

**Fieldman v Crown Point Cabinetry Corp.**

2010 NY Slip Op 31958(U)

July 27, 2010

Supreme Court, New York County

Docket Number: 600704/2010

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMOND

PART \_\_\_\_\_

Justice

Index Number : 600704/2010  
 FIELDMAN, HENRY J.  
 vs.  
 CROWN POINT CABINETRY CORP.  
 SEQUENCE NUMBER : 001  
 DISMISS

INDEX NO. \_\_\_\_\_  
 MOTION DATE 6.24.10  
 MOTION SEQ. NO. \_\_\_\_\_  
 MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

**UNFILED JUDGMENT**

*This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).*

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

The instant motion is decided in accordance with the accompanying Memorandum Decision. It is hereby

**ORDERED and ADJUDGED** that defendants' motion to dismiss all causes of action as against the individual defendants is granted, and plaintiffs' causes of action as to the individual defendants Lindsay Batchelder, Brian D. Stowell and Rebecca C. Stowell are severed and dismissed with prejudice, and the Clerk of the Court is directed to enter judgment accordingly; and it is further

**ORDERED and ADJUDGED** that defendants' motion to dismiss plaintiffs' causes of action for breach of fiduciary duty, fraud and fraudulent misrepresentation as against all defendants is granted, and plaintiffs' causes of action for fraud and fraudulent misrepresentation are severed and dismissed with prejudice, and the Clerk of the Court is directed to enter judgment accordingly; and it is further

**ORDERED** that the remaining corporate defendant shall serve and file its Answer within 30 days of entry of this order. And counsel for parties shall appear for a Preliminary Conference before Justice Carol R. Edmead, Supreme Court, New York County, Part 35, 60 Centre Street, Room 438, NY 10007 on Tuesday, October 26, 2010 at 2:15 p.m.; and it is further

**ORDERED** that counsel for defendants shall serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for plaintiffs.

Dated: 7/22/10

  
**HON. CAROL EDMOND** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

\_\_\_\_\_ x  
**HENRY J. FIELDMAN and JANET B. FIELDMAN,**

Plaintiffs,

Index No. 600704/10

**DECISION/ORDER**

-against-

**CROWN POINT CABINETRY CORP. a/k/a  
CROWN POINT CABINETRY INC., a/k/a  
CROWN POINT CABINETRY, LINDSAY  
BATCHELDER, BRIAN D. STOWELL and  
REBECCA C. STOWELL,**

Defendants.

\_\_\_\_\_ x  
EDMEAD, J.S.C.

**MEMORANDUM DECISION**

Defendants move for an order pursuant to CPLR 3211 dismissing the complaint (1) as to the individual defendants; and (2) dismissing the causes of action for breach of fiduciary duty and for fraud and fraudulent representation.

*Background*

Defendants assert that plaintiffs sought to purchase furniture items from the corporate defendant, then allegedly “complained endlessly” about the quality of the plaintiffs’ sample, to the point where Crown Point Cabinetry Corp. (Crown Point). Cancelled the contract and refunded the plaintiffs’ \$5,000 deposit in full. Plaintiffs then commenced an action against the corporate defendant and against all of the employees of Crown Point with whom plaintiffs came in contact, and alleged breach of fiduciary duty and fraud.

Plaintiffs have converted a “non-existent” breach of contract claim into a legally insufficient and more complex matter by suing the corporate defendant’s employees personally

and fabricating a legal theory not supported by law by claiming breach of fiduciary duty and fraudulent inducement and fraud by defendants.

In opposition, plaintiffs first argue that statements made by defense counsel that are not in his personal knowledge, including any that are argumentative, erroneous, irrelevant or frivolous, should be disregarded.

Next, plaintiffs argue that they are not attempting to pierce the corporate veil to find individual liability but that the individual defendants' liability is based on the tortious acts of the individual defendants and on the corporate defendant based on the acts of its officers, employees and agents.

Plaintiffs next argue that the allegations of fraud one may be sustained in the face of a breach of contract action; and two that the fraud claim is pled with sufficient particularity.

Each individual defendant personally and defendant Crown Point through its agent and marketing materials, represented to plaintiffs that Crown Point policy is, among other things, to stand by clients and work with them to correct problems with their door samples. Defendants intended plaintiffs and other potential customers to rely on such misrepresentations and be induced to negotiate and contract with the corporate defendant. Plaintiffs justifiably relied on the misrepresentations by defendants and suffered damages as a result.

In short, defendant Crown Point is liable for negligent misrepresentation because it claimed a special expertise that defendant Crown Point intended that plaintiffs to rely on in a position of trust and care.

Defendant Crown Point breached its fiduciary duty by abandoning plaintiffs, who were relying on defendant Crown Point's expertise to provide the exceptional factory-direct cabinetry

promised by the contract and marketing materials.

In reply, defendants point out that notwithstanding the fact that the court must accept the complaint's allegations of fact as true, the court makes its own decision as to whether causes of action are legally stated against proper defendants. If the court were to permit the fraud claims against the individual defendants in a standard business transaction, then incorporating in order to avoid personal liability would be rendered meaningless and all employees, including employees who are not shareholders or officers, would be subject to suit in what are basic breach of contract actions. Plaintiffs' legal "theory" nullifies the defenses of any and all corporate officers and is contrary to New York law and their definition of achieving equity totally destroys the defenses of officers in any corporate defendant action.

#### Analysis

##### CPLR 3211 [a] [1]: Defense is founded upon documentary evidence

Pursuant to CPLR 3211 [a] [1], a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." Thus, where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law," dismissal is warranted (*Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 N.E.2d 511 [1994]). The test on a CPLR 3211 [a][1] motion is whether the documentary evidence submitted "conclusively establishes a defense to the asserted claims as a matter of law" (*Scott v Bell Atlantic Corp.*, 282 AD2d 180, 726 NYS2d 60 [1<sup>st</sup> Dept 2001] citing *Leon v Martinez*, 84 NY2d 83, 88, *supra*; *IMO Indus., Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11, 699 NYS2d 43 [1<sup>st</sup> Dept 1999]).

Where documentary evidence and undisputed facts negate or dispose of the claims in the complaint or conclusively establish a defense, dismissal may be granted pursuant to CPLR 3211[a][1] (*Biondi v Beekman Hill Housing Apt. Corp.*, 257 AD2d 76, 692 NYS2d 304 [1<sup>st</sup> Dept 1999]; *Kliebert v McKoan*, 228 AD2d 232, 43 NYS2d 114 [1<sup>st</sup> Dept 1996]; *Gephardt v Morgan Guaranty Trust Co. of N.Y.*, 191 AD2d 229, 594 NYS2d 248 [1st Dept 1993]; *Juliano v McEntee*, 150 AD2d 524, 541 NYS2d 232 [1st Dept 1989]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 N.E.2d 511 [1994]; *Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1<sup>st</sup> Dept 2002]).

Defendant's motion to dismiss is not improper on the ground that it is based on an attorney's affirmation, given that the affirmation is submitted to support the documentary evidence, to wit: the Contract (*see Delaney v Westchester County*, 90 AD2d 819 [2d Dept 1982] *appeal dismissed by* 59 NY2d 763 [1983]; *Beagle v Parillo*, 116 AD2d 856 [3d Dept 1986]), and the Complaint. And, as discussed below, the documentary evidence supports dismissal of plaintiffs' claims for fraud, fraudulent misrepresentation and breach of fiduciary duty.

CPLR 3211 [a] [7]: Dismiss for Failure to State a Cause of Action

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept

1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR §3026). On a motion to dismiss made pursuant to CPLR § 3211, the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory” (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]). However, in those circumstances where the bare legal conclusions and factual allegations are “flatly contradicted by documentary evidence,” they are not presumed to be true or accorded every favorable inference (*Blondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996], and the criterion becomes “whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1st Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804, 616 NE2d 159 [1993] [CPLR 3211 motion granted where defendant submitted letter from plaintiff's counsel which flatly contradicted plaintiff's current allegations of prima facie tort]).

On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211[a]

[7] where the parties have submitted evidentiary material, including affidavits, the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS.2d 532 [1st Dept 1989]). Affidavits submitted by a plaintiff may be considered for the limited purpose of remedying defects in the complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-36 [1976]; *Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]). While affidavits may be considered, if the motion is not converted to a 3212 motion for summary judgment, they are *generally* intended to remedy pleading defects and *not to offer evidentiary support for properly pleaded claims*” (*Nonnon v City of New York*, 9 NY3d 825 [2007] [emphasis added]). As to affidavits submitted by the defendant/respondent, “[a]ffidavits submitted by a respondent will almost never warrant dismissal under CPLR 3211 unless they “establish conclusively that [petitioner] has no [claim or] cause of action” (*Lawrence v Miller*, 11 NY3d 588, 873 NYS2d 517 [2008] *citing Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]).

On a motion to dismiss directed at the sufficiency of the complaint, the plaintiff is afforded the benefit of a liberal construction of the pleadings: “The scope of a court’s inquiry on a motion to dismiss under CPLR 3211 is narrowly circumscribed” (*1199 Housing Corp. v International Fidelity Ins. Co.*, NYLJ January 18, 2005, p. 26 col.4, *citing P.T. Bank Central Asia v Chinese Am. Bank*, 1301 AD2d 373, 375 [2003]), the object being “to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action” (*id. at 376; see Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]).

It is the movant who has the burden to demonstrate that, based upon the four corners of

the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action. *See Leon v Martinez*, 84 N.Y.2d at 87-88, 614 N.Y.S.2d 972, 638 N.E.2d 511 (1994); *Guggenheimer v Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17 (1977); *Salles v. Chase Manhattan Bank*, 300 A.D.2d 226, 228, 754 N.Y.S.2d 236 (1st Dept.2002).

#### Attorney Affirmation

As the court stated in *Olan v Farrell Lines, Inc.* (64 NY2d 1092, 1092 [1985]), "The fact that defendant's supporting proof was placed before the court by way of an attorney's affidavit annexing plaintiff's deposition testimony and other proof, rather than affidavits of fact on personal knowledge, does not defeat defendant's right to summary judgment." *Hoeffner v Orrick, Herrington & Sutcliff LLP*, 61 AD3d 614 (1<sup>st</sup> Dept 2009).

The affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may, serve as the vehicle for the submission of acceptable attachments which do provide "evidentiary proof in admissible form", e. g., documents, transcripts. Such an affidavit or affirmation could also be accepted with respect to admissions of a party made in the attorney's presence.

Based on the foregoing, defendants' pre-answer motion to dismiss is properly before this court. The attorney affirmation annexes the Amended Complaint and the parties' contract (documentary evidence) and links them to the arguments in the Memorandum of Law supporting dismissal for failure to state a cause of action.

#### Fraud

The Court notes that in the context of a breach of contract case, a separate cause of action

for fraud does not lie where the only fraud alleged relates to the breach (*see Tucker v AM Sutton Associates*, 16 A.D.3d 670 [2d Dept 2005]; *Lee v Matarrese*, 17 A.D.3d 539 [2d Dept. 2005]; *34-35th Corp. v 1-10 Industry Assoc., LLC*, 2 A.D.3d 711, 712 [2d Dept 2003]; *Rocco v Town of Smithtown*, 229 A.D.2d 1034 [4<sup>th</sup> Dept 1996]; 28 N.Y. Prac., Contract Law § 21:7). And, a fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, *i.e.*, when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract (*J.A.O. Acquisition Corp. v Stavitsky*, 192 Misc.2d 7, 745 N.Y.S.2d 634 [Sup. Ct. New York County 2001], *citing*, *First Bank of the Americas v Motor Car Funding, Inc.* 257 A.D.2d 287, 291-92, 690 N.Y.S.2d 17 [1st Dept 1999]). By contrast, a cause of action for fraud may be maintained where a plaintiff pleads a breach of duty separate from, or in addition to, a breach of contract. For example, if a plaintiff alleges that it was induced to enter into a transaction because a defendant misrepresented material facts, the plaintiff has stated a claim for fraud even though the same circumstances also give rise to the plaintiff's breach of contract claim (*J.A.O. Acquisition Corp. v Stavitsky*, 192 Misc.2d 7 *supra*, *citing*, *First Bank of the Americas v Motor Car Funding, Inc. supra*]).

In this case, plaintiffs allege that each individual defendant personally and defendant Crown Point through its agent and marketing materials, represented to plaintiffs that Crown Point policy is, among other things, to stand by clients and work with them to correct problems with their door samples. Defendants intended plaintiffs and other potential customers to rely on such misrepresentations and be induced to negotiate and contract with the corporate defendant. Plaintiffs justifiably relied on the misrepresentations by defendants and suffered damages as a result. The fraud claim does not seek redress for actions that are separate and distinct from the

breach of contract claims.

General allegations that a party entered into a contract with the intention not to perform it are insufficient to support a claim for fraud (*see Hawthorne Group, LLC v RRE Ventures*, 7 AD3d 320, 323-24 [2004]; *Rochelle Assocs. v Fleet Bank*, 230 AD2d 605, 606 [1996], lv dismissed 89 NY2d 1030 [1997])

#### Fraudulent Misrepresentation

The elements of fraudulent misrepresentation are: (1) the defendant made a material false representation, (2) the defendant intended to defraud the plaintiffs thereby, (3) the plaintiff reasonably relied upon the representation, and (4) the plaintiff suffered damage as a result of his or her reliance (*Swersky v Dreyer and Traub*, 219 A.D.2d 321, 326, 643 N.Y.S.2d 33 [1st Dept. 1996] ). Misrepresentation must be pleaded with sufficient particularity, as required by CPLR 3016(b). The language of 3016(b) merely requires that a claim of misrepresentation be pleaded in sufficient detail to give adequate notice (*see Foley v. D'Agostino*, 21 A.D.2d 60, 64, 248 N.Y.S.2d 121 [1st Dept. 1964] ). Indeed, the Court of Appeals has specifically noted that this rule “is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud” (*Lanzi v Brooks*, 43 N.Y.2d 778, 780, 402 N.Y.S.2d 384, 373 N.E.2d 278 [1977] [citation omitted] ).

The claims plaintiffs assert as misrepresentations by the corporate and individual defendants do not rise to the level of stating a cause of action including, *inter alia*:

- defendant Batchelder: Crown Point works closely with its clients to make custom cabinetry to their satisfaction. Defendant Crown Point provides samples of its

custom cabinetry for approval prior to manufacturing the final product. If its clients are not satisfied with the first sample, defendant Crown Point provides additional samples and gets it right;

- defendant Stowell: Crown Point's business is to listen to its customers and work closely with its customers until defendant Crown Point gets it right. Crown Point's policy is to "provide a sample door so that if, for example, the finish is not what the customer wants, they make another sample to get it right.
- Crown Point's marketing materials and Crown Point officers and agents: Crown Point "We hand select each board for color and grain characteristics. "We take the time to build each cabinet, by hand, to your exact specifications.

### Breach of Fiduciary Duty

To assert a cause of action for breach of fiduciary duty, plaintiff must plead the following three elements: (1) the existence of a fiduciary duty between the parties; (2) the breach of that duty by defendant; and (3) damages suffered by plaintiff as a result of defendant's breach (DDCLAB Ltd. v. E.I. DuPont De Nemours and Co., 2005 WL 425495 [S.D.N.Y.,2005.] citing *Kidz Cloz, Inc. v. Officially for Kids, Inc.*, 2002 WL 392291, \*4 (S.D.N.Y. Mar. 13, 2002) (citing *Cramer v. Devon Group, Inc.*, 774 F.Supp. 176, 184 (S.D.N.Y.1991)). "Under New York law a fiduciary relationship arises when one has reposed trust or confidence in the integrity or fidelity of another who thereby gains a resulting superiority of influence over the first, or when one assumes control and responsibility over another." *Reuben H. Connelly Corp. v. Mark I Mktg. Corp.*, 893 F .Supp. 285, 289 (S.D.N.Y.1995) (citation omitted). A conventional business relationship alone does not give rise to a fiduciary relationship. *Oursler v. Women's Interart Ctr., Inc.*, 566 N.Y.S.2d 295, 297 (N.Y.App.Div.1991); *Feigen v. Advance Capital Mgmt. Corp.*, 541 N.Y.S.2d 797, 799 (N.Y.App.Div.1989). In the context of a commercial contract, a fiduciary duty

may nevertheless exist where the parties specifically agree to it or if “ ‘one party's superior position or superior access to confidential information is so great as virtually to require the other party to repose trust and confidence in the first party.’ ” See, *Ross v. FSG PrivatAir Inc.*, 2004 WL 1837366, \*5 (S.D.N.Y. Aug. 17, 2004) (quoting *Calvin Klein Trademark Trust v. Wachner*, 123 F.Supp.2d 731, 734-34 (S.D.N.Y.2000)). It is incumbent upon a plaintiff to plead some factors in the complaint from which it can be concluded that the parties had a fiduciary relationship. *Ross*, 2004 WL 1837366, \*6 (quoting *Boley v. Pineloch Assocs., Ltd.*, 700 F.Supp. 673, 681 (S.D.N.Y.1988)).

In this case, plaintiffs allege that defendant Crown Point breached its fiduciary duty by abandoning plaintiffs, who were relying on defendant Crown Point's expertise to provide the exceptional factory-direct cabinetry promised by the contract and marketing materials. This amounts to a restatement of plaintiffs' breach of contract claim, and cannot stand.

#### Individual Liability

Generally, a corporation exists independently of its owners, who are not personally liable for the corporation's obligations. Moreover, individuals may incorporate for the express purpose of limiting their liability. *East Hampton v Sandpebble*, 884 N.Y.S.2d 94, 98 (2d Dept.2009), citing *Bartle v Home Owners Coop.*, 309 N.Y. 103, 106 (1955) and *Seuter v. Lieberman*, 229 A.D.2d 386, 387 (2d Dept.1996). Plaintiffs fail to state a cause of action warranting disturbance of this rule.

Plaintiffs fail to state a cause of action for fraud, fraudulent misrepresentation or breach of contract as against any individual defendant.

Conclusion

Based on the foregoing, it is hereby

**ORDERED and ADJUDGED** that defendants' motion to dismiss all causes of action as against the individual defendants is granted, and plaintiffs' causes of action as to the individual defendants Lindsay Batchelder, Brian D. Stowell and Rebecca C. Stowell are severed and dismissed with prejudice, and the Clerk of the Court is directed to enter judgment accordingly; and it is further

**ORDERED and ADJUDGED** that defendants' motion to dismiss plaintiffs' causes of action for breach of fiduciary duty, fraud and fraudulent misrepresentation as against all defendants is granted, and plaintiffs' causes of action for fraud and fraudulent misrepresentation are severed and dismissed with prejudice, and the Clerk of the Court is directed to enter judgment accordingly; and it is further

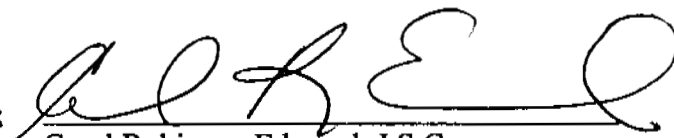
**ORDERED** that the remaining corporate defendant shall serve and file its Answer within 30 days of entry of this order. And counsel for parties shall appear for a Preliminary Conference before Justice Carol R. Edmead, Supreme Court, New York County, Part 35, 60 Centre Street, Room 438, NY 10007 on Tuesday, October 26, 2010 at 2:15 p.m.; and it is further

**ORDERED** that counsel for defendants shall serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for plaintiffs.

Dated: July 22, 2010

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 438).



Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMOAD**