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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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MYD, LLC. ,

Plaintiff,

-against-

ALEX POLAKOV, AWNING AND SIGN FACTORY OF N.Y., INC. and LIBEN & KATZ,

Defendants.

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TRIAL/IAS PART: 25
NASSAU COUNTY

Index No: 003661-09
Motion Seq. Nos: 1, 2 & 3
Submission Date: 9/16/09

Papers Read on these Motions:

Order to Show Cause, Affidavit in Support and Exhibits.....x
Affidavit in Opposition, Affirmation in Opposition and Exhibits.....x
Letter Dated April 17, 2009 and Exhibits.....x
Notice of Motion, Affirmation and Memorandum of Law in Support and Exhibits.....x
Cross Notice of Motion, Affirmation and Memorandum of Law in Support and Exhibits.....x
Affirmation in Opposition to Defendants' Motions.....x
Reply and Exhibits.....x
Affirmation and Memorandum of Law in Reply and Exhibits.....x

This matter is before the court on 1) the Order to Show Cause filed by Plaintiff MYD, LLC on February 27, 2009, 2) the Motion filed by Defendant Liben & Katz on May 28, 2009, and 3) the Cross Motion filed by Defendants Awning and Sign Factory of N.Y., Inc. and Alex Polakov on June 2, 2009, all of which were submitted on September 16, 2009. For the reasons set forth below, the Court 1) denies Plaintiff's Order to Show Cause; 2) grants the motion of Defendant Liben & Katz and dismisses the Verified Complaint as against Defendant Liben &

Katz; and 3) grants the cross motion of Defendants Polakov and Awning and Sign Factory of N.Y., Inc. and dismisses the Verified Complaint as against Defendants Alex Polakov and Awning and Sign Factory of N.Y.

BACKGROUND

I. ORDER TO SHOW CAUSE

A. Relief Sought

In its Order to Show Cause, Plaintiff MYD, LLC ("MYD") seeks an Order enjoining Defendants Alex Polakov ("Polakov") and Awning and Sign Factory of N.Y. ("ASFNY") from competing with MYD by operating the business known as United Sign & Awning, located at 2085 New York Avenue, Huntington, New York, allegedly in violation of a prior agreement among the parties.

B. The Parties' History

In support of its Order to Show Cause, Plaintiff provides an Affidavit of Mordechei Dier ("Dier") dated January 29, 2009 in which Dier affirms the following:

He is the president of MYD, which is described in the Complaint as "a limited liability company," without further description. Dier affirms that, in or about July 2006, Dier contacted L & K, a business broker located in Brooklyn, New York, because MYD was interested in purchasing a business. Polakov and ASFNY (collectively "Sellers") had listed their company with L & K as available for purchase. L & K introduced Dier to the Sellers and participated in the negotiations between Dier and the Sellers, for which L & K received a commission.

In light of his interest in purchasing ASFNY, Dier went to see the business and reviewed its financial records for the period of June through August 2006, which Sellers had provided to Dier. Those records reflected that ASFNY was profitable, and regularly received orders generating gross income of approximately $20,000 per month. Dier alleges that Sellers made false representations to him, in his capacity as President of MYD, including that 1) ASFNY was generating an average net income of $3,000 per week; and 2) Dier would require only six weeks of training to prepare himself to run ASFNY.

On or about September 20, 2006, MYD and the Sellers entered into an Asset Purchase Agreement ("Agreement"), pursuant to which MYD agreed to purchase ASFNY, a company

located at 25 Woodbury Road, Hicksville, New York for $250,000. Dier alleges that, at the time the parties executed the Agreement, ASFNY had a full staff of workers that included two fabric workers, two installers and a welder.

MYD now alleges that Sellers violated certain provisions of the Agreement, including a non-compete clause. Paragraph 6 of the Agreement, titled "Competition," provides as follows:

> Seller and Seller's principles [sic] shall not, either alone, or as a partner, stockholder, or with associates in any form or fashion, operate, control and/or own an [sic] signage business of any kind within Nassau and Queens Counties and a five (5) mile radius across and into the county line of Suffolk County for a period of three (3) years from the date of closing.
>
> Should the Purchaser choose to abandon and/or close the Business, then this provisions shall be null and void.

Dier alleges that, by the date of the closing, Polakov had already incorporated a competing business called United Signs & Awnings, Inc. ("United") located at 2085 New York Avenue, Huntington, New York. [1] Dier affirms that United is less than five (5) miles from the border between Nassau and Suffolk Counties. He also affirms that Polakov is actively involved in running United, and provides a printout from the New York Department of State, Division of Corporations reflecting that Alex Polakov is the Chairman or Chief Executive Officer of United, which was incorporated on July 28, 2005. Dier also affirms that a photograph of Polokov appears on United's website. Dier submits that Polakov's establishment and management of United violates the non-compete clause in the Agreement.

Dier also alleges that he subsequently learned that Sellers had previously sold the business and assets constituting ASFNY to another purchaser. In support thereof, Dier provides a copy of a Purchase Agreement ("Prior Purchase Agreement") from September 2001 between Polakov and Shlomo Katz regarding the sale of a sign and awning company called Singmax Awning & Sign Factory, Inc., with premises at 685 Brooklyn Avenue, Baldwin, New York. Thus, Dier submits, Sellers also violated the provisions in paragraph 10(A) of the Agreement

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[1] The Court takes judicial notice that Huntington is in Suffolk County.

pursuant to which Seller represented that, at the time of closing, it would have "good, marketable and indefeasible" title to the assets being sold pursuant to the Agreement.

MYD submits that, in light of the foregoing, it has demonstrated a clear likelihood of its success on the merits, and that it will suffer irreparable harm if the Court does not issue the requested injunctive relief.

Defendant Polakov provides an Affidavit in Opposition to MYD's Order to Show Cause, in which he disputes many of Dier's allegations. Polakov denies making representations to Dier regarding ASFNY's net income, and asks the Court to consider Dier's delay of over two years in making these allegations in evaluating the credibility of Dier's claims. Moreover, Polakov notes, the documentation relating to the sale of ASFNY contains no representations by Polakov regarding ASFNY's weekly income. Polakov submits that Dier has fabricated these claims, and is simply suffering "buyer['s] remorse."

Polakov affirms, further, that Dier himself may be responsible for the business' poor performance. Polakov affirms that, upon information and belief, Dier did not exert sufficient effort in running the store, both by closing the store for periods of time and failing to expand its customer base. Polakov affirms that he placed several calls to ASFNY and no one answered the telephone.

Polakov also denies Dier's allegation that Polakov violated the restrictive covenant in the Agreement. First, Polakov disputes Dier's contention that the beginning of the five (5) mile radius in the Agreement is the county line of Suffolk County. Polakov affirms, instead, that the five mile radius begins at ASFNY's location in Hicksville and argues that Dier's proposed interpretation is illogical, because of the difficulty in determining what it meant by a county line. Polakov submits that the parties intended the covenant's five mile radius to extend across and into the county line of Suffolk County; they did not intend the five mile radius to commence at the Suffolk County line.

Polakov admits that he opened a similar business in Huntington Station, New York (in Suffolk County), but affirms that the distance between that store and ASFNY is eight (8) miles. Polakov provides a printout from "Google" reflecting the driving distance between ASFNY, located at 25 Woodbury Road, Hicksville, New York, and Polakov's new business, located at

2085 Huntington Station, New York. That Google search reflects that the distance between those two distances is 8.0 miles. Thus, Polakov submits, he has not violated the restrictive covenant.

Polakov also denies Dier's claim that Polakov has improperly solicited ASFNY's customers. Polakov submits that Dier has failed to provide any documentation in support of his claim that United is now servicing the accounts of customers whom ASFNY previously serviced.

Finally, counsel for Polakov affirms that language in the parties' Bill of Sale and Assignment establishes that the Court should reject Plaintiff's proposed interpretation of the restrictive covenant. Paragraph 8(A) of that document provides as follows:

> Seller and Seller's principles [sic] shall not, either alone, or as a partner, stockholder, or with associates in any form or fashion, operate, control and/or own an [sic] signage business of any kind within Nassau and Queens Counties and a five (5) mile radius across and into the county line of Suffolk County for a period of three (3) years from the date of closing.

Counsel for Polakov also affirms, upon information and belief, that Plaintiff has ceased to do business at its store. Thus, pursuant to the terms of the Agreement, the restrictive covenant is no longer in effect.

Counsel for L & K also opposes Plaintiff's application, submitting, *inter alia*, that the Prior Purchase Agreement relates to the sale of an entity that is separate from and unrelated to ASFNY and, therefore, does not support Plaintiff's claim that ASFNY previously sold the same business to a different individual.

C. The Parties' Positions

MYD submits that it has established that Polakov violated the restrictive covenant in the parties' Agreement by opening a competing business, and, therefore, that MYD has demonstrated a clear likelihood of its success on the merits, and that it will suffer irreparable harm if the Court does not issue the requested injunctive relief.

Polakov opposes MYD's application, submitting that it has demonstrated that Polakov has not violated the restrictive covenant, and that MYD has failed to substantiate its allegations that Polakov is improperly soliciting ASFNY's clients.

RULING OF THE COURT

A. Standard for Issuance of Preliminary Injunction

A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving papers. *William M. Blake Agency, Inc. v. Leon*, 283 A.D.2d 423, 424 (2d Dept. 2001); *Peterson v. Corbin*, 275 A.D.2d 35, 36 (2d Dept. 2000). Injunctive relief will lie where a movant demonstrates a likelihood of success on the merits, a danger of irreparable harm unless the injunction is granted and a balance of the equities in his or her favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990); *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981); *Merscorp, Inc. v. Romaine*, 295 A.D.2d 431 (2d Dept. 2002); *Neos v. Lacey*, 291 A.D.2d 434 (2d Dept. 2002). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1073 (2d Dept. 2008); *City of Long Beach v. Sterling American Capital, LLC*, 40 A.D.3d 902, 903 (2d Dept. 2007); *Ruiz v. Meloney*, 26 A.D.3d 485 (2d Dept. 2006).

Proof of a likelihood of success on the merits requires the movant to demonstrate a clear right to relief which is plain from the undisputed facts. *Related Properties, Inc. v. Town Bd. of Town/Village of Harrison*, 22 A.D.3d 587 (2d Dept. 2005); *see Abinanti v. Pascale*, 41 A.D.3d 395, 396 (2d Dept. 2007); *Gagnon Bus Co., Inc. v. Vallo Transp. Ltd.*, 13 A.D.3d 334, 335 (2d Dept. 2004). Thus, while the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that subvert the plaintiff's likelihood of success on the merits to such a degree that it cannot be said that the plaintiff established a clear right to relief. *Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd.*, 53 A.D.3d 612 (2d Dept. 2008), quoting *Milbrandt & Co. v. Griffin*, 1 A.D.3d 327, 328 (2d Dept. 2003); *see also* CPLR § 6312(c).

A plaintiff has not suffered irreparable harm warranting injunctive relief where its alleged injuries are compensable by money damages. *See White Bay Enterprises v. Newsday*, 258 A.D.2d 520 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where

record demonstrated that alleged injuries compensable by money damages); *Schrager v. Klein*, 267 A.D.2d 296 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record failed to demonstrate likelihood of success on merits or that injuries were not compensable by money damages).

The Court concludes that Plaintiff has not demonstrated its right to injunctive relief for several reasons, including 1) Plaintiff has not demonstrated a likelihood of success on the merits in light of Defendants' sworn allegations, and documentary evidence, which demonstrate that Polokov's operation of United does not violate the parties' restrictive covenant; and 2) Plaintiff has not substantiated its claim that it will suffer irreparable injury if the Court does not grant injunctive relief, both because it has not documented its claim that Polakov has improperly solicited customers and because it has not demonstrated that money damages are insufficient compensation. Accordingly, the Court denies Plaintiff's application for an Order enjoining Defendants Polakov and ASFNY from operating United.

II. MOTION AND CROSS MOTION

A. Relief Sought

In its Motion, Defendant Liben & Katz [2] move to dismiss the verified complaint ("Complaint") pursuant to CPLR §§ 3211(a)(1) and (7).

In their Cross Motion, Defendants Polakov and ASFNY move to dismiss the Complaint pursuant to CPLR §§ 3211(a)(1) and (7).

B. The Parties' History

The Court incorporates by reference the parties' history outlined earlier in this Decision.

The Complaint contains four causes of action:

1) First Cause of Action - against Polakov and ASFNY, for allegedly inducing Plaintiff to enter into the Agreement by making misrepresentations regarding, and omitting, material facts. Plaintiff seeks rescission of the Agreement and the return of all monies paid to Sellers.

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[2] The correct spelling of this entity is apparently "Libin & Katz." In the interests of simplicity, the Court will hereinafter refer to this Defendant as "L & K."

2) Second Cause of Action - against Polakov, for damages and punitive damages Plaintiff suffered as a result of Defendants' alleged misrepresentations and omissions. Plaintiff seeks damages based on the difference between the value of the business as sold to Plaintiff and its value had it been as Plaintiff represented.

3) Third Cause of Action - against all Defendants, for allegedly failing to disclose the prior sale of the business and conspiring to conceal that information. Plaintiff seeks damages in the amount of the purchase price.

4) Fourth Cause of Action - against Polakov and ASFNY, for allegedly violating the restrictive covenant in the Agreement. Plaintiff seeks an injunction prohibiting Polakov and ASFNY from competing with Plaintiff, and damages in the amount of the profits Defendant obtained as a result of their alleged violation of the restrictive covenant.

Counsel for L & K affirms that, at the initial stage of the parties' business relationship, Dier, in his capacity as President of MYD, signed waivers that absolved L & K of any liability resulting from the sale of ASFNY and obligated MYD to conduct its own due diligence with respect to the proposed sale. In support thereof, counsel provides a copy of a Letter of Confidentiality dated June 9, 2004, containing the L & K letterhead, that is signed by Dier. Paragraph 8 of that Letter provides, in pertinent part, as follows:

> WE ARE NOT RESPONSIBLE FOR ANY INFORMATION SUBMITTED TO YOU BY US AND YOU MUST VERIFY ALL INFORMATION BY YOURSELF THROUGH YOUR ACCOUNTANT AND ATTORNEY.
>
> [Capitals and Underlining in Original]

Counsel for L & K also provides a copy of a document titled "Registration Fee," containing the L & K letterhead, dated June 9, 2004 and signed by Dier. That document provides, in pertinent part, as follows:

> Any information submitted to you will come from the seller. This information has not been verified by the brokers. You will take [sic] due diligence to submit the facts to the best of your ability. It is imperative that you remain at the place of business for

> a reasonable period of time to learn as much as possible about the business and obtain all the business facts before bringing in your accountant and your lawyer. Your accountant and you [sic] attorney must verify all the facts for your protection. Therefore, we are not responsible for any representation submitted orally or in writing. All information is subject to errors, omissions, change in price, and withdrawal without notice.

Finally, counsel for L & K provides a copy of a document titled "Disclaimer," containing the L & K letterhead, dated July 11, 2006 and signed by Dier. That document reads as follows:

> [L & K] Business Brokers are not responsible for any information given to you or any information not given to you either in writing or oral [sic].
> You must do your own due diligence by yourself, with your attorney or accountant. Under no circumstance should you rely on any information given to you by [L & K]. You must check out all information on your own with your accountant until you clearly understand everything about the business. Then, and only then can you go into contract.

C. The Parties' Positions

With respect to L& K's Motion, L & K submits that, in light of the waivers outlined above, the Complaint fails to state a cause of action against L & K. In addition, L & K submits that Plaintiff's fraud claim fails to alleged the necessary element of justifiable reliance.

Moreover, L & K submits that the Prior Purchase Agreement that Plaintiff submitted with its motion papers clearly reflects that the prior transaction related to a separate, unrelated entity. Thus, L & K submits, this documentary evidence refutes MYD's allegation in paragraph 27 of the Complaint that "L & K failed to disclose the prior sale of the business to plaintiff and conspired with the Sellers to not disclose that information." Accordingly, L & K argues that the Court should also dismiss the Complaint against L & K based on the documentary evidence.

With respect to the Cross Motion of Defendants Polakov and ASFNY, the moving Defendants move to dismiss the Complaint, arguing, *inter alia*, that 1) the Prior Purchase Agreement contradicts Plaintiff's allegation that Defendants sold the same business and assets to

another person; and 2) Plaintiff's failure to exercise due diligence in determining ASFNY's financial situation precludes its claims for fraud and misrepresentation.

Plaintiff opposes Defendants' motion and cross motion, arguing, *inter alia*, that 1) Defendants Polakov and ASFY waived their right to move to dismiss pursuant to CPLR § 3211(a)(1) because they did not move to dismiss this action prior to answering the Complaint, or raise it in a responsive pleading; 2) notwithstanding Plaintiff's execution of various waivers, Plaintiff did not waive his right to allege omissions of, as opposed to misrepresentations regarding, material facts; 3) the Complaint provides requisite specificity with respect to the allegations of fraud; and 4) the transaction that was the subject of the Prior Purchase Agreement does constitute a breach of the Agreement.

RULING OF THE COURT

I. Court Will Limit Analysis to Motion to Dismiss Pursuant to CPLR § 3211(a)(7)

CPLR § 3211(e) provides, in pertinent part, that, at any time before service of the responsive pleading is required, a party may move on one or more of the grounds in CPLR § 3211(a), but that any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) of § 3211 is waived unless raised either by such motion or in the responsive pleading. Defendants Polakov and ASFNY have provided the Court with the portion of their Verified Answer in which they asserted the affirmative defense that the Complaint fails to state a cause of action, but have not demonstrated that they asserted a defense based on documentary evidence pursuant to CPLR § 3211(a)(1). Defendant L & K has not provided the Court with a copy of its Verified Answer. Accordingly, the Court concludes that Defendants have waived their right to move to dismiss pursuant to CPLR § 3211(a)(1) and will consider their motions to dismiss pursuant to CPLR § 3211(a)(7). [3]

CPLR § 3211(a)(7) provides that a party may move for judgment dismissing one or more causes of action asserted against him on the grounds that the pleading fails to state a cause of

[3] In their motion papers, counsel for the Plaintiff and counsel for the Defendants take issue with the timeliness of their adversaries' responses. On August 20, 2009, this Court ordered that Defendants may submit replies to the Plaintiff's opposition to Defendants' motions to dismiss no later than September 4, 2009 and that all other applications by the parties regarding the motion schedule and submission are denied.

action. It is well-settled that the Court must deny a motion pursuant to CPLR § 3211(a)(7) if the factual allegations contained in the Complaint constitute a cause of action cognizable at law. *Guggenheimer v Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally accept the pleading, and accept the facts alleged as true and accord to the Plaintiff every favorable inference which may be drawn therefrom. *Leon v Martinez*, 84 N.Y.2d 83 (1994).

II. Elements of Fraud

To assert a claim for fraud in the inducement, a plaintiff must establish that the defendant made material misrepresentation that were false, the defendant knew the representations were false when made, the misrepresentations were made with intent to deceive the plaintiff, the plaintiff justifiably relied upon these representations and plaintiff was damaged as a result of relying upon these misrepresentations. *Leno v. DePasquale*, 18 A.D.3d 514 (2d Dept. 2005).

The party to whom the false statement has been made may not rely on that statement if he can verify the truth of that statement through the exercise of ordinary intelligence or reasonable diligence. *Huron Street Realty Corp. v. Lorenzo*, 19 A.D.3d 450 (2d Dept. 2005); *Sanzotta v. Continuing Development Services, Inc.*, 262 A.D.2d 1047 (4th Dept. 1999); *Curran, Cooney, Penney, Inc. v. Young & Koomans, Inc.*, 183 A.D.2d 742 (2d Dept. 1992). Where a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, he cannot claim justifiable reliance. *Urstadt Biddle v. Excelsior*, _A.D.3d_, 2009 NY Slip Op 6537 (2d Dept. 2009), quoting *Stuart Silver Assoc. v. Baco Dev. Corp*, 245 A.D.2d 96, 98-99 (1st Dept. 1997). A party fails to exercise reasonable diligence and cannot recover when he could have ascertained the actual nature of the transaction through the exercise of ordinary care or intelligence and failed to do so. *P. Chimento Co, Inc. v. Banco Popular de Puerto Rico*, 208 A.D.2d 385 (1st Dept. 1994).

III. Disclaimers Preclude Plaintiff's Cause of Action against L & K

Where an agreement contains a clear disclaimer of reliance on oral representations, a party is precluded from making subsequent assertions of fraudulent inducement based on oral representations. *Capstone Enterprises v. Westchester*, 262 A.D.2d 343 (2d Dept. 1999). *See*

also, *Danann Realty v. Harris*, 5 N.Y.2d 317, 320 (1959) (trial court correctly dismissed cause of action based on plaintiff's claim that it was induced to enter into contract of sale because of defendants' oral representations regarding the operating expenses and expected profits, where contract contained specific disclaimer).

In light of the unequivocal disclaimers that Dier signed on behalf of MYD, with respect to L & K, the Court concludes that MYD is foreclosed from pursuing its claim against L & K, and grants the motion to dismiss the Complaint as to L & K.

IV. MYD has not demonstrated that his Purported Reliance was Reasonable

Dier affirms that he went to see the business that he was purchasing, and reviewed its financial records for the period of June through August 2006, which Sellers had provided to Dier. He did not, however, employ an accountant or attorney to review those records, or conduct other research or investigation to determine the financial soundness of ASFNY. The Court concludes, under all the circumstances, that Dier has not establish that his reliance, if any, was reasonable.

In addition, the Prior Purchase Agreement relates to a separate company called Singmax Awning & Sign Factory, Inc., with premises at 685 Brooklyn Avenue, Baldwin, New York and Plaintiff has not established that Singmax and ASFNY are the same company. Therefore, Plaintiff has failed to establish that there was a prior sale of the business, as it alleges in the third cause of action.

Accordingly, the Court grants the motion to dismiss counts one, two and three of the Complaint against Defendants Polakov and ASFNY.

V. Restrictive Covenant

The Court rejects Dier's argument that the operation of United violates the restrictive covenant because United is less than five (5) miles from the border between Nassau and Suffolk Counties. The Court concludes, based on its common sense reading of the restrictive covenant, that Polakov was not permitted to establish a business within a five mile radius of ASFNY's location in Hicksville. In light of the undisputed evidence that United is eight (8) miles from ASFNY's location in Hicksville, the Court concludes that Plaintiff has failed to establish a cause of action with respect to the fourth cause of action, and dismisses the fourth cause of action

against Defendants Polakov and ASFNY.

In light of the foregoing, it is hereby

ORDERED, that Plaintiff's application for injunctive relief is denied; and it is further

ORDERED, that the Complaint is dismissed as to all Defendants.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
September 25, 2009

HON. TIMOTHY S. DRISCOLL
J.S.C.

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ENTERED
OCT 06 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE