Oppenheim v Mojo-Stumer Assoc. Architects, P.C.
2009 NY Slip Op 30939(U)
April 20, 2009
Supreme Court, New York County
Docket Number: 602408/06
Judge: Charles E. Ramos
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[* 1]

SCANNED ON 4/23/2009

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

PRESENT: ______________________ Justice

PART ______

Index Number : 602408/2006

OPPENHEIM, AVIVITH

vs.

MOJO-STUMER ASSOCIATES

SEQUENCE NUMBER : 007

PRECLUDE

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

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 is decided in accordance with accompanying Memorandum Decision.

FILED

APR 23 2009

COUNTY CLERK'S OFFICE NEW YORK

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

Dated: 4/20/09

HON. CHARLES E. RAMOS J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION
---------------------------------------X
AVIVITH OPPENHEIM and WILLIAM OPPENHEIM,

Plaintiffs,

Index No. 602408/06

-against-

MOJO-STUMER ASSOCIATES ARCHITECTS, P.C. d/b/a MOJO-STUMER ASSOCIATES, P.C., MARK STUMER AND JOSEPH VISCUSO,

Defendants.
---------------------------------------X

FILED
APR 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

Charles Edward Ramos, J.S.C.:

Motion sequence 007 and 008 are hereby consolidated for disposition.

In motion sequence 007 the defendants Mojo-Stumer Associates Architects, P.C. d/b/a Mojo-Stumer Associates, P.C. ("MSA") and Mark Stumer (collectively "Mojo-Stumer") move: (1) to preclude the submission of expert testimony and strike the fourth through sixth causes of action in the second amended complaint, (2) for summary judgment on the fourth cause of action in the second amended complaint, and (3) to strike the second amended complaint or compel disclosure (CPLR 3101, 3211[a][1],[7]; 3212).

The plaintiffs Avivith Oppenheim and William Oppenheim (the "Oppenheims") cross-move for partial summary judgment on their second cause of action for wrongful termination of the architectural services contract (the "MSA Agreement").

In motion sequence 008 Mojo-Stumer moves pursuant to CPLR 3130 seeking relief which would be, in essence, a protective order.

Background

This action arises out of a failed renovation of a cooperative apartment located at 860 Fifth Avenue, New York, New York (the "Apartment"). Avivith Oppenheim is the tenant-shareholder and leases the Apartment from 860 Fifth Avenue Corporation (the "Co-op").

As alleged in the second amended complaint, in May 2003, the Oppenheims retained the architectural firm of MSA to design the renovation of the Apartment (the "Project"). Additionally, once the renovation began, MSA was retained to monitor the performance of the contractors, and review and approve the applications for payment. The Oppenheims selected V.I.S.T.A of New York, Inc. ("Vista") as the general contractor for the Project. As architect, Mojo-Stumer strongly recommended Vista.

On February 11, 2004, Avivith Oppenheim and Vista executed a renovation contract, which provided that the Project would be substantially complete by July 16, 2004, and fixed the total cost of the Project at $760,110.00 (the "Vista Agreement").

Applications For Payment

Although the Oppenheims made the first payment on March 12, 2004, Vista did not commence work on the Project until the end of May 2004. As the Project progressed, numerous disagreements arose over the applications for payment submitted by Vista, which were reviewed and approved by MSA (*See* Complaint ¶ 49-69, 79-84). The Oppenheims objected to the increased costs of proposed change orders as being excessive. These disagreements were the source

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of lengthy delays that hindered the progress of the Project.

Unable to reconcile their differences, without the knowledge of Mojo-Stumer, the Oppenheims retained FSI Architecture ("FSI") to inspect and report on the progress of the Project. In December 2004, FSI reviewed all the Project plans and specifications, examined the Apartment, and issued a report finding that the applications for payment were seeking payments for work that was not yet completed. For example, the fifth application of payment from Vista and approved by MSA stated that the Project was 57% complete, but FSI observed that only about 25% to 30% of the work was actually performed. FSI also discovered numerous problems with the Project work that was already completed (*See* Complaint ¶ 118).

On January 20, 2005, Vista submitted its seventh application for payment, which stated that 75% of the work was complete. Conversely, FSI had determined that there was still 65% to 70% of work remaining. The Oppenheims allege that MSA consistently approved and certified the applications despite knowing that the completion of the work was being misrepresented in an effort to defraud them. Additionally, the Oppenheims contend that because MSA's construction administration fee was directly proportional to the amount of work completed on the Project, there was an incentive to MSA to approve Vista's applications for payment. In addition, the Oppenheims allege that MSA received payments from Vista not called for in the MSA Agreement or the Vista Agreement that raise, at the very least, issues that go well beyond a

potential conflict of interest.

By December 2004, Mojo-Stumer was representing that its construction administration obligations were 96.25% complete even though, FSI found that only 25% to 30% of the work was actually completed. Mojo-Stumer was not made aware of the retention of FSI or of any report until after MSA's work was halted.

On January 10, 2005, the Co-op shut down the Project due to the extensive delays. No further work was performed by Mojo-Stumer or Vista. On February 9, 2005, the Oppenheims, their counsel, and FSI called a meeting with Stumer to discuss the issues with the Project and the possibility of recovering some of the damages caused by Vista and MSA. Stumer was advised by Oppenheims' counsel that it was not necessary for MSA to be represented by counsel at this meeting. Once Stumer realized what the nature of the meeting was, he wisely stated that he would not continue the meeting without legal representation, and left the meeting. No resolution was ever reached between the parties.

By letter dated February 17, 2005, Stumer indicated that he was terminating both the Vista Agreement and the MSA Agreement and had notified the NYC Department of Buildings that he was no longer the architect of record. Attached to the letter was MSA's January 2005 invoice, which the Oppenheims have objections to.

Beginning in January 2005, the Oppenheims were informed that liens had been filed against the Apartment by subcontractors alleging that Vista failed to pay them.

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In November 2005, the Oppenheims retained a new architect and contractor that eventually completed the Project. In July 2006, the Oppenheims commenced this action asserting six causes of action against the Mojo-Stumer and Joseph Viscuso[1]. In December 2007, Mojo-Stumer answered and asserted four affirmative defenses and four counterclaims for breach of contract, wrongful termination, conversion, and unjust enrichment.

Motion Sequence 007

Mojo-Stumer is now moving to preclude the Oppenheims' expert testimony, is seeking summary judgment on the second cause of action for wrongful termination, and moves to compel disclosure. In response, the Oppenheims cross-move for summary judgment on the second cause of action.

Spoliation

Mojo-Stumer seeks to preclude the Oppenheims' expert, James Cicalo of FSI, from testifying about the Project based on the fact that when the Oppenheims finished the Project without notice or affording Mojo-Stumer access for their expert, they destroyed key evidence in this action. Specifically, Mojo-Stumer seeks to preclude any expert testimony on the amount of work completed, the alleged deficiencies in the work performed, and the costs of completing the Project.

Mojo-Stumer argues that the Oppenheims' destroyed key evidence by completing the Project after the Co-op terminated

[1] Viscuso's involvement is not the subject of the instant motions.

access to the job site in January 2005. In doing so, the Oppenheims effectively destroyed the evidence of Mojo-Stumer's alleged inadequate performance. Mojo-Stumer was not given an opportunity to inspect the Apartment itself and therefore asserts that it cannot properly defend itself against the Oppenheims' causes of action.

The Oppenheims' contention that Mojo-Stumer is not prejudiced by the completion of the Project because it is comprised of construction professionals that personally examined the Project on numerous occasions and that they can testify regarding the condition of the Project using FSI's photos and videos is unpersuasive. Although it is true that counsel for Mojo-Stumer did not request access to the Apartment to inspect the Project for the purpose of trial preparation until March 2008, because the Oppenheims had already hired another contractor to finish the work, MSA's expert has nothing to inspect.

Spoliation is the destruction of evidence, intentional or otherwise. "Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently disposes of crucial items of evidence...before the adversary has an opportunity to inspect them." (*Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 173 [1st Dept 1997]). "When a party alters, loses, or destroys key evidence before it can be examined by the other party's expert, the court should dismiss the pleadings of the party responsible for the spoliation, or, at the very least, preclude the party from offering evidence as to the destroyed

product" (*Squitieri v City of New York*, 248 AD2d 201, 202 [1st Dept 1998][internal citations omitted]).

Here, the condition of the Apartment is clearly the core of the Oppenheims fourth, fifth, and sixth causes of action. The Oppenheims failed in their obligation to preserve key evidence or to notify their adversaries that the evidence was going to be destroyed so that it could be examined by an expert. In these circumstances, the failure of the plaintiffs to preserve and/or notify constitutes bad faith. The plaintiffs were represented by counsel throughout much of this project and counsel either failed in their obligation to advise their clients of the duty to preserve evidence or they did and the advice of counsel was ignored. The plaintiffs' contention that they merely wished to mitigate their damages is not worthy of comment.

However, the severe sanctions of striking the pleadings is not necessary here. The prejudice to Mojo-Stumer by not affording their expert an opportunity to inspect the Apartment before the completion of the Project can be dealt with by precluding the Oppenheims' expert. Just as the Oppenheims have argued that Mojo-Stumer themselves can testify as witnesses, so can they. Granting this motion will place the parties at an equal disadvantage. The fact that this may work more to the the Oppenheims' disadvantage because they bear the burden of proof is offset by the seriousness of spoliation and the sanctions it warrants. The jury will determine who they believe.

Wrongful Termination

Both parties are seeking summary judgment on the second cause of action for wrongful termination.

Mojo-Stumer asserts that the Oppenheims themselves wrongfully terminated the MSA Agreement by denying access to the Project and preventing any further work from being performed by MSA or Vista. The Oppenheims contend in their cross-motion that Mojo-Stumer abandoned the Project by unilaterally withdrawing as architect of record with the New York City Department of Buildings.

A grant of summary judgment requires that no triable issues of fact have been presented (*Ugarriza v Schmieder*, 46 NY2d 471 [1979]). Both parties have raised triable issues of fact concerning their conduct after the Co-op terminated access to the Project that precludes the granting of summary judgment. It is unclear from the record when the termination of the MSA Agreement occurred. Therefore, the issue of wrongful termination of the MSA Agreement must be resolved at trial.

Compel Disclosure

Additionally, Mojo-Stumer moves to strike the second amended complaint or in the alternative, for an order directing the Oppenheims to respond to their third set of interrogatories.

The Oppenheims have failed to articulate any objections to the third set of interrogatories to the Court and do not deny that the discovery request is still outstanding. Consequently, the Oppenheims are directed to respond to Mojo-Stumer's third set

of interrogatories or set forth their objections in writing.

Motion Sequence 008

Mojo-Stumer seeks a protective order deeming all discovery exchanged in this action, including the deposition testimony, as confidential on the basis that the Oppenheims have asserted claims under the Racketeer Influenced Corrupt Organizations Act ("RICO").

Mojo-Stumer argues that the RICO allegations are highly stigmatizing and damaging to their established reputation as highly regarded architectural professionals. Additionally, certain documents exchanged contain trade secrets, are financial documents, or are documents related to the investigation in Mojo-Stumer by the District Attorney.

The Oppenheims contend that Mojo-Stumer has failed to demonstrate that any of the discovery qualifies as confidential information. Furthermore, Mojo-Stumer does not designate any specific document as secret and instead is seeking a sweeping retroactive order deeming all discovery produced as confidential.

"While plaintiff is entitled to relevant and necessary information, material confidential in nature, or information which is subject to abuse if widely disseminated, shall be accorded judicial safeguards where possible" (*McLaughlin v G. D. Searle, Inc.*, 38 AD2d 810, 811 [1st Dept 1972]).

Mojo-Stumer has failed to persuade this Court that such a sweeping and vague protective order is appropriate under these circumstances. This Court has an approved form of a

confidentiality stipulation, which provides a mechanism for designating specific disclosures as confidential, but it was not executed by the parties at the outset of discovery and for reasons unbeknownst to this Court, has yet to be executed.

Therefore, this Court will impose the procedure set forth below to give all the parties to this litigation a rational and orderly procedure to determine confidentiality issues.

Accordingly, it is

ORDERED that the defendants Mojo-Stumer Associates Architects, P.C. d/b/a Mojo-Stumer Associates, P.C. and Mark Stumer's motion (007) to preclude expert testimony is granted, in part to the extent that the plaintiffs Avivith Oppenheim and William Oppenheim shall be precluded from presenting expert testimony on the amount of work completed, the alleged deficiencies in the work performed, and the costs of completing the renovation, and denied in all other respects, it is further

ORDERED that the plaintiffs Avivith Oppenheim and William Oppenheim's cross-motion for partial summary judgment is denied in its entirety, and it is further

ORDERED that the defendants Mojo-Stumer Associates Architects, P.C. d/b/a Mojo-Stumer Associates, P.C. and Mark Stumer's motion (008) for a protective order is denied in its entirety, and it is further

ORDERED that

1. Either party may designate Documents produced, or Testimony given, in connection with this action as

"confidential," either by notation on the document, statement on the record of the deposition, written advice to the respective undersigned counsel for the parties hereto, or by other appropriate means.

2. As used herein:

(a) "Confidential Information" shall mean all Documents and Testimony, and all information contained therein, and other information designated as confidential, if such Documents or Testimony contain trade secrets, proprietary business information, competitively sensitive information, or other information the disclosure of which would, in the good faith judgment of the party designating the material as confidential, be detrimental to the conduct of that party's business or the business of any of that party's customers or clients.

(b) "Producing party" shall mean the parties to this action and any third-parties producing "Confidential Information" in connection with depositions, document production or otherwise, or the party asserting the confidentiality privilege, as the case may be.

(c) "Receiving party" shall mean the party to this action and/or any non-party receiving "Confidential Information" in connection with depositions, document production or otherwise.

3. The Receiving party may, at any time, notify the Producing party that the Receiving party does not concur in the designation of a document or other material as Confidential Information. If the Producing party does not agree to declassify

such document or material, the Receiving party may move before the Court for an order declassifying those documents or materials. If no such motion is filed, such documents or materials shall continue to be treated as Confidential Information. If such motion is filed, the documents or other materials shall be deemed Confidential Information unless and until the Court rules otherwise.

4. Except with the prior written consent of the Producing party or by Order of the Court, Confidential Information shall not hereafter be furnished, shown or disclosed to any person or entity except to:

a. personnel of plaintiff or defendant actually engaged in assisting in the preparation of this action for trial or other proceeding herein and who have been advised of their obligations hereunder;

b. counsel for the parties to this action and their associated attorneys, paralegals and other professional personnel (including support staff) who are directly assisting such counsel in the preparation of this action for trial or other proceeding herein, are under the supervision or control of such counsel, and who have been advised by such counsel of their obligations hereunder;

c. expert witnesses or consultants retained by the parties or their counsel to furnish technical or expert services in connection with this action or to give testimony with respect to the subject matter of this action at the trial of this action or

other proceeding herein; provided, however, that such Confidential Information is furnished, shown or disclosed in accordance with paragraph 5 hereof;

d. the Court and court personnel, if filed in accordance with paragraph 11 hereof;

e. an officer before whom a deposition is taken, including stenographic reporters and any necessary secretarial, clerical or other personnel of such officer, if furnished, shown or disclosed in accordance with paragraph 9 hereof;

f. trial and deposition witnesses, if furnished, shown or disclosed in accordance with paragraphs 8 and 9, respectively, hereof; and

g. any other person agreed to by the parties.

5. Confidential Information shall be utilized by the Receiving party and its counsel only for purposes of this litigation and for no other purposes.

6. Before any disclosure of Confidential Information is made to an expert witness or consultant pursuant to paragraph 5(c) hereof, counsel for the Receiving party shall provide the expert's written agreement, in the form of Exhibit A set forth below, to comply with and be bound by its terms. Counsel for the party obtaining the certificate shall supply a copy to counsel for the other party at the time of the disclosure of the information required to be disclosed by CPLR 3101(d), except that any certificate signed by an expert or consultant who is not expected to be called as a witness at trial is not required to be

supplied.

7. All depositions shall presumptively be treated as Confidential Information and subject to this Order during the deposition and for a period of fifteen (15) days after a transcript of said deposition is received by counsel for each of the parties. At or before the end of such fifteen day period, the deposition shall be classified appropriately.

8. Should the need arise for any of the parties to disclose Confidential Information during any hearing or trial before the Court, including through argument or the presentation of evidence, such party may do so only after taking such steps as the Court, upon motion of the disclosing party, shall deem necessary to preserve the confidentiality of such confidential Information.

9. This Order shall not preclude counsel for the parties from using during any deposition in this action any documents or information which have been designated as "Confidential Information" under the terms hereof. Any stenographer and deposition witness who is given access to Confidential Information shall, prior thereto, be provided with a copy of this Order and shall execute the certificate annexed hereto. Counsel for the party obtaining the certificate shall supply a copy to counsel for the other party.

10. A party may designate as Confidential Information subject to this Order any document, information, or deposition testimony produced or given by any non party to this case, or any

portion thereof. In the case of Documents, designation shall be made by notifying all counsel in writing of those documents which are to be stamped and treated as such at any time up to fifteen (15) days after actual receipt of copies of those documents by counsel for the party asserting the confidentiality privilege. In the case of deposition Testimony, designation shall be made by notifying all counsel in writing of those portions which are to be stamped or otherwise treated as such at any time up to fifteen (15) days after the transcript is received by counsel for the party asserting the confidentiality privilege. Prior to the expiration of such fifteen (15) day period (or until a designation is made by counsel, if such a designation is made in a shorter period of time),all such documents shall be treated as Confidential Information.

11. (a) A Receiving Party who seeks to file with the Court any deposition transcripts, exhibits, answers to interrogatories, and other documents which have previously been designated as comprising or containing Confidential Information, and any pleading, brief or memorandum which reproduces, paraphrases or discloses Confidential Information, shall provide all other parties with seven (7) days' written notice of its intent to file such material with the Court, so that the Producing Party may file by Order to Show Cause a motion to seal such Confidential Information. The Confidential Information shall not be filed until the Court renders a decision on the motion to seal. In the event the motion to seal is granted, all documents which are the

subject of the order to seal, shall be filed in sealed envelopes or other appropriate sealed container on which shall be endorsed the caption of this litigation, the words "CONFIDENTIAL MATERIAL-SUBJECT TO ORDER FOR THE PRODUCTION AND EXCHANGE OF CONFIDENTIAL INFORMATION" as an indication of the nature of the contents, and a statement in substantially the following f form: "This envelope, containing documents which are filed in this case by (name of party), is not to be opened nor are the contents thereof to be displayed or revealed other than to the Court, the parties and their counsel of record, except by order of the Court or consent of all the parties. Violation hereof may be regarded as contempt of the Court."

(b) As an alternative to the procedure set forth in paragraph 11(a), any party may submit to the Court on oral argument any documents previously designated as comprising or containing Confidential Information by submitting such documents to the Part clerk in sealed envelopes or other appropriate sealed container on which shall be endorsed the caption of this litigation, the words "CONFIDENTIAL MATERIAL SUBJECT TO ORDER FOR THE PRODUCTION AND EXCHANGE OF CONFIDENTIAL INFORMATION" as an indication of the nature of the contents, and a statement in substantially the following form: "This envelope, contains documents which are submitted but not to be filed." Such documents shall be returned by the Part Clerk upon disposition of the motion or other proceeding for which they were submitted.

(c) All pleadings, briefs or memoranda which reproduce,

paraphrase or disclose any documents which have previously been designated by a party as comprising or containing Confidential Information, shall identify such documents by the production number ascribed to them at the time of production.

12. Any person receiving Confidential Information shall not reveal or discuss such information to or with any person not entitled to receive such information under the terms hereof.

13. Any document or information that may contain Confidential Information that has been inadvertently produced without identification as to its "confidential" nature as provided in this Order, may be so designated by the party asserting the confidentiality privilege by written notice to the undersigned counsel for the Receiving party identifying the document or information as "confidential" within a reasonable time following the discovery that the document or information has been produced without such designation.

14. Extracts and summaries of Confidential Information shall also be treated as confidential in accordance with the provisions of this Order.

15. The production or disclosure of Confidential Information shall in no way constitute a waiver of each party's right to object to the production or disclosure of other information in this action or in any other action.

16. This Order is entered into without prejudice to the right of either party to seek relief from, or modification of, this Order or any provisions thereof by properly noticed motion

to the Court or to challenge any designation of confidentiality as inappropriate under the Civil Practice Law and Rules or other applicable law.

17. This Order shall continue to be binding after the conclusion of this litigation except

(a) that there shall be no restriction on documents that are used as exhibits in Court(unless such exhibits were filed under seal); and (b) that a party may seek the written permission of the Producing party or further order of the Court with respect to dissolution or modification of any the Order. The provisions of this Order shall, absent prior written consent of both parties, continue to be binding after the conclusion of this action.

18. Nothing herein shall be deemed to waive any privilege recognized by law, or shall be deemed an admission as to the admissibility in evidence of any facts or documents revealed in the course of disclosure.

19. Within sixty (60) days after the final termination of this litigation by settlement or exhaustion of all appeals, all Confidential Information produced or designated and all reproductions thereof, shall be returned to the Producing Party or shall be destroyed, at the option of the Producing Party. In the event that any party chooses to destroy physical objects and documents, such party shall certify in writing within sixty (60) days of the final termination of this litigation that it has undertaken its best efforts to destroy such physical objects and documents, and that such physical objects and documents have been

destroyed to the best of its knowledge. Notwithstanding anything to the contrary, counsel of record for the parties may retain one copy of documents constituting work product, a copy of pleadings, motion papers, discovery responses, deposition transcripts and deposition and trial exhibits. This Order shall not be interpreted in a manner that would violate any applicable cannons of ethics or codes of professional responsibility. Nothing in this Order shall prohibit or interfere with the ability of counsel for any party, or of experts specially retained for this case, to represent any individual, corporation, or other entity adverse to any party or its affiliate(s) in connection with any other matters.

20. This Order may be changed by further order of this Court, and is without prejudice to the rights of a party to move for relief from any of its provisions, or to seek or agree to different or additional protection for any particular material or information.

EXHIBIT "A"

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION
---------------------------------------X

,

Plaintiff,

-against-

Index No.
AGREEMENT WITH RESPECT TO CONFIDENTIAL MATERIAL

,

Defendant.
---------------------------------------X

I, , state that:

1. My address is____.

2. My present employer is ____.

3. My present occupation or job description is _____________________.

4. I have received a copy of the Order for the Production and Exchange of CONFIDENTIAL INFORMATION (the "Order") entered in the above-entitled action on______________________________.

5. I have carefully read and understand the provisions of the Order.

6. I will comply with all of the provisions of the Order.

7. I will hold in confidence, will not disclose to anyone not qualified under the Order, and will use only for purposes of this action, any Confidential Information that is disclosed tome.

8. I will return all Confidential Information that comes into my possession, and documents or things that I have prepared relating thereto, to counsel for the party by whom I am employed or retained, or to counsel from whom I received the Confidential Information.

9. I hereby submit to the jurisdiction of this court for the purpose of enforcement of the Order in this action.

Dated:

FILED
APR 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

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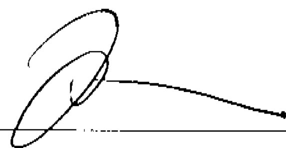
This constitutes the decision and order of this court.

Dated: April 20, 2009



J.S.C.