SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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ANTHONY T. RINALDI, LLC d/b/a THE RINALDI GROUP, LLC,

Plaintiff,

- against -

ANCHORAGE CONSTRUCTION CORP., NORTH AMERICAN SPECIALTY INSURANCE COMPANY, NAS SURETY GROUP, and SWISS RE CORPORATE SOLUTIONS GLOBAL MARKETS INC.,

Defendants.

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DECISION & ORDER
Index No.: 450691/2016
Mot Seq 001, 002

HON. ANIL C. SINGH:

Motion sequence numbers 001 and 002 are herein consolidated for disposition.

In this breach of contract action, non-party Red Apple 81 Fleet Place Development, LLC ("Red Apple"), moves pursuant to CPLR 1012 and 1013, to intervene as intervenor-plaintiff in the present action (motion sequence No. 001).

Defendant North American Specialty Insurance Company, s/h/a North American Specialty Insurance Company ("NAS"), NAS Surety Group ("NAS Surety") and Swiss RE Corporate Solutions Global Markets Inc. ("Swiss Re"), collectively ("North American"), opposes and moves, pursuant to CPLR 3212, and

in the alternative, pursuant to CPLR 3211 (a) (1), (5), and (7)[1], for an order dismissing the complaint against it (motion sequence No. 002). Both Anthony T. Rinaldi, Llc D/B/A The Rinaldi Group, LLC ("Rinaldi") and Red Apple oppose the motion.

As set forth more fully below, the motion to intervene is granted and the motion for summary judgment is denied, except with respect to dismissal as against NAS Surety and Swiss Re.

Given Rinaldi does not dispute the allegations set forth in North American's Rule 19-A statement concerning NAS Surety being a trademark, and Swiss Re being unauthorized to issue bonds in New York, and did not issue the performance bond at issue herein (*see* plaintiff's counter statement of material facts dated August 8, 2015, ¶¶ 4-5), and as there was no specific objection to dismiss the complaint as to NAS Surety and Swiss Re, that branch of North American's motion is granted.

Accordingly, the action is severed and dismissed as against them.

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[1] The court notes that to the extent defendant NAS moves, in the alternative, to dismiss based on documentary evidence (CPLR 3211 [a] [1]), and on statute of limitations grounds (CPLR 3211 [a] [5]), the branches are denied as untimely as set forth under CPLR 3211 (e) (*see Hendrickson v Philbor Motors, Inc.*, 102 AD3d 251, 257 [2d Dept 2012]; *Goncalves v Soho Vil. Realty, Inc.*, 47 Misc 3d 76 [App Term, 1st Dept 2015]; *Incorporated Vil. of Mastic Beach v Mastic Beach Prop. Owners Assn., Inc.*, 38 Misc 3d 1215[A], *5, 2013 NY Slip Op 50106[U] [Sup Ct, Suffolk County 2013]). Though motions made, pursuant to CPLR 3211 (a) (7), dismissal for failure to state a claim, may be made after service of the party's answer (CPLR 3211 [e]), since North American moves pursuant to CPLR 3211 in the alternative, and NAS has charted a summary judgment course, the court will address the motion as one for summary judgment pursuant to CPLR 3212.

Background

Red Apple is the owner of a real estate development and construction project located at 81 Fleet Street, Brooklyn, New York (the "project"). Plaintiff Anthony T. Rinaldi, LLC d/b/a The Rinaldi Group was the general contractor on the project. Defendant Anchorage Construction Corp. ("Anchorage") was one of Rinaldi's subcontractors. To guarantee Anchorage's performance, Defendant NAS is a New Hampshire corporation authorized to issue surety bonds in the State of New York. North American issued performance bond No.: 2165754, to which plaintiff has made a claim against. Red Apple was named as one of the bonds' obligees.

Rinaldi entered into a Subcontract with Anchorage dated May 1, 2013, which was executed by Anchorage on May 10, 2013 and by Rinaldi on May 15, 2013 (the "Subcontract"). The bond was issued in connection with the Subcontract. Pursuant to Section 4 of the Subcontract Performance Bond, "Any lawsuit by Obligee under this Bond must be instituted before the earlier of the following: (A) the expiration of one year from the date of substantial completion of the Construction Work under the Subcontract, or (B) one year after Principal ceased performing the Construction Work under the Subcontract."

By letter dated January 7, 2015, Rinaldi terminated the Subcontract for cause, notified NAS of the termination and asserted a claim under the performance bond based upon Anchorage's alleged breach of contract (the Bond Claim). On February

16, 2015, NAS acknowledged receipt of the termination letter. Thereafter, the parties engaged in numerous discussions and correspondence regarding the claim.

On March 12, 2015, Anchorage's counsel wrote to Rinaldi's counsel disputing the termination as wrongful and improper, stating "Please be further advised that nothing herein or admitted here shall be deemed an admission or waiver of Anchorage's rights and all such rights being expressly reserved."

On April 29, 2015, Rinaldi's counsel wrote to North American, advising, that "if we do not hear from you with an appropriate resolution to this matter within a reasonable time, we will have no choice but to pursue all remedies available to our client with regard to this matter, including but not limited to reporting NAS to any and all relevant, regulatory authorities." On June 11, 2015 and June 23, 2015, NAS's counsel wrote to Rinaldi's counsel, both of which contained the following "Reservation of Rights":

> "As I am sure you can appreciate, nothing heretofore nor herein set forth should be construed as an admission on the part of our client for any liability upon the claim submitted, nor as a waiver, estoppel or modification of any or all of our client's rights, remedies and defenses, legal or equitable, whether expressly mentioned herein or not, and all of which remain expressly reserved."

On December 22, 2015, the parties and their counsel met at Rinaldi's office, the purpose of which was to discuss a resolution of the performance bond claim (Anthony T. Rinaldi aff, ¶ 4). Others in attendance included representatives of

Rinaldi, Red Apple, Anchorage and North American as well as their counsel (*id.*, ¶¶ 5-7). Prior to the meeting, Rinaldi provided NAS with extensive documentation demonstrating its claimed entitlement to recover losses under the performance bond stemming from Anchorage's alleged failures to perform (*id.*, ¶ 6). At the meeting, NAS again requested additional documents (*id.*, ¶11; Robert A. Zorn aff, ¶ 11). Zorn, of Red Apple, immediately stated that complying with the requests would take several months (Rinaldi aff, ¶ 12; Zorn aff, ¶ 27). Zorn stated that "the timetable required to comply with the demands would effectively insulate NAS from liability and therefore, if NAS insisted upon proceeding this way, filing suit was the only remaining option" (Rinaldi aff, ¶ 13). Rinaldi also stated that it would initiate suit (Rinaldi aff, ¶ 14). NAS's counsel stated that they were not interested in litigating the matter and would work diligently to proceed as quickly as possible within the time limitation (Rinaldi aff, ¶ 15).

According to Rinaldi, "[i]n response to our continued expressions of concern, Weinberg and McManus [NAS's counsel] stated that, if any time was required to complete the determination process beyond the impending deadline to commence a legal action under the terms of the performance bond, NAS would have no objection to agreeing to an extension" (Rinaldi aff, ¶ 17; *see also* Zorn aff, ¶ 14). Based on those representations, Red Apple and Rinaldi agreed that they would comply with the requests provided that NAS would work as quickly as possible and forego

enforcing the deadline of on or about January 12, 2016 to commence a legal action under the performance bond (Rinaldi aff, ¶ 18).

Again, on December 28, 2015, after meeting with all parties involved and their counsel, NAS's counsel wrote to Rinaldi's counsel with a "List of Documents Requested" (the fourth request) and included the same Reservation of Rights quoted above (Zorn aff, exhibit 14).

On February 19, 2016, Rinaldi provided the supplemental documentation requested by NAS.

By letter dated April 4, 2016, North American denied the Bond Claim in its entirety, and stated among other reasons, that the time to commence a legal action against NAS under the bond expired on January 12, 2016, and again that "[t]his letter is sent under a full reservation of all of NAS and Anchorage's rights and defenses under the Bond, the contract documents, at equity and under law, and NAS expressly reserves those rights and defenses whether mentioned herein or not" (Rinaldi exhibit C).

On April 21, 2016, Rinaldi filed the complaint against Anchorage and North American alleging breach of contract as against Anchorage (first cause of action); performance under the bonds as against North American (second cause of action); and fraud as against North American based upon the allegation that North American made false representations that the Bond Claim should be resolved by "submissions

and interactions of the parties...in lieu of commencing litigation." (Rinaldi Aff., Exh. A at ¶73, third cause of action). North American filed its answer on May 23, 2016.

Discussion

Motion to Intervene (motion seq. No.: 001)

Pursuant to CPLR 1012 (a) (3), intervention as of right is permitted when "the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment." Under CPLR 1013, intervention by permission, provides that any person may intervene where "the person's claim or defense and the main action have a common question of law or fact . . . [and] the intervention [will] not unduly delay the determination of the action or prejudice the substantial rights of any party." "Intervention is liberally allowed by courts, permitting persons to intervene in actions where they have a bona fide interest in an issue involved in that action" (*Yuppie Puppy Pet Prods., Inc. v Street Smart Realty, LLC*, 77 AD3d 197, 201 [1st Dept 2010]; *see also Global Team Vernon, LLC v Vernon Realty Holding, LLC*, 93 AD3d 819 [2d Dept 2012]). However, intervention should not be permitted where it would raise issues which are not before the court in the main action (*see East Side Car Wash v K.R.K. Capitol*, 102 AD2d 157, 160 [1st Dept 1984]). Red Apple claims that following Rinaldi's termination of the Anchorage subcontract, Rinaldi

requested that Red Apple fund certain advance payments to Anchorage's subcontractors and supplies, which included payments for correcting and completing Anchorage's work under the subcontract, and other project costs, expenses and damages. Red Apple claims that in order to complete the project and mitigate damages, it advanced the monies to Rinaldi, without prejudice to its right to seek reimbursement, which it now seeks from Rinaldi. In addition, under the general construction contract, Rinaldi was required to substantially complete the project by a date certain, time being of the essence, with a $5,000 per day liquidated damages charge for late completion. The Project was completed beyond the contractual deadline, and, as a result, Red Apple asserts that Rinaldi owes Red Apple liquidated damages as well.

Red Apple also claims that Anchorage breach the subcontract, and that as a third-party beneficiary of the subcontract, Red Apple is entitled to enforce the subcontract's provisions for Red Apple's benefit. Moreover, Red Apple asserts that it has a direct claim against Anchorage under the subcontract provisions which requires Anchorage to indemnify Red Apple from loss or expense related to the contract work. Therefore, if Rinaldi establishes that Anchorage breached the subcontract, Anchorage would be directly liable to Red Apple for damages.

Likewise, Red Apple contends that it has a claim against NAS based on plaintiff's claims that Anchorage breached the subcontract, as NAS is responsible

for Anchorage's deficient performance wrongfully denied the Bond Claim. As Red Apple is a co-obligee under the performance bond, if Rinaldi establishes NAS did indeed wrongfully deny the Bond Claim, Red Apple would be entitled to recover directly from NAS.

Rinaldi and Anchorage do not oppose Red Apple's motion to intervene. Defendant NAS, however, opposes and counters that Red Apple is not entitled to intervene "as of right" against it as NAS claims that Red Apple's claims are premature and adequately represented by Rinaldi (*Granieri v City of New York*, 8 Misc 3d 1028[A], *4, 2005 NY Slip Op 51334[U] [Sup Ct, NY County 2005] [motion deemed premature, as contract provided no right to reimbursement until the plaintiff actually recovered compensation for medical services]).

Moreover, NAS claims that Red Apple's claims, despite being a co-obligee, are barred by a one-year contractual limitations period as set forth in the bond. Anchorage ceased performing construction work under the subcontract on January 12, 2015. Plaintiff commenced the lawsuit on April 21, 2016. Red Apple filed its proposed verified complaint in intervention on June 23, 2016. As the lawsuit on the bond was not commenced within the one-year contractual limitations period, North American contends that the claim must fail as a matter of law (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967-968 [1988]; *Snyder v Allstate Ins. Co.*, 70 AD3d 670, 67-672 [2d Dept 2010]). Red Apple counters that where the carrier

willfully prolongs settlement negotiations, lulling the defendant into deferring limitation until after the expiration of the limitations period, the insurance carrier may be estopped from relying on the limitations period (citing *Triple Cities Constr. Co. v Maryland Cas. Co.*, 4 NY2d 443 [1958]). As discussed more fully below, questions of fact remain on this issue.

In addition, North American claims that permitting intervention will delay the determination in the action, as it relates to North American's pending summary judgment motion, and will substantially prejudice it.

Red Apple seeks intervention not just to assert a claim against the Surety under the Bond but also to assert claims against Anchorage and Rinaldi for breach of contract. Red Apple on reply counters that the adversity between Red Apple and Rinaldi prevents Rinaldi from adequately representing Red Apple's interests in litigation, particularly given that the proposed intervention complaint asserts claims against Rinaldi and Anchorage, in addition to NAS.

The court agrees. Red Apple seeks reimbursement of money paid in advance to complete work on the Project. Red Apple asserts that Rinaldi broke time of the essence in performing the work, and therefore, Red Apple would be entitled to liquidated damages from Rinaldi. Red Apple's interests, therefore, cannot be adequately represented by a party it is suing in the litigation.

Red Apple has demonstrated as co-obligee, its statutory right to intervene in this action pursuant to CPLR 3012 "as the action involves the disposition or distribution . . . or a claim for damages . . . and the person may be adversely affected by the judgment" (CPLR 3012).

Likewise, the court grants the motion to intervene pursuant to CPLR 1013, intervention by permission, a remedy granted at the discretion of the court when there is a common question of law or fact, when a substantial right of a party will not be prejudiced by undue delay, and when the proposed intervenor has a real and substantial interest in the outcome of the litigation (*see Saint Joseph's Hosp. Health Ctr. v Department of Health of State of New York*, 224 AD2d 1008, 1009 [4th Dept 1996]). Here, Red Apple has a real and substantial interest in the outcome of this litigation, and has been involved in negotiations prior to the commencement of legal action. There has been no showing of undue delay or substantial prejudice to NAS or the other defendants.

Accordingly, the motion to intervene is granted.

Motion for Summary Judgment by North American (motion seq. No. 002)

Breach of contract and Recovery under the bond (First and second causes of action)

In order to grant summary judgment, there must be no material or triable issues of fact presented. It is well established that "'[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a

matter of law, tendering sufficient evidence to eliminate any material issues of fact'" (*Wolff v New York City Tr. Auth.*, 21 AD3d 956, 956 [2d Dept 2005], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The party' opposing the motion must then come forward with sufficient evidence to create an issue of fact for the consideration of the jury (*Pinto v Pinto*, 308 AD2d 571, 572 [2d Dept 2003], citing *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986] and *Zuckerman v City of New York*, 49 NY2d 557 [1980]). A motion for summary judgment may be denied as premature where "facts essential to justify opposition may exist" but are in the control of the other party and discovery has not yet taken place (CPLR 3212 [f]; *Morris v Hochman*, 296 AD2d 481 (2d Dept 2002).

Defendant NAS asserts that when the terms of a contract are unambiguous, as here, their construction is solely a question of law for the court (*Caporino v Travelers Ins. Co.*, 62 NY2d 234, 239 [1984]; *Goldman Sachs Lending Partners, LLC v High River Ltd. Partnership*, 34 Misc 3d 1209[A], *5, 2011 NY Slip Op 52460[U] [Sup Ct, NY County 2011]). As the bond provides for a one-year limitations period, a provision, which is routinely enforced (*City of Yonkers v 58A JVD Indus.*, 115 AD3d 635, 637-638 [2d Dept 2014]). Here, as there is no dispute that Anchorage ceased performing construction work on January 12, 2015, and Rinaldi did not commence suit until more than 15 months later on April 21, 2016, defendant NAS claims there are no triable issues of fact, and summary judgment should be granted.

However, the court finds that summary judgment at this stage of the proceedings is premature. The record reflects that the parties engaged in repeated interactions regarding the Bond Claim beginning January 7, 2015, when Rinaldi terminated Anchorage from the Project, continuing through and including the time of NAS's April 4, 2016 determination letter. Both Rinaldi and intervener Red Apple claim that NAS misled, deceived, defrauded and lulled Rinaldi into sleeping on its rights under the Bond.

While it is well established that an insurer's request for documentation regarding an insured's claim does not waive or toll a contractual limitations period (*Gilbert Frank Corp.*, 70 NY2d at 968; *A.J. McNulty & Co. v P.J. Carlin Constr. Co.*, 247 AD2d 254, 254 [1st Dept 1998]), "'a contracting party may *orally* waive enforcement of a contract term notwithstanding a provision to the contrary'" (*Baker v Norman*, 226 AD2d 301, 303 [1st Dept 1996], quoting *Bank Leumi Trust Co. v Block 3102 Corp.*, 180 AD2d 588, 590 [1st Dept 1992] [emphasis added]; *see also Schapfel v Taylor,* 65 AD3d 620, 620-621 [2d Dept 2009]).

"However, waiver 'should not be lightly presumed' and must be based on 'a clear manifestation of intent' to relinquish a contractual protection" (*Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgt., L.P.,* 7 NY3d 96, 104 [2006], quoting *Gilbert Frank Corp.,* 70 NY2d at 968; *see also Dart Mech. Corp. v City of New York*, 121 AD3d 452, 452-453 [1st Dept 2014]). In order to establish waiver

and avert summary judgment, plaintiff must show a "clear manifestation of intent by defendant to relinquish the protection of the contractual limitations period" (*Glibert Frank Corp.*, 70 NY2d at 968). "Generally, the existence of an intent to forgo such a right is a question of fact" (*Fundamental Portfolio Advisors, Inc.*, 7 NY3d at 104).

"An estoppel . . . rests upon the word or deed of one party upon which another rightfully relies, and, so relying, changes his position to his injury" (*Triple Cities Const. Co.,* 4 NY2d at 448 [1958] [internal quotation marks and citation omitted]; *Orchard Hotel LLC v D.A.B. Group, LLC*, 43 Misc 3d 1201[A], *3, 2014 NY Slip Op 50441[U] [Sup Ct, NY County 2014]). "A party may not, even innocently, mislead an opponent and then claim the benefit of his deception" (*Triple Cities Const. Co.*, 4 NY2d at 448 [internal quotation marks and citation omitted]). Where, as here, courts have found that an estoppel may be predicated upon evidence that the defendant, by resort to settlement negotiations, intended to lull the plaintiff into inactivity to induce it to continue negotiations until after the expiration of the time within which an action could be maintained" (*id.*).

In *Dart Mechanical Corp. v City of New York*, the defendant requested additional information without notifying plaintiff that the claims were time-barred, which plaintiff's claimed as proof that the city had waived the limitations period and should be estopped from this defense (2013 WL 4470432, *5 [Sup Ct, NY County Aug. 20, 2013, index No.: 651023/2012]. The First Department found the waiver

argument without merit as "plaintiff fails even to suggest that defendants clearly manifested an intent to relinquish their right to enforce the contractual limitations period." [other citations omitted]. *Dart Mechanical Corp. v. City of New York*, 121 A.D.3d 452, 452-53 (1st Dept 2014). *See also Beekman Regent Condominium Assn. v Greater N.Y. Mut. Ins. Co.*, 45 AD3d 311, 311 [1st Dept 2007]).

In contrast, Rinaldi and Red Apple both affirm that defense counsel indicated that they agreed to waive the limitation period in which to submit a lawsuit provided Rinaldi and Red Apple comply with NAS's additional request for documents. It is not unreasonable to find given the circumstances presented herein that Rinaldi did not file its claim, based on alleged assurances from NAS and its counsel during the December 22, 2015 meeting. However, such a determination is not for the court but rather for the trier of fact to decide. As there remain unanswered questions as to whether those assurances were given and to what extent, given the absence of discovery and taking the facts in the light most favorable to plaintiff, defendant is not entitled to summary judgment at this stage of the proceedings (*Fundamental Portfolio Advisors*, 7 NY3d 96; *205 W. 19th St. Corp. v Plymouth Mgt. Group, Inc.*, 74 AD3d 564 [1st Dept 2010]; *Cadlerock L.L.C. v Z. Renner*, 72 AD3d 454 [1st Dept 2010]; *see also Carle Place Union Free School Dist. v Bat–Jac Constr., Inc.*, 28 AD3d 596, 598–599 [2d Dept 2006] [school district raised triable issue of fact as to whether interaction between the parties after Bat–Jac's default, pursu

communications or settlement negotiations between an insurer and its insured, and misled or "lulled [it] into sleeping on its rights" under the performance bond]).

As there remain questions of facts on the first and second causes of action, and as the motion was filed prediscovery, the court denies summary judgment with leave to renew upon completion of discovery (*see e.g., Venables v Sagona*, 46 AD3d 672, 673 [2d Dept 2007] ["A party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment"] [citation omitted]; CPLR 3212 [f]).

Fraud (Third Cause of Action)

"A cause of action to recover damages for fraud does not lie when the only fraud charged relates to a breach of contract" (*Carle Place Union Free School Dist. v Bat–Jac Constr., Inc.*, 28 AD3d at 598–599). *See also, First Bank of the Ams. v Motor Car Funding,* 257 AD2d 287, 291–292 [1st Dept 1999] ("A fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, i.e., when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract. By contrast, a cause of action for fraud may be maintained where a plaintiff pleads a breach of duty separate from, or in addition to, a breach of contract. For example, if a plaintiff alleges that it was induced to enter into a transaction because a defendant misrepresented material facts, the plaintiff has

stated a claim for fraud even though the same circumstances also give rise to the plaintiff's breach of contract claim").

Here, the allegations in the fraud claim recasts the allegations of the contract claim. Rinaldi alleges that defendant committed fraud by making false representations inducing it not to file suit within the limitations period. Plaintiff seeks the same precise damages in both causes of action. Rinaldi does not allege a duty separate from the breach of contract. The allegation does not sound in fraud but rather in waiver and estoppel as a defense to the contractual limitation period and is covered by the contract claim.

Therefore, plaintiff's third cause of action for fraud is dismissed without leave to replead.

Conclusion

Accordingly, it is

ORDERED that the motion by Red Apple 81 Fleet Place Development, LLC (Red Apple) to intervene is granted (motion sequence No. 001), and that Red Apple be permitted to intervene in the above-entitled action as a party plaintiff; and it is further

ORDERED that the summons and complaint in the above-entitled action be amended by adding Red Apple thereto as a party plaintiff and listing Red Apple as the last plaintiff in the caption; and it is further

ORDERED the complaint of Red Apple filed through the NYSCEF system is deemed filed with the Court and served on all parties to the action; and it is further

ORDERED that responsive pleadings to Red Apple's complaint shall be filed and served within 20 days from service of a copy of this order with notice of entry; and it is further

ORDERED that the attorney for the intervenor shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and upon the Clerk of the Trial Support Office (Room 158), who are directed to amend their records to reflect such change in the caption herein; and it is further

ORDERED that the motion by defendants North American Specialty Insurance Company, NAS Surety Group and Swiss Re Corporate Solutions Global Markets, Inc., for summary judgment dismissal against or in the alternative for dismissal of the complaint is denied with leave to renew upon completion of discovery as to the first and second causes of action; and it is further

ORDERED that that the motion by defendants North American Specialty Insurance Company, NAS Surety Group and Swiss Re Corporate Solutions Global Markets, Inc., for summary judgment dismissal against or in the alternative for dismissal of the complaint is granted as to the third causes of action; and it is further

ORDERED that the complaint is severed and dismissed as against defendants NAS Surety Group and Swiss Re Corporate Solutions Global Market Inc., as it is a trademark and not a corporate entity (motion sequence No. 002); and it is further

ORDERED that the action is severed and continues against the remaining defendants; and it is further

ORDERED that counsel are directed to appear for a preliminary/status conference, on April 6, 2017, at 2.30 p.m.

Date: March 2, 2017
New York, New York

Anil C. Singh