Eastchester Rehabilitation & Health Care Ctr., LLC v Eastchester Health Care Ctr., LLC
2012 NY Slip Op 33470(U)
March 26, 2012
Sup Ct, NY County
Docket Number: 401277/2006E
Judge: Paul G. Feinman
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[* FILED: NEW YORK COUNTY CLERK 03/28/2012] INDEX NO. 401277/2006
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN
Justice

PART 12

Index Number : 401277/2006 E
EASTCHESTER REHABILITATION
vs.
EASTCHESTER HEALTH CARE
SEQUENCE NUMBER : 002
PARTIAL SUMMARY JUDGMENT

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ | **No(s).** ______

Answering Affidavits — Exhibits ______ | **No(s).** ______

Replying Affidavits ______ | **No(s).** ______

Upon the foregoing papers, it is ordered that this motion is

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

MED-I 4/6/2012 11:30 AM

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

Dated: 3/26/2012

______, **J.S.C.**

1. **CHECK ONE:** ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. **CHECK AS APPROPRIATE: MOTION IS:** ☐ GRANTED ☐ DENIED ☑ GRANTED IN PART ☐ OTHER
3. **CHECK IF APPROPRIATE:** ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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EASTCHESTER REHABILITATION AND HEALTH CARE CENTER, LLC, EASTCHESTER REALTY ASSOCIATES, LLC, SPLIT ROCK REHABILITATION AND HEALTH CARE CENTER, LLC and EASTROCK REALTY ASSOCIATES, LLC,

Plaintiffs,

Index Number 401277/2006E
Mot. Seq. No. 002

-against-

EASTCHESTER HEALTH CARE CENTER, LLC, SPLIT ROCK MULTI-CARE CENTER, LLC, EMZEL REALTY CORP., ZELMA PROPERTIES, INC., and ABE ZELMANOWICZ,

Defendants.

DECISION & ORDER

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APPEARANCES:

FOR PLAINTIFFS:
Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formatto & Einiger, LLP
By: Sarah C. Lichtenstein, Esq.
1111 Marcus Ave., ste 107
Lake Success, NY 11042

FOR DEFENDANTS:
No appearance on motion

E-filed papers considered in review of this motion for partial summary judgment:

Papers	E-filing Document Numbers
Notice of Motion	33
Affirmations, Affidavits	33-1 - 33-4
Exhibits A-O	33-5 – 33-19
Memorandum of Law	34
Stipulation to Adjourn Motion	35
Note of Issue	30

PAUL G. FEINMAN, J.:

Plaintiffs move for partial summary judgment pursuant to CPLR 3212. The motion is unopposed. For the reasons which follow, the motion, although unopposed, is granted in part and otherwise denied.

Background

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This case arises out of a sale of assets and real property of two skilled nursing facilities located in the Bronx, New York (Doc 33-5, Mot. ex. A, Complaint ¶¶ 1-2). Plaintiffs are the limited liability companies that bought and now own and operate the two facilities, and two limited liability companies that bought and now own the real estate on which the two facilities are located (Doc. 31-5, Mot. ex. A, Complaint ¶¶ 1-4, 12). Defendants consist of the former owners of the real estate and the nursing facilities, and their president, Abe Zelmanowicz (Doc. 31-5, ex. A, Complaint ¶¶5-9).

In June 2001, plaintiffs' assignors entered into a purchase agreement with defendants' assignors to buy Eastchester Rehabilitation and Health Care Center and Split Rock Rehabilitation and Health Center from defendants (Doc 33-5, Mot. ex. A, Complaint ¶ 10; Doc. 33-8 ex. D, Purchase Agreement). This agreement included a provision that "[a]s of the Closing Date," the sellers would indemnify and hold harmless the buyers from, *inter alia*, all claims, liabilities and expenses, "to the extent that such Losses arise from or relate to . . . a breach by any of the Sellers of any representation, warranty or covenant contained in this agreement (Doc. 33-5, Mot. ex. A, Complaint ¶ 11; Doc. 33-8, ex. D, Purchase Agreement § 8.4).

According to the complaint, the closing took place on September 19, 2002 (Doc 33-5, Mot. ex. A, Complaint ¶ 12). Also according to the plaintiffs, among the documents signed at the closing were a "Sellers' Indemnification Agreement," echoing the provision of the Purchase Agreement providing that "Sellers shall jointly and severally indemnify, defend and hold harmless Buyers from any and all claims, actions, losses, damages, costs, liability or expenses," whether they were known or asserted before or after the closing date, and a Guaranty signed by Zelmanowicz guaranteeing all payments outstanding pursuant to the Sellers' Indemnification

Agreement (Doc 33-5, Mot. ex. A, Complaint ¶ 13). There is no copy of either the Sellers' Indemnification Agreement or the Guaranty included in the motion papers.

Plaintiffs allege that during the parties' negotiations, defendants provided audited financial statements that partially reflected false operating income and occupancies, as well as annual certified cost reports originally filed with the New York State Department of Health, also containing false information (Doc. 33-5, Mot. ex. A, Complaint ¶¶ 28-29). According to the complaint, after the closing, plaintiffs discovered that defendants had overcharged Medicaid and had been reimbursed based on the overcharges, and had also inflated their operating income, reduced their operating losses, and inflated their occupancies (Doc. 33-5, Mot. ex. A, Complaint ¶¶ 25-27). They discovered that defendants did not deliver various monies received after the closing date which rightfully belong, under the Purchase Agreement, to plaintiffs (Doc. 33-5, Mot. ex. A, Complaint ¶¶ 67-72). They also discovered that defendants approved wage increases for union members that were not required under the collective bargaining agreement, and that they were now liable for "undue and excessive wages" to the facilities' employees (Doc. 33-5, Mot. ex. A, Complaint ¶¶ 54-57). In addition, after the closing, as provided for in the Purchase Agreement, plaintiffs notified defendants of various adjustments that needed to be made to the selling price totaling $646,679.84; defendants acknowledged in writing that they were liable for $386,693.95 (Dec. 33-4, Mot. ex. A, Complaint ¶¶ 44, 46-47). No payments have been made.

Plaintiffs commenced this action in Nassau County on about December 29, 2005 by filing a summons and complaint. The complaint alleges one count of fraud and six claims for breach of contract arising out of the sale and purchase of Eastchester and Split Rock. Defendants served

their answer with five counterclaims on April 7, 2006 (Doc 33-6 at 19, ex. B, Answer; Doc. 30, Note of Issue). Plaintiffs' reply with three affirmative defenses was filed on May 17, 2006 (Doc 33-7 at 4, ex. C, Reply). The note of issue was filed on July 28, 2011 (Doc. 30).

Plaintiffs timely move pursuant to CPLR 3212 for partial summary judgment against defendants as to their third, fifth, and sixth causes of action claiming outstanding adjustment costs to the purchase price (Third Cause of Action), recoupment costs from reimbursing Medicaid for overcharges made by defendants (Fifth Cause of Action), and the monies received by defendants after the closing that rightfully belong to plaintiffs (Seventh Cause of Action). Plaintiffs seek the principal amounts due, that is to say, $386,693.96 as to the third cause of action, $351,215.69 as to the fifth cause of action, and $673,608.11 as to the sixth cause of action. Plaintiffs also seek an award of interest for each of the causes of action, and request costs, disbursements, and reasonable attorney's fees.

Defendants have not opposed plaintiffs' motion. There is no issue with service of the papers, as the record contains a signed stipulation of adjournment, dated October 5, 2011, extending the time for serving opposition and reply papers as well as the return date (Doc. 30). As defendants never served opposition papers, this motion was marked submitted without opposition on November 21, 2011.

Discussion

To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor (*GTF Mtkg, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 967 [1985]). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form

sufficient to create a question of fact requiring a trial (*Kosson v Algaze*, 84 NY2d 1019 [1995]).

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue or where the issue is debatable (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Stone v Goodson*, 8 NY2d 8, 13 [1960]). It is appropriate when there is no genuine issue as to any material fact and the disposition of the causes of action may be decided as a matter of law (*Security Pacific Bus. Credit, Inc. v Peat Marwick Main & Co.*, 79 NY2d 695, *rearg denied* 80 NY2d 918 ([1992]). Issue finding rather than issue determination is its function (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). The evidence will be construed in the light most favorable to the one moved against (*Corvino v Mount Pleasant Centr. Sch. Dist.*, 305 AD2d 364, 364 [2d Dept 2003]; *Bielat v Montrose*, 272 AD2d 251, 251 [1st Dept. 2000]). Where there is any doubt as to the existence of a triable issue of fact, summary judgment should be denied (*Rotuba Extruders v Ceppos*, 46 NY2d at 231; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept. 2002]).

Plaintiffs seek summary judgment on certain of their claims of breach of contract. In order to make out a prima facie case for breach of contract, plaintiffs must show: (1) the parties had a valid and enforceable agreement; (2) plaintiffs performed all conditions precedent to defendants' performance; (3) defendants breached the contract by failing or refusing to comply with the terms of contract; and (4) plaintiffs suffered actual damages or loss as a result of defendants' breach (*Hecht v Components International, Inc.*, 22 Misc 3d 360, 364 [Sup Ct Nassau County, 2008]). As noted above, plaintiffs have not provided a copy of the Sellers' Indemnification Agreement or the Guaranty signed by Zalmanowicz, but rely solely on the terms

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of the Purchase Agreement to establish the terms at issue.[1] Defendants' Answer indicates there was also a "Closing Agreement" and a "Collections Agreement" both signed on the date of closing, but says nothing about a Guaranty (Doc. 31-6, Answer ¶ 88). Therefore, plaintiff has not established entitlement to summary judgment on any of its claims as against Zelmanowicz personally, who signed as "President" for each of the other defendants. As to the other defendants, plaintiffs' motion is addressed as follows.

Third Cause of Action - Closing Cost Adjustments

Plaintiffs claim that defendants are liable pursuant to the purchase agreement for closing adjustment amounts. They point to section 3.3.2 of the Agreement which provides that "[i]n the event an error is made in the calculations of any of the closing adjustments, the party discovering such error shall, within six (6) months after the closing date, send notice of such correction . . . to the other parties, and the party benefitting from such error shall pay the amount of such error to the party to whom such payment is due within ten (10) days of the sending of the correction notice (Doc 33-8, Mot. ex. D, Purchase Agreement).

Scott B. Lunin, Esq., the attorney who represented plaintiffs in the purchase, states that in March 2003, he sent defendants both a Correction Notice and Corrections to Closing Adjustment schedule, and a revised schedule (Doc. 33-3, Mot. ,Lunin Affirm. ¶¶ 1, 3; Doc. 33- 9 ex. E, Schedules). Defendants' attorney responded by letter on March 21, 2003 acknowledging receipt of the schedule and requesting information and materials and a 30-day extension to respond (Doc. 33-3, Mot. Lunin Affirm. ¶ 4; Doc. 33-10 ex. F, Letter of 03/21/03). Lunin responded

[1]Section 23 of the Purchase Agreement provides that with specific exceptions set forth in the contract, "all of the representations, warranties, covenants and agreements contained herein shall survive the Closing of the transactions" (Doc. 33-8, Agreement § 23).

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with a letter dated March 31, 2003, and a revised Corrections to Closing Adjustments schedule which claimed $271,844.34 as to Eastchester and $374,835.50 as to Split Rock, totaling $646,679.84 due for closing adjustments corrections (Doc. 33-3, Mot. Lunin Affirm. ¶ 5; Doc. 33-11 ex. G, Lunin letter 03/31/03). Defendants' attorney responded by email on April 28, 2003 and included a spread sheet showing defendants' figures which agreed that they owed a total of $386,693.96 on both facilities (Doc. 33-3, Mot. Lunin Affirm. ¶ 6; Doc. 33-12 ex. H, Defendants' letter and spread sheet). Lunin notes that pursuant to the Purchase Agreement, defendants were required to pay no later than April 30, 2003 (Doc. 33-3, Mot. Lunin Affirm. ¶ 6).

Plaintiffs seek summary judgment on the amount defendants conceded was owed by them, $386, 693.96, plus 9 percent interest as of May 1, 2003 (Doc. 34, Memo in Supp. of Plaintiffs' Motion, p. 12). As defendants have not opposed, this branch of plaintiffs' motion is granted for the principal amount of $386,693.96, and their request for interest at 9% per annum as of May 1, 2003, is also granted without opposition.

Fifth Cause of Action - Overpayment and Recoupment

Plaintiffs claim that under section 16.2 of the Purchase Agreement, defendants are responsible for any amounts withheld by Medicaid or Medicare in the future that are the result of adjustments pertaining to past claims submitted by defendants during their ownership (Doc 33-4 Mot. Weinstock Aff. ¶ 4, citing Purchase Agreement § 16.2). According to Jerome Weinstock, Controller for plaintiff Eastchester, the New York State Department of Health (DOH) conducted Medicaid audits in 2003 and 2005 of both facilities, and found that it had overpaid the facilities on several occasions between January 1, 1995 and September 19, 2002 (Doc. 33-4 Mot.

Weinstock Aff. ¶¶ 1, 5–14; Docs. 33-13, 33-15, 33-15 ex. I, K, L, DOH Audit Reports). Based on those audits, DOH recouped from plaintiffs amounts it had overpaid during those years, years when defendants owned and operated the two facilities. Thus, Weinstock states, according to the various audits of Eastchester, that defendants owe plaintiffs $72,517.69, the sum of what the DOH recouped from plaintiffs in May and June 2003; $27,850.16, the sum of what the DOH recouped in April 2006, and another $100,640.04 allegedly recouped by the DOH from Eastchester even before the closing (Doc. 33-4, Mot. Weinstock Aff. ¶¶ 5-11; Doc. 33-14, ex. J, Eastchester Recoupment history).

Similarly as to Split Rock, Weinstein indicates that the DOH conducted audits for the periods January 1, 1995 through June 19, 2000, and January 1, 2000 through September 19, 2002, and recouped $96,751.40 from plaintiffs in September and October 2005, and $12,726.40 from plaintiffs on April 3, 2006 (Dec. 33-4, Mot. Weinstock Aff. ¶¶ 12- 15; Doc.33-16, 33-17, ex. L, M). Plaintiffs claim these sums are due them from defendants. Additionally, Weinstock states that the Health Insurance Plan of Greater New York (HIP) also conducted an audit and thereafter voided certain claims that had been paid to defendants and offset those amounts against payments due to plaintiffs (Doc. 33-4, Mot. Weinstock Aff. ¶ 16; Doc. 33-18 ex. N, HIP offset chart). HIP allegedly recouped a total of $40,730 from plaintiffs (*id.*). Thus, the total plaintiffs allege is due from recoupment is $351,215.69 (*id.* ¶ 17).

There is no question that plaintiffs provide documentation to support most of their claims for recoupment. However, they have not provided clear documentation for all their claims. Specifically, although plaintiffs provide the DOH recoupment history for Split Rock, and the document shows a recouped amount of $12,726.40, the documentation does not establish that the

period the audit covered was that prior to the parties' closing (*see* Doc 33-17, Mot. ex. M, Recoupment History Split Rock). In addition, Weinstock states that "even before [plaintiffs] closed on the purchase of Eastchester, DOH was recouping funds from Eastchester" and claims $100,640.04 still owed by defendants to plaintiffs (Doc. 33-4, Mot. Weinstock Aff. ¶ 11). This statement and the amount claimed are not clearly established from the DOH document attached to its letter dated November 23, 2005. Therefore, plaintiffs are not entitled to these two amounts, even though their motion is not opposed. Similarly, the documents and explanation provided to show that defendants owe $40,730 as the result of an audit by HIP, establishes clearly only that $10,260 that was recouped in August 2003 (Doc. 33-4, Mot. Weinstock Aff. ¶ 16; Doc 33-18, ex. N, HIP Recoup Eastchester at pp. 5-6).

Accordingly, although plaintiffs claim $351,215.69 (Doc. 33-4, Mot. Weinstock Aff. ¶ 17), they have only sufficiently established entitlement to $207,379.15.[2]

Plaintiffs claim that they are entitled to interest on the amount owed "at the highest rate permitted by law," which they argue is 25 percent per annum (Doc. 34, Memo in Supp. of Plaintiff's Motion, pp. 13-14, citing *Marine Mgt. Inc. v Seco Mgt, Inc.*, 176 AD2d 252, 254 (2d Dept 1991), *affd* 80 NY2d 886 (1992); Penal Law § 190.40). For this proposition, they point to section 16.2 of the Purchase Agreement which pertains to retroactive payment adjustments and which provides in relevant part:

> "Each party shall reimburse the other for all costs or expenses, including reasonable attorneys fees, incurred in collecting from the other party any payments required to be made under this Section 16.2 and the amount to be paid for such costs or expenses shall bear interest at the highest rate permitted by law from the

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[2] Derived by subtracting from the total claimed of $351,215.69, the amounts at issue of $12,726.40 and $100,640.14, and also subtracting the unverified amount allegedly recouped by HIP of $30,470.

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date payment is due."

(Doc. 33-8, Mot. ex. D, Purchase Agreement § 16.2). Plaintiffs' counsel contends that "the contract provides that interest shall be paid at a specified rate until the principal shall be paid, the contract rate governs until payment of the principal, or until the contract is merged in a judgment" (Doc. 34, Memo in Supp. of Plaintiff's Motion, pp. 13-14, citing *Marine Mgt. Inc*, at 253). Contrary to counsel's argument, section 16.2 of the Purchase Agreement does not appear to provide that the amount of damages is to be calculated at 25 percent interest, but rather that costs, expenses, and attorney's fees incurred in collecting the amount at issue. Accordingly, plaintiffs shall be awarded 9 percent interest on this cause of action as of the date of the commencement of this action.

Because the amount due to plaintiffs on this cause of action is not fully and clearly established, plaintiffs are awarded summary judgment on liability as against all defendants other than Abe Zelmanowicz, with an inquest as to damages to be held at the time of trial on the remaining causes of action.

Sixth Cause of Action – Resident and Post-closing Service Payments

Plaintiffs seek amounts paid by the nursing home residents that were directly deposited into defendants' accounts but were actually owed to plaintiffs. They point to section 16.3 of the Purchase Agreement which provides in relevant part that where the defendants/sellers receive any "basic assets" after the closing, they are to deliver them to plaintiffs/new operators, within 10 days of receipt (Doc. 33-8, Mot. ex. 4, Purchase Agreement § 16.2).[3]

In support of this branch of the motion, Weinstock states that at the time of the closing on

[3] "Basic Assets" is defined in the Purchase Agreement at section 1.1.

the two facilities, "more than $40,000/month was being directly deposited to each of the facilities' banks controlled by [defendants]" (Doc. 33-4, Mot. Weinstock Aff. ¶ 20). He explains that nursing home residents who receive Medicaid are responsible for paying the nursing homes a specified amount each month (Doc 33-4 Mot. Weinstock Aff. ¶ 19). This amount, known as the Net Available Monthly Income (NAMI), is usually directly deposited from residents' bank accounts into the corresponding nursing home's bank account (*id.* ¶¶ 19–21). Weinstock alleges that such direct deposits continued to be made into defendants' bank accounts after the closing and that defendants did not turn this money over to plaintiffs (*id.*). He claims that defendants owe plaintiffs $539,322.10 for deposits for Eastchester and $134,286.01 for deposits for Split Rock, totaling $673,608.11 (*id.* ¶ 24).

To support this claim, Weinstock provides spreadsheets which he prepared and which list the payments directly made to defendants which have not been reimbursed (Doc. 33-4, Mot. Weinstock Aff. ¶ 24; Doc. 33-19, ex. 0, Eastchester Payments and Split Rock Payments). Weinstock explains that he reviewed the cash receipt/deposits listing which he maintained contemporaneously as payments were to be received from third-parties such as Medicaid, Medicare, and insurance companies, and the backup, consisting of copies of checks or remittance statements from the payor (Doc. 33-4, Mot. Weinstock Aff. ¶ 23). He also checked for cash receipts paid by defendants to plaintiffs where there were cash receipts that were not deposited into plaintiffs' bank accounts (*id*). The spreadsheets show payments made to defendants by Eastchester residents or on their behalf from October 4, 2002 through February 4, 2010, with defendants partially reimbursing plaintiffs between October 4, 2002 and March 4, 2003. The spreadsheets also show payments made to defendants by Split Rock residents or on their behalf

from September 20, 2002 through December 4, 2006, with defendants partially reimbursing plaintiffs between October 4, 2002 and March 4, 2003. The amounts claimed to be owed to Eastchester total $539,322.10 and the amounts owed to Split Rock total $134,286.01. Plaintiffs thus ask for a judgment of $673,608.11, plus 9 percent interest.

As there is no opposition to plaintiffs' presentation of its figures and the explanation contained in the affidavit of Weinstock, this branch of plaintiffs' motion, including their request for interest, is granted without opposition. Interest shall be calculated at 9 percent from commencement of the action.

It is therefore

ORDERED that the unopposed motion for summary judgment on the complaint herein is granted to the following extent, and the Clerk is directed to enter judgment in favor of plaintiffs and against all defendants *other than* Abe Zelmanowicz, as follows:

- as to the Third Cause of Action, the Clerk shall enter a money judgment in the amount of $386,693.96, together with interest at 9% per annum as of May 1, 2003, as calculated by the Clerk;

- as to the Fifth Cause of Action, the Clerk shall enter a judgment on liability, with an inquest as to damages to be held at the time of trial on the remaining causes of action, and the Clerk shall thereafter enter judgment in the principal amount found due and owing on this cause of action, together with interest at 9% per annum as of the date of commencement of this action;

- as to the Sixth Cause of Action, the Clerk shall enter a money judgment in the amount of $673,608.11, together with interest at the rate of 9% per annum as calculated by the Clerk as of the date of commencement of this action; and it is further

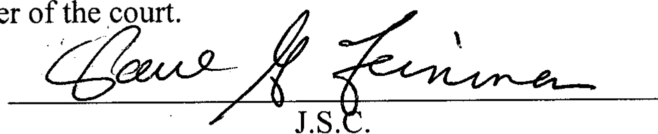
ORDERED that the remainder of the Third Cause of Action, and the First, Second, Fourth, and Seventh Causes of Action, and the inquest as to damages on the Fifth Cause of Action are severed pursuant to CPLR 3212 (e) and shall continue under this index number against all defendants, and that the entire complaint is severed and continues against defendant Abe Zelmanowicz; and it is further

ORDERED that the branch of plaintiffs' motion seeking costs, disbursements, and attorney's fees is granted but that calculation thereof is held in abeyance pending trial or resolution of the entire action; and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this decision and order upon all parties and upon the Clerk of Court (60 Centre St., Basement) who shall enter partial summary judgment in accordance with the foregoing; and it is further

ORDERED that the parties shall appear for their previously scheduled Mediation on April 5, 2012.

This constitutes the decision and order of the court.



Dated: March 26, 2012
New York, New York

J.S.C.