

Both the New York State Court of Appeals and the Code’s legislative intent make it clear that the home improvement licensing provisions of the Code were enacted to safeguard and

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<sup>3</sup> “Trade name” shall mean that name under which an organization or person solicits, engages in, conducts or transacts a business or activity (*see* NYC Admin Code, Subchpt. 22, § 20-102[f]).

protect consumers against fraudulent practices and inferior work by those who hold themselves out as home improvement contractors (*see B & F Building Corp. v. Liebig*, 76 NY2d 689, 692, [1990]; NYC Admin Code, Subchpt. 22, § 20-385). It is quite clear that the licensing requirement serves a substantive purpose and is not merely an administrative technicality. As such, strict compliance on the part of contractors with the regulatory scheme is required (*see Hanjo Contractors v. Wick*, 155 AD2d 304, 304 [1<sup>st</sup> Dept. 1989]). The seriousness with which the New York City Council (the “City Council”) regarded the problems of fraud and inferior workmanship is obvious from the fact that an unlicensed person who performs home improvement work in New York City is guilty of a misdemeanor and is subject to monetary fines and forfeiture (*see NYC Admin Code, Subchpt. 22, § 20-401 and § 20-401.1*). Any interpretation of the licensing requirements by the courts should be strictly construed to stay true to the City Council’s intent.

In accordance with the court’s holding in section I, Ivy Walk, Inc. is a corporation duly formed and existing under the laws of the State of New York. The November 2004 amendment to the certificate of incorporation was signed by Respondent Eric Wright who described himself as the president, director, and sole shareholder of the corporation. In May 2005, Respondent renewed the home improvement license of Ivy Walk Construction Company, Inc. Again, the renewal was signed by Respondent Eric Wright who described himself as president of the corporation. In renewing the license, Respondent incorrectly answered question one of the license renewal form. The question asks if there has been a change in either the name or location of the licensed premises. The instructions state that all questions must be answered “Yes” or “No” and if any of the questions are answered “Yes” the licensee must contact DCA for further

instructions. Respondent answered “No” for question one, just as it did for every other question, and returned the renewal form with an incorrect answer, despite the fact that it had changed its name six months earlier.

Respondent contends that the license issued to Ivy Walk Construction Company, Inc. applies to Ivy Walk, Inc. because the corporation merely shortened its trade name and continued its business. In addition, Respondent contends that at the time it entered into the agreement it was properly licensed. However, Respondent offers no explanation for its failure to comply with the Code. Respondent cannot circumvent the statutory requirement of notifying DCA of the corporation’s name change by arguing that it is still the same company when in fact it conducted business under a different name, albeit a modified version, than it was licensed. The interpretation of the Code suggested by Respondent would defeat the Code’s goals by permitting contractors to trivialize a requirement of licensure. Clearly the notification requirement exists for more than administrative reasons, otherwise non-compliance would not be a prohibition (*see* NYC Admin Code, Subchpt. 22, § 20-393[7]-[8]). The court cannot agree with Respondent’s actions and interpretations.

There is a strong tradition in New York of interpreting consumer protection initiatives broadly because of the ever changing types of false and deceptive business practices that plague consumers. Since consumer protection initiatives are meant to keep the marketplace honest, strict compliance by those who are subject to regulation is required.

Although Ivy Walk, Inc. is a shorter version of the original name (Ivy Walk Construction Company, Inc.) under which the corporation was incorporated, Respondent’s logic would dictate that if it changed its name to Acme Construction Company, Inc., there would be no difference.

However, a complete name change and an abbreviated name change are, for the purposes of the Code, one in the same. The Code makes no differentiation between how the licensee changes its name, just that if it changes its name it must notify DCA and failure to do so, as well as operating under a name different than it is licensed, is expressly prohibited. (*see* NYC Admin Code, Subchpt. 22, §§ 20-389[c] and 389[7]-[8]).

In furtherance of the licensing requirement, the Code provides harsh penalties, including criminal penalties, monetary fines, and forfeiture, for acting without a license (*see* NYC Admin Code, Subchpt. 22, §§ 20-401 and 401.1). This clearly represents the remedial nature of the statute militating against a finding that compliance with the statute is a mere ministerial act or technicality (*see Matter of Heller*, 178 AD2d at 195; *B & F Bulding Corp.*, 76 NY2d at 692). This is further underscored by the anti-transfer provision (*see* NYC Admin Code, Subchpt. 22, § 20-389) as well as the provisions dealing with a change in the licensee's business structure (*see* NYC Admin Code, Subchpt. 22, §§ 20-110 and 111). The Code states that when there is a change of corporate ownership or a change in a partnership, any license issued to that organization becomes void (*see* NYC Admin Code, Subchpt. 22, §§ 20-110 and 111). Notably, DCA shall "have the power impose a fine and/or suspend or revoke a license" for the violation of any provision of the licensing statute including performing or attempting to perform any act prohibited under the licensing statute (*see* NYC Admin Code, Subchpt. 22, §§ 20-392[a][8]).

Thus, the court holds that in such a situation as the instant case, where a licensee fails to notify DCA of its name change within the statutorily prescribed time period and operates under a different name than it is licensed, the license should be considered void. To allow otherwise would defeat the purpose of the licensing scheme and would allow a home improvement

contractor to operate outside the sphere of regulation.<sup>4</sup>

The harshness of this decision should not overshadow the fact that Respondent failed to properly follow a rather simple regulatory scheme and when renewing its license filed a false instrument despite clear instructions. In renewing its license under its former name (Ivy Walk Construction Company, Inc.), Respondent was either grossly negligent or maliciously deceptive. A business that is subject to a regulatory scheme in the name of consumer protection cannot be excused from compliance because certain statutory requirements may be viewed as trivial. If the legislative mandate of the City Council can be evaded by a business changing its trade name and not adhering to the licensing requirements, then the firm public policy of protecting the consumer would be frustrated and a home improvement contractor, operating outside of the regulatory scheme, would be permitted to remain in the home improvement field to the potential detriment of the consumer. As previously noted, strict compliance on the part of contractors with the regulatory scheme is required (*see Hanjo Contractors v. Wick*, 155 AD2d at 304). The court sees no reason to veer from such precedent.

Since the court has determined that Respondent's license was void at the time that the Agreement was entered into and at the time the work was performed, the Agreement is unenforceable (*see B & F Bldg. Corp. v. Liebig*, 76 NY2d at 691-92). The lack of a license also

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<sup>4</sup> Parenthetically, the court notes that Ivy Walk, Inc. was issued a home improvement contractor license by DCA on or about September/October 2006, several weeks after the parties submitted their final papers. There now appears to be different license numbers issued by DCA to both Ivy Walk Construction Company, Inc. (1030638) and Ivy Walk, Inc. (1239196). This after-acquired license does not change the court's decision. If anything, it weakens Respondent's argument that it has been duly licensed since it was known as Ivy Walk Construction Company, Inc. Moreover, after-acquired licenses cannot be used to validate a contract that was invalid when performed because the contractor's license was void (*c.f. B & F Building Corp.*, 76 NY2d at 694).

bars recovery for breach of contract or in *quantum meruit* (see *Brite-N-Up, Inc. v. Reno*, 7 AD3d 656, 657 [2<sup>nd</sup> Dept. 2004]; *B & F Bldg. Corp. v. Liebig*, 76 NY2d at 691-92). Therefore, the agreement is rescinded and the parties are left as they are.

### III. ARBITRATION IS IMPROPER

Petitioners now move for an order pursuant to CPLR 7503(b) to permanently stay the arbitration proceedings Respondent demanded. Petitioners contend that this motion is timely despite being filed more than 20 days after the demand for arbitration was served. Respondent does not object on the issue of timeliness, but contends that the dispute between the parties falls within the arbitration clause of the Agreement (*supra*, fn 2).

The ultimate determination of the timeliness of a motion to stay arbitration is based upon compliance with CPLR 7503(c), which requires the party making a demand for arbitration to notify the party being served that it has 20 days from the date of service to seek an order staying arbitration (see Sigel, N.Y. Prac. § 593 [4<sup>th</sup> ed. 2006]). Failure on the part of the party making the demand to comply with this provision relieves the party served from preclusion from bringing an action to stay arbitration based on the 20-day statute of limitations (see *In re 64 Fulton St. Development*, 240 AD2d 226, 226 [1<sup>st</sup> Dept. 1997]; *Egol v. Egol*, 118 AD2d 76, 82 [1<sup>st</sup> Dept. 1986], affirmed 68 NY2d 893); *I Herzberg v. Motor Veh. Accid. Indem. Corp.*, 42 Misc2d 790, 791 [N.Y. Sup. Ct., Kings County, 1964] [The case was decided when the applicable period was only ten days. The holding endures and today governs the twenty day period, adopted in a 1973 amendment.]; Sigel, N.Y. Prac. § 593 [4<sup>th</sup> ed. 2006]). Respondent's demand, a copy of which was provided by Petitioners in their papers, is not in accordance with CPLR 7503(c) in that

Respondent did not provide Petitioners with the notice provision. Moreover, Respondent has not provided any evidence to counter Petitioners' assertion of non-compliance with the CPLR. As such, Petitioners' motion is timely.

New York public policy strongly favors arbitration (*see Cooper v. Bruckner*, 21 AD3d 758, 758-59 [1<sup>st</sup> Dept. 2005]; *Matter of Smith Barney Shearson Inc. v. Sacharow*, 91 NY2d 39, 49 [1997]). It is the policy of New York courts to interfere as little as possible with the freedom of consenting parties to submit disputes to arbitration (*see Matter of Smith Barney Shearson Inc.*, 91 NY2d at 50 [1997]) quoting *Matter of 166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp.*, 78 NY2d 88, 93 [1991] quoting *Matter of Siegel v. Lewis*, 40 NY2d 687, 689 [1976]). On a motion to stay arbitration pursuant to CPLR 7503(b), "a party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by limitation under subdivision (b) of section 7502." It is well-established that "the party seeking to stay arbitration ha[s] the burden of showing the existence of sufficient evidentiary facts to establish a genuine preliminary issue" which would serve as a justification for the stay (*New Hampshire Indem. Co. v. Flores* 2002 WL 377029, 2002 N.Y.Slip Op. 40024(U) [N.Y.Sup. Ct. 2002]; *see, e.g., In re Empire Mut. Ins. Co. v Zelin*, 120 A.D.2d 365, 366 [1st Dept 1986]). As such, the court must decide three threshold questions: (1) whether the parties made a valid agreement; if so, then (2) whether the parties complied with the agreement; and (3) whether the claim sought to be arbitrated is barred by the statute of limitations (*see Cooper*, 21 AD3d at 759; *Smith Barney, Harris Upham & Co., Inc. v. Luckie*, 85 NY2d 193, 201-02 [1995]).

In the instant case, the court need only answer the first question. Where an unlicensed contractor demands arbitration pursuant to the terms of a home improvement contract, the court has the power to stay arbitration. The issue of compliance with the home improvement license statute is for the court rather than the arbitrator (*see Matter of Heller*, 178 AD2d at 195). Where the contractor has not complied with the license statute at the time the agreement was entered into or at the time the work was performed, making the agreement unenforceable, the contractor cannot seek arbitration to enforce that agreement.

In accordance with the court's holding in section II, that the agreement is unenforceable, the court holds that the dispute is not arbitrable and arbitration is permanently stayed.

#### **IV. PETITIONERS ARE ENTITLED TO INJUNCTIVE RELIEF**

Notwithstanding the court's determination that Respondent lacks standing to avail itself of the court or to require arbitration, Respondent's argument that Petitioners failed to meet the standard for injunctive relief is specious. In the instant case, a valid basis for disturbing the *status quo* and granting injunctive relief exists.

While ordinarily the function of a preliminary injunction is to preserve the *status quo* until a final determination upon the merits can be made, "[t]here is no question that in a proper case the Supreme Court has power as a court of equity to grant a temporary injunction which mandates specific conduct ..." (*McCain v. Koch*, 70 NY2d 109, 116, [1987]; *see also, State v. Solil Management Corp.*, 128 Misc2d 767, 767 [Sup. Ct. N.Y. Co. 1985] [an injunction may be used to either restrain or compel performance of an act]). The decision whether to grant a motion for preliminary relief is committed to the sound discretion of the trial court (*see Doe v. Axelrod*,

73 NY2d 748, 750 [1988]; *Jiggetts v. Perales*, 202 AD2d 341, 342 [1st Dept. 1994]).

The test is whether a movant has shown: “(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of the equities tipping in the moving party's favor” (*Doe*, 73 NY2d at 750; *Housing Works, Inc. v. City of New York*, 255 AD2d 209, 213 [1st Dept. 1998]). Proof establishing these elements must be by affidavit and other competent proof, with evidentiary detail (*see Scotto v. Mei*, 219 AD2d 181, 182 [1st Dept. 1996]; *Faberge International Inc. v. DiPino*, 109 AD2d 235, 240 [1st Dept. 1985]).

In addition, where as here, the injunctive relief would upset the *status quo* and grant some form of the ultimate relief requested, the movant has the heightened burden of showing that extraordinary circumstances warrant the relief (*see Rosa Hair Stylists v. Jaber Food Corp.*, 218 AD2d 793, 794 [2<sup>nd</sup> Dept. 1995]).

Clearly Petitioners have a likelihood of success on the merits (*supra*, sections II and III). The prospect of being compelled to participate in arbitration is detrimental to Petitioners because Respondent has no right to arbitration. Moreover, the balance of the equities are clearly in favor of Petitioners because the magnitude of the public policy behind the licensing statute is so strong that it outweighs any claim that Petitioners are benefitting improperly or any loss that Respondent might suffer.

### CONCLUSION

For the foregoing reasons the court holds that it is reasonably clear and ascertainable that Respondent is a valid New York corporation; that the Agreement is unenforceable because

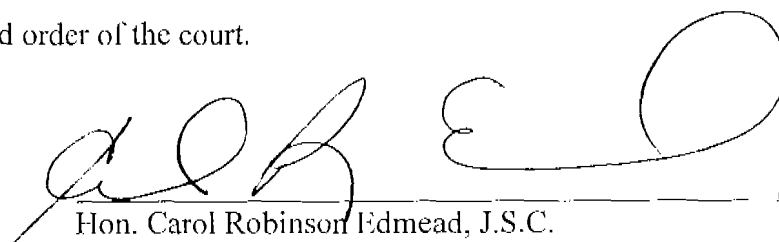
Respondent's license was void at the time that the Agreement was entered into and at the time the work was performed; and that the dispute is not arbitrable.

Accordingly, it is hereby

ORDERED that Petitioners' motion to permanently stay mediation and arbitration attempted to be had by Respondents is granted.

This constitutes the decision and order of the court.

Dated: October 6, 2006



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

**CAROL EDMEAD**  
J.S.C.

**FILED**  
OCT 10 2006  
COUNTY CLERK