

Binenti v Lynn

2019 NY Slip Op 34750(U)

January 8, 2019

Supreme Court, Westchester County

Docket Number: Index No. 61539/2016

Judge: William J. Giacomo

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

----- X
THOMAS BINENTI and ELBA FIGUEROA,
Plaintiffs,

– against –

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LAWRENCE LYNN, CADILLAC HOLDING LLC, 30-40
FLEETWOOD AVENUE CORP. and GRAMATAN
MANAGEMENT CORP.,
Defendants.

Seq. No. 6, 7, 8, 9

DECISION & ORDER

----- X
30-40 FLEETWOOD AVENUE CORP. and GRAMATAN
MANAGEMENT CORP.,
Third-Party Plaintiffs,

– against –

LAURA HANNA,
Third Party Defendant.

----- X

In an action to recover damages for personal injuries and to property (1) the third-party defendant Laura Hanna moves for summary judgment dismissing the third-party complaint (motion sequence #6); (2) the defendants 30-40 Fleetwood Avenue Corp. and Gramatan Management Corp. move for summary judgment dismissing the plaintiffs' complaint (motion sequence #7); (3) the defendants Lawrence Lynn and Cadillac Holding LLC move for summary judgment dismissing plaintiffs' complaint, limiting the scope of plaintiffs' claims for property damage, and on their cross claims against the defendants 30-40 Fleetwood Avenue Corp. and Gramatan Management Corp. (motion sequence #8); and (4) the third party plaintiffs cross-move for summary judgment on the third party action (motion sequence #9) :

Papers Considered

Sequence No. 6 & 9

1. Notice of Motion (#6)/Affirmation of Christopher R. Ingrassia, Esq./Exhibits A-O;

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2. Affirmation of Brian J. Carey, Esq. in Opposition/Exhibit A-B;
3. Notice of Cross Motion (#9)/Affirmation of Ronald P. Berman, Esq. in Support of Cross Motion and in Opposition to Motion (#6)/Exhibits A-F/Exhibit 1;
4. Affirmation of Christopher R. Ingrassia, Esq. in Opposition to Cross Motion (#9) and in Reply (#6);
5. Reply Affirmation of Ronald P. Berman, Esq. (#9)

Sequence No. 7

6. Notice of Motion (#7)/Affirmation of Ronald P. Berman, Esq./Exhibits A-V;
7. Affidavit of Brian J. Carey, Esq. in Opposition (#7)/Exhibit A;
8. Affidavit of Thomas Binenti and Elba Figueroa in Opposition (#7)/Exhibit 41;
9. Reply Affirmation of Ronald P. Berman, Esq. (#7)/Exhibit A;
10. Sur-reply Affidavit of Thomas Binenti and Elba Figueroa (#7)/Exhibits 1-4;

Sequence No. 8

11. Notice of Motion (#8)/Affirmation of Brian J. Carey, Esq./Exhibits A-Z, AA-JJ;
12. Affidavits of Thomas Binenti and Elba Figueroa in Opposition (#8)/Exhibits 1-41;
13. Reply Affirmation of Brian J. Carey, Esq. (#8)/Exhibits KK-OO;
14. Sur-reply Affidavit of Thomas Binenti and Elba Figueroa (#8)/Exhibit 1-11.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs Thomas Binenti and Elba Figueroa are rent-stabilized tenants in apartment 2F of a cooperative apartment building located at 30 Fleetwood Avenue, Mount Vernon. Binenti has been a tenant in the apartment since the 1970s. Figueroa moved into the apartment in or about 1989.

The residential cooperative building is owned by the defendant 30-40 Fleetwood Avenue Corp. ("Fleetwood") and managed by the defendant Gramatan Management Corp. ("Gramatan"). The shares to plaintiffs' apartment are owned by the defendant Cadillac Holding LLC ("Cadillac"). The defendant Lawrence Lynn ("Lynn") is a principal of Cadillac. Plaintiffs have a lease agreement with Cadillac.

The third-party defendant Laura Hanna ("Hanna") owns and occupies apartment 3F which is directly above plaintiffs' unit. Hanna is a shareholder who has lived in the building since 1980.

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Plaintiffs commenced this action seeking damages for personal injuries and property damage allegedly caused by negligent repairs made to their apartment after a leak occurred on August 20, 2013. Plaintiffs allege that the leak originated from Hanna's apartment due to an allegedly defective "flushometer" which is a component part of the toilet.

The complaint alleges that the leak resulted in flooding to plaintiffs' apartment causing damage to the ceilings, walls, windows, floors, baseboards, kitchen cabinets, and personal property. Plaintiffs assert that although Gramatan's representative came to the apartment on the day of the flood to witness the damage, it was not until August 28, 2013, that Lynn from Cadillac came to the apartment to witness the damage. The complaint alleges that Cadillac and Lynn were required to repair the furnishings and fixtures in the apartment while Fleetwood was required to repair the structural damage and that they failed to do so. Plaintiffs allege that after waiting months after the flood, they were forced to make the repairs incurring approximately \$60,000. They allege that the defendants failed to take any measures to secure the apartment regarding lead paint, asbestos, or mold after the flood.

The complaint asserts that Fleetwood, Gramatan, Lynn, and Cadillac, failed to timely or properly repair the damage resulting from the leak to plaintiff's apartment causing them to suffer further damage and personal injuries. Plaintiffs assert that the damage from the leak exacerbated Binenti's existing heart condition culminating in his need to undergo a heart transplant and that the damage caused both plaintiffs to suffer from post-traumatic stress disorder.

Plaintiffs seek \$25,000 in compensatory damages for damage to property against Cadillac; \$35,000 in compensatory damages for damage to property against Fleetwood; \$3M from all defendants for damages related to post-traumatic stress disorder and the exacerbation of Binenti's existing heart condition culminating in a heart transplant; and \$1M in punitive damages to punish the defendants for their wrong-doing and as a deterrent against future bad actions.

The Proprietary Lease

In 1992, Fleetwood and Cadillac's predecessor in interest entered into a Proprietary Lease for apartment 2F, which provides, in pertinent part:

LESSOR'S REPAIRS

2. The Lessor shall at its expense keep in good repair all of the building including all of the apartments, the sidewalk and courts surrounding the same, and its equipment and apparatus except those portions the maintenance and repair of which are expressly stated to be the responsibility of the Lessee pursuant to Paragraph 18 hereof.

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INDEMNITY

11. The Lessee agrees to save the Lessor harmless from all liability, loss, damage and expense arising from injury to person or property occasioned by the failure of the Lessee to comply with any provision hereof, or due wholly or in part to any act, default or omission of the Lessee or of any person dwelling or visiting in the apartment, or by the Lessor, its agents, servants or contractors when acting as agent for the Lessee as in this lease provided. This paragraph shall not apply to any loss or damage when Lessor is covered by insurance which provides for waiver of subrogation against the Lessee.

REPAIRS BY THE LESSEE

18. (a) ... Subject to the provisions of Paragraph 4 above, the Lessee shall keep the interior of the apartment (including interior walls, floors and ceilings, but excluding windows, window panes, window frames, sashes, sills, entrance and terrace doors, frames and saddles) in good repair, shall do all of the painting and decorating required for his apartment, including the interior of window frames, sashes and sills and shall be solely responsible for the maintenance, repair, and replacement of plumbing, gas and heating fixtures and equipment and such refrigerators, dishwashers, removable and through-the-wall air conditioners, washing machines, ranges and other appliances, as may be in the apartment. Plumbing, gas and heating fixtures as used herein shall include exposed gas, steam and water pipes attached to fixtures, appliances and equipment and fixtures, appliances and equipment to which they are attached, and any special pipes or equipment which the Lessee may install within the wall or ceiling, or under the floor, but shall not include gas, steam, water or other pipes or conduits within the walls, ceilings or floors or air conditioning or heating equipment which is part of the standard building equipment. The Lessee shall be solely responsible for the maintenance, repair and replacement of all lighting and electrical fixtures, appliances, and equipment, and all meters, fuse boxes or circuit breakers and electrical wiring and conduits from the junction box at the riser into and through the Lessee's apartment. ...

The provisions of the proprietary lease also apply as between Fleetwood and Hanna.

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The Lease Between Plaintiffs and Cadillac

The last written lease agreement between plaintiffs and Cadillac was executed on March 31, 1986, with separate renewal lease forms signed for subsequent years. The lease provides, in pertinent part:

9. Fire, accident, defects, damage. Tenant must give Landlord prompt notice of fire, accident, damage or dangerous or defective condition. If the Apartment cannot be used because of fire or other casualty, Tenant is not required to pay rent for the time the Apartment is unusable. If part of the Apartment can be used, Tenant must pay rent for the useable part ... Landlord is not required to repair or replace any equipment, fixtures, furnishings or decorations unless installed by the Landlord. ...

10. Liability. Landlord is not liable for loss, expense, or damage to any person or property, unless due to Landlord's negligence

Motions

Fleetwood and Gramatan move for summary judgment dismissing the plaintiffs' complaint.

Lynn and Cadillac move for summary judgment dismissing plaintiffs' complaint, limiting the scope of plaintiffs' claims for property damage, and for summary judgment on their cross claims against Fleetwood for contribution, indemnification, and breach of contract.

Laura Hanna moves for summary judgment dismissing the third-party complaint. Fleetwood and Gramatan cross-move for summary judgment on their third-party action.

DISCUSSION

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d at 853).

"Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Zuckerman v City of New York*, 49 NY2d at 562). Mere conclusions, expressions of hope or unsubstantiated

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allegations or assertions are insufficient to defeat a prima facie showing of entitlement to summary judgment (see *Zuckerman v New York*, 49 NY2d at 562).

Personal Injuries

Defendants demonstrated entitlement to summary judgment dismissing the plaintiffs' claim that the flooding incident in the apartment exacerbated Binenti's existing heart condition culminating in his need for a heart transplant.

The evidence demonstrates that Binenti's pre-existing cardiac condition began in 1991 when he had a stent placed. A further stent was placed in 1996. Binenti has suffered from congestive heart failure since 2007. In January 2013, he was diagnosed with chronic systolic congestive heart failure and atrial fibrillation. In November 2015, he was first told that he might need a heart transplant and underwent that procedure in December 2015. However, Binenti specifically testified that no treating physician ever told him that his heart transplant was required as a result of the incident in the apartment. Although Binenti testified that his physicians "possibly" told him that his need for a heart transplant was exacerbated by the incident, he admitted that he did not recall any doctor specifically stating such and when pressed further, he responded that no one ever told him that. Binenti further acknowledged that there was nothing in writing from any physician that the heart transplant was required because of the incident in the apartment. Defendants also submit a report of an independent medical exam conducted by Herbert A. Insel, M.D., a board certified cardiologist. Dr. Insel opines that there is no objective evidence to suggest that the conditions in the apartment led to the necessity of a heart transplant as Binenti's cardiac condition had long manifested and was severe in nature.

In opposition, plaintiffs failed to raise a triable issue of fact. Plaintiffs merely offer conclusory allegations without providing any evidence to raise an issue of fact. Further, plaintiffs' argument that their bill of particulars raises an issue of fact is without merit.

Defendants further demonstrated entitlement to summary judgment dismissing the plaintiffs' claims that they suffered from post-traumatic stress disorder as a result of the incident and Binenti's claims that he suffered injuries from exposure to asbestos, lead, mold, or vermin as a result of the incident in the apartment.

While it is true that New York recognizes a cause of action to recover damages for pure emotional distress, the plaintiffs must produce evidence which is sufficient to guarantee the genuineness of the claim (see *Conway v Brooklyn Union Gas Co.*, 189 AD2d 851, 851-852 [2d Dept 1993]).

Binenti testified at his deposition that he did not recall any physician telling him that he suffered from post-traumatic stress disorder. Binenti underwent a psychiatric IME with Norman Weiss, M.D., a board-certified psychiatrist. Dr. Weiss reviewed Binenti's medical records and averred that none of Binenti's treating physicians diagnosed him or treated him for PTSD and he had not sought psychological treatment, psychotherapy, or

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counseling. Moreover, Binenti testified that no doctor ever diagnosed him with an asbestos, lead, or mold related disease.

Figueroa also underwent an IME with Dr. Weiss. Dr. Weiss reviewed her medical records as well, noting that she had not been diagnosed with or treated for PTSD by any mental health professional. Indeed, Figueroa admitted at her deposition that she never treated with any mental health providers for PTSD and that no one ever diagnosed her with PTSD.

In opposition, plaintiffs failed to raise a triable issue of fact. Binenti's deposition testimony that he felt he had PTSD from what he read about the syndrome on the internet fails to raise a triable issue of fact (see *Monaco v CVS Corp*, 267 AD2d 437, 438 [2d Dept 1999]).

Punitive Damages

The defendants have demonstrated entitlement to summary judgment dismissing plaintiffs' demand for punitive damages.

Punitive damages are permitted when the defendant's wrongdoing is not simply intentional but "evinces a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations" (*Ross v. Louise Wise Servs., Inc.*, 8 NY3d 478, 489 [2007] quoting *Walker v Sheldon*, 10 NY2d 401, 405 [1961]).

Here, the conduct alleged by plaintiffs does not demonstrate a malicious intent or a high degree of moral culpability. The plaintiffs failed to raise a triable issue of fact that the defendants' alleged conduct was so gross, wanton, or willful, or of such high moral culpability, as to warrant an award of punitive damages (see *Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613 [1994]; *DiDomenico v Long Beach Plaza Corp.*, 60 AD3d 618 [2d Dept 2009]; *Outside Connection, Inc. v. DiGennaro*, 18 AD3d 634, 634 [2d Dept 2005]).

Claims against Lynn

"A member of a limited liability company 'cannot be held liable for the company's obligations by virtue of his [or her] status as a member thereof'" (*Matias v Mondo Props. LLC*, 43 AD3d 367, 367-368 [1st 2007], quoting *Retropolis, Inc. v 14th St. Dev. LLC*, 17 AD3d 209, 210, 797 NYS2d 1 [1st Dept 2005]). However, a party may hold a member of an LLC individually liable by application of the doctrine of piercing the corporate veil (see *Grammas v Lockwood Assoc., LLC*, 95 AD3d 1073, 1074-1075 [2d Dept 2012]). The factors to be considered in determining whether an individual has abused the privilege of doing business in the LLC form include the failure to adhere to LLC formalities, inadequate capitalization, commingling of assets, and the personal use of LLC funds (see *Grammas v Lockwood Assoc., LLC*, 95 AD3d at 1075; *East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 127 [2d Dept 2009]).

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Cadillac and Lynn demonstrated entitlement to summary judgment dismissing the individual claims against Lynn as Lynn did not act in his individual capacity. Lynn submits an affidavit attesting that he is the managing member of Cadillac, which has nine total members. He also served on the Board of Directors of Fleetwood. Lynn states that Cadillac is a limited liability company with articles of organization, operates pursuant to a written agreement, maintains its own bank account, files annual tax returns, and does not commingle funds in its bank account with any other entity. Lynn attests that at no time has he or any other member of Cadillac ever used Cadillac's funds for personal reasons. Flynn attests that Cadillac is the sole shareowner of plaintiffs' apartment and attaches a copy of the stock certificate issued to Cadillac's predecessor in interest. All lease payments were made by plaintiffs to Cadillac not to Lynn or any other member of Cadillac. Lynn attests that at no time did he ever act in his individual capacity or usurp Cadillac's role as the landlord of plaintiffs' apartment.

Plaintiffs' argument, in opposition, that Lynn is the de facto landlord as he was the only contact person known by them is insufficient to raise a triable issue of fact that the corporate veil should be pierced.

Claims Against Gramatan

The only claims asserted by plaintiffs against Gramatan are for mental anguish and a demand for punitive damages. Inasmuch as these claims have been dismissed, the complaint is dismissed against Gramatan.

Property Damage

Fleetwood argues that it did not have any legal duty to remediate any condition or to make any repairs to plaintiffs' apartment.

Cadillac argues that plaintiffs' claims for property damage should be dismissed based upon the terms of the lease or, in the alternative, should be reduced as plaintiffs failed to mitigate their damages. Moreover, Cadillac argues that Fleetwood had a duty to repair certain portions of the apartment pursuant to the proprietary lease and breached that duty.

Hanna moves for summary judgment dismissing the third party complaint and all cross claims asserted against her on the grounds that she did not have actual or constructive notice of the allegedly defective flushometer in her apartment. Hanna argues that prior to the date of the flood, the flushometer was replaced by Luis Cortez, the superintendent of the building employed by Fleetwood.

Fleetwood cross-moves for summary judgment on their third party claims against Hanna. They argue that pursuant to the proprietary lease, Hanna is responsible for the maintenance, repair, and replacement of plumbing including water pipes. The proprietary lease also includes an indemnification provision in paragraph 11 requiring the lessee to hold the lessor harmless from all liability, loss, damage, and expense arising from injury

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to property occasioned by the failure of the lessee to comply with any provision of the lease or by any act or omission of the lessee.

Cadillac argues, in opposition, that an issue of fact exists as to whether Hanna was negligent and whether she breached the proprietary lease.

The plaintiffs are tenants in their rent-stabilized apartment. After the damage occurred from the flooding, the responsibility for the resulting repairs lies either with Cadillac as the shareowner of the apartment, Fleetwood as the cooperative owner, or Hanna as shareowner of the apartment where the flood originated. The Court finds that on this record, it cannot be determined as a matter of law which party or parties are responsible for the damages as issues of fact exist. Moreover, issues of fact exist as to the amount of damages claimed by plaintiffs for the repair work.

Lynn attests that although Cadillac did not cause the water infiltration, he advised Binenti that Cadillac would undertake certain work inside the apartment. According to Lynn, Binenti declined the offer and advised that he wanted to do the repairs himself. Lynn further attests that Cadillac's standards for materials it may install inside a rent-stabilized apartment is "above builder grade but below custom" meaning materials of a like kind and quality that are durable, cost-effective, readily available, and easy to install and replace. Lynn attests that after reviewing photographs of the repairs done to the kitchen in plaintiffs' apartment, Cadillac would not have used the materials plaintiffs' chose such as ceramic, porcelain, and crown molding.

Luis Cortez, the superintendent for Fleetwood, attests that he is permitted but not required to make routine repairs inside the apartments. He attests that several months prior to the incident, Hanna had informed him that the bathroom toilet was not flushing properly. After examining the flushometer, he purchased a new one and installed it. He repeatedly flushed the toilet and confirmed that it worked properly. Hanna paid him directly for the cost of the flushometer and his labor. Hanna did not make any further complaints. On the date of incident, Binenti reported a flood in apartment 2F. Cortez went to the basement and shut off the water. He then went to Binenti's apartment and observed standing water and water coming down the walls and through the ceiling. He notified Gramatan and Lynn. He and a porter spent several hours in the plaintiffs' apartment mopping up the standing water. Cortez states that he did not have a key to Hanna's apartment. Hanna's husband eventually arrived with the key and upon entering the master bath, Cortez observed the flushometer's threaded cap had somehow become disconnected and left on the toilet seat. The threads were not stripped and there were no visible signs of damage. He screwed the flushometer back into place and then tested the toilet by flushing it approximately 40 times to ensure it worked properly. Cortez has no knowledge as to how or why the cap came disconnected.

Hanna testified that in May 2013, Cortez performed some repair work in her master bathroom replacing the flushing mechanism. Hanna paid Corez for this work. Hanna argues that she did not have any actual or constructive notice of water leaking into

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plaintiffs' apartment. After the May 2013 repair, she did not have any problems or difficulty operating the toilet. Hanna further argues that she relied on Cortez and that such reliance was not unreasonable and does not amount to negligence.

Based upon the evidence submitted, including the deposition testimony cited, the Court finds that issues of fact exist as to which party is responsible for the repairs warranting a denial of those branches of Fleetwood and Cadillac's separate motions for summary judgment dismissing the property damage causes of action and the denial of Fleetwood and Hanna's separate motions with respect to the third party complaint.

CONCLUSION

Accordingly, it is

ORDERED that the third-party defendant Laura Hanna's motion for summary judgment dismissing the third-party complaint is **DENIED** (motion sequence #6); and it is further

ORDERED that the defendants 30-40 Fleetwood Avenue Corp. and Gramatan Management Corp.'s motion for summary judgment dismissing the plaintiffs' complaint is **GRANTED** in part to the extent that the plaintiffs' demand for punitive damages is dismissed and the claim for damages related to personal injuries is dismissed; and the motion is otherwise **DENIED** (motion sequence #7); and it is further

ORDERED that the plaintiff's complaint is dismissed against Gramatan Management Corp. (motion sequence #7); and it is further

ORDERED that the branch of defendants Lawrence Lynn and Cadillac Holding LLC's motion for summary judgment dismissing plaintiffs' complaint, limiting the scope of plaintiffs' claims for property damage is **GRANTED** in part to the extent that the plaintiffs' demand for punitive damages is dismissed and the claim for damages related to personal injuries is dismissed; and the motion is otherwise **DENIED** (motion sequence #8); and it is further

ORDERED that the branch of the defendants Lawrence Lynn and Cadillac Holding LLC's motion for summary judgment dismissing plaintiffs' complaint insofar as asserted against Lawrence Lynn individually is **GRANTED** and the complaint is dismissed against him (motion sequence #8); and it is further

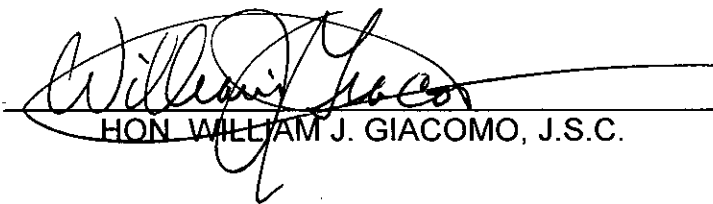
ORDERED that the branch of the defendants Lawrence Lynn and Cadillac Holding LLC's motion for summary judgment on their cross claims against 30-40 Fleetwood Avenue Corp. and Gramatan Management Corp. is **DENIED** (motion sequence #8); and it is further

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ORDERED that the third party plaintiffs Lawrence Lynn and Cadillac Holding LLC's cross motion for summary judgment on the third party action is **DENIED** (motion sequence #9).

The parties are directed to appear in the Settlement Conference Part, room 1600, on **February 5, 2019, at 9:15 a.m.** for further proceedings.

Dated: White Plains, New York
January 8, 2019



HON. WILLIAM J. GIACOMO, J.S.C.