

McGhee v HRH Constr. LLC

2008 NY Slip Op 30316(U)

January 22, 2008

Supreme Court, New York County

Docket Number: 0116314/2004

Judge: Doris Ling-Cohan

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

PRESENT: JUSTICE DORIS LING-COHAN

PART 36

Justice

Mc Ghee

INDEX NO. 116314/04

- v -

*HRH Construction LLC
et al.*

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

The following papers, numbered 1 to 7 were read on this motion to/for summary judgment

PAPERS NUMBERED	
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2</u>
Answering Affidavits — Exhibits	<u>5, 6</u>
Replying Affidavits	<u>7</u>

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: Yes No

3, 4

Upon the foregoing papers, it is ordered that this motion for summary judgment
& cross-motion to amend the bill of particulars
are decided in accordance with the attached
memorandum decision.

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

FILED

FEB 05 2008

NEW YORK COUNTY CLERK'S OFFICE

Dated: 2/22/08

JUSTICE DORIS LING-COHAN

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: PART 36**

-----x
VIVIAN M. McGHEE,

Index No.: 116314/04

Plaintiff,

-against-

Motion Seq. No.: 003

HRH CONSTRUCTION LLC,
CARLTON CONCRETE CONSTRUCTION CORPORATION,
CARLTON CONCRETE CORPORATION,
SENTRALE CONTRACTING CORPORATION,
SENTRALE CONSTRUCTION CORPORATION,
PERSICO CONTRACTING & TRUCKING, INC.,
PERSICO INDUSTRIES, INC.,
JOHN PUFF & SONS, INC., VERGONA CRANE CO., INC.,
JEFFERSON AT WHITE PLAINS, L.P.,
JEFFERSON AT WHITE PLAINS LLC,
WESTCHESTER COUNTY INDUSTRIAL DEVELOPMENT
AGENCY, JPI APARTMENT DEVELOPMENT, L.P. and
JPI APARTMENT CONSTRUCTION L.P.,

Defendants.
-----x

Ling-Cohan, J.:

This is an action to recover damages sustained by a crane oiler when she slipped and fell on the tracks of a crane at a construction site located at 300 Mamaroneck Avenue, White Plains, New York. Defendant Vergona Crane Co., Inc. (Vergona) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Vivian M. McGhee's complaint and all cross claims against it. Plaintiff cross-moves for leave to serve a second supplemental bill of particulars. as well as extending the time to file the note of issue.

BACKGROUND

On December 16, 2003, plaintiff was injured while working at a construction site when she slipped and fell on a grease spot located on the track of a crane from which she was

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descending. Defendant Jefferson at White Plains, LLC (Jefferson) was the owner of the premises where plaintiff's accident occurred (job site). Defendant JPI Apartment Construction, L.P. (JPI) served as the construction manager for the project, which entailed the construction of condominiums (the project). Defendant HRH Construction LLC (HRH) served as the general contractor for the project. From approximately November 3, 2003 until the date of plaintiff's accident, plaintiff was employed as a crane oiler by defendant Carlton Concrete Construction Corporation (Carlton), a subcontractor on the project. Defendant Vergona had leased the crane at issue to Carlton approximately three months before plaintiff's accident.

Plaintiff testified that her job duties included maintaining the crane. Although she did not operate the crane, she checked the oil and hydraulic system, sprayed the cables and started it up daily. Plaintiff was the only oiler assigned to the crane. Plaintiff stated that she did not know who owned or supplied the crane, and that it was present at the job site the entire time that she had worked at the job site. Plaintiff stated that the only way to access the cab of the crane was to walk over its tracks. In order to mount the tracks, plaintiff had to utilize a set of movable wooden stairs which were placed at the back of the tracks. However, plaintiff would exit the crane by simply jumping off the tracks to the ground.

The crane contained two tracks, each approximately two to three feet wide and two feet high. The tracks had evenly spaced ridges which were about six inches apart. In addition, the crane tracks were about one to two inches thick and about 12 feet long. A foot-wide steel catwalk connected the crane tracks to the body of the crane and ran along the side of the crane. With the exception of the area at the entrance to the cab's door, there was a railing around the entire length of the catwalk.

Plaintiff stated that she received directions and duties from one of the two crane

operators, though she did not know who employed the crane operators. Plaintiff maintained, however, that the crane operators were not employed by defendant Vergona. Plaintiff also noted that she would see her immediate supervisor, Howie, also employed by Carlton, approximately three times a week. Plaintiff asserted that it was not one of her duties to maintain the tracks of the crane, and that she had been instructed at union meetings that she was never to touch the tracks.

Plaintiff testified that, on the day of her accident, she was told by one of the crane operators to help unload supplies delivered by a Vergona mechanic. It took plaintiff approximately 30 minutes to unload the supplies from the truck to the tracks of the crane. After plaintiff unloaded the supplies, the mechanic left. Approximately one hour after the mechanic left the job site, plaintiff's accident occurred.

Plaintiff explained that, at the time of her accident, she was making trips with the supplies to the cab of the crane in order to store them, during which time she made a conscious effort to avoid the spots of grease, dirt and oil on the tracks. In order to reach the crane's cab, plaintiff would step up from the crane tracks to the catwalk, and then proceed from the catwalk to the crane's cab. After putting the last of the supplies into the cab of the crane, and as plaintiff was stepping from the catwalk to the tracks, her left foot stepped on a spot of dirt and grease, which caused her foot to slip forward and fall on her back, sustaining injuries to her back.

DISCUSSION

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (Santiago v Filstein, 35 AD3d 184, 185-186 [1st Dept 2006], quoting Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1985]).

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The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 [1st Dept 2006]; see Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; DeRosa v City of New York, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (see Rotuba Extruders v Ceppos, 46 NY2d 223, 231 [1978]; Grossman v Amalgamated Housing Corporation, 298 AD2d 224, 226 [1st Dept 2002]).

LABOR LAW § 240 (1) CLAIM

Initially, it should be noted that plaintiff has not addressed the Labor Law § 240 (1) claim in her opposition papers. Thus, this court deems this claim to be abandoned and therefore dismissed as to movant Vergona (see Genovese v Gambino, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]).

LABOR LAW § 241 (6) CLAIM

Labor Law § 241 (6) provides, in pertinent part, as follows:

"All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

* * *

- (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped ... as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. ..."

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide

reasonable and adequate protection and safety to workers (see Ross v Curtis-Palmer Hydro-Electric Company, 81 NY2d 494, 501-502 [1993]). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (id.).

Here, defendant Vergona, as merely the lessor of the crane under a rental agreement between Vergona and Carlton, was not an owner or contractor, so as to fall within the purview of Labor Law § 241 (6). In addition, testimony and documentary evidence in the record indicate that Vergona had no authority to supervise and control plaintiff's work, so as to be a statutory agent of the owner, and thus, subject to liability under Labor Law § 241 (6) (see Walls v Turner Construction Company, 4 NY3d 861, 864 [2005]; Blake v Neighborhood Housing Services of New York City, 1 NY3d 280, 293 [2003]; Russin v Louis N. Picciano & Son, 54 NY2d 311, 318 [1981]). Thus, defendant Vergona is entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim as against it.

COMMON-LAW NEGLIGENCE AND LABOR LAW § 200 CLAIMS

Labor Law § 200 is a “codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work’ [citation omitted]” (Cruz v Toscano, 269 AD2d 122, 122 [1st Dept 2000]; see also Russin v Louis N. Picciano & Son, 54 NY2d at 316-17). Labor Law § 200 (1) states, in pertinent part, as follows:

“1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable

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and adequate protection to all such persons.”

Here, although the parties in this case argue the issue of supervision, or lack thereof, on the part of defendant Vergona, that standard applies in Labor Law § 200 cases which involve injuries resulting from the means and methods of the work. However, in this case, plaintiff’s injuries arose from an unsafe condition caused by grease spots on the tracks of the crane. In such a case, the proponent of a Labor Law § 200 claim must demonstrate that the defendant created or had actual or constructive notice of the allegedly unsafe condition that caused the accident (Murphy v Columbia University, 4 AD3d 200, 202 [1st Dept 2004] [to support finding of a Labor Law § 200 violation, it was not necessary to prove general contractor’s supervision and control over plaintiff because the injury arose from the condition of the work place created by or known to contractor, rather than the method of plaintiff’s work]).

In this case, plaintiff stated that she had never made any complaints about the actual structure of the tracks, and that there were never any holes, depressions or cracks in the tracks, though plaintiff did maintain that she noticed dirt, grease and wood embedded in the tracks that appeared to have existed for a very long time. Specifically, plaintiff described three grease spots on the tracks, and explained that the spot that caused her to slip and fall was located directly below the catwalk that led to the door of the crane’s cab.

In her affidavit of June 11, 2007, plaintiff stated that dirt that had accumulated from overhead, as well as other construction activities, had concealed the boundaries of the grease spot, thereby preventing her from avoiding the greasy spot at the time of her accident. Plaintiff further stated that there was “construction dirt and debris constantly flying everywhere near the crane prior to the date of the incident,” and that she would “sometimes see blots of grease fall from the crane” (Plaintiff’s Notice of Cross Motion, Exhibit A, McGhee Affidavit, at 3).

It should be noted, however, that plaintiff maintained in her deposition that she had not observed any grease coming from the crane before the time of her accident, and that she did not know where the grease came from. In addition, plaintiff noted that, due to the fact that debris was constantly flying everywhere, the spots could have been placed as little as five minutes before her accident (Vergona's Notice of Motion, Exhibit G, McGhee Deposition, at 410-12).

Plaintiff also testified that, prior to her accident, she had complained to various people about the unsafe condition at issue, though she did not sufficiently establish that Vergona had notice of the unsafe condition. To that effect, plaintiff testified that she complained to a representative from HRH about the unsafe condition "often," which she described as "[e]very morning]" (*id.* at 89). Plaintiff also told the HRH representative that "the tracks are dirty and it needs to be cleaned," and the HRH general contractor told plaintiff that "I'll get around to it" (*id.* at 93). Plaintiff stated that she also complained to others at the job site about the unsafe condition on the tracks, including one of her supervisors from Carlton, who advised her to notify the general contractor on the project. In addition, plaintiff complained about the unsafe condition to one of the crane operators, as well as Howie, her immediate supervisor.

Although in plaintiff's affidavit of June 11, 2007, plaintiff vaguely maintains that she complained to Vergona on two occasions about spots of dirt and grease on the tracks, plaintiff testified in her deposition that she had never spoken to anyone at Vergona about the problem, other than the mechanic who delivered the supplies, who said that he would tell someone about it.¹ Plaintiff also stated that the Vergona mechanic had only been at the site three times in total, either to deliver supplies or make a repair. Other than these three times, no one from Vergona

¹ Even if her complaints to the mechanic were to constitute "notice", this issue is irrelevant given that Carton assumed exclusive responsibility to maintain and care for the crane once it was delivered, as per the lease agreement. See discussion on page 9 below.

had ever even visited the project site. Notably, Joseph Vergona (Joseph), owner of defendant Vergona, testified that, prior to the date of plaintiff's accident, he had never learned of any complaints concerning the surface of the tracks of the crane at issue.

Thus, as there is no evidence that Vergona created or had actual or constructive notice of the unsafe condition that caused plaintiff's injuries, Vergona is entitled to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims as against it.

As an alternative reason as to why defendant Vergona is not entitled to summary judgment dismissing plaintiff's common-law negligence claim, plaintiff argues that Vergona, as a contracting party to the lease agreement, breached a duty of care owed to plaintiff when it provided a defective crane. "Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party" (Espinal v Melville Snow Contractors, 98 NY2d 136, 138 [2002]; Seymour v David W. Mapes, Inc., 22 AD3d 1012, 1013 [3d Dept 2005]).

However, "[o]rdinarily, contractual obligations will not create a duty towards a third party unless the plaintiff has reasonably relied, to his or her detriment, on the continued performance of the contracting party's duties under the contract, the contract is so comprehensive and exclusive that it completely displaces the other contracting party's duty toward the third party or the contracting party has launched a force or instrument of harm [internal quotations and citations omitted]" (Karac v City of Elmira, 14 AD3d 842, 844 [3d Dept 2005]; Espinal v Melville Snow Contractors, Inc., 98 NY2d at 138-139; Cooper v Time Warner Entertainment-Advance/Newhouse Partnership, 16 AD3d 1037, 1038 [4th Dept 2005]).

Here, as plaintiff has not submitted sufficient evidence that any of these exceptions apply to the facts of the case at bar, or that the crane was delivered in a defective condition, defendant

Vergona is entitled to summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims as against it (see Mahoney v Turner Construction Company, 37 AD3d 377, 378-379 [1st Dept 2007] [no liability for plaintiff's injuries where defendant merely leased crane and did not direct or control the operation of the crane or have on-site responsibilities]; Wysocki v Balalis, 290 AD2d 504, 505 [2d Dept 2002]; Schiavone v Halicki, 221 AD2d 950, 951 [4th Dept 1995]).

Significantly, documentary and testimonial evidence in the record indicates that Carlton assumed the exclusive responsibility to maintain and care for the crane once the crane was delivered as per the lease agreement, and did, in fact, carry out these duties. Specifically, the lease agreement for the use of the crane between Vergona and Carlton stated, in pertinent part:

LESSEE AGREES to assume full responsibility for equipment during the rental period and agrees to return it to Lessor in as good condition as received less normal wear.

* * * *

LESSEE FURNISHES all fuels, oils, lubricants and necessary repair and further agrees to service and maintain said equipment in accordance with the manufacturer's instructions and in strict compliance with all applicable rules, laws and regulations.

* * * *

WE ASSUME NO LIABILITY for loss or damage on account of accidents Lessee agrees that the equipment and all persons operating such equipment, including Lessors employees, are under Lessee's exclusive jurisdiction, supervision and control ...

(Vergona Notice of Motion, Exhibit I, Carlton/Vergona Contract).

Joseph testified that Vergona owns a fleet of cranes and leases them on a "bare rental" basis to contractors for work at their job sites (Vergona's Notice of Motion, Exhibit H, Vergona Deposition, at 6).² Joseph explained that "bare rental" means "supplying a crane to a contractor.

²It should be noted that a number of pages of Joseph Vergona's deposition testimony are missing from the record.

and he takes it and operates it, uses it under his control and jurisdiction, similar to renting a car” (id. at 7).

In addition, employees from Vergona transported the crane to the job site. Once the crane was delivered, Joseph stated that Carlton was responsible for the safety of the crane at the job site according to the rental agreement between Vergona and Carlton. Carlton was also responsible for any inspections of the crane. Joseph also testified that Carlton had “people that are qualified to assemble these cranes, take them apart, repair them, upkeep them” (id. at 41-42). In fact, Joseph maintained that Vergona’s involvement during delivery is limited to sending someone out “to make sure nothing gets damaged in the assembly, or broken or scratched” (id. at 42).

Joseph also testified that, pursuant to the bare rental agreement, Carlton was also responsible for “seeing that the crane is maintained and kept in good working order, clean” (id. at 83). Joseph noted that, with the exception of performing a couple of tasks that were outside the original agreement and the delivery of some small items, there were no Vergona employees on-site on a regular basis.

Plaintiff testified that it was part of her responsibility to inspect the crane on a daily basis, and that she was the only one assigned to do as such. To that effect, plaintiff’s inspection included a “walk around” wherein she would look for “[d]ebris in the way of the tracks, in case [it] moves back or forward” (Vergona’s Notice of Motion, Exhibit G, McGhee Deposition, at 300-301). Plaintiff also testified that she would examine the tracks as part of her duties.

In his affidavit of May 24, 2007, Miles Eaddy, assigned to work at the job site by HRH, stated that, during the times that he observed the crane in use, he observed grease flying from the crane onto the crane’s catwalk and tracks. In addition, he observed a Carlton employee cleaning the crane’s catwalk and tracks with a product called “Speedy Dry,” which is used to quick dry oil

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to prevent slipping by individuals walking in that area (Plaintiff's Notice of Cross Motion, Exhibit C, Eaddy Deposition, at 2).

Eaddy also stated that he had observed the Carlton employee using "sand to dry the oil spots," as well as cleaning the crane's catwalk and treads by hosing those areas with water and by using a shovel to clear the oil that had spilled (*id.* at 3). Eaddy also noted that, on a daily basis, he would observe sawdust and concrete dust flying from the decks of the building and falling onto the crane, wherein the Carlton employees would wipe down of the side of the crane to remove it.

PLAINTIFF'S CROSS MOTION FOR LEAVE TO SUPPLEMENT BILL OF PARTICULARS

On March 7, 2006, plaintiff amended her bill of particulars by asserting previously unclaimed Industrial Code §§ 23-1.7 (d) and (e) violations. Plaintiff now cross-moves for leave to serve a second supplemental verified bill of particulars to assert additional previously unclaimed Industrial Code violations as against defendants.

“[L]eave to amend a pleading under CPLR 3025 (b) is freely given in the exercise of the trial court's discretion, provided there is no prejudice to the nonmoving party and the amendment is not plainly lacking in merit” (Matter of Miller v Goord, 1 AD3d 647, 648 [3d Dept 2003], quoting New York State Health Facilities Association v Axelrod, 229 AD2d 864, 866 [3d Dept 1996]; see also Aronov v Regency Gardens Apartment Corp., 15 AD3d 513, 514 [2d Dept 2005]). Absent prejudice or surprise, it is an abuse of discretion, as a matter of law, for the trial court to deny leave to amend (Watts v Wing, 308 AD2d 391, 392 [1st Dept 2003] [leave to amend granted inasmuch as proposed amendment did not add new factual allegations]; Smith v Pizza Hut of America, 289 AD2d 48, 50 [1st Dept 2001]).

In addition, mere delay does not warrant a denial of leave to amend, unless the delay is

coupled with significant prejudice to the other side (New York State Health Facilities Association v Axelrod, 229 AD2d at 866; see also Lake v John W. Cowper Co., 249 AD2d 934, 936 [4th Dept 1988] [leave to amend granted where only prejudice was delay]; Stengel v Clarence Materials Corp., 144 AD2d 917, 918 [4th Dept 1988] [delay in seeking an amendment for several years is not sufficient ground for denying amendment absent a showing of prejudice or surprise]).

Further, “[w]hile a plaintiff asserting a cause of action under Labor Law § 241 (6) must allege a violation of a concrete specification of the Industrial Code, his failure to identify the Code provision in his complaint or bill of particulars need not be fatal to his claim,” and “in the absence of prejudice or unfair surprise, requests for leave to amend should be granted freely [internal citations omitted]” (Noetzell v Park Avenue Hall Housing Development Fund Corporation, 271 AD2d 231, 232 [1st Dept 2000] [plaintiff’s belated identification of an Industrial Code violation in a supplemental bill of particulars was proper where it entailed no new factual allegations, raised no new theories of liability and caused no prejudice to the defendant]; Kelleir v Supreme Industrial Park, LLC, 293 AD2d 513, 513-514 [2d Dept 2002]).

Specifically, plaintiff asserts that she is entitled to supplement her bill of particulars to include alleged violations of 12 NYCRR 23-2.1 (b) and 12 NYCRR 23-8.1 (1), (2), (3) and (5), as these alleged violations involve no new factual allegations, raise no new theories of liability and will not cause any prejudice.³ Plaintiff admits in her moving papers that 12 NYCRR 23-2.1 (b) is not applicable to defendant Vergona. In addition, as discussed previously, Vergona does not fall within the purview of Labor Law § 241 (6), as it is not an owner, general contractor or

³It is noted that, in plaintiff’s proposed second supplemental bill of particulars, she also asserts a violation of Industrial Code sections 23-1.7 (a) , 23-1.7 (e) (1), and 23-1.3, though she does not mention them in her cross motion.

agent. Thus, plaintiff's proposed amendment to her Labor Law § 241 (1) claim is lacking in merit, with respect to defendant Vergona, but permitted with respect to the other defendants.

In addition, in her proposed second supplemental bill of particulars, plaintiff seeks to update her injuries to include injuries to her right shoulder, as confirmed by an MRI taken October 30, 2006, though it should be noted that she does not supply a copy of the MRI or report of the same. Plaintiff also seeks to update the amount of the sum of medical benefits from plaintiff's workers' compensation carrier, as well as claims regarding plaintiff's loss of lifetime earning capacity. The second supplemental bill of particulars is permitted with respect to the defendants, with the exception of defendant Vergona; as it has been determined that defendant Vergona is not liable to plaintiff for her injuries, such updates are moot. Thus, plaintiff's cross motion for leave to amend her bill of particulars is granted with respect to all defendants, but for defendant Vergona.

Plaintiff also cross-moves to extend the time to file the note of issue, given the pendency of defendant Vergona's summary judgment motion and plaintiff's cross motion. However, as plaintiff has since filed the note of issue on July 9, 2007, the court need not address this portion of plaintiff's cross motion.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendant Vergona Crane Co., Inc.'s motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Vivian M. McGhee's complaint and all cross claims against it is granted, and the complaint and all cross claims are severed and dismissed as against this defendant, and the Clerk is directed to enter judgment in favor of this defendant, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the portion of plaintiff's cross motion for leave to serve a second supplemental bill of particulars is granted with respect to all defendants except defendant Vergona; such second supplemental bill of particulars is deemed served, upon service of a copy of this order with notice of entry; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

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

ORDERED that within 30 days of entry of this order, defendant Vergona shall serve a copy upon all parties with notice of entry.

DATED: January 22, 2008



Hon. Doris Ling-Cohan, J.S.C.

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