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

PRESENT: PAUL G. FEINMAN Justice PART 12

Sivaraj

- v -

The City

INDEX NO. 117469/08

MOTION DATE 2/1/2010

MOTION SEQ. NO. 010

MOTION CAL. NO.

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

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

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

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

Dated: 4/2/2010

Paul G. Feinman J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

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XHEVAHIRE SINANAJ and SELVI SINANOVIC AS CO-ADMINISTRATORS OF THE ESTATE OF RAMADAN KURTAJ, DECEASED, & SELVI SINANOVIC, INDIVIDUALLY,

Plaintiffs,

-against-

THE CITY OF NEW YORK, NEW YORK CITY, DEPARTMENT OF BUILDINGS, MICHAEL CARBONE, PATRICIA J. LANCASTER, ROBERT LIMANDRI, CITY OF NEW YORK SCHOOL CONSTRUCTION FUND, NEW YORK CITY EDUCATIONAL CONSTRUCTION FUND, NEW YORK CRANE & EQUIPMENT CORP., J.F. LOMMA, INC., TES INC., JF LOMA TRUCKING AND RIGGING, JF LOMA RIGGING AND SPECIALIZED SERVICES, JAMES F. LOMMA, BRADY MARINE REPAIR CO., TESTWELL, INC., BRANCH RADIOGRAPHIC LABORATORIES, INC., CRANE INSPECTION SERVICES, LTD., SORBARA CONSTRUCTION CORP., 1765 FIRST ASSOCIATES, LLC, LEON D. DEMATTEIS CONSTRUCTION CORPORATION, MATTONE GROUP CONSTRUCTION CO. LTD., MATTONE GROUP LTD., MATTONE GROUP LLC, HOWARD I. SHAPIRO & ASSOCIATES CONSULTING ENGINEERS, P.C., NEW YORK RIGGING CORP. TOWER RIGGING CONSULTANTS, INC., TOWER RIGGING, INC., UNIQUE RIGGING CORP., LUCIUS PITKIN, INC., MCLAREN ENGINEERING GROUP, M.G., MCLAREN, P.C., & "JOHN/JANE DOES" "1" though "10,"

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Index Number 117469/2008E
Submission Date 2-1-2010
Mot. Seq. No. 010

DECISION AND ORDER

For the Plaintiffs:
Susan M. Karten & Associates, LLP
By: Susan M. Karten, Esq.
355 Lexington Avenue, Suite 1400
New York, NY 10017

For Defendants New York Crane & Equipment Corp., James F. Lomma, J.F. Lomma Inc., TES Inc., J F Lomma Trucking and Rigging, and JF Lomma Rigging and Specialized Services:
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP
By: Glenn J. Fuerth, Esq.
150 East 42nd Street
New York, NY 10017-5639
(212) 490-3000

Papers considered in review of this motion to dismiss:

Papers	E-Filing Document Number
Notice of Motion	134
Aff. in Supp. and Annexed Exhibits	135
Memo of Law in Supp.	137
Aff. in Opp. and Annexed Exhibits	20
Reply Aff. in Further Supp.and Annexed Exhibits	37, 139
Reply Memo of Law in Further Supp. and Annexed Exhibits	35, 140-142
Plaintiff's Additional Exhibits	159
Affirmation in Objection and Memo of Law	160-161

PAUL G. FEINMAN, J.:

Defendants New York Crane & Equipment Corp. ("NYC&E"), J.F. Lomma Inc., TES Inc., J F Loma Trucking and Rigging, JF Loma Rigging and Specialized Services, and James F. Lomma (collectively "movants") move to: (1) dismiss the complaint, as against all movants except for NYC&E by virtue of a defense based upon documentary evidence; (2) dismiss the complaint, as against J F Loma Trucking and Rigging, JF Loma Rigging and Specialized Services, and James F. Lomma for failure to state a cause of action; (3) dismiss the fourth and sixth causes of action as against NYC&E for failure to state a cause of cation and by virtue of a defense based upon documentary evidence; and (4) strike certain allegations and exhibits pursuant to CPLR 3024 (b). The motion is granted in part and denied in part.

Background

This litigation arises out of the collapse of a construction crane in May 2008, at East 91st Street, New York County. Plaintiffs commenced this action by filing a summons with notice in December 2008 and filed an amended summons with notice and verified complaint in March 2009. In May 2009, defendant Testwell filed a voluntary petition for Chapter 11 Bankruptcy and this matter was stayed (*see Sinanaj v City of New* York, Index No. 101871/2009 [Motion Sequence Numbers 001, 002, 004, and 005], Orders entered 9/23/09 & 9/29/2009 [Feinman, J.]).

By order dated January 14, 2010, this court granted plaintiff's motion to vacate the stay to the extent that plaintiff's claims against the defendants were restored to active status as was this motion, which formerly bore motion sequence number 004 and now bears motion sequence number 010 (*Sinanaj v City of New York*, Index No. 117469/2008 [Motion Sequence Number 006], Dec. and Ord. Dated 1/14/09 [Feinman, J.]).

Analysis

I. Motions to Dismiss

The verified complaint alleges seven causes of action: (1) negligence (Ver. Compl. ¶¶ 421-539); (2) for "personal injuries, conscious pain and suffering, emotional distress, pre and post impact terrors" (Ver. Compl. ¶¶ 540-544); (3) wrongful death (Ver. Compl. ¶¶ 545-550); (4) various Labor Law violations (Ver. Compl. ¶¶ 551-573); (5) negligent hiring, retention, supervision, and training (Ver. Compl. ¶¶ 574-579); (6) res ipsa loquitor (Ver. Compl. ¶¶ 580-586); (7) punitive and exemplary damages (Ver. Compl. ¶¶ 587-597). The movants seek to: (1) dismiss the complaint in its entirety, as against all movants except for NYC&E by virtue of a defense based upon documentary evidence; (2) dismiss the complaint in its entirety, as against J F Loma Trucking and Rigging, JF Loma Rigging and Specialized Services, and James F. Lomma for failure to state a cause of action; (3) dismiss the fourth and sixth causes of action as against NYC&E for failure to state a cause of cation and by virtue of a defense based upon documentary evidence.

1. <u>Motion to Dismiss the Complaint as Against James F. Lomma and the Corporate Entities, Other than NYC&E, Pursuant to CPLR 3211 (a) (1).</u>

The movants argue that the complaint should be dismissed in its entirety as against all movants but NYC&E for failure to state a cause of action and based upon documentary evidence.

In the context of a motion to dismiss under 3211 (a) (7), the court must "determine only whether the facts alleged fit within any cognizable legal theory" (*Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 144-145 [1st Dept 2009]). "It is axiomatic that . . . the pleading is to be afforded a liberal construction, the facts alleged in the complaint accepted as true, and the plaintiff accorded the benefit of every possible favorable inference" (*Mandarin Trading Ltd. v Wildenstein*, 65 AD3d 448, 458 [1st Dept 2009]). Under CPLR 3211 (a) (1), the court will only grant a motion to dismiss if "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]) and "utterly refutes plaintiff's factual allegations" (*McCully v Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept 2009]). The documentary evidence must resolve all factual issues (*see Barghout v Dweck*, 244 AD2d 190, 191 [1st Dept 1997]).

This motion is, almost entirely, premised upon the validity of a single assumption–that the movants are distinct entities as amongst each other. Contrary to the movants' characterization, the truth of this premise is not self-evident. Neither does the documentary evidence conclusively establish this. Rather, the identity, control, and relationship amongst James F. Lomma and the various corporate entities is precisely at issue here. In an attempt to substantiate the motion, the movants submit: (1) the affidavit of Salvatore Isola, the general manager of NYC&E (Not. of Mot. Ex. A,); (2) the agreement between NYC&E and Sorbara regarding the lease of the crane (Not. of Mot., Ex. A, Isola Aff., Ex. A, Rental Agreement); (2) the bill of sale demonstrating that NYC&E purchased the crane in February 1999 (Not. of Mot., Ex. B, Lomma Aff., Ex. B); and (4) the "affidavit" of James F. Lomma (Not. of Mot., Ex. B, Lomma Aff., Ex. B). The court declines to consider either affidavit for the purposes of determining the CPLR 3211 (a) (1) branch of this motion because "an affidavit does not qualify as 'documentary evidence' which will support a

motion to dismiss under CPLR 3211 [a] [1]" (*Williamson, Picket, Gross, Inc. v Hirschfeld*, 92 AD2d 289, 290 [1st Dept 1983]; *see Crepin v Fogarty*, 59 AD3d 837, 838 [3d Dept 2009] ["affidavits submitted by a defendant do not constitute documentary evidence upon which a proponent of dismissal can rely"]; *Tsimerman v Janoff*, 40 AD3d 242, 242 [1st Dept 2007]; *Realty Invs. of USA v Bhaidaswala*, 254 AD2d 603, 604-605 [3d Dept 1988]; *see* Siegel, NY Prac § 259, at 411 [4th ed]). Moreover, the purported "affidavit" of James F. Lomma, which was not sworn to before a notary public but was ostensibly sworn to before an attorney admitted in the state of New Jersey, was not accompanied by a certificate of conformity (*see* CPLR 2309 [c]; Real Property Law § 299-a [1]; *Sirico v F.G.G. Prods., Inc.*, 2010 NY Slip Op 01733, *3 [1st Dept 2010]). Accordingly, the only documentary evidence offered by the movants that this court will consider in support of this branch of the motion is the lease agreement between NYC&E and Sorbara (Not. of Mot., Ex. A, Isola Aff., Ex. A, Rental Agreement) and the bill of sale demonstrating that NYC&E purchased the crane in February 1999 (Not. of Mot., Ex. B, Lomma Aff., Ex. B).

As to James F. Lomma, the movants contend that the complaint must be dismissed because plaintiff cannot pierce the corporate veil. One of the policies behind incorporation is to promote commerce by limiting the personal liability. "[A] corporation exists independently of its owners, [i]s a separate legal entity, [and] the owners are normally not liable for the debts of the corporation[;] it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 140 [1993]). The corporate veil is nearly impregnable and "[t]hose seeking to pierce a corporate veil of course bear a heavy burden of showing that the corporation was dominated . . . and that such domination was the instrument of fraud or otherwise resulted in wrongful or

inequitable consequences" (*TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]).

Here, the complaint alleges that James F. Lomma was the "President, Executive Officer and owner" of NYC&E, J.F. Lomma, Inc., JF Loma Trucking and Rigging, TES Inc., JF Loma Rigging and Specialized Services (Ver. Compl. ¶ 14), and that these defendants purchased, "owned, managed, controlled, maintained and repaired" the crane that caused Kurtaj's death (Ver. Compl. ¶¶ 21-22). The complaint can also be reasonably construed as alleging that as amongst each other, the corporate entities are not distinct. Thus, plaintiff has sufficiently stated claims against these corporate entities (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

In opposition to the motion, plaintiffs also submit the grand jury indictment, issued on March 8, 2010, against James F. Lomma, NYC&E, and J.F. Lomma Inc. for manslaughter in the second degree (two counts), criminally negligent homicide (two counts), assault in the second degree, and reckless endangerment in the second degree (Karten Aff., Exs.).[1] The coordinate statement of facts claims, among other things, that of James F. Lomma, "as the owner of [NYC&E] and J.F. Lomma, Inc.," failed to "employ an engineer to oversee the repairs, failed to hire a certified welding company to perform the work, and provided [the Chinese repair

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[1] The movants' argument that "the indictment constitutes merely accusations of guilt [and] cannot salvage the [v]erified [c]omplaint from dismissal" is without merit. "Once a suspect has been indicted . . . the law holds that the Grand Jury action creates a presumption of probable cause" (*Colon v City of New York*, 60 NY2d 78, 82 [1983], *rearg denied* 61 NY2d 670 [1983]) "to believe that the suspect committed the crime" (*Strange v County of Westchester*, 29 AD3d 676, 677 [2d Dept 2006]). Such evidence *is* admissible and "in connection with motions to dismiss pursuant to CPLR 3211(a)(7), may be used to supplement, and to remedy any defects in the pleading" (*Williams v Sidley Austin Brown & Wood, L.L.P.*, 13 Misc 3d 1213(A), *1 [Sup Ct, NY County 2006], *affd* 38 AD3d 219 [1st Dept 2007]). Further, movants' contention that this submission is untimely is unavailing because the court hereby grants leave for the submission to plaintiff nunc pro tunc. This is warranted in light of plaintiff's prompt filing of the indictment within days of its occurrence.

company] with grossly inadequate welding specifications that were different from the specifications of the original bearing manufacturer" (Karten Aff., Exs.).

The movants have not submitted documentary evidence that would "utterly refute[]" the notion that one of these corporations is either a subsidiary corporation, parent corporation, sister corporations, or alter ego intended to shield another corporation from liability so as to render them judgment-proof (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]; *Teachers Ins. Annuity Assn. of Am. v Cohen's Fashion Opt. of 485 Lexington Ave., Inc.*, 45 AD3d 317, 318-319 [1st Dept 2007]). This is especially true in light of the number of corporate entities, many of which bear Lomma's name or some variation thereof.[2] "'Veil-piercing is a fact-laden claim that is not well suited for summary judgment resolution,'" let alone on a pre-answer motion to dismiss (*Damianos Realty Group, LLC v Fracchia*, 35 AD3d 344, [2d Dept 2006], quoting *First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 294 [1st Dept 1999]; *see also Forum Ins. Co. v Texarkoma Transp. Co.*, 229 AD2d 341, 342 [1st Dept 1996]). Plaintiff is entitled to the discovery needed to ascertain whether there are grounds to pierce the veil (*see First Bank of Ams. v Motor Car Funding*, 257

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[2] The movants also argue that the complaint must be dismissed as against JF Loma Trucking and Rigging and JF Loma Rigging and Specialized Services because "those entities simply do not exist"(Fuerth Aff. ¶ 23). In opposition, plaintiffs submit documentary evidence that lists the address for JF Lomma Inc. and JF Lomma Trucking & Rigging as 48 Third Street, Kearny, NY. Clearly, the existence, identity, and liability of these entities is an issue that can not be conclusively determined on this record nor at this stage of the proceedings. Therefore, this portion of the motion is denied (*see Walker v Kramer* 63 AD 3d 723 [2d Dept 2009]; *accord Guggenheimer v Ginzburg*, 43 NY2d at 275). Additionally, some of the corporate entities have virtually identical names. The court is cognizant of the threats posed by shell entities strategically created in an attempt to shield assets by evading New York jurisdiction (*see Koehler v Bank of Bermuda Ltd.*, 12 NY3d 533 [2009]; *see also* 211 Siegel's Practice Review, *Longarm Jurisdiction*, at 1 [July 2009]), and for this reason as well, the motion must be denied.

AD2d at 294; *Aubrey Equities v SMZH 73rd Assoc.*, 212 AD2d 397, 398 [1st Dept 1995]). The motion must be denied because minimal to no discovery has taken place and there is simply not enough information to determine whether the corporate veil(s) should be pierced or whether Lomma should be held personally liable (*see International Credit Brokerage Co. v Agapov*, 249 AD2d 77, 78 [1st Dept 1998]). Thus, no movant is entitled to dismissal of the complaint in its entirety.

2. Motion to Dismiss the Fourth and Sixth Causes of Action as Against NYC&E Pursuant to CPLR 3211 (a) (1) and (7).

As against NYC&E, the movants argue that the fourth and fifth causes of action should be dismissed.

A. Motion to dismiss the fourth cause of action as against NYC&E

The fourth cause of action alleges violations of Labor Law sections 200, 240, 241, and 241 (6), but the movants only seek dismissal of the fourth cause of action to the extent of the Labor Law sections 240 and 241 (6) claims as against NYC&E (Reply Aff. ¶ 33), contending that NYC&E "did not direct, control or supervise construction work at the project nor were any of its employees present at the project on the day of the alleged accident" (Fuerth Aff. ¶ 51). In support thereof, the movants submit the affidavit of Salvatore Isola and a copy of the rental agreement between NYC&E and Sorbara (Fuerth Aff., Ex. A).

The complaint alleges that "the construction . . . project was operated, managed, controlled performed, supervised, maintained, inspected and equipped by [NYC&E]" (Ver. Compl. ¶¶ 554, 564-565). Whether NYC&E constitutes a statutory agent for the purposes of determining liability under Labor Law 240 or 241 (6) depends on whether the it retained any

"authority to supervise and control the work," not whether any "actual supervision or control ha[d] been exercised" (*Rizzo v Hellman Elec. Corp.*, 281 AD2d 258, 259 [1st Dept 2001]). The very evidence the movants' submit in support of their claim–the rental agreement between NYC&E and Sorbara–explicitly provides that NYC&E reserved the rights to conduct inspections and, under certain circumstances, repossess all or part of the crane or equipment without providing Sorbara with notice, and provide a mechanic for the repair or operation of the crane (Fuerth Aff., Ex. A). Clearly, this demonstrates that "there are factual issues as to whether [NYC&E] retained control and supervision over the work site" (*Freitas v New York City Tr. Auth.*, 249 AD2d 184, 186 [1st Dept 1998]). Thus, plaintiffs have sufficiently stated this cause of action to warrant having defendant answer and participate in discovery on it and the movants' submissions cannot be said to have conclusively established a defense as a matter of law. Accordingly, this branch of the motion must be denied.

B. Sixth cause of action as against NYC&E

Next, movants seek to dismiss the "Fifth Cause of Action for Negligence on a Theory of Res Ipsa Loquitor" as against NYC&E because NYC&E did not have "exclusive control" of the instrumentality causing the injury. *Here*, plaintiffs' *fifth* cause of action is for negligent hiring, retention, supervision, and training; plaintiffs' *sixth* cause of action invokes res ipsa loquitor. However, because res ipsa loquitor *is* the fifth cause in the related matter (*see Leo v City of New York*, Index No. 117294/2008), the court must assume that this is one of the many instances where the movants' pleadings have confused this matter with the related matter *Leo v City of New York*, Index No. 117294/2008 (*see* Fuerth Aff. ¶ 3 ["Plaintiff seeks compensation for the death of

his son, Donald Christopher Leo"]).[3] Additionally, the prayer for relief in the movants' notice of motion and Glenn J. Fuerth's affirmation in support repeatedly confuses CPLR 3211 (a) (1) with CPLR (a) (7), demanding the former while invoking the latter, and vice versa (*see* Not. of Mot., at 2, ¶¶ C, D, and E; Fuerth Aff, in Supp. ¶ 2). Given the complexity of this matter, all of the parties are urged to furnish the court with accurate pleadings and should be reminded that "waste of valuable court time" could subject them to sanctions (*Wasson v Mendik*, 253 AD2d 711, 712 [1st Dept 1998]; *see Levy v Carol Mgt. Corp.*, 260 AD2d 27, 28, 33-34 [1st Dept 1999] [per curiam]). This court will endeavor to see the merits underlying inartfully crafted pleadings, but will not hesitate to summarily deny demands for relief when it is unable to decipher what counsel is referring to with any degree of certainty. Having to piece together what counsel means by referring to a completely different action wastes the court's time and delays a prompt decision from issuing on the motion.

Turning to the merits, it must first be noted that *res ipsa* is not a cause of action (*see* NY PJI 2:65, Comment; *accord Abbott v Page Airways, Inc.*, 23 NY2d 502, 512 [1969]). It is a theory of recovery by which to establish negligence (*see Crawford v City of New York*, 53 AD3d 462, 465 [1st Dept 2008]. Neither party addresses this, but this court must nevertheless dismiss plaintiff's purported sixth cause of action because it fails to state a cause of action. However, the court will deem paragraphs 580 through 586 of the verified complaint as incorporated under plaintiff's first cause of action–the negligence claim (*see Ianotta v Tishman Speyer Props., Inc.*,

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[3] While the court need not recite them all, the movants' submissions are also riddled with a litany of less egregious errors, such as the insertion of a footnote indicator that does not actually correspond to a footnote (Fuerth Aff., at 13 n 6), and repeatedly referring to the Labor Law claim as the first cause of action when it is actually the fourth (Fuerth Aff. ¶¶ 51, 54).

46 AD3d 297, 298 [1st Dept 2007]). Notably, even if plaintiff had not specifically pleaded *res ipsa loquitor*, this would not "constitute[] a bar to the invocation of *res ipsa loquitor* where the facts warrant its application" (*Weeden v Armor El. Co.*, 97 AD2d 197, 202 [2d Dept 1983]). Thus, this branch of the motion is granted insofar as the sixth cause of action is dismissed in its entirety, but denied to the extent that paragraphs 580 through 586 of the purported "sixth cause action" shall be deemed incorporated into the first cause of action sounding in negligence.

II. Motion to Strike

The movants also ask the court to strike various allegations from the complaint arguing, among other things, that they "involve evidentiary matters and are highly prejudicial [and] unnecessary for the [c]omplaint's sufficiency" (Fuerth Aff. ¶ 38). CPLR 3024 vests this court with the discretion to strike scandalous or prejudicial pleadings, or portions thereof (*see Kaufman & Kaufman v Hoff*, 213 AD2d 197, 198 [1st Dept 1995]). The matter the movants seek to strike is plainly relevant and, among other things, tends to support a claim of negligence by demonstrating a causal relationship between defendants' conduct and the decedent's injuries. The movants have also failed to demonstrate that they would suffer any prejudice from leaving the language in the complaint (*see Soumayah v Minnelli*, 41 AD3d 390, 393 [1st Dept 2007]).

III. Conversion to Summary Judgment

Lastly, the movants ask this court to convert this motion to dismiss as one for summary judgment pursuant to CPLR 3211 (c). Discovery has not been completed and by no means have the parties unequivocally charted a course for summary judgment (*see Primedia Inc. v SBI USA LLC*, 43 AD3d 685, 686 [1st Dept 2007]). Thus, this branch of the motion is denied. Accordingly it is

ORDERED that the motion to dismiss the complaint is granted to the extent that the sixth cause of action is dismissed, but the allegations therein, including paragraphs 580 through 586 of the verified complaint shall be deemed incorporated under the first cause of action sounding in negligence; and it is further

ORDERED that the motion is denied in all other respects except to the extent set forth in a Case Management Order which will be issued separately; and it is further

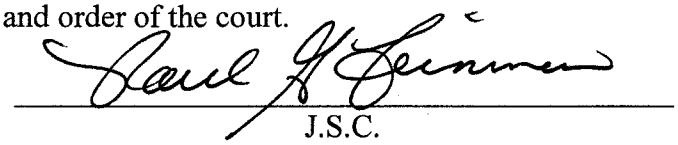
ORDERED that the movants shall serve a copy of this order on all parties and third-parties, if any, and upon the Clerk of Court, 60 Centre Street, Basement, who shall enter judgment dismissing the sixth cause of action; and it is

ORDERED that the remainder of the action is severed and continued under this index number; and it is further

ORDERED that the movants shall file and serve an answer within the time frame set forth in CPLR 3211(f).

This constitutes the decision and order of the court.

Dated: April 2, 2010
New York, New York



J.S.C.

(117469_2008_010_gms(Sinanaj_NYC&E_M2D_M2Strike).wpd)