

Mun Sang Suk v Lee

2009 NY Slip Op 31368(U)

June 12, 2009

Supreme Court, Nassau County

Docket Number: 018953-008

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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**MUN SANG SUK, YEUNG OK SUK and
552 W. 24th ST. ASSOCIATES, INC.,**

**TRIAL/IAS PART: 25
NASSAU COUNTY**

Plaintiffs,

-against-

**DANIEL LEE, PINE VILLAGE GROUP CORP.,
PARADIGM CREDIT CORP., ROOSEVELT
AVENUE CORP., YOUNG SOOK YOO, S&C
INVESTORS LLC and DENNIS A. HERMAN,**

**Index No: 018953-008
Motion Seq. Nos: 1, 2 & 3
Submission Dates:
Mot. Seq. #s 1 & 2: 5/8/09
Mot. Seq. # 3: 5/13/09**

Defendants.

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Papers Read on this Motion:

- Notice of Motion, Affirmation in Support,**
- Affidavit in Support and Exhibits.....X**
- Defendants' Memorandum of Law.....X**
- Notice of Cross Motion, Affidavit in Opposition/Support and Exhibit...X**
- Plaintiffs' Memorandum of Law.....X**
- Reply Affirmation and Exhibits.....X**
- Reply Memorandum of Law.....X**
- Notice of Motion, Affirmation in Support,**
- Affidavit in Support and Exhibits.....X**
- Affirmation in Opposition and Exhibit.....X**
- Reply Affirmation in Further Support.....X**
- Reply Memorandum of Law in Further Support.....X**
- Letters dated May 19, May 20 and May 21, 2009.....X¹**

¹ Counsel for Plaintiffs and Defendants sent these letters to the Court regarding an alleged typographical error in paragraph 6 of Plaintiffs' Reply Affirmation in Further Support.

This matter is before the Court on the a) motion filed by Defendants Paradigm Credit Corp. (“Paradigm”), S&C Investors LLC (“S&C”), and Dennis A. Herman (“Herman”) on December 5, 2008 and submitted before this Court on May 8, 2009,² for an Order, pursuant to CPLR §§ 3211(a)(1), (5), (7) and 3016(b), dismissing the Plaintiffs’ amended complaint (“Complaint”), b) cross motion filed by Plaintiffs on January 7, 2009 and submitted before this Court on May 8, 2009, for an Order, *inter alia*, pursuant to CPLR § 3211(a)(4) to dismiss the foreclosure action that the Defendants commenced in the Supreme Court of New York County or, alternatively, to consolidate the actions and direct that the actions proceed in this Court, and c) motion filed by Plaintiffs on February 18, 2009 and submitted before this Court on May 13, 2009, for leave to amend the Complaint to add 552 W. 24th LLC as an additional plaintiff in this action.

For the reasons set forth below, the Court: 1) grants the motion of Defendants Paradigm, S&C and Herman to dismiss the Complaint (Motion Sequence # 1) and dismisses the Complaint in its entirety as to those Defendants; 2) denies, as moot, Plaintiffs’ cross motion (Motion Sequence # 2), in light of the Court’s dismissal of the Complaint; and 3) denies, as moot, Plaintiffs’ motion for leave to amend the Complaint, in light of the Court’s dismissal of the Complaint.

BACKGROUND

A. Relief Sought

Defendants Paradigm Credit Corp., S&C Investors LLC, and Dennis A. Herman move for an Order, pursuant to CPLR §§ 3211(a)(1), (5), (7) and 3016(b), dismissing the Plaintiffs’ Amended Complaint.

Plaintiffs Mun Sang Suk, Yeung Ok Suk, and 552 W. 24th St. Associates, Inc. cross move for an Order, pursuant to CPLR § 3211(a)(4), dismissing a related action commenced in Supreme Court New York County, titled *Paradigm Credit Corp., S&C Investors, LLC, and Dennis A. Herman v. Pine Village Group Corp., Young Sook Yoo, New York State Department of Taxation and Finance, Mun Sang Suk, Yeung Ok Suk, 552 W. 24th St. Associates, Inc., New York City Department of Environmental Protection (DEP), et. al.*, Index No.: 603163/08, or

² This Court assumed responsibility for this case on May 8, 2009.

alternatively, for an Order, pursuant to CPLR § 602(b), removing said New York County action to Nassau County, and consolidating it for all purposes with this pending Nassau County matter.

Plaintiffs also move for an Order, pursuant to CPLR § 3025(b), permitting them to amend their Complaint to add 552 W. 24th LLC as a plaintiff in this action.

B. The Parties' History

This action involves the development of a condominium building on a property that the Plaintiffs originally owned. Plaintiffs Mun Sang Suk ("M. Suk"), Yeung Ok Suk ("Y. Suk") (collectively referred to herein after as "the Suks") and 552 W. 24th St. Associates, Inc. ("552 Associates") seek, *inter alia*, to void the conveyance of the property located at 552-554 W. 24th Street, New York, New York (hereinafter referred to as "the Property") to Defendant Pine Village Group Corp. ("Pine Village") and to void the Loan Assumption Agreement which provides for a Consolidated Mortgage, dated May 20, 2008, securing Defendant Paradigm Credit Corp.'s ("Paradigm's") \$6,500,000 loan to Pine Village. According to the Complaint, Plaintiff 552 Associates conveyed the Property to Pine Village, an entity controlled by Defendant Daniel Lee ("Lee"). Plaintiffs now seek, *inter alia*, to void the conveyance as well as Paradigm's mortgage now encumbering the Property.

The Complaint alleges the following underlying facts, which the Court must accept as true. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977) (motion made pursuant to CPLR § 3211 requires the court to accept as true the allegations of the complaint):

Plaintiffs Mun Sang Suk and Yeung Ok Suk are husband and wife. The Suks are the sole shareholders of Plaintiff 552 W. 24th St. Associates, Inc. The sole asset of 552 Associates is a parcel of real property located in Manhattan, New York with a street address of 552-554 W. 24th Street, New York, New York. The Suks wanted to develop the Property by adding a condominium building. However, they lacked the expertise in real estate to develop the Property on their own.

Defendant Daniel Lee, who is apparently well known in the Korean American community, is a real estate developer and investor. He is also the principal of Defendant Roosevelt Avenue Corp. ("Roosevelt"), a New York corporation. The Suks advised Lee of their desire to develop the Property. Lee proposed that he purchase the stock of 552 Associates from the Suks and that, as part of the consideration of the stock sale, the Suks would take title to the

first two floors of the condominium building. Plaintiffs claim that the total agreed-upon consideration for the transaction was \$18 million with the condominium units to be conveyed upon the completion of the construction. To memorialize the transaction, the Suks, 552 Associates and Daniel Lee executed a series of documents including:

1. Stock Purchase Agreement: Dated January 24, 2008. Pursuant to this Agreement, the Suks agreed to sell 200 shares of issued and outstanding capital stock in 552 Associates to Lee for the sum of \$8 million. It was agreed that Lee would pay the \$8 million price by:
 - (1) assuming an existing \$5 million mortgage on the Property;
 - (2) paying \$1 million at closing; and
 - (3) making two installments of \$1 million each, the first due on March 31, 2008, and the second due on June 1, 2008.
2. Loan Agreement: Dated January 28, 2008. Pursuant to this Agreement, the Suks agreed to lend Lee and 552 Associates \$10 million for the sole purpose of constructing and developing the condominium building (the "Loan"). Upon completion of the condominium building, in lieu of repayment of the principal amount of the loan, Lee and 552 Associates were obligated to convey to the Suks the first two floors of the condominium building.
3. Promissory Note: The Loan Agreement was accompanied by a Promissory Note in the total principal amount of \$960,000.00. Pursuant to the Loan Agreement and the Promissory Note, Lee and 552 Associates were obligated to pay to the Suks \$40,000.00 per month during the period during which the condominium building was under construction and until title was conveyed to the first two floors of the condominium building.
4. and 5. Security Agreement and Stock Pledge Agreement: The obligations under the Loan Agreement and the Stock Purchase Agreement were secured by a Security Agreement and a Stock Pledge Agreement. Pursuant to these agreements, the stock and all the assets of 552 Associates (namely the Property) would be returned to the Suks if Lee defaulted on his obligations.

Plaintiffs allege that Lee failed to make the payments he was required to make. Specifically, they claim that Lee paid only \$300,000.00 of the \$1 million installment that was to be paid on March 31, 2008. Further, Plaintiffs claim that Lee also advised them that he would be unable to pay the \$1 million installment due on June 1, 2008. Plaintiffs also assert that Lee was unable to obtain the requisite construction financing and thus could not commence construction of the condominium building.

Plaintiffs allege that in April 2008, Defendant Paradigm Credit Corp., a New York corporation, together with Lee, approached the Suks and allegedly represented to them that Paradigm was willing to extend to Lee the interim financing to pursue the development of the Property. Plaintiffs allege that Paradigm advised them that, in order to obtain the interim financing, the transaction had to be changed from a Stock Purchase Agreement to a conveyance from 552 Associates to a new entity that Lee had formed. That entity was Defendant Pine Village Group Corp. That is, 552 Associates would convey the Property (not its stock) to Defendant Pine Village, whose principal was Lee.

Plaintiffs allege that Lee and Paradigm advised them that the transaction needed to be changed in name only for Paradigm's financing purposes. Plaintiffs claim that Lee and Paradigm represented to them that all other aspects of the transaction would remain the same; that is, the Suks would be fully compensated pursuant to the terms of the Stock Purchase Agreement and Loan Agreement. Plaintiffs claim that, based upon the representations of Lee and Paradigm, and without understanding the meaning and intent of the documents, M. Suk, as president of 552 Associates, signed an Agreement for Purchase and Sale as well as a Bargain and Sale Deed dated May 20, 2008. Notwithstanding the fact that the Suks would be entitled to \$18 million pursuant to the Loan Agreement and the Stock Purchase Agreement, the sole consideration for the Bargain and Sale Deed was \$5 million, which Pine Village would pay by assuming the \$5 million mortgage. Plaintiffs allege that, were it not for the representations that Lee and Paradigm made to Plaintiffs, they would not have entered into the Loan Assumption Agreement on May 20, 2008.

The Loan Assumption Agreement represents Paradigm's agreement to provide a \$6.5 million mortgage loan. The Loan Assumption Agreement, dated May 20, 2008, was entered into between Pine Village as "Borrower" and Paradigm as "Lender." 552 Associates was referred to

as the "Prior Owner" and the Suks were referred to as the "Prior Guarantor." Collectively, 552 Associates and the Suks were referred to as the "Original Borrowers." Daniel Lee was identified as the "New Guarantor."

Pursuant to the Loan Assumption Agreement, as of May 20, 2008, the principal balance outstanding under the Notes - \$4,960,679.39 - and the Gap Note were consolidated into an outstanding principal indebtedness of \$6,500,000.00. Thus, Pine Village gave this consolidated mortgage to Paradigm and, ultimately, Pine Village acquired title to the Property and also received these mortgage proceeds. The loan was guaranteed by Pine Village's principal, Daniel Lee. Of this amount (\$6.5 million), \$4,960,679.39, went to satisfy several pre-existing mortgage loans that Plaintiffs had incurred. By signing the Loan Assumption Agreement, Plaintiffs also agreed to release all claims in favor of the moving Defendants herein - Paradigm, S&C Investors LLC ("S&C") and Dennis A. Herman ("Herman").³ Specifically, the "Release of Claims" paragraph of the Loan Assumption Agreement states as follows:

5. **Release of Claims.** Prior Owner, Prior Guarantor, Borrower and New Guarantor (individually, a "Borrower Party" and collectively, the "Borrower Parties"), hereby jointly and severally, unconditionally and irrevocably, finally and completely RELEASE AND FOREVER DISCHARGE Lender, and Lender's respective successors, assigns, affiliates, subsidiaries, parents, officers, shareholders, directors, employees, attorneys and agents, past, present and future (collectively and individually, "Lender Parties"), of and from any and all claims, controversies, disputes, liabilities, obligations, demands, damages, debts, liens, actions and causes of action of any and every nature whatsoever, known or unknown, whether at law, by statute or in equity, in contract or in tort, under state of federal jurisdiction, and whether or not the economic effects of such alleged matters arise or are discovered in the future, which Borrower Parties have as of the Effective Date or may claim to have against Lender Parties arising out of or with respect to any and all transactions relating the Loan, the Prior Owner's Loan Documents or the Loan Documents occurring on or before the effective Date, including any loss, cost or damage of any kind or character arising out of or in any way connected with or in any way resulting from the acts, actions or omissions of Lender Parties occurring on or before the Effective Date. The foregoing release is intended to be, and is, a full, complete and general release in favor of Lender Parties with respect to all claims, demands, actions, causes of action and other matters described therein. . . Borrower Parties understand and agree that the foregoing general release is in consideration for the agreements of

³ Defendants, S&C and Herman were assigned fractional interests in Paradigm's mortgage, as discussed *infra*.

Lender contained herein and that they will receive no further consideration for such release. . .

Based upon this Loan Assumption Agreement, Plaintiffs claim that Lee received an additional \$1.5 million in cash over and above the existing \$5 million mortgage. However, Plaintiffs allege that, at the closing on May 20, 2008, Paradigm did not disburse \$500,000.00 of the \$1.5 million. Rather, according to the Plaintiffs, Paradigm disbursed to Lee \$1 million (less Paradigm's fees of approximately \$300,000.00 for a total payment of approximately \$700,000.00), which they claim was clearly not sufficient to commence construction of the condominium building.

Currently, Paradigm is the holder of a \$6.5 million mortgage against the Property. Defendants S&C Investors, LLC and Dennis A. Herman were assigned fractional interests in Paradigm's mortgage. They have a participatory interest in the mortgage given by Paradigm. In August 2008, Defendants Pine Village and Daniel Lee defaulted on the Paradigm loan.

On October 16, 2008, Plaintiffs commenced this action and filed a Notice of Pendency against Daniel Lee, Pine Village and Paradigm seeking, *inter alia*, a) to set aside certain loan and mortgage transfers; and b) quiet title in the Property. The Suks sought to set aside, *inter alia*, the Consolidated Mortgage, as well as the companion Mortgage Consolidation, Modification and Extension Agreement dated May 20, 2008, that Pine Village and Paradigm entered.

Thereafter, following commencement of this action, on October 21, 2008, Roosevelt Avenue Corp. (whose principal is Lee), gave a mortgage to Defendant Young Sook Yoo. Yoo loaned \$3 million to Roosevelt which was secured by a mortgage on 150-24 Northern Boulevard, Flushing, New York 11354 property and by an alleged collateral mortgage given by Pine Village to Lee on the subject Property. The collateral mortgage that Pine Village gave to Yoo (in return for \$3 million from Yoo) is a second mortgage on the subject Property.

Subsequently, on November 4, 2008, the Plaintiffs amended their summons and complaint in order to interpose additional claims against Yoo based upon the filing of this collateral mortgage. The amended complaint ("Complaint") also named additional Defendants, including S&C and Herman, who received participatory interests in the Consolidated Mortgage from Paradigm. The Suks also asserted new causes of action all relating to the Property and the loan documents against the newly added Defendants.

On November 6, 2008, Paradigm, S&C and Herman (collectively referred to hereinafter as the "Paradigm Defendants"), commenced an action in New York County Supreme Court, titled *Paradigm Credit Corp., S&C Investors, LLC, and Dennis A. Herman v. Pine Village Group Corp., Young Sook Yoo, New York State Department of Taxation and Finance, Mun Sang Suk, Yeung Ok Suk, 552 W. 24th St. Associates, Inc., New York City Department of Environmental Protection (DEP), et. al.*, Index No.: 603163/08, to foreclose the Consolidated Mortgage on the Property. The Suks counterclaimed in the New York County action alleging the same claims as advanced herein.

Thereafter, on November 25, 2008, the Paradigm Defendants moved to dismiss the Suks' Complaint. The Suks cross moved, pursuant to CPLR § 3211(a)(4), to dismiss the New York County Action since there is a prior action pending, or in the alternative, pursuant to CPLR § 602(b), to remove the New York County Action to Nassau County, and consolidate it with this Action, in Nassau County, for all purposes.

Subsequently, on December 5, 2008, Plaintiffs - the Suks and 552 Associates - entered into a Settlement Agreement whereby they discontinued their action against Daniel Lee, Pine Village Group Corp., Roosevelt Avenue Corp., and Young Sook Yoo. Pursuant to this Settlement Agreement, these settling Defendants have released all interest in the Property to the Suks' designee - a limited liability company named 552 W. 24th LLC. ("552 LLC"). Notably, 552 LLC was not created until November 24, 2008, after commencement of this action. The Settlement Agreement states in pertinent part as follows:

2. RECONVEYANCE OF PROPERTY. Lee will cause the Property to be contemporaneously re-conveyed to the Suks' designee, 552 W 24th LLC ("Transferee") by Pine Village, subject to a state of title acceptable to the Plaintiffs and Transferee. The purchase price is deemed to be \$5,000,000.00 consisting of the mortgages encumbering the Property (presently approximately \$9.5 million dollars consisting of the Fire Mortgage (defined below) and the \$3,000,000.00 Collateral Mortgage whose propriety is expressly disclaimed and denied by Plaintiffs) less Pine Village's note to the Suks and/or 552 for 4,500,000.00 in the annexed form (the "Note"). The Note reflects the claim of the Collateral Mortgage to the Property of \$3,000,000.00 and other liabilities of Pine Village to the Suks and/or 552 [Associates]. [Settling] Defendants will also deliver a Note to the Suks for \$151,250.00 representing the transfer taxes payable in connection with the reconveyance of the Property to the transferee which the Suks and/or 552 [Associates] have agreed to lend to Pine Village. Plaintiffs and Transferee expressly deny the propriety of the recording of the Collateral

Mortgage, the validity of the purported lien of the Collateral Mortgage and expressly reserve all claims, rights and defenses with respect to the Collateral Mortgage and Transferee's acceptance of a Deed from Pine Village Group Corp. will not be deemed its consent to, or ratification of, the Collateral Mortgage. Transferee will accept title subject to all the obligations and with all the rights and benefits relating to the existing consolidated first mortgage in the originally consolidated principal sum of \$6,500,000.00 (the "First Mortgage") held by Paradigm Credit Corp., S&C Investors LLC and Dennis A. Herman (collectively, "Paradigm"). Transferee will indemnify and hold Pine Village Group Corp. and Lee harmless from any non-default judgment secured by Paradigm for principal and interest referable to the First Mortgage, but not from the cost of defending same (but the foregoing is not intended to create any rights in Paradigm or any other third parties and the parties expressly intend that this Agreement is not to benefit any person or entity other than the parties).
(emphasis added)

Thus, the Suks have settled with Lee, Pine Village, Roosevelt and Yoo in an agreement that provides that the Property has now been returned to the Suks' newly formed holding company, 552 LLC. The Suks' claims against the Paradigm Defendants, however, remain. The Plaintiffs now move to amend the Complaint to add their holding company, 552 LLC, as an additional plaintiff.

C. The Parties' Positions

The Paradigm Defendants seek an Order dismissing the Complaint, 1) pursuant to CPLR §§ 3211(a)(1) and (5), based upon the written release of claims executed by Plaintiffs, 2) pursuant to CPLR § 3211(a)(7), on the ground that the Complaint fails to state a claim upon which relief may be granted, and 3) pursuant to CPLR § 3016(b) on the ground that Plaintiffs fail to plead with required particularity the circumstances constituting the alleged wrong attributed to Paradigm.

The Paradigm Defendants argue that the Complaint lacks merit as to Paradigm, noting that Paradigm was not a party to the transactions between Plaintiffs and Lee, whom Plaintiffs initially (prior to the Settlement Agreement) accused of fraudulently inducing Plaintiffs to transfer the subject Property to Lee's corporation, Pine Village. Defendants submit that Paradigm is a *bona fide* secured lender, having loaned \$6.5 million and obtained a mortgage lien in that amount, \$5 million of which was used to pay off Plaintiffs' pre-existing mortgage debt. Defendants submit that the Complaint ignores the language of the operational agreements, in an

attempt unjustifiably to involve Paradigm in Plaintiffs' dispute with Lee. The Paradigm Defendants maintain, further, that all of the claims are precluded by the release contained in the Loan Assumption Agreement dated May 20, 2008, which the Plaintiffs executed before a notary public. Defendants further maintain that Plaintiffs' claims are legally insufficient because the Complaint does not properly plead the elements of fraud, including justifiable reliance. They argue that the alleged misrepresentations are belied by the terms of the agreements that Plaintiffs executed, and Plaintiffs lack the necessary status to sue under either Article 15 of the Real Property Actions and Proceedings Law or the Debtor and Creditor Law, as they are not a mortgagee, a contract vendee or a creditor.

Plaintiffs oppose Defendants' motion to dismiss, submitting that Plaintiffs have properly stated causes of action against Paradigm, based on their allegations that Plaintiffs were fraudulently induced into, *inter alia*, selling the Property to Pine Village and entering into the Loan Assumption Agreement. Plaintiffs argue, alternatively, that if the Court determines that Plaintiffs have not sufficiently pled the causes of action in the Complaint, the Court should permit Plaintiffs to complete discovery to obtain information from Paradigm that would permit Plaintiff to amplify the allegations in the Complaint.⁴

RULING OF THE COURT

A. Paradigm Defendants' Motion to Dismiss (Seq. 001)

1. Relevant Procedural Provisions

CPLR § 3211(a)(1) permits a defendant to seek and obtain a dismissal of one or more causes of action asserted against it on the ground that the defendant has a defense founded upon documentary evidence. When a motion to dismiss based upon documentary evidence is made pursuant to CPLR § 3211(a)(1), the defendant must show that "the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitely disposes of the plaintiff's claim." *Unadilla Silo Co. v. Ernst & Young*, 234 A.D.2d 754 (3d Dept. 1996); *see also Leon v. Martinez*, 84 N.Y.2d 83 (1994); *Sheridan v. Town of Orangetown*, 21 A.D.3d 365 (2d Dept. 2005).

⁴ In light of the Court's decision to grant Defendants' motion to dismiss Plaintiffs' Complaint, rendering motion sequence numbers 2 and 3 moot, the Court has not outlined the parties' positions with respect to motion sequence numbers 2 and 3.

CPLR § 3211(a)(5) permits a defendant to seek and obtain a dismissal of one or more causes of action asserted against it on the ground that the cause of action is barred by the statute of limitations. That statute further allows a party to move for dismissal on the ground that the claim has been released. *Koster v. Ketchum Communications*, 204 A.D.2d 280 (2d Dept. 1994).

CPLR § 3211(a)(7) permits a defendant to seek dismissal of a cause of action asserted against it on the basis that the plaintiff has failed to state a cause of action in the pleading. In deciding a motion made pursuant to CPLR § 3211(a)(7), the court must determine whether the pleader has a cognizable cause of action. *Leon v. Martinez, supra; Well v. Yeshiva Rambam*, 300 A.D.2d 580 (2d Dept. 2002). In so doing, the complaint must be liberally construed in the light most favorable to the plaintiff, and all allegations must be accepted as true. *511 West 232nd Street Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002); *Well v. Yeshiva Rambam, supra; Morad v. Morad*, 27 A.D.3d 626 (2d Dept. 2006). If the court determines, from the facts alleged in the complaint and the inferences which can be drawn from the opposition to the motion, that the pleader has a cognizable cause of action, it must deny the motion to dismiss. *Sokoloff v. Harriman Estates Development Corp.*, 96 N.Y.2d 409 (2001); *Stucklen v. Kabro Assocs.*, 18 A.D.3d 461 (2d Dept. 2005). On the other hand, “allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration.” *Maas v. Cornell Univ.*, 94 N.Y.2d 87, 91-92 (1999), quoting *Gertler v. Goodgold*, 107 A.D.2d 481, 485 (1st Dept. 1985), *aff’d*, 66 N.Y.2d 946 (1985); see also *Salvatore v. Kumar*, 45 A.D.3d 560, 563 (2d Dept. 2007).

2. The Documentary Evidence Precludes Plaintiffs’ Claims

The documentary evidence submitted herein, including the Settlement Agreement, establishes that on December 5, 2008, Plaintiffs settled their claims with Pine Village and Lee, by execution of an agreement, pursuant to which Pine Village reconveyed the Property to Plaintiffs’ designee. Plaintiffs concede in their memorandum of law that, because of the reconveyance “they are not now attempting to set aside the conveyance...” Thus, insofar as the Plaintiffs’ complaint seeks to set aside the conveyance of the Property, the Court denies that application as moot.

Moreover, the Settlement Agreement precludes Plaintiffs from seeking to void the Paradigm mortgage. Under the Settlement Agreement, Plaintiffs agreed that their designee “will

accept title subject to all the obligations and with all the rights and benefits relating to the existing consolidated first mortgage in the originally consolidated principal sum of \$6,500,000.00 (the 'First Mortgage') held by Paradigm Credit Corp., S&C Investors LLC and Dennis A. Herman (collectively 'Paradigm')." The assumption of the Paradigm mortgage constitutes the very consideration recited in the Settlement Agreement to support the purchase of the Property. The express assumption of the Paradigm mortgage under the Settlement Agreement is contrasted with Plaintiffs' treatment of the second mortgage of Yoo which is defined in the Settlement Agreement as the "Collateral Mortgage." Plaintiffs "expressly den[ied] the propriety of the recording," and "the validity of the purported lien." The Settlement Agreement also provides that Plaintiffs "expressly reserve[d] all claims, rights and defenses with respect to the Collateral Mortgage and Transferee's acceptance of a Deed from Pine Village Group Corp., will not be deemed its consent to, or ratification of, the Collateral Mortgage." As to the Paradigm mortgage, in contrast, the Settlement Agreement contains no such language of disavowal; rather, the transfer is expressly accepted "subject to all the obligations...relating to the [Paradigm mortgage]." Accordingly, the evidence before the Court establishes that the Plaintiffs expressly ratified the Paradigm mortgage and are now precluded from seeking to set it aside.

Furthermore, additional documentary evidence submitted by the Defendants in support of their motion to dismiss also confirms that Plaintiffs 1) released all claims as against Paradigm; 2) acknowledged that all prior agreements were superceded; and 3) were represented by counsel. Specifically, the Loan Assumption Agreement, which was executed by M. Suk and Y. Suk individually, and on behalf of 552 Associates, reflects that Plaintiffs executed a full release of claims in favor of Paradigm and its "assigns" which includes Defendants S&C and Herman, by which they are bound. Thus, the Court dismisses those claims as they are "utterly refuted by documentary evidence" - i.e., the Release in the Loan Assumption Agreement. *Tratoros Constr., Inc. v. New York City Housing Auth.*, 34 A.D.3d 451, 452 (2d Dept. 2006).

The Court rejects Plaintiffs' argument that they did not read or understand the Loan Assumption Agreement, and the Release contained therein. The Suks' claim - that they are "non-native English speakers" and "relied on defendants' representations with respect to the meaning and intent of the documents they signed" - does not excuse their alleged failure to read

and understand the documents they signed and does not render the Release unenforceable. *Pimpinello v. Switt & Company, Inc.*, 253 N.Y. 159 (1930). A lack of familiarity with the English language is not a valid excuse for failing to take prudent steps to understand the document before signing, even where, as here, it is alleged that the terms of the agreement were misrepresented. *Chemical Bank v. Geronimo Auto Parts Corp.*, 225 A.D.2d 461 (1st Dept. 1996) (party claiming misrepresentations by opposing party and unfamiliarity with English language bound by agreement in light of failure to seek assistance); *Son Fong Lum v. Antonelli*, 102 A.D.2d 258, 263 (2d Dept. 1984) (plaintiff claiming limited ability to read bound by her mark upon deed conveying property to defendants because plaintiff could have asked someone to read document to her).

Plaintiffs' claim that they did not understand the transactions they were entering into is further undermined by the documentary evidence reflecting that the Suks were represented by counsel at all relevant times. The Agreement for Purchase and Sale unequivocally refutes the Suks' claim that they did not have counsel when they entered into the restructured transaction with Lee. Specifically, the Agreement for Purchase and Sale, which provided for the transfer of the Property from 552 Associates to Pine Village for \$5 million was signed by M. Suk, and lists Young Min Kim, Esq. 650 E. Palisade Avenue, Suite 7, Englewood Cliffs, New Jersey 07632, as the attorney for 552 Associates. Mr. Kim was even appointed as the escrow agent with regard to the receipt of the \$100,000 contract deposit. Moreover, as reflected by the sign-in sheet at the closing of the Paradigm mortgage loan in May 2008, the Suks appeared with counsel at the closing.⁵

Further, Plaintiffs' allegations regarding the alleged inadequacy of consideration also do not, as a matter of law, invalidate the Release because a written release cannot be invalid for lack of consideration. General Obligations Law §15-303; *Touloumis v. Chalem*, 156 A.D.2d 230 (1st Dept. 1989); *Pratt Plumbing & Heating v. Mastropole*, 68 A.D.2d 973 (3d Dept. 1979). Moreover, the Court notes that, in the Loan Assumption Agreement, Plaintiffs confirmed that the

⁵ Of course, even if M. Suk, who claims that this attorney actually represented Lee, was not represented by counsel, that fact has no effect on the validity of the Release, as a failure to consult with an attorney does not preclude enforcement of the agreement. *Skluth v. United Mech. & Mfr., Inc.*, 163 A.D.2d 104 (1st Dept 1990).

agreement “contains the entire Agreement between the parties hereto with respect to the modification of the Loan and fully supercedes all prior agreements and understanding between the parties pertaining to such subject matter.” The Agreement for Purchase and Sale, dated April 10, 2008, also contains the Suks’ express acknowledgment that it constituted the entire agreement of the parties and “supercedes any and all prior agreements, arrangements, and understandings among the Parties.” Thus, Plaintiffs’ allegations in the Complaint that Paradigm represented to them that Plaintiffs’ prior Stock Purchase Agreement with Lee was not superceded are undermined by the very language of these agreements.

C. The Complaint Fails to State a Cause of Action

The complaint also fails to state a cause of action, and thus must be dismissed under CPLR § 3211(a)(7). Even assuming, for the purposes of this motion, the truth of the allegations of the Complaint, and affording the Plaintiffs the benefit of all reasonable inferences (*Prudential-Bache Securities, Inc. v. Citibank, N.A.*, 73 N.Y.2d 263 (1989)), this Court finds that the Complaint is also legally insufficient on all causes of action as against the Paradigm Defendants. For the sake of clarity, this Court will address each cause of action separately and in turn.

1. First Cause of Action (Fraud)

In order to establish a cause of action for fraud, a plaintiff must plead the following elements: (1) a false representation, (2) of material fact, (3) with intent to defraud, (4) reasonable reliance on the representation, and (5) causing damages to the plaintiff. *Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413 (1996). CPLR § 3016(b) provides that an action for fraud must be pled “with particularity, including specific dates and items, if necessary and insofar as practicable.” Conclusory allegations of fraud will not be sufficient. CPLR § 3016(b); *Dumas v. Fiorito*, 13 A.D.3d 332 (2d Dept. 2004); *Sargiss v. Magarelli*, 50 A.D.3d 1117 (2d Dept. 2008). However, it is sufficient to plead facts that would allow a reasonable inference of the alleged fraud. *Pludeman v. Northern Leasing Systems, Inc.* 10 N.Y.3d 486 (2008).

Here, the fraud claims are legally insufficient as Plaintiffs have failed to plead the elements with the requisite particularity. At the outset, a party cannot claim to have been misled where the misrepresentation could have been discovered through the exercise of due diligence. *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317 (1959); *Cohen v. Cerier*, 243 A.D.2d 670 (2d

Dept. 1997). The very documents that Plaintiffs executed establish that they could have readily discovered the owner of the Property.

Second, to sustain a fraud claim, a plaintiff must plead a basis to show that he justifiably relied on the alleged misrepresentations. *Pope v. Saget*, 29 A.D.3d 437, 441 (1st Dept. 2006). Plaintiffs have not made this showing. The Agreement for Purchase and Sale and the Bargain and Sale Deed specifically provided for the transfer of the Property from 552 Associates to Pine Village. The Agreement for the Purchase and Sale and the Loan Assumption Agreement also provided that these agreements superseded any prior agreement between or among Plaintiffs and Lee. This undercuts Plaintiffs' claim that they relied on the representation by Paradigm that, notwithstanding the transfer of the Property, they would have rights to the property or that any prior agreement Plaintiffs may have had with Lee, including with respect to the alleged conveyance of the first two floors of the condominium building when built, were still extant. Finally, to the extent that Plaintiffs' alleged lack of understanding is attributable to their own failure to take any prudent step to understand the agreements, such failure cannot establish justifiable reliance. *Chemical Bank v. Geronimo Auto Parts Corp.*, *supra*; *Son Fong Lum v. Antonelli*, 102 A.D.2d 258, 263 (2d Dept. 1984).

Plaintiffs also fail to attribute any material misrepresentation of fact to Paradigm specifically. Indeed, Plaintiffs make broad stroke allegations lumping Paradigm with "Defendants" without attributing any particular statement to Paradigm or its representatives. Paradigm's interest was as a lender, not a developer, and it is therefore illogical that Paradigm would have stated that it would "develop the property" or "re-convey two floors" of the condominium development (*Complaint*, ¶46[a]). Any allegation in this regard appears likely to be attributed to Lee who, Plaintiffs allege, even prior to the January 24, 2008 Stock Purchase Agreement, made this representation to them. Plaintiffs' allegations that the "Defendants falsely represented the nature and significance of certain documents presented to plaintiffs for signature" and "Defendants represented that the documents signed by plaintiffs would help Plaintiffs accomplish their goal of developing the Property" (*Complaint*, ¶¶ 46(c), (e)) are also insufficient in pleading a claim for fraud as against the Paradigm Defendants. The Complaint simply fails to differentiate between Lee and Paradigm and fails to identify, who, on behalf of Paradigm, made the statement, or the circumstances under which the statement was made.

Zanett Laboratories, Ltd. v. Maslow, 29 A.D.3d 495 (1st Dept. 2006).

Finally, the Complaint does not allege that Plaintiffs suffered damages as a result of their reliance on any representation by Paradigm. Paradigm did exactly what it committed to do - provided \$6.5 million in mortgage financing, \$5 million of which was applied to satisfy pre-existing mortgages that the Plaintiffs were obligated to pay. Nothing Paradigm said or did caused any injury to Plaintiffs.

Plaintiffs' settlement with Lee further establishes that Plaintiffs cannot recover any damages from the Defendants. Under General Obligations Law § 15-108, which applies to fraud and intentional tortfeasors, any amount that can be recovered from Paradigm must now be reduced by the greater of Lee's equitable share of the liability or the \$5 million consideration recited in the Settlement Agreement. *Board of Education v. Sargeant, Webster, Crenshaw & Folley*, 71 N.Y.2d 21 (1987); *Raquet v. Braun*, 90 N.Y.2d 177 (1997).

Moreover, Plaintiffs' allegation that the "Defendants intentionally set up the transaction so that it would be impossible for plaintiffs to recover the Property upon Lee's default" (*Complaint*, ¶46(e)), fails because it does not allege the (mis)representation of any fact that any Defendant made to Plaintiffs. Plaintiffs have not properly pled a fraud claim based upon an alleged omission because they do not allege any material facts that any of the Defendants intentionally concealed. *Nat'l Union Fire Insur. Co. Of Pittsburgh, P.A., v. Red Apple Group, Inc.*, 273 A.D.2d 140, 141 (1st Dept. 2000). Moreover, Plaintiffs fail to allege a relationship between Plaintiffs and Paradigm requiring any duty of disclosure. *P.T. Bank Central Asia v. ABN Amro Bank N.V.*, 301 A.D.2d 373, 376 (1st Dept. 2003).

Plaintiffs have also requested that, if the Court concludes that the Complaint is insufficient, the Plaintiffs be permitted to conduct discovery to obtain facts that, they submit, are solely within Paradigm's possession with which Plaintiffs can amplify the Complaint. The Court finds Plaintiffs' argument unavailing. Unlike the cases on which Plaintiffs rely, in which the facts concerning the fraud were "peculiarly" within a defendant's knowledge, Plaintiffs' fraud claims are not based on any fact peculiarly or solely in Paradigm's possession. On the contrary, Plaintiffs base the alleged fraud exclusively on alleged oral representations made to them by Lee and an unknown person at Paradigm. Therefore, Plaintiffs possess all of the facts concerning the alleged fraud, given that they were the recipients of the alleged oral

misrepresentations. Despite this knowledge, Plaintiffs fail even to plead the date of the alleged representations, the words that were allegedly spoken, the time and place where each representation was allegedly made, the person(s) to whom the representations were made, or any details regarding the identity or authority of this unknown person from Paradigm.

2. Second Cause of Action (Civil Conspiracy to Commit Fraud)

As there is no such cause of action, the Court concludes that dismissal of the second cause of action is appropriate. *Agostini v. Sobal*, 304 A.D.2d 395 (1st Dept. 2003). To the extent that Plaintiffs attempt to plead conspiracy as a way to connect Paradigm to the acts of Lee, the second cause of action is also insufficient. First, the Complaint does not plead the elements of fraud - including justifiable reliance - even as to Lee. Thus, there can be no valid claim based upon Paradigm's alleged assistance to Lee in commission of his fraud. *Linden v. Lloyd's Planning Service, Inc.*, 299 A.D.2d 217, 218 (1st Dept. 2002). Second, Plaintiffs fail to plead the existence of a conspiracy, as the Complaint does not allege that Paradigm knowingly agreed with Lee to engage in a common fraudulent scheme, intended to aid in the commission of any fraud by him or knowingly committed an overt act in furtherance of Lee's alleged fraudulent scheme. *Elghanian v. Harvey*, 249 A.D.2d 206, 207 (1st Dept. 1998). Accordingly, the second cause of action is legally insufficient and the Court dismisses that cause of action.

The Court notes, further, that Plaintiffs have failed to establish their right to rescind the agreements in question. To justify the intervention of equity to rescind a contract, a party must allege fraud in the inducement of the contract, failure of consideration, an inability to perform the contract after it is made, or a breach in the contract which substantially defeats the purpose thereof. *Babylon Assoc. v. County of Suffolk*, 101 A.D.2d 207, 215 (2d Dept. 1984). Here, the complaint asserts fraudulent representations as the basis for rescission. Plaintiffs sue in an action at law to recover the consideration parted with upon the fraudulent contract. Thus, Plaintiffs effectively seek to rescind the contract absolutely, asking that the "transactions [be declared] null and void" and that they be "restor[ed] [to] the ownership of the Property," in addition to seeking "actual damages." To maintain such action however, Plaintiffs must first restore, or offer to restore, to the other party whatever may have been received by them by virtue of the contract. *Vail v. Reynolds*, 118 N.Y. 297, 302-303 (1890); *see also Motor Vehicle Manufacturers Assn. of the United States, Inc. v. State of New York*, 75 N.Y.2d 175, 182-183

(1990). Plaintiffs fail to plead and allege that they returned the \$1,460,000 to Lee, or the \$6.5 million loaned by Paradigm, most of which went to satisfy their pre-existing mortgage liability. *Goldsmith v. National Container Corp.*, 287 N.Y. 438, 442 (1942); *Davis v. A. Davis & Sons, Inc.*, 267 AD691 (1st Dept. 1944). Accordingly, their actions for fraud and “conspiracy to commit fraud” may not be based upon a rescission of the contracts.

3. Third Cause of Action (Lack of Consideration)

Plaintiffs’ third cause of action seeks to void Paradigm’s mortgage based upon an alleged failure of consideration. This cause of action seeks declaratory relief declaring that the Agreement for Purchase and Sale, the Bargain and Sale Deed and the Loan Assumption Agreement are void and unenforceable on the ground of failure of consideration. However, this cause of action fails to state a claim for relief as against Paradigm because Paradigm was not a party to the transfer of title agreements between Plaintiffs and Lee. Thus, whether or not there was a failure of consideration with regard to Plaintiffs’ agreement to transfer the Property to Lee and Pine Village, those agreements do not affect Paradigm’s mortgage. Moreover, the Loan Assumption Agreement to which Paradigm is a party is supported by adequate consideration; Paradigm loaned \$6.5 million and secured a mortgage in that amount.

Furthermore, the cause of action fails because a contract is not void for failure of consideration as long as something of real value is given. *Apfel v. Prudential-Bache Securities Inc.*, 81 N.Y.2d 470, 475 (1993). The Court concludes that Plaintiffs effectively conceded that \$5 million was adequate consideration to support the repurchase of the property from Lee to Pine Village to their designee - 552 LLC - by their execution of the Settlement agreement. The Settlement Agreement expressly provides that “[t]he purchase price is deemed to be \$5 million.” Thus, Plaintiffs are now estopped from claiming that the transfer to Pine Village for \$5 million was inadequate consideration, and the Settlement Agreement constitutes an admission against interest as to the adequacy of the consideration. *Figueiredo v. New Palace Painters Supply Co., Inc.*, 39 A.D. 3d 363 (1st Dept. 2007).

4. Fourth Cause of Action (New York RPAPL, Article 15)

Plaintiffs’ fourth cause of action seeks to void the conveyance of the Property and the Paradigm mortgage under Article 15 of the Real Property Actions and Proceedings Law (“RPAPL”). The Court dismisses this cause of action because Plaintiffs lack standing to assert

the claim. Article 15 permits suits only by those with an interest in the real property. In turn, RPAPL §1501(5) defines a mortgagee and a contract vendee as one having an interest in reality. *Siess v. Rudinger*, 17 Misc. 2d 38 (Sup. Ct. New York 1959). Plaintiffs are neither a mortgagee nor a contract vendee. The Court rejects Plaintiffs' argument that they have cured this infirmity by execution of the Settlement Agreement, which makes their designee, 552 W 24th LLC, the owner of the Property. 552 LLC is not a party to this lawsuit. Plaintiffs are not the owners and the transfer to 552 LLC confers no standing upon Plaintiffs to pursue the Article 15 claim.⁶

Moreover, even if 552 LLC were a party, it would have no claim to invalidate the mortgage because it was not fraudulently induced by Paradigm to do anything. It was not created until November 24, 2008, after this lawsuit was commenced. Further, under the Settlement Agreement, it expressly accepted title to the property "subject to all obligations and with all the rights and benefits relating to the existing consolidated mortgage in the originally consolidated principal sum of \$6,500,000 (the "First Mortgage") held by Paradigm Credit Corp." Therefore, 552 LLC would have no basis to challenge a mortgage that it expressly agreed to assume and that pre-existed its purchase of the Property. Thus, the Court dismisses Plaintiffs' fourth cause of action as against Paradigm.

5. Fifth Cause of Action (Fraudulent Conveyance - New York Debtor and Creditor Law)

Plaintiffs seek to void the conveyance of the Property, as well as the Paradigm mortgage. Plaintiffs also assert that, by reason of its participation in the alleged fraud, Paradigm is personally liable for the proceeds of various agreements. Plaintiffs' arguments are unavailing.

The Court dismisses the Plaintiffs' claim for relief under the Debtor and Creditor Law ("DCL") §276. The DCL affords no rights to a grantor to avoid its own transfer. Here, Plaintiffs conveyed the Property to Pine Village. As grantors, they have no rights under the DCL, even if the transfer was without adequate consideration. *Pattison v. Pattison*, 301 N.Y. 65, 73 (1950). Further, the DCL provides no basis to void Paradigm's mortgage. The mortgage is not a conveyance of assets. *Stickler v. Ryan*, 270 A.D.2d 962 (3d Dept. 1946).

Moreover, the Settlement Agreement vitiates plaintiffs' status as a "creditor;" thus, to the extent Plaintiffs were a "creditor," they were a creditor of Lee who allegedly duped them into

⁶ The Court has denied Plaintiffs' cross motion to add 552 LLC as a plaintiff in the action. *See infra*.

transferring the Property for less than fair consideration and then further encumbered the property. However, as Plaintiffs have now settled with Lee and, as expressly provided in the Settlement Agreement, executed a general release in favor of Lee and Pine Village, they are no longer a “creditor” and have no basis to pursue the fraudulent conveyance claim.

6. Sixth Cause of Action (Fraudulent Conveyance - New York Debtor and Creditor Law)

Plaintiffs’ sixth cause of action seeks to void an unrelated collateral mortgage recorded by Defendant Yoo, and makes reference to an assignment and conveyance executed by Roosevelt, Yoo and Pine Village. As this cause of action does not address Paradigm or the other moving Defendants, the Court dismisses this cause of action as to the moving Defendants.

7. Seventh Cause of Action (Attorneys’ Fees pursuant to New York Debtor and Creditor Law §276-a)

Plaintiffs’ seventh cause of action seeks an award of attorneys’ fees under Section 276-a of the DCL. In light of the Court’s dismissal of the DCL claim against Paradigm, the Court dismisses Plaintiffs’ request for attorneys’ fees.

8. Punitive Damages

Finally, the Court strikes Plaintiffs’ prayer for punitive damages. Punitive damages are available only where (1) the defendant’s conduct is actionable as an independent tort; (2) the tortious conduct is of an egregious nature; (3) the egregious conduct is directed at the plaintiff; and (4) the conduct is part of a pattern directed at the public generally. *New York University v. Continental Insurance Co.*, 87 N.Y.2d 308, 316 (1995). Plaintiffs have failed to plead a) an independent tort, b) tortious conduct of an egregious nature, and c) that Paradigm’s conduct is part of an ongoing pattern directed at the public generally.

Based upon the foregoing, the Court grants Defendants’ motion to dismiss the Plaintiffs’ Complaint and dismisses the Complaint in its entirety.

B. Plaintiffs’ Cross Motion (Seq. 002)

In light of the Court’s dismissal of Plaintiffs’ Complaint in its entirety, the Court denies Plaintiffs’ cross motion, a) for an Order, pursuant to CPLR § 3211(a)(4), to dismiss the foreclosure action commenced by the Defendants in Supreme Court New York County or, alternatively, b) to consolidate the actions and direct that the consolidated actions proceed in Nassau County.

While the Court's dismissal of the Complaint renders Plaintiffs' application effectively moot, the Court notes further that Plaintiffs have not established a basis to dismiss or stay the foreclosure action. The subject real property is located in New York County; thus, New York County is the only county that can hear the foreclosure action. *Marine Midland Bank, N.A. v. Lake Huntington Development Group, Inc.*, 185 A.D.2d 395 (3d Dept. 1992). Further, the fact that Plaintiffs have filed counterclaims in the New York foreclosure action, asserting the same grounds for relief, based on the same facts as alleged in the Complaint herein, in effect confirms that they have consented to the New York County venue by seeking affirmative relief in that action. Finally, Plaintiffs' motion to consolidate is improperly made before this Court. This Court does not have jurisdiction over other parties, including the New York State Department of Taxation and Finance, the New York City Department of Finance, and the New York City Department of Environmental Protection, who are not parties to this action. Only the New York Supreme Court has jurisdiction over all of the parties who have a right to be heard as to the proper venue for these actions. Accordingly, the Court denies Plaintiffs' cross motion in its entirety.

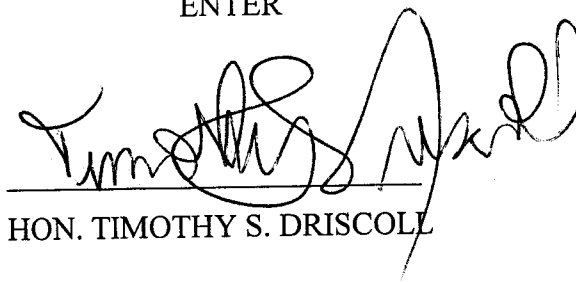
C. Plaintiffs' Motion for Leave to Amend (Seq. 003)

The Court also denies Plaintiffs' motion for leave to amend their complaint to add 552 LLC as a plaintiff in this action. In light of the Court's dismissal of the Complaint, this motion is moot. Further, as stated above, 552 LLC does not have a claim against Defendants in light of the fact that it was formed 6 months after the alleged fraud and 6 weeks after Plaintiffs commenced this litigation. In addition, 552 LLC's acceptance of the deed subject to the Consolidated Mortgage in the Settlement Agreement constituted ratification and waiver and thus its claims, if any, are barred against the Paradigm Defendants. Thus, the Court concludes that Plaintiffs' proposed amendment to add 552 LLC as a party to the litigation is palpably insufficient and totally devoid of merit. *Jacobowitz v. Leak*, 19 A.D.3d 453 (2d Dept. 2005) (trial court erred in granting defendant leave to add "patently meritless affirmative defense" related to unsupportable claim that contract contained "time is of the essence" clause). Accordingly, the Court denies Plaintiffs' motion for leave to amend their complaint.

All matters not decided herein are hereby denied.
This constitutes the decision and order of the Court.

DATED: Mineola, NY
June 12, 2009

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

JUN 17 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**