Homola v Jewelers Mut. Ins. Co.
2017 NY Slip Op 31536(U)
July 7, 2017
Supreme Court, Nassau County
Docket Number: 608489/2016
Judge: Vito M. DeStefano

SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 11
NASSAU COUNTY

IVAN HOMOLA, KRYSTYNA HOMOLA, and EJ JEWELERS, INC.,

Plaintiffs,

-against-

JEWELERS MUTUAL INSURANCE COMPANY, PROTECTION ONE ALARM MONITORING, INC., PROTECTION ONE ALARM MONITORING, INC. d/b/a PROTECTION 1 SECURITY SOLUTIONS, SPA 79 E L.P., SPA 79 E CORP., STALLER ASSOCIATES, INC., CARY F. STALLER, individually, LTGO INC., LTGO INC. d/b/a THE NUTTY IRISHMAN a/k/a THE NUTTY IRISHMAN OF FARMINGDALE, MICHAEL J. McELWEE, individually, JOHN COURT, individually, TNI MAIN STREET, INC. TNI MAIN STREET INC. d/b/a THE NUTTY IRISHMAN a/k/a THE NUTTY IRISHMAN OF FARMINGDALE, JOSEPH FORTUNA, individually, JAMES LAMENDOLA, individually,

Defendants.

Decision and Order

MOTION SEQUENCE: 02, 03
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The following papers and the attachments and exhibits thereto have been read on this motion:

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Defendants Protection One Alarm Monitoring, Inc. and Protection One Alarm Monitoring Inc., d/b/a Protection 1 Security Solutions (collectively "Protection One") move for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the complaint (Motion Sequence No. 2).

Defendants LTGO Inc., LTGO Inc., d/b/a The Nutty Irishman a/k/a The Nutty Irishman of Farmingdale, Michael J. McElwee and John Court (collectively the "LTGO Defendants") move for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the complaint (Motion Sequence No. 3).

Background

Plaintiffs Ivan and Krystyna Homola were the owners of EJ Jewelers, Inc. ("EJ"). On April 10, 2009, the Plaintiffs and Protection One entered into two agreements whereby Protection One would install a burglar alarm monitoring system and closed circuit television. On May 7, 2014, the parties entered into a third agreement for burglar monitoring services, the terms of which superceded all prior agreements (the "2014 Agreement"). The 2014 Agreement provided, in relevant part, as follows:

> (A)WE ARE NOT AN INSURER * * * OF YOUR PREMISES OR ITS CONTENTS; (B) IT IS YOUR RESPONSIBILITY TO OBTAIN ADEQUATE INSURANCE COVERING YOU, YOUR PREMISES AND ITS CONTENTS * * *; (D) THE EQUIPMENT AND SERVICES MAY NOT ALWAYS OPERATE AS INTENDED FOR VARIOUS REASONS, INCLUDING OUR NEGLIGENCE OR OTHER FAULT. WE CANNOT PREDICT THE POTENTIAL AMOUNT, EXTENT OR SEVERITY OF ANY DAMAGES * * * THAT MAY BE INCURRED * * * DUE TO THE FAILURE OF THE EQUIPMENT OR SERVICES TO WORK AS INTENDED. AS SUCH: (I)YOU AGREE THAT THE LIMITS ON OUR LIABILITY AND THE WAIVERS AND INDEMNITIES SET FORTH IN THIS AGREEMENT ARE A FAIR ALLOCATION OF RISKS AND LIABILITIES BETWEEN YOU, US AND ANY AFFECTED THIRD PARTIES;(II) YOU WILL LOOK EXCLUSIVELY TO YOUR INSURER FOR FINANCIAL PROTECTION FROM SUCH RISKS AND LIABILITIES, AND (III) * * * YOU WAIVE ALL RIGHTS AND REMEDIES AGAINST US, INCLUDING ALL RIGHTS OF SUBROGATION, THAT YOU, ANY INSURER, OR ANY OTHER THIRD PARTY MAY HAVE DUE TO ANY LOSSES YOU OR OTHERS MAY INCUR" (Ex. "C" to Affidavit in Support at ¶ 9 (emphasis in original).

In addition to the above risk allocation provision, the 2014 Agreement further provided for Protection One's limitation of liability as follows:

> Limitation of Liability for Alarm Failure Events. NEITHER WE NOR ANY PERSON OR ENTITY AFFILIATED WITH US SHALL BE LIABLE FOR ANY LOSSES ARISING DIRECTLY OR INDIRECTLY FROM ANY ALARM FAILURE EVENT.[1] WE ARE NOT LIABLE UNDER ANY CIRCUMSTANCES FOR THE ADEQUACY OF THE EQUIPMENT DESIGN OR DESIGN CRITERIA ESTABLISHED BY YOU, YOUR DESIGN PROFESSIONAL, OR LOCAL CODE REQUIREMENTS, IF, NOTWITHSTANDING THE PROVISIONS OF THIS PARAGRAPH 10(B), WE OR ANY PERSON OR ENTITY AFFILIATED WITH US ARE DETERMINED TO BE RESPONSIBLE FOR ANY LOSSES ARISING FROM ANY ALARM FAILURE EVENT, YOUR CLAIMS AGAINST US AND/OR ANY PERSON OR ENTITY AFFILIATED WITH US SHALL BE LIMITED TO $2,000.00. THIS AMOUNT IS YOUR SOLE AND EXCLUSIVE

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[1] "Alarm failure events" is defined as the "condition, nonfunctioning, malfunction, faulty design, faulty installation, or failure in any respect of the equipment or services to operate or perform as intended" (Protection One's Memorandum of Law in Support at p 4, fn 3 [Motion Seq. No. 2]).

> REMEDY FOR ANY ALARM FAILURE EVENT, EVEN IF CAUSED BY PROTECTION ONE'S NEGLIGENCE OR THAT OF OUR AFFILIATES OR OUR RESPECTIVE EMPLOYEES OR AGENTS, BREACH OF CONTRACT, BREACH OF WARRANTY, STRICT LIABILITY, OR OTHER FAULT (Ex. "C" to Affidavit in Support at ¶ 10[b]).

The Plaintiffs similarly agreed to limit their recovery to $1,000 with respect to the closed circuit television service.

At approximately 6:00 a.m. on March 20, 2016, the Plaintiffs received a phone call from Protection One informing them that the jewelry store was experiencing a "communication error" whereupon Krystyna directed Protection One to call the police. Approximately one hour later, Krystyna "called Protection One to follow up and asked if everything was ok and if the store was protected." Krystyna was told that "everything was fine, the police came to the store, and the store was fully secured by the alarm." At 1:00 a.m. on March 21, 2016, the Plaintiffs received a second call from Protection One at which time they were informed "that the store was again experiencing a 'communication error' in a few zones" but that there was "no burglary, just a communication problem." On Monday morning, March 21, 2016, Krystyna again contacted Protection One and was told that "everything [was] fine" (Amended Complaint at ¶¶ 66-71; Affidavit in Opposition at ¶ 8 [Motion Seq. No. 2]).

On Tuesday morning, March 22, 2016, the Plaintiffs went to the store and discovered that it had been burglarized. Apparently, perpetrators had accessed the alarm system's power supply, which was housed in the basement of a business adjacent to the jewelry store. After disrupting the power, the perpetrators allegedly waited for the "back-up" batteries in the store's alarm system to dissipate and thereafter cut a hole through the roof and descended into the store stealing in excess of $500,000 in jewelry. That same day, the Plaintiffs also learned "that the cameras supplied by Defendant Protection One . . . had not filmed at all and the camera's back-up storage provided by Defendant Protection One was completely empty" (Amended Complaint at ¶¶ 31-33, 38, 72).

The Plaintiffs thereafter filed a claim with their insurance carrier, Defendant Jewelers Mutual Insurance Company ("insurance carrier"), which had issued a policy covering losses up to $80,000. However, as a consequence of the stolen merchandise having been "out of safe or vault while closed to business," the insurance carrier paid only $5,000 on the claim (Amended Complaint at ¶ 39).

On November 2, 2016, the Plaintiffs commenced the instant action. Insofar as asserted against Protection One, the causes of action are for breach of contract, detrimental reliance, violations of General Business Law § 349, gross negligence, negligence and *res ipsa loquitur*. Causes of action sounding in gross negligence, negligence and *res ipsa loquitur* are also asserted against the LTGO Defendants.

The Protection One and LTGO Defendants separately move to dismiss the amended complaint insofar as asserted against them.

For the reasons that follow, the motions are granted and the amended complaint is dismissed insofar as asserted against the Protection One and LTGO Defendants.

Protection One's Motion (Motion Seq. No. 2)

The allegations in the amended complaint sufficiently allege conduct on the part of Protection One that, if true, may constitute gross negligence (*see Abacus Fed. Sav. Bank v ADT Sec. Servs., Inc.*, 18 NY3d 675, 683 [2012]; *Lenoci v Secure Alarm Installations, LLC*, 97 AD3d 800 [2d Dept 2012]; *Gentile v Garden City Alarm Co, Inc.*, 147 AD2d 124 [2d Dept 1989]; *Williamsburg Food Specialties, Inc. v Kerman Protections Systems, Inc.*, 204 AD2d 718 [2d Dept 1994] [triable issue of fact as to whether defendant's delay in responding to the alarm signal was so great as to constitute gross negligence]; *Hanover Insurance Co. v D&W Central Station Alarm Co., Inc.*, 164 AD2d 112 [1st Dept 1990] [triable issues of fact as to whether defendant was grossly negligent when, *inter alia*, it failed to notify the police upon receipt of three alarm

signals in the span of four hours]).[2]

Notwithstanding any alleged gross negligence, the risk allocation/waiver of subrogation provision set forth in paragraph nine of the 2014 Agreement, which requires the Plaintiffs to obtain insurance for all losses occurring at the jewelry store and whereby Plaintiffs waived any remedies against Protection One, functions as a complete defense to the breach of contract, gross negligence, negligence and *res ipsa loquitor* claims asserted in the amended complaint against Protection One[3] (*Abacus Fed. Sav. Bank v ADT Sec. Servs., Inc.*, 18 NY3d at 682-683, *supra*; *Great American Ins. Co. of New York v Simplexgrinnell LP*, 60 AD3d 456 [1st Dept 2009] [holding that waiver of subrogation provision bars not only claims of negligence but also claims of gross negligence]; *see also Tower Risk Mgt. v Ni Chump Hu*, 84 AD3d 616 [1st Dept 2011]; *Footlocker, Inc. v KK&J, LLC*, 69 AD3d 481, 482 [1st Dept 2010] [noting that a "waiver of subrogation may bar a claim for gross negligence]).

In this regard, the Second Department's analysis in *Travelers Property Cas. Co. of*

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[2] Specifically, unlike situations where there was a delay or inadequate response to an alarm signal (*see Hartford Ins. Co. v Holmes Protection Group*, 250 AD2d 526, 528 [1st Dept 1998]; *Consumers Distrib. Co. v Baker Protective Servs.*, 202 AD2d 327, 327 [1st Dept 1994]; *Master Craft Jewelry Co. v Holmes Protection of N.Y.*, 277 AD2d 56, 56 [1st Dept 2000]) or a failure to inspect cameras on the premises (*see David Gutter Furs v Jewelers Protection Servs.*, 79 NY2d 1027, 1028 [1992]), both of which do not constitute gross negligence, the Plaintiffs herein allege that: on two consecutive days, Protection One failed to alert the police and appropriate authorities after having been notified that the alarm system at the jewelry store was experiencing a "communication error"; in response to Krystyna's call to follow-up, Protection One responded that the jewelry store was fully alarmed and secured; and again, in a second conversation, Protection One informed Krystyna that "there was no burglary, just a communication problem" (Amended Complaint at ¶¶ 66-71).

[3] A waiver of subrogation allocates the risk of liability to the insurer (*State Farm Ins. Co. v J.P. Spano Const., Inc.*, 55 AD3d 824 [2d Dept 2008]; *Gap, Inc. v Red Apple Companies, Inc.*, 282 AD2d 119 [1st Dept 2001]). "Waiver of subrogation provisions reflect the parties' allocation of the risk of liability whereby liability is shifted to the insurance carriers of the parties to the agreement" (*Travelers Indemn. Co. v AA Kitchen Cabinet & Stone Supply, Inc.*, 106 AD3d 812, 813 [2d Dept 2013] [internal quotation marks and citation omitted]. A waiver clause in an agreement does not, however, preclude "one party from suing the other to recover for a loss to the extent that such loss is not required by the parties' agreement to be covered - and, in fact, is not covered - by insurance" (*Reade v Reva Holding Corp.*, 30 AD3d 229, 233 [1st Dept 2006]).

America v Global Protection Systems, Inc. (71 AD3d 1124 [2d Dept 2010]) is particularly instructive:

> Contrary to the plaintiff's contention, the waiver of subrogation clause expressly released and discharged the alarm monitoring company from and against all hazards covered by the school's insurance, and barred the plaintiff from seeking, from the monitoring company, the return of any proceeds paid to the school under the subject policy. In addition, contrary to the plaintiff's contention, "[a] distinction must be drawn between contractual provisions which seek to exempt a party from liability to persons . . . whose property has been damaged and contractual provisions . . . which in effect simply require one of the parties to the contract to provide insurance for all of the parties." Thus, while an exculpatory clause in an agreement will not protect a defendant from liability for gross negligence, a waiver of subrogation clause which releases and discharges an alarm company from and against all hazards covered by insurance clearly precludes an insurer, as subrogee, from seeking return of any proceeds covered by insurance notwithstanding any claim of gross negligence.
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> Accordingly, the waiver of subrogation clause at bar conclusively established a defense to the plaintiff insurer's claims against the alarm monitoring company (*Id.* [internal citations omitted]; *see also Board of Ed., Union Free School District No. 3, Town of Brookhaven v Valden Assocs., Inc.*, 46 NY2d 653 [1979]):

Given the foregoing, the second (breach of contract), third (breach of contract), sixth (gross negligence), seventh (negligence) and twelfth (*res ipsa loquitor*) causes of action are dismissed.[4]

In the fourth cause of action, Plaintiffs "alternatively assert a claim . . . for detrimental reliance" predicated upon Protection One's employee's statement to the Plaintiffs that all video

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[4] The court further notes the amended complaint does not allege conduct that would give rise to Protection One's separate liability in tort given the absence of any duty independent of that arising from its contractual obligations (*see Abacus Fed. Sav. Bank v ADT Sec. Servs., Inc.*, 18 NY3d at 684-85, *supra*; *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]; *cf Sommer v Federal Signal Corp*, 79 NY2d 540, 551-553 [1992] [the plaintiff's breach of contract claim against the defendant fire alarm company may also sound in tort where the defendant's alleged failure to act with due care affected a significant public interest independent of its contractual obligations]).

footage would be recorded and stored for seven days (Amended Complaint at ¶¶ 94-95). Under New York law, detrimental reliance is an element of equitable and promissory estoppel; there is no independent cause of action for detrimental reliance (*Paxi, LLC v Shiseido Americas Corp.*, 636 FSupp2d 275 [SD NY 2009]; *Chupack v Gomez*, 2017 WL 1881088 [Sup Ct New York County 2017]; *Adams v Washington Group, LLC*, 11 Misc3d 1083[A] [Sup Ct Kings County 2006]). The fourth cause of action is, therefore, dismissed.

In the fifth cause of action, the Plaintiffs allege that Protection One violated General Business Law § 349 when it used technical language in the Agreement and failed to direct the Plaintiffs, whose primary language is not English, to particular provisions in the Agreement which limited their liability. Plaintiffs further allege that they would not have hired Protection One "had they known and understood what they were purportedly agreeing to" (Amended Complaint at ¶¶ 104-106).

General Business Law § 349 prohibits deceptive and misleading business practices. In order to state a claim under General Business Law § 349, a plaintiff must allege that the defendant has engaged "in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof" (*Small v Lorillard Tobacco Co.*, 94 NY2d 43, 55 [1999]; *Wilner v Allstate Ins. Co.*, 71 AD3d 155 [2d Dept 2010]).

The court notes that similar agreements have repeatedly been found enforceable (*see Abacus Fed. Sav. Bank v ADT Sec. Servs., Inc.,* 18 NY3d at 683-684, *supra*; *Hartford Insurance Company v Holmes Protection Group*, 250 AD2d 526 [1st Dept 1998]), thus undermining Plaintiffs' allegations that such agreements are "illegal and/or unenforceable as a matter of law" (Amended Complaint ¶ 104).

Moreover, a party who executes a contract is presumed to know its contents and to assent to them. "An inability to understand the English language, without more, is insufficient to avoid this general rule" (*Holcomb v TWR Express, Inc.*, 11 AD3d 513, 514 [2d Dept 2004] quoting

Moon Choung v Allstate Ins. Co., 283 AD2d 468, 468 [2d Dept 2001]; *Guerra v Astoria Generating Co., L.P.*, 8 AD3d 617 [2d Dept 2004] [a party that signs a document is conclusively bound by its terms absent a valid excuse for having failed to read it]; *Shklovskiy v Khan*, 273 AD2d 371 [2d Dept 2000] ["A party who signs a document without any valid excuse for having failed to read it is conclusively bound by its terms. Persons who are illiterate in the English language are not automatically excused from complying with the terms of a contract which they sign simply because they could not read it. Such persons must make a reasonable effort to have the contract read to them"]).

Accordingly, the fifth cause of action is dismissed.

LTGO Defendants Motion (Motion Seq. No. 3)

The LTGO Defendants move for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the tenth, eleventh, and twelfth causes of action sounding in gross negligence, negligence and *res ipsa loquitor*, respectively.

As alleged in the amended complaint, at the time of the burglary, the adjacent property was occupied by LTGO Inc., which operated a pub called The Nutty Irishman, the co-owners of which were Defendants, Michael J. McElwee and John Court (Amended Complaint at ¶¶ 16-20).[5]

As the basis for their negligence and gross negligence claims, Plaintiffs allege that the LTGO Defendants "owed a duty, as reasonable persons, professionals with knowledge and skills, and lessees of the adjacent property, to Plaintiffs to protect the power source housed within the pub and to perform their duties and obligations in a manner that would protect Plaintiffs against

[5] According to counsel's affirmation in support of the LTGO Defendants' motion to dismiss, McElwee was the president of LTGO Inc. and Court was an employee of LTGO Inc. (Affirmation in Support at ¶ 4 [Motion Seq. No. 3]).

unreasonable risk of injury, including the risk that E & J Jewelry would be left open and vulnerable to theft" (Amended Complaint at ¶¶ 134, 141).[6]

In support of their motion, the LTGO Defendants submit, *inter alia*, a Bill of Sale and Assignment and Assumption of Lease, both of which are dated March 15, 2016 and indicate that LTGO Inc. sold the pub and its assets and assigned its lease to Defendant TNI Main Street Inc. six days prior to the burglary. Given these submissions, the LTGO Defendants argue that LTGO Inc. was no longer a tenant at the premises on the date of the burglary; thus no duty can be imposed on it and the causes of action asserted against LTGO Inc. and the LTGO Defendants should be dismissed.[7]

Whether a duty exists is a question of law for the court (*Di Ponzio v Riordan*, 89 NY2d 578 [1997]; *Northen Assur. Co., Ltd v Nick*, 203 AD2d 342 [2d Dept 1994]).[8]

"'A property owner, or one in possession or control of property, has a duty to take reasonable measures to control the foreseeable conduct of third parties on the property to prevent

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[6] Plaintiffs also allege, "upon information and belief," that individual Defendants McElwee and Court "suspiciously sold the bar within days of the burglary . . . giving rise to 'conduct that smacks of intentional wrongdoing'" (Amended Complaint at ¶ 138).

[7] In reply, the LTGO Defendants argue for the first time, apparently correctly that individual Defendants McElwee and Court "were never lessees of the premises" and that "there are virtually no direct allegations against the individual defendants . . . other than veiled references to the possibility of wrongdoing" (Reply Affirmation at ¶ 9 [Motion Seq. No. 3]).

[8] According to the Court of Appeals in *Di Ponzio v Riordan* (89 NY2d 578 [1997] [internal quotations omitted]):

> The existence and scope of an alleged tortfeasor's duty is, in the first instance, a legal question for determination by the court. In analyzing questions regarding the scope of an individual actor's duty, the courts look to whether the relationship of the parties is such as to give rise to a duty of care, whether the plaintiff was within the zone of foreseeable harm and whether the accident was within the reasonably foreseeable risks. The nature of the inquiry depends, of course, on the particular facts and circumstances in which the duty question arises. The analysis is also driven by considerations of public policy.

them from intentionally harming or creating an unreasonable risk of harm to others'" (*Tiranno v Warthog, Inc.*, 119 AD3d 772, 772-773 [2d Dept 2014] quoting *Jaume v Ry Mgt. Co.*, 2 AD3d 590, 591 [2d Dept 2003]). "However, '[t]his duty [only] arises when there is an ability and opportunity to control such conduct, and an awareness of the need to do so'" (*id.* at 773 quoting *J Jaume v Ry Mgt. Co.*, 2 AD3d at 591, *supra*). Here, the Bill of Sale and Assignment and Assumption of Lease, which the court considers to be documents within the ambit of CPLR 3211(a)(1) (*see Ganje v Yusuf*, 133 AD3d 954 [3d Dept 2015]; *Quatrochi v Citibank, N.A.*, 210 AD2d 53 [1st Dept 1994]; *Leeirv Corporation v S & E Realty Co.*, 178 AD2d 403 [2d Dept 1991]) patently refute the Plaintiffs' allegations and establishes that LTGO was not in possession or control of the pub adjacent to the jewelry store and thus owed no duty to the Plaintiffs (*id.*; *Fontanetta v John Doe 1*, 73 AD3d 78, 84-85 [2d Dept 2010]).[9]

Moreover, given that the LTGO Defendants, at the time of the incident, were not in control of the power source that allegedly provided the means through which the burglary occurred, the *res ipsa loquitor*[10] claim also fails inasmuch as the instrumentality purportedly causing injury - the power source located in the basement of the pub - was not within their exclusive control (*McCarthy v Northern Westchester Hosp.*, 139 AD3d 77 [2d Dept 2016] [*res ipsa loquitur* claim not applicable where plaintiff failed to establish that the injury was caused by an agency or instrumentality within the exclusive control of the defendants]).

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[9] The LTGO Defendants further contend that, in any event, and even assuming tenancy at the premises, they owed no duty to an adjacent business and assumed no duty to maintain the power supply located in the basement.

[10] Under appropriate circumstances, the evidentiary doctrine of *res ipsa loquitur* may be invoked to allow the factfinder to infer negligence from the mere happening of an event. To invoke the doctrine, a plaintiff must demonstrate: 1) causing event be of a kind that ordinarily does not occur in the absence of negligence; 2) the injury was caused by an agent or instrumentality within the *exclusive control* of defendant; and 3) no act or negligence on the plaintiff's part contributed to the happening of the event (*States v Lourdes Hospital*, 100 NY2d 208 [2003] [emphasis added]).

Conclusion

Based upon the foregoing, it is hereby

Ordered that the motion by Defendants Protection One Alarm Monitoring, Inc. and Protection One Alarm Monitoring Inc., d/b/a Protection 1 Security Solutions, which seeks an order dismissing the Plaintiffs' amended complaint, insofar as asserted against them, is granted (Motion Seq. No. 2); and it is further

Ordered that the motion by Defendants, LTGO Inc., LTGO Inc., d/b/a The Nutty Irishman a/k/a The Nutty Irishman of Farmingdale, Michael J. McElwee and John Court, which seeks an order dismissing the Plaintiffs' amended complaint, insofar asserted against them, is granted (Motion Seq. No. 3).

This constitutes the decision and order of the court.

Dated: July 7, 2017

ENTERED

JUL 11 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE

Vito DeSt

Hon. Vito M. DeStefano, J.S.C.