SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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ANTOINETTE TROVATO, as Executrix of the Estate of SALVATORE TROVATO,

Plaintiff,

-against-

GALAXY SANITATION SERVICES OF NEW YORK, INC., SUPERIOR AGGREGATES INC., SKY MATERIALS CORP., and MICHAEL CHOLOWSKY,

Defendants.

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TRIAL/IAS PART: 12

NASSAU COUNTY

Index No: 605704-16
Motion Seq. No. 3
Submission Date: 8/11/17

Papers Read on this Motion:

Notice of Motion, Affirmation in Support and Exhibits.....x
Affirmation in Opposition and Exhibit.....x
Reply Affirmation in Support.....x

This matter is before the court on 1) the motion filed by Defendants Galaxy Sanitation Services of New York, Inc. ("Galaxy"), Superior Aggregates Inc. ("Superior"), Sky Materials Corp. ("Sky") and Michael Cholowsky ("Cholowsky") (" Defendants") on July 5, 2017 and submitted on August 11, 2017. For the reasons set forth below, the Court denies the motion.

BACKGROUND

A. Relief Sought

Defendants move for an Order, pursuant to CPLR § 3211(a), 1) dismissing the Plaintiff's First, Second and Fourth Causes of Action with prejudice; and 2) dismissing Defendant Sky from the above-captioned action ("Instant Action") entirety.

Plaintiff Antoinette Trovato, as Executrix of the Estate of Salvatore Trovato, opposes the motion.

B. The Parties' History

The parties' history is outlined in detail in the prior decision ("Prior Decision") of the Court dated May 3, 2017 and the Court incorporates the Prior Decision by reference as if set forth in full herein. As noted in the Prior Decision, Plaintiff initiated the Instant Action by Summons with Notice which notified Defendants that 1) the nature of this action is declaratory judgment and breach of contract arising out of an agreement dated July 28, 2010; and 2) the relief sought is declaratory judgment confirming Plaintiff's 50% ownership interest in Superior and Galaxy or, in the alternative, breach of contract seeking monetary relief against Defendants in the amount of $2,650,000.00, for breach of the July 28, 2010 agreement for purchase of, *inter alia*, a 50% ownership interest in Superior and Galaxy, for which full consideration was paid. Subsequent to the Prior Decision, Plaintiff filed and served its Complaint (Ex. A to Gardner Aff. in Supp.), dated May 5, 2017, which alleges as follows:

Plaintiff Antoinette Trovato ("Plaintiff") is the wife of decedent Salvatore Trovato ("Decedent" or "Salvatore") and was appointed executrix of Decedent's estate ("Estate") by letters testamentary issued on August 7, 2012. Salvatore's 50% percent ownership in the shares of Galaxy and Superior, which he purchased in August 2010 from Cholowsky in an integrated transaction ("Transaction") involving Galaxy, Superior and Emjay Environmental Recycling, Ltd. ("Emjay") and any claims arising from Cholowsky's failure to issue the Galaxy and Superior stock to Salvatore passed into his residuary Estate upon his death and are to be held and administered by Plaintiff in her capacity as Executrix of the Estate. Notwithstanding the $2,650,000.00 purchase price paid by Trovato for a 50% ownership interest in Superior, Galaxy and Emjay, no dividends or distribution and share in net profits has ever been paid to Decedent while he was alive, or to his Estate.

Galaxy and Superior are domestic corporations. Sky is a domestic corporation of which Cholowsky is and has always been the sole or principal shareholder. On July 28, 2010, Salvatore and Cholowsky entered into a letter agreement ("Letter Agreement") establishing a framework for the Transaction, including the formation of a new company to own and operate the stone business-related assets of Sky. The Letter Agreement provided for, *inter alia*, a collective purchase price of $2,650,000 to be paid by Salvatore for a 50% interest in the outstanding stock

of Galaxy, Newco LLC and Emjay. After entering into the Letter Agreement, Salvatore and Cholowsky agreed that they would form Superior, in the place of the entity designated as Newco LLC. Thereafter, Superior was formed for the purpose of owing and operating the stone business-related assets of Sky. A closing ("Closing") on the Transaction was held in August 2010 at the office of Sullivan Garner, P.C.

On August 12, 2010, Salvatore and Cholowsky executed a stock purchase agreement ("SPA") pursuant to which Salvatore was to acquire his 50% interest in Emjay. The SPA made reference to the Letter Agreement. Section 11.8 of the SPA provides for payment of reasonable attorney's fees for the prevailing party in any litigation under that agreement.

At the time of the execution of the Letter Agreement and Closing, it had been represented to Salvatore that Cholowsky was the sole owner and principal of Galaxy and Sky, and a 50% shareholder of Emjay, together with John Kelly ("Kelly"). On July 26, 2010, Cholowsky executed a promissory note ("Note") in favor of Salvatore for the sum of $650,000, which was to be repaid on the occurrence of the earlier of the closing on the "Purchase and Sale Transactions" (Comp. at ¶ 21), or 91 days following the execution of the Note.

The consideration for the Note was, in part, in the form of $300,000 wired by Salvatore on July 26, 2010 to Kelly's counsel, Hankin Mazel PLLC, so that Cholowsky could acquire Kelly's shares of Emjay's stock. The balance of the consideration for the Note was paid by Salvatore to Cholowsky by check number 1032 in the sum of $350,000, which cleared his account on July 27, 2010. The Note defined the "Purchase and Sale Transactions" as

> the purchase by [Salvatore, as payee] of (i) fifty percent (50%) of the outstanding stock of [Emjay], a New York corporation, (ii) fifty percent (50%) of the limited liability company interests of a newly-formed Delaware limited liability company from [Sky], which shall own and operate the stone business assets of Sky, and (iii) fifty percent (50%) of the outstanding stock of [Galaxy].
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> Comp. at ¶ 24.

At the Closing, Salvatore and Cholowsky agreed that the $650,000 owed by Cholowsky to Salavtore under the Note would be applied against the collective purchase price of $2,650,000 for Salavtore's acquisition of a 50% stock interest in Galaxy, Superior and Emjay. Subsequently, Salvatore, either directly from his personal account or from the account of Trocom Construction

Utilities ("Trocom Utilities"), made an additional $2 million in payments in connection with the Transaction. The Complaint includes a schedule of the consideration for the payments made by or on behalf of Salvatore to or for the benefit of Cholowsky in connection with the Transaction (Ex. A to Comp.), and sets forth in detail the amounts of the checks that Salvatore provided to Cholowsky, which were paid from Trocom Utilities' account, and the dates on which they cleared (Comp. at ¶¶ 27 - 44). The balance of the purchase price was paid by Salvatore from Trocom Utilities' account to vendors of Galaxy, Superior and/or Emjay. At all relevant times, Trocom Utilities was a DBA of Trocom Construction Corp. ("Trocom Construction"). Trocom Construction was an S-Corporation, of which Salavtore was the sole owner. At all relevant times, the gains and losses realized by Trocom Construction were reported in Salvatore's personal tax returns.

Subsequent to the Closing, Salvatore permitted Cholowsky to continue handling the daily operations of Galaxy and Superior. Defendants never delivered certificates representing Salvatore's 50% stock interest in Galaxy and Superior. Salvatore was made a signatory, along with Cholowsky, on the Galaxy, Superior and Emjay bank accounts. Disbursements above a certain amount made on those accounts required the signatures of both Salvatore and Cholowsky.

The 2010 federal tax return for Galaxy, a C-Corporation, includes Schedule G, Part 2 reflecting Salvatore's 50% stock ownership in Galaxy, and Galaxy's 2010 federal tax return reporting Salvatore's stock ownership in Galaxy was filed with and accepted by the Internal Revenue Service ("IRS") on August 4, 2011. The 2010 federal tax return for Superior, an S-Corporation, includes the K-1 schedule for Salvatore's 50% personal shareholder interest in Superior reporting his share of income, losses, deductions and credits for the approximately 4 month period of time in 2010 since his stock purchase pursuant to the Transaction. Superior's 2010 federal tax return reporting Salvatore's stock ownership in Galaxy was filed with and accepted by the IRS on August 4, 2011.

Cholowsky, Galaxy and Superior failed to provide Salvatore with tax reporting forms for any tax period after 2010, and failed to provide Salvatore or Plaintiff with any information regarding the financial condition and operations of Galaxy and Superior, despite demand. As a result, Plaintiff filed a petition in the Supreme Court of New York, Suffolk County against Cholowsky, Galaxy and Superior, assigned Suffolk County Supreme Court Index Number

4027/15 ("Suffolk County Action"). By Short Form Order dated May 20, 2015 ("2015 Order"),[1] the Honorable Jerry Garguilo granted the petition in its entirety, but reserved decision as to the prayers for relief enjoining Cholowsky from using corporate funds of Galaxy and Superior to fund their defense, reimbursements of fees and costs. In the 2015 Order, Justice Garguilo noted that Respondents opposed the relief sought in the petition on the grounds that they "cannot permit access to books and records at this time because it is not clear who is the rightful owner of the shares claimed by Petitioner, Petitioner has not established the ownership of the claimed shares by [Salvatore] and therefore the requested relief should be denied" (Comp. at ¶ 61). The Complaint sets forth portions of the 2015 Order (Comp. at ¶¶ 62-64) which include Justice Garguilo's conclusions *inter alia* that 1) Salvatore transferred in excess of $2 million in anticipation of the contested acquisition; and 2) during a conference with Justice Garguilo in chambers, "the question as to where [Salvatore's] $2.2 million dollars is located went unanswered."

Plaintiff alleges that, according to documents examined subsequent to the 2015 Order, notwithstanding the fact that under the Letter Agreement Cholowsky agreed to establish Superior to own and operate the stone business-related assets of Sky, Cholowsky either failed to contribute those assets to Superior or returned those assets to Sky in or after 2010 so that he could avoid sharing the profits arising from the ownership and operation of those assets with Salvatore and Plaintiff. Following Salvatore's death, Cholowsky caused Superior to cease operating and transferred all of its assets, including its equipment and receivables, to Sky, and thereafter Sky used Superior's assets and collected its receivables.

The Complaint contains four (4) causes of action:

1) a request for a declaratory judgment a) declaring Plaintiff to be the owner of 50% of the shares of Galaxy and Superior, b) directing Defendants to issue and deliver to Plaintiff certificates reflecting the shares to which Salvatore was entitled; c) declaring that Plaintiff, as the subscriber to those shares, is entitled to all the rights and privileges of a holder of such shares, effective as of August 2010; d) directing Defendants to account to Plaintiff for all income, disbursements, assets and liabilities of Galaxy and Superior since August 2010; and e) directing Defendants to pay Plaintiff all distributions to which Salvatore was entitled, but not paid, since August 2010, plus attorney's fees and costs,

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[1] The 2015 Order is annexed as Exhibit 1 to the Blansky Affirmation in Opposition.

2) a request for a declaratory judgment a) declaring Sky to be the successor-in-interest to Superior; b) declaring Plaintiff to be the owner of 50% of the shares of Sky; c) directing Defendants to issue and deliver to Plaintiff certificates reflecting 50% of the stock of Sky; d) declaring that Plaintiff, as the subscriber to those shares, is entitled to all the rights and privileges of a holder of such shares, effective as of August 2010; e) directing Defendants to account to Plaintiff for all income, disbursements, assets and liabilities of Sky since August 2010; and f) directing Defendants to pay Plaintiff all distributions from Sky to which Salvatore would have been entitled had he been made a shareholder of Sky, as of August 2010, plus attorney's fees and costs,

3) breach of the Letter Agreement by Cholowsky by, *inter alia*, failing to deliver the shares of Galaxy and Superior purchased by Salvatore from Cholowsky or, alternatively, by removing Salvatore as a stock holder of Galaxy and Superior, and

4) unjust enrichment based on the allegation that Cholowsky was the direct recipient or beneficiary of the $2,650,000 paid by Salvatore in connection with the Transaction, and that permitting Cholowsky to retain the $2,650,000 would unjustly enrich Cholowsky, to the detriment of Plaintiff.

In support of the motion, counsel for Defendants ("Defendants' Counsel") submits that Plaintiff's assertion that Sky is a continuation of Superior, and that Plaintiff is entitled to an ownership interest in Sky, is "preposterous on its face" (Gardner Aff. in Supp. at ¶ 16) and contradicted by the Complaint. Defendants' Counsel affirms that Sky has been in business since April 1995, more than 15 years before the alleged Letter Agreement. In support, Defendants' Counsel provides a copy of Sky's entity information obtained from the New York Department of State, Division of Corporations ("DOS") (Ex. B to Gardner Aff. in Supp.) which reflects that Sky was formed in April of 1995. Defendants' Counsel affirms, further, that he has personally represented Sky for the past 10 years in numerous matters, has personal knowledge of Sky's business, and can attest that it is a large construction company primarily in the business of building high-rise superstructures in New York City. Thus, Plaintiff's allegation that Sky is merely a continuation of Superior based on the allegations that Sky retained, or had returned to it, stone business-related assets of Superior, and Plaintiff's claim to entitlement to ownership of Sky, are "absurd" (Gardner Aff. in Supp. at ¶ 16). Moreover, Defendants' Counsel affirms, Superior has not been dissolved, but rather is in existence. In support, Defendants' Counsel provides a print-out of Superior's entity information obtained from the DOS (Ex. C to Gardner Aff. in Supp.) which reflects that Superior's current entity status is "active."

C. The Parties' Positions

Defendants submit that the Court should dismiss the second cause of action because the evidence does not support Plaintiff's contention that Sky is a mere continuation of Superior and, therefore, that Plaintiff has an interest in Sky. Defendants contend that this allegation is refuted by evidence, including DOS documentation reflecting that Sky was formed in 1995, information gleaned by Defendants' counsel during his representation of Sky, and DOS documentation reflecting that Superior is still in existence and has not been dissolved. Defendants contend, further, that the allegations in the Complaint, including the allegation that Cholowsky had Sky retain or recover the stone-related business assets (Comp. at ¶ 83) are insufficient to support a claim for successor liability.

Defendants contend, further, that 1) the second cause of action is also not viable because Cholowsky's transfer of stone business related assets could only harm Superior, not Trovato individually, and this claim must therefore be asserted derivatively rather than directly; 2) Plaintiff does not, and cannot, assert derivative claims on behalf of Superior, in part because Plaintiff does not even plead that she is a shareholder; 3) even if Plaintiff were a shareholder entitled to bring a derivative action, she must make a demand on Superior's board as a condition precedent to a derivative action and plead that demand, which she has failed to do; 4) the Court should dismiss Plaintiff's unjust enrichment claim because Plaintiff pleads an express agreement governing the payment of funds to Cholowsky in exchange for the transfer of shares, and Plaintiff may not proceed on an unjust enrichment claim where, as here, the parties' dispute is governed by a contract; and 5) the relief sought in the first cause of action is not the proper subject of a declaratory judgment action, and is otherwise improper, because a declaratory judgment may not be used to compel a party to perform an act, and because the request for an accounting may only be brought derivatively, not on behalf of Plaintiff individually.

Plaintiff opposes the motion submitting that 1) Plaintiff has asserted sufficient allegations to support her claim that Sky was, and is, merely a continuation of Superior, including but not limited to allegations that there a continuity of ownership as between Superior and Sky, and that Superior ceased most of its ordinary business operations as a result of the retention or return of the stone-related business assets to Sky; 2) Plaintiff has asserted a claim that may be pursued in her individual capacity, specifically that her shares were redistributed without compensation; 3) Plaintiff has properly asserted a claim for unjust enrichment in light of the potential dispute regarding whether a valid contract exists, as evidenced, *e.g.* by Defendants' reference to the Letter Agreement as an "alleged Letter Agreement" (Gardner Aff. in Supp. at ¶ 3); and 4) the

relief sought in the first cause of action, specifically relief necessary to vindicate Plaintiff's rights as a 50% shareholder of Galaxy and Superior, is the proper subject of a declaratory judgment action.

In reply, Defendants submit *inter alia* that 1) dismissal of the second cause of action against Sky is warranted because that cause of action solely alleges harm to Superior which, at best, may only be asserted in a derivative action on behalf of that corporation, not individually by Plaintiff; 2) Plaintiff, who does not allege privity of contract or any relationship between herself and Sky, may not proceed on a successor liability theory because she is a shareholder and not a creditor of Superior, the alleged transferor corporation; 3) to the extent that Plaintiff, in her capacity as a shareholder, believes that there was an improper transfer that is actionable, that claim would be actionable in a shareholder's derivative action; and 4) Plaintiff has failed to allege the elements of successor liability with sufficient particularity.

RULING OF THE COURT

A. Dismissal Standards

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Bivona v. Danna & Associates, P.C.*, 123 A.D.3d 956, 957 (2d Dept. 2014), quoting *Alva v. Gaines, Gruner, Ponzini & Novick, LLP*, 121 A.D.3d 724 (2d Dept. 2014) (internal quotation marks omitted) and citing *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

A motion to dismiss a cause of action pursuant to CPLR § 3211(a)(1) may be granted only if documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law. *Bivona v. Danna & Associates, P.C.*, 123 A.D.3d at 957, citing *Indymac Venture, LLC v. Nagessar*, 121 A.D.3d 945 (2d Dept. 2014), quoting *Whitebox Concentrated Convertible Arbitrage Partners, L.P. v. Superior Well Servs., Inc.*, 20 N.Y.3d 59, 63 (2012).

B. Declaratory Judgment

Declaratory relief is usually unnecessary where a full and adequate remedy is already provided by another well-known form of action. *James v. Alderton Dock Yards*, 256 N.Y. 298, 305 (1931), *reh. den.*, 256 N.Y. 681 (1931). *See also Olsen v. New York State Dept. of Env. Conservation*, 307 A.D.2d 595 (3d Dept. 2003), *lv. app. den.*, 1 N.Y.3d 502 (2003) (action for declaratory judgment unnecessary where action at law for damages is available, citing *inter alia*

James v. Alderton Dock Yards, 256 N.Y. at 305). While a court may dismiss a declaratory judgment action in a proper exercise of discretion, the mere existence of other adequate remedies does not mandate dismissal. *Permanent General Assurance Company v. Thomas*, 2016 N.Y. Misc. LEXIS 1339, *4 (Sup. Ct. N.Y. Cty. 2016)

C. Derivative Claims

The pertinent inquiry in determining whether an individual has standing to assert a claim against a corporation is whether the thrust of the plaintiff's action is to vindicate his personal rights as an individual and not as a stockholder on behalf of the corporation. *Craven v. Rigas*, 85 A.D.3d 1524, 1527 (3d Dept. 2011), *lv. dism.*, 17 N.Y.3d 932 (2011), quoting *Albany-Plattsburgh United Corp. v. Bell*, 307 A.D.2d 416, 419 (3d Dept. 2003), *lv. dism. and den.*, 1 N.Y.3d 620 (2004) (internal quotation marks and citations omitted).

A plaintiff asserting a derivative claim seeks to recover for injury to the business entity. A plaintiff asserting a direct claim seeks redress for injury to himself individually. Sometimes whether the nature of the claim is direct or derivative is not readily apparent. New York does not have a clearly articulated test, but approaches the issue on a case by case basis depending on the nature of the allegations. *Yudell v. Gilbert*, 99 A.D.3d 108, 113 (1st Dept. 2012).

D. Successor Liability

As a general rule, a corporation which acquires the assets of another corporation is not liable for the torts of its predecessor. *Nationwide Mutual Fire Ins. Co. v. Long Island Air Conditioning, Inc.*, 78 A.D.3d 801 (2d Dept. 2010), citing *Schumacher v. Richards Shear Co.*, 59 N.Y.2d 239, 244 (1983). A corporation, however, may be held liable for the torts of its predecessor if 1) it expressly or impliedly assumed the predecessor's tort liability; 2) there was a consolidation or merger of seller and purchaser; 3) the purchasing corporation was a mere continuation of the selling corporation; or 4) the transaction was entered into fraudulently to escape such obligations. *Nationwide Mutual Fire Ins. Co. v. Long Island Air Conditioning, Inc.*, 78 A.D.3d at 802, citing *Schumacher v. Richards Shear Co.*, 59 N.Y.2d at 245. This doctrine is also applicable in breach of contract actions. *Nationwide Mutual Fire Ins. Co. v. Long Island Air Conditioning, Inc.*, 78 A.D.3d at 802, citing *inter alia Kretzmer v. Firesafe Prods. Corp.*, 24 A.D.3d 158 (1st Dept. 2005).

The de facto merger doctrine creates an exception to the general principle that an acquiring corporation does not become responsible thereby for the pre-existing liabilities of the acquired corporation. This doctrine is applied when the acquiring corporation has not purchased another corporation merely for the purpose of holding it as a subsidiary, but rather has effectively

merged with the acquired corporation. The hallmarks of a de facto merger include: continuity of ownership; cessation of ordinary business and dissolution of the acquired corporation as soon as possible; assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and continuity of management, personnel, physical location, assets and general business operation. *Fitzgerald v. Fahnestock & Co., Inc.* , 286 A.D.2d 573, 574 (1st Dept. 2001), citing *Sweatland v. Park Corporation*, 181 A.D.2d 243, 245-46 (4th Dept. 1992). Not all of these element are necessary to find a de facto merger. *Fitzgerald v. Fahnestock & Co., Inc.*, 286 A.D.2d at 574-75.

In determining the applicability of the mere continuation doctrine, the fact that the old company still exists is not dispositive. The First Department, in *Tap Holdings, LLC v. Orix Finance Corp.*, 109 A.D.3d 167 (1st Dept. 2013), rejected defendant's argument that no mere continuation claim can exist because defendant entity existed, "albeit in some meager form." *Id.* at 176. The plaintiff in *Tap Holdings* alleged that the entity's sole employee was a dissolution officer, and that the entity was no longer in good standing in Delaware for having failed to pay a tax assessment. The First Department held that it could be reasonably inferred from these allegations, for purposes of a motion pursuant to CPLR § 3211(a)(7), that the entity had been effectively extinguished for purposes of the application of the mere continuation doctrine.

E. Unjust Enrichment

The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in good conscience should be paid to the plaintiff. *Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 790 (2012), *rearg. den.*, 19 N.Y.3d 937 (2012), citing *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011), quoting *Paramount Film Distrib. Corp. v. State of New York*, 30 N.Y.2d 415, 421 (1972), *reh. den.*, 31 N.Y.2d 709 (1972), *cert. den.*, 414 U.S. 829 (1973). Plaintiff may not maintain an action for unjust enrichment where the matter in dispute is governed by an express contract. *Scavenger, Inc. v. Interactive Software Corp.*, 289 A.D.2d 58 (1st Dept. 2001).

F. Application of these Principles to the Instant Action

The Court denies the motion based on its conclusion that 1) Plaintiff has sufficiently alleged facts in support of her contention that Sky is the successor-in-interest to Superior, including but not limited to allegations that there was a continuity of ownership as between Superior and Sky and that Superior ceased most of its ordinary business operations as a result of the retention or return of the stone-related business assets to Sky, and the fact that Superior is still technically an active corporation is not dispositive of this claim; 2) Plaintiff may properly assert a

direct, rather than derivative, claim based on her allegation that her shares were redistributed without compensation, as the thrust of Plaintiff's action is to vindicate her personal rights as an individual and not as a stockholder on behalf of the corporation; 3) Plaintiff may assert an unjust enrichment claim where, as here, there is an apparent dispute regarding the existence of the Letter Agreement; and 4) Plaintiff has properly asserted causes of action seeking a declaratory judgment given the issues raised regarding Plaintiff's ownership rights in the relevant entities.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Preliminary Conference on September 25, 2017 at 9:30 a.m. as directed herein.

ENTER

DATED: Mineola, NY
September 19, 2017

HON. TIMOTHY S. DRISCOLL
J.S.C.