Vladeck, Waldman, Elias & Engelhard, P.C. v Paramount Leasehold, L.P.
2013 NY Slip Op 32908(U)
November 12, 2013
Supreme Court, New York County
Docket Number: 653416/2011
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
PRESENT: Hon. Eileen Bransten, Justice PART 3

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VLADECK, WALDMAN, ELIAS & ENGELHARD, P.C.,

Plaintiff,

-against-

PARAMOUNT LEASEHOLD, L.P.,

Defendant.
----------x

Index No.: 653416/2011
Motion Date: 5/21/2013
Motion Seq. No.: 002

The following papers, numbered 1 to 3, were read on this motion to amend and to compel.

Notice of Motion/Order to Show Cause - Affidavits - Exhibits No(s). 1

Answering Affidavits - Exhibits No(s). 2

Replying Affidavits No(s). 3

Cross-Motion: X Yes ☐ No

Upon the foregoing papers, this motion is decided in accordance with the accompanying memorandum decision.

Dated: ~~October~~ November 12, 2013

Hon. Eileen Bransten J.S.C.

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

1. CHECK ONE: .....☐ CASE DISPOSED X NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: Motion Is: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART X 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: IAS PART THREE

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VLADECK, WALDMAN, ELIAS & ENGELHARD, P.C.,

Plaintiff,

-against-

PARAMOUNT LEASEHOLD, L.P.,

Defendant.

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Index No. 653416/2011
Motion Date: 5/21/2013
Motion Seq. No.: 002, 003

BRANSTEN, J.

Motion sequence numbers 002 and 003 are consolidated for disposition.

This matter comes before the Court on Plaintiff Vladeck, Waldman, Elias & Engelhard, P.C.'s ("Vladeck") motion to amend its Complaint and to compel Defendant Paramount Leasehold, L.P. ("Paramount") to produce its representative, Arthur Cohen, for deposition (motion sequence 002). Paramount opposes Vladeck's motion and cross-moves for a protective order suspending further pre-trial disclosure. Vladeck opposes the cross-motion.

Plaintiff Vladeck also seeks to vacate the Note of Issue filed by Defendant on April 10, 2013 (motion sequence 003). Paramount likewise opposes this motion and cross-moves to stay discovery. For the reasons that follow, Plaintiff's motion to amend and to compel the deposition of Arthur Cohen is granted, and Paramount's cross-motion

for a protective order is denied. In addition, Plaintiff's motion to vacate the Note of Issue and to impose sanction is granted, while Defendant's cross-motion is denied.

I. Background

The instant litigation stems from a January 1, 2010 Assignment of Lease ("Lease") executed by the parties, under which Vladeck leased commercial office space for conduct of its law practice at 1501 Broadway, New York, New York (the "Premises"). According to Vladeck, before the Lease renewal, it seriously entertained moving to another location, given its dissatisfaction with the Premises. *See* Affirmation of Peter N. Wang ("Wang Affirm."), Ex. B ¶ 10 (Proposed First Amended Complaint). Following "extremely arduous" negotiations that extended from late 2009 until January 2011, the parties executed the Lease.[1] *Id.* ¶ 11.

Vladeck maintains that Paramount's alleged commitment to contribute improvements to the Premises was a "material and vital inducement" to enter into the Lease. *Id.* ¶ 12. Specifically, Vladeck states that the Premises had not had a major renovation in years and were starting to show considerable wear and tear. *Id.*

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[1] While the Lease was dated as of January 1, 2010, Vladeck avers that it was not executed, delivered, and effective until sometime in 2011. *See* Proposed Am. Compl. ¶ 11.

At the time of the Lease execution, Vladeck alleges that it was unaware of Paramount's intention to convert the Premises into hotel space prior to the expiration of Vladeck's lease term. *Id.* ¶¶ 14-15. Vladeck contends that it would not have executed the Lease had it been informed of Paramount's plan.

Before it learned of Paramount's hotel conversion plan, Vladeck asserts that it invested in the Premises, spending hundreds of thousands of dollars upgrading its phone, technology and computer systems. *Id.* ¶ 19. Vladeck then planned to begin additional improvements on the Premises, which Paramount purportedly committed to subsidizing under the Lease. *Id.* ¶ 21. However, when Vladeck informed Paramount of its plan to begin the additional improvements, Paramount told Vladeck not to do so since the owners of the building were discussing converting the Premises to a hotel. *Id.* ¶ 22. Paramount then allegedly disclosed its plan to end Vladeck's lease term prematurely. *Id.* ¶ 26. After learning of the hotel conversion, Vladeck terminated its improvement plans and notified its then-subtenant of Paramount's plans. *Id.* ¶ 27. The subtenant then terminated its sublease. *Id.* ¶ 27.

Vladeck filed this action on December 12, 2011. Now before the Court is Vladeck's motion seeking leave to file a First Amended Complaint, adding claims for fraudulent inducement and breach of the implied covenant of good faith and fair dealing, as well as new facts supporting anticipatory breach, all stemming from Paramount's

alleged failure to disclose the hotel conversion plan and attempt to terminate the Lease prematurely.

Plaintiff also seeks to compel the deposition of Arthur Cohen, a representative of Paramount who allegedly has knowledge of the hotel conversion plan. Vladeck asserts that Paramount previously produced a corporate representative who professed to have no knowledge of the hotel plan. However, this previous deponent identified Cohen as a person with knowldege.

In addition, Vladeck seeks to vacate the Note of Issue filed by Paramount in April 2013, arguing that the Certificate of Readiness erroneously states that discovery is complete and that the matter is ready for trial. Vladeck also requests that sanctions be imposed against Paramount for its "frivolous" filing of this Note of Issue. Paramount cross-moves for a protective order suspending further discovery in this litigation.

II. Analysis

A. *Plaintiff's Motion to Amend (Motion Sequence 002)*

Plaintiff first seeks leave to amend its Complaint to add a claim for fraudulent inducement and breach of the implied covenant of good faith and fair dealing, as well as add new allegations in support of its anticipatory breach claim.

Leave to amend a pleading should be freely granted so long as the amendment will not cause surprise or prejudice to the opposing party. *See* CPLR 3025(b); *see also Solomon Holding Corp. v. Golia*, 55 A.D.3d 507, 507 (1st Dep't 2008) (granting motion to amend absent showing of surprise or prejudice). A showing of "[p]rejudice requires 'some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position.'" *Cherebin v. Empress Ambulance Serv., Inc.*, 43 A.D.3d 364, 365 (1st Dep't 2007) (quoting *Loomis v. Civetta Corinno Constr. Corp.*, 54 N.Y.2d 18, 23 (1981)).

Here, Paramount makes no showing of prejudice. Instead, Paramount's attorney argues in his affirmation that Plaintiff has "delayed inordinately in moving to amend its complaint." *See* Affirmation of Norman Flitt in Opposition to Motion to Amend at 5.[2] This argument falls far short of demonstrating prejudice. "'Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side,

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[2] Paramount's attorney submitted a 25-page affirmation, largely comprised of argument that properly belonged in his brief. The attorney affirmation is not a second briefing opportunity, nor is it an opportunity to extend the briefing page limits set forth in Commercial Division Rule 17. Instead, the attorney affirmation is intended for the attorney to present facts of which he has personal knowledge or to introduce the documents attached as exhibits to the affirmation. To the extent that Paramount's attorney affirmation contained information in accordance with these proper purposes, those portions of his affirmation was proper. However, the Court notes for the benefit of both parties in this case that the attorney affirmation is not meant to be an alternate vehicle by which to present legal argument. *Cf. Lewis v. Safety Disposal Sys. of Penn., Inc.*, 12 A.D.3d 324, 325 (1st Dep't 2004) (stating that attorney affirmation "may serve as a vehicle to introduce documentary evidence" but that an opposing attorney's arguments in an affirmation are not properly placed).

the very elements of the laches doctrine.'" *Edenwald Constr. Co. v. City ofN. Y.*, 60 N.Y.2d 957, 959 (1983) (citation omitted). Having failed to show surprise or any prejudice accruing from Plaintiff's amendment, Paramount's timeliness argument fails.

Moreover, Vladeck's claims as pleaded are not "palpably insufficient" or "devoid of merit." *Perotti v. Becker, Glynn, Melamed & Muffly LLP*, 82 A.D.3d 495, 498 (1st Dep't 2011) (quoting *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 500 (1st Dep't 2010) ("[O]n a motion for leave to amend a pleading, the movant 'need not establish the merit of its proposed new allegations, but [must] simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit.'"). Analyzing Vladeck's claims under the proper standard, the Court concludes that none of the claims asserted in the First Amended Complaint fall short of this bar. Accordingly, for the reasons that follow, Plaintiff's motion to amend is granted.

1. Fraudulent Inducement

To plead a fraudulent inducement claim, a plaintiff must allege "a knowing misrepresentation of material fact, which is intended to deceive another party and to induce them to act upon it, causing injury." *Sokolow, Dunaud, Mercadier & Carreras v. Lacher*, 299 A.D.2d 64, 70 (1st Dep't 2002).

Defendant first argues that Plaintiff's fraudulent inducement claim fails, as it is a misstated breach of contract claim, predicated on the assertion that Paramount never intended to comply with the Lease. Defendant attempts to cast Vladeck's claim as hinging on an insincere promise of future performance.

If Plaintiff's claim were so presented, Defendant's argument may have had merit. However, Plaintiff's proposed fraudulent inducement claim does not rest on Paramount's sincerity about its performance. Plaintiff instead asserts that Paramount failed to disclose its hotel conversion plan to Vladeck during the Lease negotiations and that the omission of this material fact was intended both to deceive Vladeck and to induce it to enter into the Lease. *See* Proposed Am. Compl. ¶¶ 31-33. This fraudulent inducement pleading is neither palpably insufficient nor clearly devoid of merit.

Taking the facts as pleaded by Vladeck, as the Court must for the purpose of this motion, Plaintiff sufficiently states misrepresentation of a present existing fact, not a future failure to perform under the Lease. A "misrepresentation of a present fact, unlike a misrepresentation of future intent to perform under the contract, is collateral to the contract, even though it may have induced the plaintiff to sign it, and therefore involves a separate breach of duty." *GoSmile, Inc. v. Levine*, 81 A.D.3d 77, 81 (1st Dep't 2010). Since such a misrepresentation is collateral to the contract, it is "separate from and may be maintained in addition to" a breach of contract claim. *Id.* at 82.

Moreover, taking the facts as pleaded, Vladeck has stated a viable fraud claim under the special facts doctrine based on Paramount's knowledge of and duty to disclose the hotel conversion plan. "Under the 'special facts' doctrine, a duty to disclose arises 'where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair.'" *Swersky v. Dreyer & Traub*, 219 A.D.2d 321, 327 (1st Dep't 1996). "Thus, where one party possesses superior knowledge, not readily available to the other, and knows that the other is acting on the basis of mistaken knowledge, there is a duty to disclose that information." *MBIA Ins. Corp. v. Royal Bank of Canada*, 28 Misc.3d 1225(A), at *28 (Sup. Ct. Westchester Cnty. Aug. 19, 2010) (internal citation omitted). Here, Plaintiff pleads that, at the time of the Lease signing, Paramount had superior knowledge that Vladeck's leasehold would be converted into a hotel and that Vladeck's lease then would be terminated before the end of its term. Such pleading is not clearly devoid of merit. *See Madison Apparel Grp. Ltd. v. Hachette Filipacchi Presse, S.A.*, 52 A.D.3d 385, 385 (1st Dep't 2008) (sustaining fraud claim under "special facts doctrine" where "complaint alleges that defendants had peculiar and superior knowledge of their ongoing negotiations with a third-party licensee, that plaintiff was unable to discern such negotiations through the use of reasonable intelligence or due diligence, and that defendants were aware that plaintiff sought to terminate the parties' agreement at least in part due to its lack of knowledge about the negotiations.").

Therefore, Plaintiff's motion to amend its complaint to add a fraudulent inducement claim is granted.

2. Breach of the Implied Covenant of Good Faith and Fair Dealing

Defendant next argues that Plaintiff's breach of the implied covenant claim, like its fraudulent inducement claim, fails as a duplicative breach of contract claim. Paramount argues that Vladeck's claim turns on the allegation that Paramount breached the Lease by seeking its early termination.

Again, Paramount miscasts Vladeck's claim. The Proposed Amended Complaint does not assert that an express term of the Lease was violated, but instead that Vladeck was denied the right to receive the benefits that it bargained for under the Lease through Paramount's "plans to renovate the Premises prior to the expiration of the Vladeck Lease term..." *See* Proposed Am. Compl. ¶ 38.

"In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153 (2002) (citations omitted). Courts define this covenant as requiring that neither party "do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Id.* (quoting *Dalton v. Educational Testing Serv.*, 87 N.Y.2d 348, 389 (1995)). In its proposed claim, Plaintiff pleads that

Paramount's hotel conversion plan destroyed its right to receive the fruits of the Lease, particularly as Paramount's plan led to "the loss of [Vladeck's] subtenant, the loss of the Replacement Subtenant, and the damages incurred as a result of the loss in value of the leasehold due to foregone Tenant Improvements." *See* Proposed Am. Compl. ¶ 40. This pleading is sufficient to state a claim for breach of the implied covenant and thus is not palpably insufficient. Plaintiff's motion to amend is granted.

3. Anticipatory Breach

Finally, Defendant disputes the merits of Plaintiff's anticipatory breach claim. Paramount contests the facts underlying Plaintiff's claim, arguing that Vladeck's anticipatory breach allegations are belied by its failure to perform any of the conditions precedent to performance under the Lease. In presenting this argument, Paramount highlights a potential factual dispute but does not provide a basis to deny the motion to amend. The inquiry on a motion to amend is whether the movant has stated a "prima facie basis for the amendment." *Pier 59 Studios, L.P. v. Chelsea Piers, L.P.*, 40 A.D.3d 363, 366 (1st Dep't 2007). Once that prima facie basis is established, "that should end the inquiry, even in the face of a rebuttal that might provide the ground for a subsequent motion for summary judgment." *Id.* Accordingly, after review of the papers, Plaintiff's motion to amend is granted as to its anticipatory breach claim.

4. Other Arguments

Finally, Paramount argues that Plaintiff's motion to amend is procedurally defective since it is supported only by an affirmation of counsel. Contrary to Paramount's protestations, however, an affirmation of counsel is sufficient to support a motion to amend, particularly where the affirmant relies on deposition testimony and documents for any information not in his personal knowledge. *See MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 500 (1st Dep't 2010) ("Contrary to the corporate defendant's argument, the proposed amendment was supported by a sufficient showing of merit through the submission of an affirmation by counsel, along with a transcript of relevant deposition testimony."). Accordingly, Vladeck's failure to submit a separate affidavit of merits in addition to counsel's affirmation does not mandate denial of its motion. Indeed, for the reasons set forth above, Plaintiff's motion to amend is granted.[3]

B. *Motion to Compel the Deposition of Arthur Cohen (Motion Sequence 002)*

Plaintiff Vladeck also seeks to compel the deposition of Arthur Cohen, a representative of Paramount who purportedly has knowledge of the hotel conversion plan.

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[3] Paramount submitted a cross-motion to suspend further pre-trial disclosure until Vladeck's motion to amend was resolved. Since Vladeck's motion is granted, Paramount's cross-motion is denied as moot. Moreover, Paramount's alternative request to suspend disclosure until the filing of its Answer is likewise denied. Paramount has presented no compelling rationale for the suspension of documentary or deposition discovery.

Vladeck maintains that Paramount previously produced a representative for deposition who had no knowledge of the conversion. However, this previous deponent identified Cohen as an individual involved with the hotel conversion discussions. *See* Wang Affirm. Ex. R at 20:24-21:24 (Stanley Garber Deposition Transcript).

Paramount offers no opposition in its briefing to Vladeck's motion, aside from the argument that Plaintiff's request is "interdependent with" its motion to amend and likewise should be denied. *See* Paramount's Opp. Br. at 4. Since Plaintiff's motion to amend was granted, however, Paramount's interdependence argument counsels in favor of granting Plaintiff's motion to compel. Moreover, Vladeck has made a detailed showing as to the necessity of the Cohen deposition, in that Vladeck demonstrated that the Paramount representative already deposed "had insufficient information and there was a substantial likelihood that those sought to be deposed possess information necessary and material to the prosecution of the case." *Alexopoulos v. Metro. Transp. Auth.*, 37 A.D.3d 232, 233 (1sr Dep't 2007). Accordingly, Plaintiff's motion to compel the deposition of Arthur Cohen is granted.

C. *Plaintiff's Motion to Vacate the Note of Issue (Motion Sequence 003)*

Plaintiff next seeks to vacate the Note of Issue filed by Defendant Paramount on April 10, 2013 – one day after the filing of Plaintiff's motion to amend and compel the

deposition of Arthur Cohen and two and a half months before the Note of Issue deadline set by the Court. Defendant argues that this early filing was proper since Vladeck waived any right to further discovery by neither amending its complaint nor pursuing pretrial discovery with sufficient vigor.

Here, Paramount's Note of Issue was premised on a certificate of readiness containing erroneous facts. Discovery has not been completed in this litigation, nor has Plaintiff waived its right to conduct further discovery. Plaintiff's motion to amend, addressed above, was timely filed in accordance with the Court's scheduling order. Moreover, the Court set a Note of Issue deadline of June 28, 2013 to allow for the filing of this motion to amend as well as additional discovery relief sought by Vladeck. Both the deadline for the motion to amend and the Note of Issue date were referenced in this same March 26, 2013 order.

Further, the attorney affirmation accompanying the Note of Issue contains a misstatement. The April 10, 2013 affirmation states that: "Two weeks have now passed since the March 26, 2013 compliance conference and plaintiff has failed to move to amend its complaint and has failed to move to compel additional disclosure." *See* Affirmation of Norman Flitt in Opposition to Motion to Vacate Note of Issue, Ex. H ¶ 16. However, Plaintiff filed its motion to amend and compel on April 9, 2013 – within the

deadline set by the Court and before the filing of Paramount's Note of Issue and accompanying attorney affirmation.

While Paramount may wish to end discovery, its premature filing of the Note of Issue was improper and rested on a certificate of readiness containing erroneous facts. Therefore, Paramount's Note of Issue is vacated. *See Nielsen v. N.Y. State Dormitory Auth.*, 84 A.D.3d 519, 520 (1st Dep't 2011) ("A note of issue should be vacated where, as here, it is based upon a certificate of readiness that incorrectly states that all discovery has been completed."); *Ortiz v. Arias*, 285 A.D.2d 390, 390 (1st Dep't 2001) ("We have repeatedly held that a note of issue should be vacated when it is based upon a certificate of readiness that contains erroneous facts," including an incorrect statement that all physical examinations and other discovery have been completed or waived.").

Defendant's cross-motion for a protective order suspending pre-trial discovery given the filing of its Note of Issue is denied, as the Note of Issue is vacated.

D. Plaintiff's Motion for Sanctions (Motion Sequence 003)

In response to Defendant Paramount's premature Note of Issue filing, Plaintiff Vladeck seeks sanctions from the Court pursuant to 22 NYCRR § 130.1(c)(3). Specifically, Vladeck deems Paramount's conduct frivolous and asks the Court to award costs and attorneys' fees.

Frivolous conduct under 22 NYC RR § 130.11(c) has been defined in "any of three manners": "the conduct is without legal merit; or is undertaken primarily to delay or prolong the litigation or to harass or maliciously injure another; or asserts material factual statements that are false." *Levy v. Carol Mgmt. Corp.*, 260 A.D.2d 27, 34 (1st Dep't 1999).

Here, Paramount's premature Note of Issue filing falls under the first and third definitions of frivolous conduct, as it was without legal merit and asserted material factual statements that were false.

Paramount justified its premature Note of Issue filing by stating to the Court that discovery should be deemed closed since "plaintiff failed to follow the Court's directions for obtaining additional pre-trial disclosure herein or amending its complaint." *See* Affirmation of Norman Flitt in Opposition to Motion to Vacate Note of Issue, Ex. H ¶ 16; *see also* Docket No. 26 (same). This representation was inaccurate. Vladeck filed its motion to amend and motion to compel on April 9, 2013, within the Court's two-week deadline. *See* Docket No. 23. This motion, submitted by Order to Show Cause, was electronically filed. Notably, Paramount does not contest this; in fact, Paramount's counsel acknowledged in an April 10, 2013 letter to the Court that it received notification of Vladeck's motion on April 9, 2013. *See* Affirmation of Peter N. Wang in Support of Motion to Vacate Note of Issue, Ex. CC.

Paramount also does not contest Plaintiff's assertion that it promptly informed Paramount of its error to give Paramount the opportunity to withdraw its Note of Issue. However, the Note of Issue was not withdrawn, necessitating Plaintiff's file of the motion to vacate.

Viewing the matter as a whole, Paramount's filing of the Note of Issue two and half months before the deadline scheduled by the Court, while discovery requests remained outstanding, premised on the demonstrably incorrect assertion that Plaintiff failed to timely file its motion to amend and compel, justifies the imposition of sanctions. Vladeck "should not have had to resort to motion practice" in order to enforce the Note of Issue deadline set by the Court and to point out the inaccuracies in Paramount's filing. *See Grayson v. N.Y. City Dep't of Parks & Recreation*, 99 A.D.3d 418, 419 (1st Dep't 2012). Therefore, the Court grants Plaintiff's motion and requires Paramount to pay to Vladeck those costs and attorney's fees that were incurred by Vladeck in filing and arguing the motion to vacate.

III. Conclusion

Accordingly, it is

ORDERED that Plaintiff's motion to amend the complaint herein is granted, and the amended complaint in the proposed form annexed to the moving papers shall be

deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that Defendant shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that Plaintiff's motion to compel the deposition of Arthur Cohen is granted; and it is further

ORDERED that Defendant shall produce Arthur Cohen for deposition within 30 days from the date hereof; and it is further

ORDERED that Plaintiff's motion to vacate the Note of Issue is granted, Defendant's cross-motion to stay discovery is denied, and the Note of Issue is vacated and the case is stricken from the trial calendar; and it is further

ORDERED that all further discovery in this matter shall be completed within 60 days from the date hereof; and it is further

ORDERED that, within 15 days from the entry of this order, movant shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the Trial Support Office (Room 158), who is hereby directed to strike the case from the trial calendar and make all required notations thereof in the records of the court; and it is further

ORDERED that, within 15 days from completion of discovery as herein directed, the plaintiff shall cause the action to be placed on the trial calendar by the filing of a new note of issue and statement of readiness and payment of the fee therefor; and it is further

ORDERED that the Court having determined that Defendant has engaged in frivolous conduct as defined in Section 130-1.1(c) of the Rules of the Chief Administrator as set forth above and that costs should be awarded, and having found that the amount of sanctions to be awarded is appropriate as set forth above, that Plaintiff's motion for sanctions therefore is granted; and it is further

ORDERED that Plaintiff prepare an affirmation detailing the costs and expenses of filing its motion to vacate the Note of Issue, and provide it to Defendant's counsel within 14 days of service of notice of entry of this decision and order. Within 30 days of service of notice of entry of this decision and order, Defendant's counsel may serve a copy of this decision and order with notice of entry on the Clerk of the Office of Special Referees (60 Centre Street, Room 119), who shall set the matter down for a hearing concerning the costs and attorneys' fees associated with Plaintiff's motion to vacate. Failure to serve this decision and order on the Office of the Special Referee within 30 days of service of notice of entry shall result in a judgment in favor of Plaintiff in the amount set forth in its affirmation related to costs and attorneys' fees. Plaintiff's failure to serve a costs/fees affirmation on defendant's counsel within 14 days of service of notice

of entry of this decision and order will result in a waiver of recovering costs and fees by that party; and it is further

ORDERED that the parties shall appear for a status conference in Room 442, 60 Centre Street, on January 6, 2013, at 10 AM.

Dated: New York, New York
November 12, 2013

ENTER:

Hon. Eileen Bransten, J.S.C.