

Goldenberg v Friedman
2018 NY Slip Op 33973(U)
January 3, 2018
Supreme Court, Rockland County
Docket Number: 034866/2016
Judge: Thomas E. Walsh II
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
EUGENE GOLDENBERG, UNIVERSAL STEEPLEJACK
MASTER RIGGER, LLC and SETH EISENBERGER,

Plaintiff,

DECISION & ORDER

Index No. 034866/2016

Motion # 3 - MD MG

Motion # 4 - MD

Motion # 5 - MD MG

Motion # 6 - MG

DC- N

Adj: 3/1/18

-against-

CHAIM M. FRIEDMAN and BREWER HOLDINGS, LLC,

Defendant(s).

-----X
Hon. Thomas E. Walsh II, J.S.C.

The following papers numbered 1- 12 were considered in connection with Defendant's Notice of Motion (Motion #3) for an Order (i) pursuant to Civil Practice Law and Rules § 3211(a)(7) dismissing Plaintiff's Amended Complaint, (ii) pursuant to Civil Practice Law and Rules § 3016(b) dismissing Plaintiff's Amended Complaint, (iii) pursuant to DR 5-102, 22 N.Y.C.R.R. 1200.21, disqualifying the Law Office of Seth Eisenberger as counsel for Plaintiffs and (iv) for such other and further relief as the Court deems just, equitable and proper; and was also considered in connection with Plaintiff's Notice of Motion (Motion #4) for an Order

(A) pursuant to Civil Practice Law and Rules § 3126 striking Defendants' motion to dismiss and entering judgment in favor of Plaintiffs and against Defendants, jointly and severally, for the relief requested in the Amended Complaint and for an Order declaring and Ordering

(i) that Defendants must transfer the property known as 211 Old Nyack Turnpike, Chestnut Ridge, New York 10977, Section 57.17, Block 2, Lot 23, Town of Ramapo, Rockland County, State of New York (the "Property") or authorizing the Rockland County Sheriff or other appropriate governmental office to transfer the Property together with all previously and future

rent collected to Eisenberger and Goldenberg,

(ii) that the Property be sold and the proceeds of the Property sale together with all previously and future rent collected be paid as follows and in the following order,

(a) one third of the gross amount received for the sale of the Property and rent collected to Eisenberger and authorizing Eisenberger to effectuate such sale and collect all rents; then

(b) \$263,882.29 plus prejudgment interest to Goldenberg to reimburse him for the fees paid to Hahn & Hessen and Sandford Rosen, Esq.; then

(c) to Goldenberg his pro rata share of the remaining proceeds of the Property sale and rent proceeds computed as follows: $\$489,100/290,137.50$ with the larger percentage amount paid to Goldenberg; then

(d) to Eisenberger the legal fees uncurred for this action;

(iii) transferring all of Chaim Friedman's rights in the Settlement Agreement in In re Cole, Case No. 11-22313 (RDD) (Bankr. S.D.N.Y.), Goldenberg et al, v. Cole, Adv Pro. No. 11-08281 (RDD), Universal Steeplejack Master Rigger LLC et al v. Universal Steeplejack Inc., et al, Adv. Pro. No. 11-08314 (RDD) a copy of which is attached to the Eisenberger Aff. And any resulting judgment pursuant to the Settlement Agreement (the "Cole Judgment") and any proceeds thereof as follows:

(a) one third to Eisenberger; then

(b) to Goldenberg his pro rata share of the Cole Judgment computed as follows $\&489,100/290,137.50$ with the larger percentage amount paid to Goldenberger;

(c) \$263,882.29 plus prejudgment interest to Goldenberg to reimburse him for the fees paid to Han & Hessen and Sandford Rosen, Esq.; then

(d) to Eisenberger the legal fees incurred for this action;

(B) awarding Plaintiffs their actual and consequential damages against Defendants jointly and severally;

(C) awarding in favor of Plaintiffs a constructive trust if the Property and the Cole Judgment;

(D) awarding Plaintiffs punitive damages in the amount of ten million dollars against Defendants, jointly and severally,

(E) awarding Plaintiffs their costs, disbursements and attorney's fees of this action; and
(F) awarding Plaintiffs such other and further relief as the Court deems just and proper;
and also considered in connection with Plaintiff's Order to Show Cause (Motion #5) for an
Order:

(i) pursuant to Civil Practice Law and Rules § 2308(d), compelling all Subpoenaed
Witnesses to comply with subpoena lawfully issues to them by Plaintiffs' counsel, and to provide
all requested documents in the subpoenas to Plaintiff's counsel at their office located at 275
North Middletown Road, Second Floor, Pearl River, New York 10965;

(ii) issuing a warrant to the Sheriff of Rockland County commanding the Sheriff to bring
all Subpoenaed Witnesses before Plaintiff's attorney 275 North Middletown Road, Second Floor,
Pearl River, New York 10965 to provide testimony;

(iii) pursuant to Civil Practice Law and Rules § 2308(a) and New York Judiciary Law §§
753, 773 and 774 adjudging all Subpoenaed Witnesses in civil contempt of Court, on the grounds
that all Subpoenaed Witnesses willfully refused to obey a judicial subpoena commanding their
appearance for a deposition and their production of documents;

(iv) adjudging and finding that all Subpoenaed Witnesses have acted to defeat, impair,
impede, and prejudice Plaintiff's;

(v) ordering all Subpoenaed Witnesses to be fined, for their civil contempt the sum of
\$150 per day since the date of their contempt and to pay the fine to Plaintiffs;

(vi) ordering all Subpoenaed Witnesses to pay Plaintiffs' damages, including attorney's
fees incurred by Plaintiffs, by reason of all subpoenaed Witnesses' failure to comply with a
lawfully issued subpoena, in an amount to be determined at trial;

(vii) issuing a Warrant to Apprehend to the Sheriff of Rockland County commanding the
Sheriff to apprehend all Subpoenaed Witnesses and commit them to jail, there to remain until
they appear before Plaintiff's counsel, 275 North Middletown Road, Second Floor, Pearl River,
New York 10965, by whom their attendance was required for a deposition, and to produce the
documents requested;

(viii) issuing a warrant to the Sheriff of Rockland County commanding the Sheriff to
bring all Subpoenaed Witnesses before the Court for a deposition and to produce the required
documents;

(ix) striking Defendant's pleadings; and

(x) granting such other and further relief as the Court deems just and proper; and it is further; and also considered in connection with Plaintiff's Notice of Motion (Motion #6) for an Order (A) permitting Plaintiff's expert to examine Defendant's computer and email accounts, including the emails saved on the website or domain server; (B) awarding Plaintiff's such other and further relief as the Court deems just and proper:

PAPERS

NUMBER

Notice of Motion (Motion #3)/Affirmation of Jeremy Rosenberg, Esq./ Exhibit A/Defendant's Memorandum of Law in Support of their Motion to Dismiss the Amended Complaint	1
Memorandum of Law in Opposition (Motion #3)/Affirmation of Seth Eisenberger, Esq./Exhibits (A-C)	2
Memorandum of Law in Reply (Motion #3)	3
Notice of Motion (Motion #4)/Affirmation of Seth Eisenberger, Esq./Exhibits (A-F)	4
Affirmation of Jeremy Rosenberg, Esq. In Opposition (Motion #4)/Exhibits (A-D)	5
Affirmation of Seth Eisenberger, Esq. In Reply (Motion #4)/Exhibits (A-L)	6
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Notice of Motion (Motion #6)/Affirmation of Seth Eisenberger, Esq./Exhibits (A-E)	8
Affirmation of Jeremy Rosenberg, Esq. In Opposition (Motion #6)/Exhibits (A-C)/ Affirmation of Chaim M. Friedman	9
Affirmation of Jeremy Rosenberg, Esq. In Opposition (Motion #5)/Exhibit A	10
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The instant action was commenced by Plaintiff's filing of a Summons and Complaint on November 8, 2016. Defendants were served pursuant to Civil Practice Law and Rules § 308 on

December 20, 2016 and December 24, 2016.

Plaintiff claims that Plaintiffs and Defendants entered into an agreement in which Plaintiffs and Defendants allegedly agreed to divide any proceeds collected from a third party, who had previously defrauded the Plaintiff and Defendant. Further, Plaintiff alleges that the proceeds were to come from the financing of a property of the third party's that was to be transferred from the third party to both Defendants and Plaintiffs. Plaintiffs allege in the instant action that the Defendants transferred the property to themselves only.

Motion #3 Defendant's Pre-Answer Motion to Dismiss and Motion #4 Plaintiff's Motion Striking Defendant's Motion to Dismiss and relief sought in Amended Complaint

Defendants filed a pre-answer Motion to Dismiss (Motion #3) on January 24, 2017 pursuant to Civil Practice Law and Rules §§ 3211(a)(7), 3016(b) and seeking to disqualify the Law Office of Seth Eisenberger as counsel for Plaintiffs. Annexed to Defendant's motion is an Affidavit of Defendant's counsel, Jeremy Rosenberg, Esq., a copy of the Amended Complaint in the instant action and a Memorandum of Law. The Court notes that the Defendant's motion is lacking an affidavit/affirmation of the party or a person with personal knowledge in the instant action.

Plaintiff in their cross motion address each of the twenty-two (22) causes of action in the Amended Complaint. Annexed to Plaintiff's cross motion opposing Defendant's motion to dismiss is the Retainer Agreement between Plaintiff Goldenberg, Defendant Friedman and Plaintiff Seth Eisenberger (as their counsel), the Bankruptcy Court Order for the third-party (Cole) and the Settlement Agreement between Plaintiff Goldenberg, Defendant Friedman and the third party (Cole).

In considering a motion to dismiss for failure to state a cause of action pursuant to Civil Practice Law and Rules § 3211(a)(7) the pleadings must be liberally construed and the sole criterion is whether from within the complaint's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law. The facts pleaded are to be presumed to be true and are to be accorded every favorable inference. [*Gershon v Goldberg*, 30 AD3d 372 (2d Dept 2006); *Fitzgerald v. Federal Signal Corp.*, 63 AD3d 994 (2d Dept 2009)]. When a party moves to dismiss a complaint under this sub-section the standard is whether the

pleading states a cause of action, not whether the proponent of the pleading has a cause of action, and, in considering such a motion the court must determine only whether the facts as alleged fit within any cognizable legal theory. Whether a plaintiff can ultimately establish its allegations is not part of the calculus. [*Sokol v Leader*, 74 AD3d 1180 (2d Dept 2010)].

Upon a motion (iii) to dismiss for failure to state a cause of action under Civil Practice Law and Rules §3211(a)(7), the court must determine whether from the four corners of the pleading factual allegations are discerned which taken together manifest any cause of action cognizable at law. The Court should view the allegations in the complaint as true and accord plaintiffs the benefit of every reasonable inference and in determining such a motion [*Fitzgerald v. Federal Signal Corp.*, 63 AD3d 994 (2d Dept 2009)]. The Court also recognizes plaintiff's right to seek redress, and not have the courthouse doors closed at the very inception of the action, where the pleadings need meet only a minimal standard necessary to resist dismissal of a complaint [*Campaign for Fiscal Equity v State of New York*, 86 NY2d 307 (1995)]. The Court finds that the Amended Complaint does state the causes of action with specificity and sufficiently to allow the Defendants to defend the instant action.

The Court has reviewed the Amended Complaint and, based upon the foregoing, the motion should be denied as Defendants have not demonstrated their entitlement to the requested relief.

Turning now to Defendant's application to disqualify the Law Office of Seth Eisenberger as counsel to the Plaintiffs, Defendant argue that since Attorney Eisenberger is a named plaintiff in the instant action, he has asserted claims against the Defendants and is seeking a judgment against the Defendants it is clear his testimony is essential. Further, Defendants assert that as a witness Attorney Eisenberger will "certainly be deposed."

Disqualification of an attorney rests within the sound discretion of the Supreme Court. [*Nationscredit Fin. Servs. Corp. v. Turcios*, 41 AD3d 802 (2d Dept 2007); *Mondello v. Mondello*, 118 AD2d 549, 550 (2d Dept 1986); *Boyd v. Trent*, 287 AD2d 475, 476 (2d Dept 2001); *Campolongo v. Campolongo*, 2 AD3d 476 (2d Dept 2003); *Olmoz v. Town of Fishkill*, 258 AD2d 447 (2d Dept 1999)]. A party is entitled to be represented by counsel of their choice and that right should not be effected or abridged without a clear showing that disqualification is warranted. [*Aryeh v. Aryeh*, 14 AD3d 634 (2d Dept 2005); *Matter of Abrams [John Anonymous]*,

62 NY2d 183, 196 (1984)]. However, disqualification is warranted if the attorney's testimony is necessary. [*Nationscredit Fin. Servs. Corp. v. Turcios*, 41 AD3d at 802]. Rule 3.7 of the Rules of Professional Conduct provides that unless certain exceptions apply "[a] lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact." [Rules of Professional Conduct 22 NYCRR 1200.00 [Rule 3.7(a)]. The party moving to disqualify an attorney has the burden of making a showing of the necessity for the disqualification. [*S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.*, 69 NY2d 437, 445 (1987); *Nationscredit Fin. Servs. Corp. v. Turcios*, 41 AD3d at 803; *Solow v. Grace & Co.*, 83 NY2d 303, 308 (1994)]. To disqualify counsel, the moving party must demonstrate that (1) the testimony of the opposing party's counsel is necessary to his or her case and (2) such testimony would be prejudicial to the opposing party. [*S & S Hotel Ventures, Ltd. Partnership v. 777 S.H.*, 69 NY2d at 446; *Daniel Gale Assoc., Inc. v. George*, 8 AD3d 608, 609 (2d Dept 2004)].

Under the circumstances presented, Defendant established that attorney Seth Eisenberger is an essential witness who ought to be called to testify at trial. Attorney Eisenberger himself is a Plaintiff in the instant action and represented Plaintiff and Defendants over many years in an action in which he had a financial interest tied to the settlement agreement. Accordingly, Plaintiff Eisenberger can choose to represent himself, but he and his law firm are disqualified from representing Plaintiff Goldenberg or the company owned by Plaintiff Goldenberg, Universal Steeplejack Master Rigger, Inc (co-Plaintiff). The instant action is stayed thirty (30) days to allow Plaintiffs Goldenberg and Universal Steeplejack Master Rigger, LLC to obtain new counsel.

Plaintiff's Cross Motion for an Order striking Defendant's Motion to Dismiss and for a Judgment (Motion #4)

Plaintiff filed a cross motion seeking seeking an Order pursuant to Civil Practice Law and Rules § 3126(3) striking Defendants Motion to Dismiss and for a judgment in favor of Plaintiffs and against Defendants, jointly and severally, for the relief requested in the Amended Complaint due to Defendant's failure to comply with the Court ordered discovery schedule and failure to produce the Defendant for a deposition.

In opposition Defendants argue that they finally provided responses to Plaintiff's Request for Production of Documents in August 2017 and sought to have Plaintiff withdraw the instant

motion pursuant to Civil Practice Law and Rules § 3126(3). However, Defendant argues that Plaintiff refused to withdraw Motion #4 despite repeated requests by Plaintiff to withdraw the motion. Further, Defendants seek attorney's fees and costs pursuant to 22 NYCRR § 130-1.1 based on the Plaintiff's refusal to withdraw Motion #4. The Court declines to grant Defendant's request as it is not properly before the Court since it is raised solely in Defendant's opposition and not in a motion brought by Defendant.

As to Plaintiff's application to strike Defendant's Motion to Dismiss, the Court denies the application as moot. The Defendant's Motion to Dismiss has been denied by the undersigned. Nonetheless, the Court has considered the arguments raised by Plaintiff in support of their motion.

Pursuant to Civil Practice Law and Rules § 3126:

If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

The Court has broad discretion in making determinations concerning matters of disclosure including the nature and degree of the penalty to be imposed under Civil Practice Law

and Rules § 3126. [*Stone v. Zinoukhova*, 119 AD3d 928 (2d Dept 2014); *Silberstein v. Maimonides Medical Center*, 109 AD3d 812 (2d Dept 2013); *Raville v. Elnomany*, 76 AD3d 520 (2d Dept 2010)]. The striking of a pleading may be appropriate where the movant has made a clear showing that the failure to comply with the discovery demands is willful or contumacious. [*Silberstein v. Maimonides Medical Center*, 109 AD3d 812 (2d Dept 2013)]. Further, the Court can infer that a party is acting willfully or contumaciously through repeated failures to respond to demands or to comply with discovery orders, coupled with inadequate explanations for the failure to comply. [*Stone v. Zinoukhova*, 119 AD3d 928 (2d Dept 2014); *Silberstein v. Maimonides Medical Center*, 109 AD3d 812 (2d Dept 2013)]. However, public policy favors the resolution of cases on their merits, and the drastic remedy of striking a pleading should not be imposed unless the failure to comply is clearly willful and contumacious. [*Stone v. Zinoukhova*, 119 AD3d 928 (2d Dept 2014)].

In the instant action the Plaintiff is seeking to strike Defendant's Motion to Dismiss, as the Defendant's have not answered in the instant action due to the filing of the pre-answer Motion to Dismiss. The Court notes that the Defendant failed to comply with the discovery schedule set by the undersigned in early 2017 delaying the instant matter for months and resulting in several motions to be filed unnecessarily. Defendant argues that they have complied with Plaintiff's demands and produced all parties and non-parties for depositions. However, Plaintiff submits that the Defendant's responses are insufficient as they contain altered emails and the Defendant has cancelled several depositions. In hopes of moving the instant matter forward past the discovery stage, the Court is directing the Plaintiff to file Supplemental Discovery Demands within forty-five (45) days of the date hereof and Defendant is directed to respond to Plaintiff's requests within ten (10) days of the date of receipt of the demands by Defendant. All depositions, both party and non-party, are to be completed by **February 28, 2018, with no exceptions**. Any issues or problems with this final discovery Order is to be brought to the Court's attention via letter e-filed through NYSCEF and faxed to chambers within twenty-four (24) hours of the alleged violation.

The Court reminds the parties that Standards and Goals in this matter passed on November 8, 2017. As such, there will be no further extensions, adjournments or alterations to the aforementioned discovery schedule. Discovery not exchanged or depositions not completed

within the aforementioned schedule will be precluded.

Plaintiff's Order to Show Cause for Contempt and Sanctions (Motion #5)

Plaintiff filed an Order to Show Cause seeking a finding of contempt and for sanctions due to the failure of Defendants and subpoenaed non-parties - Haim (Chaim) Goldstein, Moses (Moshe) Friedman, Abe (Avrumi) Fischbein, Jacob Lichter, Arthur Liefer and Isaac Wiznitzer to appear for scheduled depositions and provide documents requested pursuant to a Subpoena Duces Tecum.

Based on the Court's ruling above the Court has directed the Defendants and all non-party depositions to be completed by **February 28, 2018, with no exceptions**. The Court declines to make a finding of contempt or assess sanctions at this time. However, if Defendant continues to act in a manner which delays discovery and/or depositions the Plaintiff will be granted leave to file an application for contempt and sanctions.

Plaintiff's Motion Permitting Plaintiff to Defendant's Computer and Email Accounts including emails served on the website or domain server (Motion #6)

Plaintiff makes a motion to have an expert complete a forensic review of Defendant's computer based on Plaintiff's allegation that the discovery responses and documents provided by Defendant to Plaintiff were "altered."

Under New York Law, a party is required to preserve evidence that may be relevant to pending or reasonably foreseeable litigation. [*Voom VD Holdings, LLC v. Echo Star Satellite, L.L.C.*, 69 AD3d 912 (1st Dept 2012)]. The requirement to preserve evidence has been extended to electronically stored information such as emails and other electronic documents. [*915 Broadway Associates, LLC v. Paul, Hastings, Janofsky & Walker, LLP*, 34 Misc.3d 1229(A), (Sup Ct NY Cty 2012)]. Any allegation of a party that the opposing party has altered, lost or destroyed key evidence before it can be examined by an other party's expert is best by an other party's expert is best addressed by the law of spoliation of evidence. Plaintiff is currently seeking access to Defendant's electronic files due to alterations to the documents.

In considering Plaintiff's argument and Defendant's opposition the Court has determined that the Defendant has been less than cooperative in exchanging discovery and a question

remains regarding the authenticity of the electronic discovery that has been exchanged to this point. The Plaintiff has identified variations and alterations within the discovery already provided which raises questions as to the possible spoliation of electronic evidence. Plaintiff is unable to make a spoliation of evidence motion regarding the electronic discovery without engaging in an examination of the computers upon which the records were taken to determine whether the records have been altered. The Court is granting Plaintiff's motion and directing the parties to arrange a mutually agreed upon date and time within forty-five (45) days of the date hereof for a computer forensic analyst, at the expense of the Plaintiff, to examine Defendant's computer and email accounts, including the emails saved on the website or domain server.

In arriving at this decision the Court has reviewed, evaluated and considered all of the issues framed by these motion papers and the failure of the Court to specifically mention any particular issue in this Decision and Order does not mean that it has not been considered by the Court in light of the appropriate legal authority.

Accordingly, it is hereby

ORDERED that Defendant's Notice of Motion (Motion #3) is denied in part and granted in part consistent with the above Decision; and it is further

ORDERED that Attorney Seth Eisenberger and the Law Office of Seth Eisenberger are disqualified from representing Plaintiff Eugene Goldenberg and Plaintiff Universal Steeplejack Master Rigger, LLC in the instant action; and it is further

ORDERED that the instant action is stayed thirty (30) days for Plaintiffs Eugene Goldenberg and Universal Steeplejack Master Rigger, LLC to obtain new counsel; and it is further

ORDERED that Plaintiff's Notice of Motion (Motion #4) is denied in its entirety; and it is further

ORDERED that the Plaintiffs are to file Supplemental Discovery Demands within forty-five (45) days of the date hereof and Defendant is directed to respond to Plaintiffs' requests within ten (10) days of the date of receipt of the demands by Defendant. All depositions, both party and non-party, are to be completed by **February 28, 2018, with no exceptions.**

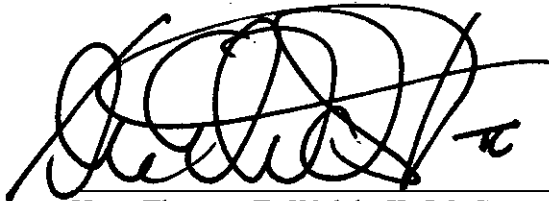
ORDERED that Plaintiff's Order to Show Cause (Motion #5) is denied in part and granted in part consistent with the foregoing Decision; and it is further

foregoing Decision; and it is further

ORDERED that the parties to arrange a mutually agreed upon date and time within forty-five (45) days of the date hereof for a computer forensic analyst, at the expense of the Plaintiff, to examine Defendant's computer and email accounts, including the emails saved on the website or domain server; and it is further

ORDERED that the parties are to appear for a conference on **THURSDAY MARCH 1, 2018 at 9:30 a.m.**

Dated: New City, New York
January 3, 2018

A handwritten signature in black ink, appearing to read "Thomas E. Walsh II", written over a horizontal line.

Hon. Thomas E. Walsh II, J.S.C.

To:

SETH EISENBERGER, ESQ.
THE LAW OFFICE OF SETH EISENBERGER.
Attorney for Plaintiffs
(via e-file)

MARK KURZMANN
KURZMANN LAW OFFICES, P.C.
Attorney for Plaintiffs
(via e-file)

JEREMY ROSENBERG, ESQ,
THE LAW OFFICE OF JEREMY ROSENBERG
Attorney for Defendants
(via e-file)