

Aldi v Integrated Constr. Enters., Inc.

2007 NY Slip Op 31931(U)

June 27, 2007

Supreme Court, New York County

Docket Number: 0109253/2004

Judge: Sherry Klein Heitler

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

Sherry Klein Heitler
Index Number : 109253/2004

PART 30

ALDI, MICHAEL JOSEPH, SR.
vs
INTEGRATED CONSTRUCTION

INDEX NO. 109253/04

Sequence Number : 002
SUMMARY JUDGMENT

MOTION DATE

MOTION SEQ. NO. (002)

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 6.27.07

FILED

JUL 02 2007

Dated: 6.27.07

Sherry Klein Heitler
HON. SHERRY KLEIN HEITLER 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: IAS PART 30

-----X
MICHAEL JOSEPH ALDI, SR. and
BARBARA ALDI,

Plaintiffs,

Index No. 109253/04

DECISION AND ORDER

-against-

INTEGRATED CONSTRUCTION ENTERPRISES, INC.,
COW BAY CONTRACTING, INC., CITY OF NEW YORK
and NEW YORK DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Defendants.

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

FILED
JUL 02 2007
NEW YORK
COUNTY CLERK'S OFFICE

Motion sequence numbers 001 through 004 are consolidated for disposition.

In this action to recover monetary damages as the result of a construction workplace injury sustained by Michael Joseph Aldi, Sr. (Aldi), defendant Integrated Construction Enterprises, Inc. (Integrated) seeks to (1) strike plaintiffs' Note of Issue and Certificate of Readiness and (2) remove the case from the trial calendar (motion sequence 001).

In motion sequence 002, the City of New York (NYC) and the New York City Department of Environmental Protection (NYCDEP) seek summary judgment dismissing plaintiffs' complaint, as well as an order that both NYC and NYCDEP are entitled to common-law indemnification as against Integrated and Cow Bay Contracting (Cow Bay).

In motion sequence 003, Integrated seeks partial summary judgment dismissing plaintiffs' Labor Law § 200 claim, as well as

summary judgment on its cross-claims against Cow Bay.

Finally, in motion sequence 004, plaintiffs seek summary judgment against all defendants on their Labor Law § 240 (1) claim. Cow Bay cross-moves to dismiss plaintiffs' complaint in its entirety, as well as to dismiss all cross-claims against it.

Background

Plaintiffs allege that on September 22, 2003, Aldi, an electrician in the employ of non-party Aldi Electric, Inc., was injured when he fell from a ladder at a construction site in Gilboa, New York (the Gilboa, New York project). According to plaintiffs, at the time of his accident, Aldi was installing temporary electrical wiring to the partially completed NYC Police Precinct Building at the site. It is uncontested that Aldi had placed a ladder owned by his employer on ungraded ground prior to climbing to the second rung from the top to commence his work. According to plaintiffs, almost immediately after Aldi began to work, the ladder shifted and then fell to the ground. They allege that the movement of the ladder also caused Aldi to fall to the ground below, and as the result of that fall, Aldi suffered injuries to his head, back, hip, and left leg and arm.

In their complaint, plaintiffs seek recovery of monetary damages from defendants for violations of Labor Law §§ 200, 240 (1), and 241 (6), as well as under the common-law, for negligence. Defendants in this action include NYC and NYCDEP, which are the

owners of the Gilboa, New York, project site¹; Integrated, who plaintiffs allege was the general contractor for the construction of the police precinct building and a garage on the Gilboa, New York project site; and Cow Bay, which had contracted with Integrated to perform all construction work associated with the Gilboa, New York project.²

Discussion

Motion to Strike Note of Issue

Defendant Integrated moves to strike plaintiffs' May 1, 2006 Note of Issue and Certificate of Readiness, as well as to remove the case from the trial calendar. Integrated contends that these documents were prematurely filed, in that plaintiffs had served a third and fourth Supplemental Bills of Particulars on defendants on March 8, 2006 and May 1, 2006, respectively, and that the service of those Supplemental Bills of Particulars, necessitated additional discovery. Integrated asserts that absent such discovery, it would be prejudiced in defending its case.

¹ NYC and NYCDEP had contracted with non-party Army Corps of Engineers (ACE) to be the construction manager on the site. See Plaintiffs' Notice of Motion, Exhs. E & H.

² See NYC and NYCDEP Notice of Motion, Exh. N. Cow Bay subsequently sub-subcontracted to Aldi Electric, Inc. to perform all the electrical work during the construction. See NYC and NYCDEP Notice of Motion, Exh. O.

The Uniform Rules for Trial Courts (12 NYCRR 202.21) provides two methods for seeking to vacate a Note of Issue. Subsection (e) of the rule states that,

[w]ithin 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect. . . . After such period, . . . no such motion shall be allowed except for good cause shown. At any time, the court on its own motion may vacate a note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect. If the motion to vacate a note of issue is granted, a copy of the order vacating the note of issue shall be served upon the clerk of the trial court.

See also Vargas v. Villa Josefa Realty Corp., 28 AD3d 389 (1st Dept 2006).

Additionally, "[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings." 12 NYCRR 202.21 (d).

A failure to complete discovery is a material fact that can lead to striking a Note of Issue under 12 NYCRR 202.21 (e). See Savino v Lewittes, 160 AD2d 176 (1st Dept 1990); see also Mosley v Flavius, 13 AD3d 346 (2d Dept 2004). However, the granting of any

such motion to strike the Note of Issue and Certificate of Readiness is within the discretion of the court and may be denied if there are no "special, unusual or extraordinary circumstances" (See Pannone v Silberstein, ___ AD3d ____, 2007 WL 1365366 [1st Dept 2007]) or the Note of Issue and Certificate of Readiness contain no incorrect material facts. See Mateo v City of New York, 282 AD2d 313 (1st Dept 2001).

Additionally, there are situations where courts have allowed the completion of outstanding additional discovery without striking a Note of Issue and Certificate of Readiness. See Torres v New York City Transit Authority, 192 AD2d 400 (1st Dept 1993); see also Sun Plaza Enterprises Corp. v Crown Theatres, L.P., 307 AD2d 352 (2d Dept 2003), appeal dismissed 2 NY3d 794 (2004).

In the instant action, the proffered evidence reveals that, in response to the third Supplemental Bill of Particulars, Integrated sent a written demand to plaintiffs for both an additional independent medical examination (IME) of Aldi and a continued Examination Before Trial (EBT) of him. See Integrated's Notice of Motion, Exh. F. This court, however, accepts plaintiffs' contention that they filed those documents in an attempt to meet this court's imposed date for the filing of the Note of Issue and Certificate of Readiness, and that plaintiffs filed the supplemental Bills of Particulars as part of their ongoing requirement to keep defendants abreast of Aldi's treatment for his alleged injuries.

The court additionally finds that neither supplemental Bill of Particulars seeks damages for injuries that would require extensive EBT testimony on a new claim.

It is true that plaintiffs could have sought an extension of the court-imposed deadline date for the filing of the Note of Issue and Certificate of Readiness. However, it would not serve justice to strike the Note of Issue and Certificate of Readiness at this point in the action. However, to avoid any prejudice to defendants, Integrated is entitled to a further IME and continued EBT questioning. Any such questioning shall be limited to the additional injuries listed in the third and fourth Supplemental Bills of Particulars and shall be completed within 90 days of date of entry of this decision and order.

Therefore, although Integrated's motion is denied, this court will allow defendants 90 days from date of entry of this decision and order to obtain a continued EBT and further IME of Aldi.

Summary Judgment

To obtain summary judgment, a movant must establish entitlement to a court's directing judgment in its favor as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320 (1986). "[I]t must clearly appear that no material and triable issue of fact is presented" (Glick & Dolleck, Inc. v Tri-Pac Export Corp., 22 NY2d 439, 441 [1968]; see also Giuffrida v Citibank Corp., 100 NY2d 72 [2003]), because summary judgment is a drastic remedy that should

not be invoked where there is any doubt as to the existence of a triable issue or when the issue is even arguable. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980).

Common-Law Negligence and Labor Law § 200

To establish a prima facie case of common-law negligence, a plaintiff is required to establish that: (1) a defendant either created or had notice of the alleged dangerous or defective condition, and (2) that the alleged dangerous condition was the proximate cause of the injury. See, Pouso v City of New York, 177 AD2d 560 (2d Dept 1991).

An owner and a general contractor's duty to maintain a safe workplace under the common-law is codified in Labor Law § 200. See Gasper v Ford Motor Co., 13 NY2d 104 (1963). In the context of a Labor Law case, if a defective condition is alleged to be the cause of a worker's injuries, the worker must proffer evidence that the owner or contractor either caused the dangerous condition or had actual or constructive notice of it. See Higgins v 1790 Broadway Assocs., 261 AD2d 223 (1st Dept 1999); see also Balaj v Equitable Life Assur. Soc. of U.S., 211 AD2d 487 (1st Dept), lv denied 85 NY2d 811 (1995).³

³ Supervision and control of the injured worker is not required to show that a claim that a defective condition existed. See Murphy v Columbia University, 4 AD3d 200 (1st Dept 2004).

If the accident is the result of the worker's methods, however, to be held liable, an owner or general contractor must have "the authority to control the activity bringing about the injury to enable it to avoid or correct the unsafe condition." Russin v Louis N. Picciano & Son, 54 NY2d 311, 317 (1981).

Supervision and control of the injured worker's methods by an owner or general contractor are, therefore, prerequisites to such liability. See Candela v City of New York, 8 AD3d 45 (1st Dept 2004); see also Comes v New York State Elec. and Gas Corp., 82 NY2d 876, 877 (1993); Mitchell v New York University, 12 AD3d 200 (1st Dept 2004). To establish liability, the control exercised must be more than a "general duty to supervise the work and ensure compliance with safety regulations." De La Rosa v Philip Morris Management Corp., 303 AD2d 190, 192 (1st Dept 2003); see also Vasiliades v Lehrer McGovern & Bovis, Inc., 3 AD3d 400 (1st Dept 2004); Reilly v Newireen Associates, 303 AD2d 214 (1st Dept 2003), ly denied 100 NY2d 508 (2003). "[M]onitoring and oversight of the timing and quality of the work [are] not enough to impose liability under section 200[, n]or is a general duty to ensure compliance with safety regulations or the authority to stop work for safety reasons." Dalanna v City of New York, 308 AD2d 400, 400 (1st Dept 2003); see also Gonzalez v United Parcel Service, 249 AD2d 210 (1st Dept 1998).

In this action, as respects plaintiffs' common-law negligence and Labor Law § 200 claims, it is Aldi's methods that are at issue. Thus, to be held liable, the defendants must have exercised supervision and control over such work. Because it is clear that the owners of the site, NYC and NYCDEP, had no such supervision and control over Aldi's work (see Joseph Rutkowski EBT, at 16-22), that portion of plaintiffs' complaint that seeks to recover monetary damages as against NYC and NYCDEP for common-law negligence and violations of Labor Law § 200 is dismissed.

The issue is more complex when Integrated's role in the work done at the Gilboa, New York site is considered. Although the contract between ACE and Integrated was not proffered in the motion papers, other papers and EBT testimony support the contention that Integrated was engaged as a general contractor on the project (see Joseph Rutkowski EBT, at 27; Walter Heller [Heller] EBT, at 10). Although Heller maintained that Integrated had only a general supervisory role, coordinating the trades at the construction site (see Robert Pope EBT, at 10, 21), Aldi contends that he took his instructions from "Bob", who appears to have been Bob Pope, who worked for Integrated. See Aldi EBT, at 19-20.

Because there is conflicting testimony about who, if anyone at Integrated, gave Aldi instructions as to what he should do on the site, there are material questions of fact that need to be resolved at trial regarding this issue. Therefore, Integrated's motion that

seeks partial summary judgment dismissing plaintiffs' Labor Law § 200 claim is denied.

Subcontractor Cow Bay also seeks dismissal of plaintiffs' common-law negligence and Labor Law § 200 claims. Plaintiffs have proffered no evidence that Cow Bay supervised Michael Aldi, Sr. on the site. Aldi's testimony was that the Cow Bay supervisor, "Bob," was running the job. See Aldi EBT, at 19-20. However, the evidence indicates that "Bob" worked for Integrated and not Cow Bay. Additionally, Cow Bay proffered evidence that its job as respects the Gilboa, New York project was to "watch the men, make sure that they're [working] correctly, take care of any problems, order the material, schedule, [and] make sure that the site was safe [and] clean." See Heller EBT, at 6. Heller did admit to running safety meetings and telling the subcontractors the order of the work (see Heller EBT, at 14, 18). Further, he provided instructions to him as to what to do on a particular day. However, according to Heller, he "never gave [Aldi] instructions as to the method and manner" of his work. See Heller EBT, at 46, 48.

Because there is no evidence that Cow Bay supervised and controlled Aldi, that portion of plaintiffs' complaint that seeks to recover monetary damages under common-law negligence and Labor Law § 200 as against Cow Bay is dismissed.

Labor Law § 240 (1)

Under Labor Law § 240 (1), owners, general contractors, and their agents who fail to provide or erect the safety devices necessary to give proper protection to a worker involved in the erection, demolition, repair, alteration, painting, cleaning or pointing of a building or structure are absolutely liable when that worker sustains injuries proximately caused by that failure. See Rocovich v Consolidated Edison Co., 78 NY2d 509 (1991); see also Rizzo v Hellman Elec. Corp., 281 AD2d 258 (1st Dept 2001).

In the instant action, plaintiffs assert that Aldi is within the class of workers whose accident is governed by the provisions of Labor Law § 240 (1). Defendants, however, contend that Aldi was the sole proximate cause of his own injuries, and that, therefore, any cause of action predicated on Labor Law § 240 (1) should be dismissed.

Aldi's accident was allegedly caused by the movement and subsequent fall of the ladder he was standing on. According to plaintiffs, Aldi had placed the ladder on uneven ground and then tested the ladder with his hands prior to ascending. Defendants maintain that Aldi should not have placed the ladder on the uneven ground, and should have either used one of the lifts on the site or had another worker hold the ladder for him.

"It is well established that proof of a fall from a ladder does not, by itself, establish liability under section 240(1), unless

there is also evidence that the fall was proximately caused by a violation of the statute. Thus, 'where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability [under the statute]' [U]nder this principle, a plaintiff who knowingly chooses to use defective or inadequate equipment, notwithstanding being aware that he or she could request or obtain proper equipment, has no claim under Labor Law § 240(1)." Miro v Plaza Const. Corp., 38 AD3d 454, 455 (1st Dept 2007).

Issues such as whether or not a plaintiff had alternative available safety devices, that he or she knew about them and knew that they were supposed to be used, that the worker did not have a good reason not to use the alternative devices, and if he or she had done so, the worker would have not been injured, are all material questions that must be decided at a trial. See Cahill v Triborough Bridge and Tunnel Authority, 4 NY3d 35 (2004).

Aldi testified that he was aware that there was a "Dino" lift available on the site, but he asserted that he had been told the day before by "Bob" that the lift was broken. See Aldi EBT, at 24. He admitted that he had never requested another Dino lift, or asked if the Dino lift had been fixed, but stated that he used the ladder most of the time, several times in the same location in which he fell and there were no problems (See Aldi EBT, at 37, 167).

Given the standard set forth by the court in the Miro v Plaza Const. Corp., *supra*, this court finds that there are material

questions of fact as to whether Aldi was the sole proximate cause of his injuries. Issues of whether or not Aldi's placement of the ladder on uneven ground and/or the possibility of the availability of another safety device (i.e., the Dino lift) are sufficient to preclude this court from determining the issues as a matter of law.

Therefore, those portions of the instant motions and cross motion that seek summary judgment on plaintiffs' Labor Law § 240 (1) are denied.

Labor Law § 241 (6)

Cow Bay, NYC and NYCDEP all seek summary judgment dismissing plaintiffs' Labor Law § 241 (6) claims.

Labor Law § 241 (6) provides that "[all areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places." The section requires owners and contractors at a construction site to "'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor." Ross v. Curtis-Palmer Hydro-Electric Co., 81 NY2d 494, 501-502 (1993). In their complaint, plaintiffs seek to recover monetary damages for a violation of Industrial Code sections 12 NYCRR 23-1.16, 23-1.17.

Section 12 NYCRR 23-1.16 contains regulations regarding safety belts, harnesses, tail lines and lifelines. The section is sufficiently specific to support a Labor Law § 241 (6) claim. However, there is no evidence that Aldi was provided with any of those devices. Therefore, regulations on their specifications and use are inapplicable to the facts of the instant action. See Dzieran v 1800 Boston Road, LLC, 25 AD3d 336 (1st Dept 2006); see also D'Acunti v New York City School Const. Authority, 300 AD2d 107 (1st Dept 2002).

Section 12 NYCRR 23-1.17 contains regulations regarding lifenets. Similar to the discussion above, there were no lifenets given to Aldi for his use prior to his accident, and the section itself does not expound upon when the safety device is required to be used.

Finally, plaintiffs seek recovery under 23-1.21(a), (b), and (e). Such section sets forth regulations concerning ladders and ladderways, and is sufficiently specific to predicate a Labor Law § 241 (6) claim. See Hart v Turner Const. Co., 30 AD3d 213 (1st Dept 2006). However, none of the requirements of the section are applicable to the accident at issue herein.

Because none of the sections that plaintiffs have offered as predicates to their Labor Law § 241 (6) are applicable to the accident at issue, that portion of plaintiffs' complaint that seeks recovery based upon violations of Labor Law § 241 (6) is denied.

Common-Law Indemnification

Defendants NYC and NYCDEP are seeking an order of common-law indemnification as against co-defendants Integrated and Cow Bay. An order of entitlement to common-law indemnification requires a finding that a party was negligent for any personal injuries sustained in a workplace accident. See Reilly v S. DiGiacomo & Son, Inc., 261 AD2d 318 (1st Dept 1999). Because this court has held above that Cow Bay was, in fact, not negligent, that portion of NYC and NYCDEP's motion that seeks common-law indemnification as against that entity is denied.

As respects Integrated, because there are material issues of fact as to whether or not that entity was negligent in Aldi's accident, any order of entitlement to common-law indemnification would be premature. See Barraco v First Lenox Terrace Associates, 25 AD3d 427 (1st Dept 2006). Therefore, that portion of NYC and NYCDEP's motion that seeks common-law indemnification as against Integrated is also denied.

Cross-Claims

Finally, Integrated seeks summary judgment on its cross-claims against Cow Bay, and Cow Bay seeks to dismiss all cross-claims as against it. Those cross-claims include entitlement to common-law and contractual indemnification, as well as the failure to procure insurance.

This court has already dismissed all common-law indemnification claims against Cow Bay (see discussion above). Thus that portion of Cow Bay's motion that seeks to dismiss Integrated's cross-claim for common-law indemnification is granted.

As respects contractual indemnification, the indemnification provision of the Integrated/Cow Bay October 14, 2002 contract states as follows:

13.4 The subcontractor hereby agrees, to the fullest extent permitted by law, to assume the entire responsibility and liability for and the defense of and to pay and indemnify [Integrated] against any and loss, expense or liability and will hold the contractor harmless from and pay any and all losses, damages, costs or expenses ..., which [Integrated] incurs because of injury to or death of any person ... to the extent caused in whole or part by any negligent act, omission by the sub-contractor or any of its sub-contractors, officers, directors, employees, agents or anyone whose acts the sub-contractor may be liable as it relates to the scope of this contract.

See NYC and NYCDEP Notice of Motion, Exh. N.

As stated above, there is no proffered evidence that Cow Bay was negligent in Aldi's accident. However, as there are material issues of fact as to whether Cow Bay's subcontractor, Aldi, was negligent in his own injury, Integrated's cross-claim for contractual indemnification will not be dismissed. Thus, that portion of Cow Bay's cross motion that seeks dismissal of Integrated's cross-claim is denied.

Finally, although sections 13.1 and 13.2 require Cow Bay to procure liability insurance and "include the contractor in the contract documents as Additional Insured and Certificate Holder,"

there is no evidence that Cow Bay, in fact, did so. Therefore, Integrated is entitled summary judgment on that portion of its cross-claim for failure to procure insurance.

Order

Accordingly, it is hereby

ORDERED that Integrated Construction Enterprises, Inc. motion to strike plaintiffs' Note of Issue and Certificate of Readiness and remove the case from the trial calendar is denied; and it is further

ORDERED that Integrated Construction Enterprises, Inc. Is granted 90 days from date of entry of this decision and order to conduct an additional Independent Medical Examination and continued Examination Before Trial of plaintiff Michael Joseph Aldi, Sr., limited to issues raised in the Third and Fourth Supplemental Bills of Particular; and it is further

ORDERED that if said IME and EBT are not held within the given time period, they are deemed waived; and it is further

ORDERED that the City of New York and the New York City Department of Environmental Protection's motion is granted only to the extent of dismissing that portion of plaintiffs' complaint based upon common-law negligence, as well as Labor Law §§ 240 (1) and 241 (6), and is otherwise denied; and it is further

ORDERED that the portion of Integrated Construction Enterprises, Inc.'s motion for partial summary judgment dismissing plaintiffs' Labor Law § 200 claim is denied; and it is further

ORDERED that the portion of Integrated Construction Enterprises, Inc.'s motion that seeks summary judgment on its cross-claims against Cow Bay Contracting, Inc. is granted, only to the extent of granting summary judgment on the claim of Cow Bay Contracting, Inc.'s failure to procure insurance, and is otherwise denied; and it is further

ORDERED that plaintiffs motion for summary judgment on their complaint is denied; and it is further

ORDERED that the portion of Cow Bay Contracting, Inc.'s motion that seeks dismissal of plaintiffs' complaint is granted, only to the extent of dismissing plaintiffs' common-law negligence, as well as Labor Law §§ 200 and 241 (6) claims, and is otherwise denied; and it is further

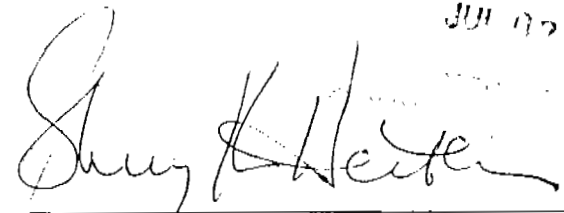
ORDERED that the portion of Cow Bay Contracting, Inc.'s motion that seeks dismissal of co-defendant Integrated Construction Enterprises, Inc.'s cross-claim is granted, only to the extent of dismissing Integrated Construction Enterprises, Inc.'s claims for common-law indemnification, and is otherwise denied.

This shall constitute the decision and order of the court.

DATED: JUNE 27, 2007

FILED

JUL 02 2007



SHERRY KLEIN HEITLER
U.S.C.

JUL 02 2007

NEW YORK
COUNTY CLERKS OFFICE