SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR F. ENGORON** **PART** **IAS MOTION 37EFM**

Justice

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INDEX NO. 452069/2020

MORLEEN FISHER, TAMARA WILLIAMS, BJ ATHILL, RODAISHA SMITH, GARY CORBIN, COALITION FOR THE HOMELESS

MOTION DATE N/A

MOTION SEQ. NO. 001

Petitioner,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES, STEVEN BANKS, AS COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES, THE NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES, JOSLYN CARTER,

DECISION + ORDER ON MOTION

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 14, 15, 16, 17, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39

were read on this motion for PREL INJUNCTION/CLASS CERTIFICATION.

Upon the foregoing documents, it is hereby ordered that the instant motion is denied.

THE SHORT VERSION

The New York State Constitution, Article XVII, Section 1 (adopted in 1938, in the wake of the Great Depression) provides as follows: "The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner, and by such means, as the legislature may from time to time determine." A well-established line of cases interprets those words to compel the City of New York to provide safe shelter to homeless persons.

In or about January 2020, the novel coronavirus started spreading throughout the United States, early on reaching New York City. The virus causes Covid-19, a highly contagious disease that can cause serious illness, sometimes with lingering significant side effects, or death. Humans transmit it to other humans primarily via respiratory aerosol droplets that breathing creates and speaking, coughing, etc., expel. "Social distancing," which lessens contagion, has become a watchword in our society.

The crux of this case is whether homeless people, or "at-risk" homeless people, or "disabled" homeless people, are entitled to single-occupancy rooms ("SORs") in hotels or other shelters. Petitioners have moved for a preliminary injunction (1), declaring such entitlement and

compelling concomitant action; and (2), for class action certification. However, as there is no competent medical, or unrebutted statistical, evidence that "congregate" (i.e., group) shelter significantly, or even noticeably, raises the risk of contracting Covid-19, and because declaratory judgment actions against governmental entities are disfavored, the motion must be denied.

THE LONG VERSION

Background

In early 2020 the Covid-19 pandemic started raging through the United States, sowing sickness and death in its wake. To date, 25,000,000 Americans have been infected. https://www.nytimes.com/live/2021/01/23/world/covid-19-coronavirus/?referringSource=articleShare. New York State, particularly New York City, was an early epicenter and has been particularly hard-hit. Cases first peaked in April, with 1,003 deaths statewide on April 14 alone; the weekly average was 974. After a quiescent summer, the virus came roaring back in the fall and winter. On January 21, 2021, one single day, the coronavirus infected 13,908 New York State residents; the daily average of infections that week was 14,324; 200 people died; and the daily average of deaths that week was 193. Despite the recent introduction of vaccines and their incipient widespread use, the new federal administration predicts half a million total American Covid-19 deaths, almost 100,000 more than the current number, within a few months, and that "things will get worse before they get better." Worldwide, well over a million people have died. To quote astronaut Jack Swigert, in the Apollo 13 Space Capsule, "Okay, Houston, we've had a problem here."

Petitioners, Morleen Fisher; Tamara Williams; BJ Athill; Rodaisha Smith; Gary Corbin; and Coalition for the Homeless (collectively, "Petitioners"), commenced the instant special proceeding/proposed class action against respondents, the City of New York ("NYC"); The New York City Department of Social Services ("DSS"); Steven Banks, as Commissioner of DSS; the NYC Department of Homeless Services ("DHS"); and Joslyn Carter, as Administrator of DHS (collectively, "Respondents"), to "remedy the failures of Respondents … to take appropriate action to temporarily provide shelter placements to single adults that are free of significant health risks during the course of the COVID-19 pandemic." (NYSCEF Doc. No. 1.) According to the petition:

> Many congregate shelters are housed in older buildings that had been previously used as armories or hospitals and can contain up to hundreds of residents under one roof; the largest shelter had as many as 851 men per night pre-pandemic. Bathroom facilities usually contain multiple showers, sinks, and toilets in one space. Meals are often distributed in a cafeteria … . Residents sleep at least three feet apart, but, prior to COVID-19, there were as many as 60 people sleeping in one dorm.

(NYSCEF Doc. No. 1 ¶ 77.) This may explain why "the age-adjusted COVID-19 mortality rate through the end of August 2020 for sheltered homeless single adults was 409 deaths per 100,000 people – 80 percent higher than the general population of New York City." (Id. ¶ 84, citation omitted.) Petitioners argue, "[s]ocial distancing, as is now universally understood, is not

possible in congregate shelters, where hundreds of people share sleeping, bathing, eating, and recreational space." (Id. ¶ 101.) As of late October, "the number of single adults in congregate shelter has [apparently] remained at roughly 5,500." (Id. ¶ 111.)

The proposed class action is on behalf of all single adults in NYC who are entitled to shelter who have not received placement in an SOR ("the Right-to-Shelter Class"), which includes two sub-classes: (1) members of the Right-to-Shelter Class who are at "heightened risk," as defined by the Centers for Disease Control and Prevention ("CDC"), of severe illness or death from Covid-19 due to their ages and/or medical conditions ("the Heightened-Risk Sub-Class"); and (2) members of the Right-to-Shelter Class who have a disability within the meaning of the Americans with Disabilities Act of 1990 ("ADA"), the federal Rehabilitation Act of 1973 ("the Rehabilitation Act"), the New York State Human Rights Law, and/or the NYC Human Rights Law ("the Disability Sub-Class").

The petition pleads ten causes of action against Respondents, to wit (as this Court interprets them):

(1) that Respondents' failure to offer SORs to the Right-to-Shelter Class is arbitrary and capricious;

(2) that Respondents' failure to offer SORs to the Heightened-Risk Sub-Class is arbitrary and capricious;

(3) that Respondents are failing to provide State due process to the Heightened-Risk Sub-Class;

(4) that Respondents are failing to provide Federal due process to the Right-to-Shelter Class;

(5) that Respondents are failing to provide State due process to the Right-to-Shelter Class;

(6) that Respondents are violating the ADA rights of the Disability Sub-Class;

(7) that Respondents are violating the Rehabilitation Act rights of the Disability Sub-Class;

(8) that Respondents are violating the New York State Human Rights Law § 296.2(a) rights of the disability Sub-Class;

(9) that Respondents are violating the New York State DSS Regulations rights of the Disability Sub-Class;

(10) that Respondents are violating the NYC Human Rights Law rights of the disability Sub-Class.

Respondents claim (1) that they have developed a "comprehensive program" to ensure the safety of homeless people living in congregate shelters and double-occupancy rooms ("DORs"); and (2) that they are providing due process galore. DHS formulated the program with input from the NYC Department of Health and Mental Hygiene ("DHMH"), including its then-Deputy

Commissioner of the Division of Disease Control, Doctor Demetre Daskalakis (now apparently at the CDC). DHS also has a recently updated "reasonable accommodation policy," titled "DHS PB-2020-012 Interim Reasonable Accommodation Request Process," originally developed pursuant to the settlement in Butler v City of New York, 15-CV-3783 (RWS) (JLC) (SDNY 2017).

DHS's Office of the Medical Director has recently formulated Covid-19 Risk Factor Guidelines, with input and review by DHMH, based on, but slightly different from, the following 13 conditions that the CDC has identified as associated with an increased risk of severe illness from Covid-19: cancer; kidney disease; chronic obstructive pulmonary disease ("COPD"); heart failure; coronary artery disease; cardiomyopathies; immuno-compromised state; organ transplant; obesity; severe obesity; sickle cell disease; smoking; and type 2 diabetes mellitus.

The CDC has identified the following 12 other conditions that may be associated with an increased risk of severe illness from Covid-19: hypertension; cerebrovascular disease; cystic fibrosis; immune deficiencies; neurological conditions; liver disease; pregnancy; overweight; pulmonary fibrosis; thalassemia; type 1 diabetes mellitus; and moderate-to-severe asthma.

Petitioners point out that the DHS Covid-19 Risk Factor Guidelines do not exactly track the CDC; for example, the guidelines fail to include smoking, obesity, and mild-stage COPD; and they specify only certain types of cancer.

The Instant Motion

Petitioners now move, simply put, pursuant to CPLR Article 9, for class certification; and, pursuant to CPLR 6301, for a preliminary injunction requiring Respondents, during the Covid-19 pandemic, to offer SORs to members of the Right-to-Shelter Class; or, in the alternative, to the Heightened-Risk Sub-Class; or, in the alternative, to the Disability Sub-Class; and to make individualized determinations with adequate notice and an opportunity to be heard. Respondents oppose the motion.

Discussion

Justiciability

Respondents argue (1) that the issues presented in this proceeding are non-justiciable, because DHS is vested with administrative discretion to determine how to provide shelter in the midst of a pandemic; and (2) that this Court should not substitute its judgment for that of public health officials. True, Respondents are vested with discretion to run NYC's shelter system; but this Court is vested with an obligation to ensure that their actions pass constitutional muster. "[I]t is the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them." Campaign for Fiscal Equity Inc. v New York, 100 NY2d 893, 925 (2003). See generally, Klostermann v Cuomo, 61 NY2d 525, 530, 536-37 (1984) (Cooke, J.) (homeless "claims do not present a nonjusticiable controversy merely because the activity contemplated on the State's part may be complex and rife with the exercise of discretion" or "because any adjudication in support of plaintiffs will necessarily require the expenditure of funds and a concomitant allocation of resources"); Hurrell-Harring v State, 15 NY3d 8, 26 ("enforcement of a clear constitutional or statutory mandate is the proper work of the courts"). In short, the instant dispute is as justiciable as they come.

Preliminary Injunction Requirements

"A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual." CPLR 6301. "[A] preliminary injunction will only be granted when the party seeking such relief demonstrates a likelihood of ultimate success on the merits, irreparable injury if the preliminary injunction is withheld, and a balance of equities tipping in favor of the moving party." 1234 Broadway LLC v West Side SRO Law Project, Goddard Riverside Community Ctr., 86 AD3d 18, 23 (1st Dept. 2011).

Likelihood of Success on the Merits

CPLR Article 78 – Arbitrary and Capricious Standard

In a CPLR Article 78 special proceeding, the scope of judicial review is limited to the issue of whether the administrative action is rationally based. Matter of Pell v Board of Educ., 34 NY2d 222, 230-31 (1974). "[A] court may not substitute its judgment for that of the board or body it reviews *unless* the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion." Id. at 232 (internal citation omitted). "The determination of an agency, acting pursuant to its authority and in its area of expertise, is entitled to deference." Nelson v Roberts, 304 AD2d 20, 23 (1st Dept. 2003).

Petitioners argue, inter alia, that Respondents' response to Covid-19 is arbitrary and capricious, because DHS has provided SORs to some homeless individuals and not to others, and because the current guidelines differ somewhat from CDC recommendations. Petitioners' position is untenable. Providing SORs to some homeless individuals and not others is rational, because the degree of risk every individual faces is different and is based on many factors. Likewise, the CDC recommendations are one-size-fits-all and do not take into account individual differences or NYC's current budgetary challenges.

According to Respondents, members of the Right-to-Shelter Class face the same – if not a lesser – risk of contracting Covid-19 as do members of the general public, many of whom share living space with family members and roommates, walk the streets and ride public transportation, and work front-line jobs. But see, "The Virus is Surging Through Many Overcrowded Homes In Los Angeles," https://www.nytimes.com/live/2021/01/23/world/covid-19-coronavirus#the-virus-is-surging-through-the-many-overcrowded-homes-in-los-angeles. Furthermore, DHS's reasonable accommodation policy provides members of the Heightened-Risk Sub-Class with an SOR if needed. (NYSCEF Doc. No. 32). Thus, Petitioners are not likely to succeed on the merits of their CPLR Article 78 claim.

Constitutional Claims

In Tucker v Toia, 43 NY2d 1, 8 (1977) (Gabrielli, J.), the New York Court of Appeals recognized that Article XVII, Section 1 "imposes upon the State an affirmative duty to aid the needy." Thus, "the provision for assistance to the needy is not a matter of legislative grace; rather, it is specifically mandated by our Constitution." Id. at 7. In McCain v Koch, 70 NY2d 109, 113-14 (1987) (Hancock, Jr., J.), the court held that this court, in a situation analogous to the instant one, has the power to issue a preliminary injunction requiring NYC "to provide

housing which satisfies minimum standards of sanitation, safety, and decency." More recently, in Callahan v Carey, 12 NY3d 496, 502 (2009) (Read, J.), the court recognized that NYC is obligated "to provide decent shelter for homeless adults." The trial courts have, of course, followed suit. See Barnes v Koch, 136 Misc 2d 96, 101 (Sup Ct, New York County 1987) (Tompkins, J.), holding that the right to "shelter necessarily includes the right to be sheltered free of potentially significant health threats." Currently, homeless individuals are housed in so-called "congregate" shelters, and DOR and SOR hotel rooms.

Doctor Daskalakis appears to be NYC's version of the federal government's Doctor Anthony Fauci (born and bred in Brooklyn, incidentally):

> I received my medical degree from the New York University School of Medicine and have a Master of Public Health from Harvard University's School of Public Health. I am Board Certified in Internal Medicine and Infectious Diseases and have practiced medicine for over 20 years. Before joining DOHMH, I worked full-time as a physician and researcher at the NYU School of Medicine and Mount Sinai Hospital's Icahn School of Medicine in New York City. I continue to work as an Associate Professor of Medicine and Infectious Diseases at Mount Sinai Hospital, where I also continue to see patients.

(NYSCEF Doc. No. 25 ¶ 1). He affirms as follows:

> Based on my public health expertise including expertise regarding the prevention and control of COVID-19 gained during my over nine months overseeing DOHMH's COVID-19 response, I disagree with Petitioners' assertions. The current DHS model is safe and has shown to be effective at minimizing the introduction and spread of COVID-19 within DHS facilities.
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> The effectiveness of the DHS model is due to a combination of factors, including DHS' ability to promptly identify possible or confirmed cases of COVID-19 at intake and after through a robust testing program; immediately isolate individuals who have symptoms of or test positive for COVID-19; and rapidly identify and quarantine individuals within the facility who may have been exposed (close contacts). These methods, along with proven prevention measures such as face coverings and physical distancing, have proven efficacious at preventing and containing the spread of COVID-19 within DHS congregate facilities.
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> * * *
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> DHS' efforts … have greatly reduced opportunities for transmission. After the establishment of these interventions, few instances of ongoing transmission among residents in adult congregate setting shelters have been identified, as reflected in the testing data.
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> Percent positivity (the percent of positive tests out of all the tests performed in a given population) is an important indicator of disease incidence and spread. The

> percent positivity during proactive COVID-19 testing at DHS facilities (at intake and routinely at DHS' adult facilities) has precipitously decreased since June, reaching 0.04% in September. Even with the recent increase in cases in New York City, the positivity rate for proactive testing at DHS sites remains less than 1% as of November 23, 2020. These numbers, placed in the context of overall New York City percent positivity, highlight the success of DHS' shelter model. Testing percent positivity for the City has been steadily rising since September, surpassing 3% in mid-November, and is currently over 4%.
>
> [T]here appears to have been minimal transmission within DHS facilities among clients. To the extent that DHS clients become infected with COVID-19, there appears to be minimal transmission that occurs among residents within DHS facilities, particularly within adult congregate shelter facilities. Rather, clients are likely infected in the community and then diagnosed either in the community or via DHS's onsite testing program. With the caveat that contact tracing cannot definitely confirm an individual's source of infection, the transmission that has been identified among DHS clients seems to occur principally in the Family Shelter system, among family groups— that is, clients transmit the virus to their family members with whom they live in DHS non-congregate facilities. This observation is similar to what we see in the general population in households. Accordingly, DHS' protocols are working: new cases are rapidly identified and isolated; exposed contacts rapidly identified, quarantined, and tested; and potential outbreaks averted.
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> * * *
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> As to Petitioners' assertion that single room occupancy is the only safe mechanism to house shelter clients, I am not aware of any guidance from the CDC, New York State, or New York City stating that private hotel rooms with private bathrooms are the only way to provide safe shelter to homeless individuals during the COVID-19 pandemic.

(NYSCEF Doc. No. 25 ¶¶ 6, 7, 16-18, 22). Consistent with this, Carolyn Wolpert, the Interim Deputy General Counsel for Homeless Services in the office of Legal Affairs of DSS, states that "[s]ince July, there has been only one potentially COVID-related death in the DHS shelter system. Final autopsy results are pending, and the cause of death has not been determined." (NYSCEF Doc. No. 30 ¶ 13.)

Petitioners have not submitted an affirmation from a licensed medical doctor affirming that the current system is unsafe. It is not in this Court's purview to question Respondents' reliance on their own unrebutted medical expert(s), especially without evidence of a significant amount of actual Covid-19 transmission within congregate homeless shelters. As they say in politics, "[y]ou can't beat someone with no one." Thus, Petitioners are not likely to succeed on their constitutional claims.

Due Process Claims

Petitioners argue that the homeless have a right to adequate notice, an opportunity to be heard, and individualized determinations to enforce those rights. However, Respondents appear to be providing all of the elements of due process. (NYSCEF Doc. Nos. 15, 17). Since December 21, 2020, DHS has been seeking to identify heightened-risk individuals at intake. The "reasonable accommodation policy," as updated, and the DHS COVID-19 Risk Factor Guidelines, taken together, illustrate that determinations regarding housing accommodations are made on individualized bases, with shelter clients having the opportunity to challenge their current shelter placements by requesting a post-deprivation State Fair Hearing. Simply put, Respondents appear to be providing "due process" to the extent that they have procedures in place by which members of the Right-to-Shelter Class are notified that they may apply for SORs, and that such applications are heard, considered, and decided.

Petitioners have submitted significant anecdotal and statistical evidence that the "process" is not working well. Their reply papers call the process "cumbersome" and "burdensome." (NYSCEF Doc. No. 33, at 3.) If so, this is unfortunate; but most bureaucracies could be so described. A streamlined process is, of course, desirable, and perhaps can be obtained, but is not constitutionally necessary. Respondents are entitled to some time, and are hereby encouraged, to make the process work better. However, Petitioners have not demonstrated that they are likely to succeed on their due process claims.

Disability Discrimination Claims

Petitioners argue, on behalf of the proposed Disability Sub-Class, that Respondents are violating the ADA, the Rehabilitation Act, the New York State Human Rights Law, the NYC Human Rights Law, and the New York State DSS regulations by discriminating against the proposed Disability Sub-Class, as many high-risk and/or disabled homeless persons are not being given SORs. This in no way demonstrates discrimination against the members of the Sub-Class. To establish a violation of the ADA and the Rehabilitation Act, for example, Petitioners must show that: (1) they are "qualified individual[s]" with a disability; (2) Respondents are subject to the ADA and Rehabilitation Act; and (3) class members were "denied the opportunity to participate in or benefit from [Respondents'] services, programs, or activities, or [were] otherwise discriminated against by [Respondents], by reason of [their] disabilities." Sinisgallo v Town of Islip Hous. Auth., 865 FSupp2d 307, 337 (EDNY 2012). Here, Respondents are not denying anybody an opportunity to participate in or benefit from any service, program, or activity by reason of a disability. To the contrary, if anything, Respondents appear to be providing more services to disabled individuals than to other individuals. Thus, Petitioners are unlikely to succeed on their disability discrimination claims.

Irreparable Harm

Had Petitioners demonstrated a likelihood of success on the merits on any of their claims, this Court would not have hesitated to find that they faced irreparable harm, in the form of serious illness or death. Respondents argue that illness or death would be speculative. However, the risk would not be speculative at all.

Balance of Equities

Petitioners argue that the balance of equities tips in their favor, as de-densification of homeless shelters will benefit the public at large. Assuming that congregate homeless housing is dangerous, it would increase the risk of infecting not only the residents, but also the public at large, because many residents (perhaps contrary to popular belief) travel and work around the City. Respondents have submitted reams of data to show that the financial costs would be significant. According to Ellen Levine, Chief Program Planning and Financial Management Officer at DSS, requiring NYC to provide all single homeless adults with single-occupancy hotel rooms would require an additional 15,920 hotel rooms, resulting in an estimated incremental cost of $913 million annually. (NYSCEF Doc. No. 26 ¶ 9.) Petitioners dispute these numbers and note significant Federal Emergency Management Agency ("FEMA") reimbursement. Furthermore, as recognized in Klostermann, supra, 61 NY2d at 537, the arguments that "there simply is not enough money to provide the services that plaintiffs assert are due them" and that a "lack of staff or facilities" can justify denying help for the homeless, simply do not fly. See generally, Doe v Dinkins, 192 AD2d 270, 276 (1st Dept. 1993) ("Compliance is mandatory despite a purported claim of insufficient funds").

When all is said and done, which way the balance of the equities tips will depend on how dangerous, if at all, congregate homeless shelter is.

Class Certification

This Court sees no basis for class certification. A declaratory judgment from this Court would bind Respondents whether there be one petitioner or ten thousand. An early case espousing this idea is Galvan v Levine, 490 F2d 1255, 1261 (2nd Cir 1973) (Friendly, J.): "[A]n action seeking declaratory or injunctive relief against state officials on the ground of unconstitutionality of a statute or administrative practice is the archetype of one where class action designation is largely a formality." More recently we have Aumic v Bane, 161 Misc 2d 271, 281 (Sup Ct, Monroe County 1994):

> Class actions against governmental bodies and agencies are normally held not to satisfy … the [class action] statute, and as a general rule, class certification is therefore inappropriate in lawsuits against the State or any of its political subdivisions. The reason for this rule … is simply the fact that the doctrine of stare decisis will presumably benefit and protect all petitioners in the purported class.

(Citations omitted). See also McCain v Koch, 117 AD2d 198, 221 (1st Dept. 1986): "We reverse Special Term's determination granting class certification. Class certification is superfluous where … the record does not evidence any unwillingness on the part of respondent government officials to comply with and apply court rulings equally to all persons similarly situated."

Final Thoughts

To this Court, unrelated adults, many with major health problems, living and sleeping in large, dormitory-style rooms sounds like a perfect recipe for Covid-19 disaster, for super-spreading. Yet Doctor Daskalakis says not to worry, all is well; and, at this stage of the litigation, no

evidence belies him. This reminds the Court of the memorable lines in The Marx Brothers's classic movie *Duck Soup*:

Margaret Dumont (as Mrs. Teasdale) - "But I saw you with my own eyes."
Chico (born Leonard) Marx (as Chicolini) - "Well, who ya' gonna believe, me or your own eyes."

Judges must follow the science, wherever it leads. This Court always believes in the paraphrase, "render unto doctors the things that are doctors." At this stage of this litigation, this Court will not substitute its judgment for that of Doctor Daskalakis, and the statistical evidence that apparently backs him up.

Summary of Holdings

This Court finds that this case is justiciable; that Petitioners have failed to demonstrate a likelihood of success on the merits on their Article 78, constitutional (including due process), and disability discrimination claims; and that class action certification is unwarranted.

CONCLUSION

Thus, the instant motion for class certification and a preliminary injunction are hereby denied; and, as previously arranged, the case-in-chief will be heard on March 19, 2021, at 11:00 AM via Microsoft Teams. The Court will be sending a link via NYSCEF or other means well in advance. At that time the Court will address any issues of compliance and enforcement. Counsel should be prepared with up-to-date health information and statistics and with concrete yet creative ideas to resolve the instant dispute.

1/25/2021
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE