

**Enterprise Radiology, P.C. v CDP Holdings Group,
LLC**

2015 NY Slip Op 32841(U)

May 11, 2015

Supreme Court, Nassau County

Docket Number: 601786-15

Judge: Timothy S. Driscoll

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ORIGINAL

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
**ENTERPRISE RADIOLOGY, P.C. d/b/a
WASHINGTON HEIGHTS IMAGING,**

Plaintiff,

-against-

**CDP HOLDINGS GROUP, LLC and LONG
ISLAND RADIOLOGY ASSOCIATES, P.C.,**

Defendants.
-----x

**TRIAL/IAS PART: 14
NASSAU COUNTY**

**Index No: 601786-15
Motion Seq. No. 1
Submission Date: 4/29/15**

Papers Read on this Motion:

- Order to Show Cause.....X**
- Affidavit in Support and Exhibits.....X**
- Affirmation in Support and Exhibits.....X**
- Memorandum of Law in Support.....X**
- Affidavit in Opposition and Exhibits.....X**
- Memorandum of Law in Opposition.....X**

This matter is before the court on the motion filed by Plaintiff Enterprise Radiology, P.C. d/b/a Washington Heights Imaging (“WHI” or “Plaintiff”) on March 20, 2015 and submitted on April 29, 2015. For the reasons set forth below, the Court grants Plaintiff’s motion to the extent that the Court directs that the stipulation entered into by the parties on the record on March 20, 2015 shall remain in effect, pending further court order. In light of the fact that the stipulation entered into on March 20, 2015 requires Plaintiff to place sums in escrow, the Court declines to require the posting of a bond.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR § 6301, enjoining Defendants CDP Holdings Group, LLC (“CDP”) and Long Island Radiology Associates, P.C. (“LIRAD”) (“Defendants”) from restricting and denying WHI’s access to WHI’s patients’ medical records that are stored on LIRAD’s picture archiving and communications systems (“PACS”) and requiring Defendants to ensure that WHI’s access to such medical records is completely restored.

B. The Parties’ History

The Complaint (Ex. 1 to Sandler Aff. in Supp.) describes the nature of this action as follows:

This is an action by WHI for conversion, declaratory judgment, specific performance, breach of contract, breach of good faith and fair dealing, tortious interference and injunctive relief against CDP and LIRAD...resulting from CDP’s actions in barring WHI from accessing critical medical records of WHI’s patients, specifically electronically stored mammograms for patients, many of whom have been diagnosed with breast cancer, as well as additional radiological images, and in preventing LIRAD from giving WHI access to these critical medical records and LIRAD’s actions in agreeing or acquiescing to CDP restricting WHI’s access to its medical records.

Comp. at ¶ 4.

The Complaint contains seven (7) causes of action: 1) conversion, 2) a request for a declaratory judgment setting forth the rights and obligations of the parties, including that a) the mammography and other radiological records of WHI’s patients are the property of WHI and its patients; b) CDP is improperly retaining and refusing to permit access to said records; and c) WHI does not owe to CDP any sum of money for the restoration of access to said records for the purpose of viewing said records or migrating them to WHI’s PACS, 3) for specific performance requiring Defendants to provide WHI with cost-free access to PACS until the migration of WHI’s patients’ records to WHI’s PACS is complete, 4) breach of the parties’ implied and/or oral contract to provide ready access to patient records, 5) breach of the implied covenant of good faith and fair dealing, 6) tortious interference with business relations and economic advantage, and 7) a request for injunctive relief prohibiting Defendants from restricting

WHI's ready access to its patient records and ordering CDP to immediately restore WHI's access to LIRAD's PACS.

In support of the motion, Dr. Daniel E. Beyda ("Beyda") affirms that he is the President and Medical Director of WHI, a radiology practice located in Manhattan, and has held those positions since WHI opened in 2012. From 2004 to the present, he has been a shareholder of LIRAD, a radiology practice located in Elmont, New York, and is one of six shareholders of LIRAD. From September 5, 2014 to March 4, 2015, Beyda was the President and sole director of LIRAD.

Beyda affirms that since 1984, LIRAD has provided medical imaging services to patients including, but not limited to, magnetic resonance imaging scans ("MRIs"), CT scans, x-rays, ultrasound exams, mammograms and DEXA scans. Beyda joined LIRAD in 2003. LIRAD stores its medical records and images in a PACS. Communications regarding mammography images are exchanged on a system called Secure Exchange. Communications regarding all other radiological images are exchanged on a system called Merge PACS.

In 2012, Beyda and his wife Dr. Victoria Beyda ("Victoria") considered expanding their radiology practice to the Washington Heights ("WH") area of New York City which, he affirms, is composed primarily of low-income individuals and families. Beyda and Victoria discussed this move with other members of LIRAD who were not interested in joining them but supported the decision to open a practice in WH. In October 2012, WHI began providing medical imaging services to the WH community, and Beyda and Victoria also continued to practice at LIRAD. From WHI's opening in October 2012 until February 2015, WHI and LRAD had a "symbiotic and mutually beneficial relationship with respect to their provision of medical services" (Beyda Aff. in Supp. at ¶ 8). For example, WHI would perform medical imaging services at its WH location and LIRAD radiologists would read and interpret the images and provide advice to WHI. WHI paid LIRAD for these services.

WHI paid monthly fees to LIRAD based on the number of radiologic images read and interpreted by LIRAD physicians. The monthly fees paid to LIRAD, which generally totaled tens of thousands of dollars per month, included any costs associated with record storage associated with WHI's patient images. This relationship was profitable for LIRAD. As part of the

agreement, the parties agreed that WHI would have full access to any WHI patient records and images stored on LIRAD equipment. Beyda submits that this was a “critical part of the agreement” (Beyda Aff. in Supp. at ¶ 9) because WHI, like any radiology practice, requires ready access to its patient images and other medical records.

During the parties’ relationship, all medical imaging records of WHI and LIRAD were stored on LIRAD’s PACS. Medical imaging records of WHI patients were each assigned an identifying number with a WHI prefix to reflect that the records were associated with WHI patients. The parties obtained access to the PACS via a virtual private network (“VPN”) to which LIRAD and WHI had access over a secure T1 line via computers with internet connections. This allowed LIRAD and WHI to store and exchange medical records securely and efficiently. All personnel with access to the PACS, including Beyda and Victoria, had logon credentials which allowed full access to the VPN and records stored on the PACS. The records were stored and maintained in this fashion so that it was easier and more effective for LIRAD radiologists to view and interpret the records of WHI’s patients in accordance with the parties’ arrangement. Beyda affirms that it is his understanding that the mammograms to which Defendants have denied WHI access are stored on a computer located in LIRAD’s Elmont office.

Pursuant to an Asset Purchase Agreement (“APA”) dated September 5, 2014, CDP was to acquire substantially all of the non-professional assets of LIRAD such as furniture and equipment. In September 2014, CDP began providing infrastructure and support services to LIRAD. The APA and related promissory notes provided that CDP was to make a \$1 million payment on the closing date of the APA, but in no event later than October 5, 2014, and equal consecutive monthly installments on the fifth day of each month. Due to CDP’s alleged default under the APA and related promissory notes, Beyda filed an action against CDP and its principal Daniel DiPietro (“DiPietro”), assigned Nassau County Supreme Court Index Number 600915/15 (“Beyda Lawsuit”). In addition, CDP has filed an action against Beyda in which CDP alleges that Beyda refused to cede control and transfer ownership of LIRAD to two other doctors, assigned New York County Supreme Court Index Number 650261/15 (“CDP Lawsuit”).

Beyda affirms that WHI continued to be provided with access to patient records following the execution of the APA. By letter dated February 16, 2015 (Ex. A to Beyda Aff. in Supp.)

CDP, for the first time, demanded that WHI remit to it a monthly sum of \$100,000 from September 5, 2014 to January 31, 2015 and a 4.5% fee of WHI's gross receipts for that time period, "ostensibly" (Beyda Aff. in Supp. at ¶ 18) as compensation for providing infrastructure and support services. CDP also demanded that WHI remit a \$100,000 monthly payment plus a 6.5% fee of WHI's gross receipts from February 1, 2015 going forward. CDP also advised WHI that if WHI failed to remit these amounts within five days, CDP would terminate services to WHI. Beyda submits that these demands were contrary to the prior relationship between WHI and LIRAD. CDP's actions came shortly after Beyda advised CDP that it was in default of the APA and promissory notes. In an email to Beyda dated February 17, 2015 (Ex. B to Beyda Aff. in Supp.), DiPietro asserted that Beyda had failed to perform on his promises and made derogatory comments about Beyda's character.

Beyda affirms that WHI did not remit payment to CDP within the five days provided because there was no written or oral agreement entitling CDP to these payments. On February 23, 2015, CDP "purported to terminate" (Beyda Aff. in Supp. at ¶ 23) its provision of services with respect to the storage of WHI patient medical records and blocked WHI's electronic access to the PACS. At this time the VPN containing WHI patient records was controlled by the information technology personnel at LIRAD, all of whom are employees of CDP. WHI demanded that CDP immediately restore WHI's ability to access prior mammography records. CDP demanded that WHI's patients provide written releases which, Beyda submits, were not required because the individuals were patients of WHI, not LIRAD. CDP also demanded that WHI pay an amount for each image that, Beyda submits, was not reasonable or proportionate to CDP or LIRAD's actual cost of providing access to the images. By email dated February 23, 2015 (Ex. C to Beyda Aff. in Supp.), WHI demanded restoration of access to the "off-site records."

Although CDP provided some limited records to WHI, it refused to provide additional records unless WHI paid \$45 per patient record and a \$150 delivery charge for every group of requests which, Beyda submits, exceeds CDP's actual cost of providing the images. On March 1, 2015 WHI advised CDP that it was prepared to arrange for a one-time export of all mammography images of WHI's patients. WHI arranged for a vendor to migrate the

mammography images from LIRAD's PACS to WHI's new PACS at no cost to CDP but CDP would not agree to restore the electronic access necessary for that migration. By letter dated March 2, 2015 (Ex. F to Beyda Aff. in Supp.), CDP demanded that WHI pay CDP \$119,745.59 or CDP would not agree to allow the transfer of the mammography records to WHI. To date, CDP continues to refuse to provide access to LIRAD's PACS so that WHI can view, obtain and migrate the prior mammography records of its patients. Beyda affirms that migration of the WHI patient files from LIRAD to WHI would take less than one week, would not interfere with the normal operation of the PACS and would not require CDP to incur any cost. Beyda affirms that, without immediate access to the records at issue, WHI is unable to compare current mammography records to past records to detect changes that might suggest developing cancer. These prior images also assist surgeons in determining a treatment plan and performing surgery.

Plaintiff's motion included an application for a temporary restraining order. The parties resolved that application pursuant to a stipulation ("TRO Stipulation") that was placed on the record on March 20, 2015. Pursuant to the TRO Stipulation, the Plaintiff agreed to place \$35,000 in escrow by the close of business on March 23, 2015 and then \$45,000 by the close of business on March 30, 2015 and Defendants agreed to restore access to the radiological records as they existed prior to February 17, 2015.

In opposition to the motion, DiPietro affirms that LIRAD is a radiology practice with several locations in Long Island and New York City that is composed of multiple legal entities that collectively do business under the name LIRAD. Until September 2014, there were seven partners in LIRAD, including Beyda. The other LIRAD doctors have never had an ownership interest in WHI. Instead, they periodically read images of WHI patients in exchange for a "reading fee" (DiPietro Aff. in Opp. at ¶ 3), which is a common arrangement in radiology.

On September 5, 2014, the LIRAD partners entered into the APA (Ex. 1 to DiPietro Aff. in Opp.) pursuant to which CDP agreed to buy substantially all of LIRAD's assets. The APA's transaction documents required LIRAD to enter into a management agreement pursuant to which CDP would manage LIRAD's non-clinical affairs in exchange for monthly fees. As part of CDP's management, all of the non-clinical employees, such as technicians and accountants, became employees of CDP. MHI was not a party to the CDP transaction and CDP did not

acquire its assets or manage its affairs in any way. As part of this transaction, ownership of all of the LIRAD legal entities was transferred to Beyda. The expectation was that CDP and Beyda would work together for the benefit of all of LIRAD's stakeholders, with CDP in charge of non-clinical matters, including the employment of the administrative staff, and with Beyda in charge of clinical matters. DiPietro affirms that "[i]t has not turned out as planned" (DiPietro Aff. in Opp. at ¶ 5).

DiPietro learned that MHI was using substantial LIRAD resources, assets that CDP owned as of September 5, 2014, without paying for them. Those resources included 1) CDP's PACS software, 2) CDP's radiology information systems ("RIS") software, 3) a software package called PowerScribe that uses speech recognition technology to transcribe an oral analysis of a radiology image into written form, and 4) a digital imaging software package specific to mammograms called the Hologic Secureview System. In addition, CDP's IT professionals have spent time addressing issues at MHI's office and other CDP employees have assisted WHI with matters including human resources and bill payment and collection. WHI has been "paying nothing" for these resources (DiPietro Aff. in Opp. at ¶ 8).

DiPietro describes as "completely false" (DiPietro Aff. in Opp. at ¶ 9) Beyda's claim that there was an arrangement with LIRAD pursuant to which WHI would have all of these support systems for free, including access to LIRAD's PACS. While it is true that WHI was paying LIRAD a reading fee, that fee pertained only to the professional services of other LIRAD doctors who read studies for WHI. In support, DiPietro provides a spreadsheet that Beyda created (Ex. 2 to DiPietro Aff. in Opp.) which supports the conclusion that the reading fee only covers the human resources cost of the doctors, including their salary and insurance, not the other costs related to their work such as software, hardware and back office support. Moreover, any arrangement that may have existed with LIRAD did not continue after the execution of the APA which resulted in CDP owning LIRAD's assets, including the PACS. DiPietro contends that "[i]t would make no sense for [WHI] to pay one entity (LIRAD) for services and equipment provided by another (CDP) - which is of course why this alleged agreement is a complete fiction" (DiPietro Aff. in Opp. at ¶ 11).

DiPietro affirms that, shortly after the APA closed, he approached Beyda about WHI paying CDP regular fees to cover all of the resources that WHI was using to operate its business. Beyda agreed that WHI should pay fees to CDP and promised to enter into a formal arrangement. Beyda offered to pay CDP 5% of his billings but DiPietro advised Beyda that such an arrangement would constitute illegal fee splitting. No agreement was reached and Beyda never paid fees to CDP for use of these resources.

DiPietro affirms that CDP is engaged in other disputes with Beyda related to Beyda's alleged mismanagement and self-dealing and the other LIRAD doctors, except Victoria, urged Beyda to have no further involvement with LIRAD. On January 5, 2015, Beyda and CDP entered into a written settlement agreement (Ex. 3 to DiPietro Aff. in Opp.) pursuant to which Beyda would relinquish his ownership and control in exchange for \$415,000. Beyda then reneged on that promise and threatened to withhold payroll payments to CDP's employees who are also the support staff at LIRAD. CDP filed the CDP Lawsuit on January 29, 2015 and the Honorable Saliann Scarpulla of the Supreme Court, New York County granted CDP a temporary restraining order requiring Beyda to fund CDP's next payroll (Ex. 5 to DiPietro Aff. in Opp.). The following week, Justice Scarpulla granted, in part, CDP's motion for a preliminary injunction (*see* Ex. 6 to DiPietro Aff. in Opp.) which effectively directed Beyda to share management duties with another doctor pending final resolution of the CDP Lawsuit and provided that Beyda was no longer permitted to be the sole signatory on LIRAD's bank accounts. A meeting was conducted with Beyda on February 13, 2015 but no final agreement was reached. DiPietro affirms that the other LIRAD doctors have since foreclosed on Beyda's ownership position and he no longer controls LIRAD.

On February 17, 2015, DiPietro sent a letter to Beyda (Ex. 7 to DiPietro Aff. in Opp.) in which he advised Beyda that CDP would no longer provide WHI with infrastructure services for free. CDP demanded that WHI bring its balance current or, within five days, CDP would remove WHI's access to those services. The letter also stated: "Further, CDP shall make the records of WHI's patients and referring physicians available within approximately 2 business days of receipt of written request. Copies of such records shall be provided at CDP's then standard charges therefore." In addition, DiPietro affirms, he has repeatedly advised Beyda that individual

patient records would remain available to the patients at no charge. After hearing nothing from WHI in the five-day time period, CDP blocked Enterprise's access to the various software systems containing medical records for WHI's patients.

DiPietro affirms that counsel for WHI and CDP subsequently corresponded regarding the records at issue (*see* Exs. 8-18 to DiPietro Aff. in Opp.). None of the correspondence from Beyda's counsel mentions the theory, as set forth by Plaintiff in the instant motion, that there was an agreement pursuant to which software, storage and other support services would be provided for free, or included in the reading fee. DiPietro submits that "[t]his theory was clearly contrived after the fact by Dr. Beyda's litigation lawyers" (DiPietro Aff. in Opp. at ¶ 19). By letter to Beyda's counsel dated March 2, 2015 (Ex. 18 to DiPietro Aff. in Opp.), counsel for CDP, *inter alia*, offered to transfer all of the records at one time, provided that WHI made a single payment of \$119,745.29, which is well below what is actually due, and less than a vendor would charge for the support that CDP provided to WHI over the past six months. DiPietro affirms that CDP, however, will not agree to turn over the records at no charge.

C. The Parties' Positions

Plaintiff, citing *inter alia Gerson v. New York Women's Medical, P.C.*, 671 N.Y.S.2d 104 (2d Dept. 1998), contends that "New York courts consistently have held that medical imaging records taken by a doctor in the examination and treatment of a patient are that doctor's property" (P's Memo. of Law at p. 9). Plaintiff submits that it has demonstrated that WHI "indisputably" (*id.* at p. 10) owns the mammograms and other medical records housed in LIRAD's PACS. Plaintiff contends that it has demonstrated a likelihood of success on the merits by establishing that the parties agreed that WHI would have continuing access to the records without any other preconditions and demonstrating that, despite this agreement, Defendants continue to wrongfully bar WHI's access to its own records. Plaintiff contends that Defendants cannot identify any basis, contractual or otherwise, for requiring WHI to pay up front to access its patients' images. Plaintiff also contends that it will suffer irreparable harm without injunctive relief because, without that relief, Defendants will continue to interfere with WHI's ability to care for its patients, and also because WHI may lose patients as a result of its inability to access patient records. Plaintiff also contends that a balancing of the equities favors Plaintiff because the only

adverse consequence facing Defendants is the loss of monetary compensation to which they claim to be entitled whereas Plaintiff and its patients face harm without access to the records in question.

CDP opposes the motion submitting that WHI is not seeking to preserve the status quo but, rather, is seeking mandatory injunctive relief in the form of an order requiring CDP to completely restore WHI's access to certain medical records. CDP submits that the Court should not permit WHI, effectively, to "moot the dispute without a trial" (CDP Memo. of Law at p. 3).

CDP submits that the Court should deny the motion because Plaintiff has not demonstrated a likelihood of success on the merits. CDP contends that it provided valuable support services to Plaintiff in exchange for the promise of reasonable payment, and was within its rights to suspend performance under the agreement when no payments were forthcoming for six months. CDP contends that Beyda's claim that these services were included in the reading fee that WHI paid to LIRAD is "simply not credible" (CDP Memo. of Law at p. 6). CDP also contends that WHI cannot demonstrate irreparable harm because any alleged urgency was created by WHI and could have been avoided, and can still be avoided, if WHI would simply pay for the services that CDP provided. CDP also argues that WHI's delay in filing this motion, which was filed over a month after CDP warned WHI about terminating its support, undermines Plaintiff's claim of urgency. CDP also argues that the claimed urgency is offset by the fact that patients can access the records from CDP on their own for no charge, and by CDP's offer to prioritize requests relating to patients with upcoming appointments or surgeries.

RULING OF THE COURT

A. Injunctive Relief

A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving papers. *William M. Blake Agency, Inc. v. Leon*, 283 A.D.2d 423, 424 (2d Dept. 2001); *Peterson v. Corbin*, 275 A.D.2d 35, 36 (2d Dept. 2000). Injunctive relief will lie where a movant demonstrates a likelihood of success on the merits, a danger of irreparable harm unless the injunction is granted and a balance of the equities in his or her favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990); *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981); *Merscorp, Inc. v.*

Romaine, 295 A.D.2d 431 (2d Dept. 2002); *Neos v. Lacey*, 291 A.D.2d 434 (2d Dept. 2002). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1073 (2d Dept. 2008); *City of Long Beach v. Sterling American Capital, LLC*, 40 A.D.3d 902, 903 (2d Dept. 2007); *Ruiz v. Meloney*, 26 A.D.3d 485 (2d Dept. 2006).

Proof of a likelihood of success on the merits requires the movant to demonstrate a clear right to relief which is plain from the undisputed facts. *Related Properties, Inc. v. Town Bd. of Town/Village of Harrison*, 22 A.D.3d 587 (2d Dept. 2005); see *Abinanti v. Pascale*, 41 A.D.3d 395, 396 (2d Dept. 2007); *Gagnon Bus Co., Inc. v. Vallo Transp. Ltd.*, 13 A.D.3d 334, 335 (2d Dept. 2004). Thus, while the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that subvert the plaintiff's likelihood of success on the merits to such a degree that it cannot be said that the plaintiff established a clear right to relief. *Advanced Digital Sec. Solutions, Inc. v. Samsung Techwin Co., Ltd.*, 53 A.D.3d 612 (2d Dept. 2008), quoting *Milbrandt & Co. v. Griffin*, 1 A.D.3d 327, 328 (2d Dept. 2003); see also CPLR § 6312(c). The existence of a factual dispute, however, will not bar the imposition of a preliminary injunction if it is necessary to preserve the status quo and the party to be enjoined will suffer no great hardship as a result of its issuance. *Melvin v. Union College*, 195 A.D.2d 447, 448 (2d Dept. 1993).

A plaintiff has not suffered irreparable harm warranting injunctive relief where its alleged injuries are compensable by money damages. See *White Bay Enterprises v. Newsday*, 258 A.D.2d 520 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record demonstrated that alleged injuries compensable by money damages); *Schrager v. Klein*, 267 A.D.2d 296 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record failed to demonstrate likelihood of success on merits or that injuries were not compensable by money damages).

Mandatory injunctive relief should not be granted *pendente lite* without a showing of extraordinary circumstances where the status quo would be disturbed and the plaintiff would be granted the ultimate relief in the action. *Village of Westhampton Beach v. Cayea*, 38 A.D.3d 760, 762 (2d Dept. 2007).

B. Application of these Principles to the Instant Action

In consideration of the principles outlined herein, the Court concludes that some injunctive relief is appropriate to ensure that WHI's patients receive the benefit of the mammograms and other records at issue. The Court is mindful, however, that it is Defendants' position that Plaintiff has artificially created the urgency by failing to make required payments. The Court, in consideration of all of the circumstances, grants Plaintiff's motion to the extent that the Court directs that the TRO Stipulation shall remain in effect, pending further court order, and reminds all parties of their obligation to comply with the TRO Stipulation. In light of the fact that the TRO Stipulation requires Plaintiff to place sums in escrow, the Court declines to require the posting of a bond.

All matters not decided herein are hereby denied.

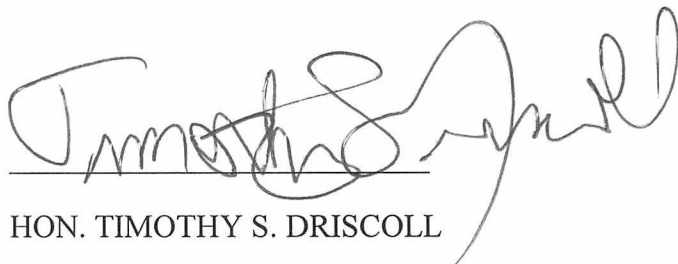
This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Compliance Conference on August 11, 2015 at 9:30 a.m.

ENTER

DATED: Mineola, NY

May 11, 2015



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

MAY 22 2015

NASSAU COUNTY
COUNTY CLERK'S OFFICE