

<b>Jamison Capital Partners, LP v Avenue of Ams., LLC</b>
2018 NY Slip Op 30566(U)
March 30, 2018
Supreme Court, New York County
Docket Number: 650187/2017
Judge: Andrea Masley
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NYSCEF DOC. NO. 73

RECEIVED NYSCEF: 04/02/2018

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL PART 48

-----X  
JAMISON CAPITAL PARTNERS, LP,  
Plaintiff,

Index No. 650187/2017

-against-

AVENUE OF AMERICAS, LLC, NORMANDY REAL  
ESTATE PARTNERS, LLC, and FINALLY GENERAL  
CONTRACTING CORP.,  
Defendants.  
-----X

**Masley, J.:**

In motion sequence number 003, defendant Finaly General Contracting Corp. (Contractor) moves, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the amended complaint in its entirety. In motion sequence number 004, defendants Avenue of Americas, LLC (Landlord) and Normandy Real Estate Partners, LLC (Construction Manager) move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the amended complaint in its entirety.

Motion sequence numbers 003 and 004 are consolidated for disposition.

**Background**

The following factual allegations are set forth in the amended complaint, and for the purposes of this motion are accepted as true.

This action arises out of defendants' alleged failure to fulfill their obligations to build out two floors of commercial space that plaintiff Jamison Capital Partners, LP (Tenant) leased from the Landlord.

On March 10, 2014, the Landlord and the Tenant entered into a lease (Lease), whereby the Tenant agreed to rent the premises consisting of the entire 34<sup>th</sup> and 35<sup>th</sup> floors in a building located at 1370 Avenue of the Americas, New York, New York (Premises). The Lease term was seven years with an option to extend for an additional five years. Pursuant to the Lease, "Landlord was to undertake certain alterations and improvements to the Premises before turning over possession to Tenant" (defined in the

Lease as "Tenant Improvements" and "Base Building Work") (complaint ¶ 14). The parties' rights and obligations "with respect to the Tenant Improvements and Base Building Work are set forth in an exhibit to the Lease known as the parties' "Work Letter" (*id.*). In accordance with the terms of both the Lease and the Work Letter, the costs of the Tenant Improvements and Base Building Work were to be shared by the Landlord and Tenant.

The Landlord retained the services of the Construction Manager for the "management, oversight, and administration of the Tenant Improvements" and "to act as a construction manager/agent for Tenant" (complaint ¶ 17). Pursuant to the Work Letter, the Tenant was to pay the Landlord a 5% supervisory fee. The Landlord was also required to hire a contractor to perform the Tenant Improvements, by obtaining at least three bids from reputable contractors and accepting the lowest bid unless it had a reasonable concern about that particular contractor.

On August 7, 2014, the Construction Manager entered into an agreement with the Contractor (the Tenant Improvement Contract) to perform the Tenant Improvements at the Premises at a cost of \$4,424,140.66 (the Contract Sum). The Tenant Improvement Contract identifies the Construction Manager as "Owner;" however, the Construction Manager never signed the Contract. Rather, "[t]he Tenant Improvement Contract was intended and/or required to be signed by [nonparty] Principal Real Estate Investors, LLC [Principal], as the authorized signatory for [Landlord]" (complaint ¶ 28). Principal Real Estate Investors, LLC (Principal) is the parent company of the Landlord. It is alleged that the Construction Manager failed to disclose to the Contractor that it was acting as an agent for the Tenant.

Between August 2014 and June 2015, the Tenant paid its portion of the Contract Sum owed to the Contractor, which the Construction Manager allegedly accepted and agreed to hold in escrow during the construction. Pursuant to the Tenant Improvement Contract, the Contractor was to be paid the Contract Sum in installments of varying amounts based upon the progress of the Tenant Improvements. Ten percent of the amount of each progress payment was supposed to be held back as retainage.

The Tenant alleges that the Contractor never finished the Tenant Improvements and caused significant damage to the Premises. For example, when the Landlord delivered the Premises to the Tenant there was rippled carpeting throughout the space, amongst other deficiencies. The estimated costs to complete the Tenant Improvements and fix the defects was \$900,000.

It is alleged that the Construction Manager informed the Tenant that the Contractor was discharged for performing substandard work, using inferior materials, failing to supervise workers and subcontractors, and failing to perform all work in accordance with the Work Letter, the Tenant Improvement Contract, and the detailed plans and specifications approved by the Tenant. Under the Tenant Improvement Contract, the Construction Manager was not to pay the Contractor the retainage until the work was satisfactorily completed and a "Final Project Certificate" was issued by the Construction Manager's architect. The Tenant alleges neither happened.

The Tenant alleges that it made a written request for the return of the balance of the Contract Sum it paid in connection with the Tenant Improvement Contract, but instead, in June 2016, the Landlord demanded that the Tenant pay an additional sum of \$182,526.92 for "excess costs" incurred by the Landlord (the Disputed Charges). The

Tenant refused to pay. On June 13, 2016, the Landlord issued a notice of default based on the Tenant's refusal and threatened to terminate the Lease if the Disputed Charges were not paid within ten business days. On November 4, 2016, after being granted a deadline extension to cure, the Tenant tendered a check under protest to the Landlord for the Disputed Charges. The Tenant alleges that the Landlord has not completed the Tenant Improvements or remedied the outstanding defects.

In its amended complaint, dated April 20, 2017, the Tenant asserts claims for breach of contract against all defendants, a declaratory judgment against all defendants, breach of implied covenant of good faith and fair dealing against the Landlord and Construction Manager, an accounting against the Construction Manager, money had and received against the Construction Manager and Contractor, and indemnification against the Landlord. Defendants now move to dismiss the amended complaint in its entirety based on documentary evidence and for failure to state a cause of action.

### Discussion

Under CPLR 3211 (a) (7), on a motion addressing the sufficiency of the pleadings, the court must accept each and every allegation in the complaint as true, and liberally construe those allegations in the light most favorable to the pleading party (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The court "determine[s] only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d at 87-88).

Where a written contract "unambiguously contradicts the allegations supporting a litigant's cause of action for breach of contract, the contract itself constitutes

documentary evidence warranting the dismissal of the complaint pursuant to CPLR 3211 (a) (1), regardless of any extrinsic evidence or self-serving allegations offered by the proponent of the claim" (*150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 5 [1<sup>st</sup> Dept 2004]). On a motion to dismiss, a plaintiff may supplement the complaint by affidavit, to further apprise the defendant of the transactions and matters that form the basis of the complaint (*High Definition MRI, P.C. v Travelers Cos., Inc.*, 137 AD3d 602, 603 [1<sup>st</sup> Dept 2016]; see CPLR 3013).

### **Contractor's Motion to Dismiss**

The Tenant alleges that the Contractor breached the Tenant Improvement Contract by performing substandard work, using inferior products and materials, negligently supervising workmen and subcontractors, causing faulty installation, causing substantial physical damage to the Premises, and failing to perform and complete all work in accordance with the Work Letter, Tenant Improvement Contract, and the approved plans. However, the Contractor argues it is not liable to the Tenant because the Tenant is not a party to the Tenant Improvement Contract and was never intended to be a third-party beneficiary of that Contract. In support of its motion, the Contractor submits a copy of the Tenant Improvement Contract. This submitted copy is only executed by the Contractor. The Landlord and the Construction Manager, in support of their motion, also submit a copy of the Tenant Improvement Contract. Their copy is fully executed, signed by Principal, as "authorized signatory for Landlord", and the Contractor. Counsel for the Tenant argues that the unsigned copy of the Tenant Improvement Contract submitted by the Contractor cannot be considered as conclusive evidence, and the fully executed copy submitted by the Landlord and Construction

Manager was most likely signed and created for the purposes of litigation.

Besides counsel's unsupported theory, there is no evidence contradicting that the Tenant Improvement Contract, submitted by all defendants, is the operative document setting out the rights and obligations of the parties involved. In fact, the amended Complaint includes allegations about this Contract and its terms.

In response to this argument, the Contractor submits an affidavit of its President and Director who affirms that the submitted Contract is an accurate copy. In addition, the Landlord and the Construction Manager submit an affidavit of Principal's Director of Architecture & Engineering, Kevin J. Stubbs, who also affirms that the Tenant Improvement Contract was fully executed in 2014, and not for the purpose of this litigation. Stubbs submits a "document transmittal sheet" as evidence of the transmittal of the Contract in 2014 between Principal's Kathy Baker, a signatory to the Contract, located in its Iowa office, and the New York office where Stubbs is located. He also submits proof of mailing between the two offices. As there is no evidence disproving that the Tenant Improvement Contract submitted in support of both motions is a true and accurate copy, and the signatories to the Contract affirm that the copies submitted are true and accurate, the court will consider it in deciding this motion.

Breach of Contract

The Contractor argues that the Tenant's breach of contract claims asserted against it must be dismissed because the Tenant is not a party to the Tenant Improvement Contract at issue, and the Tenant is not an intended third-party beneficiary. In response, the Tenant asserts three arguments: (1) the Landlord assigned its rights against the Contractor to the Tenant; (2) when considering all the

surrounding circumstances, the Tenant is an intended third-party beneficiary of the Tenant Improvement Contract; and (3) an agency relationship exists between the Construction Manager and the Landlord as well as the Construction Manager and the Tenant, establishing the necessary privity between the Tenant and the Contractor to state a cause of action against the Contractor.

#### *Assignment*

In support of its assignment argument, the Tenant relies on Section 5.3 of the Work Letter, which provides,

"[L]andlord shall not be liable for, and Tenant hereby waives all claims against Landlord for, any defaults of the contractor, subcontractors, and/or suppliers relating to the construction of the Tenant Improvements. In the event of any such default, Tenant shall look solely to the contractor or such subcontractors or suppliers, and Landlord shall make available to Tenant any warranties from such contractors, subcontractors or suppliers."

This provision does not assign any of the Landlord's rights to the Tenant. The language does not grant some title, legal or equitable, to the Tenant (*see Spencer v Standard Chemicals & Metals Corp.*, 237 NY 479 [1924] [citation omitted]). Through this provision, the Landlord has not divested all control and right to any causes of action against the Contractor for allegedly defaulting (*id.*). Rather, this provision only requires the Landlord to provide any warranties to the Tenant. There is no assignment of a right to sue. Thus, this argument fails.

#### *Intended Third-party Beneficiary*

To state a claim for breach of contract as a third-party beneficiary, the plaintiff must establish "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [its] benefit, and (3) that the benefit to [it] is sufficiently immediate ... to indicate the assumption by the contracting parties of a duty

to compensate [it] if the benefit is lost” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011], quoting *Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 786 [2006]). The benefit cannot be incidental; it must be intended (*Alicea v New York*, 145 AD2d 315, 317 [1<sup>st</sup> Dept 1988]). An intended beneficiary is “one whose right to performance is appropriate to effectuate the intention of the parties to the contract and either the performance will satisfy a money debt obligation of the promisee to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance” (*id.* [internal quotation marks and citation omitted]).

The Contractor argues that the language of the Tenant Improvement Contract expressly negates any alleged intent to make the Tenant a third-party beneficiary. Specifically, Section 6.2 of the Tenant Improvement Contract provides that,

“[t]he Contract Documents<sup>1</sup> form the Contract for Construction. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. The Contract may be amended or modified only by a Modification. The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and Contractor, (2) between the Owner and a Subcontractor or sub-subcontractor, (3) between the Owner and Architect or (4) between any persons or entities other than the Owner and Contractor.”

In response, the Tenant argues that the court must look at the surrounding circumstances, as well as the Contract itself, and examine the Landlord’s intention in causing the Construction Manager to enter into the Tenant Improvement Contract with the Contractor. Further, the Tenant argues that, where performance is rendered directly

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<sup>1</sup> Contract Documents are defined in Section 6.1 of the Tenant Improvement Contract, which states, “[t]he Contract Documents consist of this Agreement with Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to the execution of this Agreement, other documents listed in this Agreement and Modifications issued after the execution of this Agreement.”

to a third party, boilerplate contractual provisions, such as the one relied on here, do not control where enforceable rights may have been granted otherwise to an intended third-party beneficiary.

Section 6.2 clearly precludes the Tenant from enforcing the Tenant Improvement Contract as a third-party beneficiary, as it states that "The Contract Documents shall not be construed to create a contractual relationship of any kind ... (4) between any persons or entities other than the Owner and Contractor." This provision is clear and unambiguous.

The Tenant's reliance on *Diamond Castle Partners IV PRC, L.P. v IAC/InterActiveCorp*, 82 AD3d 421 (1<sup>st</sup> Dept 2011), for the proposition that boilerplate contractual provisions do not control where enforceable rights of a third party may have been granted otherwise, is misplaced. In *Diamond Castle Partners IV PRC, L.P.*, the Appellate Division, First Department, affirmed JHO Ira Gammerman's holding that the plaintiffs were third-party beneficiaries under the agreement in issue. The First Department agreed with JHO Gammerman's determination that the agreement was plainly intended to give the plaintiffs enforceable rights, even though the agreement contained a boilerplate provision to the contrary. The First Department found that the agreement contained numerous provisions granting plaintiffs enforceable rights, so much so that it was reasonable to construe the boilerplate provision not to exclude the plaintiffs. This is not the case here as the Tenant Improvement Contract does not contain any provision that grants the Tenant enforceable rights.

Further, the Tenant's argument that surrounding circumstances, such as the fact that the Project was entitled the "Jamison Project," should be considered is also

unpersuasive. The fact that the project title included the Tenant's name is not enough to bestow rights on the Tenant in contrary to the Contract to itself. The same is true in regard to the alleged oversight that the Tenant's Representative had over the project. Finally, as discussed above, the Work Letter is also not evidence that the Tenant was an intended third-party beneficiary under the Tenant Improvement Contract, because the Work Letter did not assign any of the Landlord's rights to the Tenant.

*Agency*

The Tenant argues that an agency relationship can defeat a claim that a contractual provision bars third-party beneficiary claims, and it has sufficiently pled the existence of an agency relationship between both the Landlord and the Construction Manager and the Tenant and the Contractor Manager to state a cause of action for breach of contract by the Contractor. Specifically, in paragraph 17 of the Amended Complaint, the Tenant alleges that, pursuant to the Work Letter, the Construction Manager was paid a supervisory fee by the Tenant for management, oversight, and administration of the Tenant Improvements and was supposed to act as a construction manager/agent for the Tenant in connection with the Tenant Improvement Contract.

Section 4.1 of the Work Letter provides that the Tenant is to pay the Landlord, not the Construction Manager, the costs associated with the Tenant Improvements and the total cost shall include a construction supervisory fee. Contrary to the allegation in the amended complaint, there is no language that designates the Construction Manager as an agent for the Tenant or that they are working on behalf of the Tenant.

The basic tenet of the principal-agent relation is that "the principal retains control over the conduct of the agent with respect to matters entrusted to the agent, and the

agent acts in accordance with the direction and control of the principal" (*William Stevens, Ltd. v Kings Village Corp.*, 234 AD2d 287, 288 [2nd Dept. 1996]). The Work Letter does not grant the tenant control over the Construction Manager or the Contractor. Although the Tenant may have communicated directly with the Construction Manager and the Contractor, that communication does not create an agency relation. The Tenant did not have the right to control the Construction Manager; it was the Landlord that controlled Construction Manager's conduct. Thus, the agency argument must fail.

Declaratory Judgment

The Tenant's second cause of action seeks a judgment, declaring the Tenant's legal rights and relations as to the Lease, Work Letter, and Tenant Improvement Contract. Specifically, the issues arising from this claim that are relevant to the Contractor are: who is bound by the Tenant Improvement Contract and whether a signature or further writing was required to make the Tenant Improvement Contract valid. Both of these issues were addressed above, and for the reasons stated, this claim must also be dismissed as to the Contractor.

Monies Had and Received

"The essential elements of a cause of action for money had and received are (1) the defendant received money belonging to the plaintiff, (2) the defendant benefitted from receipt of the money, and (3) under principles of equity and good conscience, the defendant should not be permitted to keep the money" (*Goel v Ramachandran*, 111 AD3d 783, 790 [2d Dept 2013] [citations omitted]). This claim "allows plaintiff to recover money which has come into the hands of the defendant 'impressed with a species of

trust' because under the circumstances it is 'against good conscience for the defendant to keep the money" (*Parsa v State*, 64 NY2d 143, 148 [1984] [internal citations omitted]). "The remedy is available 'if one man has obtained money from another, through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass" (*id.* [citation omitted]).

Here, the Tenant alleges that the Construction Manager and the Contractor received money belonging to the Tenant, that the money the Tenant deposited with the Landlord and/or the Construction Manager for the Tenant Improvements has been wrongfully withheld by the Construction Manager and Contractor, and that under principles of equity and good conscience, the Contractor should not be permitted to keep the money. However, the Tenant does not allege that the money paid to the Contractor was for no legitimate purpose. It also does not allege that the Contractor obtained the money from the Tenant and/or Construction Manager "through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass" (*id.*). The amended complaint contains allegations that the Construction Manager was not to pay the retainage to the Contractor until the Construction Manager's architect issued a certificate for final payment. However, if this retainage was wrongfully paid by the Construction Manager to the Contractor, the transfer would constitute a breach of the Tenant Improvement Contract. Nevertheless, this allegation "does not render the money allegedly transferred to [the Contractor] the rightful property of [the Tenant]" (*Goe*, 111 AD3d at 790).

Based on the foregoing reasons, the amended complaint is dismissed against the Contractor.

**Construction Manager Motion to Dismiss**

Breach of Contract

The Tenant alleges that the Construction Manager has breached the Lease by failing to perform and complete all of the Tenant Improvements. It is also alleged that the Construction Manager breached the Tenant Improvement Contract. For the reasons stated above, the claim for breach of the Tenant Improvement Contract is dismissed. Also, the claim against for breach of the Lease/Work Letter is also dismissed as the Construction Manager is not a party to that agreement.

Declaratory Judgment & Breach of the Implied Covenant of Good Faith and Fair Dealing

As the declaratory relief sought against the Construction Manager involves the Tenant Improvement Contract and the Tenant is not a party or third-party beneficiary to that contract, this cause of action is dismissed. This is also true for the claim for breach of the implied covenant of good faith and fair dealing, which must also be dismissed as the Tenant cannot satisfy the essential element of privity (*22 CPS Owner LLC v Carter*, 2010 NY Slip Op 31508 [u], \*15 [Sup Ct, NY County 2010]).

Money Had and Received

The claim against the Construction Manager for money had and received also fails. As previously stated, the Tenant has failed to allege that the Construction Manager obtained the money "through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass" (*Parsa v. State*, 64 NY2d at 148). It was money paid pursuant to the Work Letter.

Accounting

Finally, the Construction Manager's motion to dismiss Tenant's claim for an

accounting is also granted. The Work Letter provides that the Tenant is to deposit any money for the Tenant Improvements with the Landlord and that the Landlord is responsible for disbursing any excess amounts to the Tenant. This agreement flatly contradicts the Tenant's conclusory allegation that it entered into an escrow relationship with the Construction Manager and that the Construction Manager was to release any excess funds. Any information the Tenant seeks in regard to the funds it deposited for the Tenant Improvements and the amounts paid out to contractors, subcontractors, etc. will be discoverable from the Landlord.

### **Landlord's Motion to Dismiss**

#### **Breach of Contract**

Section 4.01 of the Lease provides that "Landlord shall install and construct the Tenant Improvements ... (as such terms are defined in Exhibit C [the Work Letter] hereto) in accordance with the terms, conditions, criteria and provisions of Exhibit C." Section 5.3 of the Work Letter provides, "Landlord shall not be liable for, and Tenant hereby waives all claims against Landlord for, any defaults of the contractor, subcontractors, and/or suppliers relating to the construction of the Tenant Improvements." The term "defaults" is not defined, and it is not clear as to what qualifies as a default of the Contractor. If a failure to complete the work is not a "default" pursuant to the Work Letter, the Tenant has a breach of contract claim against the Landlord for its failure to "install the Tenant Improvements" under Section 4.01 of the Lease. Thus, this ambiguity must be resolved and the claim for breach of contract may proceed against the Landlord.

Breach of the Implied Covenant of Good Faith and Fair Dealing

The Tenant's claim for breach of the implied covenant of good faith and fair dealing also survives this motion. In New York, the implied covenant of good faith and fair dealing "embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002] [citation and internal quotation marks omitted]). Here, the Tenant has sufficiently pled that the Landlord has injured its right to receive the fruits of the Lease and Work Letter, because the agreements landlord negotiated with the Construction manager and the Contractor omit the Tenant as a third-party beneficiary. They do not give the Tenant a mechanism to hold anyone responsible. When the Landlord disavowed any liability or responsibility for the renovation, the Tenant must be able to look to someone when any default occurs. This is exactly the type of situation that this cause of action remedies.

Declaratory Judgment

As far as this claim seeks equitable relief with regard to the Lease and Work Letter, it survives this motion to dismiss. With regard to any declarations involving the Tenant Improvement Contract, those claims are dismissed for the reasons previously stated.

Indemnification

The Tenant's sixth cause of action seeks indemnification by the Landlord as provided for in the Lease. The Lease provides that the Landlord shall indemnify the Tenant against and from any and all claims arising from negligence, default, or work performed by the Landlord. It further provides that the Landlord will defend any action

or proceeding brought against the Tenant. "A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances' (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]). This indemnification provision is only meant to protect the Tenant from third-party claims, and not its own damages. Thus, this claim is dismissed.

Accordingly, it is

ORDERED that defendant Finaly General Contracting Corp.'s motion to dismiss the amended complaint is granted and the amended complaint is dismissed in its entirety as against this defendant with costs and disbursements to this defendant as taxed by the Clerk of the Court and the Clerk is directed to enter judgment in favor of defendant Finaly General Contracting Corp.; and it is further

ORDERED that Normandy Real Estate Partners, LLC's motion to dismiss the amended complaint is granted and the amended complaint is dismissed in its entirety as against this defendant with costs and disbursements to this defendant as taxed by the Clerk of the Court and the Clerk is directed to enter judgment in favor of defendant Normandy Real Estate Partners, LLC; and it is further

ORDERED that defendant Avenue of Americas, LLC's motion to dismiss is granted, in part, and the second cause of action, in so far as it involves the Tenant Improvement Contract, and the sixth cause of action for indemnification are dismissed; and it is further

ORDERED that defendant Avenue of Americas, LLC is directed to serve an

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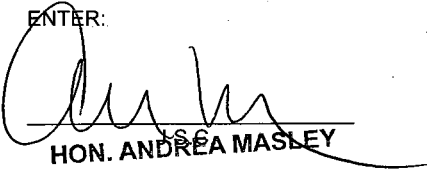
answer to the amended complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 242, 60 Centre Street, on April 25, 2018 at 9:30 a.m.

Dated:

3/30/18

ENTER:

  
HON. ANDREA MASLEY