American Stevedoring, Inc. v Red Hook Container Term., LLC
2017 NY Slip Op 32602(U)
December 13, 2017
Supreme Court, New York County
Docket Number: 651472/2012
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49
--X
AMERICAN STEVEDORING, INC,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 651472/2012
Motion Seq. Nos. 020-022

RED HOOK CONTAINER TERMINAL, LLC, and
PORT AUTHORITY OF NEW YORK AND
NEW JERSEY,

Defendants.
--X

O. PETER SHERWOOD, J.:

I. BACKGROUND[1]

These three motions concern the two remaining claims of plaintiff American Stevedoring Inc. (ASI) arising from the failure of defendant Red Hook Container Terminal, LLC (Red Hook) to return heavy stevedoring equipment (the Equipment) following expiration of an equipment lease agreement between ASI and Red Hook dated September 26, 2011 (the Lease), the failure of Red Hook to obtain proper insurance coverage for the Equipment and the failure to properly maintain and safeguard the Equipment against damage in Hurricane Sandy. In motion sequence 020, ASI moves for summary judgment on its first and tenth causes of action, for breach of contract (failure to return the Equipment, safeguard it and maintain proper insurance) and breach of a so-ordered stipulation dated, May 2, 2012, (failing to secure and safeguard the Equipment), respectively. In motion sequence numbers 021 and 022, Red Hook and defendant, the Port Authority of New York and New Jersey (the Port Authority), respectively seek summary judgment dismissing the case.

[1] By Orders dated July 12, 2017 and December 13, 2017, the property damage and insurance coverage causes of action were severed, assigned a new index number (452887/2017), and the parties directed to file new pleadings (*see* NYSCEF Doc. No. 1105).

II. FACTS

ASI leased the Brooklyn Marine Terminal (an "intermodal freight transport maritime facility" which includes a container terminal in Brooklyn, New York and a satellite facility in Port Newark, New Jersey) (the Terminal) from the Port Authority where ASI provided stevedoring services from 1993 to about September 2011. The relationship devolved into litigation and resulted in a settlement agreement that required ASI to vacate the facility. At the time of the settlement, the Port Authority and Red Hook entered into an "Operating Agreement" pursuant to which Red Hook would manage the Terminal and provide the stevedoring services needed to keep marine commerce flowing (*see* NYSCEF Doc. No. 1031). One aspect of the settlement agreement called for ASI to lease some of its stevedoring equipment to Red Hook pursuant to a separate agreement (the Lease). ASI claims that, while the Port Authority is not a signatory to the Lease, the Port Authority is a principal of Red Hook, controls it, and is the real party in interest. ASI argues that the Port Authority negotiated the Lease, supervised Red Hook's performance, gets notices and must consent to all significant matters. ASI also claims that it was understood the Port Authority was going to make Red Hook's payments pursuant to the Lease. The Port Authority claims Red Hook acts independently.

The Lease was set to expire on March 31, 2012. As relevant here, the Lease provides that "[a]t the conclusion of the Lease Term, [Red Hook] shall: return the Equipment to [ASI] to a location specified by [ASI], not more than 20 miles from the Red Hook Container Terminal." The Lease also required Red Hook to obtain a $10 million insurance policy to cover loss or damage to the Equipment, with Red Hook and ASI both named as insureds. The Lease also provided that Red Hook would shoulder the risk of loss to the Equipment for any reason. The parties dispute whether Red Hook obtained the required insurance coverage.

As the Lease neared its termination, ASI told Red Hook that it needed to inspect the Equipment and the parties needed to address the issue of removal of the Equipment. On March 27, 2012, ASI proposed moving the Equipment to a location at the intersection of McCarter Highway & Murray Street in Newark, New Jersey (the First Location). Red Hook objected, claiming it was more than 20 miles by road from the Brooklyn Marine Terminal. Subsequently, Red Hook added that the proposed location was unsuitable and would expose the Equipment to risk of theft and damage. Red Hook demanded that ASI designate another site or start paying storage charges. ASI disputes that

Red Hook has the authority to demand storage charges. ASI later withdrew its designation of this site and, on April 13, designated a second location for the delivery of the Equipment at 319 Tonnelle Ave, Jersey City, New Jersey (the Second Location). Red Hook objected to this location as well. ASI then filed suit in this court on May 1, 2012.

At a May 2, 2012, hearing, ASI and Red Hook entered into a so-ordered stipulation (the Stipulation) (ASI Exhibit L, NYSCEF Doc. No. 982), in which the parties agreed that Red Hook will (1) refrain from using the Equipment; (2) maintain and safeguard the Equipment using commercially reasonable means; and (3) continue to maintain insurance on the Equipment. After the hearing, ASI and Red Hook inspected the Second Location, but Red Hook disputes whether it agreed the Location was acceptable. Nonetheless, Red Hook made arrangements for delivery to the Second Location. On May 14, 2012, Michael Stamatis, of Red Hook, spoke with Mark Meltser, owner of the Second Location. According to Red Hook, Meltser instructed Stomatis not to deliver the Equipment to his property. On May 21, Red Hook's counsel, Eugene D'Ablemont (D'Ablemont) asked Meltser's counsel to tell the court that ASI does not have permission to use the property for receipt of the Equipment. The parties dispute whether Meltser had a prior agreement with ASI, which he then abandoned, and whether Meltser was pressured by Red Hook to walk away.

On May 23, 2012, the court directed Red Hook and ASI to designate a new location and proceed with the delivery within seven days (NYSCEF Doc. No. 345, at 13-15). On June 6, 2012, ASI designated a new site located at 318 Port Street, Newark, New Jersey (the Third Location). The site is owned by the Port Authority, but this fact was not disclosed to the court at that time. ASI claims International Motor Freight (IMF) was then the lawful occupant of the site. Although not asserted until after Hurricane Sandy hit New York[2], Red Hook now claims IMF merely had a right of entry license, a view defendant the Port Authority shares. By letter, dated October 10, 2012 (NYSCEF Doc. No. 989), Lou Grato, a principal of IMF, confirmed his consent to delivery of the Equipment to the Third Location. Red Hook disputes whether Grato had the authority to give consent. In any event, on June 13, 2012, counsel for ASI advised the court that it was still attempting to "paper the

[2] *See, e.g.* NYSCEF Doc. No. 991, D'Ablemont letter, dated October 31, 2013, in response to Hiller letter, dated October 12, 2012 (NYSCEF Doc. No. 990) providing a copy of Grato letter consenting to delivery of Equipment at Third Location.

transaction" by obtaining "a licensing agreement of some sort" that would allow ASI to use the 318 Port Street property (NYSCEF Doc. No. 39 at 3). As of the time of the parties' next court appearance on June 25, 2012, ASI had not received a license.

Given the lack of clarity for handling removal of the Equipment, the court specified a protocol that required (a) ASI to provide Red Hook with a writing from ASI's counsel or the owner of the property, confirming that ASI had the consent of the owner or other authorized person to deliver the Equipment on the property; (b) ASI to inspect the Equipment and provide Red Hook with an inspection report; (c) Red Hook to make the repairs disclosed therein; and (d) after completion of those steps, delivery of the Equipment to the designated location (*see* NYSCEF Doc. No. 345, transcript at 39-48).

ASI contends IMF had a right to authorize delivery of the Equipment to the Third Location and that the Port Authority interfered with the delivery by trying to get IMF to deny its consent. The Port Authority claims it did not have any substantive involvement in the return process after the end of the Lease term.

ASI states it repeatedly demanded delivery of the Equipment to the Third Location, but Red Hook did not comply. Red Hook disputes this claim and states that no written permission meeting the requirements of the protocol was ever received. It asserts that the letter of authorization, dated October 10, 2012, was a "sham," as IMF did not own the property or lease it before April 16, 2014 (*see* Red Hook Memo, p.7, NYSCEF Doc. No. 1017, at 7). Red Hook claims IMF had only a limited right of entry to make repairs and improvements while IMF and the Port Authority contemplated a potential lease of the property. ASI argues that IMF already had a lease, and the license was to give that lease effect. Red Hook presents an email it received from a Port Authority official dated December 11, 2012, which states that IMF did not have authority to permit ASI or any third party to use the property.

In an affidavit dated July 27, 2017, in connection with ASI's motion, Grato states that IMF gave its consent to delivery of the Equipment at the Third Location (NYSCEF Doc. No. 970). He states that as part of IMF's transaction with ASI, IMF would have enjoyed full use and control of the Equipment as part of IMF's business activities (*id*, ¶ 16). Grato also states that the Port Authority

never advised him that IMF was not authorized to use the Third Location for general commercial activity such as delivery of the Equipment for its control, use and/or rental and if it had, IMF would have had the ability to accept the Equipment at its 120 Taylor Street facility (*id*, ¶ 13).

The Equipment had not been moved from Red Hook's facility when Hurricane Sandy made landfall in New York on October 29, 2012. The parties dispute how much the Equipment was damaged from the storm, with ASI claiming the Equipment was a total loss, and Red Hook claiming the estimated cost to repair the damage was $200,000, leaving the Equipment valued at $1.2 million (Red Hook 19-a Stmt. NYSCEF Doc. No. 1016, ¶ 40). ASI valued the Equipment at $10 million. The parties continued to discuss delivery of the Equipment after Hurricane Sandy but no agreement was reached.

The parties also dispute whether Red Hook again offered to deliver the Equipment at a December 12, 2012, conference before the court. The parties dispute whether the Lease allowed ASI to refuse to accept delivery of the Equipment while it was in damaged condition (*see* ASI 19-a Counter Stmt. NYSCEF Doc. No. 1046 ¶ ¶ 38-39). Further, while independent adjusters found the value of the Equipment to have decreased from $1.6 M to $1.4 M, ASI points to the Lease, which states that if Equipment is "damaged beyond repair," Red Hook is required to pay ASI "an amount equal to the insured value of such item" (*id.*, ¶ 39). The parties also disagree as to whether Red Hook used the Equipment after the end of the Lease, and whether any measures were taken to protect the Equipment (*id.*, ¶ ¶ 48-49). Finally, Red Hook and ASI dispute whether ASI owes Red Hook storage fees, which Red Hook now calculates as totaling $2,830,500.

III. ARGUMENTS

A. Motion 20 - ASI's Motion for Summary Judgment

1. ASI's Arguments in Support

In its motion for summary judgment, ASI asserts breach of the Lease, specifically failure to return the Equipment, failure to obtain the required insurance, and failure to maintain and safeguard the Equipment. It also asserts breach of the May 2, 2012 stipulation.

On June 6, 2012, ASI's counsel Michael Hiller (Hiller) provided Red Hook's counsel, Eugene D'Ablemont (D'Ablemont), with the address of the Third Location (*see* NYSCEF Doc. No.

985). Given the experience of the refusal of the owner of the Second Location to accept delivery, at the June 25, 2012 court appearance, Red Hook raised the issue of wanting written consent for delivery to any designated site.

Consistent with the courts' protocol, ASI ordered an inspection of the Equipment. The report of the inspection conducted by CargoTec was delivered to Red Hook on September 17, 2012 (NYSCEF Doc. No. 1012). By letter dated October 3, 2012, D'Ablemont requested written authorization for delivery to the Third Location (NYSCEF Doc. No. 987). The Grato letter of authorization was provided on October 12, 2012 (NYSCEF Doc. No. 990). Red Hook failed to raise any issues about the use of the Third Location at that time. Hurricane Sandy hit on October 29, 2012. Counsel for Red Hook stated, in an October 31, 2012, letter, and again at a hearing on December 12, 2012, that it was about to load the trucks to deliver the Equipment to the Third Location (20 Memo at 2). Had there been any issue with the Third Location, IMF had another nearby site where it was ready and willing to accept delivery of the Equipment, 120 Tyler Street, Newark (*id.* at 14, citing Grato Aff., ¶ 13). In his October 31 and December 11, 2012, letters (NYSCEF Docs. No. 991 and 992), D'Ablemont conveyed Red Hook's intention to make certain repairs and to then "prepare the equipment for delivery and complete delivery" (*id.* 991) and that Red Hook "remains ready, willing and able to delivery to 318 Port Street those items of leased equipment" (*id.* 992). Red Hook only raised the defense that delivery to the Third Location would be illegal in its 2014 cross motion for summary judgment.

ASI states there is no issue of fact as to whether Red Hook risked a trespass claim by the Port Authority, had it attempted delivery of the Equipment to the Third Location (20 Memo at 17). The Port Authority is Red Hook's principal, and chose Red Hook as the new port operator. IMF, in peaceful possession of the Third Location, gave permission for delivery of the Equipment. There is no evidence that Red Hook even suspected, let alone knew that its presence at the Third Location would be unauthorized, as required by the standard for criminal trespass (*id.* at 18, citing Penal Law § 140.05). Here, Red Hook had permission from an entity with authority to occupy the location.

In the Lease, Red Hook agreed to, "at its own cost and expense, [ ] keep and maintain the Equipment in the same or, at the Lessee's option, better, condition as or than . . . reflected in the Equipment Inspection Report . . . except for normal wear and tear, and shall furnish all parts,

mechanisms, devices and servicing required therefor . . . [Red Hook] hereby assumes all risk of loss, damage or destruction for whatever reason to the Equipment" (Lease, ¶4.1). Further, "[f]rom the date of the delivery of the Equipment to [Red Hook], [Red Hook] hereby assumes and shall bear the entire risk of loss for theft, damage, destruction or other injury to the Equipment from any and every cause whatsoever" (*id.* ¶ 4.2).

ASI argues there is no issue of material fact that Red Hook failed to keep and maintain the Equipment as required by the Lease and the Stipulation (ASI Exhibit L, NYSCEF Doc. No. 982, ¶ 2). It is undisputed that damage to the Equipment occurred from Hurricane Sandy while the Equipment was in Red Hook's possession. The Equipment was not properly secured and maintained during the hurricane. As the post-Sandy Cargotec equipment survey dated December 6, 2012, showed, most, if not all, of the Equipment would have to be replaced (*see* ASI Exhibit AA, NYSCEF Doc. No. 997). Accordingly, Red Hook should be held responsible (ASI Memo at 21, NYSCEF Doc. No. 966).

ASI also asserts that it is undisputed that Red Hook failed to obtain the required insurance. Section 4.3 of the Lease required Red Hook to "obtain and maintain . . . (as primary insurance for Lessor and Lessee), commercial property damage insurance and insurance against loss or damage to the Equipment . . . in the amount of $10,000,000 . . . . Each insurance policy will name Lessee as an insured and Lessor as an additional insured and loss payee thereof." However, Red Hook did not obtain a dedicated policy for the Equipment, but only a policy to cover the interests and equipment of a variety of parties. There were many entities competing for the same coverage limits (*id.*, at 22, citing Certificate of Insurance, attached as ASI Exhibit W). The failure to obtain the proper insurance, as required by the Lease, is a breach of the Lease, regardless of whether there is a $5 million flood sub-limit, as claimed by the insurer Seneca (*id.*, at 23).

Finally, ASI argues that, as far as Red Hook counterclaims for storage fees in the amount of $1,500/day, it is not entitled to any relief, as Red Hook is in breach of the Lease. In any event, there is no provision in the Lease entitling Red Hook to storage fees (*id*, at 24). Nor is there a statutory basis for the counterclaim (*id.* at 25).

2. Red Hook's Arguments in Opposition[3]

Red Hook claims ASI proposed poor transfer locations that risked exposing the Equipment, which was already old and damaged, to being stolen or damaged further. Accordingly, ASI could not invoke the damages clause of the Lease to force Red Hook to pay for repairs or new Equipment (Red Hook Opp at 2, NYSCEF Doc. No. 1070).

Red Hook argues that, as ASI withdrew the First and Second Locations, any claim based on failure to deliver to either is immaterial. Delivery at the Third Location was impossible, as IMF only had a Right of Entry License and was not the occupant of that property, despite ASI's representations to the court that IMF was the proprietor there. In 2012-13, IMF and the Port Authority were negotiating a lease. IMF had a right to enter the Third Location during this period to inspect and prepare the site. It did not have a lease until April 16, 2014 (*id.* at 7, citing IMF Right of Entry License, ASI Exhibit CC, NYSCEF Doc. No. 999). Thus, IMF was only authorized to use a portion of the Third Location, and had authority to make repairs and improvements to a building on site (Right of Entry License at NYSCEF Doc. No. 999). The rights granted in the Right of Entry could not be assigned, or transferred without leave of the Port Authority (*id.* at ¶ 12[d]).

Red Hook argues IMF and ASI misled the court about IMF's status with regard to the Third Location (Red Hook Opp at 8, NYSCEF Doc. No. 1070). As far as Grato states that IMF's lease allows IMF to use the property in this way, there was no lease in place at that time. The Right of Entry License limits IMF's use of the property (*id.* at 9-10). As far as ASI claims the 120 Tyler Street site could have been used as an alternative, it was never designated as a delivery location, and should not be considered now (*id.*). Red Hook contends that the other fact affidavits, provided by Keith Catucci and Matt Yates of ASI, mischaracterize the Right of Entry and the Lease.

Red Hook contends it had no obligation to attempt delivery to the Third Location, since delivery there was unauthorized and the Appellate Division stated that there was no obligation to deliver to an unauthorized site and risk being a trespasser (*id.* at 11). The court did not require such

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[3] Because Red Hook makes the same arguments in its motion for summary judgment (motion sequence no. 021) and in its opposition to ASI's motion, both are discussed here.

an attempt during the June 25, 2012, conference (*id.* at 12, citing Order dated Feb. 23, 2017, attached as ASI Exhibit JJ, NYSCEF Doc. No. 1006 ["the court did not order delivery of [all of the Equipment] without any assurance that plaintiff had a legal right to use the designated delivery site"]). IMF's letter dated October 10, 2012, was not a proper authorization for ASI to use the Third Location for the transfer (Red Hook Opp, NYSCEF Doc. No. 1070, at 4-6).

Red Hook also argues that ASI's claim of being deprived of the Equipment is without merit, as the Equipment was old and hard-used, and there was no market in the area for this type of equipment. Red Hook made several efforts to return the Equipment or to get ASI to pick it up (*id.*, at 13). Red Hook repeatedly offered to return the Equipment to the Third Location as soon as it received the required authorization (*id.* at 14). Upon receipt of the October 10 and October 12, 2012, letters from ASI and IMF, Red Hook prepared to deliver the Equipment (*id.* at 14-15). Red Hook contends that the only reason delivery was not made on November 7, 2012, is because ASI refused to accept Equipment it said had been totally destroyed by Hurricane Sandy and could not be moved, contrary to the opinion of independent adjustors (*id.* at 15-16). Red Hook continued to offer to deliver the Equipment if ASI could provide an authorization from the Port Authority (*id.* at 16). ASI was not cooperative with any of Red Hook's proposed solutions.

While there may have been no risk of criminal trespass, based on the lack of knowledge that Red Hook's presence at the Third Location was unauthorized, Red Hook was entitled to avoid liability for civil trespass. A civil trespass claim "does not require an intent to produce the damaging consequences, merely intent to perform the act that produces the unlawful invasion" (*id.*, at 17, quoting *Berenger v 261 W. LLC*, 93 AD3d 175, 181 [1st Dept 2012]). Red Hook further denies that it is an agent of the Port Authority (*id.*, at 18).

Red Hook contends that ASI breached the Lease, and that the storage fees, while not specifically mentioned in the Lease, are a measure of Red Hook's damages (*id.*). Red Hook has stored the Equipment at its facility for more than five years, was unable to lease that portion of the property, and incurred storage expenses (*id.* at 18-19). Further, Red Hook informed ASI it would start charging storage fees on April 9, 2012 (*id.* at 20, citing Brayman letter to Catucci dated April 9, 2012, NYSCEF Doc. No. 368). ASI admitted that it could not afford to store the Equipment while

repairs were made, and is attempting to shift that cost onto Red Hook (Red Hook Opp at 20, citing Transcript of December 12, 2012, conference, NYSCEF Doc. No. 359, at 8:3-19).

Red Hook also argues it properly safeguarded the Equipment (Red Hook Opp NYSCEF Doc. No. 1070, at 20). At the time of Hurricane Sandy, the Lease was no longer in effect, nor was the unconditional promise to safeguard the Equipment in section 4.1 of the Lease (*id.* at 21). Accordingly, Red Hook had no obligations regarding the Equipment. As of May 2, 2012, the Stipulation defined Red Hook's obligations, requiring Red Hook to use commercially reasonable means and methods. No evidence has been presented suggesting that Red Hook did not do so (*id.*). To the contrary, Red Hook has presented deposition testimony that it placed the Equipment as far from the water's edge as possible, laid out sandbags, and secured it in the same way Red Hook secured its other equipment (*id.* at 22).

As to the issue of insurance, section 4.3 of the Lease does not require a dedicated insurance policy covering ASI's equipment only (*id.* at 23). The Equipment was insured, along with other equipment, by an insurance policy for $10 million. There is no evidence ASI's status as a loss payee as opposed to as an additional insured had an adverse effect on ASI, and any claim ASI had to a particular type of insurance under the Lease ended when the Lease ended on March 31, 2012 (*id.* at 24). Any obligation to insure the Equipment pursuant to the court-ordered Stipulation ended when the order to show cause was resolved on June 25, 2012 (*id.*). Red Hook argues that, at the outside its obligation to provide insurance ended on October 12, 2012, when ASI provided what Red Hook calls a "bogus letter of authorization from a bogus proprietor" (*id.* at 25). All of these dates are before Hurricane Sandy made landfall in New York, and there is no allegation that the Equipment was damaged before then, making it impossible to sustain a claim for breach of contract.

3. The Port Authority's Arguments in Opposition

ASI did not move for summary judgment against the Port Authority, but maintains that as the principal of Red Hook, the Port Authority is liable for damage to the Equipment (*see* ASI 19-a Stmt., NYSCEF Doc. No. 1027, ¶ 27). The Port Authority filed papers in opposition (PA Opp, NYSCEF Doc. No. 1080) to emphasize that Red Hook was not its agent, that IMF was not an occupant of the Third Location with the right to use that property for the transfer of the Equipment

(PA Opp at 2), and that ASI never satisfied the return Protocol specified by the court on June 25, 2012.

The Port Authority argues that in the Fall of 2012, IMF had access to the Third Location only to make repairs and certain improvements to one of the buildings on the site (*id.*). The Right of Entry License did not give IMF authority to permit ASI to use it for the transfer (*id.* at 5). The Port Authority cites the merger clause in the Right of Entry License which states that the entire agreement between IMF and the Port Authority is in that agreement, and prohibits oral modification. Accordingly, any verbal permission Grato claims to have received is unenforceable (*id.*, citing Right of Entry License, section 12[c]). Any claim to the contrary in the Grato affidavit is a self-serving sham, and cannot create a genuine issue of disputed fact, as it ignores and contradicts the terms of the License (*id.* at 6). ASI's claim that Grato told Lombardi (of the Port Authority) on or about February 8, 2013, that IMF was interested in storing the Equipment at the Third Location is belied by Lombardi's email the same day, which notes that IMF did not yet have a lease for the Third Location, and would not for some time (*id.*, citing Lombardi e-mail dated February 8, 2013, NYSCEF Doc. No. 1005). Finally, Wayne Rakoski, the Port Authority's Assistant Manager for Port Leasing, provided an affidavit in which he confirms that IMF had no right to use the Third Location for the transfer, and that he told Red Hook as much on December 11, 2012 (*see* Rakoski Aff, attached as Exhibit A to Geraghty Aff, NYSCEF Doc. No. 1082, paragraphs 8-9). Accordingly, IMF had no legal right to give anyone permission to deliver the Equipment to the Third Site in October of 2012 (PA Opp NYSCEF Doc. No. 1080, at 7). ASI has failed to demonstrate it had a legal right to use the Third Location. To the contrary, Red Hook has shown ASI did not have that right.

4. ASI's Reply

In its reply, ASI maintains that the motion should be granted because it had permission of the Third Location's tenant, IMF, and Red Hook could not have been exposed to liability for trespass, since the owner of the property was Red Hook's principal, the Port Authority, and the Port Authority never raised an objection (ASI Reply Memo NYSCEF Doc. No. 1096, at 1). ASI relies on the Grato affidavit as evidence of IMF's right to use the Third Property for the transfer, and that neither Red Hook nor the Port Authority objected to that plan (*id.* at 2, citing Grato aff.). The Right of Entry License would not have prohibited this plan, and IMF was already using and storing its heavy

equipment at the Third Location (*id.* at 2-3). The License gave IMF the right to use the whole eight acres of property, with the Port Authority reserving a right of re-entry, suggesting IMF had control of the whole site (*id.* at 4, citing License at ¶ 1[b]). IMF also indemnified the Port Authority for all risks of damage to property arising from IMF's use of the site (*id.* at 5, citing License, ¶ 7[a]). Regardless of whether IMF had a license or a lease, IMF had the right to use the property for the transfer, and there could have been no liability for either criminal or civil trespass (*see id.* at 6, quoting *St. Matthew Church of Christ Disciples of Christ, Inc. v Creech*, 196 Misc 2d 843, 858 [Sup Ct, Kings County, 2003] ["[l]iability for civil trespass requires the fact-finder to consider whether the person, without justification or permission, either intentionally entered upon another's property, or, if entry was permitted, that the person refused to leave after permission to remain ha[d] been withdrawn"][internal quotations omitted]). As IMF invited Red Hook, there could be no trespass (ASI Reply Memo at 6, NYSCEF Doc. No. 1080). Nor is it possible to believe the Port Authority would sue Red Hook for trespass, due to their relationship, and the Port Authority would have been indemnified by IMF, at any rate. While the agreement between IMF and the Port Authority was called a license, the substance of the agreement was more aptly described as a lease, as it gave IMF rights greater than those of a license holder (*id.*, at 7-8). Further, it is undisputed that the Port Authority never voiced to IMF any objection to the Third Location for the transfer, communicating its objection to Red Hook only after Hurricane Sandy (*id.* at 8). Lombardi, the Port Authority Deputy Director of Port Commerce, sent D'Ablemont an e-mail on February 8, 2013, indicating that the Port Authority was "attempting to confirm that IMF was no longer interested" (NYSCEF Doc. No. 1105), indicating the Port Authority had not objected to that use of the Third Location (ASI Reply Memo at 8, NYSCEF Doc. No. 1080). The e-mail contradicts the e-mail from Rakoski, a subordinate of Lombardi, sent to Red Hook in December 2012 (*id.*).

As far as Red Hook argues that there is no market for the Equipment, leaving it without value, Red Hook had just leased the Equipment for 6 months, paying ASI over a million dollars (*id.* at 10). Accordingly, the value of the Equipment (as Red Hook was required to return it in at least as good condition as it was received) was at least the $175,000/month Red Hook was paying (*id.*).

ASI also argues Red Hook's lack of action to return the Equipment is a breach of the covenant of good faith and fair dealing (*id.*). Nor did the Stipulation change the terms of the Lease or the

parties' obligations under it, including Red Hook's obligations to return the Equipment and to safeguard it (*id.* at 10-11). Further, according to Red Hook's witness, Anthony Gambale, no repairs were made to the Equipment and no measures were taken to safeguard the Equipment, even though Red Hook was expecting Hurricane Sandy (*see id.* at 11, *see also* Deposition of Anthony Gambale, NYSCEF Doc. No. 1024).

As to Red Hook's claim for storage fees, any damage suffered by Red Hook arising from having to store the Equipment is the result of its own malfeasance. Red Hook should not be rewarded for it (*id.* at 12).

B. Motion 22 - Port Authority Motion for Summary Judgment

1. Port Authority's Arguments in Support

In its statement of undisputed material facts on this motion, the Port Authority states that it leased the Brooklyn Marine Terminal property to Red Hook, and that Red Hook was solely responsible for the activities at that site, that the Port Authority was not a party to the Lease, that Red Hook was solely responsible under the Lease, that the Port Authority had no control over Red Hook's activities, that the Port Authority was not a party to the so-ordered Stipulation, that Red Hook acted without the Port Authority's direction, and that Red Hook was not authorized to act on behalf of or bind the Port Authority (*see* NYSCEF Doc. No. 1032). In support of its contentions, the Port Authority cites provisions of its Operating Agreement and transcripts of proceedings before the court. ASI denies these statements, except for acknowledging that the Port Authority was not a party to the Stipulation. Otherwise, ASI contends that Red Hook was a subsidiary of the Port Authority, that the Port Authority had authority over it, supervised it, was responsible for making payments under the Lease, and had substantial control over Red Hook (*see* NYSCEF Doc. No. 1068).

The Port Authority argues, first, that ASI's first and tenth causes of action should be dismissed because Red Hook did not breach the Lease, for the reasons discussed above. Further, the Operating Agreement between the Port Authority and Red Hook expressly disclaims making Red Hook a representative of the Port Authority (*see* PA Memo at 4, citing Operating Agreement, section 30[g], NYSCEF Doc. No. 1029).

The Port Authority contends that the first claim, for breach of contract, is not actually aimed at the Port Authority, as the Port Authority is not named in that claim, and, if it was, ASI appears to have abandoned it, as ASI did not move for summary judgment against the Port Authority. Also, ASI makes no mention of any claims against the Port Authority in its December 14, 2016, Note of Issue (PA Memo NYSCEF Doc. No. 1029, at 6-7). Nor were any claims against the Port Authority mentioned in ASI's motion to vacate the Note of Issue. Additionally, the Port Authority argues that, once ASI declared all of the Equipment destroyed and refused delivery of the Equipment, it can no longer claim breach of the Lease (*id.* at 12).

Regarding the Tenth Cause of Action, Red Hook has not breached the court ordered Stipulation. Also, the Trutneff affidavit and the Port Authority/Red Hook Operating Agreement shows Red Hook was an independent contractor, had authority to act independently in handling the Terminal and was not authorized to bind the Port Authority (*id* at 16).

2. ASI's Arguments in Opposition

ASI responds that the Port Authority was involved, as the Port Authority required ASI to lease the Equipment to Red Hook as part of the settlement agreement (ASI Opp at 1, NYSCEF Doc. No. 1069). An "Execution Version" of the Lease was attached to the settlement agreement (NYSCEF Doc. No. 456). The Lease was signed in accordance with the terms of the settlement agreement (ASI Opp. NYSCEF Doc. No. 1069, at 1-2). Dennis Lombardi, Deputy Director of Port Commerce, testified that Red Hook operated the Terminal on the Port Authority's behalf (*id.*, quoting Lombardi Aff at 280). Further, the Port Authority was entitled to legal notices pursuant to the Lease, and the Port Authority had negotiated and drafted the terms of the Lease (*id.*, citing Brayman Transcript at 41). Additionally, as Red Hook was a new entity with no assets, the Port Authority was to be responsible for payments under the Lease (*id.*, citing Brayman Transcript at 201). The Operating Agreement also indicates a close relationship between the Port Authority and Red Hook, including that Red Hook was not charged an operating fee, the Port Authority paid Red Hook's permitted expenses, and the Port Authority had a right of approval over Red Hook's high level hiring and salaries (*id.* citing Operating Agreement, section 3[d]). Representatives of the Port Authority were also involved in evaluating and rejecting the different return sites.

ASI denies it dropped its breach of the Lease claims against the Port Authority (*id.* at 16), and argues that, as Red Hook was acting as the Port Authority's agent, the Port Authority can be held responsible for Red Hook's breaches, and the Port Authority's motion should be denied.

IV. DISCUSSION

A. Summary Judgment Standard

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez supra*; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver*, 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v Stop & Shop*, 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, v Ceppos*, 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "[a] shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *see Zuckerman v City of New York, supra; Ehrlich v American Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255, 259 [1970]).

Lastly, "[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of

credibility" (*Ruiz v Griffin*, 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]).

B. First Cause of Action- Breach of the Lease against Red Hook

To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

It is undisputed that Red Hook leased the Equipment from ASI, that ASI provided the Equipment in "as is" condition and Red Hook accepted it as "satisfactory" (Lease § 1.1, NYSCEF Doc. No. 972), that the Equipment was not returned to ASI "in the same or. . . better condition. . . except for normal wear and tear" at the end of the Lease (*id*, § 4.1) due to a dispute over terms for returning the Equipment and its condition, and that the Equipment remains in the custody of Red Hook in damaged condition.

The Lease provides that at the end of the lease term, Red Hook shall "return the Equipment to Lessor to a location specified by Lessor, not more than 20 miles from the Red Hook Container Terminal" (*id. at* § 6.1). Red Hook did not return the Equipment and unless excused from this obligation, ASI's motion must be granted and Red Hook's denied.

Initially, Red Hook resisted transporting the Equipment to any designated location in Newark, New Jersey because such location was more than 20 miles away by road (NYSCEF Doc. No. 306, Transcript of May 4, 2014 at 48). In a Decision and Order dated January 13, 2015, the court held that under § 6.1 of the Lease, Red Hook is required to assume the cost of delivery to any proper

location within a 20-mile radius of the Brooklyn Marine Terminal. Driving distance between the two locations is not relevant (*see* NYSCEF Doc. No. 424, at 7).

As to the locations designated for delivery of the Equipment, Red Hook objected that the First Location was improper. When ASI proposed the Second Location, Red Hook objected because ASI had not shown it had permission of the property owner to enter onto the designated land and deliver the Equipment (*see id.*, at 3). ASI withdrew this designation after the property owner stated he would not accept delivery. ASI protest that Red Hook improperly procured the objection.

As discussed above, on June 25, 2012, the court fixed a protocol for inspection and repair of the Equipment prior to delivery as called for in the Lease (*see* NYSCEF Doc. No. 996, Transcript at 39-49). The protocol also set a pre-condition to delivery requiring ASI to provide evidence of permission to enter onto the land and deliver the Equipment to be provided by the owner of the land or other authorized person (*see id.*). The court deemed a written representation of such permission by counsel for ASI sufficient to satisfy the precondition.

Over the next four months, the parties inspected the Equipment, determined what repairs were needed and prepared for transfer of the Equipment to the Third Location, consistent with the terms of the protocol. On September 17, 2012, Red Hook received an inspection report prepared by Cargotec concerning the condition of the Equipment and the needed repairs (*see* NYSCEF Doc. No. 1012). On October 3, 2012, counsel for Red Hook wrote to Hiller on behalf of ASI asserting that the report confirmed no repairs were needed (NYSCEF Doc. No. 347). On October 9, 2012, ASI gave Red Hook a list of items requiring repair and noting "[w]e are advised by Cargotech (sic) that only the first two items ...represent anything significant in terms of repair resources" (NYSCEF Doc. No. 988). By letter dated October 12, 2012, Hiller provided the Grato consent letter to D'Ablemont. Hiller also requested that the repairs be made and the Equipment transported to the Third Location (*see* NYSCEF Doc. No. 990). As the Port Authority states in its Memorandum of Law in Opposition to ASI's motion for summary judgment, at that point, Red Hook had "no reason to believe it could not rely on the [Grato] letter" (NYSCEF Doc. No. 1080, at 4). Red Hook was required to make the necessary repairs and deliver the Equipment to 318 Port Street, absent objection as to the authenticity of the letter of authorization. Red Hook states it made preparations for delivery, but it had made no repairs as of October 29, 2012, when Hurricane Sandy made landfall in New York, or at anytime since.

By letter dated October 31, 2012, counsel for Red Hook responded to the ASI October 12, 2012, letter, agreeing to make certain repairs and refusing others. Red Hook's counsel also stated that if the parties reach agreement as to the repairs, Red Hook would then deliver the Equipment (*see* NYSCEF Doc. No. 991). ASI refused to accept the Equipment, asserting it was a "total loss" as a result of damage caused by Hurricane Sandy (*see* Marotta Aff'm NYSCEF Doc. No. 967, ¶ 89). Red Hook acknowledges there was damage to the electrical components of the Equipment, which required repairs valued at approximately $200,000 (*see* Red Hook 19-a Stmt, NYSCEF Doc. No. 1071, ¶ 66).

The sufficiency of the evidence of authority to permit delivery of the Equipment to 318 Port Street in October 2012 became disputed after the hurricane. There are now issues of fact as to the scope of IMF's authority at the time to accept delivery for the use then intended by IMF. Under the terms of the Right of Entry License as it existed in the summer/fall of 2012, IMF had only "permission to enter upon, use and occupy the Site for the purpose of performing the Work, and for no other purpose whatsoever" (License at p. 1, NYSCEF Doc. No. 999). The "Work" is narrowly defined as

> Conduct[ing] inspections on the Property, including without limitation, the right to enter an [identified] Building . . . and associated open area . . . for the purpose of performing necessary repairs and improvements to [the] Building

(*id.*). The License also states unequivocally that

> [t]he License shall not assign, sell or transfer the License or any of the rights granted hereunder without the prior written approval of the Port Authority . . . and any such assignment, transfer or sale without such prior written approval shall be void as to the Port Authority (*id* § 12 [d]).

Nothing in this language prohibits IMF from maintaining moving equipment for its use in connection with the authorized work it was conducting at the site. The Grato letter of October 10, 2012, confirms "that the ASI port equipment . . . will be received as part of our joint project . . . " (emphasis added) (NYSCEF Doc. No. 989). Whether IMF was authorized to conduct the "joint project" from 318 Port Street is a question of fact that cannot be resolved on this motion.

Even if IMF lacked authority to receive the Equipment at 318 Port Street, it was willing to do so at 120 Tyler Street, the base of its operations during the relevant time period. However, by

the time the issue of which of the two locations was more appropriate for delivery ripened, the Equipment had been damaged by Hurricane Sandy and ASI's position that the Equipment was a "total loss" many have rendered the issue academic. In an affidavit dated July 27, 2017, Grato states that in September and October 2012, IMF was already conducting various operations at 318 Port Street with Port Authority's knowledge and that "[i]f at any time the [Port Authority] advised [him] that IMF was not authorized to use IMF PORT STREET for general commercial activity . . . IMF would have had, at its discretion, the ability to use other property for the purpose of the commercial transaction with ASI . . . , including the property at 120 Tyler Street" (Grato Aff'd NYSCEF Doc. No. 970, ¶ 13). Red Hook's assertion that the 120 Tyler Street alternative should not be considered as that site was not designated must be rejected, as the need to designate an alternative IMF site did not arise until 2013 after Red Hook's counsel questioned whether 318 Port Street constituted an authorized location (*see* NYSCEF Doc. No. 1005). Whether, in October 2012, ASI needed to find an alternative location controlled by IMF for delivery of the Equipment and whether delivery to that site was feasible, are questions of fact to be addressed at a trial.

C. Tenth Cause of Action- Breach of the Stipulation

In the Tenth Cause of Action, ASI alleges Red Hook (and thus its alleged principal, the Port Authority)[4] breached its obligations under the Stipulation by failing to "secure and safeguard the Equipment, using commercially reasonable means and methods pending resolution of the Order to Show Cause"[5] (Stipulation, NYSCEF Doc. No. 12 ¶ 2). The Stipulation had the effect of eliminating any doubt as to Red Hook's continuing obligation to "secure and safeguard the Equipment" while in its custody, even past the expiration date of the Lease. Red Hook claims to have moved the Equipment away from the waterline and protected it with sandbags prior to the hurricane. ASI disputes this, and contends Red Hook did nothing to protect the Equipment (citing the Marotta attorney affirmation which cites the Gambale deposition testimony, but without citing a particular page). Even if what Red Hook did to protect the Equipment was undisputed, neither party has established whether or not the actions taken were "commercially reasonable means and methods". Accordingly, summary judgment is denied on this claim, for breach of the Stipulation

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[4] The Port Authority is not a party to the Stipulation (*see* NYSCEF Doc. No. 12).
[5] The injunction barring use of the Equipment while in possession of Red Hook was in effect on October 29, 2012, and thereafter.

D. Claims against the Port Authority

As the breach of contract claims against Red Hook survive, the Port Authority's liability must also be considered. The Port Authority is not named in the First Cause of Action of the Second Amended Complaint. However, in the Tenth Cause of Action, ASI alleges that "[a]s Red Hook's principle [sic], the Port Authority is responsible for the acts and omissions of Red Hook, acting within the scope of its agency and/or authority" (Second Amended Complaint, NYSCEF Doc. No. 1060 ¶ 229). ASI contends that while the Port Authority did not sign the Lease, it is the real party in interest, and so should be held liable.

It is "the general rule that a principal is liable on contracts entered into on its behalf by an authorized agent" (*Key Intern. Mfg., Inc. v Morse/Diesel, Inc.*, 142 AD2d 448, 453–54 [2d Dept 1988] [*internal quotations and additions omitted*]) Further it is also a "general rule that" a subsidiary may become an agent for the corporation which controls it" (*id.*[*internal quotation omitted*]). ASI asserts that the Port Authority negotiated the Lease, was responsible for paying the monthly fee, and generally controlled Red Hook. ASI points to the fact that the Lease is called for in the Settlement Agreement and the form of the Lease is attached thereto. However, the Port Authority is not a party to the Lease and ASI has offered no admissible evidence sufficient to raise an issue of fact suggesting that Red Hook entered into the Lease on behalf of the Port Authority. To the contrary, the record reveals that the Port Authority has no agency relationship with Red Hook, as the affidavit of Jon Trutneff, General Manager of the New York Marine Terminals in the Port Department, attests. Trutneff states that Red Hook is a private company, not affiliated with the Port Authority, let alone its agent (Trutneff Aff. NYSCEF Doc. No. 1030, ¶ 8). Trutneff notes, among other things, that the Operating Agreement between Red Hook and the Port Authority disclaims any agency relationship (*id.* ¶ 11)[6], and that Red Hook was responsible for its own obligations under the Stipulation (*id.* ¶14). There being no evidence raising a triable issue of fact to support the claim that Red Hook is an agent

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[6] The Operating Agreement between the Port Authority and Red Hook that authorizes Red Hook to operate the Brooklyn Marine Terminal and § 30 (g) thereof states expressly that

> (g) This Agreement does not render the Operator the agent or representative of the Port Authority for any purpose whatsoever. Neither a partnership nor any joint venture is hereby created, notwithstanding the fact that the parties are sharing the Excess Revenues from the operations of the Terminal Space hereunder.

of the Port Authority and thereby rendering the Port Authority liable for Red Hook's alleged breach of contract, the claim against the Port Authority shall be dismissed.

E. Storage Fees Claim

As to Red Hook's claim for fees for storage of the Equipment, no repairs were made to the Equipment as of October 29, 2012, the date Hurricane Sandy made landfall in New York City. It is undisputed that the hurricane caused damage to the Equipment but the parties dispute the extent thereof. The Lease does not specify how long after termination Red Hook was obligated to retain possession of the Equipment but the Lease, as well as the protocol, provide for Red Hook to inspect and repair of the Equipment prior to delivery. That work was not done. Nevertheless, Red Hook seeks to recover storage fees. This portion of the motion is denied, as there has been no determination as to whether Red Hook's failure to make repairs and deliver the Equipment should be excused.

V. CONCLUSIONS

The motion for summary judgment of ASI against Red Hook (motion sequence number 020) is granted in part and otherwise denied. The motion for summary judgment of Red Hook against ASI (motion sequence number 021) on its breach of contract claims is denied insofar as it concerns the refusal of Red Hook to transport the Equipment at its expense to a location designated by ASI. The motion of the Port Authority for summary judgment (motion sequence number 22) is granted.

The Lease requires Red Hook "at its own cost and expense . . . [to] keep and maintain the Equipment in the same or, at Lessee's option, better, condition as or than . . . reflected in the Equipment Inspection Report." The Lease also provides that Red Hook "hereby assumes and shall bear the entire risk of loss for theft, damage, destruction or other injury to the Equipment from any and every cause whatsoever" (NYSCEF Doc. No. 972, ¶ 4.1). Whether Red Hook may be excused from these obligations due to an alleged failure of ASI to designate a proper site for delivery of the Equipment, must await trial. The motion of ASI shall be granted to the extent Red Hook failed to maintain or repair the Equipment as required by the Lease. A trial will be held to determine the extent of damage to the Equipment as reflected in inspection reports prepared at or after expiration of the Lease, the extent of damage to the Equipment resulting from the hurricane and the reasonableness of the measures taken to protect it.

In addition, a trial will be required to determine 1) whether or not Red Hook breached §§ 4.1 through 4.3 and/or 6.1 of the Lease or whether it is excused from one or more of the obligations assumed thereunder; 2) whether or not the parties complied with the terms of the protocol; 3) whether Red Hook is entitled to recover storage fees; and 4) entitlement to attorney fees and costs.

As to that branch of ASI's motion relating to its claim for breach of contract arising from the Lease provision requiring Red Hook to "obtain and maintain . . . (as primary insurance for Lessor and Lessee), commercial property damage insurance and insurance against loss or damage to the Equipment . . . in the amount of $10,000,000 to cover loss to the Equipment" *(id.)*, the motion is denied as academic. Under § 4.1 of the Lease, Red Hook is directly responsible for all of the losses also covered by the insurance it was obligated to procure and any failure to procure it neither adds to nor detracts from that obligation. In any event, whether Red Hook had adequate insurance is a subject of separate litigation.

It is hereby

ORDERED that the motion for summary judgment of plaintiff American Stevedoring Inc., against defendant Red Hook Container Terminal, LLC (motion sequence number 020), is granted to the extent damages shall be awarded for the cost of repairs to the Equipment arising from injury thereto save normal wear and tear and is otherwise denied; and it is further

ORDERED that the motion for summary judgment of the defendant Red Hook Container Terminal LLC against plaintiff American Stevedoring, Inc. (motion sequence number 021) for storage fees is denied; and it is further

ORDERED that the motion for summary judgment of defendant Port Authority of New York and New Jersey against plaintiff American Stevedoring, Inc. (motion sequence number 022) is granted and the complaint is dismissed in its entirety as to said defendant, with costs and disbursements to said defendant against said plaintiff as taxed by the Clerk of the Court, upon submission of a proper bill of costs and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that ASI and Red Hook shall appear at a pretrial conference on January 23, 2018 at Noon, Part 49, Room 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

DATED: **December 13, 2017**

ENTER,

O. PETER SHERWOOD J.S.C.