SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: HON. MARCY S. FRIEDMAN, J.S.C.

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NINOTCHKA JANNETJE MANUS,

*Plaintiff,*

- against -

FAMILY M. FOUNDATION LTD. and
ELIZABETH MANUS a/k/a LIBBY MANUS,

*Defendants.*

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Index No.: 602326/2004

DECISION/ORDER

Motion Seqs. 012, 013

In this protracted family dispute, plaintiff Ninotchka Manus (Ninotchka)[1] moves to disqualify defendants' attorneys based on an imputed conflict of interest and to dismiss the counterclaim of defendants Family M. Foundation Ltd. (Family M) and Elizabeth Manus (Libby), pursuant to CPLR 3211 (a) (3) and (7).[2] By separate, earlier filed motion, defendants move to strike Ninotchka's jury demand.[3]

It is undisputed that Allen Manus formed Family M in 1992 under the laws of the Cayman Islands. The stock certificates were subsequently transferred to Libby, Allen's third and surviving wife; Jane von Richthofen (Jane), Allen's daughter; and Ellen Sue Goldberg (Ellen

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[1] As many of the parties share the same surname, each will be referred to by his or her first name.

[2] As noted in the order of this court, dated March 25, 2013, plaintiff withdrew the branch of her motion which sought to dismiss defendants' defenses and counterclaims on the ground that Family M was struck off the corporate register and dissolved by operation of Cayman Islands law.

[3] Defendants withdrew the branch of their motion seeking an order precluding plaintiff from submitting a pre-trial memorandum and any evidence at trial. (Oral Argument Tr. at 4-5.)

Sue), Allen's niece. Ninotchka was Allen's second wife. Allen died in 2003. (Ninotchka Manus v Family M. Found. Ltd., Sup Ct, NY County, July 7, 2008, Fried, J., Index No. 602326/2004 at 2.)

The parties dispute the current ownership of the shares of Family M. Jane initiated this action alleging that Ellen Sue sold her shares in Family M to Jane and that, as a result, Jane owned two-thirds of the shares of Family M and Libby owned one-third. During the pendency of this action Jane assigned her right, title, and interest in Family M to Ninotchka. (Id. at 2-3; Von Richthofen v Family M. Found. Ltd., 44 AD3d 573, 574-575 [1st Dept 2007].) Ninotchka was substituted for Jane as plaintiff and seeks a declaratory judgment declaring that she is the rightful owner of "a two-thirds (2/3) ownership interest in Family M,"and directing that defendants deliver "stock certificates representing two-thirds (2/3) of the issued and outstanding shares of stock of Family M" to Ninotchka. (Complaint, ¶ 16.) In addition, Ninotchka seeks a permanent injunction restraining defendants from selling or assigning any shares of stock or property of Family M, without taking into consideration Ninotchka's status as two-thirds owner of the Family M shares. (Id., ¶ 19.) Defendants counterclaim for a declaratory judgment that "Libby Manus is the sole 100% shareholder, officer and director of Family M." (Answer and Amended Counterclaims [Answer], ¶ 43.)[4]

[4] The fight for control over Family M is apparently driven by the fact that Ninotchka owes a debt to Family M that is subject to enforcement. As appears from proceedings in a prior related action (Family M. Found. Ltd. v Ninotchka Manus, Sup Ct, NY County, July 1, 2004, Fried, J., Index No. 605207/98 [Family M action], and March 17, 2009, affd 71 AD3d 598 [1st Dept 2010], lv dismissed 15 NY3d 819 [2010]), Family M lent $400,000 to Ninotchka in 1994. In return, Ninotchka granted Family M a security interest in certain jewelry. In 1998, Family M sued Ninotchka for non-payment. The parties settled in 1999, and Ninotchka agreed to repay the principal of the loan. As security for that payment, Ninotchka endorsed in blank and deposited with an escrow agent a certificate representing her ownership interest in her apartment in Manhattan. Ninotchka did not make the payments required under the settlement agreement. In 2004, after Allen's death, Family M, through Libby as its president and sole

Disqualification

Plaintiff moves to disqualify Davidoff Hutcher & Citron LLP, the law firm which has represented defendants throughout the entirety of this action, because Michael Wexelbaum, an attorney who previously represented Jane in this action, joined the Davidoff firm as a partner in 2011. It is undisputed that Wexelbaum represented Jane when she was the plaintiff, and never represented Ninotchka. (Aff. Of Michael Wexelbaum, ¶¶ 2, 4.) Wexelbaum attests that his involvement with this matter ceased "in or about" 2005, and that he was not aware that the action was ongoing when he joined the Davidoff firm. (Id., ¶¶ 5, 6.) It appears from the record that Wexelbaum's former firm ceased to represent Jane in this action and that another firm substituted as her counsel in November 2005. (Consent to Change Attorneys [NYSCEF Doc No. 25], filed Nov. 17, 2005 [substituting Lowenstein Sandler PC as attorneys for Jane].) Ninotchka was substituted as the plaintiff in 2007, and retained her current counsel in March 2011. (Oral Argument Tr. at 14.) Asserting a conflict of interest, Ninotchka now moves to disqualify the Davidoff firm. (P.'s Memo. In Support at 4.)

Rule 1.10 (c) of the Rules of Professional Conduct (22 NYCRR 1200.0) provides as follows:

> "When a lawyer becomes associated with a firm, the firm may not knowingly represent a client in a matter that is the same as or substantially related to a matter in which the newly associated lawyer, or a firm with which that lawyer was

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director, moved to restore the action. This Court (Fried, J.) restored the action, found that Ninotchka had defaulted, and directed the release of the apartment shares held in escrow to Family M. In doing so, this Court rejected Ninotchka's contention that Libby lacked the authority to direct the actions of Family M and held that, whether or not Libby was a majority shareholder, she had the authority as the corporation's president. The Court (Fried, J.) subsequently denied Ninotchka's motion to vacate the judgment and to dismiss the action based, in part, on Libby's alleged lack of authority to direct the actions of Family M. (Family M action, March 17, 2009, Fried, J., Index No. 605207/1998, affd 71 AD3d 598.) In addition, Ninotchka unsuccessfully pursued a legal malpractice action against her attorney in that action. (Manus v Flamm, 111 AD3d 525 [1st Dept 2013].)

> associated, formerly represented a client whose interests are materially adverse to the prospective or current client unless the newly associated lawyer did not acquire any information protected by Rule 1.6 or Rule 1.9(c) that is material to the current matter."

A party seeking disqualification "must prove that there was an attorney-client relationship between the moving party and opposing counsel, that the matters involved in both representations are substantially related, and that the interests of the present client and former client are materially adverse." (Jamaica Pub. Serv. Co. v AIU Ins. Co., 92 NY2d 631, 636 [1998]. See also Pellegrino v Oppenheimer & Co., Inc., 49 AD3d 94, 98-99 [1st Dept 2008].) The rule serves "to free the former client from any apprehension that matters disclosed to an attorney will subsequently be used against it in a related litigation" and to avoid the appearance of impropriety on behalf of the attorney or the law firm. (Solow v W.R. Grace & Co., 83 NY2d 303, 309 [1994].)

Defendants contend that as Wexelbaum never represented Ninotchka, she lacks standing to seek disqualification. (Ds.' Memo. In Opp. at 10.) It is undisputed, however, that during Wexelbaum's representation of Jane, he acquired highly material confidential information on the critical issue in this action – i.e., the ownership of the shares of Family M. In order to prevail here, Ninotchka must demonstrate that Jane owned the shares before assigning them. In order to have prevailed when she was plaintiff, Jane would have had to prove her ownership of the shares. Wexelbaum thus represented Jane in this very action on the very issue that is central to Ninotchka's case. It can hardly be contested that Jane's (and, now Ninotchka's) interests are substantially adverse to those of Libby, with whose attorneys Wexelbaum is now associated. Moreover, as held by the Appellate Division in this action, "Ninotchka is the assignee of Jane's

right, title and interest (if any) in [Family M] via irrevocable assignment, and is the proper party to litigate these claims." (Von Richthofen, 44 AD3d at 575.) This case thus differs from cases in which the mere assignment of property will not suffice to transfer the attorney-client relationship. (See Tekni-Plex, Inc. v Meyner & Landis, 89 NY2d 123, 132-133 [1996], rearg denied 89 NY2d 917 [1996] [holding that attorney-client relationship was transferred from seller corporation to surviving corporation in merger, and contrasting cases in which "the mere transfer of assets with no attempt to continue the pre-existing operation generally does not transfer the attorney-client relationship"].) The court accordingly holds that although Ninotchka never retained Wexelbaum, she may assert the attorney-client relationship, as she does not merely claim an assignment of Jane's shares but succeeded to Jane's right to prosecute this action.

Under the rule of imputed disqualification, "where an attorney working at a law firm is disqualified from undertaking a subsequent representation opposing a former client, all the attorneys in that firm are likewise precluded from such representation." (Kassis v Teacher's Ins. & Annuity Assn., 93 NY2d 611, 616 [1999].) While "imputed disqualification is not an irrebuttable presumption (id., citing Solow, 83 NY2d 303, supra), "the party seeking to avoid disqualification must prove that any information acquired by the disqualified lawyer is unlikely to be significant or material in the litigation." (Kassis, 93 NY2d at 617.) Only in that factual scenario will an ethical screen be sufficient to avoid firm disqualification. (Id.) Here, as held above, there can be no serious dispute that Wexelbaum acquired material confidential information in the course of his representation of Jane. An ethical screen therefore cannot mitigate the Davidoff firm's conflict of interest.

As the Court of Appeals has repeatedly explained, "disqualification motions present competing concerns. Balanced against the vital interest in avoiding even the appearance of impropriety is concern for a party's right to representation by counsel of choice and danger that such motions can become tactical 'derailment' weapons for strategic advantage in litigation." (Jamaica Pub. Serv. Co., 92 NY2d at 638, citing S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp., 69 NY2d 437, 443 [1987].) In determining whether a firm must be disqualified, a court must therefore carefully appraise the interests involved. (See Tekni-Plex, 89 NY2d at 132.)

The court recognizes that the Davidoff firm has been long-standing counsel for Libby, and that retention of new counsel will pose a hardship for Libby. In addition, the court has taken into consideration that the Davidoff firm represents that it imposed an ethical screen.[5] Given the materiality of the confidences acquired by Wexelbaum, however, the screen is plainly insufficient to avoid disqualification under the authority cited above.

Finally, the court has undertaken heightened scrutiny of this motion in light of the fact that it is the fourth disqualification motion brought against the Davidoff firm in this and the Family M actions. (See Von Richthofen v Family M. Found. Ltd., June 16, 2006, Fried, J., Index No. 602326/2004, revd on other grounds 44 AD3d 573 [denying motion to disqualify Davidoff firm in this action based on its representation of Ninotchka in connection with the loan that was the subject of the Family M action, the court holding that the motion was untimely and, in the alternative, that there was a written waiver of conflict]; Manus v Family M. Found. Ltd., May 12, 2009, Fried, J., Index No. 602326/2004 [denying motion to disqualify Davidoff firm from

[5] It is noted, however, that neither Wexelbaum nor the Davidoff firm states when the screen was imposed. (See Wexelbaum Aff., ¶ 10; Preite Aff. In Opp., ¶ 20.)

representing both Libby and proposed intervenor, a bankruptcy trustee claiming an ownership interest in the shares][6]; Family M. Found. Ltd. v Ninotchka Manus, Sup Ct, NY County, Dec. 20, 2004, Fried, J., Index No. 605207/98 [denying Ninotchka's motion for leave to renew and reargue a prior denial, by order dated June 25, 2004, of Ninotchka's motion to disqualify the Davidoff firm from representing Family M Foundation].) The court notes that the prior motions were brought on different grounds and by different counsel for Ninotchka. Wexelbaum joined the Davidoff firm after the prior motions were decided. It is undisputed, moreover, that the instant motion was brought within three months of Ninotchka's current counsel's discovery that Wexelbaum had joined the Davidoff firm. (Oral Argument Tr. at 14-15.)

The court is reluctant to disqualify the Davidoff firm after almost a decade of litigation, but is constrained to do so based on the critical nature of the confidences disclosed to Wexelbaum in this very action and on the firm's resulting conflict of interest. Disqualification is mandated in order to avoid the appearance of impropriety and to protect the integrity of the judicial process.

Lack of Standing and Failure to State a Claim

Plaintiff moves to dismiss defendants' first counterclaim for a declaratory judgment that Libby is the sole shareholder of Family M. (Answer, ¶ 43.) In particular, Ninotchka contends that Libby lacks standing to assert the counterclaim, pursuant to CPLR 3211 (a) (3), and that the counterclaim fails to state a cause of action under Cayman Islands law, pursuant to CPLR 3211

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[6] The motion to disqualify was denied by the March 12, 2009 order, which referred to previous proceedings on the motion, the transcript of which has not been provided to the court. It is noted that the order, dated May 21, 2007, granting intervenor's motion to intervene was vacated by order of the Court (Fried, J.), dated October 22, 2010.

(a) (7).[7]

CPLR 3211 (a) (3) provides that a motion to dismiss may be brought on the ground that "the party asserting the cause of action has not legal capacity to sue." There is authority that a claim of lack of standing may be brought under this provision. (See Security Pacific Nat. Bank v Evans, 31 AD3d 278 [1st Dept 2006], appeal dismissed 8 NY3d 837 [2007].)

CPLR 3211 (a) (7) authorizes a motion to dismiss on the ground that the pleading fails to state a cause of action. It is well settled that on a motion to dismiss addressed to the face of the pleading, "the pleading is to be afforded a liberal construction (see, CPLR 3026). [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See also 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts." (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003]; see also Water St. Leasehold LLC v Deloitte & Touche LLP, 19 AD3d 183 [1st Dept 2005], lv denied 6 NY3d 706 [2006].) When documentary evidence under CPLR 3211 (a) (1) is considered, "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a

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[7] While defendants do not expressly claim that plaintiff's motion to dismiss based on standing is untimely, they note that plaintiff brought this motion years after the answer and counterclaims were served. (Ds.' Memo. In Opp. at 14-15.) Moreover, it does not appear from the record that a reply to the counterclaims was served. A question therefore exists as to whether the standing objection was waived. (See CPLR 3211 [e].) However, as this objection to the motion to dismiss was not raised by defendants, the motion to dismiss is not decided on this ground.

matter of law." (Leon, 84 NY2d at 88.)

Whether plaintiff's ground for dismissal is characterized as lack of standing or failure to state a cause of action, she seeks a determination on the merits of Libby's claim that Libby is the owner of 100% of the shares. The first counterclaim pleads that Jane and Ellen Sue transferred their shares to Libby in or about 2001. (Answer, ¶ 43.) In a motion to amend this counterclaim that was previously denied, Libby sought to amend her pleading to allege that she owned two-thirds rather than 100% of the shares of Family M, and that Jane and Ellen Sue transferred their shares not to Libby but to Allen, from whom she inherited the shares. (Proposed Amended Answer, ¶¶ 40 [NYSCEF Doc No. 139-2].)[8] Based on the pleaded counterclaim and also on the proposed but disallowed amendment, Ninotchka characterizes Libby's "theories" of ownership as follows: (1) Libby has possession of the three original share certificates, and they are "bearer" shares; (2) Jane transferred her one-third interest and Ellen Sue's one-third interest to Libby or to Allen; and (3) if the shares were transferred to Allen, Libby inherited them upon Allen's death from his intestate estate. (P.'s Reply Memo. at 8.) Ninotchka then relies on the kind of evidence that would be considered on a motion for summary judgment to show that each of these claims to ownership is without merit.

With respect to the bearer share claim, for example, Ninotchka argues that there are no documents reflecting the transfer of shares from the original nominee holders (i.e., the Campbells entities in the Cayman Islands) to anyone associated with Family M. In support of this argument,

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[8] The Answer was served on March 19, 2008. In early 2012, defendants moved to amend the Answer in the above respects. The Court (Fried, J.) denied the motion by order dated April 25, 2012. The order does not set forth the Court's reasoning but refers to proceedings on the record, the transcript of which has not been provided on this motion.

Ninotchka relies on an affirmation of Alistair Walters, the Managing Partner of Campbells, stating that various Campbells entities held three shares as nominees for Libby, Jane, and Ellen Sue, respectively, and that Campbells' records do not reflect any transfer of legal ownership of the shares. (P.'s Reply Memo. at 12; Walters Aff., ¶¶ 4, 6 [annexed to P.'s Notice of Motion].)

With respect to Libby's claim that the shares were transferred from Jane to Allen, Ninotchka relies on the affidavit of Peter Broadhurst, her expert on Cayman Islands law, that such transfer would have required a written directive from the Campbells nominees. (Broadhurst Aff., ¶ 19 [annexed to P.'s Notice of Motion].) She then cites Jane's affidavit stating that she consented to her father's dissolution of Family M but never transferred her ownership interest to him. (Jane's Jan. 8, 2007 Aff., ¶ 19; see also Jane's Mar. 13, 2008 Aff., ¶¶ 7-9 [annexed to P.'s Notice of Motion].) However, Ninotchka also cites Jane's deposition in which she testified, variously, that she did not remember whether her father asked her to sign documentation evidencing her relinquishment of the shares, and looked for but did not find such documentation; and that she did not think Allen had said he needed her shares back. (Jane's Dep. at 112, 115 [Preite Aff. In Opp., Ex. 16].)

In further claiming that Libby could not have inherited the shares from Allen, Ninotchka does not rely on evidence to the same extent as she does in seeking dismissal of the claims that Libby had possession of bearer shares or acquired shares transferred by Jane and Ellen Sue to Allen. Rather, she assumes facts not in evidence. She thus asserts, in part, that "[w]e are informed that Allen died intestate in Florida" and that no proceeding to appoint an administrator was brought. (P.'s Memo. In Support at 18.) She then concludes, based on this assertion lacking any evidentiary support, that under Florida law, Libby is not Allen's sole heir.

In sum, the evidence on which Ninotchka relies is not documentary evidence within the meaning of CPLR 3211 (a) (1), as it is not documentary evidence that is sufficient, without explanation or further testimony, to establish that the counterclaim lacks merit as a matter of law. Plaintiff does not request conversion of this motion to one for summary judgment. In any event, the court would decline to convert on this record in which plaintiff relies on affidavits and portions of deposition testimony that are, in certain instances, equivocal or present credibility issues that should not be resolved on a motion for summary judgment. The court accordingly holds that plaintiff's motion to dismiss should be denied.

Jury Demand

Ninotchka made a jury demand, dated March 7, 2012, after defendants served a Note of Issue requesting a trial without a jury. (Preite Aff. In Supp., Exs. A [note of issue], B [jury demand].)

It is well settled that a jury trial may be demanded in "an action in which a party demands and sets forth facts which would permit a judgment for a sum of money only," in actions enumerated by statute, or in "any other action in which a party is entitled by the constitution or by express provision of law to a trial by jury." (CPLR 4101.) Pursuant to the New York Constitution, Article I, § 2, a jury trial may be had where a jury was permitted in actions prior to 1894, as well as where new causes of action are asserted "that are analogous to those traditionally tried by a jury." (Matter of DES Mkt. Share Litig., 79 NY2d 299, 304–305 [1992].) As an action for a declaratory judgment was not known at the time of the adoption of the 1894 Constitution, "it is necessary to examine which of the traditional common-law actions would most likely have been used to present the instant claim had the declaratory judgment action not

been created." (Strachman v Palestinian Auth., 73 AD3d 124, 127 [1st Dept 2010], appeal withdrawn 16 NY3d 796 [2011]; see also Anesthesia Assoc. of Mount Kisco, LLP v Northern Westchester Hosp. Ctr., 59 AD3d 481, 482 [2d Dept 2009] [same].) "[I]f the traditional action that most likely would have been used is an action at law, then the plaintiff will be entitled to a jury trial; if the traditional action that would have been presented is equitable, there is no right to a jury trial." (Strachman, 73 AD3d at 127 [internal citations omitted].)

Here, Ninotchka does not seek money damages, but rather a declaratory judgment as to her ownership of shares in Family M. Under the common-law, cases involving title to stock certificates were held to be equitable in nature. (See New York & New Haven R.R. Co. v Schuyler, 34 NY 30, 44-46 [1865] [holding that where plaintiff sought to cancel illegal stock certificates and transfers issued and effected as part of a fraud, plaintiff's action was equitable]; see also Cushman v Thayer Mfg. Jewelry Co., 76 NY 365, 369 [1879] [holding that action to compel transfer of stock by corporation to owner was equitable where damages would not "furnish a complete and satisfactory remedy"].)

Trial courts addressing demands for declaratory judgments regarding ownership of securities have also determined that the requested relief was equitable. (Smouha v Metropolitan Tr. Auth., 8 Misc 3d 248, 250-251 [Sup Ct, Kings County 2005] [holding that demand for declaratory judgment that "children are the true owners of the subject securities and directing defendants to transfer ownership and issue new certificates" was "equitable relief"]; Katzen v Balaj, 5 Misc 3d 1007 [A], 2004 WL 2381086, *2 [Sup Ct, Bronx County 2004] [holding that counterclaim seeking a declaration that the plaintiff was not a shareholder in any of defendant entities was equitable in nature]; Matter of Grodsky, 50 Misc 2d 220, 221 [Sur Ct, Westchester

County 1966] [holding that where objectants asserted that decedents held title to stocks at time of death, claim was equitable in nature]. Compare Matter of Rivara, 12 AD3d 611, 612 [2d Dept 2004] [holding that if petitioner had sought return of stock certificates, such an action would be akin to one for replevin and would be actionable at law].)

State Farm Mutual Auto Insurance Company v Sparacio (15 AD3d 777 [2d Dept 2006]), on which Ninotchka relies, is not to the contrary. There, the Appellate Division, Second Department, restated the general proposition that a declaratory judgment action "can be legal or equitable in nature" and that "which of the traditional actions would most likely have been used" to seek the relief requested would govern whether a jury could be demanded. (Id. at 778-779.) The case held that a claim for insurance coverage was legal in nature and, beyond the restating the general rule, has no application to the causes of action in this matter.

Finally, Ninotchka's own allegations demonstrate the equitable nature of the relief she seeks. In support of her demand for declaratory a judgment, Ninotchka pleaded that she had no adequate remedy at law. (Complaint, ¶17.) She also pleads a second cause of action for permanent injunctive relief relating to her claimed ownership of the Family M. shares. As Ninotchka seeks exclusively equitable relief, she is not entitled to a jury.

It is accordingly hereby ORDERED that that branch of plaintiff's motion to disqualify defendants' attorneys is granted to the extent of disqualifying Davidoff Hutcher & Citron, LLP from representing defendants Family M. Foundation Ltd. and Elizabeth Manus in any further proceedings in this action; and it is further

ORDERED that Davidoff Hutcher & Citron, LLP shall within five days of the date of this order (a) serve a copy of this decision and order, and a notice to substitute attorney, upon Family

M. Foundation Ltd. and Elizabeth Manus at their last known addresses by overnight mail; and (b) e-file proof of such service; and it is further

ORDERED that no further proceedings may be taken against Family M. Foundation Ltd. and Elizabeth Manus without leave of this court for a period of 90 days from the date of this order; and it is further

ORDERED that that branch of plaintiff's motion to dismiss defendants' first counterclaim is denied; and it is further

ORDERED that defendants' motion to strike plaintiff's jury demand is granted; and it is further

ORDERED that the parties shall appear in Part 60, Room 248, 60 Centre Street, New York, New York, on July 31, 2014 at 2:30 p.m. for a pre-trial conference.

This constitutes the decision and order of the court.

Dated: New York, New York
April 4, 2014

MARCY S. FRIEDMAN, J.S.C.