Stanger v Shoprite of Monroe, NY
2019 NY Slip Op 30383(U)
February 14, 2019
Supreme Court, New York County
Docket Number: 152038/18
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 2

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JOEL STANGER and LILY WONG,

Plaintiffs,

-against-

SHOPRITE OF MONROE, NY, BRIXMOR PROPERTY GROUP, INC., UNISOURCE MANAGEMENT CORPORATION, and CENTROP NP LLC,

Defendants.

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DECISION AND ORDER
Ind. No. 152038/18
Seq. Nos. 001 and 002

HON. KATHRYN E. FREED, J.S.C. :

The following efiled documents, listed by NYSCEF document numbers 20-29, 37-44, 49-58, 62 and 64, were considered in determining motion sequence 001.

The following efiled documents, listed by NYSCEF document numbers 72-101 and 103-115, were considered in determining motion sequence 002.

Motion sequence numbers 001 and 002 are consolidated for disposition. In motion seq. 001, plaintiffs move, pursuant to CPLR 1003, for an order "so ordering" a stipulation which seeks to amend the caption to add Brixmor Monroe Plaza, LLC (Brixmor Monroe) as a new defendant and remove defendants Centrop NP LLC (Centrop) and Brixmor Property Group, Inc. (Brixmor) from this action. Plaintiffs also move, pursuant to CPLR 1003 and CPLR 3025 (b), for leave to file and serve an amended summons and amended complaint to reflect the "changed names of the Brixmor defendants."[1] Defendants Brixmor, Centrop and Unisource Management Corporation (Unisource)

[1]The Court notes that plaintiffs filed the instant motion on June 4, 2018 but failed to annex a proposed amended summons and amended complaint to their motion as required by CPLR 3025 (b). Thereafter, on June 21, 2018, plaintiffs filed a proposed amended summons and proposed amended verified complaint which removed Centrop from the caption and included the

oppose the motion and plaintiffs submit a reply.

In motion seq. 002, Brixmor Monroe, a non-party and the proposed new defendant, moves, in lieu of an answer, to dismiss the complaint and all cross claims, as time barred pursuant to CPLR 3211 (a) (5). Plaintiffs submit opposition and, while Brixmor, Centrop, and Unisource did not move for the relief, they join in the reply.

I. Background

This is a negligence action to recover damages for personal injuries allegedly sustained by plaintiff Joel Stanger (Stanger) and a derivative claim for damages of plaintiff Lily Wong (Wong). Plaintiffs allege that, on March 7, 2015, as a result of defendants' negligence, Stanger slipped and fell at the Shoprite Monroe Plaza parking lot located at 785 State Route 17M, Monroe, New York (subject property) (verified complaint at 10, ¶¶ 52, 55). Stanger claims the accident resulted in his personal injuries as well as Wong's deprivation of the "comfort, care, companionship and society of her husband" (*id.*, at 10, ¶¶ 54-56; at 13, ¶ 65).

The captioned action was commenced on March 6, 2018 by the filing of a summons with notice against defendants, Unisource, Brixmor, Centrop[2], and Shoprite of Monroe, NY (Shoprite). On April 19, 2018, Brixmor and Centrop filed a notice of appearance and demanded a complaint. The demand for a complaint filed on behalf of Brixmor and Centrop was submitted by Heath Bender, Esq. Moreover, Mr. Bender filed a notice of appearance on behalf of Brixmor and Centrop.

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proposed new defendant, Brixmor Monroe. On June 22, 2018, plaintiffs filed an amended summons and amended verified complaint which included both Centrop and Brixmor Monroe in the caption.

[2] Brixmor alleges that Brixmor LLC, is sued herein as Centrop NP LLC.

Unisource by its attorney, Lisa Kramer, filed its notice of appearance on April 27, 2018 and also demanded a complaint. On May 24, 2018, plaintiffs filed a verified complaint alleging causes of action for negligence and loss of consortium (*id.*, at 10-13). Unisource answered on June 5, 2018, Brixmor and Centrop answered on June 8, 2018 and Shoprite answered on June 12, 2018.[3]

After receiving Brixmor's answer, plaintiffs claim they were advised by Mr. Bender that Brixmor Monroe was the owner of the subject property. Plaintiffs further allege that Mr. Bender agreed to stipulate to the same and to accept service of a supplemental summons on behalf of Brixmor Monroe (plaintiffs' moving papers at 3, ¶ 8). Thereafter, on or about May 11, 2018, Mr. Bender, as attorney for Brixmor Monroe, signed the stipulation. On or about June 1, 2018, Unisource's attorneys, Faust, Goetz, Schenker and Blee, were substituted as attorney of record for Brixmor and Centrop (NYSCEF Doc #23). The stipulation provided for the amendment of the caption of this action to remove Centrop and Brixmor as defendants and to replace Centrop with Brixmor Monroe. The stipulation, dated May 11, 2018, reads, in part, as follows:

> "1. Plaintiffs will electronically file via NYSCEF a Supplemental Summons changing the caption of the within action by removing "CENTROP NP LLC" and replacing said defendant with "BRIXMOR MONROE PLAZA, LLC", and removing "BRIXMOR PROPERTY GROUP, INC...."

Plaintiffs' stipulation also provided that "Unisource Management Corporation consents to accept service of a Supplemental Summons which reflects the corrected caption of this action..." (NYSCEF Doc #23).

It is undisputed that neither Unisource, Brixmor or Centrop executed the stipulation. On June

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[3] Despite plaintiffs' assertion to the contrary, Shoprite has appeared in this action by filing a verified answer with cross claims on June 12, 2018 (see plaintiffs' moving papers at 3, ¶ 6; Shoprite's Answer, dated June 12, 2018).

4, 2018, plaintiffs submitted the stipulation to the court to be "so ordered."

II. Discussion

MOTION SEQ. 001

Under motion seq. 001, plaintiffs seek an order "so ordering" the stipulation amending the caption and for leave to file an amended summons and amended complaint. In opposition, Brixmor, Centrop and Unisource argue that (1) plaintiffs improperly attempted to file a stipulation which was not executed by all parties and (2) any claims against the proposed new defendant, Brixmor Monroe, are time barred pursuant to CPLR 214 and 3211 (a) (5). Brixmor Monroe does not oppose plaintiffs' motion.

CPLR 1003 provides, in relevant part, that "parties may be added at any stage of the action by leave of court or by stipulation of all parties who have appeared." It is undisputed that counsel for plaintiffs and counsel for Brixmor Monroe executed the stipulation. Importantly, despite having appeared in this action, neither Centrop nor Brixmor was included in the stipulation. Furthermore, despite plaintiffs listing Unisource on the stipulation and requesting that that entity execute the same, neither Unisource nor its attorney signed the stipulation.

CPLR 2104 provides that an "agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered."

While plaintiffs argue that Unisource's refusal to sign the stipulation is irrelevant because the stipulation does not affect Unisource or prejudice a substantial right of any party, the stipulation

expressly contemplated Unisource's consent to accept service of a supplemental summons. In the instant case, since the stipulation is not executed by all parties who appeared in this action, i.e., Brixmor, Centrop and Unisource, the stipulation is not binding. Therefore, plaintiffs may not obtain the relief requested by way of stipulation (see CPLR 1003). Accordingly, that portion of plaintiffs' motion for an order "so ordering" the stipulation is denied.

Next, that branch of plaintiffs' motion for an order granting them leave to file an amended summons and amended verified complaint is decided as set forth below.

Plaintiffs again rely on the provisions of CPLR 1003 for an order adding Brixmor Monroe as a defendant[4]. In their reply, plaintiffs cite CPLR 3025 (b) as additional authority for the relief requested.

McKinney's CPLR 1003 is entitled "Nonjoinder and misjoinder of parties," and reads in relevant part, as follows:

> "**Parties may be added at any stage of the action by leave of court** or by stipulation of all parties who have appeared, or **once without leave of court** within twenty days after service of the original summons or at anytime before the period for responding to that summons expires or **within twenty days after service of a pleading responding to it. Parties may be dropped by the court, on motion of any party or on its own initiative**, at any stage of the action and upon such terms as may be just." **(emphasis added)**.

CPLR 3025, entitled "Amended and supplemental pleadings" reads in pertinent part as follows:

> "(a) Amendments without leave. A party may amend his pleading once without leave of court within twenty days after its service, or at any

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[4]Plaintiffs' proposed amended summons and proposed amended complaint removed Centrop as a defendant in the caption. The instant motion seeks only to add Brixmor Monroe as a party and is silent on the issue of dropping Centrop as a defendant. Plaintiffs' amended summons and amended verified complaint is consistent with the instant motion under Motion Seq. 001 in that it has retained Centrop as a defendant.

time before the period for responding to it expires, **or within twenty days after service of a pleading responding to it.**" **(emphasis added)**.

"(b) Amendments and supplemental pleadings by leave. A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading."

Here, plaintiffs timely commenced this action on March 6, 2018 by filing the summons with notice. Sometime between April 19-27, 2018, defendants demanded a complaint be filed. Plaintiffs complied by filing a verified complaint on May 22, 2018 and timely served all defendants. Unisource answered on June 5, 2018, Brixmor and Centrop answered on June 8, 2018, and Shoprite answered on June 12, 2018. On June 4, 2018, plaintiffs filed their instant motion to amend.

Pursuant to CPLR 3025 (a), plaintiffs were permitted to amend their pleadings as of right within 20 days from the service of defendants' answers. The earliest answer was served on the plaintiffs on June 5, 2018. While plaintiffs' proposed amended summons and proposed amended verified complaint naming the new defendant was required to be submitted with the motion on June 4, 2018, said proposed amendment was timely filed 16 days later. Likewise, the amended summons and amended verified complaint was filed 17 days after plaintiffs were served with Unisource's June 5, 2018 answer. Accordingly, the plaintiffs were entitled to amend their pleading to add a new party without leave of court, pursuant to CPLR 1003 and CPLR 3025 (a). Nonetheless, having filed the instant motion, the court concludes that the branch of plaintiffs' motion seeking leave to amend the summons and verified complaint in this action is granted pursuant to CPLR 1003. In view of the foregoing, plaintiffs' application is granted and the caption shall be amended to include Brixmor

Monroe Plaza, LLC as a defendant.[5]

MOTION SEQ. 002

In motion seq. 002, Brixmor Monroe moves to dismiss the complaint and all cross claims, in lieu of an answer, as time barred pursuant to CPLR 3211 (a) (5).

A. Motion to Dismiss Standard

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction and 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" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Pursuant to CPLR 3211 (a) (5), the Court may dismiss a cause of action as time barred under the applicable statute of limitations. The initial burden is on the defendant to show that the claims against him are time barred by the applicable statute of limitations (*see Tristaino v Teitler*, 24 Misc 3d 1244[A], 2009 NY Slip Op 51876[u],*2 [Sup Ct, Suffolk County 2009]). Then, the burden shifts to the plaintiff to establish that the statute of limitations should have been tolled or that the defendant should have been stopped from asserting a statute of limitations defense (*see Putter v North Shore Univ. Hosp.*, 7 NY3d 548, 552 [2006]; *Tristaino v Teitler*, 24 Misc 3d 1244[A] [2009]; 2009 NY Slip Op 51876[u]).

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[5]The court notes the amended summons and amended verified complaint contain the incorrect spelling of defendant Centrop's name. The correct spelling is "Centrop NP, LLC" rather than "Centro NP, LLC".

CPLR 214 (5) provides that an action for personal injury must be commenced within three years. The act of filing marks the "interposition" of the claim for statute of limitations purposes (*Matter of Gershel v Porr*, 89 NY2d 327, 330 [1996]). As a general proposition, a tort cause of action cannot accrue until an injury is sustained (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90 [1993], see generally, Siegel, NY Prac § 40, at 64 [6th ed]).

CPLR 203 ("Method of computing periods of limitation generally") states in pertinent part as follows:

> "(a) Accrual of cause of action and interposition of claim. The time within which an action must be commenced, except as otherwise expressly prescribed, shall be computed from the time the cause of action accrued to the time the claim is interposed."

Here, plaintiffs' causes of action accrued on March 7, 2015 when Stanger allegedly fell on the subject property. On March 6, 2018, this action was timely commenced against Shoprite, Brixmor, Unisource and Centrop, by the filing of a summons with notice, albeit one day prior to the expiration of the three-year limitations period applicable to this action (see CPLR 214 [5]). Brixmor Monroe was served with a proposed amended summons and proposed amended verified complaint on June 21, 2018. Brixmor Monroe was also served with an amended summons and an amended verified complaint on June 22, 2018.

Brixmor Monroe has established that the pleading joining it as a defendant had neither been filed nor served before the expiration of the applicable period of limitations. Brixmor Monroe was not named as a party to the action in the summons with notice filed on March 6, 2018. Accordingly, Brixmor Monroe has satisfied its burden of showing that the claims against it are time barred by the applicable statute of limitations. Now, the burden shifts to plaintiffs to

establish that the statute of limitations should have been tolled or that the defendant should have been stopped from asserting a statute of limitations defense.

The issue before the court is under what circumstances an amended complaint adding a new defendant relates back to the initial complaint for statute of limitation purposes.

Plaintiffs argue that, pursuant to CPLR 203 (f), the "relation-back" doctrine applies and tolls the statute of limitations in this case.

CPLR 203 (f) states as follows:

> "(f) Claim in amended pleading. A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading."

The relation-back doctrine "enables a plaintiff to correct a pleading error - by adding either a new claim or a new party - after the statutory limitations have expired" (*Buran v Coupal*, 87 NY2d 173 [1995]). In order to facilitate a decision on the merits, the relation-back doctrine allows for judicial discretion to "identify cases that justify relaxation of limitation strictures." (*id.*, at 177). The court must also rule out any undue prejudice to plaintiffs' adversary (*id.*).

"Under the relation-back doctrine of CPLR 203 (b) and (c), new parties may be joined as defendants in a previously commenced action, after the statute of limitations has expired on the claims against them, where the plaintiffs establish that each of the following three criteria are satisfied" (*Higgins v City of New York*, 144 AD3d 511, 512 [1st Dept 2016]). First, plaintiffs must show that the claims against the new defendant arise from the same conduct, transaction, or occurrence as the claims against the original defendant. Second, the plaintiffs must show that the new defendant is "united in interest" (CPLR 203 [b][c]), with the original defendant, and will not

suffer prejudice due to lack of notice. Third, the plaintiffs must show that the new defendant knew or should have known that, but for the plaintiffs' mistake, they would have been included as a defendant (*id.*, at 513).

Brixmor Monroe argues that (1) it is a wholly separate entity from Brixmor, (2) the entities are not united in interest, (3) the relation back rule does not apply and (4) it did not have any principals or board members in common with Brixmor on March 7, 2015, when this cause of action accrued (Brixmor Monroe's motion at 8, ¶ 33). In support, Brixmor Monroe submits the affidavits of its Property Manager, Peter Calabrese, and its Property Director, Mary Hollebeke. In his affidavit, Mr. Calabrese states that, on March 7, 2015, the date of the alleged accident, Brixmor (1) did not own, control, manage, maintain, or operate Brixmor Monroe, (2) did not own control, manage, maintain, repair, supervise, inspect, or operate the subject property, and (3) Brixmor was not responsible for owning, controlling, managing, maintaining, repair, supervising, inspecting, and operating the subject property. Mr. Calabrese also claims that Brixmor does not have principals in common with Brixmor Monroe. Ms. Hollebeke submits the exact same affidavit as Mr. Calabrese but further asserts that (1) Brixmor is not responsible for the day-to-day operations of Brixmor Monroe, and (2) there is no contract or agreement in effect between Brixmor Monroe and Brixmor with regard to the ownership, control, management, maintenance, repair, supervision, inspection, and/or operation of the subject property.

In opposition, plaintiffs argue that Brixmor Monroe is united in interest with Brixmor and, thus, Brixmor Monroe can be charged with notice of the institution of the action and will not be prejudiced in maintaining a defense on the merits. It is uncontested that the claims against Brixmor Monroe arise out of the same conduct, transaction or occurrence, as the claims against

the originally named defendant, Brixmor. It is also uncontested that Brixmor Monroe knew or should have known that, but for plaintiffs' mistake as to the identity of Brixmor Monroe, the summons with notice would have been bought against Brixmore Monroe as well (Brixmor Monroe's affirmation at 3, ¶ 7).

As Brixmor Monroe concedes that plaintiffs have satisfied the first and third prongs of the relation-back doctrine, the court will now address the issue of whether Brixmor and Brixmor Monroe are "united in interest" for the purposes of tolling the statute of limitations.

The second requirement for applicability of the relation-back doctrine requires that Brixmor Monroe and Brixmor are united in interest. To be united in interest, the entities interests must be "'such that they stand or fall together and that judgment against one will similarly affect the other'" (*Lord Day & Lord, Barrett, Smith v Broadwall Mgt. Corp.*, 301 AD2d 362, 363 [1st Dept, 2003]; quoting *Connell v Hayden*, 83 AD2d 30 [2nd Dept 1981]; *Prudential Ins. Co. of Am. v Stone*, 270 NY 154 [1936]). Parties are united in interest when there is "some relationship between the parties giving rise to vicarious liability of one for the conduct of the other" (*Toribio v 575 Broadway LLC*, 61 Misc3d 1224[A]*2 [2017], quoting *Valmon v 4 M & M Corp.*, 291 AD2d 343, 344 [1st Dept 2002]). "[W]hether parties are united in interest generally is a question of law, not a question of fact"(*LeBlanc v Skinner*, 103 AD3d 202, [2d Dept 2012]; citing *Connell v Hayden*, 83 AD2d 30, 43 [1981]). "However, if the nature of the jural relationship between the defendants is disputed, then a question of fact is presented" (*id.*, at 44). The mere existence of a parent-subsidiary relationship does not demonstrate unity in interest. "Control by the parent over the subsidiary's everyday operations will, however, render the parent liable for the subsidiary's act." (*Pebble Cove Homeowners' Assn. v Fidelity*

N.Y. FSB, 153 AD2d 843 [2nd Dept 1989]). In order for vicarious liability to exist, "[t]he parent corporation must exercise complete dominion and control [over] the subsidiary's daily operations" (*Feszczyszyn v General Motors Corp.*, 248 AD2d 939, 940 [4th Dept 1998]; quoting 14 NY Jur 2d, Business Relationships, § 41, at 119).

Plaintiffs argue that Brixmor's SEC 8-k and 10-k filings (1) indicate that Brixmor owns 100% of Brixmor Monroe and (2) demonstrate that it has direct dominion and control over Brixmor Monroe, specifically in terms of financial obligations and profits (NYSCEF Doc #54 at 2, 30, 144). As proof, plaintiffs annex Brixmor's SEC 10-k documents which purport to establish that Brixmor and Brixmor Monroe are united in interest by virtue of the direct and physical financial obligations, burdens and profits that these parent-subsidiary entities jointly and equally share.

Next, plaintiffs argue that Mr. Calabrese, while acting in his capacity of Property Manager for Brixmor Monroe, submitted a Planning Board Application, on behalf of Brixmor, involving a conditional use permit for the subject property at issue in the instant action (plaintiffs' opposition, exhibit A). Plaintiffs also claim Mr. Calabrese attended planning board meetings on behalf of Brixmor which meetings concerned a conditional use renewal application and where discussions were held about various concerns, including snow removal, at the subject property in the instant case. Plaintiffs further allege that Brixmor's attorney confirmed in writing that Brixmor would repair shrubs and replace a broken island at the subject property. Next, plaintiffs argue that Mr. Calabrese is managing and operating Brixmor Monroe on behalf of Brixmor. Therefore, plaintiffs allege that both entities are jointly responsible for and involved with the ownership, management, operations, etc. of the subject property.

In reply, Brixmor Monroe merely argues that plaintiffs did not meet their burden and that plaintiffs' computer printouts fail to meet the foundational requirements to qualify as business records. CPLR 4518 provides that any writing or record, whether in the form of an entry in a book or otherwise, made as a record of any act, transaction or event, shall be admissible in evidence in proof thereof, if the judge finds that it was made in the regular course of any business (see CPLR 4519 [a] [c]) . While Brixmore Monroe argues that the computer printouts, including the transcripts of various board meetings, are uncertified and inadmissible, it fails to raise any issues which would place in doubt the accuracy of the computer records. For the purposes of the instant pre-discovery motion to dismiss, whether the complaint will survive a motion for summary judgment, or whether plaintiffs will ultimately be able to prove their claims, should not play a part in the determination of the instant motion *(McCarthy v Young*, 57 AD3d 955 [2d Dept 2008]). The record shows that the two companies, intentionally or not, often blurred the distinction between them. Moreover, the affidavits submitted by Mr. Calabrese and Ms. Hollebeke do not contradict plaintiffs' submissions. Nor does Brixmor Monroe offer other evidence or factual support to show that judgment against one would not necessarily bind the other.

Here it cannot be said that, as a matter of law, at this juncture, that Brixmor does not exercise complete dominion and control over the daily operations of Brixmor Monroe. In this pre-answer motion to dismiss, discovery has not yet been conducted as to the relationship between Brixmor and Brixmor Monroe. Accordingly, dismissal based on the statute of limitations is denied without prejudice.

III. Conclusion

Accordingly, based upon the foregoing, it is hereby:

ORDERED that the portion of plaintiffs' motion seq. 001 for an order "so ordering" the stipulation filed on June 2, 2018 is denied; and it is further

ORDERED that the portion of plaintiffs' motion seq. 001 for leave to amend the summons and verified complaint is granted, and the amended summons and amended verified complaint filed on June 22, 2018 (NYSCEF Doc. Nos. 59 and 60) are deemed served upon service of a copy of this order with notice of entry thereof, which service shall occur on all parties and on the Clerk of the Court within 30 days after entry of this order; and it is further

ORDERED that the Clerk of the Court shall amend the caption of this action to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 2

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JOEL STANGER and LILY WONG,

INDEX NO.: 152038/2018

Plaintiffs,

-against-

SHOPRITE OF MONROE, NY, BRIXMOR PROPERTY GROUP, INC., UNISOURCE MANAGEMENT CORPORATION, CENTROP NP LLC, and BRIXMOR MONROE PLAZA, LLC,

Defendants.

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and it is further

ORDERED that motion seq. 002 by Brixmor Monroe for an order dismissing the complaint and all cross claims on the ground that the action is barred by the statute of limitations is denied without prejudice; and it is further

ORDERED that Brixmor Monroe shall serve an answer to the amended verified complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that counsel are directed to appear for a preliminary conference to be held at the Supreme Court, 80 Centre Street, New York, New York, Room 280 on the 18th day of June, 2019 at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the Court.

Dated: February 14, 2019

ENTER:

HON. KATHRYN E. FREED, J.S.C.