

Siegel v Revival Constr. & Dev. Corp.

2010 NY Slip Op 30897(U)

April 12, 2010

Supreme Court, New York County

Docket Number: 114525/07

Judge: Joan A. Madden

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4-14-10

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

PRESENT: Hon. Joan A. Mader
Justice

PART 11
114525/07
~~114525/07~~

Siegel

INDEX NO. _____
MOTION DATE 1-28-10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

- v -

Revival Construct & Development
Corp. et al

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

PAPERS NUMBERED	
_____	_____
_____	_____
_____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross motion are decided in accordance with the annexed memorandum Decision + order.

FILED
APR 12 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: April 12, 2010 _____ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

-----X
JORAM SIEGEL and LYNN SIEGEL,
Plaintiffs,

-against-

Index No. 114525/07

REVIVAL CONSTRUCTION & DEVELOPMENT CORP.
a/k/a REVIVAL CONSTRUCTION DEVELOPMENT
CORPORATION,
Defendant.

FILED

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-----X
Joan A. Madden, J.

In this action relating to performance of a home improvement contract, defendant Revival Construction & Development Corp. ("Revival") moves for summary judgment dismissing the complaint against it (motion seq. no. 001). Plaintiffs Joram Siegel ("Mr. Siegel") and Lynn Siegel ("Mrs. Siegel") (together, the "Siegels") oppose Revival's motion and cross move for summary judgment as to Revival's liability. For the reasons stated below, Revival's motion for summary judgment is denied, and the Siegels' cross motion for summary judgment is granted in part and denied in part.

Background

This action arises from a contract between Revival and the Siegels under which Revival agreed to perform certain home improvement services for the Siegels in return for payment. The Siegels commenced this action against Revival for breach of contract, negligence, and unjust enrichment.

During the relevant periods, the Siegels owned apartments 7E and 7F located within the cooperative building known as 170 West End Avenue, New York, NY, 10023 (the "Building"). The Siegels sought to combine apartments 7E and 7F (together "the Apartment") and have certain renovations to the Apartment performed (the "Project"). The Siegels retained Stacey

Jacovini (“Jacovini”) of Ascape Architecture, PLLC (“Ascape”) (together the “Architect”) to prepare and design construction documents (the “plans”, the “spec”, or the “blueprints”) for the Project. The Architect estimated that the Project would take four months to complete. The Architect and the Siegels allege that the plans produced by the Architect were Building Code compliant and Revival does not dispute this.

Pursuant to a Letter Agreement (the “Architect’s Contract”) between the Architect and the Siegels, the Architect was supposed to receive bids from various general contractors and assist the Siegels in selecting a general contractor to work on the Project. The Architect’s Contract also specified that the Architect was to act as the owner’s representative, convey instructions to the general contractor, visit the Apartment at intervals to determine if work was proceeding in accordance with plans, endeavor to guard the owner against any defects and deficiencies in the work of the general contractor, and to approve payments made to the general contractor. In her affidavit, Jacovini states that, while she observed the construction, she “never directed or controlled the means or methods” by which Revival or subcontractors hired by Revival performed their work (Jacovini Affidavit, ¶¶ 7, 8).

After the Architect and the Siegels entered into the Architect’s Contract, the Architect referred Revival to the Siegels as a potential candidate to serve as a general contractor for the Project. Joseph Cox (“Cox”) was the president and owner of Revival at this time and has been Revival’s only president and owner to date.

According to Cox, Revival had three meetings with Jacovini and the Siegels. Cox testified that, at the second meeting, he was provided with the plans. Cox further testified that, in June 2006, about two weeks after receiving the plans, he prepared a written proposal (the “Proposal”) describing the scope of the Project, as he understood it, and providing a fee estimate of \$150,000 for the work Revival would be performing if selected. Cox dep. at 27. At the next meeting, Revival entered into a contract (the “original Contract”) with the Siegels to serve as

their general contractor. Revival and the Siegels added an amendment (the “Amendment”) to the original Contract (together with the Amendment, “the Contract”) during August 2006, after the Project commenced.

The original Contract is two pages long and is undated.¹ The original Contract specifies that Revival is to perform certain construction work and renovations, including sheet rocking and framing, in accordance with the “spec” (i.e. plans) provided by the Architect, in a “workmanship” manner. Contract, at 1. Revival was responsible for providing the necessary labor and material for the Project and for hiring subcontractors as needed to perform its responsibilities. The Contract states that Revival will complete “all work agreed upon in this [C]ontract [in] approximately six weeks” and any additional work that the Siegels wish Revival to perform must be agreed upon by the parties in writing and an additional fee for such work would be charged. *Id.* The Contract also states that the “Contractor shall work closely with the [A]rchitect during this project.” *Id.*

The total price in the original Contract (the “original Contract price”) is listed as \$112,500 plus a \$2,500 bonus if Revival completes its work on the Project in less than seven weeks. The Contract states that the Siegels are to provide Revival with a down payment of \$30,000 and payments of \$28,000² every two weeks until the job is completed. The Amendment provides that Revival would also perform certain electrical work in addition to \$5,000 of electrical work that Revival was responsible for in the original Contract. The price of this new work is listed as \$13,000 (together with the original Contract price, the “total Contract price”).³ Thus, the total Contract price was \$125,500.

¹ In a letter from Jacovini to Cox, Jacovini states that the Contract was signed on August 17, 2006.

² The dollar amount shown in the Contract is \$28,000, but it is written as “twenty thousand dollars”.

³ The amendment states that half the cost of the \$18,000 of total electric work must be provided as a down payment and the rest is to be paid upon completion of the work.

On July 21, 2006, the Siegels sent two checks to Revival, each for \$15,000. Based on a spreadsheet produced by the Siegels and contained in Exhibit H of the Siegels' moving papers, the Siegels made periodic payments to Revival after this, but do not seem to have made flat payments to Revival every two weeks. Instead, Revival provided the Architect with invoices relating to the amounts Revival spent for various materials and labor, including "payroll". If the Architect approved these invoices, she forwarded them to the Siegels for payment.⁴ This system, whereby the Siegels made payments on invoices which were approved by Jacovini (per the Architect's Contract), is consistent with Cox's deposition testimony in which he mentions that invoices were paid to him periodically.

Cox testified that the scope of the work he outlined in the Proposal was essentially the same as what was contemplated in the Contract, except with respect to certain items for the kitchen. Cox dep. at 27, 30-1. The Proposal specifies that Cox was to do certain demolition work, certain partition work, and perform certain renovations in three bathrooms, the living/dining room, the master bedroom, the smaller bedrooms, the kitchen, and the playroom.⁵ Cox states in his reply affidavit, that it is documented that it was agreed upon by the parties that if the Architect "screwed up" and Revival was requested to rectify such a "screw up," Revival would be paid additional funds and given additional time to make the requested changes (Cox Affidavit, ¶ 7). However, Cox points to no documentation to support this statement and, in fact, this statement, is directly at odds with the Contract which provides that Revival will charge an added fee only for any additional work that the Siegels ask Revival to perform.

After retaining Revival to serve as the general contractor, the Siegels sought approval from the Building for the Project. The Building approved the Siegels' request in a letter (the

⁴ Mr. Siegel stated that Revival once sent him an invoice of \$20,000 with respect to cabinets in violation of this practice.

⁵ This is a summary of the work outlined in the Proposal, which is more detailed.

“Approval Letter”) to the Siegels dated August 15, 2006, but imposed certain conditions, including that the Project must be completed by December 18, 2006.

Based on Cox’s testimony, it appears that Revival commenced work on the Project in July or August of 2006.⁶ At this time, Revival employed three individuals who worked on the Project, other than Cox. These included three carpenters and a laborer; however, John, one of carpenters, only worked on the Project for four days before being “fired.” George Ramos (“Ramos”), who was one of the carpenters, acted as the foreman for the Project.

Cox testified that the first stage of the Project involved demolition for the purpose of combining the two apartments into one. Cox dep. at 46. Cox testified that this portion of the Project took longer than he anticipated because there was “[a] lot of unforeseen wiring and electrical bars in the wall.” *Id.* Cox admitted that during this stage of the Project one of his employees caused a water line to crack or break in one of the bathrooms and this caused damage in the apartment below. However, Cox testified that Revival repaired the water damage.

The second stage of the Project was framing and, according to Cox, this stage lasted approximately three days. The plans provided to Revival by the Architect for this stage of the Project specified that Revival was to frame at least five doors in the apartment as 36 inches. Jacovini stated in her affidavit that the blueprints used were compliant with the New York City Building Code (the “Building Code”). However, Ramos and John, the carpenter who was employed by Revival for only a few days before being dismissed, framed these doors at less than 36 inches.⁷ In her affidavit, Jacovini states that the doors were framed in such a way that they did not provide 32 inches of clear space in contravention of the Building Code.⁸ Mr. Siegel

⁶ If Jacovini’s statement that the Contract was signed on August 17, 2006, is accurate, then it appears that the Project was commenced sometime between that date and August 31, 2006.

⁷ There may have also been additional closet doors which were supposed to be framed as 36 inches, but were in fact framed more narrowly.

⁸ The Siegels’ moving papers state that a failure to frame the doors to provide a minimum of 32 inches of clear space contravenes Article 8, Section 158; however, this citation appears to be inaccurate. The relevant provision appears to be New York City Administrative Code §27-

testified at his deposition that the doors frames were not 32 inches and had to be redone. Siegel dep. at 24.

Revival does not dispute that the framing was too narrow to accommodate a 32 inch door and in fact Cox testified that 32 inch doors that Revival purchased did not fit. Cox dep. at 97. However, Cox testified that the door framing provided an opening of 32 inches, which he maintains would have made the opening compliant with the Building Code. Id at 100.

Cox also testified that Jacovini was responsible for the doors having been framed too narrowly as she allegedly provided oral instructions to Revival's employees on how to frame the doors and had them "mark the floor for door openings and door sizes and where walls could or could not go". See Cox dep. at 49-51.

According to Cox, he was not present at the time these doors were being framed and he only learned that the doors were framed too narrowly when he learned that the 32 inch doors which Revival had subsequently purchased did not fit in the framing. Cox dep. at 49-50, 96-7. Cox further testified that when he discussed this with Jacovini, she said that the doors could be brought into compliance with the Building Code if they used a certain kind of hinges. Id. at 97.

Mr. Siegel testified that, in addition to the doors being framed at an improper width, he later found out that they were also constructed in an unworkmanlike manner as there was essentially only "a piece of tape connecting the door frames to the existing sheetrock or plaster foundation walls of the [B]uilding". Mr. Siegel dep. at 36.

Following the framing stage, Cox testified that Revival did certain electrical and plumbing work with the assistance of outside contractors who were paid by Revival. Cox dep. at 51-57. Cox also testified that he and his employees began sheet rocking and taping after the framing stage. After this was completed, painting began. Cox testified that not all of the painting that Revival was supposed to perform was finished.

371(e)(3) and this section specifies that door openings in "habitable and occupiable rooms" shall be 32 inches.

During the course of the Project, Revival installed bamboo flooring in the Apartment, which was supposed to be glued. Cox dep. at 61. Cox testified that he instructed Ramos not to lay the flooring until he came back from a one week cruise, as Cox had obtained instructions for how to properly lay the flooring. Id. at 62. However, Cox also told Ramos to follow the Architect's instructions while he was gone. Id. According to Cox, while Cox was away, Jacovini and Mrs. Siegel instructed Ramos to lay the flooring, even though Ramos told them that Cox told him not to do so until Cox returned and that they would be taking a risk if it was laid prior to Cox's return. Cox dep. at 64 and Cox Reply. Ramos and another employee of Revival did lay the flooring prior to the time Cox got back and failed to properly install it with the end result that the flooring began to separate within some weeks after the time it was installed. Cox dep. at 63-5.

At some time following the installation of the flooring, during or after October 2006, Cox and Mr. Siegel had a conversation about Revival potentially leaving the job. According to Cox, Mr. Siegel was upset about how long the job was taking and they "discussed monies from the original bid to what is taking place now". Cox dep. at 68. Cox testified that he could not finish the job as soon as the Siegels desired without additional money and that Mr. Siegel had not yet paid the total Contract price, but Mr. Siegel said he would not pay any more until the job was done. Revival does not contend that the Siegels failed to make their obligated contractual payments prior to the time that Mr. Siegel and Cox discussed Revival leaving the Project.

At the time the relationship ended, according to Mr. Siegel, Revival had been working on the job for approximately 10 to 12 weeks. Mr. Siegel dep. at 46. There were services that Revival and the Siegels had contracted for that had not yet been provided at the time Revival ceased to work on the Project and there was also certain work that Revival performed which needed to be corrected. Cox admitted in his testimony that at the time Revival ceased to work on the Project, Revival had caused damage to the seventh floor hallway which was not yet repaired,

the children's bathroom was incomplete, the painting was incomplete, and the moldings were incomplete.

The Siegels allege that, after Revival ceased to work on the Project, they became aware of certain work performed by Revival in the Apartment that they considered to have been done in an unsatisfactory manner. This included Revival's failure to frame the doors in compliance with the Building Code, failure to properly install the bamboo flooring, and what they viewed as "sloppy" painting. Cox testified that Mr. Siegel called Cox at some point after Revival ceased work on the Project to tell him that the Siegels observed that the bamboo flooring was separating. Cox dep. at 65.

Following this conversation, the Siegels and Cox met on certain occasions to discuss the work that had been done on the Project and the work left undone. However they could not come to an agreement.

After Revival's work on the Project ended, the Siegels hired various other contractors to finish the work that Revival had not completed and fix the work they considered to have been performed improperly. This work included reframing the doorways that were out of compliance with the Building Code and removing the bamboo flooring and installing a different and less expensive type of flooring. According to Mr. Siegel, the Siegels eventually moved into the Apartment in November or December of 2006. Mr. Siegel dep. at 67.

The Siegels commenced this action against Revival on or around October 26, 2007, asserting claims for breach of contract, negligence, and unjust enrichment.

Revival moves for summary judgment dismissing the complaint against it. Revival argues that the Siegels have the burden of proving that there was a contract between the parties, the exact items that were embraced and set forth in the Contract, that plans were made available to Revival, that such plans were approved by the Building Department, that Revival deviated from these plans, and that the Siegels were damaged. Revival states that the Siegels cannot meet

this burden because all discovery has been completed and the Siegels' responses to requests in Revival's notice for discovery and inspection, many of which state that the plaintiffs are not in possession of the sought after record(s) at issue, show that the Siegels cannot establish (1) what work was to be done by Revival, (2) that there were any architectural plans, (3) the amount of damages that the Siegels are alleged to have sustained, (4) deviation from any architectural plans, and (5) that any deviation was due to Revival. As such, Revival argues that there is no genuine issue of fact to be decided and the Siegels' complaint must be dismissed.

The Siegels oppose the motion and cross move for summary judgment as to liability. The Siegels submit evidence that shortly after Revival's motion was served they provided a supplementary response to discovery contained all the relevant documents sought by Revival. The Siegels also submit evidence which they assert establishes that there was a contract between them and Revival, including the Proposal, the original Contract, and the Amendment. The Siegels also assert that they have established that Revival was provided with the relevant architectural plans and state that these plans are included in the opposition papers and marked "Acceptable for Permit." The Siegels further assert that Cox's own testimony shows that Revival deviated from the plans, and that as a result they were damaged.

The Siegels also rely on the affidavit of Jacovini in which Jacovini states that she never directed or controlled either the means or the methods by which Revival performed its work.⁹ The Siegels assert that, as a result of Revival's poor workmanship and failure to complete all the agreed upon work, they sustained monetary damages because they were forced to hire other contractors to finish the incomplete work and fix all the poor workmanship since Revival would not perform these services itself.

⁹ Revival claims that it was not provided with a copy of this affidavit; however, it may have been attached directly behind the Siegels' moving papers as this is where the copy of Jacovini's affidavit which was submitted to the Court is located.

With respect to the door framing, the Siegels assert that Revival was negligent per se as employees of Revival framed the doors too narrowly in violation of the Building Code and that Cox was aware of this deviation prior to the time Revival ceased work on the Project. The Siegels also contend that Revival's work on the door framing violated its implied duty in the Contract to perform work in accordance with the Building Code and that the framing was also contrary to the Architect's plans. In regard to the flooring, the Siegels argue that Revival admitted that it improperly installed the bamboo flooring in breach of the Contract.

In opposition to the Siegels' cross motion for summary judgment, Revival argues that the Siegels' moving papers, supported by the affirmation of their attorney, Troyetsky, who possesses no personal knowledge of the facts and circumstances of this case, are of no probative value and cannot support a cross motion for summary judgment. Revival also argues that the Architect had a duty to review Revival's work and that Revival cannot be held liable for any failure to comply with the Building Code because it is up to the Architect to obtain all final plan approvals. Notably, however, Revival does not deny that it agreed, in the Contract, to follow the "spec" (i.e. the plans) or that these plans provided for doors in compliance with the Building Code.

Revival also contends that it cannot be held liable with respect to the bamboo flooring as Mrs. Siegel and Jacovini told Ramos to lay the floor when Cox was gone and Ramos told at least Jacovini that Cox knew how to install the floor and that she would be taking a risk if she insisted that the floor was laid before Cox returned. Revival asserts that it would have rectified the error but it was not given additional time or money to do so. Revival also asserts that if the Siegels sustained any damages, they were required to look to the Architect to pay them.

In reply, the Siegels assert that Troyetsky's affirmation is of probative value since it is supported by evidence including, deposition testimony, Jacovini's affidavit, and other documentary evidence. The Siegels also argue that, even if the Architect is partially responsible for Revival's failure to properly perform the work, Revival is still liable to the Siegels.

Discussion

On a motion for summary judgment, the proponent “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case...” Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986). As a preliminary matter, and contrary to Revival’s argument, an affirmation of counsel is a proper vehicle for the submission of evidence in support of a summary judgment motion. Lewis v. Safety Disposal System of Pennsylvania, 12 AD3d 324, 325 (1st Dept 2004); Blueberry Investors Co. v. Ilana Realty Inc., 184 A.D.2d 906, 907 (3rd Dep’t 1992).

To establish a breach of contract claim, a plaintiff must prove plaintiff’s performance under the contract, the defendant’s breach of the contract, and resulting damages. JP Morgan Chase v. J.H. Elec. of New York, Inc., 69 A.D.3d 802 (2d Dept. 2010). Here, as explained below, the Siegels have made a prima facie showing as to these elements with respect to their claims that Revival breached the Contract in connection with the door framing and the bamboo flooring and Revival has not controverted this showing.

It is has been held that “in every home improvement contract, the contractor has an implied duty to perform the contract in accordance with... the [B]uilding [C]ode requirements.” Reale v. Linder, 135 Misc2d 317, 321 (Sup Ct Nassau Co. 1987), aff’d as modified on other grounds, 143 Misc2d 496 (App Term 1988); see generally, 22 NYJur2d Contracts § 353. Of relevance here, under the New York City Building Code, door openings “to all habitable and occupiable rooms,” must have door opening widths of 32 inches. See New York City Administrative Code §27-371(e)(1).

Here, while the record shows that at least five door frames in the Apartment were not framed to accommodate a 32 inch wide door which would have required an opening of approximately 33 ½ inches, Cox's testimony that the doors provided 32 inches of space is sufficient to raise a triable issue of fact as to whether the doors were framed in violation Building Code despite the evidence to the contrary submitted by the Siegels. However, even assuming *arguendo* that the doors were Building Code compliant, the uncontroverted record nonetheless shows that Revival breached the Contract by failing to comply with the Architect plans, which were incorporated into the Contract, and which specified that the doors be framed at 36 inches.

Moreover, Revival's assertion that Jacovini gave Revival oral instructions to frame the doors in violation of the plans does not raise a triable issue of fact as any instructions given by the Architect would not excuse Revival's failure to comply with the Contract. Revival was contractually obligated to the Siegels, not the Architect, and agreed to follow the Architect's plans in performing its contractual obligations. Moreover, while the Contract provided that Revival would "work closely with the [A]rchitect," it did not give the Architect authority to unilaterally modify the plans or the Contract. Moreover, even assuming that Jacovini suggested that hinges might correct the problem, such suggestion does not constitute a modification of Revival's obligations under the Contract or cure its breach.

The Siegels have also put forth sufficient evidence that they performed their duties such that they are entitled to recover for breach of contract. It undisputed that the Siegels made the \$30,000 down payment to Revival in accordance with their agreement and made payments to Revival through at least October when the Contract was terminated.

The Siegels have also shown that Revival is liable for breaching the Contract by laying the bamboo flooring improperly so that it began to separate within weeks after being installed. There is no dispute that the flooring was laid improperly and that laying the flooring was one of Revival's obligations under the Contract. In fact, when Cox examined the floor he stated that he

was dissatisfied with Revival's work on it. Furthermore, Cox's statement that Ramos told him that Mrs. Siegel and/or the Architect instructed him to lay the flooring, despite the risk of improper installation in Cox's absence, does not raise a triable issue of fact. First, Cox's statement regarding what Ramos told him constitutes hearsay and "[e]vidence of hearsay statements cannot alone defeat summary judgment." Wilbur v. Wilbur, 266 A.D.2d 535, 526 (2d Dept 1999). In any event, even if the court were to consider Ramos' statement, it would not relieve Revival of responsibility for improperly laying the floor since the work was done by Ramos, who is Revival's employee. In addition, to the extent that Revival argues that the Architect bears joint responsibility for the improper installation of the flooring, this fact would not relieve Revival of liability to the Siegels.

Accordingly, the Siegels have established that they are entitled to summary judgment as to liability for the damages they suffered as a result of Revival's breach of the Contract in connection with the framing of the doors and the laying of the bamboo floor. However, with respect to the other work performed by Revival, which was allegedly incomplete or otherwise defective, there are triable issues of fact, including whether Revival's failure to complete the work was the result of its being terminated before it could do so

In addition, insofar as the Siegels move for summary judgment as to Revival's liability for negligence, such motion is denied, and the negligence claim is dismissed, since a claim for negligent performance of a contractual obligation cannot succeed when the complaint seeks to breach of contract type damages only. George A. Fuller Co. v. U.S. Fidelity and Guar. Co., 200 A.D.2d 255, 260 (1st Dep't), lv denied, 84 N.Y.2d 866 (1994); see generally, New York University v. Continental Ins. Co., 87 NY2d 398, 316 (1995). The unjust enrichment claim must also be dismissed as there is an express contract between the parties. MJM Advertising v. Panasonic Indus. Co., 294 A.D.2d 265, 266 (1st Dep't 2002); Frydman & Co. v. Credit Suisse First Boston Corp., 272 A.D.2d 236 (1st Dep't 2000).

Conclusion

In view of the above, it is

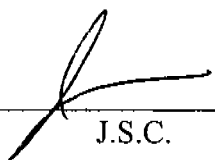
ORDERED that the motion for summary judgment by defendant Revival Construction & Development Corp. is denied; and it is

ORDERED that the cross motion for summary judgment by plaintiffs Joram Siegel and Lynn Siegel is granted as to liability to the extent that they have established that defendant Revival Construction & Development Corp. breached its contract with respect to its framing of certain doorways and laying of flooring, and summary judgment with respect to the other aspects of the breach of contract claim is denied; and it is further

ORDERED that the claims for negligence and unjust enrichment must be dismissed; and it is further

ORDERED that the parties shall appear on April 15, 2010 at noon for a pre-trial conference in Part 11, room 351, 60 Centre Street, New York, NY.

Dated: April 12, 2010



J.S.C.

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