Board of Mgrs. of the Washington Condominium v Silvershore Props. 97, LLC
2021 NY Slip Op 32709(U)
December 13, 2021
Supreme Court, Kings County
Docket Number: Index No. 515649/21
Judge: Lawrence S. Knipel
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At an IAS Term, Part Comm 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 13th day of December, 2021.

PRESENT:

HON. LAWRENCE KNIPEL,

Justice.

----------X

THE BOARD OF MANAGERS OF THE WASHINGTON CONDOMINIUM, on behalf of the unit owners of the WASHINGTON CONDOMINIUM,

Plaintiff,

- against -

Index No. 515649/21

SILVERSHORE PROPERTIES 97, LLC,

Defendant.

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The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations)	16-21

Upon the foregoing papers in this action to foreclose the ground floor commercial condominium unit at 35 Underhill Avenue in Brooklyn (Condominium Unit) for defendant's alleged failure to pay common charges, plaintiff, The Board of Managers of the Washington Condominium, on behalf of the unit owners of the Washington Condominium (Condominium Board), moves (in motion sequence [mot. seq.] one) for an order, pursuant to CPLR 3211 (a) (5) and (a) (7), dismissing the counterclaims asserted by defendant Silvershore Properties 97, LLC (SP 97).

Background

The Complaint

On June 25, 2021, the Condominium Board commenced this action by filing a summons, a verified complaint and a notice of pendency against the Condominium Unit. The complaint alleges that SP 97 purchased the Condominium Unit from the Condominium Board for $930,000.00 by a June 16, 2015 contract of sale (Contract of Sale) (complaint at ¶ 7). The Contract of Sale was allegedly amended on October 28, 2015, which "established that the total purchase price for the unit was $600,000 ('Amendment')[,]" which was "amended by a side agreement dated October 28, 2015 (the 'Side Agreement')" (*id.* at ¶¶ 8-9). The complaint further alleges that the Condominium Unit was "assigned" to SP 97, pursuant to an October 28, 2015 assignment, and that SP 97 is the "owner" of the Condominium Unit, as reflected in the deed (*id.* at ¶¶ 10-11).

The complaint alleges that Schedule A of the deed to the Condominium Unit provides, in relevant part, that it is:

> "SUBJECT to the rights, obligations, easements, restrictions and other provisions set forth in the Declaration, Floor plans and the By-Laws of the Condominium, as the same may be amended from time to time (herein after referred to as the 'By-Laws'), all of which shall constitute covenants running with the Land and shall bind any person having at any time any interest or estate in the Unit, as though recited and stipulated at length herein" (*id.* at ¶ 13).

Notably, the deed to the Condominium Unit (annexed as Exhibit G to the complaint,

NYSCEF Doc No. 8) specifically provides, in relevant part, that:

> "AND the party of the second part [SP 97] covenants that, in the event the certificate of occupancy for the unit is amended or newly issued to permit any and every use aside from its current use as 15 off street parking spaces, at the election of the party of second part [SP 97], the party of the second part [SP 97] shall pay, as consideration for the right to effectuate such amendment or new certificate of occupancy, the amount of $550,090 in certified funds to the party of the first part [the Condominium Board] within fifteen (15) days of the issuance of said amended or new certificate of occupancy . . . This provision may be enforced at law or in equity and shall be binding on successors, assigns, heirs, subsidiaries, affiliates, related entities or any future third party purchaser or transferee."

The Contract of Sale (annexed as Exhibit B to the complaint, NYSCEF Doc No. 3) references the deed, and provides at Section 16.02 that:

> "The delivery of the deed by Seller, and the acceptance thereof by Purchaser, shall be deemed the full performance and discharge of every obligation on the part of Seller to be performed hereunder, except those obligations of Seller which are expressly stated in this contract to survive the Closing.

Section 5.02 of the Contract of Sale provides that:

> Before entering into this contract Purchaser has made such examination of the Premises, the operation, income and expenses thereof and all other matters affecting or relating to this transaction as Purchaser deemed necessary. *In entering into this contract, Purchaser has not been induced by and has not relied upon any representations, warranties or statements, whether express or implied, made by Seller or any agent employee or other representative of Seller or by any broker or any other person representing or purporting to represent Seller, which are not expressly set forth in this contract,* whether or not any such representations, warranties or statements were made in writing or orally" (emphasis added).

Section 17.02 of the Contract of Sale provides that:

> "This contract embodies and constitutes the entire understanding between the parties with respect to the transaction contemplated herein and all prior agreements, understandings, representations and statements, oral or written, are merged into this contract. *Neither this contract nor any provision hereof may be waived, modified, amended, discharged or terminated except by an instrument signed by the party* against whom the enforcement of such waiver, modification, amendment, discharge or termination is sought, and then only to the extent set forth in such instrument" (emphasis added).

An October 28, 2015 "Amendment to Contract" (annexed as Exhibit C to the complaint, NYSCEF Doc No. 4) provides that:

> "2. Schedule C of the Contract of Sale is amended to reflect a purchase price of $600,000.00, a deposit of $46,500.00 and a balance due at closing in the amount of $553,500.00.
>
> "3. The parties hereby acknowledge and agree to be bound by the covenant for additional compensation in the amount of $550,000.00 as more fully set forth in the Deed dated October 28, 2015 between the parties, as well as the Side Agreement dated October 28, 2015."

The October 28, 2015 "Side Agreement" referenced in the "Amendment to Contract" (annexed as Exhibit D to the complaint, NYSCEF Doc No. 5) provides that:

> "WHEREAS [SP 97] purchased the condominium unit . . . from the Board by Deed dated October 28, 2015 . . . ; and
>
> "WHEREAS the Deed sets forth a covenant (the 'Bonus Covenant') as follows:
>
> '*And the party of the second part covenants that, in the event*

the certificate of occupancy for the unit is amended or newly issued to permit any and every use aside from its current use as 15 off street parking spaces, at the election of the party of second part, the party of the second part shall pay, as consideration for the right to effectuate such amendment or new certificate of occupancy, the amount of $550,000 in certified funds to the party of the first part within fifteen (15) days of the issuance of said amended or new certificate of occupancy. . . . This provision may be enforced at law or in equity and shall be binding on successors, assigns, heirs, subsidiaries, affiliates, related entities or any future third party purchaser or transferee.'; and

"WHEREAS the parties hereby agree that if the Bonus Covenant is effectuated . . . and [SP 97] collects actual rent or use and occupancy for the remaining square footage not converted to the new use, then the Board shall be entitled to additional compensation as set forth below.

* * *

"1. The Board shall be entitled to be compensated, via certified funds, by [SP 97] in the amount of $550,000.00 less any payment made under the Bonus Covenant within fifteen (15) days of all of the following to occur: (a) an amended or new certificate of occupancy is issued for the Property permitting any and every use aside from its current use as 15 off street parking spaces; and (b) the new use as set forth in the amended or new certificate of occupancy is for less square footage then the total square footage for the entire property; and (c) [SP 97] collects rent and/or use and occupancy for the remaining square footage for the property not converted to the new use.

"2. The Board agrees to cooperate with [SP 97] in the conversion process as follows:

> "a. By permitting [SP 97] to file an alteration application with the Department of Building ('DOB') to convert the Property to a use other than parking . . . and/or

> "b. In the event [SP 97] enters into an agreement to acquire additional development rights ('Development Rights') from any neighboring parcel, the Board agrees:
>
> "i. to use commercially diligent efforts to cause the unit owners and their mortgagees, if any, to waive (as parties in interest) execution of any declaration of zoning lot restrictions and any related zoning lot and development agreement for the acquisition of such Development Rights;
>
> "ii. upon such acquisition, to permit such Development Rights to be allocated exclusively to the Property; and
>
> iii. to permit [SP 97] to file an alteration application, pull permits and amend the certificate of occupancy to develop the Property for any legal use."

Importantly, the "Side Agreement" to the Contract of Sale further provides that:

> "3. *This Agreement may not be changed orally* and shall inure to the benefit and be binding upon the parties hereto, their respective heirs, successors, and assigns. No amendment, modification or waiver of any provision of this Agreement shall, in any event, be effective unless the same be in writing and signed by the [Condominium] Board and [SP 97].
>
> "4. This agreement shall be construed and interpreted under the law of the State of New York without regard to its conflicts of laws principles. This Agreement supersedes all prior agreements, representations, or understandings (whether oral or written) between the parties concerning the Property, [ex]cept as set forth in the Deed, *and represents the entire, complete and fully integrated understanding and agreement with respect to the subject matter hereto, and can be only be amended; supplemented, or changed by the written document signed by all of the parties hereto*" (emphasis added).

The complaint also references and quotes from Sections 2.4 and 6.4 of the

Condominium's By-laws, which allegedly grants the Condominium Board specific powers and duties to collect common charges from unit owners (complaint at ¶ 14).

The complaint alleges that SP 97 "has been woefully delinquent in paying its common charges, which caused Plaintiff to file a lien against [it] pursuant to Real Property Law [RPL] § 339-z for $67,181.93 in common charges that were due by September 1, 2020, which was recorded on October 16, 2020 . . ." (*id.* at ¶ 19). The complaint further alleges that additional unpaid common charges have accrued since the lien was recorded and the total due and owing for common charges on the Condominium Unit through June 1, 2021, is $88,793.90, plus interest at 16% (*id.* at ¶¶ 22 and 33-36). The complaint alleges that SP 97 has also violated the Condominium's By-laws and the "House Rules" by allowing the Condominium Unit to fall into disrepair and was, therefore, assessed a $4,500.00 fee for its willful violation (*id.* at ¶¶ 23-24 and 26). The complaint alleges that SP 97 is liable for the monthly fair market value of the Condominium Unit ($7,500.00) since January 1, 2018, when it stopped paying the common charges (*id.* at ¶¶ 27-30) and reasonable attorneys' fees to enforce the recorded lien, pursuant to the By-laws (*id.* at ¶ 32). The complaint seeks a total of $130,354.44 in damages, pursuant to RPL § 339-aa, and to foreclose on the lien recorded against the Condominium Unit.

SP 97's Answer and Counterclaims

On August 26, 2021, SP 97 filed an answer to the complaint, denied the material allegations therein, asserted seven affirmative defenses and asserted seven counterclaims.

SP 97's answer alleges that the deed to the Condominium Unit states "in sum and substance" that "if the Certificate of Occupancy for the Unit is amended or newly issued to permit any use aside from its current use as 15 off street parking spaces, then SP 97 shall pay the amount of $550,000.00 to the [Condominium] Board (the 'Bonus Covenant')" (answer at ¶ 8). The answer also alleges that the parties executed an October 28, 2015 agreement "which noted the existence of the Bonus Covenant and also stated that 'the Board agrees to cooperate with [SP 97] in the conversion process . . .'" (*id.* at ¶ 9). The answer generally alleges that the Condominium Board "induced SP 97 into purchasing the Unit through its representations" (*id.* at ¶ 10).

The answer alleges that, following SP 97's purchase of the Condominium Unit, the "former President of the [Condominium] Board informed a principal of SP 97 that the [Condominium] Board would not enforce or otherwise seek to collect the Bonus Covenant" and, in reliance on that alleged oral representation, "SP 97 expended time and resources seeking to convert the Unit's use from parking to retail" (*id.* at ¶¶ 11-12). The answer also alleges that the Condominium Board "acted to prevent SP 97 from timely and successfully converting the Unit's use . . . by denying SP 97 and the professionals it engaged access to certain aspects of the building" (*id.* at ¶ 13).

The answer asserts the following seven counterclaims against the Condominium Board for: (1) breach of contract based on the former president's alleged oral promise not to enforce or seek to collect the Bonus Covenant; (2) a judgment declaring that SP 97 need not pay the Bonus Covenant; (3) promissory estoppel based on the former

president's alleged oral promise; (4) fraud based on the former president's alleged oral promise; (5) breach of the implied covenant of good faith and fair dealing in the deed; (6) breach of the implied covenant of good faith and fair dealing in the October 28, 2015 Contract of Sale; and (7) tortious interference with prospective business/economic advantage because the Condominium Board allegedly "interfered with SP 97's economic prospects" with respect to the Condominium Unit (*id.* at ¶¶ 54-55).

The Condominium Board's Dismissal Motion

On September 2, 2021, the Condominium Board moved to dismiss SP 97's counterclaims, pursuant to CPLR 3211 (a) (5) and CPLR 3211 (a) (7). The Condominium Board submits an attorney affirmation annexing the pleadings (and all Exhibits thereto), the Contract of Sale and the October 28, 2015 deed to the Condominium Unit. The Condominium Board also submits a memorandum of law arguing that "[t]he ill-conceived Counterclaims are poorly pled, mostly conclusory, and devoid of the requisite elements to state a cause of action" and "are barred as matter of law by the Statute of Frauds."

The Condominium Board argues that the first counterclaim for breach of contract is subject to dismissal as "patently defective" because it fails to: (1) plead the material terms of the alleged contract; (2) identify the parties thereto; (3) attach the contract to the pleading; and (4) allege whether the contract was written or oral.

The Condominium Board also asserts that "[m]ost of the Counterclaims are premised on Defendant's contention that the parties made an oral agreement to modify

the unambiguous, written language set forth in the Deed and [the Contract of Sale]" and argues that, under the parole evidence rule, "oral modification of an unambiguous contract is invalid to the extent that such modification conflicts with the written word . . ." The Condominium Board argues that, for this reason alone, the first through fourth causes of action for breach of contract, a declaratory judgment, promissory estoppel and fraud are "barred." The Condominium Board also argues that the alleged oral contract that forms the basis of SP 97's counterclaims violates the Statute of Frauds, and thus, all counterclaims predicated thereon are subject to dismissal.

Regarding the fifth and sixth counterclaims for breach of the implied covenant of good faith and fair dealing in the Deed and the October 28, 2015 Contract of Sale, respectively, the Condominium Board argues that those counterclaims are barred because there is an express contract governing the Condominium Board's conduct.

Finally, the Condominium Board argues that the fourth counterclaim for fraud, the fifth and sixth counterclaims for breach of the implied covenant of good faith and fair dealing and the seventh counterclaim for tortious interference with prospective business/ economic advantage are subject to dismissal because they do not allege the requisite elements of those causes of actions.

SP 97's Opposition

SP 97, in opposition, submits a memorandum of law arguing that the Condominium Board "intentionally mischaracterizes" its counterclaims and its legal theories to "muddy the waters . . ." SP 97 argues that the Statute of Frauds is inapplicable

to its first counterclaim for breach of "the subsequent agreement not to enforce or otherwise seek to collect the Bonus Covenant (*i.e.*, the Promise) . . ." and is a "red herring" because the alleged oral Promise by the Condominium Board's former president "does not concern the creation of an interest or estate in real property." SP 97 contends that "the Promise created a separate contractual right unrelated to an estate or interest in real property." SP 97 also argues that the first counterclaim for breach of the alleged oral "Promise" is not defective and adequately pleads the elements of a counterclaim for breach of contract because "the Counterclaims plainly plead an *oral* contract between SP 97 and the [Condominium] Board (*i.e.*, the Promise), the critical term being the . . . Board's agreement not to enforce the Bonus Covenant."

SP 97 contends that the Condominium Board's "argument that unambiguous written agreements cannot be orally modified is based on a misunderstanding or misstatement of the nature of SP 97's claim." SP 97 clarifies that its counterclaims allege "that the Promise [not to enforce the Bonus Covenant] was entered into *after* the conveyance of the real property had occurred[,]" and thus, does not fall within the parole evidence rule.

SP 97 asserts that its third counterclaim for promissory estoppel alleges the necessary elements "as the allegations establish a clear and unambiguous promise to waive the Bonus Covenant[,]" its reasonable and foreseeable reliance on the promise and damages. SP 97 similarly claims that its fourth counterclaim for fraud based on the former Condominium president's alleged oral promise is adequately pled. SP 97 clarifies

that its fraud claim "is *not* that the [Condominium] Board's statement fraudulently induced [it] to enter into the Purchase Contract, as the [Condominium] Board states in its motion . . . [r]ather, the fraud alleged by the Counterclaims stems from the Promise itself, not the Purchase Contract."

Regarding the fifth and sixth counterclaims for breach of the implied covenant of good faith and fair dealing, SP 97 asserts that "efforts to frustrate the purpose of the two contracts that specifically contemplated the conversion of the [Condominium] Unit qualify as breaches of the implied covenant." SP 97 also argues that its counterclaims for breach of the implied covenant of good faith and fair dealing regarding the Deed and Side Agreement are distinct from its first counterclaim for breach of the former president's oral Promise not to enforce the Bonus Covenant.

Finally, SP 97 asserts that its seventh counterclaim for tortious interference with prospective business/economic advantage is adequately pled since the counterclaim alleges "direct interference with a third party, namely the professionals enlisted by SP 97 to aid in the conversion process" and "the use of dishonest or wrongful means – namely, the fraud committed by the [Condominium] Board in connection with the Promise . . ."

The Condominium Board's Reply

The Condominium Board, in reply, submits a memorandum of law reiterating that SP 97's counterclaims fail to plead the requisite elements of the claims, or are otherwise barred by established law, including the Statute of Frauds. The Condominium Board also

asserts that it "adamantly denies the existence of the alleged oral Contract[,]" "[i]t was never formed" and that "[i]t defies credulity that a small board, the size of Plaintiff's, would ever agree to turn down over half a million dollars." The Condominium Board argues that "[t]he allegation is baseless, unsupported by first-hand testimony or documentary evidence" and "[a]s such, the supposed Contract is premised on conclusory, unsubstantiated claims [that are] insufficient to withstand a motion to dismiss."

Discussion

A dismissal motion under CPLR 3211 (a) (7) requires determining whether the plaintiff has stated a cause of action, but "[i]f the court considers evidentiary material, the criterion then becomes 'whether the proponent of the pleading has a cause of action'" (*Sokol v Leader*, 74 AD3d 1180, 1181-1182 [2010]). Dismissal results only if the movant demonstrates conclusively that the plaintiff has no cause of action, or that "a material fact as claimed by the pleader to be one is not a fact at all" (*id.* at 1182). "On a motion to dismiss pursuant to CPLR 3211 (a) (7), a court must accept the facts alleged in the [pleading] as true, accord the [pleader] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*A.D.E. Sys., Inc. v Quietside Corp.*, 188 AD3d 762, 764 [2020]).

General Obligations Law (GOL) § 15-301 (1) (the statute of frauds) provides that:

> "[a] written agreement . . . which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought."

"The statute of frauds bars oral modifications to a contract which expressly provides that modifications must be in writing" (*B. Reitman Blacktop, Inc. v Missirlian*, 52 AD3d 752, 753 [2008]; *see also Vogel v Vogel*, 128 AD3d 681, 683-684 [holding that "the Supreme Court properly directed the dismissal of the six causes of action relating to the alleged oral modification of the parties' separation agreement" under the statute of frauds]; *Irving O. Farber, PLLC v Kamalian*, 16 AD3d 506, 506-507 [2005] [holding that "(t)he parties' written retainer agreement, which provided, inter alia, that any modifications must be in writing and signed by both parties, was unambiguous" and "(a)ccordingly, the purported oral contingency fee modification was unenforceable"]). "As a general rule, where a contract has a provision which explicitly prohibits oral modification, such clause is afforded great deference" (*Healy v Williams*, 30 AD3d 466, 467 [2006]). "Where such a clause is present, one claiming that provisions of the agreement were orally modified can only prevail upon proof that there was an oral modification and that the performance of the modification was not merely executory, *but had actually been performed* in a manner which was unequivocally referable to that oral modification" (*id.* at 468 [emphasis added]).

Here, the parties' October 28, 2015 Contract of Sale and the Side Contract containing the "Bonus Covenant" requiring SP 97 to compensate the Condominium Board $550,000.00 if SP 97 converts the Condominium Unit from its use as a parking garage both expressly provide that any modifications, changes and amendments *must be in writing*. Indeed, the Side Contract, specifically states that "[t]his Agreement may not

be changed orally" and "can be only be amended, supplemented, or changed by the written document signed by all of the parties hereto." Thus, an alleged oral modification is enforceable only if there is part performance that is unequivocally referable to the oral modification (*Parker v Navarra*, 102 AD3d 935, 936 [2013]). SP 97's answer vaguely alleges that an unidentified former president of the Condominium Board informed an unidentified "principal" of SP 97 that the Condominium Board "would not enforce or otherwise seek to collect the Bonus Covenant" (answer at ¶ 11, NYSCEF Doc No. 15). SP 97's counterclaims and opposition to the Condominium Board's dismissal motion fails to allege acts of part performance that were unequivocally referable to the alleged oral "promise" by the Condominium Board's "former president" to modify the unambiguous terms of the parties' Contract of Sale and Side Contract sufficient to obviate the need for a writing.[1] Consequently, SP 97's first (breach of the oral promise), second (a declaration that the oral promise is enforceable), third (promissory estoppel based on the oral promise) and fourth (fraud based on the oral promise) counterclaims, all of which are based on the alleged oral promise by the Condominium Board's former president not to enforce the "Bonus Covenant" provision in the deed and Side Contract, are subject to

[1] While paragraph 12 of SP 97's answer alleges that "[i]n reliance on the representation of the former President of the Washington Board that the Washington Board would not enforce or otherwise seek to collect the Bonus Covenant, SP 97 expended time and resources seeking to convert the Unit's use from parking to retail[,]" SP 97's conversion of the Condominium Unit was already contemplated under the express, written terms of the deed and the Side Agreement.

dismissal.

The fifth and sixth counterclaims are for breach of the covenants of good faith and fair dealing in the deed and the Side Agreement, respectively. Those counterclaims are based on the allegations that the deed contained the "Bonus Covenant," "SP 97 and the [Condominium] Board executed [the Side] Agreement, dated October 28, 2015 . . . which noted the existence of the Bonus Covenant and also stated that 'the [Condominium] Board agrees to cooperate with [SP 97] in the conversion process . . .'" "[t]he [Condominium] Board acted to prevent SP 97 from timely and successfully converting the [Condominium] Unit's use, *including but not limited to* . . . denying SP 97 and the professionals it engaged access to certain aspects of the building" "[b]oth parties understood that SP 97 purchased the [Condominium] Unit with the expectation that it might seek to convert its use from parking to retail" and "[t]he [Condominium] Board's actions have frustrated the fundamental purpose" of the deed and the Side Agreement (*see* answer at ¶¶ 8, 9, 13, 41, 43, 44, 48, 50 and 51, NYSCEF Doc No. 15 [emphasis added]). Every contract contains an implied covenant of good faith and fair dealing (*see Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62 [1978]). "This covenant is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement" (*P.T. & L. Contracting Corp. v Trataros Const., Inc.*, 29 AD3d 763, 764 [2006]). Accepting the truth of the allegations in SP 97's answer, the fifth and sixth counterclaims adequately plead claims for breach of the covenants of good faith and

fair dealing in the deed and the Side Contract since they allege that the Condominium Board "frustrated the fundamental purpose" of the deed and the Side Contract by preventing SP 97 from converting the Condominium Unit (*Travelsavers Enterprises, Inc. v Analog Analytics, Inc.*, 149 AD3d 1003, 1006 [2017]).

Finally, the seventh counterclaim for tortious interference with prospective business/economic advantage is subject to dismissal because SP 97's answer fails to identify any third parties with which it had a current or prospective economic relationship. "In order to state a cause of action to recover for tortious interference with prospective economic advantage, the [pleader] must allege a specific business relationship with an identified third party with which the [other party] interfered" (*Mehrhof v Monroe-Woodbury Cent. Sch. Dist.*, 168 AD3d 713, 714 [2019]). While the answer generally alleges that the "[Condominium] Board interfered with SP 97's economic prospects[,]"[2] it fails to allege a specific business relationship with an identified third party with which the Condominium Board interfered. Accordingly, it is hereby

ORDERED that the Condominium Board's dismissal motion (mot. seq. one) is only granted to the extent that the first, second, third, fourth and seventh counterclaims are hereby dismissed; the dismissal motion is otherwise denied.

This constitutes the decision and order of the court.

E N T E R,

[2] *See* answer at ¶ 55, NYSCEF Doc No. 15.

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HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE