

**Bridgewater Ctr. for Rehabilitation & Nursing v
Dinstber**

2022 NY Slip Op 34854(U)

December 7, 2022

Supreme Court, Broome County

Docket Number: Index No. EFCA2021000196

Judge: Eugene D. Faughnan

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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, Binghamton, New York, on the 10th day of June 2022.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT: COUNTY OF BROOME

BRIDGEWATER CENTER FOR REHABILITATION
AND NURSING,

Plaintiff,

DECISION AND ORDER

vs.

Index No. EFCA2021000196

GEORGE DINSTBER,

Defendant.

APPEARANCES:

Counsel for Plaintiff:

Hinman Howard & Kattell, LLP
BY: RICHARD C. LEWIS, ESQ.
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PO Box 5250
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Defendant

Self-Represented Litigant:

George Dinstber
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EUGENE D. FAUGHNAN, J.S.C.

This matter is before the Court to consider the motion of Plaintiff, Bridgewater Center for Rehabilitation and Nursing (“Bridgewater”), for summary judgment against Defendant, George Dinstber (“Dinstber”). Oral argument was held in Binghamton, NY, at which time only Plaintiff availed itself of the opportunity to appear in person. The Court will consider Defendant’s position based on his written submissions. After due deliberation, this Decision and Order constitutes the determination of this Court.¹

BACKGROUND FACTS

Bridgewater filed a summons and complaint on January 25, 2021 seeking to recover from Defendant the amount of \$42,057.84, representing the charges associated with services provided to Defendant’s wife, Donna Novick, who was a patient and resident at Bridgewater from May 8, 2019 to September 28, 2019. She passed away on January 12, 2020. Plaintiff alleges, among other things, that Ms. Novick’s claim for Medicaid benefits was denied because Defendant did not provide necessary information to the Department of Social Services to support the claim from Medicaid benefits.

During the time Ms. Novick was at Bridgewater, Plaintiff believed that she was unable to manage her personal needs and affairs, and that Defendant was making detrimental health care decisions for Ms. Novick, which essentially interfered with health care decisions made by clinical staff. Based on those concerns, in June 2019 Bridgewater made an application to have a Guardian of the person and property appointed for Ms. Novick, and for a temporary restraining order preventing Defendant from interfering in Ms. Novick’s treatment (Index No. CA2019001859). An Order to Show Cause appointing Mental Hygiene Legal Services to represent Ms. Novick, and granting the temporary restraining order, was signed on June 20, 2019 (Lebous, J.). The Petition also noted that Ms. Novick’s care at Bridgewater was covered by insurance, and that Ms. Novick was the owner of two parcels of real property in Cortland County that were transferred from being in her name only, to being in the name of her and Defendant.

¹ All the papers filed in connection with the Petition are included in the NYSCEF electronic case file, and have been considered by the Court.

These transfers were accomplished by two Quit Claim Deeds on April 1, 2019 (slightly more than one month prior to Ms. Novick being admitted to Bridgewater), with Defendant signing on behalf of Ms. Novick under a Power of Attorney.

In response to the 2019 Petition, Defendant filed a cross-Petition objecting to the appointment of a Guardian, because Ms. Novick had previously signed papers appointing Defendant as her health care proxy and Power of Attorney. The cross-Petition also claimed that Bridgewater failed to establish that Ms. Novick was incapacitated, or that Defendant had breached any fiduciary duties.

On November 26, 2019, due to the fact that Ms. Novick was no longer residing at Bridgewater, the Petition to appoint a Guardian for her was denied. In addition, the Court reinstated the Health Care Proxy and rescinded the temporary restraining order contained in the Order to Show Cause dated June 20, 2019.

Following commencement of this 2021 action for damages, Defendant served an Answer with Counterclaims and Affirmative Defenses, consisting of 23 pages and a verification page dated March 8, 2021, and separately set forth Counterclaims in pages 24 through 53. Bridgewater filed an Answer to the Counterclaim on March 29, 2021. On August 30, 2021, the Court set a Scheduling Order directing discovery to be completed by December 31, 2021. After some discovery and further Court proceeding relating thereto, Defendant appeared for his deposition, in person, on January 18, 2022.

Subsequently, Plaintiff filed this motion for summary judgment and included an affidavit of Jade Ebeling, current Administrator for Bridgewater. He stated that, during her stay at Bridgewater, Ms. Novick did not understand her financial circumstances and required assistance with activities of daily living. Ebeling further alleged that Defendant was making health care and life sustaining decisions for Ms. Novick, but interfering with decisions made by clinical staff. Ebeling also noted that Ms. Novick's medical costs were covered by Medicare, but when those benefits expired, Bridgewater submitted a Medicaid application for Ms. Novick's care. That application was withdrawn based upon the submission of a Medicaid application by Defendant for Ms. Novick. However, according to Ebeling, on May 8, 2020 Broome County Department of Social Services informed Plaintiff that Ms. Novick's Medicaid Long-Term Care benefits were denied based upon Defendant's failure to provide supporting information. Ebeling also stated that certain parcels of real property were transferred from Ms. Novick individually to

Ms. Novick and Defendant on April 1, 2019, the month before Ms. Novick was admitted to Bridgewater. The deponent did not indicate the basis of his knowledge of the deed transfer.

In this motion for summary judgment, Plaintiff argues that Defendant is liable under the “doctrine of necessities” for the cost of medical care provided by Bridgewater to Defendant’s wife. Plaintiff also contends that the transfer of real property in April 2019 was a fraudulent conveyance, intended to prevent Bridgewater from being paid, and that Defendant was Ms. Novick’s representative payee for Social Security benefits but that he improperly diverted those funds to his own benefit. Plaintiff lastly claims that Defendant’s actions constitute a tortious interference with contract causing financial harm to the Plaintiff.

Defendant filed opposition to the motion, including a 14 page (plus Exhibits) counter-Statement of Facts, and his own affidavit consisting of 13 pages and Exhibits “A” through “C” and “H”. Among other things, Defendant’s opposition argues that a change of venue to Cortland County should be ordered, pursuant to CPLR 507, due to the fact that the real property involved is situated in Cortland County. Defendant also contends that the doctrine of necessities is not applicable because Bridgewater has not alleged that Defendant’s credit-worthiness was relied upon; in fact, the evidence shows that Ms. Novick was insured when at Bridgewater, so there was no need to rely upon Defendant’s credit. Defendant suggests that, at the least, there is a question of fact on that issue. Defendant also argues that Bridgewater prevented him from seeing Ms. Novick and that Ms. Novick’s continued stay in Bridgewater was against her desire and that of her family.

LEGAL DISCUSSION AND ANALYSIS

1. Change of Venue

The Court will first address Defendant’s argument that a change of venue to Cortland County is appropriate. CPLR § 507 is applicable to claims that “would affect title to, or the possession, use or enjoyment of, real property.” Plaintiff’s Complaint, while asserting that the transfer of property was a fraudulent conveyance, seeks monetary damages for the amount it claims to be owed for the services provided to Ms. Novick. It does not seek to set aside the conveyance of real property, nor does it make any claim as to the property or title to the property.

Rather, Bridgewater seeks to use the conveyance, and alleged misappropriation of Social Security benefits, as a basis to pursue the monetary claim against Dinstber. The ultimate relief, however, is not against the title to the property. Thus, contrary to Defendant's position, CPLR § 507 is not applicable.

Furthermore, the Court concludes that Defendant's challenge to venue has been waived and/or is untimely. Pursuant to CPLR § 511(b) "a demand to change venue shall be served before or with the answer, and a motion incorporating that demand must be made within 15 days after the demand has been served." *Valley Psychological, P.C. v. Gov't Empls. Ins. Co.*, 95 AD3d 1546, 1547 (3rd Dept. 2012). Defendant previously made a Demand to Change Venue pursuant to CPLR § 511(b), which was filed in the electronic case file on April 2, 2021 (Dkt. No. 9). The affidavit of service indicates that the Answer/511 (b)/Counterclaims were served by mail on March 8, 2021 (Dkt. No. 10). Assuming the Demand to change venue was timely filed (i.e. filed with or before the Answer), Defendant did not make a motion within 15 days of the demand. Therefore, the demand for a change of venue under CPLR § 511 could not be granted, even if a motion was made at this time. See, *Martirano v. Golden Wood Floors Inc.*, 137 AD3d 612 (1st Dept. 2016); *Jackson v. City of New York*, 127 AD3d 552 (1st Dept. 2015).

Accordingly, Defendant's request to change venue is DENIED.

2. Summary Judgment

When seeking summary judgment, "the movant must establish its prima facie entitlement to judgment as a matter of law by presenting competent evidence that demonstrates the absence of any material issue of fact." *Lacasse v. Sorbello*, 121 AD3d 1241, 1241 (3rd Dept 2014) citing *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986) and *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985) (other citation omitted); see *Amedure v. Standard Furniture Co.*, 125 AD2d 170 (3rd Dept. 1987); *Bulger v. Tri-Town Agency, Inc.*, 148 AD2d 44 (3rd Dept. 1989), *app dismissed* 75 NY2d 808 (1990). Such evidence must be tendered in admissible form. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 (1979). Once this obligation is met, the burden shifts to the respondent to establish that a material issue of fact exists. *Dugan v. Sprung*, 280 AD2d 736 (3rd Dept. 2001); *Sheppard-Mobley v. King*, 10 AD3d 70, 74 (2nd Dept. 2004) *aff'd as mod.* 4 NY3d

627 (2005); *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324; *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853. “When faced with a motion for summary judgment, a court’s task is issue finding rather than issue determination (*see, Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]) and it must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference and ascertaining whether there exists any triable issue of fact.” *Boston v. Dunham*, 274 AD2d 708, 709 (3rd Dept. 2000); *see, Boyce v. Vazquez*, 249 AD2d 724, 726 (3rd Dept. 1998). The motion “should be denied if any significant doubt exists as to whether a material factual issue is present or even if it is arguable that such an issue exists.” *Haner v. De Vito*, 152 AD2d 896, 896 (3rd Dept. 1989) (citation omitted); *Lacasse v. Sorbello*, 121 AD3d 1241; *Asabor v. Archdiocese of N.Y.*, 102 AD3d 524 (1st Dept. 2013). It “is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact.” *Vega v. Restani Constr. Corp.*, 18 NY3d 499, 505 (2012) (citation omitted).

A. Doctrine of Necessaries

Bridgewater’s first argument for summary judgment is that Dinstber should be liable for the skilled nursing care provided to his wife. “The common law of [New York] has long required a husband to support his wife in conformity with his means, and to provide her with such ‘necessaries’ as food, clothing, shelter, and medical care. Under the common-law doctrine of necessaries, a husband is thus liable to third parties who furnish his wife with goods or services which fall within the scope of the rule.” *Medical Business Assoc., Inc. v. Steiner*, 183 AD2d 86, 87 (2nd Dept. 1992). The doctrine arose in early common law when a married woman had no right to own property, enter into a contract, or control her own finances. As a result, liability was placed on the husband for those necessary expenses that were provided by third parties to his wife. Some cases have discussed the evolution of the rights of a married woman, and the modern view of marriage as an economic partnership, as supporting reciprocal obligations on both spouses (*See, e.g. Medical Business Assoc., Inc. v. Steiner*, 183 AD2d 86; *Our Lady of Lourdes Mem’l Hosp. v. Frey*, 152 AD 73 [3rd Dept. 1989]). Even though the underpinning of the common law rule has changed, the doctrine of necessaries still exists today. *Wayne Health Care DeMay Living Ctr. v. Estate of Gaudio*, 2016 NY Misc LEXIS 3053 (Sup.

Ct. Wayne County 2016). “[A] creditor seeking to recover for necessities retains the burden of demonstrating that necessities were furnished on the nondebtor spouse's credit. Moreover, as at common law, the responsibility to pay for a spouse's debts must remain limited by the nondebtor spouse's ability to do so.” *Medical Business Assoc., Inc. v. Steiner*, 183 AD2d at 97-98, citing *Our Lady of Lourdes Mem. Hosp. v. Frey*, 183 AD2d 994 [3rd Dept] (second appeal of the case).

Plaintiff has failed to make a *prima facie* case with respect to its claim under the “doctrine of necessities.” Plaintiff has to show that it provided the service to the resident based on the credit of the spouse. Although a presumption may exist on that point (*Our Lady of Lourdes Mem’l Hosp. v. Frey*, 152 AD2d 73), even with that presumption, the facts of this case do not support Plaintiff’s claim. As acknowledged in Ebeling’s affidavit, when Ms. Novick was admitted to Bridgewater, Medicare covered her medical costs. Thus, the initial furnishing of services was not based on Defendant’s ability to pay. Ebeling further notes that once the Medicare services were exhausted, a Medicaid application was submitted by Bridgewater. That would again show that the services to Ms. Novick were not based on Defendant’s ability to pay—instead, it shows that Bridgewater was seeking payment from another source, not from Defendant. Bridgewater withdrew its application based upon Defendant submitting an application for Medicaid benefits on behalf of Ms. Novick. The allegations concerning Defendant’s failure to follow through with the Medicaid application do not change the fact that payment was being sought from Medicaid, not from Defendant, nor based on his credit. Plaintiff’s complaint fails to allege that it provided services on the credit of Defendant, nor does its evidence support such a conclusion. Accordingly, the Court finds that Plaintiff has not made a *prima facie* showing for summary judgment under the “doctrine of necessities.” “[T]he moving party's failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers.” *William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh*, 22 NY3d 470, 475 (2013), citing *Vega v. Restani Constr. Corp.*, 18 NY3d at 503.

B. Claim of fraudulent conveyance of real property and/or diversion of monthly Social Security payments

Plaintiff’s next argument is that Defendant intentionally transferred Ms. Novick’s assets to avoid payment to creditors, including Plaintiff. On this motion, Plaintiff points to New York

Debtor and Creditor Law § 276 to support the relief being requested.² Pursuant to the version of Debtor and Creditor Law § 276 applicable at the time of the subject real property conveyances, “[e]very conveyance made and every obligation incurred with actual intent . . . to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.” *Chemung Canal Trust Co. v. Living Better, Inc.*, 127 AD3d 1373, 1374 (3rd Dept. 2015), quoting [former] Debtor and Creditor Law § 276. Actual intent to defraud is the critical distinction between former Debtor and Creditor Law § 276, and former Debtor Creditor § 273, which deals with constructive fraud. See, *Atsco Ltd. v. Swanson*, 29 AD3d 465 (1st Dept. 2006); *Ryan v. Potbotics, Inc.*, 2021 NY Misc LEXIS 5855 (Sup. Ct. New York County 2021). Plaintiff’s complaint and motion is based on a claim of actual fraud. A finding of “actual fraud” can be made based upon a showing of either “actual intent” or “badges of fraud”. It has been noted that:

Because direct proof of actual intent is rare, creditors may rely on [‘badges of fraud’] to establish an inference of fraudulent intent (*Pen Pak Corp. v LaSalle Natl. Bank*, 240 AD2d 384, 386 [2nd Dept. 1997]). Factors that are considered “badges of fraud” are (1) a close relationship between the parties to the transaction, (2) a secret and hasty transfer not in the usual course of business, (3) inadequacy of consideration, (4) the transferor’s knowledge of the creditor’s claim and his or her inability to pay it, (5) the use of dummies or fictitious parties, and (6) retention of control of the property by the transferor after the conveyance [citation omitted].

Shelly v. Doe, 249 AD2d 756, 758 (3rd Dept. 1998); see, *Matter of Bernasconi v. Aeon, LLC*, 105 AD3d 1167 (3rd Dept. 2013).

Although Plaintiff has set forth a variety of facts that could support a claim that Defendant transferred property and/or misappropriated funds to hinder Bridgewater’s attempt to collect on the alleged debt, Plaintiff has not yet established the debt. Even assuming for purposes of this discussion that Ms. Novick’s need for care was evident at the time of the subject transfers, there is a dispute as to whether Bridgewater is entitled to judgment on its claimed charges, or whether any such debt/judgment is collectible from Ms. Novick or her estate. A determination as to Bridgewater’s entitlement to the damages claimed would need to be made

² Article 10 of the Debtor and Creditor Law (§§ 270-281) was repealed and replaced by a new Article 10 (§§ 270-281-a), which became effective on April 4, 2020, after the date of the transfers that are the subject of this action, and after Ms. Novick was released from Bridgewater. Therefore, the prior version of the statute is applicable to this case.

before a finding could be made as to an intent to defraud. If Plaintiff does not prove its right to recover, then the contention of fraudulent conveyances would be moot.

Defendant disputes Bridgewater's entitlement to the charges, based largely on his argument that Ms. Novick was held in the facility over his objections, and without her consent. Some of those issues were raised in the 2019 case to have a Guardian appointed for Ms. Novick. Plaintiff contends that those issues were resolved in its favor, and support its present claim for damages. However, this Court does not view the facts of the earlier action as conclusive, or pertinent, to the instant claims. In the 2019 action, Judge Lebus signed an Order to Show Cause relating to the Petition seeking appointment of a Guardian, and also granted temporary relief suspending Defendant's rights under Ms. Novick's Health Care Proxy. It also restrained him from acting on her behalf with respect to health care decisions. Dinstber then filed a motion to modify the temporary restraining order, as well as a cross Petition. The Petitions were given a return date of August 22, 2019, after which the parties submitted a proposed stipulation and proposed Order, which the Court declined to sign. However, in the Letter Decision and Order dated November 21, 2019, the Health Care Proxy was reinstated and the temporary restraining order was rescinded. There were no findings on the merits with respect to any claims that Ms. Novick was restrained against her will or Dinstber's objections to the treatment provided to Ms. Novick. Thus, there was no determination as to Bridgewater's entitlement to payment for the charges incurred. Plaintiff's current argument that the results of the earlier guardianship proceeding somehow establish a debt, or support Bridgewater's current claim for damages, is unpersuasive.

That is not to say that a conveyance made before a debt is incurred or established cannot be a fraudulent conveyance. The Court recognizes that, in certain situations, the transfer of assets even prior to the debt being incurred can still give rise to a claim for fraudulent conveyance. "[A] conveyance made without fair consideration at a time when the person making the conveyance 'intends or believes that he [or she] will incur debts beyond his [or her] ability to pay as they mature, is fraudulent as to both present and future creditors.'" *Grace Plaza of Great Neck, Inc. v. Heitzler*, 2 AD3d 780, 781 (2nd Dept. 2003) (brackets in original), quoting former Debtor and Creditor Law § 275; Cf. *Bay Park Ctr. for Nursing & Rehabilitation, LLC v. Plummer*, 2016 NY Misc LEXIS 4645 (Sup. Ct. Bronx County 2016) (no fraudulent conveyance when defendant gifted \$30,000 to her son to pay student loans three years prior to being admitted

to a nursing home and there was no indication that she would need to go into a nursing home three years later); *Promenade Nursing Home v. Cohen-Fleisher*, 41 Misc3d 1236 (A) (Sup. Ct. Kings County 2013) (no fraudulent conveyance when defendant's husband put her on the deed to the marital home in 2009 and defendant had no way of knowing that her husband would choke on a chicken bone in 2011, which resulted in him needing to be admitted to a nursing home). In the present case, Plaintiff has submitted medical evidence that Ms. Novick suffered from cognitive problems, mental decline and other health problems prior to entering Bridgewater. Plaintiff uses that information to support a conclusion that the transferor (Ms. Novick) and/or Defendant knew at the time of the transfer of real property that she would be incurring nursing care charges at some point in the not-too-distant future. Further, the monthly Social Security payments were allegedly diverted even after Ms. Novick was admitted to Bridgewater. Although this evidence may be relevant to the issues of "actual intent" to hinder, delay or defraud a creditor, or future creditor, a Plaintiff must show it is actually a creditor. *See, e.g. Ruby Weston Manor v. Vidal*, 18 Misc3d 1115 (A) (Sup. Ct. Kings County 2008). In contrast to cases where the nursing home resident sought and received nursing home care, this case involved a situation where Defendant has submitted evidence that the care was over his objection and, by extension, over the resident's objection. Thus, Plaintiff's entitlement to recover for its damages has not been proven, and any claim for fraudulent conveyance is premature.

As an additional factor, the Court also notes that Defendant has asserted counterclaims. Plaintiff has not moved for dismissal or summary judgment against those claims, nor has Defendant sought summary judgment. To the extent Defendant has damages associated with the counterclaims, they would offset Plaintiff's claimed damages. This provides a further reason for denying summary judgment as to fraudulent conveyance and any damage to Plaintiff.

Accordingly, Plaintiff's motion for summary judgment on the claim of fraudulent conveyance is DENIED.

C. Tortious interference with contract

Plaintiff also argues that Defendant's conduct thwarted efforts to obtain Medicaid benefits on behalf of Ms. Novick, and that his actions constitute a tortious interference with contract. "[T]o sustain a claim for tortious interference with a contract, it must be established

that a valid contract existed which a third party knew about, the third party intentionally and improperly procured the breach of the contract and the breach resulted in damage to the plaintiff.” *Clearmont Prop., LLC v. Eisner*, 58 AD3d 1052 1055 (3rd Dept. 2009), quoting *Bradbury v. Cope-Schwarz*, 20 AD3d 657, 659 (3rd Dept. 2005); see, *Ullmannglass v. Oneida, Ltd.*, 86 AD3d 827 (3rd Dept. 2011).

Plaintiff concedes that there was no admission agreement signed, but asserts that a contract existed between Bridgewater and Ms. Novick, whereby Bridgewater would provide skilled nursing services and Ms. Novick was responsible to pay for those services. Plaintiff contends that Defendant’s actions prevented payments by, or on behalf of, Ms. Novick.

On this motion, Plaintiff submitted a copy of the charges for which it seeks payments. Specifically, Plaintiff claims damages for care provided to Ms. Novick from August 16, 2019 to September 28, 2019. This was the time after Ms. Novick’s Medicare coverage was exhausted, and a Medicaid application was submitted by Bridgewater on Ms. Novick’s behalf.

However, Defendant argues that Ms. Novick was removed from a ventilator on August 8, 2019 and was no longer in need of in-patient rehabilitation after her Medicare coverage expired on August 15, 2019. Defendant was objecting to Ms. Novick’s continuing to remain at Bridgewater subsequent to that date. Because of Plaintiff’s Order to Show Cause in the 2019 guardianship case (signed on June 20, 2019), Defendant was prohibited from making health care decisions on behalf of Ms. Novick. Bridgewater was also actively seeking to have a Guardian appointed, alleging that Ms. Novick did not have capacity to handle her affairs. Thus, on the basis of Plaintiff’s own allegations, Ms. Novick was unable to enter into a contract for skilled medical services after August 16, 2019, or for making arrangement to pay for the same. Without such capacity, or a representative to act on her behalf, the existence of an express or implied contract has not been established. Since Plaintiff has not proven the existence of a contract, it has not made a *prima facie* case of Defendant’s tortious interference with a contract.

Accordingly, Plaintiff’s motion for summary judgment on its claim for tortious interference of contract is DENIED.

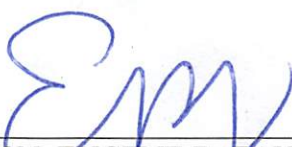
CONCLUSION

Based on all the foregoing, it is hereby

ORDERED, that Defendant's request for a change of venue is DENIED; and it is further ORDERED, that Plaintiff's motion for summary judgment is DENIED.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

Dated: December 7, 2022
Binghamton, New York



HON. EUGENE D. FAUGHNAN
Supreme Court Justice