

**Executive Cleaning Servs. Corp. v Larocca-Fels**

2018 NY Slip Op 33918(U)

July 5, 2018

Supreme Court, Albany County

Docket Number: 907194-17

Judge: Roger D. McDonough

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**STATE OF NEW YORK  
SUPREME COURT**

**COUNTY OF ALBANY**

EXECUTIVE CLEANING SERVICES CORPORATION,

Plaintiff/Petitioner,

**DECISION, ORDER, JUDGMENT**

-against-

Index No.: 907194-17

RJI No.: 01-17-126706

KAREN LAROCCA-FELS, MATTHEW WEISS, OSSINING  
PUBLIC LIBRARY, ITS BOARD OF TRUSTEES, AND  
COMMISSIONER OF LABOR ROBERTA REARDON,

Defendants/Respondents.

(Supreme Court, Albany County All Purpose Term)

Appearances:

MICHAEL D. DIEDERICH, JR., ESQ.  
Attorney for Plaintiff/Petitioner Executive Cleaning Services Corporation ("Executive")  
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Stony Point, NY 10980

MAYNARD, O'CONNOR, SMITH & CATALINOTTO, LLP  
Attorneys for Defendants/Respondents Karen Larocca-Fells, Matthew  
Weiss, Ossining Public Library and Its Board of Trustees ("Ossining defendants")  
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6 Tower Place  
Albany, NY 12203

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New York State Office of the Attorney General  
28 Liberty Street  
New York, NY 10005  
(Jessica Agarwal, Esq., Assistant Attorney General, Of Counsel; ReNika Moore, Bureau Chief,  
Labor Bureau; Seth Kupferberg Section Chief, General Labor Defensive Section, Of Counsel)

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**Roger D. McDonough, J.:**

Plaintiff (hereinafter “Executive”) seeks Article 78 relief, declaratory relief, and permanent injunctive relief in this hybrid proceeding. Additionally, Executive seeks relief for the following causes of action in their verified amended complaint and petition: (1) unjust enrichment as to the Public Library (“Library”); (2) negligence as to the Ossining defendants; (3) imposition of an unlawful tax by the Library and the Commissioner<sup>1</sup>; (4) breach of contract as to the Ossining defendants; (5) violation of General Business Law § 349 by Ossining defendants; (6) State and Federal Constitutional violations of Executive’s rights and conspiracy to deprive Executive of its civil rights, by all defendants/respondents (“all defendants”); (7) abuse of process as to all defendants; (8) malicious prosecution as to all defendants; (9) defamation as to all defendants; and (10) prima facie tort as to all defendants.

The Ossining defendants move to dismiss the proceeding pursuant to CPLR §§ 7804 and 3211. The Commissioner moves to dismiss the proceeding pursuant to CPLR § 7804(f) as well as § 3211(a)(2), (7) and (8). Executive has opposed both dismissal motions and the matter is fully submitted. The Court notes that no temporary injunctive relief was sought in this matter.

**Background**

Executive began providing cleaning services at the Library in late 2014-early 2015. The Library had no written contract with Executive. One of Executive’s employees complained to the Library of a wage nonpayment issue. Executive alleges that the Library, or one of its authorized representatives, reported the wage issue and other information the New York State Department of Labor (“NYSDOL”). Executive maintains that it was never informed that the Library was subject to the prevailing wage requirements of New York’s Labor Law.

NYSDOL sought to recover the difference between Executive’s wage payments and the prevailing wages, as well as interest and penalties. As a part of this process, NYSDOL has apparently directed the New York State Department of Motor Vehicles (one of Executive’s customers) to retain/withhold payments of nearly \$34,000.00 to Executive until the recovery is complete. The issues are the subject of an administrative proceeding before NYSDOL.

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<sup>1</sup> This cause of action appears to seek declaratory relief in the form of the Court declaring the Labor Commissioner’s collection efforts unlawful.

NYSDOL held a hearing in the matter on December 20, 2017. Executive brought a motion to dismiss before the hearing officer on that date. Said motion is based upon, *inter alia*, Executive's contention that the Library is not a public agency covered by the prevailing wage provisions. The instant litigation against the Commissioner, the Library, the Library's Director, the Library's Board of Trustees' President and the Library's Board of Trustees was commenced in November of 2017.

### **Procedural Background**

All defendants responded to Executive's original verified complaint/petition with motions to dismiss. Executive served an amended verified complaint/petition. The Commissioner withdrew its motion to dismiss as moot. The Ossining defendants took the position that their motion was fully submitted and that Executive could not serve an amended pleading without leave of the Court or consent of the parties. Nevertheless, the Ossining defendants did respond to the amended pleading with further opposition. The Court advised that Executive was allowed to amend its pleading as of right (*see, STS Management Development Inc. v New York State Department of Taxation and Finance*, 254 AD2d 409, 410 [2<sup>nd</sup> Dept. 1998]). Additionally, the Court advised that it would treat the Ossining defendants' motion to dismiss and all its submissions as applying to the amended pleading. Additionally, the Ossining defendants and Executive were given an opportunity to be heard as to Court's treatment/interpretation of the issue of the amended pleading and the motion to dismiss. None of the litigants availed itself of this opportunity. The Court further advised that, in the interests of judicial economy, the Court would address both motions to dismiss in a single decision and order.

### **Discussion**

#### **Motion to Dismiss Standard for CPLR § 3211(a)(7)**

In considering the dismissal motions under CPLR §3211(a)(7), the Court must accept the facts set forth in the amended pleading as true, accord Executive the benefit of every possible favorable inference, and solely determine whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, the Court cannot accept as true factual allegations and legal conclusions that are inherently incredible (*Quail Ridge Assoc. v Chemical Bank*, 162 AD2d 917, 918 [3<sup>rd</sup> Dept. 1990]).

**Commissioner's Motion to Dismiss<sup>2</sup>**

The Commissioner maintains that the Article 78 petition must be dismissed as premature based upon Executive's failure to exhaust its administrative remedies. In support, the Commissioner relies upon CPLR Article 78, the administrative hearing process set forth in Labor Law § 235 and the fact that no decision had been rendered on the administrative hearing at the time the amended pleading was served. The Commissioner also provided the Court with case law directly addressing the exhaustion issue in the context of a Labor Law prevailing wage issue. Finally, the Commissioner maintains that no exception to the exhaustion requirement applies here.

Executive maintains that the exhaustion requirement is inapplicable here and should not stop the Court from issuing declaratory relief. More specifically, Executive maintains that there are no factual issues in this case regarding the Library's purported public agency status. Accordingly, Executive argues that the exhaustion requirement should not apply. Additionally, Executive appears to be arguing that an administrative challenge would be futile because the Commissioner has a rule prohibiting the Administrative Law Judge from reaching a motion to dismiss the administrative hearing prior to conducting the hearing. Finally, Executive maintains that the exhaustion requirement does not apply because the Commissioner is proceeding without jurisdiction.

In reply, the Commissioner stresses that the Court cannot adjudicate the applicability of the prevailing wage issue or reach the "public agency" question while the underlying administrative proceeding is still underway.

As to the causes of action against the Commissioner (Cause of Action 3 and 6-10), she maintains that they were prematurely brought for the reasons already stated. Additionally, the Commissioner argues that Executive is improperly attempting to avoid and usurp NYSDOL's statutory authority to investigate Executive's purported violation(s) of the prevailing wage law. The Commissioner also notes that Executive's causes of actions are improperly based upon a prevailing wage theory that has already been disallowed by the Courts. Further, the Commissioner contends that a number of the causes of action fail to meet the CPLR standard for

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<sup>2</sup> It appears that the Commissioner has abandoned the personal jurisdiction argument based on her failure to address it in her reply papers. To the extent the argument is still viable, the Court finds that dismissal is unwarranted on this record.

particularity or clarity. Finally, the Commissioner discredits the sufficiency of the amended pleading as to the theories of: abuse of process; malicious prosecution; defamation and prima facie tort.

Executive did not address the Commissioner's arguments regarding the various causes of action. Rather, Executive argued for the first time that the issuance of declaratory relief would allow the parties to avoid the uglier aspects of this case including "the racially/ethnically biased nature of the Commissioner's prosecution." The Court notes that no facts supporting this extremely serious and inflammatory allegation have been proffered.

### **Article 78 Petition**

The Court finds that the instant article 78 petition was improperly commenced prior to the issuance of a final agency determination (*see, Matter of Hopewell Volunteer Fire Dept., Inc. v Gardner*, 101 AD3d 1652, 1653 [4<sup>th</sup> Dept. 2012]). Further, the Court finds that the relevant case law directly contradicts Executive's position that exhaustion is unnecessary here because of a purported lack of power or jurisdiction on the part of the Commissioner (*see, Id.; Matter of Christa Constr., LLC v Smith*, 63 AD3d 1331, 1331 [3<sup>rd</sup> Dept. 2009]). Finally, Executive's argument regarding the futility of exhaustion is bereft of merit and any relevant case law citations. In sum, the Court finds that Executive has prematurely commenced this Article 78 petition prior exhausting its administrative remedies and has failed to establish that any exception to the exhaustion rule applies here.

### **3<sup>rd</sup> Cause of Action – Unlawful Creation and Imposition of Tax**

The Court finds that the unlawful tax imposition claim has been prematurely brought prior to the resolution of the underlying administrative proceeding and the determination therein as to whether Labor Law Article 9 covers Executive's work for the Library. Additionally, the Court notes that the cause of action is premature as it has been brought prior to the actual imposition (as opposed to withholding) of any penalties, interests or other costs by the Commissioner. Further, the complained of high interest and penalties are specifically set forth in Labor Law § 235 and Executive has not brought any challenge to the legality or the constitutionality of said statute. For all of the foregoing reasons, the Court finds that the third cause of action must be dismissed.

### **6<sup>th</sup> Cause of Action - Constitutional Violations and Conspiracy**

The Court finds that the constitutional claims have been prematurely brought prior to the

resolution of the underlying administrative proceeding and the determination therein as to whether Labor Law Article 9 covers Executive's work for the Library.

Additionally, the conspiracy claim must be dismissed based upon Executive's failure to plead wrongful acts constituting an independent tort (*see, Gorman v Gorman*, 88 AD2d 677, 678 [3<sup>rd</sup> Dept. 1982]).

#### **7<sup>th</sup> Cause of Action - Abuse of Process**

The Court finds that Executive failed to allege that the Commissioner's pursuit of an administrative proceeding was outside the proper scope of a NYSDOL proceeding to recover for a purported failure to pay prevailing wages (*see, Panish v Steinberg*, 32 AD3d 383, 384 [1<sup>st</sup> Dept. 2006]). Accordingly, the cause of action must be dismissed. Additionally, the Court finds that the cause of action was prematurely brought prior to the resolution of the underlying administrative proceeding.

#### **8<sup>th</sup> Cause of Action - Malicious Prosecution**

Executive has failed to plead that the proceeding at issue (the administrative hearing) was terminated in Executive's favor (*see, 347 Central Park Associates, LLC v Pine Top Associates, LLC*, 144 AD3d 785, 785-786 [2<sup>nd</sup> Dept. 2016]; *D'Amico v Correctional Medical Care, Inc.*, 120 AD3d 956, 961 [4<sup>th</sup> Dept. 2014]). Accordingly, this cause of action must be dismissed.

#### **9<sup>th</sup> Cause of Action - Defamation**

Executive has failed to set forth the actual words complained of as well as the actual person(s) to whom the Commissioner published the allegedly defamatory statements (*see, CSI Group, LLP v Harper*, 153 AD3d 1314, 1320 [2<sup>nd</sup> Dept. 2017]). Accordingly, this cause of action must be dismissed (*see, Id.*). Additionally, the Court finds that this cause of action cannot stand because Executive has failed to allege that the Commissioner published a false statement without privilege or authorization (*see, Ferrar v Esquire Bank*, 153 AD2d 671, 672 [2<sup>nd</sup> Dept. 2017]).

#### **10<sup>th</sup> Cause of Action - Prima Facie Tort**

The Court finds that this cause of action cannot stand because Executive has alleged that the Commissioner was motivated by a desire to enrich the State Treasury. As such, Executive has negated the pleading requirement that the offending party must have acted with disinterested malevolence (*see, AREP Fifty-Seventh, LLC v PMGP Associates, L.P.*, 115 AD3d 402, 403 [1<sup>st</sup> Dept. 2014]). Accordingly, the prima facie tort cause of action must be dismissed as to the Commissioner.

### Ossining Defendants' Motion to Dismiss

The Ossining defendants assert that Executive's causes of action are premised upon the prevailing wage issue between Executive and NYSDOL. Said defendants further maintain that the action must be dismissed based on the relevant caselaw on prevailing wage regulations. More specifically, the Ossining defendants rely upon Court of Appeal case law holding that a contractor may not seek Labor Law § 220-d prevailing wage relief against a public entity through a private cause of action. Said defendants also discuss the public policy implications of allowing a corporation to seek to recover a prevailing wage shortfall against a public entity. Though not specified in any of their papers, the submissions make clear that the Ossining defendants are seeking relief pursuant to CPLR §§ 3211(a)(7) and 7804(f).

In opposition, Executive argued that it had plausibly alleged five viable causes of action. Executive also discussed each of the causes of action and the required elements in some detail. At the time of service of the opposition, Executive had only set forth the first five causes of action listed above. Additionally, Executive noted that it was in the process of serving an amended pleading.

In reply, the Ossining defendants argue that none of the causes of action are sustainable because they clearly arise from Executive's alleged failure to strictly comply with prevailing wage requirements. Accordingly, said defendants argue that case law prohibits pursuit of Executive's first five causes of action. Additionally, said defendants maintain that Executive failed to even meaningfully respond or argue to the motion to dismiss as to the second and fifth causes of action.

More specifically, the Ossining defendants argue that Executive's first cause of action for unjust enrichment clearly alleges that the Ossining defendants was unjustly enriched by the failure to pay prevailing wages. Therefore, the Ossining defendants maintain that the cause of action is unavailable under existing case law. As to the second cause of action, the Ossining defendants appear to be relying upon the theory that the negligence cause of action is too closely aligned with the forbidden type of cause of action related to Labor Law § 220-d. As to the third cause of action, the Ossining defendants argue that it in no way relates to them as Executive's theory appears to be that NYSDOL would be collecting monies from Executive in the form of an

unauthorized tax. As to the fourth cause of action, said defendants maintain that the cause of action is prematurely brought and improperly conflates issues.

In response to Executive's amended pleading, the Ossining defendants maintain that the new causes of action should be dismissed on the same basis as the original pleading. Additionally, said defendants argue that Executive's claims of federal constitutional violations would not be properly before this Court. The Ossining defendants also argue that the new causes of action (numbered 6-10) do not involve any alleged actions on the part of said defendants and only involved allegations against the Commissioner.

### **1<sup>st</sup> Cause of Action - Unjust Enrichment**

The Court finds this cause of action to be an improper attempt to circumvent clear Court of Appeals case law that prohibits recovery from a public agency for a contractor's non-compliance with the prevailing wage requirements (*see, Brian Hoxie's Painting Co. v Cato-Meridian Cent. Sch. Dist., supra*). The language of the amended pleading makes clear that the gravamen of this unjust enrichment cause of action against the Ossining defendants is the alleged failure to give notice of the prevailing wage requirements. This type of recovery has been clearly prohibited by the Court of Appeals (*see, Id.*).

Additionally, the Court finds that Executive failed to allege that it would be against equity and good conscience for the Library to retain the purported windfall of monies received here or that the purported windfall belongs to Executive (*see, L.A. Grika on behalf of McGraw, 161 AD3d 450 [1<sup>st</sup> Dept. 2018]; Town of Amherst v Brewster Mew Housing Co., Inc., 133 AD3d 1317, 1319 [3<sup>rd</sup> Dept. 2015]*). Accordingly, the first cause of action must be dismissed.

### **2<sup>nd</sup> Cause of Action - Negligence**

Again, the Court finds this cause of action to be an improper attempt to circumvent case law prohibiting recovery from a public agency for a contractor's non-compliance with the prevailing wage requirements (*see, Brian Hoxie's Painting Co. v Cato-Meridian Cent. Sch. Dist., supra*). The language of the amended pleading makes clear that the gravamen of this negligence cause of action against the Ossining defendants is the alleged failure to give notice of the prevailing wage requirements. This type of recovery has been clearly prohibited by the Court of Appeals (*see, Id.*). Additionally, the Court finds that Executive has failed to allege any form of

damages that would be recoverable in a negligence action. Rather, the alleged damages speak to purely economic losses as opposed to any physical harm, emotional harm or property damage (*see generally*, Milliken v Consolidated Edison Co. of New York, Inc., 84 NY2d 469, 476 [1994]; Restatement (Third) of Torts: Phys. & Emot. Harm § 4 (2010)). Further, the Court finds that Executive has not alleged the violation of a legal duty that exists independent of the contractual relationship with the Library (*see*, Clark-Fitzpatrick v Long Is. R.R. Co., 70 NY2d 382, 289-290 [1987]). As such, the second cause of action must be dismissed.

### **3<sup>rd</sup> Cause of Action – Unlawful Creation and Imposition of a Tax**

Again, the Court finds this cause of action to be an improper attempt to circumvent case law prohibiting recovery from a public agency for a contractor's non-compliance with the prevailing wage requirements (*see*, Brian Hoxie's Painting Co. v Cato-Meridian Cent. Sch. Dist., *supra*). The language of the amended pleading makes clear that the gravamen of this taxation cause of action against the Ossining defendants is the alleged failure to give notice of the prevailing wage requirements. This type of recovery has been clearly prohibited by the Court of Appeals (*see*, Id.). Additionally, the Ossining defendants' role in the purported unlawful creation and imposition of a tax is wholly unclear from the amended pleading. Further, the Court finds that the unlawful tax imposition claim has been prematurely brought prior to the resolution of the underlying administrative proceeding and the actual imposition (as opposed to withholding) of any penalties, interests, "taxes" or other costs by the Commissioner. Lastly, the complained of high interest and penalties are specifically set forth in Labor Law § 235 and Executive has not brought any challenge to the legality or the constitutionality of said statute. Based on all of the foregoing, the Court finds that the third cause of action must be dismissed.

### **4<sup>th</sup> Cause of Action - Breach of Contract**

Again, the Court finds this cause of action to be an improper attempt to circumvent case law prohibiting recovery from a public agency for a contractor's non-compliance with the prevailing wage requirements (*see*, Brian Hoe's Painting Co. v Cato-Meridian Cent. Sch. Dist., *supra*). The amended pleading makes clear that the gravamen of this contractual cause of action is the Ossining defendants' alleged failure to give notice of the prevailing wage requirements. This type of recovery has been clearly prohibited by the Court of Appeals (*see*, Id.). As such, the

fourth cause of action must be dismissed.

**5<sup>th</sup> Cause of Action - Violation of General Business Law § 349**

Again, the Court finds this cause of action to be an improper attempt to circumvent case law prohibiting recovery from a public agency for a contractor's non-compliance with the prevailing wage requirements (*see, Brian Hoe's Painting Co. v Cato-Meridian Cent. Sch. Dist., supra*). The language of the amended pleading makes clear that this deceptive practices cause of action against the Ossining defendants is a simple retread of the theory of the Ossining defendants' alleged failure to give notice of the prevailing wage requirements. This type of recovery has been clearly prohibited by the Court of Appeals (*see, Id.*). Additionally, Executive has not sufficiently identified consumer-oriented conduct arising out of this oral contract between Executive and the Library (*see, Shebar v Metropolitan Life Ins. Co., 25 AD3d 858, 858-859 [3<sup>rd</sup> Dept. 2006]*).

**6<sup>th</sup> Cause of Action - Constitutional Violations & Conspiracy**

The Court finds that the Ossining defendants' role in purported constitutional violations is wholly unclear from the amended pleading. The Court also again finds this cause of action to be an improper attempt to circumvent case law prohibiting recovery from a public agency for a contractor's non-compliance with the prevailing wage requirements (*see, Brian Hoe's Painting Co. v Cato-Meridian Cent. Sch. Dist., supra*). Additionally, the conspiracy claim must be dismissed based upon Executive's failure to plead wrongful acts constituting an independent tort (*see, Gorman v Gorman, 88 AD2d 677, 678 [3<sup>rd</sup> Dept. 1982]*).

**7<sup>th</sup> Cause of Action - Abuse of Process**

The Court finds that Executive failed to allege that the Ossining defendants' purported role in the pursuit of an administrative proceeding was outside the proper scope of a NYSDOL proceeding to recover for a purported failure to pay prevailing wages (*see, Panish v Steinberg, supra*). As such, the cause of action must be dismissed.

**8<sup>th</sup> Cause of Action - Malicious Prosecution**

Executive has failed to plead that the proceeding at issue (the administrative hearing) was terminated in Executive's favor (*see, 347 Central Park Associates, LLC v Pine Top Associates, LLC, supra; D'Amico v Correctional Medical Care, Inc., supra*). Accordingly, this cause of

action must be dismissed.

**9<sup>th</sup> Cause of Action - Defamation**

Executive has failed to set forth the actual words complained of as well as the actual person(s) to whom the Ossining defendants published the allegedly defamatory statements (*see, CSI Group, LLP v Harper, supra*). Accordingly, this cause of action must be dismissed (*see, Id.*). Additionally, the Court finds that this cause of action cannot stand because Executive has failed to allege that the Ossining defendants published a false statement without privilege or authorization (*see, Ferrar v Esquire Bank, supra*). Accordingly, this cause of action must be dismissed.

**10<sup>th</sup> Cause of Action - Prima Facie Tort**

The Court finds that this cause of action cannot stand because Executive has alleged that the Ossining defendants were motivated by a desire to steal Executive's services and thereby reduce cleaning costs. As such, Executive has negated the pleading requirement that the offending party must have acted with disinterested malevolence (*see, AREP Fifty-Seventh, LLC v PMGP Associates, L.P., supra*). Accordingly, the prima facie tort cause of action must be dismissed as to the Commissioner.

**11<sup>th</sup> Cause of Action - Declaratory Relief**

The Court finds that the portion of the amended pleading seeking declaratory relief must also be denied based on Executive's failure to exhaust its administrative remedies (*see, Matter of Manor v Commissioner of Health of State, 107 AD3d 1116, 1118-1119 [3<sup>rd</sup> Dept. 2013]*). Further, as partially noted above, the Court has not been persuaded that Executive's pursuit of full administrative remedies would be futile or would cause an irreparable injury (*see, Id.* at 1119). Court interjection as requested by Executive would be a complete waste of judicial resources and an unnecessary intrusion into a clear statutory administrative process that was designed to handle the precise prevailing wage issues that Executive is attempting to litigate here. Accordingly, the Court finds that the portion of the amended pleading seeking declaratory relief must be dismissed.

**Injunctive Relief**

For the reasons stated above in dismissing the article 78 petition and all of Executive's

causes of actions, the Court finds that Executive has failed to establish the element of likelihood of success on the merits. Accordingly, without even reaching the remaining two elements, the Court finds that injunctive relief is wholly unwarranted in this matter.

The Court has considered the parties' remaining arguments and requests for relief and finds them to be without merit and/or unnecessary to reach in light of the Court's holdings.

Based upon the foregoing it is hereby

**ORDERED and ADJUDGED** that the Ossining defendants' motion to dismiss is hereby granted in its entirety; and it is further

**ORDERED and ADJUDGED** that the Commissioner's motion to dismiss is hereby granted in its entirety; and it is further

**ORDERED and ADJUDGED** that the portion of the amended petition seeking declaratory relief is hereby denied based on Executive's failure to exhaust its administrative remedies; and it is further

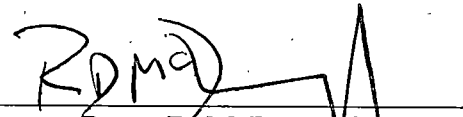
**ORDERED and ADJUDGED** that Executive's request for injunctive relief is hereby denied.

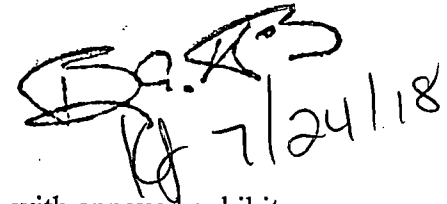
This shall constitute the Decision, Order and Judgment of the Court. The original Decision, Order and Judgment is being returned to the counsel for the Commissioner who is directed to enter this Decision, Order and Judgment without notice and to serve the respective counsel for all parties with a copy of this Decision, Order and Judgment with notice of entry. The Court will transmit a copy of the Decision, Order and Judgment to the County Clerk. As this is an E-file case, the Court will not provide any of the papers considered to the County Clerk. The signing of the Decision, Order and Judgment and delivery of a copy of the Decision, Order and Judgment shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved

from the applicable provisions of that rule respecting filing, entry and notice of entry.

**ENTER.**

Dated: Albany, New York  
July 5, 2018

  
Roger D. McDonough  
Acting Supreme Court Justice

  
7/24/18

Papers Considered<sup>3</sup>:

1. Ossining's Notice of Motion, dated December 4, 2017;
2. Affirmation of Andrea P. Demers, Esq., dated December 4, 2017, with annexed exhibits;
3. Affirmation<sup>4</sup> of Michael D. Diederich, Jr., Esq., dated December 28, 2017;
4. Reply Affirmation of Andrea P. Demers, Esq., dated January 5, 2018;
5. Affirmation of Andrea P. Demers, Esq., dated March 19, 2018;
6. Commissioner's Notice of Motion, dated March 26, 2018;
7. Affirmation of Jessica Agarwal, Esq., A.A.G., dated March 26, 2018, with annexed exhibits;
8. Affirmation of Michael D. Diederich, Jr., Esq., dated April 20, 2018, with annexed exhibit;
9. Affirmation of Jessica Agarwal, Esq., A.A.G., dated April 27, 2018, with annexed exhibits.

<sup>3</sup> All of the parties submitted memorandums of law in support of their respective positions. The Commissioner added a reply memorandum of law as well.

<sup>4</sup> This affirmation and the one dated April 20, 2018, were improperly titled as affidavits.