Lucky Cashew Assoc., L.P. v Board of Mgrs. of the 125 E. 4th St. Condominium
2022 NY Slip Op 32006(U)
June 28, 2022
Supreme Court, New York County
Docket Number: Index No. 158308/2018
Judge: David B. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART** **58**

Justice

---X

INDEX NO. 158308/2018

LUCKY CASHEW ASSOCIATES, L.P. and LUCKY CASHEW L.L.C.,

Plaintiffs,

MOTION SEQ. NO. 001

- v -

BOARD OF MANAGERS OF THE 125 EAST 4TH STREET CONDOMINIUM,

Defendant.

---X

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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

were read on this motion to/for SUMMARY JUDGMENT.

In this real property action, plaintiffs Lucky Cashew Associates, L.P. ("LCA") and Lucky Cashew L.L.C. ("LCLLC") move: a) to restore this case to the calendar; b) upon restoration of this case to the calendar, for summary judgment, pursuant to CPLR 3212, on their first cause of action (seeking a declaratory judgment) and on their third cause of action (breach of contract); c) to dismiss the counterclaim asserted by defendant Board of Managers of the 125 East 4th Street Condominium; and d) for such other and further relief as this Court deems just and proper. Defendant opposes the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant is responsible for the governance and operation of the 125 East 4th Street Condominium ("the Condominium"), which was duly formed pursuant to (a) the Declaration of

Condominium, dated December 18, 1988 ("the Declaration"), and issued pursuant to Article 9-B of the Real Property Law of the State of New York and (b) the Bylaws of the condominium ("the Bylaws"). Docs. 29, 40. According to the Declaration, the Condominium was comprised of certain land and the condominium units at the building located at 125 East 4th Street, New York, New York ("the building") (the land and the building are collectively referred to as "the property"). Docs 29, 40. Pursuant to Article 3 of the Declaration, the property was comprised of six (6) stories and a cellar and contained: (a) a commercial unit comprised of the street level retail space and portions of the cellar level of the building ("the Commercial Unit"); (b) the residential units located on portions of the first floor, and floors one (1) through six (6) of the building ("the Residential Units"); and certain common elements ("the Common Elements" or "the General Common Elements"). Docs. 29, 40. LCA became the fee owner of the Commercial Unit pursuant to a deed dated June 12, 2003. Docs. 1, 20, 29, 40. LCLLC, an affiliate of LCA, is the landlord of the Commercial Unit. Doc. 1.

The Declaration dictated that the Condominium was to be governed subject to the Declaration and the Bylaws. Docs. 29, 40. The Declaration and Bylaws set forth the maintenance and repair obligations for the Common Elements. Docs. 29, 40. Specifically, defendant was obligated to repair and maintain the General Common Elements of the property as defined in Article 9(a) of the Declaration. Article 9(a) provided as follows:

> (a) The General Common Elements will consist of the entire Property including the Land and all parts of the Building and improvement[s] thereon (other than the Units, the Residential Limited Common Elements and the Commercial Limited Common Elements) including, without limitation, the following:
>
> > i. all foundations, columns, beams, supports, girders, interior walls and partitions in the cellar and first floors … ceilings and roofs, drains and leaders to the extent that the same are not expressly provided in this

> Declaration to be included as part of a Unit, a Residential Limited Common Element or a Commercial Limited Common Element;
>
> iv. all other parts of the Property including but not limited to all apparatus and installations existing in the Building or on the Property either for the common use of the Units or the Unit Owners or necessary for, or convenient to, the existence, maintenance or safety of the Property, or not expressly provided in this Declaration to be included as part of the Unit or a Residential Limited Common Element or a Commercial Common Element;
>
> v. all of the sidewalks outside of and immedicably appurtenant to the Building;
>
> vi. all of the land, open spaces and other equipment and facilities in the Building on whatever floor they may be located which serve or benefit or are necessary or convenient for the existence, maintenance, operation or safety of all Units See Ex. D.

Docs. 18, 29, 40.

On December 16, 2017, a portion of the sidewalk adjoining the Condominium collapsed. As a result of the collapse, the New York City Department of Buildings ("DOB") issued DOB Partial Vacate Order # M144/17 (the "Partial Vacate Order") and an Order to Correct, and the New York City Department of Transportation issued a similar violation to protect the public safety. The Partial Vacate Order covered that portion of the Commercial Unit containing two of the four commercial store locations at the westerly portion of the Commercial Unit. Docs. 29, 40.

In response to the Partial Vacate Order, defendant abated the emergency conditions by retaining Pace Engineering P.C. to file (a) DOB Job No. 140728327 to install temporary shoring below the sidewalk; (b) DOB Job No. 140728336 to install temporary access to the Commercial Unit; and (c) DOB Job No. 140735836 to replace the sidewalk. Docs. 29, 40. Approximately seven months later, in July 2018, defendant retained F&S Contracting Group, Inc. ("F&S") to

repair the sidewalk and the underlying beams and supports which supported the sidewalk, which had rusted and deteriorated ("the sidewalk repair project"). Docs. 29, 40.

On September 7, 2018, plaintiffs commenced the captioned action against defendant. Doc. 1. As a first cause of action, plaintiffs alleged that they "are entitled to a judgment declaring that [d]efendant is obligated to maintain and repair the [s]idewalk, the [s]labs and [b]eams and the [g]irders and [j]oists as Common Elements of the Condominium in accordance with the Declaration and the Bylaws." Doc. 1 at par. 33. As a second cause of action, plaintiffs alleged that they are entitled to a permanent injunction directing defendant to: remedy the condition of the sidewalk, which has caused, and continues to cause, damage to the Commercial Unit and poses a threat to the safety of the occupants of the Commercial Unit, the Condominium and the public; vacate the Partial Vacate Order; and to take any other steps necessary to prevent further damage to the sidewalk and the slabs, beams, girders and joists located within or adjacent to the Commercial Unit and the sidewalk. Doc. 1 at par. 39. As a third cause of action, plaintiffs alleged that defendant breached the Declaration and Bylaws by failing and/or refusing to maintain and repair the Common Elements of the Condominium including, but not limited to, the sidewalk and the slabs, beams, girders and joists associated with the same. Doc. 1 at par. 42. Plaintiffs claim that defendant's failure and/or refusal to perform such repair and maintenance has prevented their tenants from using the Commercial Unit, thereby depriving them of rents for the said unit in an amount no less than $7,000 per month commencing on the date of the collapse. Doc. 1 at pars. 43-44, 46.

Defendant joined issue by its answer filed November 16, 2018. Doc. 5. In its answer, defendant denied all substantive allegations of wrongdoing, asserted certain affirmative defenses, and counterclaimed against plaintiffs, alleging that they were liable for the cost of the sidewalk

repair project due to their use of the vault space beneath the sidewalk. Doc. 5 at pars. 9-29; Docs. 29, 40. In support of its counterclaim, defendant relied on Article 7(b) of the Declaration, which provided, inter alia, that the Commercial Unit included "all other facilities in the building which exclusively serve or benefit or are exclusively necessary for the existence, maintenance, operation or safety of the Commercial Unit," Doc. 18 at 4. Article 7(b) also included "storage areas" as part of the Commercial Unit. Doc. 18 at 4. It also relied on Article 9(b)(2), which provided that the owner of the Commercial Unit was obligated to maintain, at its own cost and expense, Commercial Limited Common Elements, which were defined as

> those rooms, areas, corridors, walls, doors, partitions, floors and other portions of the Building (other than the Units, the General Common Elements or the Residential Limited Common Elements) as well as the Equipment therein, either currently or hereafter existing for the exclusive use of, or which service only, or enclose only, the Commercial Unit, shall be commercial limited common elements for the exclusive use of the Owner of the Commercial Unit. The Commercial Limited Common elements shall be maintained, repaired and replaced by the owner of the Commercial Unit at its sole cost and expense and the cost thereof shall be paid directly by the Commercial Unit Owner.
>
> * * *
>
> Generally, all painting, decorating, maintenance, repairs and replacements, whether structural or non-structural, ordinary or extraordinary in or to any Unit (other than Common Elements located in the Units) and Limited Common Elements will be made by the owner of such Unit at such Unit Owner's sole cost and expense. The cost of maintenance, repair and replacement of General Common Elements will be borne by all Unit Owners as a Common Expense of the Condominium, in proportion to their respective Common Interests in the Common Elements and will be included in their Common Charges unless the need for repair or replacement was occasioned by the negligence of one of the Unit Owners or his guest(s) or agent(s), in which case the cost shall be borne exclusively by said Unit Owners.

Doc. 18 at 9.

Defendant's counterclaim also relied on Article V, Section 16(a) of the Bylaws, which provided that:

> All maintenance of and repairs to any Unit and all maintenance and repair and replacement of any Limited Common Elements appurtenant thereto, as more fully described in the Declaration (other, than maintenance of any General Common Element contained therein and not necessitated by the negligence, misuse or neglect of the owner of such Unit) shall be made by the owner of such Unit at said Unit Owner's sole cost and expense. Each Unit Owner shall be responsible for all damages to any and all other Units and/or to the General Common Elements that its failure to make necessary repairs or replacements or perform necessary maintenance may engender.

Doc. 19 at 24.

Additionally, the counterclaim relied on Article V, Section 16(h) of the Bylaws, which provided that:

> Unit Owners who have sole and exclusive access to storage rooms as Limited Common Elements shall have full responsibility for all aspects of maintenance, repair and replacement of the same except for any maintenance, repair or replacement work necessitated by the negligence of the Board of Managers, in which case cost thereof shall be borne by the Unit Owners as a Common Expense.
>
> In the event that a Unit Owner fails to make any maintenance or repair, which maintenance or repair is necessary to protect any of the Common Elements or any other unit, the Board of Managers shall have the right to make such maintenance or repair (after the failure of said Unit Owner to do so after ten (10) days written notice, or written or oral notice of a shorter duration in the event of an emergency situation) and to charge said Unit Owner for the cost of all such repairs and/or maintenance. In the event that the Board of Managers charges a Unit Owner for the cost of all such repairs or maintenance required hereunder to be made by such Unit Owner or for repairs to any Common Elements restricted in use to such Unit Owner, and the Unit Owner fails to make prompt payment, the Board of Managers shall have a lien on such Unit and shall be entitled to bring suit thereon and, in such event, the Unit Owner shall be liable for the reasonable attorneys' fees and costs of such suit or proceeding together with interest on all sums due.

Doc. 19 at 25-26.

Defendant has attempted to charge plaintiffs for the entire cost of the sidewalk repair project, in the form of an additional common charge, in the amount of $259,059.44 ("the common charge repair amount"). Docs. 29, 40. On November 5, 2019, defendant filed a Notice of Lien in the amount of $259,059.44, representing the common charge repair amount and

arising from unpaid common charges, against LCA under the Condominium Act and the By-Laws ("the lien"). The lien was recorded on November 8, 2019. Docs. 29, 40.

Plaintiffs paid their 14.22% proportionate share of the common charge repair amount on December 4, 2018, as required by the Declaration and By-Laws for repairs performed by defendant on behalf of the condominium. Docs. 29, 40.

In 2019, a related action, entitled *Chimborazo v. The City of New York*, *et al*., Index No. 150275/2019, was filed by an individual who was allegedly injured as a result of the collapsed sidewalk. Docs. 29, 40. Plaintiffs and defendant were made parties to *Chimborazo*, which involved liability issues relating to the sidewalk collapse. Docs. 29, 30. Given that liability issues which could be determinative in the captioned action were being litigated in *Chimborazo*, the parties herein entered into a so-ordered stipulation, dated May 11, 2020, which, inter alia, marked the captioned action off of the calendar pending a final determination of the liability issues in *Chimborazo*. Docs. 26, 29, 40. The parties further stipulated that they would be bound by a final determination of such liability issues in *Chimborazo*. Pursuant to paragraph 6 of the May 2020 stipulation, if plaintiffs were found to be liable in *Chimborazo*, they would be liable for a stipulated settlement amount, and if defendant were found liable, it would vacate its lien. Docs. 26, 29, 40. The stipulation also provided that, if liability were not determined in *Chimborazo*, the parties could move to restore the captioned action to the court's calendar. Doc. 26 at par. 9; Docs. 29 and 40.

By order dated April 14, 2021, this Court (Sweeting, J.) dismissed *Chimborazo* based on the failure of plaintiff therein to retain new counsel and prosecute the action. Docs. 26, 27, 40. Since the dismissal occurred before any determination was made regarding liability, *Chimborazo*

does not affect the liability issues herein. Further, no appeal has been taken by the plaintiff in *Chimborazo* and the time in which to do so has expired.

In July 2021, plaintiff filed the instant motion seeking the relief set forth above. Docs. 12-29. Plaintiffs seek a declaration that defendant is obligated to maintain and repair the sidewalk and the sidewalk support structures since the Bylaws require it to maintain General Common Elements, and the said areas are defined as such in the Declaration. Docs. 13, 28. Alternatively, plaintiffs argue that, even if the sidewalk and its support structures were not General Common Elements, case law dictates that sidewalks are general common elements. Doc. 28. Plaintiffs also maintain that they are entitled to summary judgment on their third cause of action (breach of contract) because defendant's failure to properly maintain and/or repair the sidewalk and its supporting elements caused them to lose rental income. Doc. 28. Additionally, plaintiffs argue that defendant's counterclaim must be dismissed since neither the Declaration nor the Bylaws require them to maintain the sidewalk.

In support of their motion, plaintiffs submit the affidavit of their construction manager, Thomas Battaglia, who states, inter alia, that: the "beams and supports that held up the [s]idewalk . . . had rusted and deteriorated" (Doc. 14 at par. 12); plaintiffs are not liable for the cost of repairing the sidewalk (Doc. 14 at par. 17); and that, pursuant to Section 16(b) of the Bylaws, defendants were required to repair and maintain the General Common Elements, as defined by Article 9(a) of the Declaration including, but not limited to, the sidewalk and the slabs, beams, girders, and joists in the cellar of the building (Doc. 14 at par. 18). Battaglia also states that "[a]lthough [d]efendant has alleged that certain aspects of the [s]idewalk [r]epair [p]roject are not General Common Elements because they are located in the vault space located underneath the [s]idewalk that was occupied by [p]laintiff's third-party tenant, [plaintiffs'] tenant

used the vault space for the storage of dry goods only" and "[n]o misuse or neglect was ever alleged by [d]efendant." Doc. 14 at par. 25. Battaglia urges that "[i]n the absence of any allegations of negligence, misuse or neglect (there are none), there can be no issue of fact as to [d]efendant's obligation to maintain the [s]idewalk and the [s]idewalk [s]upport [s]tructures." Doc. 14 at par. 29. Further, he maintains that "[n]othing in the Declaration or [Bylaws] precludes portions of the General Common Elements [from being] located within or adjacent to a particular [u]nit, or within space within the particular exclusive possession of a particular [u]nit [o]wner." Doc. 14 at par. 27.

In a memorandum of law in opposition to the motion, defendant argues, inter alia, that plaintiffs are not entitled to summary judgment because the obligations imposed by the Declaration and Bylaws do not establish as a matter of law that defendant was responsible for installing, repairing or maintaining the beam which collapsed. Doc. 39. Rather, it asserts that, since the terms of the Declaration and Bylaws are ambiguous, liability cannot be determined on a motion for summary judgment. Doc. 39 at 2. Defendant further asserts that, since plaintiffs' predecessors-in-interest drafted the Declaration and Bylaws as part of the Offering Plan for the Condominium, the terms thereof must be construed against them. Doc. 39 at 8. Additionally, defendant maintains that plaintiff's motion must be denied as premature since it has had no opportunity to conduct discovery. Doc. 39 at 10. This, explains defendant, is because the captioned action was marked off the calendar pending the outcome of *Chimborazo* and that, as soon as that case was dismissed, plaintiff quickly filed the instant motion. Doc. 39 at 10.

Defendant submits two affidavits in opposition to the motion. The first is by Fran Kempler, property manager for the Condominium since 2018, who represents, inter alia, that,

"upon information and belief", between 2001 and 2018, the prior property manager did not replace any structural elements in the cellar or install the beam which allegedly failed. Doc. 32.

Baris Acar, a professional engineer employed by Pace Engineering, also submitted an affidavit in opposition to the motion. Doc. 31. He was retained by the Board in December 2017 to draw plans for emergency repairs, supervise the construction work, and obtain necessary permits for the repairs. Doc. 31 at par. 3. When he arrived at the premises, he saw the collapsed portion of the vault and believed that the remaining part of the vault was in imminent danger of collapse." Doc. 31 at par. 3. Acar represented that, according to Pace, "the failure was related to a combination of defective structural components, inappropriate repairs undertaken in the space, poor structural design and lack of maintenance. Specifically, [he saw] that load bearing beams were removed and replaced with makeshift structural components" which were "not capable of providing required support." Doc. 31 at par. 4. The "structure" he saw was not welded to the building properly and there was severe rust and corrosion of the structure which weakened the support it provided. Doc. 31 at par. 5. He opined that the changes made to the structure were "done negligently and that the condition was not properly maintained or repaired which was the cause of the collapse of the sidewalk vault." Doc. 31 at par. 6.

In reply, Jerry Atkins, a general partner of LCA, argues, inter alia, that "[n]either plaintiffs nor their agents ever installed or replaced the steel support beam in the ceiling of the cellar vault space at any point subsequent to the conversion of the [b]uilding to condominium in 1989." Doc. 42 at par. 7. He insists that, since the steel beam referenced in Acar's affidavit was not for the exclusive use of the Commercial Unit, it was a Common Element which defendant had the duty to maintain and repair. Doc. 42 at par. 14.

LEGAL CONCLUSIONS

Plaintiff's Motion to Restore the Case to the Calendar

As discussed previously, the May 2020 stipulation provided that, if liability were not determined in *Chimborazo*, the parties could move to restore the captioned action to the court's calendar. Doc. 26 at par. 9; Docs. 29 and 40. Since *Chimborazo* was dismissed prior to the determination of any liability issues therein, plaintiffs are clearly entitled to restore the captioned action to the court's calendar, especially since there is no opposition to this branch of their motion.

Plaintiff's Motion for Summary Judgment

> "[S]ummary judgment is a drastic remedy, to be granted only where the moving party has "tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact" (*Kebbeh v City of New York*, 113 AD3d 512, 512 [1st Dept 2014], *quoting Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). When the movant fails to make this prima facie showing, the motion must be denied, "regardless of the sufficiency of the opposing papers" (*id.*). When deciding a motion for summary judgment, the court's function is issue finding rather than issue determination (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). Moreover, the evidence will be construed in the light most favorable to the nonmoving party (*id.*). Summary judgment must be denied "where there is any doubt as to the existence of a triable issue" (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978] [internal quotation marks omitted]) or where "the issue is arguable" (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968] [internal quotation marks omitted]).

(*Genesis Merchant Partners, L.P. v Gilbride, Tusa, Last & Spellane*, LLC, 157 AD3d 479, 481-482 [1st Dept 2018]).

"As with any summary judgment motion, the evidence submitted both in support of and in opposition [to] must be tendered in admissible form." (*Benedetto v Hyatt Corp*., 203 AD3d 505, 506 [1st Dept 2022]). Here, plaintiffs submit an attorney affirmation and a memorandum of law, both of which do not constitute admissible evidence. Plaintiffs also submit their Rule 202.8-g Statement of Undisputed Facts, although that document is not verified and not all facts

therein are undisputed by defendant. Docs. 29, 40. In seeking summary judgment, plaintiffs principally rely on Battaglia's affidavit, which this Court finds is insufficient to entitle them to such relief. Doc. 14. Despite his representation that he is construction manager for LCA and LCLLC, Battaglia does not state when he became employed in that position; does not state whether he began in that role before or after the collapse of the sidewalk; what his duties in that role entailed; does not discuss any training or experience he had which would have enabled him to evaluate the cause of the collapse; and, most importantly, fails to state whether he personally saw the "rusted and deteriorated" sidewalk structures and, if so, when he saw them. Doc. 14 at par. 12. Given Battaglia's failure to render an opinion based on his own personal knowledge, plaintiffs cannot establish as a matter of law that they had no duty to maintain and/or repair the premises and that the obligation to do so rested on defendant (*See Board of Managers of 150 East 72nd St. Condominium v Vitruvius Estates LLC*, 204 AD3d 465 [1st Dept 2022]; *see also Almonte v 638 W. 160 LLC*, 139 AD3d 439 [1st Dept 2016] [court declined to consider affidavit of defendant's managing member absent indication it was based on his personal knowledge]). Nor does Battaglia submit any blueprints or plans which would shed light on the exact location of the allegedly deteriorated structures, which fact is crucial fact given that the crux of the parties' dispute arises from whether the structures under the sidewalk were in an area one or more of the parties was obligated to maintain and/or repair.

Further, although plaintiffs rely on the language of the Declaration and Bylaws in attempting to persuade this Court that defendant had the obligation to maintain and/or repair the sidewalk and its supporting structures, they fail to authenticate those governing documents by means of an affidavit or sworn deposition testimony (*See Tuchman v Deam Props. [US], LLC*, 2014 NY Slip Op 31227[U], *13-14 [Sup Ct, NY County 2014] [Billings, J.] [citations omitted]).

Since plaintiffs have failed to establish their prima facie entitlement to summary judgment, there is no need to address the sufficiency of defendant's opposing papers (*See Vega*, 18 NY3d *supra* at 503). Even assuming, arguendo, that plaintiffs had established their prima facie entitlement to summary judgment, the motion would still be denied. As noted above, Battaglia maintains in his affidavit that, "[i]n the absence of any allegations of negligence, misuse or neglect (there are none), there can be no issue of fact as to [d]efendant's obligation to maintain the [s]idewalk and the [s]idewalk [s]upport [s]tructures." Doc. 14 at par. 29. However, Battaglia's contention overlooks the fact that defendant alleged in its counterclaim that the sidewalk collapse was attributable to plaintiffs' failure to repair and/or maintain the Commercial Unit. Doc. 5. Since defendant *did* assert an allegation of negligence, misuse, and/or neglect as against plaintiffs, Battaglia has conceded, albeit indirectly, that an issue of fact exists regarding which party was obligated to maintain the sidewalk and its supporting structures. Thus, the branch of plaintiffs' motion seeking summary judgment as against defendant must be denied (*See Onetti v Gatsby Condominium*, 111 AD3d 496, 497 [1st Dept 2013] [summary judgment denied where issues of fact existed regarding whether condition which caused a fire was located within the "common elements" of a building or an area considered part of plaintiffs' unit]).

Moreover, as defendant contends, since this action was marked off the calendar, there has been no opportunity for the parties to conduct discovery. Thus, plaintiffs' motion is also denied pursuant to CPLR 3212(f).

Plaintiff's Motion to Dismiss Defendant's Counterclaim

Just as plaintiffs have failed to establish their prima facie entitlement to summary judgment on liability as against defendants, they have failed to demonstrate through admissible evidence that defendant's counterclaim must be dismissed on the ground that it is without merit

as a matter of law (*See* CPLR 3212). Nor have they established that the counterclaim fails to state a cause of action (*See* CPLR 3211[a][7]). Thus, the branch of plaintiffs' motion seeking dismissal of defendant's counterclaim is denied.

Accordingly, it is hereby:

ORDERED that the branch of plaintiffs' motion seeking to restore this action to the active calendar is granted; and it is further

ORDERED that the branch of plaintiffs' motion seeking summary judgment against defendant on their first cause of action (declaratory judgment) and third cause of action (breach of contract) is denied; and it is further

ORDERED that the branch of plaintiffs' motion seeking dismissal of defendant's counterclaim is denied; and it is further

ORDERED that, within 10 days from entry of this order, plaintiffs 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); and it is further

ORDERED that such service upon the Clerk 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 upon receipt of the foregoing, the Clerk of the General Clerk's Office shall immediately restore the case to the active calendar; and it is further

ORDERED that if plaintiffs fail to serve the Clerk within the time frame set forth above, then the case will not be restored because the Clerk will not know that such restoration has been ordered and plaintiffs' motion will be considered abandoned.

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6/28/2022		DAVID B. COHEN, J.S.C.
DATE		

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