SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

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230 PARK AVENUE HOLDCO, LLC,

Plaintiff,

-against-

KURZMAN KARELSEN & FRANK, LLP, STANLEY E. MARGOLIES, PETER G. GOODMAN, PHYLLIS H. WEISBERG, DEIDRE E. CARSON, ISAAC A. SAUFER, RICHARD E. MILLER, LOUIS I. NEWMAN, JOSEPH F. SEMINARA, ERNEST L. BIAL, M. DAVIS JOHNSON a/k/a MALCOLM DAVIS JOHNSON, JR., MICHAEL P. GRAFF, and FRANK E. KARELSEN, III,

Defendants.

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Index No.: 653178/2011
Submission Date: 2/13/2013
Motion Seq. No.: 001

DECISION AND ORDER

For Plaintiff:
Klein & Solomon, LLP
By Maurice I. Rosenberg, Esq.
275 Madison Avenue
11th Floor
New York, New York 10016
212-661-9400

For Defendant:
Kurzman, Karelsen & Frank, LLP
By Charles Palella, Esq.
437 Madison Avenue, 29th Floor
New York, NY 10022
212-867-9500

Papers considered in review of this motion for summary judgment:

Papers	**Numbered**
PLTF's n/motion (CPLR 3212) w/affidavit, exhibits, memo	1
DEFs' opposition w/affirmation, affidavit, exhibits, memo	2
PLTF's reply w/affidavit, exhibits, memo	3

ELLEN COIN, J.S.C.:

In an action for rental fees under a commercial lease, plaintiff 230 Park Avenue Holdco, LLC (230 Park), moves pursuant to CPLR 3212 for summary judgment against defendant Kurzman, Karelson & Frank, LLP (Kurzman), dismissing Kurzman's affirmative defenses, and granting 230 Park damages in the amount of $716,104.14. Additionally, 230 Park moves for summary judgment against defendants Stanley E. Margolies, Peter G. Goodman, Phyllis H. Weisberg, Deidre A. Carson, Isaac A. Saufer, Richard E. Miller, Louis I. Newman, Joseph F.

Seminara, Ernest L. Bial, M. Davis Johnson a/k/a Malcolm Davis Johnson, Jr., Michael P. Graff, and Frank E. Karelsen, III (collectively, the Guarantor defendants) in the amount of $200,000. Finally, 230 Park moves pursuant to CPLR 3025 (b) to amend the complaint to include all sums that it alleges are due and owing to it through the date of judgment.

BACKGROUND

Kurzman and 230 Park's predecessor executed a lease on April 1, 1997 for office space on the 23rd floor of the Helmsley Building, or, as plaintiff refers to it, "The Crown Jewel of Park Avenue" (the Lease). The Lease ran from the date of execution until December 31, 2012. Also on April 1, 1997, the Guarantor defendants executed an agreement with 230 Park through which they guaranteed Kurzman's obligations under the Lease up to $200,000.

On July 18, 2011, Kurzman's real estate agent, CBRE, sent an email to Monday Properties (Monday), 230 Park's property manager, stating: "Kurzman Karelsen has signed a lease outside of the building so we [are] going to have to take some steps to handle our space at 230 Park. Of course we would still like to sit down with you and work out some type of exit that works for both parties" (Ken Rapp July 18, 2011 email to Anthony Westreich and Brian Robin, ¶ 2).

Prior to this email, 230 Park had sent Kurzman notice that it believed Kurzman was late in paying its real estate escalation charges. Kurzman disputed these charges. The day after receiving the email, counsel for 230 Park sent a letter threatening an eviction proceeding relating to the disputed real estate escalation charges (Lee Unterman September 14, 2012 affidavit, ¶ 62). On August 1, 2011, Lee Unterman (Unterman), managing partner of Kurzman, wrote to 230 Park's counsel. Among other things, Unterman wrote:

> "We also do not understand why you would threaten to institute a summary dispossess proceeding given that the Landlord, by its conduct and communications, gave us a clear directive to vacate our space, and as your Client has already been advised, we will in fact be vacating our space by the end of the month. Moreover, we hereby agree to enter into a stipulation wherein [Kurzman] would deliver possession to the landlord and each party would reserve all other claims, rights, remedies and defenses. Please call to discuss the terms of such stipulation. Given this position, the institution of a summary proceeding at this time would be in bad faith and wasteful of judicial resources. Notwithstanding our belief that a surrender by operation of law has been established under the facts and circumstances thereby relieving [Kurzman] from further obligations after August 31, 2011, we reiterate our prior offer to meet with you and your clients to discuss a global settlement of all issues. In this regard, please see the attached settlement proposal"

(Unterman August 1, 2011 letter, ¶ 3).

230 Park brought an action to reclaim possession of the space, entitled *230 Park Avenue Holdco, LLC v Kurzman Karelsen & Frank, LLP*, index No. L & T: 76749/11. The action was settled by a stipulation filed on August 26, 2011 (the Stipulation).[1] Under the Stipulation, Kurzman agreed to turn over the space to 230 Park and pay $18,660.25 for the real estate escalation, and $3,450.08 for electric charges billed through August 1, 2011 (the Stipulation, ¶ 6). The Stipulation also contained a mutual reservation of rights:

> "This stipulation is being entered into between the parties hereto solely for the purpose of adjudicating [230 Park's] right to possession of the Premises, and (i) shall not in itself constitute a surrender of the lease by operation of law or otherwise; and (ii) is without prejudice and with full reservation of rights by each party hereto in regard to (a) claims, causes of action and defenses, and (b) all rights by the parties under the terms and provisions of the parties' Lease."

(*id.* at ¶ 9).

The Stipulation also provided that "Notwithstanding anything herein to the contrary, nothing herein shall prohibit [Kurzman] from locating and/or offering [230 Park] a potential

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[1] The parties executed the Stipulation on August 18, 2011.

tenant for the Premises, subject to [230 Park's] approval of any such prospective tenant" (*id.* at ¶ 8).

Kurzman vacated its space in the Helmsley Building on August 31, 2011. 230 Park argues that it is entitled to rent and other sums due under the Lease for the period between August 31, 2011 and December 31, 2012. 230 Park filed its complaint electronically on November 15, 2011. Kurzman and the Guarantor defendants filed their answer on January 17, 2012. Kurzman and the Guarantor defendants maintain that they are not liable under the Lease, alleging the following affirmative defenses: (1) the Lease was surrendered by law, (2) 230 Park breached the Stipulation between the parties, and (3) the obligations of the Guarantor defendants are void, as 230 Park failed to join the Guarantor defendants in the eviction proceeding and failed to gain the Guarantor defendant's consent to the Stipulation. Aside from maintaining the validity of these defenses, Kurzman also opposes summary judgment here by arguing that questions of fact remain as to damages and whether the Lease was assigned to 230 Park.

DISCUSSION

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

I. Surrender of the Lease

230 Park argues that it has not surrendered the Lease by operation of law, as oral modifications are prohibited by the Lease. Article 27 of the Lease provides:

> "No act or omission of Landlord or its agents shall constitute acceptance of a surrender of the premises, except by a writing signed by the Landlord. The delivery of keys to Landlord or its agents shall not constitute a termination of this lease or a surrender of the premises. No waiver of any provision of this lease shall be effective, unless the waiver be in writing signed by Landlord. This lease contains the entire agreement between the parties, and no modification thereof shall be binding unless in writing and signed by the party concerned."

Citing to *L & B 595 Madison, Inc. v Ravagnan* (242 AD2d 413 [1st Dept 1997]) and *99 Realty Co. v Eikenberry* (242 AD2d 215 [1st Dept 1997]), 230 Park argues that where, as here, a lease expressly bars any oral modification and contains a no-waiver provision, a tenant may not allege an oral agreement contrary to the express terms of the lease. *L & B 595 Madison* held that the defendant's affirmative defense of surrender "should be dismissed since defendant's early departure from the premises is not unequivocally referable to an oral modification of the lease, which, by its terms, could only be modified in writing" (242 AD2d at 413). *99 Realty Co.* involved a commercial lease and held that as the lease contained a no-waiver clause and a merger clause barring modifications except by writing, "[a]cceptance of a surrender of the premises could be accomplished only by a writing signed by the landlord" (242 AD2d at 216).

230 Park argues that as there has been no written surrender of the Lease, its provisions were binding on both parties until it expired on December 31, 2012.

Kurzman relies on *Riverside Research Inst. v KMGA, Inc.* (68 NY2d 689 [1986]), where the Court of Appeals articulated the doctrine of surrender by law:

> "A surrender by operation of law occurs when the parties to a lease both do some

> act so inconsistent with the landlord-tenant relationship that it indicates their intent to deem the lease terminated. As distinguished from an express surrender, a surrender by operation of law is inferred from the conduct of the parties. Whether a surrender by operation of law has occurred is a determination to be made on the facts"

(*id.* at 691- 692 [internal citations omitted]).

In *Riverside Research*, the Court of Appeals applied these principles to find a surrender by law:

> "Review of the record establishes that defendant, acting in response to plaintiff's request, gave plaintiff advance written notice that it was about to vacate the premises pursuant to an earlier 'understanding.' Plaintiff thereafter physically assisted defendant in departing and billed defendant for nominal damages sustained in the move. These facts support the inference . . . that a surrender by operation of law has occurred"

(*id.* at 692).

Kurzman submits the Unterman affidavit in order to show a surrender by operation of law. Unterman states that Kurzman repeatedly tried, beginning in January 2009, to initiate lease renewal negotiations, but was repeatedly rebuffed and ignored by 230 Park (Unterman affidavit, ¶¶ 25-37). Next, Unterman alleges, 230 Park tried to persuade Kurzman to surrender the Lease because it had an outside tenant, Golub Capital, BDC, interested in Kurzman's space:

> "Indeed, after 11 months of rebuffing or ignoring our requests to negotiate a renewal lease, Monday suddenly was in frequent contact, either in meetings, phone calls, or e-mails, all directed to inducing us to vacate the 23rd floor and surrender the leasehold as soon as possible . . . . On December 13, 2010, we were asked to attend a meeting in Mr. Westreich's office . . . . Kurzman's agenda for that meeting was to reiterate our goal of renewing our lease in place, and communicate our willingness and ability to agree to terms being offered to other new tenants, while crediting us with the savings to the Landlord for a renewal lease . . . . Failing that, if, as we had begun to believe, Monday simply wanted us out, we wanted to be compensated for giving up the remaining period of below market rent. We quickly found out that the Landlord's agenda, however, was to get Kurzman to make an immediate commitment to surrender the 23rd floor as

> soon as possible. Mr. Westreich . . . was negative, patronizing, angry, aggressive, and more importantly, firm, in indicating that there was no possibility of the Landlord ever making a proposal to [Kurzman] to renew its lease on the 23rd floor. Rather, he said that Monday was quickly developing ideas to relocate [Kurzman] in the Building and that he wanted [Kurzman] to consider those immediately . . . . At Monday's request we met with Mr. Westreich again on December 15, 2010. At that meeting, Mr. Westreich was more direct about having a prospective 'outside tenant' to move into our floor. [Kurzman] indicated that the normal inducement offered to a tenant to surrender a below market rent leasehold is a buy-out of the remaining term. Mr. Westreich said that the Landlord would not make a buy-out offer. Instead, he said he was going to offer us a new lease for less desirable space in the Building at what he wanted us to believe was a favorable price, provided we got out of the 23rd floor right away. On the same day, Monday sent us a proposal for our firm to relocate into essentially subterranean space, which was then the management office on part of the 5th floor . . . . Persisting in their efforts to get us out of the 23rd floor, Monday next offered us the 16th floor [like the 5th floor, the space was undesirable to Kurzman and Monday offered to bear only a fraction of the renovation/build out cost; Kurzman considered the offer a 'sham'] . . . . Given what was going on, at some point in the December meetings I had said to Mr. Westreich (in those or very similar words), 'I know what you are telling me to do.' [Mr. Westreich responded,] 'I know you do. Go do what you have to do.' In short, by late January 2011 it was abundantly clear that the Landlord would not renew our lease for the 23rd floor, that the Landlord wanted us to give back the 23rd floor as soon as possible, that the Landlord would not offer us any compensation for moving out early, that the Landlord would not offer us a renewal lease on the same terms and conditions it was offering to others, and that the Landlord was telling us to go get other space so that we would be out of our lease on the 23rd floor. [Kurzman] acted in reliance upon the Landlord's clear and unequivocal message"

(Unterman affidavit, ¶¶ 42-53).

In reply, 230 Park argues that there was never a meeting of the minds with respect to a surrender of the Lease, contending that, given that both parties are sophisticated, a surrender would have been documented in writing. As it did not issue any writing or other document accepting or authorizing Kurzman's vacatur, 230 Park contends that no surrender by operation of law took place.

Here, the Lease clearly forbids a surrender except in writing, which, just as clearly, has not taken place. The threshold question, then, is whether the clear language prohibits, as a general matter, application of the doctrine of surrender by operation of law. The Appellate Division, Second Department, provides some guidance on this subject: "Although acceptance of a tenant's surrender would generally release the tenant from further rental obligation under the terms of the lease, parties are free to contract otherwise" (*Chestnut Realty Corp. v Kaminski*, 95 AD3d 1254, 1254 [2d Dept 2012] [internal citation omitted]). However, the Second Department held that the lease provisions invoked by the landlord in *Chestnut Realty Corp.* were "not applicable where there has been a surrender of the lease by operation of the law" (*id.*).[2]

Kurzman submits a trial court case in which default judgment was denied to the commercial landlord plaintiff, even though the lease prohibited oral modification, as "[d]efendants . . . demonstrate a meritorious defense of surrender of the premises, whether by law or an oral modification of the lease providing for the surrender, through evidence, albeit partially disputed, of both the landlord's and the tenant's actions consistent with a surrender and inconsistent with a continuing lease" (*Gioia Equities, Inc. v ONC Dev. LLC*, 33 Misc 3d 1218[A], *3, 2011 NY Slip Op 51970[U] [Sup Ct, NY County 2011]). The tenants version of the facts involved: "a request to terminate the lease that plaintiff accepted" (*id.*).

Here, however, unlike *Gioia Equities*, the Lease expressly prohibits surrender by any means but writing. Kurzman is a sophisticated commercial tenant. When 230 Park initially started pressuring it to surrender the Lease, Kurzman opted instead to shelter in the protection of

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[2] The Court in *Chestnut Realty Corp.* did not specify the contents of the lease provisions rendered inapplicable by surrender by operation of law (*see also 4400 Equities, Inc. v Dhinsa*, 52 AD3d 654 [2d Dept 2008]).

the Lease, deciding that if it left the leased space early, it would only be through an enticement, such as a payout, or favorable terms on a renewal lease or a lease for another desirable space within the building (*see* Unterman affidavit, ¶ 44). Kurzman rejected what it considered to be 230 Park's paltry enticements to surrender. As Kurzman knew that the Lease prohibited surrender except in writing, its decision to move out without a written agreement of surrender, and instead to rely on a defense of surrender by operation of law, can only be considered a decision to make an efficient breach of the Lease. Thus, there was, as a matter of law, no surrender by operation of law here.

Accordingly, the branch of 230 Park's motion seeking dismissal of Kurzman's affirmative defense of breach by operation of law is granted.

II. Violation of the Stipulation

Kurzman's third affirmative defense alleges that 230 Park breached the Stipulation. Specifically, Kurzman claims that 230 Park sabotaged its ability find a tenant to take possession of the space for the remainder of the Lease. Paragraph eight of the Stipulation provides: "Notwithstanding anything herein to the contrary, nothing herein shall prohibit [Kurzman] from locating and/or offering [230 Park] a potential tenant for the Premises, subject to [230 Park's] approval of any such prospective tenant." Kurzman alleges that the context of this provision was clear, as its real estate agent had, among other marketing efforts, already placed, with 230 Park's knowledge, a listing with CoStar, a prominent listing service for commercial buildings (Unterman affidavit, ¶¶ 76-78). Shortly after the Stipulation was filed on August 26, 2011, Kurzman alleges that 230 Park violated paragraph eight of the Stipulation by sabotaging its efforts to find a prospective tenant:

> "On September 15, 2011, Monday contacted CoStar directly and instructed it to delete the listing for the 23rd Floor that was posted on [Kurzman's] behalf by CBRE . . . . Monday also resisted the efforts of CBRE to show the 23rd floor to interested parties. On October 3, 2011, attorney Charles Palella [Kurzman partner] wrote to [230 Park]. He declared the Landlord in breach of the Stipulation . . . . The Landlord's attorney did not respond in writing . . . . Monday never remedied the Landlord's breach of Paragraph 8 of the Stipulation. The Landlord's breach obstructed [Kurzman's] ability to conduct a search for and identify prospective tenants for our vacated offices. I believe that, but for the Landlord's obstruction CBRE would have identified several interested parties for the space who would have been desirable tenants"

(*id.*, ¶¶ 82-88).

230 Park argues that Kurzman's affirmative defenses based on breach of the Stipulation should be dismissed, as it had no obligation to relet the space, or mitigate the damages of Kurzman's breach. 230 Park cites to *Holy Props. Ltd., L.P. v Kenneth Cole Prods., Inc.* (87 NY2d 130 [1995]), where the Court of Appeals held that the general rule that a party's ability to recover damages from a breach is limited by that parties' obligation to make reasonable efforts to mitigate damages after the breach:

> "for, unlike executory contracts, leases have been historically recognized as a present transfer of an estate in real property. Once the lease is executed, the lessee's obligation to pay rent is fixed according to its terms and a landlord is under no obligation or duty to the tenant to relet, or attempt to relet abandoned premises in order to minimize damages"

(*id.* at 133 [internal citation omitted]).

Nothing in *Holy Props.*, however, prevents parties from agreeing between themselves as to obligations to release or mitigate. 230 Park argues that the Stipulation only obligated it to consider any potential tenants Kurzman may have located, and that, as Kurzman did not offer any prospective tenants, it did not breach the Stipulation.

Kurzman makes three arguments in opposition. First, Kurzman argues that 230 Park breached the Stipulation by obstructing its search for a prospective tenant. Second, Kurzman argues that while 230 Park may have initially had no duty to mitigate, it assumed one through the Stipulation. In arguing that 230 Park breached this assumed obligation, Kurzman cites to *Salvia v Dyer* (21 Misc 3d 140[A], 2008 WL 5004312 [App Term, 2d Dept 2008]), where the Court held that "[a]lthough a residential landlord is under no duty to mitigate damages where the terms of the lease do not indicate otherwise, once plaintiff affirmatively undertook to relet the apartment on defendants' account, he was obligated to comply with the agreement and to do so in a timely fashion" (*id.* at *2 [internal quotation marks and citations omitted]). Kurzman argues that while the obligation that 230 Park undertook here is narrower than the one the landlord took on in *Salvia*, the same principle nonetheless applies. Kurzman argues further that 230 Park's insistence that it did not breach the Stipulation, as Kurzman did not offer any prospective tenants, is sophistic, in that 230 Park breached the Stipulation by obstructing Kurzman's ability to present a prospective tenant.

Third, Kurzman argues that equitable estoppel would be appropriate, as it would be unconscionable to allow 230 Park to agree to consider prospective tenants, and then proceed to make it impossible for Kurzman to identify prospective tenants. Kurzman relies on *American Bartenders School, Inc. v 105 Madison Co.* (59 NY2d 716 [1983]), despite the fact that *American Bartenders School* held that equitable estoppel, a doctrine designed "to prevent the infliction of unconscionable injury and loss upon one who has relied on the promise of another," was inapplicable, as the landlord's refusal to execute a lease modification would not inflict an unconscionable injury (*id.* at 718 [citation omitted]).

In reply, 230 Park distinguishes *Salvia* by noting that the landlord in *Salvia* affirmatively undertook to relet the apartment, which 230 Park has not done here. 230 Park argues that the Stipulation does not create any obligation on its part to mitigate damages, but only to allow Kurzman to present prospective tenants, which Kurzman failed to do.

While Kurzman failed to present a prospective tenant, 230 Park says little to contradict the evidence that it prevented Kurzman from locating one. If paragraph eight of the Stipulation does not obligate 230 Park to at least allow Kurzman to find a prospective tenant, then it is meaningless. As "[i]t is a cardinal rule of contract construction that a court should avoid an interpretation that would leave contractual clauses meaningless," the court must interpret the Stipulation as obligating 230 Park to allow Kurzman to present a prospective tenant (*US Bank N.A. v Lightstone Holdings LLC*, 103 AD3d 458, 459 [1st Dept 2013] ["(s)tated otherwise, courts are obliged to interpret a contract so as to give meaning to all of its terms"] [internal quotation marks and citation omitted]). As Kurzman has clearly raised an issue of fact as to whether 230 Park breached paragraph eight of the Stipulation by preventing it from finding a prospective tenant, 230 Park is not entitled to summary judgment dismissing Kurzman's affirmative defense for breach of the Stipulation. Thus, the court need not reach Kurzman's argument as to equitable estoppel.

Moreover, as there has yet to be a determination as to whether 230 Park breached the Stipulation, and, if so, the amount by which such a breach limits 230 Park's recovery, the branch of the motion for summary judgment seeking damages in the amount of $716,104.14 is denied.

III. The Guarantors

230 Park moves for summary judgment dismissing Kurzman's fourth affirmative defense,

which alleges that the Lease's guaranty was voided because the Guarantor defendants were not joined as respondents in the eviction action. 230 Park argues that the Guarantor defendants were not necessary or proper parties to the summary proceeding. Thus, 230 Park argues, it was justified in not joining the Guarantor defendants, and, in any event, their absence from the eviction proceeding is irrelevant to their liability under the Lease. Kurzman abandons their fourth affirmative defense relating to the Guarantor defendants by failing to address these arguments (*see Gary v Flair Beverage Corp.*, 60 AD3d 413, 413 [1st Dept 2009] ["plaintiff's failure to address this issue in its responding brief indicates an intention to abandon this basis of liability"] [citations omitted]). As such, the branch of 230 Park's motion seeking dismissal of Kurzman's fourth affirmative defense is granted.

IV. Leave to Amend

230 Park seeks to amend the complaint to include all sums due and owing through the date of the judgment. This branch of the motion is granted, as Kurzman does not oppose it.

CONCLUSION

In accordance with the foregoing, it is hereby

ORDERED that so much of plaintiff 230 Park Avenue Holdco, LLC's motion for summary judgment as seeks dismissal of defendants' first and second affirmative defenses, for surrender by operation of law is granted; and it is further

ORDERED that so much of plaintiff 230 Park Avenue Holdco, LLC's motion for summary judgment as seeks dismissal of defendants' third affirmative defense for breach of the stipulation entered into by the parties on August 18, 2011 is denied; and it is further

ORDERED that so much of plaintiff 230 Park Avenue Holdco, LLC's motion for

summary judgment as seeks dismissal of defendants' fourth affirmative defense is granted; and it is further

ORDERED that so much of plaintiff 230 Park Avenue Holdco, LLC's motion for summary judgment as seeks judgment against defendant Kurzman, Karelsen & Frank, LLP in the amount of $716,104.14 and against defendants Stanley E. Margolies, Peter G. Goodman, Phyllis H. Weisberg, Deidre A. Carson, Isaac A. Saufer, Richard E. Miller, Louis I. Newman, Joseph F. Seminara, Ernest L. Bial, M. Davis Johnson a/k/a Malcolm Davis Johnson, Jr., Michael P. Graff, and Frank E. Karelsen, III in the amount of $200,000 is denied; and it is further

ORDERED that the remainder of the motion seeking to amend the complaint in order to reflect all sums due and owing through the date of judgment is granted, and plaintiff is directed to serve a copy of the amended complaint, consistent with this decision, on defendants within 30 days, and defendants shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from receipt of the amended complaint; and it is further

ORDERED that the parties appear for a court conference in Room 311, 71 Thomas Street on July 24, 2013 at 2:00 p.m.

This constitutes the decision and order of the Court

Dated: 4/30/13

ENTER:

Hon. Ellen Coin, A.J.S.C.