SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** **PART** **57TR**

Justice

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RCI HOSPITALITY HOLDINGS, INC.,RCI 33RD STREET VENTURES INC.,RCI DINING SERVICES (37TH STREET), INC.

Plaintiff,

- v -

SCOTT WHITE,

Defendant.

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INDEX NO. 161752/2019

MOTION DATE 2/7/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

were read on this motion to/for DISMISSAL.

BACKGROUND

Plaintiffs commenced this action, pursuant to a summons with notice, filed on December 5, 2019. Plaintiffs alleged the action was commenced for libel and slander arising out of statements defendant made to the New York Post, which were published, and in court filings in a related action commenced by defendant against plaintiffs in November 2019. The parties' disputes center on transactions that occurred when defendant visited two strip clubs known as Hoops Cabaret and Vivid Cabaret on September 11, 2019.

Plaintiffs filed a verified complaint on March 6, 2020, asserting six causes of action: defamation; tortious interference with contractual relationship; tortious interference with prospective economic relationship; *prima facie* tort; injurious falsehood; and abuse of process.

Defendant filed an answer on July 1, 2020, asserting fifteen affirmative defenses including: failure to state a cause of action; that the claims are barred by applicable privileges and the Noerr-Pennington Doctrine; and that the action violates New York's anti-SLAPP laws.

PENDING MOTION

On July 14, 2021, defendant moved for an order dismissing the action pursuant to CPLR §3211(g) and CPLR §3211(a). Defendant also seeks costs, attorneys' fees and sanctions pursuant to CPLR §8303-a and 22 NYCRR 130-1.1.

On February 7, 2022, the court heard oral argument and reserved decision.

ALLEGED FACTS

On September 11, 2019, defendant visited Hoops Cabaret (Hoops). Defendant was there from approximately 8:00 pm until shortly before 3:00 am. Defendant incurred charges for food, alcohol, and adult entertainment, which totaled $574.00 for three transactions. Defendant paid for each of these transactions with a credit card and provided identification and a thumbprint for verification, as is the policy of the club.

Defendant left Hoops and went to Vivid Cabaret (Vivid) another club owned by a related entity. [1] Defendant arrived at Vivid at approximately 3:00 am and stayed till approximately 4:30 am. Defendant hired a private room, which was billed at an hourly rate, and incurred charges totaling $4475.00 over two transactions, to which defendant added gratuities totaling $600.00. Again, the charges were paid with a credit card, verified by identification and a thumb print. [2]

[1] There is no sworn statement by defendant of the events of that evening submitted to this court. No affidavit was submitted by defendant on the motion. The answer does not contain the facts and is only verified by counsel, and even in defendant's related action against plaintiffs the complaint is not verified. As such the facts are based on the documents and affidavits submitted by plaintiffs.

[2] Plaintiffs submitted a video clip showing defendant paying for the second transaction at Vivid.

Three days later, defendant filed a dispute with American Express challenging all charges incurred at both clubs. American Express resolved the dispute in plaintiffs favor finding the charges were actually incurred.

On or about October 9, 2019, defendant went to Hoops and requested a refund of some charges incurred at the club. He spoke with Thomas Campbell (Campbell), the General Manager. Defendant told Campbell that he might have been slipped something from one of the entertainers that evening. Defendant also alleged he might have been drugged while visiting Vivid. Campbell reviewed video surveillance tapes of defendant that evening from both clubs and determined there was no basis to refund him any monies.

Defendant asked Campbell to put him in touch with someone from Vivid and Campbell gave him contact information for Charles Castro (Castro) a manager at Vivid. On or about October 29, 2019, defendant came to Vivid and spoke with Castro alleging he had been drugged and disputing the charges. Castro reviewed, investigated and determined from video surveillance, which showed defendant paying for some charges while with Castro, that no refund was due.

On November 26, 2019, Scott White (White) filed a summons with notice under Index No. 657068-2019, claiming that plaintiffs herein acting in concert drugged and defrauded White and converted his money through forced cash withdrawals and unauthorized credit card charges. The next day a reporter from the New York Post contacted White's attorney and asked if White would be willing to speak with her about his claims. White agreed. The Post published an article on November 28, 2019, the headline is a quote from White stating 'I got drugged and fleeced at Manhattan strip clubs' and shows a picture of White displaying his American Express Card.

White told the Post that he believed the man who approached him when he left Hoops drugged him stating the man offered to take him to Vivid and "I said 'No, actually. I have no interest. I'm going home.' I leave and this is where it gets fuzzy. I believe he drugged me. I get in, I believe, his car and he drives me to Vivid Cabaret." White told the Post he had no memory of being at Vivid. White is further quoted in the article as saying "Nobody was really listening to me [at the clubs]. They didn't care. They weren't incentivized to, because they are all connected to each other. There is incentive to drug them, and to bus them around from place to place and take things from them."

On December 5, 2019, The Post published a second article, after this action was commenced. White is not directly quoted in the second article.

DISCUSSION

The Motion to Dismiss Pursuant to CLR §3211(g) Is Denied

Civil Rights Law §§70-a and 76-a, known as New York's "anti-SLAPP" laws, protect free speech in a public forum with respect to issues of public concern. §76-a-1(a) defines an 'action involving public petition participation' as a claim based upon "(1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or (2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition." (a Civil Rights Law §76-a 1.(a)(1), (2)).

The SLAPP Statute was adopted to prevent well-heeled parties from using the threat of personal damages and litigation costs to harass, intimidate or punishing an individual, who has spoken out publicly against the well-heeled party. (*Street Beat Sportswear, Inc. v. National Mobilization Against Sweatshops*, 182 Misc.2d 4

47, 451 (Sup Ct, N.Y.) SLAPP suits have little legal merit but are filed nonetheless to burden opponents with legal defense costs and the threat of liability and to discourage people from speaking out.

CPLR §3211(g) provides in pertinent part:

> 1.A motion to dismiss based on paragraph seven of subdivision (a) of this section, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law, shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law.
>
> 2. **In making its determination on a motion to dismiss made pursuant to paragraph one of this subdivision, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the action or defense is based.**

N.Y. C.P.L.R. 3211 (McKinney) (emphasis added). CPLR §3211(g) reverses the burden of proof that normally lies with the moving party, to the party opposing dismissal, requiring the proponent of the SLAPP claim to establish its "substantial" legal basis in order to survive the claim's dismissal.

In support of its argument that plaintiffs' claim has a substantial basis in law and fact plaintiffs provide the affidavits of two witnesses, one of whom, Castro, was with defendant when he signed for the credit card charges at issue and personally observed the transaction take place. They provided a detailed account of defendant's activities that evening that is not contradicted by defendant. Defendant signed for the disputed charges and provided identification and his thumb print as verification. Plaintiffs provide the documentation of the charges. A videotape showing defendant, who is not blacked out but standing upright signing a credit card bill. All of the evidence submitted by plaintiffs in the face of not even a sworn statement submitted by defendant, does support plaintiffs' position that the cause of action has a substantial

basis in law and fact and that plaintiffs may establish at trial that defendant made statements that he knew were false or that he made with reckless disregard as to the truth of said statements.

It is hard to see how defendant's statements can be based on much more than supposition or conjecture. Defendant stated to the press that he really does not remember what happened, that he blacked out portions of the evening, and that he was not thinking clearly. Defendant does not dispute that he was at Hoops drinking for hours. Defendant alleged he was only drinking beer, but plaintiffs provide documentation and testimony that he also drank hard alcohol over the many hours he was at Hoops. At this point in this action, there is absolutely no evidence to find that defendant was drugged and robbed by plaintiffs or their employees as he stated to the New York Post.

Based on the foregoing the motion to dismiss pursuant to CPLR §3211(g) is denied.

Defendant's Motion to Dismiss Pursuant to NY Civil Rights Law §74 is Denied

NY Civil Rights Law §74 provides:

> A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published.
>
> This section does not apply to a libel contained in any other matter added by any person concerned in the publication; or in the report of anything said or done at the time and place of such a proceeding which was not a part thereof.

The statutory privilege is intended to promote the truth on the part of litigants and allow them to state their positions without fear of being sued for libel and the interest in having judicial proceedings public for the proper administration of justice [*Wenz v. Becker*, 948 F. Supp. 319, 322 (S.D.N.Y. 1996)].

Plaintiffs allege that they were not the defendants in the original summons with notice because they were not properly named. The court agrees with defendant that this argument lacks merit.

While the White Action's initial Summons with Notice did contain a misnomer in Plaintiffs' formal corporate designation the caption referenced HOOPS CABARET AND SPORTS BAR and VIVID CABARET and asserted claims against, and alleged wrongs committed by Hoops Cabaret and Sports Bar and Vivid Cabaret. The Action, both the initial and amended Summons with Notice, named RCI, the parent company of Hoops and Vivid. The court does not believe the technical deficiencies in naming the plaintiffs are a bar to asserting the privilege.

Generally, summaries of or comments on a lawsuit's allegations are protected by the privilege and cannot give rise to a defamation claim (*Russian American Foundation, Inc. v Daily News, L.P.*, 109 AD3d 410, 413 [1st Dept 2013]; *Lacher v Engel*, 33 AD3d 10, 17 [1st Dept 2006]). The privilege is a threshold legal hurdle (*Palmieri v Thomas*, 29 AD3d 658, 659 [2d Dept 2006]).

However, an exception to this rule was established by the Court of Appeals in *Williams v. Williams* (23 N.Y.2d 592 [1969]).

Press releases that "essentially summarize or restate the allegations of the complaint" are ordinarily afforded protection under Section 74. *McRedmond v. Sutton Place Rest. & Bar*, 48 A.D.3d 258, 259 (1st Dep't 2008); *Lacher v. Engel*, 33 A.D.3d 10, 17 (1st Dep't 2006). However, under the *Williams* exception enunciated by the Court of Appeals, a report on a judicial proceeding is unprotected by Section 74 where a party has maliciously commenced an action in order to disseminate "false and defamatory charges, and to then circulate a press release or other communication based thereon and escape liability by invoking the statute." *Williams v. Williams*, 23 N.Y.2d 592, 599 (1969); *Halcyon Jets, Inc. v. Jet One Group, Inc.*, 69 A.D.3d 534, 534 (1st Dep't 2010).

FCRC Modular, LLC v. Skanska Modular LLC, No. 652721/2014, 2016 WL 4181019, at 10 (N.Y. Sup. Ct. Aug. 04, 2016).

In its complaint herein plaintiffs include sufficient allegations to come under the *Williams* exception. For example, plaintiffs allege "(d)efendant hoped that Plaintiffs' fear of unwanted negative press would make them rush to quiet his false claims with offers of compensation and monetary concessions, including but not limited to waiving payment of the charges incurred at the Clubs, to which Plaintiffs are lawfully entitled, and paying out additional sums as 'hush money.'"

The *Williams* exception applies if it appears that the public policy goals of the statute are being thwarted by the commencement of litigation intended as a device to protect a report thereof and thereby disseminate defamatory information (*see id.* at 599, 298 N.Y.S.2d 473, 246 N.E.2d 333). Defendant's intention to use his litigation as such a device is a factual issue that is sufficiently plead and not subject to dismissal at this point in the litigation [*Halcyon Jets, Inc. v. Jet One Grp., Inc.*, 69 A.D.3d 534, 534–35 (2010); *see also Giuffre v Maxwell* 2017 WL 1536009; *Reska v Collins* 136 AD3d 1299 (2016)].

The Cause of Action for Defamation is Sufficiently Pled

Defamation is "the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society" (Dillon, 261 AD2d 34; *Foster v Churchill*, 87 NY2d 744, 751 [1996]).

Plaintiffs claim is based on the following statements made by defendant to the New York Post:

"I got drugged and fleeced at Manhattan strip clubs" (Underneath this quote is a phot of defendant displaying his American Express Card);

"I believe he drugged me" (referring to man defendant alleges was acting as plaintiffs' agent);

"Nobody was really listening to me [at the clubs]. They didn't care. They weren't incentivized to, because they are all connected to each other. There is incentive to drug them, and to bus them around from place to place and take things from them," White said adding that this could be happening to others.

The elements (of the cause of action) are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se (Restatement of Torts, Second § 558). CPLR 3016(a) requires that in a defamation action, "the particular words complained of ... be set forth in the complaint." The complaint also must allege the time, place and manner of the false statement and to specify to whom it was made (*Arsenault v. Forquer,* 197 A.D.2d 554, 602 N.Y.S.2d 653; *Vardi v. Mutual Life Insurance Co. of New York,* 136 A.D.2d 453, 523 N.Y.S.2d 95).

Dillon v. City of New York, 261 A.D.2d 34, 38 (1999).

In this case, the defamation claim in Complaint alleges all the above elements and with sufficient particularity. Plaintiffs allege particular published false statements of fact not entitled to constitutional protection. They allege an absence of privilege. They allege that such statements were published to a third party with at least negligent disregard for the truth. Finally, defamation *per se* is adequately alleged. The allegations irrefutably tend to injure plaintiffs in their business and accuse them of a serious crime (*Nolan v State of New York* 158 AD3d 186, 195). Based on the foregoing, defendant's motion to dismiss the defamation claim based on failure to state a cause of action is denied.

Plaintiffs Cause of Action for Abuse of Process is Dismissed

"Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without justification, and (3) use of the process in a perverted manner to obtain a collateral objective" (*Liss v Forte*, 96 AD3d 1592, 1593 [4th Dept 2012]; *Goldman v Citicore* I, LLC, 149 AD3d 1042 [2d Dept 2017]; *Curiano v Suozzi*, 63 NY2d 113 [1984]).

"[T]he institution of a civil action…is not legally considered process capable of being abused" (*Curiano*, 63 NY2d at 117; *Hoppenstein v Zemek*, 62 AD2d 979, 980 [2d Dept 1978]; *Varela v Investors Ins. Holding Corp*., 185 AD2d 309, 311 [2d Dept 1992] *affd* 81 NY2d 958, 961 [1993]).

Based on the forgoing defendant's motion to dismiss the abuse of process claim is granted.

Plaintiff's Tortious Interference with Contract Claim is Dismissed

"Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." *Lama Holding Co. v. Smith Barney Inc*., 88 N.Y.2d 413, 424 (1996).

Defendant argues that the cause of action fails to specify any specific contract and breach. Plaintiffs argue in the opposition to the motion that the express contracts at issue were between plaintiff and American Express. However, this is not what is plead in the complaint which refers to loss of business and clientele due to the allegations.

Additionally, even if the allegations had specifically been made regarding American Express, plaintiffs acknowledge that American Express, after its investigation, did not side with defendant and the charges were put through.

Based on the foregoing, plaintiff's cause of action for tortious interference with contract is dismissed.

Plaintiffs' claim for Tortious Interference with Prospective Economic Relationship is Dismissed

> The required elements of a cause of action for tortious interference with prospective business relations are as follows: (a) business relations with a third party; (b) the defendant's interference with those business relations; (c) the defendant acting with the sole purpose of harming the plaintiff or using wrongful means; and (d) injury to the business relationship. (*See Guard–Life Corp. v. S. Parker Hardware Mfg. Corp.,* 50 N.Y.2d 183, 428 N.Y.S.2d 628, 406 N.E.2d 445 [1990]; *Carvel v. Noonan,* 3 N.Y.3d 182, 190, 785 N.Y.S.2d 359, 818 N.E.2d 1100 [2004]; *NBT Bancorp Inc. v. Fleet/Norstar Financial Group, Inc.,* 87 N.Y.2d 614, 641 N.Y.S.2d 581, 664 N.E.2d 492 [1996]).

Advanced Glob. Tech. LLC v. Sirius Satellite Radio, Inc., 15 Misc. 3d 776, 779 (Sup. Ct.), *aff'd as modified*, 44 A.D.3d 317 (2007).

Defendant argues this cause of action must also be dismissed because *inter alia* the complaint does not identify specific business relations which have been interfered with. The court agrees plaintiffs failed to allege any specific business relationship they were prevented from entering by reason of the purported tortious interference and this cause of action is dismissed (*Rondeau v. Houston*, 118 A.D.3d 638, 639 (2014).

Additionally, "(s)uch a cause of action 'does not lie absent an allegation that the action complained of was motivated solely by malice or to inflict injury by unlawful means rather than by self-interest or other economic considerations.'" *Kramer v. Pollock-Krasner Found.*, 890 F. Supp. 250, 258 (S.D.N.Y. 1995). In this case, plaintiffs have alleged that defendant's comments,

like his lawsuit, were intended to have him avoid paying the charges he incurred at the clubs and get hush money from them.

Based on the foregoing, plaintiffs' third cause of action is dismissed.

Plaintiffs' Claim for Injurious Falsehood and Prima Facie Tort Are Dismissed

To sustain an action for injurious falsehood the complaint must allege defendant's publication of false and disparaging statements about defendant's business under circumstances which would lead a reasonable person to anticipate that damage might flow therefrom [*Cunningham v. Hagedorn*, 72 A.D.2d 702, 704 (1979)].

Defendant correctly alleges that plaintiffs fail to allege special damages sufficient to withstand a motion to dismiss as to both these causes of action.

Special damages are an essential element of both injurious falsehood and *prima facie* tort, which must be plead with specificity (*see, Freihofer v. Hearst Corp.,* 65 N.Y.2d 135, 490 N.Y.S.2d 735, 480 N.E.2d 349; *Nyack Hosp. v. Empire Blue Cross & Blue Shield,* 253 A.D.2d 743, 677 N.Y.S.2d 485; *Penn–Ohio Steel Corp. v. Allis–Chalmers Mfg. Co.,* 7 A.D.2d 441, 184 N.Y.S.2d 58). "Because general allegations of lost sales from unidentified lost customers are insufficient (*see, Drug Research Corp. v. Curtis Publ. Co.,* 7 N.Y.2d 435, 199 N.Y.S.2d 33, 166 N.E.2d 319; *De Marco–Stone Funeral Home v. WRGB Broadcasting,* 203 A.D.2d 780, 610 N.Y.S.2d 666)" defendant's motion to dismiss the claims alleging injurious falsehood and *prima facie* tort are granted. *DiSanto v. Forsyth*, 258 A.D.2d 497, 498 (1999).

CONCLUSION

The court does not find any conduct herein warrants sanctions and defendant's request for same are denied.

Wherefore it is hereby

ORDERED that the defendant's motion to dismiss pursuant to CPLR §3211(g) and NY Civil Rights Law §74 is denied; and it is further

ORDERED that the defendant's motion to dismiss is granted with respect to the second, third, fourth, fifth and sixth causes of action and is otherwise denied; and it is further

ORDERED that the second, third, fourth, fifth and sixth causes of action of the complaint are dismissed; and it is further

ORDERED that plaintiff is granted leave to serve and file an amended complaint in which the fourth and fifth causes of action alleging *prima facie* tort, and injurious falsehood may be repleaded; and it is further

ORDERED that the amended complaint, if any, shall be served and filed within 20 days after service on plaintiffs' attorney of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that plaintiff fails to serve and file an amended complaint in conformity with the deadline set forth herein, leave to replead shall be deemed denied and the dismissals of the causes of action shall be deemed to be with prejudice; and it is further

ORDERED that the above-captioned action is consolidated in this Court with *White vs. RCI Hospitality Holdings, Inc. et al*, Index No. 657068-2019[i], pending in this Court; and it is further

ORDERED that the consolidation shall take place under Index No. 161752-2019 and the consolidated action shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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RCI HOSPITALITY HOLDINGS, INC., RCI 33rd STREET VENTURES, INC. d/b/a HOOPS CABARET AND SPORTS BAR and RCI DINING SERVICES (37th STREET), INC. d/b/a VIVID CABARET,

Plaintiffs,

-against

SCOTT W. WHITE,

Defendant.

----------X

SCOTT W. WHITE,

Counterclaim-Plaintiff,

-against

RCI HOSPITALITY HOLDINGS, INC., RCI ENTERTAINMENT (NEW YORK) INC., RCI HOSPITALITY HOLDINGS, INC. d/b/a HOOPS CABARET AND SPORTS BAR, RCI HOSPITALITY HOLDINGS, INC. d/b/a VIVID CABARET, RCI 33RD STREET VENTURES INC. d/b/a HOOPS CABARET AND SPORTS BAR, RCI DINING SERVICES (NEW YORK), INC. d/b/a VIIVD CABARET, and John Does 1-10 and Jane Does 1-10,

Counterclaim-Defendants

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And it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that, within 30 days from entry of this order, movant shall serve a copy of this order with notice of entry on the Clerk of the Court (60 Centre Street, Room 141 B), who shall consolidate the documents in the actions hereby consolidated and shall mark his records to reflect the consolidation; and it is further

ORDERED that counsel for plaintiff shall contact the staff of the Clerk of the Court to arrange for the effectuation of the consolidation hereby directed; and it is further

ORDERED that service of this order upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

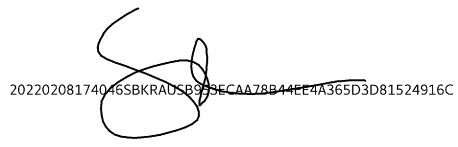
ORDERED that, as applicable and insofar as is practical, the Clerk of this Court shall file the documents being consolidated in the consolidated case file under the index number of the consolidated action in the New York State Courts Electronic Filing System or make appropriate notations of such documents in the e-filing records of the court so as to ensure access to the documents in the consolidated action; and it is further

ORDERED that, within 30 days from entry of this order, movant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is hereby directed to reflect the consolidation by appropriately marking the court's records; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made shall be made in accordance with the procedures set forth in the aforesaid *Protocol*; and it is further

ORDERED that any relief not specifically addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that counsel are directed to appear for a Virtual Preliminary Conference on May 12th, 2022 at 10:00 am.



2/8/2022
DATE

SABRINA KRAUS, J.S.C.

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

[i] Consolidation is ordered under the Index Number with the oldest RJI in accordance with the rules of the court. While there was no motion pending for consolidation, at oral argument the court stated it intention to order consolidation and no objection was raised by either party.