Consolo v Selevan
2006 NY Slip Op 30437(U)
June 1, 2006
Supreme Court, New York County
Docket Number: 601720/05
Judge: Louis B. York
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[* 1]
SCANNED ON 6/14/2006

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

PRESENT: LOUIS B. YORK J.S.C. PART ______

Index Number : 601720/2005
CONSOLO, FAITH H.
vs
SELEVAN, LARRY
Sequence Number : 002
DISMISS

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______
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

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
JUN 14 2006
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/1/06

LOUIS B. YORK 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

---x

FAITH H. CONSOLO,

Index No.: 601720/05

Plaintiff,

-against-

LARRY SELEVAN, PETER NELSON,
GARRICK-AUG ASSOCIATES STORE LEASING,
INC. and IAN BLANT, ESQ., as Escrowee,

Defendants.

---x

GARRICK-AUG ASSOCIATES STORE LEASING,
INC. and GARRICK-AUG WORLDWIDE, LTD,

Third-Party Index No.: 591075/05

Third-Party Plaintiffs,

-against-

JOSEPH AQUINO, KENNETH I. HABER,
DOUGLAS ELLIMAN LLC and N.Y. STORE
LEASING, INC.

Third-Party Defendants.

---x

YORK, J.:

Motion sequence numbers 001 and 002 are hereby consolidated for disposition.

In this action by plaintiff Faith Hope Consolo (Consolo) to recover real estate commissions allegedly owed to her by defendants Garrick-Aug Associates Store Leasing, Inc. and Garrick-Aug Worldwide, Ltd. (together "Garrick-Aug"), third-party defendants Douglas Elliman LLC (Elliman) and Kenneth I. Haber (Haber) move to dismiss causes of actions one through three and five of defendant third-party plaintiff Garrick-Aug's third-party complaint, pursuant to CPLR 3211 (a)(1) and CPLR 3211(a)(7). Third-party defendant Joseph Aquino

(Aquino) moves to dismiss Garrick-Aug's third-party complaint, insofar as it applies to him.

FACTUAL ALLEGATIONS

Plaintiff Consolo was affiliated with defendant Garrick-Aug as a real estate broker, specializing in retail properties, from approximately 1985 to January 2005. During this time, Consolo worked as an independent contractor, receiving a percentage of commissions from Garrick-Aug for real estate transactions she conducted for Garrick-Aug.

Aquino worked for Garrick-Aug from approximately 1989 to January 2005, also as a real estate broker and independent contractor. Aquino had a written employment contract with Garrick-Aug, dated April 1, 1989 and amended in March of 2000. The Aquino Employment Contract dictated that Aquino agree to certain restrictive covenants including a non-compete provision, nonsolicitation of other Garrick-Aug employees for work outside Garrick-Aug, and ownership of proprietary documents and confidential customer lists, in the event the employment contract was terminated. Specifically, the contract stated,

> [a]ll lists of landlords, building owners, tenants and agents (collectively "Customers") of the Corporation owned or developed by the Corporation are and shall be the sole and exclusive property of the Corporation ... Upon termination of your employment under this Agreement, you shall promptly deliver to the Corporation all records, books ... lists, copies or extracts from any of the foregoing or under your control ... In the event you terminate your relationship with the Company or the Company terminates its relationship with you, you will not interfere with the Corporation's business relationships with its Customers"

(Elliman Memorandum of Law, Exhibit A, Aquino Employment Contract, at 3).

The Aquino Employment Contract also stated, "[t]he term of this Agreement shall commence upon the signature of this document by you and a duly authorized representative of the corporation, and end upon your death or the sooner termination of this Agreement by either party by written notice given to the other" (id. at 1).

During their time at Garrick-Aug, Consolo and Aquino worked on many real estate leasing deals together. In the summer of 2004, and as stated in Garrick Aug's complaint, Consolo and Aquino decided to leave Garrick-Aug. In September of 2004, Consolo and Aquino arranged with Haber, an officer of Elliman, to establish a retail broker business relationship with Elliman. Consolo and Aquino officially joined Elliman in January of 2005.

A termination agreement was entered into on January 17, 2005 between Consolo, Aquino and Garrick-Aug (Elliman Memorandum of Law, Exhibit B, Termination Agreement, at 1) (Termination Agreement). The Termination Agreement set forth that Consolo and Aquino had decided to terminate their relationship with Garrick-Aug and enter into agreements with Elliman. In addition to setting forth a payment schedule for commissions owed by Garrick-Aug to Consolo and Aquino, the Termination Agreement provided that the agreement between Aquino and Garrick-Aug "is terminated waiving all rights referencing the non competition covenants" (id. at 1).

In addition, the Termination Agreement provided that, on or before February 1, 2005, Consolo and Aquino were to deliver to Garrick-Aug all of the "original" files dated from January 1, 1999 to the date of the Termination Agreement, and all files "previously removed and such files that will be removed by FC and JA in the next twenty (24) hours from GASL's offices ..." (id. at 1).

In May of 2005, Consolo filed a complaint against Garrick-Aug, alleging that Garrick-Aug failed to pay commissions owed to her in accordance with the Termination Agreement. Soon after, Garrick-Aug filed a third-party complaint against third-party defendants Elliman, Haber and Aquino. In its third party complaint, Garrick-Aug asserts as its first cause of action

and counterclaim against Consolo, Aquino, Elliman and Haber, unfair competition, stating that Consolo and Aquino "appropriated and converted Proprietary Documents and copies thereof, in violation of their respective agreements not to do so" (Garrick-Aug's Third-Party Complaint, at 10-11). Garrick-Aug further alleges that Elliman and Haber participated in the conversion of Garrick-Aug's proprietary documents and trade secrets by "accepting, retaining and failing to return" these documents and "by using and disseminating trade secrets, confidential customer lists and the Proprietary Documents owned by Garrick-Aug" (id. at 10-11).

In its second cause of action and counterclaim against Consolo, Aquino, Elliman and Haber, Garrick-Aug requests that third-party defendants Elliman, Haber and Aquino be permanently enjoined from continued use and dissemination of confidential customer lists and proprietary documents belonging to Garrick-Aug (id. at 11).

In its third cause of action and counterclaim against Consolo, Aquino, Elliman and Haber, Garrick-Aug asserts a claim of fraud, stating that the "misappropriation, conversion and taking of Garrick-Aug's confidential customer lists and the Proprietary Documents and the exploitation of the information therein contained by Plaintiff and Third-Party Defendants was deliberately and consciously undertaken with the intention of defrauding Garrick-Aug of commissions for brokering commercial leases and to earn commissions and other income derived therefrom by defendants" (id. at 12).

Garrick-Aug's fourth cause of action and counterclaim is for breach of contract against Consolo and Aquino. Without specifying the contractual provisions at issue, Garrick-Aug alleges that, among other things, Consolo and Aquino breached their respective contractual duties to Garrick-Aug by misappropriating proprietary documents and confidential customer

lists, competing with Garrick-Aug during the course of their employment with Garrick-Aug, procuring employment for persons then employed by Garrick-Aug while working for Garrick-Aug, and that Aquino violated the non-compete clause in his employment contract with Garrick-Aug (id. at 12-13).

Finally, in its fifth cause of action against Elliman and Haber, Garrick-Aug asserts that Elliman and Haber tortiously interfered with both the alleged oral and written contracts of Consolo, Aquino and other unidentified employees of Garrick-Aug, in an "unlawful scheme" to induce them to terminate their relationships with Garrick-Aug and "follow Consolo and Aquino to Douglas Elliman, and to unlawfully hijack the business of Garrick-Aug" (id. at 14).

DISCUSSION

The court grants third-party defendants Elliman and Haber, and third-party defendant Aquino's, motions to dismiss Garrick-Aug's third-party complaint, pursuant to CPLR 3211(a)(7) and CPLR 3211(a)(1). "The standards in determining a CPLR 3211(a)(7) motion for dismissal for failure to state a cause of action are well known" (Ackerman v 305 East 40th Owners Corp., 189 AD2d 665, 666 [1st Dept 1993]; 219 Broadway Corp. v Alexanders's, Inc., 46 NY2d 506 [1979]). "Such a motion assumes the truth of the complaint's material allegations and whatever can be reasonable inferred therefrom (id. at 666). However, although the facts pleaded are presumed to be true and accorded every favorable inference, the court should not accept allegations that are conclusory or "either inherently incredible or flatly contracted by documentary evidence" (Herman v Greenberg, 221 AD2d 251, 251 [1st "Dept 1995]).

As stated in Delran v Prada USA, Corp. (23 AD3d 308, 308 [1st Dept 2005]), "[w]hile it is true that in considering a motion to dismiss brought pursuant to CPLR 3211(a)(7), the court

must presume the facts pleaded to be true and must accord them every favorable inference, factual allegations that do not set forth a viable cause of action, or that consist of bare legal conclusions, are not entitled to such consideration" (id. at 308; Cron v Hargro Fabrics, Inc., 91 NY2d 362, 366 [1998]; *see also* Skillgames, LLC v Brody, 1 AD3d 247, 250 [1st Dept 2003]).

In order to prevail on a motion to dismiss based upon documentary evidence, pursuant to CPLR 3211(a)(1), a defendant must show that the documents relied on in forming his defense "definitively dispose" of all of the factual issues as a matter of law (Bronxville Knolls, Inc. v Webster Town Ctr., 221 AD2d 248, 248 [1st Dept 1995]; Blonder & Co., Inc. v Citibank, N.A., __ __ AD3d ___ , 808 NYS2d 214, 217, (1st Dept 2006).

Garrick-Aug has failed to state a cause of action for unfair competition, because it has not put forth sufficient facts and documentary evidence to established that third-party defendants Elliman, Haber and Aquino misappropriated Garrick-Aug's proprietary information and trade secrets by improper means (*see* Delran v Prada USA, Corp., 23 AD3d at 309; Bronxville Knolls, Inc. v Webster Town Ctr., 221 AD2d at 248). "The gravamen of a claim of unfair competition is the bad faith misappropriation of a commercial advantage belonging to another by ... exploitation of proprietary information and trade secrets" (Eagle Comtronics, Inc v Pico Products, Inc., 256 AD2d 1202, 1203 [4th Dept 1998]; Derven v PH Consulting, Inc., ____ F Supp 2d _____, 2006 WL 959813 [SD NY]).

"To establish a claim for misappropriation of trade secrets, a plaintiff must show "(1) that it possessed a trade secret and, (2) that defendant is using that trade secret in breach of an agreement, confidence or duty, or as a result of discovery by improper means" (Integrated Cash Management Services, Inc. v Digital Transactions, Inc., 920 F2d 171, 173 [2d Cir 1990]; Rapco

Foam, Inc. v Scientific Applications, Inc., 479 F. Supp 1027, 1029 [SD NY 1979]). Restatement of Torts section 757 defines a trade secret as "any formula, pattern, device, or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitor who does not know or use it."

"[A] trade secret must first of all be secret" (Ashland Mgmt., Inc. v Janien, 82 NY2d 395, 407, 407 [1993]). Several factors should be considered in determining the existence of a "trade secret" such as (1) the extent to which the information is known outside the business; (2) the extent to which it is known by the employees of the business and other involved with the business; (3) the extent to which the information is kept secret; (4) the value of the information to the business and its competitors; (5) the amount of money the business spends to develop the information; and (6) the ease with which the information could be properly acquired or duplicated by others (id. at 407; Restatement of Torts section 757, Comment B).

Here, Garrick-Aug has failed to set forth any facts to establish that its customer lists and proprietary documents constituted trade secrets. "Solicitation of an entity's customer list by a former employee or independent contractor is not actionable unless the customer list is considered a trade secret or there was wrongful conduct such as physically taking or copying files or using confidential information" (Eastern Bus. Sys., Inc. v Specialty Bus. Solutions, LLC, 292 AD2d 336, 338 [2d Dept 2002]). Customer lists are generally not considered confidential information, without a plaintiff showing that "its customers are not known in the trade, and are discoverable only by extraordinary efforts" (H. Meer Dental Supply Co. v Commisso (269 AD2d 662, 663 [3d Dept 2000]; see Leo Silfen, Inc. v Cream, 29 NY2d 387, 389 [1971][trade secret protection of the customer list not warranted as the nature of plaintiff's business could be

considered "open and notorious" in that customers were likely, if not known, users of the employers merchandise and engaged in business at advertised location]; Starlight Limousine Svc., Inc. v Cucinella, 275 AD2d 704, 705 [2d Dept 2000][customer lists not entitled to trade secret protection when, despite the time and money put into compiling customer list, such information can be acquired without extraordinary effort from non-confidential sources]).

Although Garrick-Aug alleges that Aquino appropriated and converted its proprietary documents in violation of his employment contract with Garrick-Aug, and that Elliman and Haber participated in the conversion by "accepting, retaining and failing to return" these documents," Garrick-Aug fails to put forth evidence to show how its customer lists constituted "trade secrets" as a matter of law, and thus, should be protected.

In fact, the termination agreement between Aquino and Garrick-Aug, which seems to assume that Consolo and Aquino might take customer lists with them in the event of termination, belies the fact that the information was a trade secret sufficient to support a claim for unfair competition. For example, the termination agreement stated that, in the event of termination, Consolo and Aquino were to deliver to Garrick-Aug all of the "original" files previously removed by Consolo and Aquino and "such files that will be removed" by them in the next twenty-four hours."

Similarly, in Starlight Limousine Svc., Inc.v Cucinella, (275 AD2d at 705), the court weighed the fact that plaintiffs failed to take any assertive measures to prevent defendants from using the information contained in the customer list once they left the plaintiffs' service. Of note, in the instant case, it was not until the filing of plaintiff's complaint, almost a year after Consolo and Aquino left Garrick-Aug, that Garrick-Aug expressed concern over the fact that its

customer lists were in the hands of the third-party defendants.

In addition, Garrick-Aug has failed to properly plead a cause of action for unfair competition, as it has not established that Elliman, Haber and Aquino misapropriated Garrick-Aug's proprietary information and trade secrets by improper means (*see* Eagle Comtronics, Inc v Pico Products, Inc., 256 AD2d at 1203) or "in breach of an agreement, confidence, duty, or as a result of discovery by improper means" (Rapco Foam, Inc. v Scientific Applications, Inc., 479 F. Supp at 1029).

Here, Garrick-Aug alleges that Consolo and Aquino delivered to Elliman and Haber proprietary documents, and that Haber and Elliman accepted the documents. Garrick-Aug asserts that by accepting, retaining and failing to return the proprietary documents, Elliman and Haber participated in Consolo and Aquino's conversion of the documents. However, Garrick-Aug has failed to establish that, by their simply accepting allegedly proprietary documents, Elliman, Haber or Aquino misappropriated and used Garrick's confidential information in breach of an agreement, confidence or duty, or as a result of discovery by improper means (id. at 1029). Although Garrick-Aug alleges an "unlawful scheme" to "hijack" the business of Garrick-Aug by the third-party defendants, it offers no facts at all to support its conclusory accusations. Thus, Garrick-Aug has failed to establish that the third-party defendants improperly misappropriated trade secrets, so as to sustain a cause of action for unfair competition against Elliman, Haber and Aquino.

Second Cause of Action: Injunction

As Garrick-Aug has failed to state a cause of action for unfair competition against third-party defendants Elliman, Haber and Aquino, the court denies Garrick-Aug's request that

Elliman, Haber and Aquino be permanently enjoined from the use and dissemination of confidential customer lists and proprietary documents allegedly belonging to Garrick-Aug.

Third Cause of Action: Fraud

Garrick-Aug has failed to state a cause of action for fraud, as its third-party complaint does not state in detail the essential elements of a fraud claim against Elliman, Haber and Aquino. "In an action to recover damages for fraud, the plaintiff must allege a misrepresentation or a material omission of fact which is false and known to be false, made for the purpose of inducing reliance, justifiable reliance on the misrepresentation or material omission by the plaintiff, and resulting injury" (Lama Holding Co. v Smith Barney, Inc., 88 NY2d 413, 421 [1996]; see also Swersky v Dreyer & Traub, 219 AD2d 321, 326 [1st Dept 1996]).

Further, the circumstances constituting fraud must be stated in detail (CPLR 3016(b); *see* Brown v Wolf Group Integrated Commc'ns, Ltd., 23 AD3d 239 [1st Dept 2005][court properly dismissed complaint where fraud claim not pleaded with particularity in that plaintiff failed to specify how the defendant misrepresented the facts and words in order to deceive the plaintiff]); Giant Group, Ltd. v Arthur Anderson LLP, 2 AD3d 189, 190 [1st Dept 2003][allegations of fraud must be supported with specific facts]).

Here, Garrick-Aug fails to identify any communications that it had with Elliman, Haber or Aquino which might have resulted in the alleged misrepresentation or omission of fact that was justifiably relied on by Garrick-Aug. Instead, Garrick-Aug puts forth unsupported and conclusory allegations of a conspiracy between Elliman, Haber and Aquino to loot Garrick-Aug of its business and trade secrets. Garrick-Aug also fails to put forth any facts to demonstrate scienter on the part of the third-party defendants. Thus, Garrick's unsupported allegations are

insufficient to state a claim for fraud against Elliman, Haber and Aquino.

Garrick-Aug also fails in its effort to show that it has adequately pled a misrepresentation, in that Elliman and Haber, by their silence, did not properly inform Garrick-Aug that Consolo and Aquino were engaging in dishonest acts and not complying with their fiduciary obligations. As neither Elliman or Haber had a fiduciary duty to Garrick-Aug, they had no duty to disclose such that their silence is actionable as fraud (see Mobil Oil Corp. v Joshi, 202 AD2d 318, 318 [1st 1994][mere silence did not constitute concealment actionable as fraud where no fiduciary relationship existed]).

Further, Garrick-Aug's allegations of fraudulent behavior as against Haber must fail, as an action for fraud will be dismissed if brought against a party having acted only in a representative capacity and who did not personally participate in conduct that was fraudulent. The court has held that an action for fraud is subject to dismissal if brought against a party acting in a representative capacity (see Brener v. Lewis Mgmt. Co., Inc. v Estate of Crespi, 268 AD2d 243, 243 [1st Dept. 2000]; Application of Kummerfeld (186 AD2d 90, 91 [1st Dept 1992][court held that "the alter ego theory is simply insufficient to support claims for breach of contract against individuals in the absence of factual allegations demonstrating fraud ... or that the individual in question conducted business in their personal rather than corporate capacity"]).

Fourth Cause of Action: Breach of Contract

It should be noted that Aquino makes no mention of Garrick-Aug's cause of action for breach of contract against him in his moving papers for dismissal of Garrick-Aug's third-party complaint. However, as Garrick-Aug has failed to state a cause of action, pursuant to CPLR 3211(a)(7), by failing to put forth any evidence to support its conclusory allegations that Aquino

breached his contractual duties to Garrick-Aug by misappropriating proprietary documents and confidential customer lists; competing with Garrick-Aug during the course of his employment with Garrick-Aug; procuring employment for persons then employed by Garrick-Aug while he was working for Garrick-Aug; and violating the non-compete clause in his employment contract with Garrick-Aug, the court dismisses Garrick-Aug's fourth cause of action against Aquino (*see* Ackerman v 305 East 40th Owners Corp., 189 AD2d at 666; Herman v. Greenberg, 221 AD2d at 251).

Fifth Cause of Action: Tortious Interference

Garrick-Aug fails to state a cause of action for tortious interference with a contract against Elliman and Haber. In order to plead a claim for tortious interference, a plaintiff must allege the existence of a contract enforceable by plaintiff; the defendant's knowledge of the contract; the defendant's intentional inducement of the breach of the contract without justification; and damages to the plaintiff (Foster v Churchill, 87 NY2d 744, 749-750 [1996]; Israel v Wood Dolson Co., 1 NY2d 116, 120 [1956]).

Here, Garrick-Aug's conclusory allegations, that Elliman and Haber engaged in an "unlawful scheme" to induce Consolo, Aquino and other unidentified employees of Garrick-Aug to breach their contracts with Garrick-Aug, do not support the elements for a claim of tortious interference, as Garrick-Aug did not specify any contract provisions at issue; it did not show that Elliman and Haber had knowledge of the provisions of the employees' contracts; and did not put forth evidence that Elliman and Haber intentionally induced the breach of the employees' contracts without justification, and thus, damaged the business of Garrick-Aug. In fact, in its complaint, Garrick-Aug acknowledged that Consolo and Aquino had decided to leave Garrick-

Aug on their own volition before they sought an employment relationship with Elliman.

In Winterview Inc. v Karin Models, LLC (294 AD2d 120, 120 [1st Dept 2002]), the court held that if an employee seeks out a new employer, the new employer is not liable to the former employer for tortious interference with the employment contract, even where the defendant knew of the existence of the employee's contract. An essential element for a claim of tortious interference is that "the breach of the contract would not have occurred but for the activities of the defendant" (Cantor Fitzgerald Assocs., LP v Tradition North America, Inc., 299 AD2d 204, 204 [1st Dept 2002][business failed to establish proximate cause for its tortious interference with contract where employees had become dissatisfied, had actively sought new employment prior to any involvement by the competitor and had dictated the terms that they would require to work for the new employer]). Thus, Garrick-Aug's argument that Elliman and Haber induced Consolo and Aquino to break their contract with Garrick-Aug must fail.

In addition, if an employee's contract is terminable at will or upon notice, a claim for tortious interference of that contract by an employer is not actionable (see Guard-Life Corp. v Parker Hardware Mfg. Corp., 50 NY2d 183, 193-194 [1980]; Miller v Mount Sinai Medical Ctr., 288 AD2d 72, 72 [1st Dept 2001]; Snyder v Sony Music Entertainment, Inc., 252 AD2d 294, 299 [1st Dept 1999]). In the instant case, Aquino's contract specifically provided that "the term of this Agreement shall commence upon the signature of this document by you and a duly authorized representative of the Corporation, and end upon ... termination of this Agreement by either party by written notice given to the other." Further, the Termination Agreement at issue states that Aquino's original agreement is "terminated." Thus, as the employment contract between Aquino and Garrick-Aug indicates an "at-will" relationship, this contract cannot support

a claim for tortious interference.

Further, there can be no tortious interference with an employees contract when a defendant acts in its own economic interest, as long as there is no showing of malice or illegality (see Foster v Churchill, 87 NY2d at 750; see also Felsen v Sol Café Mfg. Corp., 24 NY2d 682, 687 [1969][economic interest is a defense to an action for tortious interference with a contract, unless there is a showing of malice or illegality]). Here, Garrick-Aug has not established that Elliman and Haber were acting to serve their own personal interests in procuring the alleged breach of Consolo and Aquino's employment contracts or that Elliman and Haber acted with malice or in an illegal way. Thus, Garrick-Aug has not stated a claim for tortious interference on the part of Elliman and Haber.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that third-party defendant Douglas Elliman LLC and third-party defendant Kenneth I. Haber's motion to dismiss causes one through three and five of defendant and third-party plaintiff Garrick-Aug's third-party complaint, pursuant to CPLR(a)(1) and CPLR (a)(7), is granted, and the complaint is severed and dismissed as to these defendants, with costs and disbursements as taxed by the Clerk of Court; and it is further

ORDERED that defendant Joseph Aquino's motion to dismiss the complaint, as it applies to him, is granted, and the complaint is severed and dismissed as to this defendant, with costs and disbursements as taxed by the Clerk of Court; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 6/1/06

ENTER:

J.S.C.

FILED
JUN 14 2006
NEW YORK
COUNTY CLERK'S OFFICE