

397 West 12th Street Corp. v Zupa

2006 NY Slip Op 30356(U)

June 6, 2006

Supreme Court, New York County

Docket Number: 0107542/2004

Judge: Sherry Klein Heitler

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

PRESENT: **HON. SHERRY KLEIN HEITLER**

PART 30

Index Number : 107542/2004

397 WEST 12TH STREET

vs
ZUPA, VICTOR

Sequence Number : 004

DISMISS ACTION

INDEX NO. 107542/04

MOTION DATE _____

MOTION SEQ. NO. 004

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 memorandum decision dated 6.6.06.

FILED
JUN 09 2006
COUNTY CLERKS OFFICE
NEW YORK

Dated: 6.6.06

Sherry Klein Heitler
SHERRY KLEIN HEITLER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 30

-----X
397 WEST 12TH STREET CORP.,

Plaintiff,

-against-

Index No. 107542/04

VICTOR ZUPA, MADISON CAPITAL ACQUISITIONS,
LLC, BLUESTAR LLC, DOE CORPORATIONS 1-3,
AND JANE DOES 1-10,

DECISION AND ORDER

Defendants.

-----X
HEITLER, SHERRY KLEIN, J:

Motions sequence numbers 004 through 008 are consolidated for disposition herein.

In motion sequence 004, plaintiff moves for summary judgment dismissing defendants Madison Capital Acquisitions, LLC's and Bluestar LLC's (together, "Madison's") first and second counterclaims, and cancelling the notices of pendency filed by Madison in this action. In motion sequence 005, Madison moves for partial summary judgment dismissing all causes of action asserted against it in the complaint, and for permission, pursuant to CPLR 3025 (b), to serve a supplemental answer asserting an additional counterclaim and cross claim, and to compel discovery, pursuant to CPLR 3124, and to vacate a stipulation of discontinuance filed by plaintiff 397 West 12th Street Corp. ("West 12th Street Corp.") and defendant Victor Zupa. In motion sequence 006, Zupa moves to renew this court's order, dated January 13, 2005, which denied his motion for summary judgment dismissing Madison's third cross claim, and for summary judgment dismissing Madison's first and second cross claims, as well as to confirm the stipulation of discontinuance filed by West 12th Street Corp. pursuant to CPLR 3217 (b). In motion sequence 007, West 12th Street Corp. moves for an order compelling the depositions of two principals of Madison, as well as Madison's outside counsel, for a conditional order of

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NEW YORK

preclusion against Madison should it fail to comply with its discovery obligations, for permission to file a note of issue and complete discovery thereafter, and for approval of the stipulation of discontinuance dated August 11, 2005. In motion sequence 008, Madison moves to join 397 West 12th Street L.L.C., and 144 Tenth Avenue L.L.C., as party defendants with respect to Madison's counterclaim for a declaratory judgment, and its cross claim for specific performance.

West 12th Street Corp. was a tenant of the premises at 397 West 12th Street in Manhattan ("the 12th Street property"), which was owned and managed by Zupa. Pursuant to its lease, if Zupa, the landlord, decided to sell the premises, West 12th Street Corp. held a right of first refusal to purchase the property on the same terms and conditions as any offer accepted by Zupa. In early 2004, Madison made an offer to purchase the 12th Street property, as well as another property owned by Zupa at 140-144 West 10th Avenue, which was located at West 19th Street ("the 10th Avenue property") for a total of \$22 million.

Thereafter, on February 20, 2004, Zupa and Madison entered into three written agreements, which were prepared by Zupa. The first was a contract of sale for the 12th Street property, for \$14 million. The second contract was for the sale of the 10th Avenue property, for \$8 million. The first contract was contingent on West 12th Street Corp. declining to exercise its right of first refusal. The second contract provided that both sales were contingent upon the closing of both properties. That is, the contracts were to required to close simultaneously, or neither would close. The third contract, between Zupa and Madison ("the Surrender Agreement") recognized West 12th Street Corp.'s right of first refusal, and provided, *inter alia*, that: (1) Zupa would attempt to negotiate terms for the extinguishment, or surrender, of the right of first refusal; (2) if West 12th Street Corp. agreed to a cash settlement, that Madison and Zupa would each pay half, and (3) if West 12th Street Corp. did not timely exercise its rights, or if it did

and then defaulted, Zupa would enforce the provisions of the contract against it.

West 12th Street Corp alleges that in December 2003, it had learned from one of Madison's principals that Madison had intended to offer \$11.4 million for the 12th Street property, not \$14 million. It further alleges that Zupa and Madison conspired to combine the two transactions so that Zupa could inflate the price of the 12th Street property above market value and thereby either defeat West 12th Street Corp.'s right of first refusal, or obtain a windfall profit.

Zupa notified West 12th Street Corp. of Madison's offer on February 20, 2004. Thereafter, West 12th Street Corp. informed Zupa, by letter dated May 6, 2004, of its intention to exercise its right of first refusal to purchase the 12th Street property, and tendered a down payment of \$700,000.00. It then instituted this action to compel Zupa to sell it the 10th Avenue property as well, or to have the price of the West 12th Street property reduced to market value. It also filed notices of pendency against both properties.

In its complaint, West 12th Street Corp. alleged causes of action against Zupa for breach of contract and specific performance, as to both properties (first cause of action), a declaratory judgment finding that Zupa was obligated to offer to sell both properties to West 12th Street Corp. (second cause of action), and breach of the implied covenant of good faith and fair dealing (third cause of action). It also alleged causes of action against Madison for tortious interference with a contract (fourth cause of action) and unjust enrichment (fifth cause of action).

Zupa counterclaimed that West 12th Street Corp. failed to timely close on the 12th Street property and had therefore lost its right of first refusal, and that it improperly filed notices of pendency encumbering the 12th Street property as well as the 10th Avenue property.

Madison counterclaimed/ cross-claimed for declaratory judgment finding that West 12th Street Corp. failed to exercise its right of first refusal (first counterclaim/ cross claim), for

specific performance (second counterclaim/ cross claim), and breach of contract against Zupa as to the Surrender Agreement (third cross claim).

Thereafter Zupa moved for summary judgment dismissing the complaint, dismissing Madison's third cross claim for breach of contract against Zupa, and to vacate West 12th Street Corp.'s notice of pendency against the 10th Avenue property. Madison cross-moved for summary judgment dismissing all causes of action in the complaint, and for summary judgment on its counterclaims/ cross claims for a declaratory judgment and for specific performance.

By decision and order dated January 18, 2005, Justice Lowe denied the motion and cross motion, noting that there was evidence that the price of the 12th Street property may have been inflated as a means to defeat West 12th Street Corp.'s right of first refusal, and that, by combining the two properties into a single real estate transaction, there were issues as to whether West 12th Street Corp. had a right to the 10th Avenue property as well. Justice Lowe denied Zupa's motion to dismiss Madison's cross claim for breach of contract, but granted leave to renew after discovery. On appeal, the Appellate Division modified the decision only to the extent of dismissing West 12th Street Corp.'s claims relating to the 10th Avenue property and vacating the notice of pendency as to that property (397 W.12th St. Corp. v Zupa, 20 AD3d 335 [1st Dept 2005]). The Appellate Division stated, in part, as follows:

While defendant Zupa may not defeat plaintiff's right to exercise its right of first refusal to purchase the West 12th Street property by tying it to the sale of the 10th Avenue property, plaintiff, having a right of first refusal to purchase only the West 12th Street property, may not obtain specific performance as to both properties [citations omitted] . . .

(id. at 336).

Shortly after the Appellate Division rendered its decision, Zupa and West 12th Street

Corp. entered into a "Stipulation and Agreement" and a "Stipulation of Discontinuance," both dated August 11, 2005, whereby the parties agreed, *inter alia*, that Zupa would sell to West 12th Street Corp., or its designee, the 12th Street property for \$14 million, and the 10th Avenue property for \$10 million, thereby bringing the total to \$24 million. The parties also agreed to discharge the notices of pendency against both properties, and to cooperate to dismiss all of Madison's claims against each of them in this action. Thereafter, West 12th Street Corp. purchased both properties pursuant to this Agreement.

West 12th Street Corp. now moves to dismiss Madison's first and second counterclaims/cross claims for a declaratory judgment and specific performance, respectively, and to vacate the notices of pendency filed by Madison.

Madison contends that, since West 12th Street Corp. did not close on the 12th Street property within 90 days, as required under its lease agreement, it waived its right of first refusal, and Madison is now entitled to purchase both the 12th Street property as well as the 10th Avenue property. Madison points to Paragraph 55 of West 12th Street Corp.'s lease, which states, in part, as follows:

If the Landlord, or it's[sic] successors in title, have an opportunity to sell the premises . . . the Landlord, or it's successors in title, shall give the Tenant . . . a first option to purchase the premises upon the same terms and conditions within ninety days after receipt of written notice via certified mail, return receipt requested, is mailed to the Tenant If the Tenant accepts the terms and conditions of the proposed sale, it must be committed to a writing, and the Tenant must deliver a certified check to the Landlord for the amount of the deposit required under the sale contract [T]he Landlord agrees to enter into a written agreement of sale with the Tenant within ten (10) days after receipt of said writing and check

Madison contends that the above provision provides that the Tenant must close on the property

* 7]
within 90 days.

West 12th Street Corp. counters that, pursuant to the above provision, it timely exercised its right of first refusal by its May 6th letter, wherein it committed itself to purchase the 12th Street property under the terms and conditions of Madison's contract. Moreover, West 12th Street Corp. argues that its mere *election* to exercise its right of first refusal terminated Madison's rights to the property.

A right of first refusal, or preemptive right, requires an owner, when and if he decides to sell, to offer the property first to the party holding the preemptive right so that he may meet a third-party offer (Yudell Trust I v API Westchester Assoc., 227 AD2d 471, 472 [2d Dept 1996]). Where, as here, the holder of the right of first refusal accepts the offer, as did West 12th Street Corp. in its May 6, 2004 letter, a binding contract is created (id. at 473). The fact that West 12th Street Corp. thereafter contested the legitimacy of the price set forth by Zupa for the 12th Street property, did not change the unequivocal acceptance of the offer (see id.).

Paragraph 55 of the lease is not a model of clarity, in that it requires "the landlord . . . [to] give the Tenant . . . a first option to purchase . . . within ninety days after receipt of written notice . . . is mailed to the Tenant." Fortunately, paragraph 55 is not dispositive of the issues presented herein, because once West 12th Street Corp. indicated to Zupa that it was electing to exercise its option to purchase, under the terms of Madison's contract, Madison lost its rights to purchase both the 12th Street property and the 10th Avenue property. Paragraph 28 (s) of the contract of sale between Zupa and Madison, regarding the 12th Street property, provides, in part, that: "the obligations of the parties hereunder are *contingent* upon the tenant under the Lease *declining* to exercise its Right of First Refusal under same" (emphasis added). Other provisions provided for Madison to be reimbursed for certain expenses if West 12th Street Corp. chose to exercise its right

of first refusal.

Thus, under the terms of the above provision, Madison's rights to the 12th Street property, and by extension, the 10th Avenue property, were contingent upon West 12th Street Corp. declining to exercise its right of first refusal. West 12th Street Corp. clearly did not decline to exercise its right of first refusal. Therefore, Madison's first and second counterclaims/ cross claims, which are based upon its alleged rights to the two properties, are dismissed as to both West 12th Street Corp. and Zupa. The notices of pendency filed by Madison are also cancelled.

In motion sequence 005, Madison moves for the following relief: 1) partial summary judgment dismissing all causes of action asserted against it in the complaint; 2) leave to file a supplemental answer asserting a supplemental cross claim for breach of contract against Victor Zupa, and a supplemental counterclaim for tortious interference with contract against West 12th Street Corp. and others; 3) additional discovery; and 4) to vacate the stipulation of discontinuance filed by Madison and Zupa.

As to that part of the motion for summary judgment dismissing the complaint as against Madison, the motion is granted. West 12th Street Corp.'s claims against Madison are for declaratory judgment finding that West 12th Street Corp. had the right to purchase both the 12th Street and 10th Avenue properties (first cause of action), tortious interference with contract (fourth cause of action), and unjust enrichment (fifth cause of action). Inasmuch as West 12th Street Corp. has settled its claims with Zupa and has purchased both properties, and Madison's claims regarding its right to purchase the properties are dismissed, as indicated above, West 12th Street Corp.'s first cause of action for declaratory judgment, as well as the fifth cause of action for unjust enrichment, are moot. In addition, in order to establish a claim for tortious interference with contract, a plaintiff must set forth facts establishing the following elements: (1) a valid

contract between the plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional procurement of an actual breach of the contract without justification; and (4) damages resulting therefrom (Lama Holding Co. v Smith Barney, Inc., 88 NY2d 413, 424 [1996]). Here, since there is no longer a breach of contract, there can be no cause of action for tortious interference with contract. Therefore, West 12th Street Corp.'s fourth cause of action is also dismissed.

Madison next seeks leave to serve a supplemental answer, annexed to its papers as Exhibit K, alleging an additional cross claim for breach of contract against Zupa and an additional counterclaim for tortious interference with contract against West 12th Street Corp., as well as the principals of 397 West LLC and Oaktree Capital Management, LLC, two entities to whom West 12th Street Corp. assigned its right of first refusal.

Madison's initial breach of contract claim against Zupa was that Zupa breached the Surrender Agreement in that he did not make a good-faith effort to induce West 12th Street Corp. to enter into an agreement to surrender its right of first refusal. In its proposed supplemental pleading, Madison adds that, subsequent to the Appellate Division's decision, Zupa entered into secret negotiations with West 12th Street Corp. and the other defendants, which were designed to frustrate Madison's right under its purchase agreements, by selling both properties to West 12th Street Corp., or its designee, for a combined purchase price of \$24 million, which is greater than the combined \$22 million price of Madison's purchase agreements.

Madison acknowledges that although Zupa did, at first, comply with his obligations under the Surrender Agreement by contending that West 12th Street Corp had failed to properly exercise its right of first refusal, Zupa was obligated to continue to challenge West 12th Street Corp.'s right to purchase the properties.

The Surrender Agreement provides, in relevant part, as follows:

In the alternate event that the Tenant shall elect to exercise its Right of First Refusal and thereafter default in the performance of its contracted obligations, then unless Purchaser shall have previously requested and received the return of the Reimbursable Expenses, Zupa shall enforce the provisions of the contract against Tenant, terminate the Tenant's right to purchase the 12 Street Premises and promptly provide Madison with written notice thereof in accordance with par 25 of the 12 Street Contract . . .

Madison contends that Zupa should have challenged West 12th Street Corp.'s assignment agreement with 397 West 12th Street LLC and Oaktree Capital Management, whereby West 12th Street Corp. assigned to them the right of first refusal. According to Madison, since the West 12th Street Corp.'s lease with Zupa did not give it the right to assign its right of first refusal, it did not have the right to do so. Madison also alleges that West 12th Street Corp.'s failure to purchase the property within 90 days of giving Zupa notice of its intent to exercise its right of first refusal was a breach of paragraph 55 of its lease, and that by commencing the within action, West 12th Street Corp. renounced and repudiated its right to first refusal.

The history of this action indicates that Zupa has, in fact, challenged West 12th Street Corp.'s right to purchase the properties. Upon West 12th Street Corp.'s commencement of this action, Zupa counterclaimed that West 12th Street Corp. had failed to timely close on the 12th Street property, and had, therefore, lost its right of first refusal.

Zupa also brought a motion for summary judgment to dismiss West 12th Street Corp.'s causes of action for breach of contract and specific performance, as to the sale of both properties. Justice Lowe denied the motion, finding that there were issues of fact as to West 12th Street Corp.'s right to purchase both properties.

Thereafter, both Zupa and Madison appealed to the Appellate Division arguing that, as a

matter of law, West 12th Street Corp. had no right to purchase either property. The Appellate Division modified Justice Lowe's decision only to the extent of determining that West 12th Street Corp. did not have a right of first refusal as to the 10th Avenue property.

Notably, in its brief to the Appellate Division, Madison argued that West 12th Street Corp. had not complied with paragraph 55 of its lease in that it did not close within 90 days, and that it had breached the lease by assigning its right of first refusal. The Appellate Division rejected these arguments and stated that "We have considered defendants' other arguments and find them unpersuasive."

Thus, Madison seeks to place an obligation on Zupa to continue litigating arguments that the Appellate Division found "unpersuasive." In order to plead a breach of contract cause of action, a complaint must allege the provision of the contract upon which the claim is based (see e.g. Matter of Sud v Sud, 211 AD2d 423, 424 [1st Dept 1995]). The Surrender Agreement does not, either explicitly, or by implication, require Zupa to litigate any of the issues involved.

As to Madison's cause of action for tortious interference with contract against West 12th Street Corp. and the principals of 397 West 12th Street LLC, Madison alleges only that "upon information and belief" these individuals tortiously interfered with both Madison's purchase agreements and the Surrender Agreement, by "inducing Zupa to breach same" (Answer ¶¶ 35-38). As noted above, Zupa's settlement of this action was not a breach of the Surrender Agreement. Therefore, West 12th Street Corp.'s involvement in the settlement was not a tortious interference with that agreement. In addition, a cause of action for tortious interference with a contract requires that the defendant act "without justification" (see, Lama Holding Co. v Smith Barney, Inc., 88 NY2d at 424,). Where a party is merely exercising a contractual and legal right, its actions cannot be said to have been unjustified (MLI Indus. v New York State Urban Dev.

Corp., 205 AD2d 998, 1001 [3d Dept 1994]).

Where the proposed amended pleading is insufficient or devoid of merit, the request for leave to amend will be denied (Tapps of Nassau Supermarkets, Inc. v Linden Blvd., L.P., 269 AD2d 306, 308 [1st Dept 2000]; Falmouth Bldg. Corp. v Zottoli, 189 AD2d 569 [1st Dept 1993]). For these reasons, that part of Madison's motion for leave to serve and file the supplemental pleading as annexed to moving papers, is denied.

Inasmuch as Madison's motion for leave to assert a claim for tortious interference with contract has been denied, and further, that any rights to purchase the properties was extinguished as of May 6, 2004, when West 12th Street Corp. indicated that it would exercise its right of first refusal, Madison's attempt to compel discovery from the individual principals of West 12th Street Corp. and the related LLCs is, in essence, a fishing expedition. Madison is attempting to find evidence of some unknown wrongdoing occurring after its rights to purchase were extinguished. That part of Madison's motion to compel and extend the period of discovery is, therefore, denied.

Finally, as to that part of Madison's motion to vacate the stipulation of discontinuance filed by West 12th Street Corp. and Zupa, CPLR 3217 (a) (2) requires that a stipulation filed with the court be signed by the attorneys of record for all parties. The stipulation filed by West 12th Street Corp. and Zupa was not signed by all parties, and therefore should not have been filed. However, CPLR 3217 (b) allows a party to discontinue its action upon order of the court. In motion sequence 006, Zupa has moved to confirm the stipulation of discontinuance, and in motion sequence 007, West 12th Street Corp. has also moved to confirm the stipulation. Inasmuch as West 12th Street Corp. and Zupa have agreed to discontinue their claims against each other with prejudice, this court hereby confirms the stipulation of discontinuance and permits it to be filed.

In motion sequence 006, Zupa moves, pursuant to CPLR 2221, to renew his motion for summary judgment dismissing Madison's third cross claim against him for breach of contract regarding his good faith efforts to induce West 12th Street Corp. to surrender its right of first refusal. Zupa also moves for summary judgment dismissing Madison's first and second counterclaims/cross claims, and, pursuant to CPLR 3217 (b), to confirm the stipulation of discontinuance filed by West 12th Street Corp and Zupa.

As to that part of Zupa's motion for leave to renew, Justice Lowe has already granted leave to renew after discovery. Although discovery has not yet been entirely completed, there has been sufficient discovery to address the issues presented herein. Zupa's motion is, therefore, re-considered herein.

Madison's claim for breach of the Surrender Agreement is based upon two specific allegations as to Zupa's lack of good faith: first, that despite Zupa's explicit agreement to pay one-half of any payment made to West 12th Street Corp. in connection with its surrender of its right of first refusal, when Madison proposed offering West 12th Street Corp. \$150,000.00 to surrender that right, Zupa refused to pay more than \$37,500.00. Second, Madison alleges that Zupa did not keep it informed of the progress of negotiations.

The Surrender Agreement provides in relevant part, as follows:

2. Zupa further agrees to forthwith contact the Tenant for the purpose of attempting to negotiate terms for the extinguishment of the Right of First Refusal, the termination of the Lease Agreement and the vacating by Tenant and all subtenants or other occupants of the leased premises upon an accelerated basis, prior to the dates otherwise provided within the Lease Agreement
3. Zupa agrees to keep Madison advised as to the progress of all negotiations with Tenant, pursuant to par 2 hereof. It is further agreed that Zupa shall not enter any agreement with

the Tenant without the prior written consent and approval of Madison as to the terms of such agreement. *In the event that Zupa and Madison agree upon terms for the amendment of the Lease Agreement which are also satisfactory to Tenant, then Zupa and Madison shall each be obligated for and responsible to pay ½ of the total cash payment* required to be made to Tenant at the time that Tenant shall vacate the demised premises.

(Emphasis added). The italicized provision clearly indicates that Zupa was entitled to agree to terms regarding any cash payment to be made to West 12th Street Corp.

Madison also alleges that Zupa did not keep Madison informed as to his negotiations with West 12th Street Corp. However, deposition testimony of Madison's principal, Philippe Weissberg, indicates that Weissberg's attorney had many conversations with the attorney for West 12th Street Corp. and it was clear that Madison was aware that West 12th Street Corp. was not interested in surrendering its right of first refusal. Madison's third cause of action against Zupa is, therefore, dismissed.

As to that part of Zupa's motion to dismiss Madison's first and second counterclaims/cross claims, for declaratory judgment and specific performance, respectively, those causes of action have been dismissed, as indicated above. Zupa also moves to confirm the stipulation of discontinuance, which is granted.

In motion sequence 007, West 12th Street Corp. moves to compel depositions of Madison's principals, and for a conditional order of preclusion against Madison. West 12th Street Corp. also moves for approval of the stipulation of discontinuance. In motion sequence 008, Madison moves to join 397 West 12th Street, L.L.C. and 144 Tenth Avenue L.L.C. as party defendants with respect to Madison's counterclaim for declaratory judgment and cross claim for specific performance.

Inasmuch as the parties' claims, counterclaims and cross claims have been either discontinued, dismissed, determined above, these motions are denied as moot.

This decision resolves all of the remaining claims, counterclaims and cross claims in this action.

Accordingly, based upon the foregoing, it is

ORDERED that as to motion sequence 004, plaintiff's motion for summary judgment dismissing the first and second counterclaims of defendants Madison Capital Acquisitions, LLC, and Bluestar LLC, is granted, and the first and second counterclaims/ cross claims are dismissed as to both plaintiff and defendant Victor Zupa; and it is further

ORDERED that as to motion sequence 004, that part of plaintiff's motion to cancel the notices of pendency filed by Madison Acquisitions, LLC and Bluestar LLC, is granted; and it is further

ORDERED that as to motion sequence 005, the portion of the motion by defendants Madison Capital Acquisitions LLC, and Bluestar LLC, for summary judgment dismissing plaintiff's first, second, fourth and fifth causes of action is granted; and it is further

ORDERED that as to motion sequence 005, the portion of the motion for leave to serve a supplemental answer and to compel discovery is denied; and it is further

ORDERED that as to motion sequence 005, the portion of the motion to vacate the stipulation of discontinuance is denied; and it is further

ORDERED that as to motion sequence 006, defendant Victor Zupa's motion for summary judgment dismissing the third cross claim of defendants Madison Capital Acquisitions, LLC and Bluestar LLC is granted; and it is further

ORDERED that as to motion sequence 006, that part of the motion to confirm the

stipulation of discontinuance is granted; and it is further


ORDERED that as to motion sequence 007, the motion by plaintiff to compel depositions and for a conditional order of preclusion against Madison Capital Acquisitions LLC and Bluestar LLC is denied; and it is further

ORDERED that as to motion sequence 008 the motion by defendants Madison Capital Acquisitions, LLC and Bluestar LLC to join additional defendants is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This shall constitute the decision and order of the court.

DATED: June 6, 2006



SHERRY KLEIN HEITLER
J.S.C.

FILED
JUN 09 2006
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