Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LEONARD LIVOTE IA PART 33
Acting Supreme Court Justice

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R.Vig Properties LLC and Vig Associates LLC,
Plaintiff,

-against-

Yama Rahimzada, Y&R Management, LLC and Azeeta, Inc.,
Defendants.

Index No: 703252/12

Motion Date: 2/26/19

Mot. Seq. No. 4

The following papers read on this motion by defendants Yama Rahimzada, Y & R Management LCC (Y & R) and Azeeta, Inc. for an order granting summary judgment dismissing the complaint.

	Papers Numbered
Notice of Motion-Affidavit-Exhibits-Memorandum of Law--Defendants' Statement of Material Facts- Supporting Affirmation-Exhibits	EF 156-168
Opposing Affirmation-Affidavit-Exhibits-Response to-Statement of Material Facts-Memorandum of Law	EF170-190
Reply Affidavit-Reply Affirmation-Exhibits-Memorandum of Law	EF 191-195

Upon the foregoing papers the motion is granted as more fully set forth below:

Ramesh C. Vig is the managing member of Vig Associates LLC, and has a 50% interest in said entity. In mid-2005, a broker contacted Mr. Vig in connection with the sale of three improved commercial properties located in Valatie, New York, Tannersville, New York and Morrisville, Vermont. These properties were owned by defendant Y & R Management LLC, and each had a triple-net master lease with a supermarket tenant. Mr. Vig and the broker viewed the New York properties, and he thereafter declined to purchase said properties.

In 2006, Mr. Vig was contacted by a different broker in connection with the sale of the same three properties, and on June 5, 2006, he executed a binder with non-party WRA Properties Inc., for the purchase of said properties, for the sum of $20,400,000.00, with an offer to pay a down payment of $400,000.00, if his offer was accepted by the seller. The

amount that Mr. Vig was willing to pay for said properties was less than the 2005 asking price.

On June 21, 2006, Vig Associates LLC entered into a contract of sale with Y & R Management LLC to purchase the three parcels of land. The contract was executed by Ramesh C. Vig on behalf of Vig Associates LLC, and by Yama Rahimzada on behalf of Y & R Management LLC. The Valatie property's main tenant was a Grand Union supermarket, acting through its company, GU Markets of Valatie LLC. Said tenant had a triple-net lease, with approximately18 years remaining on the lease, at the time the contract of sale was executed. There was a single mortgage for the three properties. It is alleged that although then counsel for the parties negotiated the terms of the contract of sale, the seller produced a new contract of sale on June 21, 2006, which Mr. Vig signed on behalf of R. Vig.

The closing occurred on December 20, 2006, at which time both the seller and the purchaser were represented by counsel. At the closing the purchaser received an estoppel certificate dated September 25, 2006, signed by a representative of the Valatie tenant, Grand Union, stating that the rent was fully paid as of said date. The purchaser did not request an updated estoppel certificate stating whether or not the rent had been paid as of December 20, 2006.

The contract of sale was executed by a member of Y & R Management LLC, whose signature is illegible, and by Mr. Vig on behalf of Vig Associates LLC. The contract of sale gave the purchaser the right to assign said contract to a limited liability company in which the purchaser controlled more than 50%. No evidence has been submitted which establishes that the contract of sale was assigned or transferred to R. Vig by the purchaser, Vig Associates LLC. However, the bargain and sale deed transferred the Valatie property to R. Vig and was executed by Yama Rahimzada as President of Azeeta Inc., the sole manager of Y & R Management LLC. The closing statements also list R. Vig as the purchaser.

The Valatie tenant did not make any rent payments to R.Vig in January 2007, or any time thereafter. It is alleged that in January 2007, Barry Stafford, of Consolidated Affiliates Inc., a real estate consulting firm working on behalf of C & S Wholesale Grocers and GU Markets LLC, the companies "controlling" the Valatie tenant GU Markets of Valatie LLC, informed R. Vig that the Grand Union store was vacating the property. R. Vig thereafter made certain mortgage and other payments, but eventually deeded the properties to the lender in lieu of foreclosure.

R. Vig commenced an action arising out of the breach of the lease against the Grand Union Company, C & S Wholesale Groceries Inc., Montgomery Logistics LLC, Gu Markets of Valatie LLC and Gu Markets LLC, under Index Number 18885/2007 (Action No.1). R. Vig thereafter commenced an action against Gloria A. Cirino, Esq., Christina M. Panzarella,

Esq. and Aramanda & Panzarella, P.C., who represented the purchaser in the transaction involving the contract of sale, under Index No. 33887/2009 (Action No 2).

On December 12, 2012, R. Vig and Vig Associates LLC commenced the within action for breach of contract, fraud and fraudulent inducement, against Yama Rahimzada, Y & R Management Inc., and Azeeta, Inc.

All three actions were consolidated for the purposes of a joint trial, pursuant to an order dated June 14, 2013. The parties in Action No. 1 consented to e-filing and was assigned Index No. 702245/2018. Action No 1 was discontinued on June 8, 2018. The parties in Action No. 2 also consented to e-filing and the action was assigned Index Number 701812/2018. Action No. 2 was discontinued on April 25, 2019.

Plaintiffs in the within complaint allege that the defendant seller knew, but failed to disclose, that the master tenant of the Valatie property, the Grand Union supermarket "was in financial straits, had no assets apart from the lease, and intended to breach the lease and vacate the premises, while no longer paying rent, taxes and utilities." It is alleged that the defendants, individually and collectively, fraudulently induced the plaintiffs to purchase the three parcels of commercial property, and assume the mortgage covering all of the parcels, including the improved property in Valatie, New York, which was described as occupied with a triple net master lease.

Plaintiffs allege that defendants breached a duty to disclose; that they withheld material information regarding the viability of the anchor tenant of the Valatie property, and failed to disclose that said tenant was a single asset entity with no means of securing its rental obligations to a prospective purchaser, including the plaintiffs. It is further alleged that the defendants withheld material information regarding the tenant's changed factual circumstances, "revealed exclusively to them" which alerted the defendants of the tenant's financial difficulties, and intention to breach the master lease and vacate the Valatie property, absent rent concessions.

The complaint further alleges that the "defendants knew that there was a prior determination of the United States Bankruptcy Court for the District of New Jersey, which relieved all prior assignees of the Master Lease from any liability, absent new conduct that imposed liability via a lawsuit, for rent or obligations, notwithstanding the plain language of the lease which provided that such assignees were liable... yet failed to disclose this information the plaintiffs-buyer." It is alleged that R. Vig first learned of these details regarding the Bankruptcy Court order during discovery in Action No.1.

Plaintiffs allege that they are seeking to pierce the corporate veil of defendants Y &

R Management LLC and Azeeta LLC, and allege that said entities are exclusively controlled by Yama Rahimzada and function as his alter-ego, and that the fraudulent acts of these entities was done with the personal involvement of Rahimzada for his personal benefit and gain.

The first cause of action for fraud and deceit alleges, in essence, that the defendants had a duty to disclose material facts known to them that altered the plain meaning of the contract of sale in that the defendants knew that the master lease for the Valatie property had been effectively altered by the Bankruptcy Court order, and that the defendants had prior knowledge that the master tenant at the Valatie property was experiencing financial difficulties and was seeking rent concessions and that it intended to breach the lease. It is alleged that the defendants had a duty to disclose the same to the plaintiffs; that defendants willfully and intentionally failed to disclose said information in order to induce the plaintiffs into entering the contract of sale; and that defendants induced the plaintiffs to expeditiously close on the contract before the master tenant breached the lease. Plaintiffs allege that the suppression of said material facts by defendants "evidences false representation" and that the suppression of said material facts by defendants is "the equivalent of false representation". It is alleged that the defendants failed to disclose material changes in circumstances known exclusively to them, in order to deceive the plaintiffs; that the defendants did deceive the plaintiffs; and that the "defendants, individually, and collectively actively deceived the plaintiffs in misconduct which evinced a high degree of moral turpitude and demonstrated a wanton dishonesty as to imply a criminal indifference to civil obligations owed to the plaintiffs". Plaintiffs seek to recover compensatory damages of no less than $27,750,000.00 and punitive damages.

The second cause of action for misrepresentation alleges that the suppression of the aforesaid material facts by the defendants "evidences false misrepresentation"; that the suppression of said material facts by defendants is "the equivalent of false representation"; that all of these matters were material to the entire real estate transaction; that the defendants knew that they were concealing material facts; that the defendants concealed and withheld material facts in order to induce the plaintiffs "to act upon the facts as they appeared"; that the plaintiffs "acted upon the facts as they appeared and closed on the contract, causing substantial damages to the plaintiffs, such that the plaintiffs' down payment was disbursed to the defendants, the funds for financing were disbursed on behalf of the defendants, the plaintiffs incurred legal expenses, and the plaintiffs were deprived of $27,750,000.00, as 18 ½ years of rent due and payable under the Valatie commercial Master Lease, and in mitigation was compelled to deed the bundle of properties to the lender, in lieu of foreclosure". It is alleged that the "defendants, individually, and collectively actively deceived the plaintiffs in misconduct which evinced a high degree of moral turpitude and demonstrated a wanton dishonesty as to imply a criminal indifference to civil obligations

owed to the plaintiffs."

The third cause of action for breach of contract alleges, in pertinent part, that the defendants and plaintiffs entered into a contract for the sale of three parcels of improved, occupied, self-sustaining, commercial real property, with triple-net master leases, including the property in Valatie, New York and that as part of the contract plaintiffs would assume the mortgage on the three properties. It is alleged that at the time of the closing "defendants knew that the Valatie Master Tenant would be breaching its lease, not paying rent, taxes and utilities and vacating the premises notwithstanding that more than 18 years remained on the term of the Master Lease"; that the "occupied nature of the commercial real properties was material to the transaction"; that the "self-sustaining nature of the triple net leases was material to the transaction"; that the plaintiffs met and performed their obligations under the contract, and paid consideration; that the defendants "did not meet their obligations under the contract in a material way"; that at the time of the closing and the transfer of title, "defendants knew that the Valatie Master Tenant would be breaching its lease, not paying rent, taxes and utilities and vacating the premises notwithstanding that more than 18 years remained on the terms of the Master Lease"; that the defendants "knew that the viability of the master tenants was material to the transaction...knew that the self-sustaining nature of the properties was material to the transaction...knew that the Master Leases, as displayed to the plaintiffs was material to the transaction...knew that the Master Leases, as displayed to the plaintiffs, did not disclose the fact that the Bankruptcy Court had stricken the liability of prior assignees under the Master Lease...that as regards the Valatie property at closing the defendants did not what they plaintiffs had bargained for", thus materially breaching the contract of sale.

It is alleged that by virtue of defendants' breach of contract, plaintiffs lost the value of the entire bundle of the three properties that had to be deeded to the lender in lieu of foreclosure, and which plaintiffs would have "ultimately to have owned free and clear"; that defendants lost the value of the triple net leases on all of the properties, and seeks to recover no less that $100,000,000.00 in compensatory damages for breach of contract.

Defendants in their amended verified answer interposed ten affirmative defenses.

The parties have been deposed in this action and other depositions were taken of the parties in the now discontinued actions.

Defendants now move for an order granting summary judgment dismissing the complaint on the grounds that the fraud claims and breach of contract claim are barred by Paragraph 5 of the contract of sale, and by specific merger clauses contained in the contract of sale. Defendants further assert that plaintiffs cannot establish detrimental reliance, an

element of the fraud claims, and that the doctrine of caveat emptor further bars plaintiffs' claims.

Plaintiffs, in opposition, assert that defendants have failed to include in their moving papers copies of "any decision rendered", as directed by the court in an order dated September 24, 2015 and that defendants have failed to comply with prior discovery demands, and a stipulation and order dated January 25, 2018 pertaining to prior discovery demands. It is asserted that defendants thus have failed to produce any documents with respect to piercing the corporate veil. In addition, plaintiffs assert that although nonparty subpoenas were served on Yama Rahimzada's former attorneys who represented him in either the purchase of the subject property or the sale of the subject property, said subpoenas were not complied with and defendants' counsel have failed to assist plaintiffs in obtaining said depositions.

Plaintiffs further assert that defendants' motion should be denied and asserts that the parties' contract of sale contains a material inconsistency with respect to the provisions pertaining to rental arrears; that at the closing the seller did not disclose the rent arrears barred by the contract, and took a rent adjustment which was barred by the contract of sale, and thus breached the contract and engaged in fraud; and that the estoppel certificate produced by the seller failed to disclose the tenant's impending breach of the lease. It is asserted that the Tannersville and Valatie leases produced by the seller are misleading as Rahimzada did not disclose that material terms within the leases were inaccurate, in that the Grand Union Company bankruptcy proceeding resulted the eradication of liability by prior assignees. Defendants assert that Rahimzada, breached the contract of sale and "by way of material misrepresentations and active concealment" defrauded the plaintiffs, and therefore seek reverse summary judgment.

At the outset the court finds that defendants' failure to include copies of prior orders is not fatal to the within motion. Copies of prior orders, denying motions for summary judgment on procedural grounds have been submitted by the plaintiffs and have no bearing on the within motion. Plaintiffs have not moved to compel defendants to comply with the order of January 25, 2018, and a motion for summary judgment stays discovery (CPLR 3214[b]). The court further finds that defendants have no obligation to assist plaintiffs in securing the depositions of their prior transactional attorneys, as they do not have control over said non-parties.

It is well established that summary judgment may be granted only when it is clear that no triable issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The party moving for summary judgment "bears the initial burden of making a prima facie showing of its entitlement to judgment as a matter of law" (*Holtz v Niagara Mohawk Power,* 147 AD2d 857, 858 [1989]). It is equally well settled that on such a motion, the facts must be viewed

in the light most favorable to the non-moving party (*see e.g. Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). Once such a showing has been established, 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,* 68 NY2d at 324, *citing Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]). " '[O]ne opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim ... mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient' " (*Amatulli v Delhi Constr.,* 77 NY2d 525, 533 [1991], *quoting Zuckerman*, 49 NY2d at 562).

The elements of a cause of action for fraud are material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 488[2007]; *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). In a claim for fraudulent misrepresentation, a plaintiff must allege and establish "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011], *quoting Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421[1996]; *see also Channel Master Corp. v Aluminum Ltd. Sales*, 4 NY2d 403, 406-407[1958]). With respect to a claim of fraudulent omission, the complaint must also allege that the defendant owed a fiduciary duty to the plaintiff *(Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 179 [2011]; *see also Cobalt Partners L.P. v GSC Capital Corp.*, 97 AD3d 35 [1st Dept 2012]; *SNS Bank v Citibank,* 7 AD3d 353, 356 [1st Dept 2004]; *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept 2003]). Here, the complaint does not allege that the defendants owed a fiduciary duty to the plaintiffs, and plaintiffs do not assert that this transaction "was anything more than at arm's length, between sophisticated commercial parties who had their own advisors" (*Cobalt Partners L.P. v GSC Capital Corp.*, 97 AD3d at 43). Absent a fiduciary duty, plaintiffs may not maintain a claim for fraud in the inducement.

The court further finds that plaintiffs' claim for fraud in the inducement is barred by the terms of the parties' contract of sale. "While a general merger clause is ineffective to exclude parol evidence of fraud in the inducement, a 'specific disclaimer destroys the allegations in [a] plaintiff's complaint that the agreement was executed in reliance upon . . . contrary oral [mis]representations' " (*Rudnick v Glendale Sys.*, 222 AD2d 572, 573 [2d Dept 1995], *quoting Danann Realty Corp. v Harris*, 5 NY2d 317, 320-321 [1959]; *see Citibank v Plapinger,* 66 NY2d 90 [1985]; *Kim v Il Yeon Kwon*, 144 AD3d 754, 756 [2d

Dept 2016]; *Oseff v Scotti*, 130 AD3d 797, 799-800 [2d Dept 2015]; *Rudnick v Glendale Sys.*, 222 AD2d 572, 573-574 [2d Dept 1995]; *Weiss v Shapolsky*, 161 AD2d 707 [2d Dept 1990]).

Here, Section 4 of the contract of sale contains a specific merger clause, which provides, in pertinent part, as follows:

"Purchaser hereby acknowledges that Purchaser has inspected the Premises....Purchaser agrees to take the premises and all such property "as is" and in their present condition, subject to reasonable use, wear, tear and deterioration between now and Closing Date. Seller shall not be liable for any latent or patent defects in the Premises. Seller shall have the right to inspect the Premises prior to closing upon reasonable prior notice".

"Purchaser acknowledges that neither Seller nor any representative or agent of Seller has made any representation or warranty (expressed or implied) as to the physical condition, state of repair, income, leases, expenses or operation of the Premises or any matter or thing affecting or relating to the Premises or this Agreement, except as specifically set forth herein. Purchaser has not been induced by or relied upon any statement, representation or agreement, whether express or implied, not specifically set forth in this Agreement. Seller shall not be liable or bound in any manner by any oral or written statement, broker's "set-up", representation, agreement or information pertaining to the Premises or this Agreement furnished by any broker, agent, employee or other person, unless specifically set forth herein".

The court finds that Section 4 of the contract is sufficiently specific to bar the plaintiffs from claiming that they were fraudulently induced into entering the contract due to any oral representations pertaining to the Valatie property's lease (*see, Danann Realty Corp. v Harris*, 5 NY 2d at 320; *Kim v Il Yeon Kwon*, 144 AD3d at 756; *Oseff v Scotti*, 130 AD3d at 799-800; *Rudnick v Glendale Sys.*, 222 AD2d at 573-574; *Weiss v Shapolsky*, 161 AD2d at 708).

In addition, "New York adheres to the doctrine of caveat emptor and imposes no duty on the seller or the seller's agent to disclose any information concerning the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller or the seller's agent which constitutes active concealment" (*Jablonski v Rapalje*, 14 AD3d 484, 485[2d Dept 2005]). "Mere silence on the part of the seller, without some affirmative act of deception, is not actionable as fraud" (*Perez-Faringer v Heilman*, 95 AD3d 853, 854 [2d Dept 2012]; *see Matos v Crimmins*, 40 AD3d 1053, 1054 [2d Dept 2007]). "'To maintain a cause of action to recover damages for active concealment, the plaintiff must show, in effect, that the seller or the seller's agents thwarted the plaintiff's efforts to fulfill his responsibilities

fixed by the doctrine of caveat emptor" (*Perez-Faringer v Heilman*, 95 AD3d at 854, *quoting Jablonski v Rapalje*, 14 AD3d at 485). "Where the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations" (*Perez-Faringer v Heilman*, 95 AD3d at 854 [internal quotation marks omitted]; *see Schottland v Brown Harris Stevens Brooklyn, LLC*, 107 AD3d 684, 685-686 [2d Dept 2013]).

Plaintiffs' contention that facts peculiarly within the sellers' knowledge pertaining to the Valatie property's lease and the Grand Union tenant were allegedly misrepresented or not disclosed, is rejected (*see Danann Realty Corp. v Harris*, 5 NY2d 317; *Rudnick v Glendale Sys.*, 222 AD2d at 573-574; *LaBarbera v Marino*, 192 AD2d 697, 698 [2d Dept 1993]; *DiFilippo v Hidden Ponds Assocs.*, 146 AD2d 737 [2d Dept 1989]; *Dunkin' Donuts v Liberatore*, 138 AD2d 559 [2d Dept 1988]; *Superior Realty Corp. v Cardiff Realty*, 126 AD2d 633 [2d Dept 1987]). The plaintiffs had the means available to them by the exercise of ordinary intelligence to learn the facts underlying the alleged misrepresentations and nondisclosures (*see DiFilippo v Hidden Ponds Assocs.*, [2d Dept 1989]). Although the purchaser acknowledged in the contract of sale that it had inspected the subject property, Mr. Vig testified at his deposition he only visited the Valatie property in 2005, at which time he declined to purchase it. He admittedly did not visit the property in 2006, nor did he contact the Grand Union store manager or other employees, prior to entering the contract of sale or prior to the closing. Had he done so, he would have known that Grand Union was no longer the only supermarket in this small rural community. The existence of a new competing supermarket and its impact on the Grand Union supermarket's financial viability was not a fact solely within the knowledge of the seller.

The court further finds that information pertaining to Grand Union Company's Bankruptcy Court proceedings affecting the lease for the Valatie property, including an Asset Sale Agreement dated November 12, 2000, and a lease assignment and assumption agreement dated March 4, 2001, as well as an order of the United States Bankruptcy Court for the District of New Jersey, are matters of public record, and not facts known solely to the seller. Under these circumstances the plaintiffs will not now be heard to complain that they were induced to enter into this contract by misrepresentations or omissions, based upon their failure to conduct ordinary due diligence (*see Rudnick v Glendale Sys.*, 222 AD2d at 573-574; *LaBarbera v Marino*,

192 AD2d 697 [2d Dept 1993]).

The essential elements of a cause of action for breach of contract are the existence of a contract, the plaintiff's performance pursuant to that contract, the defendant's breach of its obligations pursuant to the contract, and damages resulting from that breach (*see Liberty Equity Restoration Corp. v Maeng-Soon Yun*, 160 AD3d 623 [2d Dept 2018]; *Elisa Dreier Reporting Corp. v Global Naps Networks, Inc.*, 84 AD3d 122, 127 [2d Dept 2011]; *JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802 [2d Dept 2010]; *Furia v Furia*, 116 AD2d 694 [2d Dept 1986]).

Here, plaintiffs claim for breach of contract is based upon the same omissions that were alleged in connection with the claims for fraud and misrepresentation. Plaintiffs, however, cannot maintain a claim for breach of contract based upon said omissions, as they failed to conduct proper due diligence. The complaint does not allege a breach of contract based on the failure to provide an estoppel certificate that covered rental payments up to and including December 2006, and plaintiffs have not sought to amend their complaint.

Furthermore, the tenant's default in paying rent at the time of the closing was not an impediment to closing, as Section 5 of the contract, entitled "Leases" provides as follows: "Purchaser has inspected the Leases and has relied solely upon the content thereof. Seller does not warrant that the tenants will be in possession on the Closing Date. If any tenant is in default under its lease, Seller may terminate said lease and remove said tenant. The removal of tenants by summary proceedings or otherwise prior to the closing shall not affect the obligations Purchaser hereunder, and shall not give rise to any claim against Seller or abatement of Purchase Price. Nor shall it be an objection if on the Closing Date any tenant shall holdover or be in default". A handwritten provision provides that: "All leases are triple net to tenants without expense to landlord."

In view of the foregoing, this court finds that defendants have established, prima facie, their entitlement to summary judgment dismissing the complaint, and plaintiffs have failed to establish the existence of a triable issue of fact. Plaintiffs have also failed to establish an entitlement to reverse summary judgment. Accordingly, defendants' motion is granted and it is,

Ordered, that the complaint is dismissed.

This constitutes the decision and Order of the Court.

Dated: June 14, 2019

A.J.S.C.