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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

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UNIVERSITY SPORTS PUBLICATIONS CO., INC.,

Plaintiff,

-against-

ARENA MEDIA NETWORKS, LLC,

Defendant.

---x

INDEX NO. 109436/2006

MOTION DATE _____

MOTION SEQ. NO. 001

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 is decided in accordance with the accompanying Decision and Order.

Dated: February 9, 2007

KARLA MOSKOWITZ J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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UNIVERSITY SPORTS PUBLICATIONS CO., INC.,

Plaintiff,

Index No. 109436/06

-against-

ARENA MEDIA NETWORKS, LLC,

Decision and Order

Defendant.

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KARLA MOSKOWITZ, J.:

Plaintiff University Sports Publications Co., Inc. ("USP") seeks to enforce non-compete agreements that it executed with two former employees, Peter Mason ("Mason") and Shane Pitta ("Pitta").[1] In the underlying dispute with defendant Arena Media Networks, LLC ("AMN"), that now employs Mason and Pitta, USP contends that AMN unlawfully persuaded its former employees to violate the terms of their non-compete agreements with USP. USP has a separate action against the employees pending before Justice LaMarca in New York Supreme Court, Nassau County (*United Sports Publications v Pitta and Mason*, Index No.8669/06). In this motion (sequence number 001), defendant moves to dismiss plaintiff's first cause of action for tortious interference with contract on the basis of documentary evidence pursuant to 3211(a)(1). For the reasons below, I grant defendant's motion to dismiss the first cause of action.

[1]The complaint mentions a third, former USP employee, Michael Sietz-Honig ("Sietz-Honig"), and alleges that AMN also tried to lure him away from USP. (Complaint ¶ 6). However, USP does not allege violations of a specific non-compete agreement against Sietz-Honig. In its tortious interference with contract claim, it states only that Pitta and Mason are "in violation of the Non-Compete Agreements." (*Id.* ¶ 22). Neither party addresses Sietz-Honig in its papers, so, in this decision and order, I will not consider his alleged involvement.

BACKGROUND

The following facts are primarily from the complaint and other papers the parties submitted on this motion.

Both Pitta and Mason worked as advertising salespeople in USP's sales department. Pitta began in December 1996 and resigned in March 2006. Mason began in May 2002 and resigned in February 2006. Soon after their resignations, Pitta and Mason commenced employment with AMN. (Complaint ¶¶ 4-5). In addition, USP claims that, before his departure, Pitta emailed to a personal account for AMN's use "files containing trade secrets and proprietary information." (*Id.* ¶ 19).

USP and AMN sell advertising for sports, but they debate whether their businesses overlap. AMN distinguishes the two businesses by claiming USP sells ads in print publications, whereas AMN focuses its advertising efforts on digital displays. (Memorandum of Law in Support of Defendant's Motion to Dismiss Count I of the Complaint, p 3). Plaintiff, however, states, that both companies are in the "business of selling game-day, game-site advertising for collegiate and professional sporting events." (Complaint ¶¶ 2-3).

As a condition of their employment, Pitta and Mason signed non-compete agreements that plaintiff claims were necessary to prevent employees from "us[ing] USP's confidential information [about USP's contacts and sales technique] against it." (*Id.* ¶ 12). The Non-Competition Agreement and Restrictive Covenant Agreements ["Non-Compete Agreements"] of both Pitta and Mason contain the same two major provisions: a four-year non-compete provision and a confidentiality provision.

1(a) During his employment and for a period of four (4) years from the date of

> termination of his employment, whether voluntarily or not, the Employee shall neither engage (whether as principal, employee, joint venturer or independent contractor) in any business, directly or indirectly, which is in the same or similar business as Employer or interfere with or endeavor to entice away from the Employer any customers (advertisers, colleges and universities and other companies with which Employer acts as subcontractor) or any person, firm, company, partnership, corporation or entity dealing with the Employer or interfere with or entice away any other employee of the Employer, subject to the provisions of Paragraph 2 hereof, so long as the Employer is not in default under this Agreement. All of the above constraints shall apply with respect to this Employee's activities in dealing with any college, university, academy or other institution within the United States.
>
> 1(b) The Employee shall not, during the term of this Agreement, communicate or make available to anyone other than the Employer and its affiliated companies and their respective directors and officers (otherwise than in the regular course of the business of the Employer and its affiliates) any confidential information relating to any of the Employer's or its affiliates' business or activities, including, without limitation, customer lists, computer programs, information regarding the present or future business, methods of operation or affairs of the Employer.

(Non-Competition Agreement and Restrictive Covenant of Shane Pitta, dated December 17, 1996, ¶ 1[a-b] ["Pitta Agreement"]; Non-Competition Agreement and Restrictive Covenant of Peter Mason, dated May 13, 2002, ¶ 1[a-b] ["Mason Agreement"]).

The complaint contains six causes of action: tortious interference with contractual relations (first cause of action); misappropriation of trade secrets and other proprietary information (second cause of action); unfair competition (third cause of action); aiding and abetting a breach of fiduciary duty (fourth cause of action); tortious interference with business relations (fifth cause of action); and permanent injunction (sixth cause of action). This motion to dismiss involves the first cause of action for defendant's alleged interference with plaintiff's non-compete agreements. Plaintiff contends that "Defendant has frequently extended offers of employment to USP employees, knowingly attempting to induce employees to breach non-compete agreements and other obligations owed to USP." (Complaint ¶ 17).

DISCUSSION

Defendant moves to dismiss the first cause of action on the grounds that "a defense is founded upon documentary evidence." (CPLR 3211[a][1]). Pursuant to CPLR 3211, "[t]he facts alleged in the complaint are presumed to be true, and it is the role of the court to accord plaintiffs the benefits of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory. However, dismissal is warranted if the documentary evidence contradicts the claims raised in the complaint.'" (*Jericho Group, Ltd. v Midtown Dev., LP*, 32 AD3d 294, 297-98 [1st Dept 2006] [citations and internal quotations omitted]). A court grants a motion to dismiss on documentary evidence "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Ladenburg Thalmann & Co. v. Tim's Amusements, Inc.*, 275 AD2d 243, 246 [1st Dept 2000] [citation omitted]) or if the allegations in the complaint are "inherently incredible or flatly contradicted by documentary evidence" (*Triple Z Postal Servs., Inc. v United Parcel Serv., Inc.*, 13 Misc 3d 1241A, 16 [Sup Ct, NY County 2006, Fried, J.] [internal quotations omitted]).

Defendant in this action argues for dismissal based on the Non-Compete Agreements that, defendant maintains, are invalid and thus cannot support plaintiff's first cause of action for tortious interference with contract. Specifically, defendant claims that (1) the non-competes are unreasonable in both time and geographic scope; (2) the services of Pitta and Mason were not so unique that the non-competes protect plaintiff's legitimate interests; and (3) because USP used its dominance to obtain the non-competes and to prevent Pitta and Mason from pursuing their chosen sales careers, the non-competes are against public policy. (Memorandum of Law in Support of Defendant's Motion to Dismiss Count I of the Complaint, p 2). I agree with all of

defendant's assertions.

I. The Validity of the Non-Compete Provisions

New York courts apply a three-pronged test to assess the reasonableness of non-compete agreements. "A restraint is reasonable only if it: (1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public." (*BDO Seidman v Hirshberg*, 93 NY2d 382, 388-89 [1999] [citations omitted]). A court enforces non-compete agreements when they are "reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee." (*Id.* at 389 [internal quotations omitted]). Generally, courts strictly interpret the reasonableness test and rules to "limit enforcement of broad restraints on competition" (*id.*), and they do so by "focus[ing] on the particular facts and circumstances giving context to the [employment] agreement" (*id.* at 390).

Specifically, courts consider the length of the time restraint on competition and the breadth of the geographical limitation that the non-competes impose. (*See Crown IT Servs., Inc. v Koval-Olsen*, 11 AD3d 263, 264 [1st Dept 2004] [finding one-year time restraint and geographical limitation of non-compete to employer's client sites reasonable for employees who provided computer consulting services to employer's clients]). Courts have upheld eighteen and twelve-month time restrictions as reasonable. (*Globaldata Management Corp. v Pfizer Inc.*, 10 Misc 3d 1062A, 7 [Sup Ct, NY County 2005, Fried, J.], citing *BDO Seidman*, 93 NY2d 382, 393 [eighteen-month restriction is reasonable] and *Crown IT*, 11 AD3d at 264 [twelve-month restriction is reasonable]; *see also Primo Enter. v Bachner*, 148 AD2d 350, 352 [1st Dept 1989] [three-year restriction is "unusually lengthy period"]). Lack of any geographical limitations,

however, can render a covenant overbroad and hence unenforceable. (*Globaldata*, 10 Misc 3d 1062A at 8; *see also Karpinski v Ingrasci*, 28 NY2d 45, 50 [1971] [finding geographical limitation "proper and permissible" because it covered only the territory of employer's medical practice that defendant dentist served when in plaintiff's employ]).

Courts also consider the type of employer interest the non-compete purports to protect and whether this interest is legitimate. Four situations give rise to legitimate employer interests and thus can justify enforcement of a restrictive covenant not to compete: (1) when an employee has allegedly misappropriated trade secrets; (2) when an employer claims the employee has used confidential information; (3) if the employee performs unique or extraordinary services; and (4) to prevent "former employees from exploiting or appropriating the goodwill of a client or customer, which had been created and maintained at the employer's expense, to the employer's competitive detriment." (*Globaldata,* 10 Misc 3d 1062A at 7 [internal quotations omitted]).

Regarding an employer's legitimate interest in an employee's services, the terms "extraordinary" or "unique" require more "than that the employee excels at his work or that his performance is of high value to his employer. It must also appear that his services are of such character as to make his replacement impossible or that the loss of such services would cause the employer irreparable injury." (*Purchasing Assocs., Inc. v Weitz*, 13 NY2d 267, 274 [1963] [citations omitted]; *see also Investor Access Corp. v Doremus*, 186 AD2d 401, 404 [1st Dept 1992] [refusing to enforce non-compete because executive, who sold financial investment and public relations services and eventually took one account with him, did not perform unique or extraordinary services and did not misappropriate trade secrets or confidential information]). Professionals possess the unique or extraordinary skills that can render non-competes enforceable

on the grounds of an employer's legitimate interests. (*See Gelder Med. Group v Webber*, 41 NY2d 680, 683 [1977] ["Covenants restricting a professional, and in particular a physician, from competing with a former employer or associate are common and generally acceptable."]; *Karpinski*, 28 NY2d at 49 [doctor is a professional, so enforcement of non-compete would not be a restraint of trade]; *see also Primo*, 148 AD2d at 352 [stating "[t]here is no indication that defendant, a salesman, rendered services so remarkable in kind"]).

Finally, courts assess the impact of the non-compete on the public and the individual employee. "With few exceptions, New York courts are generally reluctant to enforce restrictive covenants contained in employment agreements due to public policy considerations which militate against sanctioning the loss of a person's livelihood." (*Kanan, Corbin, Schupak & Aronow, Inc. v FD Intl., Ltd.*, 8 Misc 3d 412, 416 [Sup Ct, NY County 2005, Ramos, J.], citing *Purchasing Assocs.*, 13 NY2d at 271; *see also Columbia Ribbon & Carbon Mfg. Co., Inc. v A-1-A Corp.*, 42 NY2d 496, 499 [1977] [because of public policy, "restrictive covenants which tend to prevent an employee from pursuing a similar vocation after termination of employment are disfavored by law"]). For example, if an employer's interest in enforcing the non-compete includes protection of trade secrets when no misappropriation has occurred, "an employee should not be inhibited from realizing his professional potential." (*Id.*, citing *Reed, Roberts Assocs., Inc. v Strauman*, 40 NY2d 303, 309 [1976]).

Following the case law cited above, the time restraint on Pitta and Mason is overbroad because it restricts their employment options for four years. (*See Globaldata*, 10 Misc 3d 1062A at 7; *Primo*, 148 AD2d at 352). The non-competes completely lack any kind of geographical limitation, for they cover the entire United States, and are therefore not reasonable in this regard

either. (*Globaldata*, 10 Misc 3d 1062A at 8). Given the unreasonable scope of the non-competes, these non-competes impermissibly prevent employees from pursuing their chosen careers and impose an unfair burden. (*Columbia Ribbon & Carbon*, 42 NY2d at 499). Nor can USP argue that these particular employees, Pitta and Mason, possess "unique or extraordinary" skills as a legitimate interest that explains the restraints of the non-competes. Pitta and Mason are salespeople, and salespeople are not professionals with unique enough skills to create a legitimate interest for employers. (*See Investor Access*, 186 AD2d at 404; *Primo*, 148 AD2d at 352; *Kanan, Corbin, Schupak & Aronow, Inc.*, 8 Misc 3d at 418). Accordingly, the non-compete provisions of Pitta's and Mason's Non-Compete Agreements are unreasonable.

Because the non-compete provisions are unreasonable in scope and thus unenforceable, I need not reach the issue of USP's other alleged legitimate interest in imposing the non-competes on Pitta and Mason. Specifically, USP contends that protection of trade secrets and confidential information makes the non-competes necessary. (Plaintiff's Memorandum of Law in Opposition to Motion to Dismiss Count I of the Complaint, p 7). USP then points to its allegation that Pitta emailed USP files with client information to his personal account (*id.* at 7) and highlights the explicit provision of the non-competes (paragraph 1[b]) prohibiting this disclosure as indication of the legitimacy and importance of its concerns about protection (*id.* at 6). However, this allegation against Pitta does not save the otherwise unenforceable non-compete provisions. Instead, USP may pursue this allegation in, for example, its second cause of action for misappropriation of trade secrets and its third cause of action for unfair competition against AMN for allegedly inducing Pitta to take and use confidential information and for allegedly persuading other former USP employees to misappropriate proprietary information to the

detriment of USP.

Plaintiff's attempt to distinguish the *Heartland Securities* case, that both parties debate at length in their briefs, is to no avail. Plaintiff first attempts to distinguish the case as addressing a recoupment provision and not a non-compete provision in employment contracts. (Plaintiff's Memorandum of Law in Opposition to Motion to Dismiss Count I of the Complaint, p 6). However, Judge Pauley of the Southern District of New York, using New York law, interpreted this provision as a restrictive covenant "designed to chill people from changing jobs." (*Heartland Secs. Corp. v Gerstenblatt*, 2000 US Dist LEXIS 3496, *19 [SDNY, Mar. 22, 2000]). Specifically, the court stated, "The duration of the restrictive covenant [two years for one defendant employee and four years for the others], especially when read with the limitless geographic scope of the covenant, is unreasonable." (*Id.* at 22). As in *Heartland*, the non-competes here are unreasonable because they are likewise "limitless [in] geographic scope" and unfairly restrict Pitta's and Mason's careers for four years.

Plaintiff makes another attempt to distinguish *Heartland* by stating the employment agreements at issue, unlike the ones for Pitta and Mason, lacked a provision to protect trade secrets, so Judge Pauley refused to find any legitimate interest for the employer that required the agreements. (Plaintiff's Memorandum of Law in Opposition to Motion to Dismiss Count I of the Complaint, p 6). Plaintiff, however, fails to recognize that the court used this lack of a legitimate business interest in trade secret protection as "an additional reason" not to enforce the non-competes. (*Heartland*, 2000 US Dist LEXIS 3496 at *25). The primary reason the non-competes failed arose from their unreasonable scope. (*Id.* at *22). Thus, *Heartland* merely supports the conclusion that Pitta's and Mason's non-competes are invalid because the

geographic scope of the entire United States and the time restraint of four years are unreasonable.

II. The Confidentiality Provisions and Blue Penciling the Non-Compete Agreements

Plaintiff asks, "[i]n the event, however, that the court finds Paragraph 1(a) of the agreements unenforceable, the court should exercise its discretion to enforce Paragraph 1(b) of the non-compete agreements. This provision plainly seeks to protect USP's legitimate business interests, which have been threatened as a result of AMN's wrongful conduct." (Plaintiff's Memorandum of Law in Opposition to Motion to Dismiss Count I of the Complaint, p 2). Specifically, plaintiff alleges that paragraph 1(b) on confidentiality likewise prohibits the "wrongful conduct alleged," so Shane's and Pitta's Agreements should be blue penciled to remove paragraph 1(a), if found unenforceable (*id.* at 10), and thus still allow a claim for tortious interference with contract based on paragraph 1(b). Defendant asks that the request be denied because courts permit blue penciling only in the absence of overreaching and solely for the protection of legitimate business interests. (Memorandum of Law in Support of Defendant's Motion to Dismiss Count I of the Complaint, p 10).

A court's decision to cure an overbroad non-compete through partial enforcement or severance considers the employer's conduct in imposing the agreement, specifically "overreaching," "coercive use of dominant bargaining power" and "anticompetitive misconduct." (*BDO Seidman*, 93 NY2d at 394). To obtain partial enforcement, an employer must demonstrate it "has in good faith sought to protect a legitimate business interest, consistent with reasonable standards of fair dealing . . . ." (*Id.* [citations omitted]). For example, a court considers whether the employer imposed the covenant "as a condition of [the employee's] initial employment, or even his continued employment." (*Id.* at 395 [awarding partial enforcement of non-compete

because employer did not impose covenant as a condition of employment or continued employment but only "in connection with promotion to a position of responsibility and trust"]; *see also Portware, LLC v Barot*, 11 Misc 3d 1059A at 4 [Sup Ct, NY County 2006, Fried, J.] ["Other factors weighing in favor of partial enforcement are the imposition of the covenant in connection with a promotion to a position of responsibility and trust, rather than the imposition of the covenant in connection with hiring or continued employment."] [citations omitted]).

Plaintiff USP has displayed all three types of behavior that bar blue penciling its Non-Compete Agreements with Pitta and Mason. First, the Agreements are so overbroad (four years and the entire United States) that plaintiff cannot possibly contend it imposed these Agreements in good faith and for legitimate business interests on salespeople whom courts do not consider "unique or extraordinary." (*See Investor Access*, 186 AD2d at 404; *Primo*, 148 AD2d at 352; *Kanan, Corbin, Schupak & Aronow, Inc.*, 8 Misc 3d at 418). USP therefore overreached in imposing the Agreements. Second, USP coerced Mason and Pitta into signing the Non-Compete Agreements because they state, "WHEREAS, the Employer *requires* that Employee agree to the terms hereof as *a condition of continued employment*." (Pitta Agreement at 1; Mason Agreement at 1 [emphasis added]). Imposition of a covenant as a condition for employment or continued employment indicates coercion and prevents blue penciling. (*See BDO Seidman*, 93 NY2d at 394; *Portware*, 11 Misc 3d 1059A at 4). Finally, the Non-Compete Agreements are anti-competitive because they unfairly prevent Pitta and Mason from working in their chosen field and prevent other employers from hiring them. Accordingly, I decline plaintiff's request to blue pencil the Non-Compete Agreements so that the confidentiality provisions would remain.

Moreover, as with the non-compete provisions (*see supra* p 8), plaintiff has alternative

causes of action, such as the misappropriation of trade secrets and unfair competition claims, that enable it to litigate allegations about confidential information that the unenforceable confidentiality provisions of the Non-Compete Agreements cover. On a motion to dismiss, a decision not to blue pencil an agreement can be problematic because "all of the facts and circumstances have not been presented." (*Globaldata*, 10 Misc 3d 1062A at 8 [employer did not make signing non-competes a condition of employment or continued employment, but court denied motion to dismiss and refused to blue pencil agreements because court required evidence of employer's bad faith in allegedly discharging employees without cause]). Unlike *Globaldata*, however, the documentary evidence of the Non-Compete Agreements here reveals that USP "*requires* that Employee agree to the terms hereof as *a condition of continued employment*." (Pitta Agreement at 1; Mason Agreement at 1[emphasis added]). No question of fact remains because Pitta's and Mason's Non-Compete Agreements clearly reveal coercion, and the presence of coercion prevents blue penciling. Accordingly, because the two major provisions of the Non-Compete Agreements are unenforceable, the Agreements cannot be blue penciled and the Non-Compete Agreements are unenforceable as a matter of law.

III. Tortious Interference with Contracts

In plaintiff's first cause of action for tortious interference with contract, it alleges, "[d]espite its knowledge of the Non-Compete Agreements, Defendant intentionally offered incentives to [Pitta and Mason] with the objective of inducing them to violate their valid contract with Plaintiff and to become employees of AMN. . . . In addition, AMN has induced Pitta and Mason to use USP's proprietary information to solicit customers on behalf of AMN in direct violation of the Non-Compete Agreements." (Complaint ¶ 22). Defendant responds, "USP has

premised its tortious interference with contract claim against AMN on four-year Non-Competes allegedly entered into by two former employees who accepted employment with AMN. As a matter of law, a four-year non-compete barring salesmen of advertising in game-day sports publications from working anywhere in the United States in the same or a similar business is unenforceable. Accordingly, any tortious interference claim based on such an invalid contract must also fall." (Memorandum of Law in Support of Defendant's Motion to Dismiss Count I of the Complaint, p 1).

As discussed above, the Non-Compete Agreements are invalid as a matter of law, and therefore plaintiff cannot maintain a cause of action for tortious interference with contractual relations. To plead tortious interference with contract, a plaintiff must show: "'the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom.'" (*Triple Z Postal Servs.*, 13 Misc 3d 1241A at 15, quoting *Lama Holding Co. v Smith Barney Inc.*, 88 NY2 413, 424 [1996]). To avoid dismissal of a tortious interference with contract claim, "[a]ll of the elements of the theory must be pleaded . . . ." (*Id.*; *see also 397 West 12 th Street Corp. v Zupa*, 34 AD3d 236, 236 [1st Dept 2006] ["[A]bsent a contract, there can be no claim for tortious interference."] [citation omitted]; *Artwear, Inc. v Hughes*, 202 AD2d 76, 85 [1st Dept 1994] [finding pleading defects because plaintiff failed to plead two elements of its tortious interference with contract claim]). USP fails to plead the first element, existence of a valid contract, so its tortious interference with contract claim fails.

Finally, in an overall attempt to preserve its claim for tortious interference with contract,

plaintiff asserts, "USP's claim for tortious interference with contractual relations depends upon questions of fact that are unresolved by the documentary evidence and, therefore, AMN's motion to dismiss Count I is clearly deficient." (Plaintiff's Memorandum of Law in Opposition to Motion to Dismiss Count I of the Complaint, p 10). Namely, USP suggests issues of fact exist about the nature of USP's and AMN's business and whether they are direct competitors. (*Id.*). Because USP's tortious interference with contractual relations claim depends solely on the validity of the underlying contracts (in this case, the Non-Compete Agreements), plaintiff's reasoning is faulty. The Non-Compete Agreements are invalid, and, therefore, plaintiff cannot maintain a cause of action for tortious interference with contract. Accordingly, I grant defendant's motion to dismiss the first cause of action for tortious interference with contract.

CONCLUSION

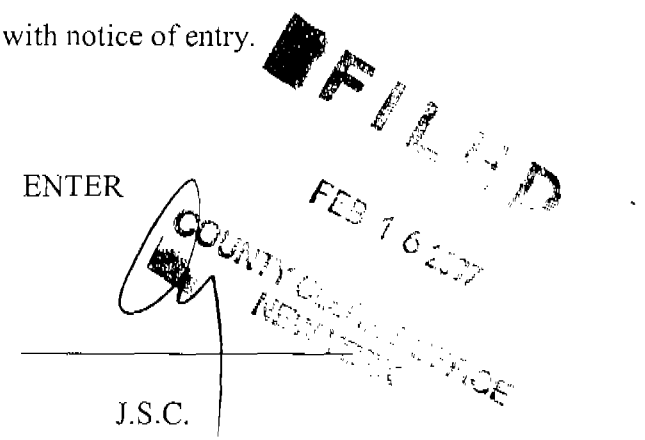
Accordingly, it is

ORDERED that defendant's motion to dismiss, motion sequence 001, is granted and the first cause of action of the complaint is dismissed; and it is further

ORDERED that the complaint is deemed amended accordingly; and it is further

ORDERED that defendant is directed to serve an answer to the amended complaint within 10 days after service of a copy of this order with notice of entry.

Dated: February 09, 2007



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