

Chamberlain v Guardian Serv. Ind., Inc.

2014 NY Slip Op 31724(U)

July 1, 2014

Sup Ct, New York County

Docket Number: 590331/2010

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

PART 35

Justice
Index Number : 590331/2010
PORT AUTHORITY Seq no 1 112963707
vs:
GUARDIAN SERVICES INDUSTRIES
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001

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). _____

FILED

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

JUL 07 2014

**NEW YORK
COUNTY CLERK'S OFFICE**

In accordance with the accompanying Memorandum Decision, it is hereby

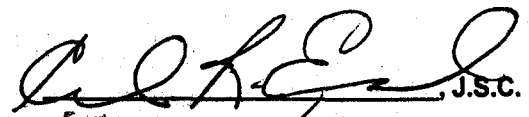
ORDERED that the motion by Moretrench American Corporation for summary judgment dismissing the second third-party complaint against it, and the Port Authority's third-party complaint against Guardian Service Industries, Inc. is granted solely to the extent that the contribution claims asserted by the Port Authority and by Guardian are severed and dismissed; and it is further

ORDERED that the cross-motion by Guardian Service Industries, Inc. for summary judgment dismissing the Port Authority's third-party complaint against it is granted solely to the extent that the contribution claim asserted by the Port Authority is severed and dismissed; and it is further

ORDERED that Moretrench American Corporation shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 7.1.2014

 J.S.C.

HON. CAROL EDMEAD

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
ROBERT CHAMBERLAIN,

Index No.: 590331/2010

Plaintiff,

Motion Seq. No. 001

-against-

GUARDIAN SERVICE INDUSTRIES, INC.,

Defendant.

-----X
GUARDIAN SERVICE INDUSTRIES, INC.,

Third-party

Index No.: 590192/2013

Third-party Plaintiff,

FILED

-against-

MORETRENCH AMERICAN CORPORATION,

JUL 07 2014

Third-party Defendant

NEW YORK

COUNTY CLERK'S OFFICE

-----X
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

This action arises out of an incident in which plaintiff, Robert Chamberlain ("plaintiff") fell from a beam on which he was standing while working at the World Trade Center ("WTC") construction site.

Factual Background

Plaintiff alleges that the Port Authority of New York and New Jersey (the "Port Authority"), as owner, retained Phoenix Constructors Joint Venture ("Phoenix Constructors") as general contractor, concerning work at the WTC site. Phoenix retained Skanska Mechanical Services ("Skanska"), the injured plaintiff's employer, to erect steel.

Guardian Service Industries, Inc. ("Guardian") was retained to perform dewatering services at the site; said subcontract contained additional insured and defense and

indemnification requirements in favor of the Port Authority. Guardian, in turn, sub-subcontracted the work to Moretrench American Corporation (“Moretrench”); said sub-subcontract contained similar additional insured and defense and indemnification requirements in favor of the Port Authority.

According to plaintiff, on the date of the accident, he and his co-workers were installing steel beams. While standing on a beam, another beam being lifted by a crane swung towards him. In attempting to avoid being hit, he slipped on the beam and fell to the ground six feet below.

Thus, plaintiff commenced this action under Labor Law 200, 240(1), and 241(6) against defendants Port Authority and Phoenix.

On March 4, 2010, this Court granted summary judgment against the Port Authority and Phoenix Constructors pursuant to Labor Law 240(1) and 241(6) (premised on violations of Industrial Code Regulations, §§23-8.1(f)(1)(iv), 23-8.1(f)(2)(I), and 23-1.16).

Thereafter, on April 19, 2010, the Port Authority commenced a third-party action against Guardian for (1) contractual and common law indemnification, (2) apportionment of damages based on, *inter alia*, breach of duty, negligence, and culpable conduct, (3) breach of contract for failure to name the Port Authority as an additional insured and (4) contribution.

The Port Authority and Phoenix Constructors then settled plaintiff’s action, and the main action was severed.

Guardian then commenced a second third-party action against Moretrench for (1) common law indemnification and contribution, (2) contractual indemnification, and (3) breach of

contract for failure to procure insurance.¹

Moretrench now moves for summary judgment dismissing Guardian's second third-party complaint, and the Port Authority's third-party complaint.

Moretrench argues that given the Port Authority's settlement with the injured plaintiff, the third-party action is barred by General Obligations Law ("GOL") 15-108(c), which bars a contribution claim by a tortfeasor who has obtained its own release from liability, such as the Port Authority herein.

And, in light of the Court's determination that the Port Authority was liable to plaintiff under Labor Law 240(1) and 241(6) in failing to provide a lifeline to prevent the injured plaintiff's fall, the Port Authority cannot pass on its liability to either Moretrench or Guardian, who bore no responsibility for providing proper safety or protective devices to plaintiff, or regarding the hoisting of the beams. Since the Port Authority was found liable under 241(6), which is some evidence of negligence, it is barred from seeking contractual and common law indemnification, which requires a showing of freedom from one's own negligence. And, the contractual indemnification claims fail because the Port Authority's contract with Guardian did not involve any services related to providing safety devices or hoisting beams at the site. Nor did Guardian undertake to provide such services. Likewise, Guardian's unexecuted contract with Moretrench was not in effect at the time of the underlying accident, and in any event, involved the provision of maintenance and basic electrical, plumbing, and carpentry services did not involve the provision of safety devices or hoisting beams. Lastly, the Port Authority has

¹ The third-party pleadings and second third-party pleadings were converted to the instant action and third-party action, respectively.

insurance coverage (through Lloyd's and any excess carriers), which paid the settlement. Thus the Port Authority did not sustain any damages to support any breach of contract claim. Therefore, both third-party actions should be dismissed.

Similarly, Guardian cross moves for summary judgment dismissing the Port Authority's third-party complaint, or in the alternative, denying Moretrench's motion to dismiss Guardian's second third-party complaint. Guardian adopts Moretrench's arguments, and adds that it was only contracted to keep water levels below two inches and to keep water levels at the below sea level construction site under two inches, not completely dry. Nothing indicates that it had any bearing on the accident. And, the Port Authority's claim that plaintiff slipped off the beam due to water is insufficient.

Guardian also adds that discovery is necessary regarding its contract with Moretrench. The contract, which was formalized in July 2010, was backdated to February 1, 2007, which was the time the Port Authority requested it to use Moretrench's services. Even though the contract is unsigned, it may still be enforceable. Moretrench performed all de-watering services at the site, and Guardian is entitled to common law indemnification from Moretrench if Moretrench was somehow responsible for plaintiff's accident. Since documents regarding Moretrench's activities at the site and proof of insurance naming Guardian as an additional insured are in the possession of Moretrench, and have yet to be exchanged, summary judgment in Moretrench's favor is premature. Therefore, if the Court denies dismissal of the Port Authority's complaint, Moretrench's motion to dismiss Guardian's third-party complaint should likewise be denied.

In opposition, the Port Authority argues that there is evidence of its lack of fault, and that no one complained to the Port Authority about any water condition. There is evidence that

plaintiff's fall was due to water in the area, plaintiff complained about "a lot of flooding problems," and water "over the whole surface we were working on," and that plaintiff's feet slipped because they had been wading around in the water. Therefore, there is evidence that Guardian and Moretrench's breach of their dewatering obligations caused plaintiff's accident. The Court's order granting plaintiff summary judgment was not based on any active negligence of the Port Authority, but on passive, statutory violations of the Labor Law.

Both motions should be denied because neither defendants supplied an affidavit from anyone with knowledge of their dewatering activities at the site. And, neither produced anyone for depositions.

Since the Port Authority was not negligent, as it had no notice of the water conditions and did not control the means or methods of plaintiff's work, it may pursue its contractual indemnification claim. And, the negligence under 241(6) was completely vicarious. The failure of both defendants to perform their dewatering obligations contributed to the happening of the accident, which triggered their contractual and common law indemnity obligations.

And, the Port Authority can maintain its claim for breach of failure to name it as an additional insured. Neither defendant showed their compliance with their contractual obligations. Further, the Port Authority is entitled to recover all out-of-pocket damages caused by defendants' breach, including the purchase cost of the insurance the Port Authority procured for itself, premiums, deductibles, co-payments, and increased future premiums. Thus, that the Port Authority maintained its own insurance does not absolve the defendants from their obligations. Indeed, as it is undisputed that defendants breached their obligation to name the Port Authority as an additional insured on their policies, the Court should award the Port Authority

summary judgment and order an inquest on damages.

In reply, Guardian adds that the only issue is whether the Port Authority was negligent and whether Guardian's work was connected to plaintiff's accident; if the accident was not related to Guardian's work, then summary judgment should be granted. And, plaintiff's boots would have been wet whether or not a dewatering contract between Guardian and the Port Authority existed, since Guardian was only responsible for keep water levels at the below sea level construction site under two inches, not completely dry. Further, even if the Port Authority was not actively negligent, there is no evidence that Guardian was a substantial factor in bringing about plaintiff's accident, in light of the fact that it did not contract to provide a bone dry site. And, the Port Authority's request in opposition for summary judgment on its breach of contract claim is procedurally defective, and cannot be granted in any event due to outstanding discovery needed to oppose such relief.

Moretrench also replies, adding that additional discovery is unnecessary since the alleged improper dewatering was not a proximate cause of the accident. Therefore, no common law indemnification claim can be maintained. Guardian provides no evidence that Moretrench was responsible for the safety devices for the plaintiff or the hoisting of beams. And, since contractual indemnification is limited to claims arising out of Moretrench's services, and the Court already held that the alleged water conditions at the site were irrelevant, Guardian is not entitled to contractual indemnification against Moretrench based on the purported contract. Further, Moretrench failed to produce a copy of its policy proving that it named Guardian as an additional insured.

Discussion

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the “cause of action . . . has no merit” (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v. BHL Realty Corp.*, 83 A.D.3d 510, 922 N.Y.S.2d 293 [1st Dept. 2011]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Madeline D’Anthony Enterprises, Inc. v. Sokolowsky*, 101 A.D.3d 606, 957 N.Y.S.2d 88 [1st Dept. 2012] citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 501 NE2d 572 [1986] and *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR §3212 [b]; *Madeline D’Anthony Enterprises, Inc. v. Sokolowsky*, 101 A.D.3d 606, 957 N.Y.S.2d 88 [1st Dept. 2012]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v. Steward M. Muller Constr. Co.*, 46 N.Y.2d 276, 281-82, 413 N.Y.S.2d 309 [1978]; *Carroll v. Radoniqi*, 105 A.D.3d 493, 963 N.Y.S.2d 97 [1st Dept. 2013]). The opponent “must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist,” and the “issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief” (*American Motorists Ins. Co. v. Salvatore*, 102 A.D.2d 342, 476 N.Y.S.2d 897 [1st Dept. 1984]; see also, *Armstrong v. Sensormatic/ADT*, 100

A.D.3d 492, 954 N.Y.S.2d 53 [1st Dept. 2012]).

Contribution Claims

It is undisputed that pursuant to GOL 15-108, the Port Authority's settlement of the plaintiff's claim against it bars its contribution claim against Guardian (fourth cause of action), and consequently, Guardian's contribution claim against Moretrench (see first cause of action). Therefore, such contribution claims are dismissed.

Contractual/Common Law Indemnification

A party is entitled to full contractual indemnification provided that the intention to indemnify can clearly be implied from the language and purpose of the entire agreement and the surrounding facts and circumstances (*Drzewinski v. Atlantic Scaffold & Ladder Co Inc.*, 70 N.Y.2d 774, 777 521 N.Y.S. 2d 216 [1987]; *Masciotta v. Morse Diesel International, Inc.*, 303 A.D.2d 309, 758 N.Y.S.2d 286 [1st Dept. 2003]).

However, a party seeking contractual indemnification must establish that it is free from any negligence and that its liability is solely vicarious arising from the non-delegable duty imposed by the Labor Law (*Quick v. City of New York*, 24 Misc 3d 1210, 890 N.Y.S.2d 370 [Sup Ct Kings County 2009] citing *Rey v. Ridamaset, LLC*, 19 Misc 3d 1114, *2 [Sup Ct Queens County 2008]; *Correia v. Professional Data Mgt., Inc.*, 259 A.D.2d 60, 693 N.Y.S.2d 596 [1st Dept. 1999] (“In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability”); *FrancaVilla v. Nagar Const. Co., Inc.*, 151 A.D.2d 282, 542 N.Y.S.2d 557 [1st Dept. 1989] (“Since the evidence at trial in this case was insufficient to support a finding that L.H.L. Realty was in any way negligent, and its liability was vicariously predicated solely on its nondelegable

duty under the Labor Law, L.H.L. was entitled to be indemnified from its co-defendant, who was the party actually at fault”).

Similarly, “implied indemnity permits one held vicariously liable solely on account of the negligence of another to shift the entire burden of the loss to the actual wrongdoer (*17 Vista Fee Assoc. v. Teachers Ins. & Annuity Assn. of Am.*, citing *Mas v. Two Bridges Assocs.*, 75 N.Y.2d 680, 690; *Guzman v. Haven Plaza Hous. Dev. Fund Co.*, 69 N.Y.2d 559, 567-568; *Trustees of Columbia Univ. v. Mitchell/Giurgola Assocs.*, 109 A.D.2d 449). Thus, “a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine [of indemnification]” (*17 Vista Fee Assoc.*, citing *Trustees of Columbia Univ. v. Mitchell/Giurgola Assocs.*, *supra*, at 453). Here, to “be entitled to common-law indemnification, the Port Authority must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work” (*Naughton v. City of New York*, 94 A.D.3d 1, 940 N.Y.S.2d 21 [1st Dept. 2012] citing *McCarthy v. Turner Constr., Inc.*, 17 N.Y.3d at 377–378, 929 N.Y.S.2d 556, 953 N.E.2d 794; *Reilly v. DiGiacomo & Son*, 261 A.D.2d 318, 690 N.Y.S.2d 424 [1999]; *Martins v. Little 40 Worth Associates, Inc.*, 72 A.D.3d 483, 899 N.Y.S.2d 30 [1st Dept. 2010] (“Common-law indemnification requires proof not only that the proposed indemnitor’s negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence”) citing *Correia v. Professional Data Mgt.*, 259 A.D.2d 60, 65, 693 N.Y.S.2d 596 [1999]; *Espinoza v. Federated Dept. Stores, Inc.*, 73 A.D.3d 599, 904 N.Y.S.2d 3 [1st Dept. 2010] (As there has been no finding of negligence on the part of Macy’s, co-defendants are not entitled to common law

indemnification for costs and attorney's fees by Macy's)).

Contrary to Moretrench and Guardian's contention, the Court's determination that the Port Authority was liable to plaintiff under Labor Law 240(1) and 241(6) does not constitute a finding of negligence against the Port Authority so as to bar its common law indemnification claim (*see Auriemma v. Biltmore Theatre, LLC*, 82 A.D.3d 1, 917 N.Y.S.2d 130 [1st Dept. 2011] ("finding in favor of the plaintiff on his § 240(1) claim does not constitute a finding of negligence on the part of the defendant general contractor for purposes of barring indemnification") *citing Brown v. Two Exch. Plaza Partners*, 76 N.Y.2d 172, 179, 556 N.Y.S.2d 991, 994, 556 N.E.2d 430, 433 [1990] (finding that liability for a violation of § 240(1) "is not the equivalent of negligence and does not give rise to an inference of negligence"); *Mouta v. Essex Market Development LLC*, 106 A.D.3d 549, 966 N.Y.S.2d 13 [1st Dept. 2013] ("Since the record establishes that plaintiff's accident was not caused by any negligence on JF's part, that JF's liability is purely vicarious under Labor Law § 240(1), and potentially under § 241(6), and that Marangos was responsible for the accident, JF is entitled to summary judgment on its contractual indemnification claim against Marangos"); *Fiorentino v. Atlas Park LLC*, 95 A.D.3d 424, 944 N.Y.S.2d 60 [1st Dept. 2012] ("Atlas and Plaza's only liability, if any, would be vicarious under Labor Law § 241(6). Accordingly, they are entitled to enforce the indemnification provisions in their contracts with Sage and Donaldson"))).

Therefore, the Court's determination that the Port Authority is liable under Labor Law 240(1) and 241(6), in and of itself, is insufficient to establish the Port Authority's negligence so as to preclude the Port Authority from pursuing its contractual indemnification and common law claims.

Further, Guardian's contract with the Port Authority indicates that Guardian was responsible for "Dewatering Services" (Addendum D), in addition to maintenance services. The record indicates that said "Dewatering Services" were sub-subcontracted to Moretrench. The Court's prior decision indicates that the beam plaintiff was standing on had mud and water due because plaintiff's "feet was tracking it up there." (Decision, p. 2). The area was allegedly wet, as water had been coming down in certain places from a wall in "waterfall" like fashion (*id.*). Therefore, the claim that Guardian's contract did not involve, and that Guardian did not undertake to provide, any services related to providing safety devices or hoisting beams at the site is not dispositive. Moreover, there is no affidavit from a person with knowledge or deposition testimony from a Guardian witness indicating that Guardian did not undertake any dewatering services at the WTC work site. And, the Court's finding, that the issue of the alleged slippery condition of the beam was irrelevant, has no bearing on whether Guardian owes the Port Authority contractual or common law indemnification, as such finding was made in the context of determining the Port Authority's liability under Labor Law 240(1) and 241(6). Nor did the Court make any finding that Guardian's work at the site bore no relation to plaintiff's accident. Thus, it cannot be said, as a matter of law, that plaintiff's accident was not related to Guardian's work at the site.

And, as to Moretrench, the record indicates that Guardian contracted with Moretrench to provide the subject "Dewatering Services" at the site. Although the purported contract between Guardian and Moretrench is unexecuted, unexecuted contracts have been found to be binding upon parties thereto (*Moyano v. Gertz Plaza Acquisition, LLC*, 110 A.D.3d 612, 973 N.Y.S.2d 623 [1st Dept. 2013]) (copies of unsigned contracts and evidence raised issues of fact as to

“whether the parties intended to be bound by a maintenance agreement and whether the agreement contained indemnity and additional insured provisions”). And, that Moretrench’s contract did not involve the provision of safety devices or hoisting beams is not dispositive, for the reasons noted above. In the absence of any affidavit from a person with knowledge of the dewatering activities at the site, or deposition testimony from a Moretrench witness of same, again, it cannot be said that plaintiff’s accident was not related to Moretrench’s work at the site.

Thus, as neither Moretrench nor Guardian established their freedom from liability for plaintiff’s injuries at this juncture, summary judgment dismissing the contractual and common law indemnification claims is denied.

Breach of Obligation to Obtain Insurance

In its fourth cause of action for breach of contractual obligation to procure insurance, the Port Authority seeks defense costs, and alleges its potential liability for plaintiff’s claim. In turn, and in its third cause of action under the same theory, Guardian seeks against Moretrench any judgment the Port Authority obtains against Guardian for the damages the Port Authority incurs.

A party which breaches its obligation to procure insurance naming such party as an additional insured “is liable for the resulting damages, including the amount of damages awarded to or paid to the injured party in the main action, within the limits of the policy that was to have been procured, as well as the costs incurred in defense of the main action” (*Encarnacion v. Manhattan Powell L.P.*, 258 A.D.2d 339, 685 N.Y.S.2d 227 [1st Dept. 1999] citing *Kinney v. G.W. Lisk Co.*, 76 N.Y.2d 215, 219, 557 N.Y.S.2d 283, 556 N.E.2d 1090).

As pointed out in *Amato v. Rock-McGraw, Inc.* (297 A.D.2d 217, 746 N.Y.S.2d 150 [1st Dept. 2002]), the Court of Appeals in *Inchaustegui v. 666 5th Ave. Ltd. Partnership* (96 N.Y.2d

111, 749 N.E.2d 196 [2001]) held “that where a tenant, in violation of a lease agreement, had failed to procure insurance on behalf of its landlord and the landlord had obtained its own insurance, the landlord was limited to damages for any out-of-pocket expenses such as premiums and any additional costs incurred including deductibles, co-payments and increased future premiums. *This principle applies in a breach of contract action based on a subcontractor's failure to procure insurance on behalf of a general contractor*” and likewise applies to in the Port Authority’s breach of contract claim based on Guardian’s and Moretrench’s alleged failure to name the Port Authority as an additional insured on an policy of insurance (emphasis added) (*Amato v. Rock-McGraw, Inc.*, 297 A.D.2d at 219, citing *Sheppard v. Blitman/Atlas Building Corp.*, 288 A.D.2d 33, 734 N.Y.S.2d 1).

As the Port Authority points out, it may recover all out-of-pocket damages caused by defendants’ breach, including “the premiums and any additional costs it incurred such as deductibles, co-payments and increased future premiums (*Inchaustegui v. 666 5th Ave. Ltd. Partnership* (96 N.Y.2d at 114)).

Therefore, the claim that the Port Authority has insurance coverage (through Lloyd’s and possibly, any excess carriers), which paid the settlement to the plaintiff is insufficient to defeat the Port Authority’s breach of contract claim as a matter of law. Therefore, dismissal of this claim is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by Moretrench American Corporation for summary judgment dismissing the second third-party complaint against it, and the Port Authority’s third-party

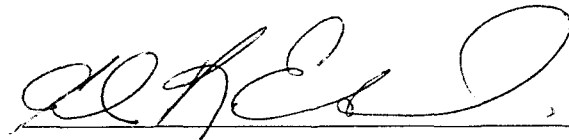
complaint against Guardian Service Industries, Inc. is granted solely to the extent that the contribution claims asserted by the Port Authority and by Guardian are severed and dismissed; and it is further

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ORDERED that Moretrench American Corporation shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: July 1, 2014



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMOAD

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