BDC Fin. L.L.C. v Barclays Bank PLC
2024 NY Slip Op 30042(U)
January 3, 2024
Supreme Court, New York County
Docket Number: Index No. 650375/2008
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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BDC FINANCE L.L.C.	**INDEX NO.**	650375/2008
Plaintiff,	**MOTION DATE**	
- v -	**MOTION SEQ. NO.**	019
BARCLAYS BANK PLC,		
Defendant.	**DECISION + ORDER ON MOTION**	

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 019) 695, 696, 697, 698, 702

were read on this motion to/for MISCELLANEOUS.

Upon the foregoing documents, it is

In this action, plaintiff BDC Finance LLC (BDC) and defendant Barclays Bank PLC (Barclays) each assert a separate breach of contract claim arising from the collapse of Lehman Brothers on September 15, 2008 and the resulting immediate economic turmoil.

In motion seq. no. 019, BDC moves to enforce remittitur of the First Department's decision remanding for trial the question of whether Barclay's loss calculation was reasonable and in good faith. (NYSCEF Doc. No. [NYSCEF] 689, *BDC Fin. LLC v Barclays Bank PLC*, 201 AD3d 458 [1st Dept 2022].) If the answer is no, then BDC insists it is entitled to damages for Barclays's breach of contract, which BDC pled in the amended complaint ¶57(f), alleging "[i]n the event that Barclays was entitled to calculate the amount payable on Early Termination (which as the defaulting party it was not), calculate reasonably and in good faith the net amount payable on Early Termination

pursuant to the terms of the Agreements." (NYSCEF 98, First Amended Complaint at 21.) BDC claims Barclays failed to do so. Admittedly BDC has not pursued this claim until now. (NYSCEF 708, tr at 26:13-15 [September 7, 2022 Argument].) Barclays argues that BDC has no live claims and thus the only issue for trial is the damages to which Barclays is entitled on its counterclaim for breach of contract against BDC.

BACKGROUND

After more than 16 years of litigation, including a bench trial and four appeals, the following facts are not disputed.[1]

BDC, a Connecticut based hedge fund which invests in derivative transactions, commenced this action against Barclays, "a British and Welsh bank that is a leader in the derivatives market'" seeking to recover damages for breach of a total return swap entered by the parties. (NYSCEF 451, Decision & Order After Trial at 2.) Specifically, "[s]ince October 2008, Barclays [] has been holding approximately $300 million in cash that BDC [] posted with Barclays." (NYSCEF 281, BDC MOL at 6[2] [Motion Seq. 010]; *see also* NYSCEF 98, First Amended Complaint ¶¶ 8, 36, 42, 51, 52.)

In this action, BDC seeks return of its collateral, but Barclays countered that BDC owed Barclays $309,373,164.44 as an Early Termination Amount pursuant to the agreement at issue. (NYSCEF 100, Answer to Amended Complaint, Defenses and Counterclaims; NYSCEF 34-1, ISDA Master Agreement § 6 [e].)

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[1] The background of this action is detailed in two prior decisions of this court (Bransten, J.). (*See* NYSCEF 248, Decision and Order [Motion Seq. 009]; NYSCEF 451, Decision & Order After Trial.)

[2] NYSCEF pagination

The parties memorialized the agreement in a series of documents, including a standard form Master Agreement, a Schedule, and a standard form Credit Support Annex (CSA). (NYSCEF 34-1, ISDA Master Agreement.) Each party had the right to demand collateral from the other party based on changes in the value of the underlying debt instruments. (NYSCEF 451, Decision/Order After Trial at 4.) Thus, Barclays was entitled to ask BDC to transfer a "Delivery Amount" of additional collateral to Barclays if Barclays was under-collateralized, and BDC was entitled to ask Barclays to transfer a "Return Amount" of collateral if Barclays was over-collateralized. (*Id.*)

The CSA set forth the dispute resolution mechanism for when the parties disagreed about the calculation of the delivery and return amounts. (NYSCEF 34-1, ISDA Master Agreement, Credit Support Annex ¶5 at 31/75.) First, the disputing party was required to notify the other party of the dispute and transfer any undisputed amount. (*Id.*) Second, the parties were to attempt to resolve what remained of the dispute. (*Id.*) If the parties could not resolve the dispute, a formal mechanism was in place that required the party making the demand for payment to recalculate the amount of the payment using specific metrics. (*Id.*) Relevant here, the CSA required a disputing party to transfer any returned amount "no later than the business day following the business day on which BDC requests the transfer of such return amount." (*BDC Finance LLC v Barclays Bank LLC*, 25 NY3d at 40 [2015].)

The 2005 transaction began to unravel on October 6, 2008, resulting with BDC's termination of the CSA on October 14, 2008. First, Barclays demanded a Delivery Amount of $11,750,000 in collateral from BDC. (NYSCEF 153, Barclays October 6, 2008 Collateral Call [9:56 AM].) Next, BDC demanded that Barclays transfer a Return

Amount of $40,140,405.78. (NYSCEF 34-6, October 6, 2008 BDC's Collateral Call [12:56 PM].) Barclays did not make a transfer, but rather, responded by email noting its disagreement with BDC's call, inquiring whether BDC wanted to invoke the dispute mechanism, and reiterating that Barclays was due collateral from BDC. (NYSCEF 35 and NYSCEF 35-1, October 6, 2008 emails.) After discussions, the parties agreed that BDC owed Barclays $13,520,000. (NYSCEF 153-8, Call Transcript; NYSCEF 153-9, October 6, 2008 email.)

After further discussions on October 7, 2008, Barclays agreed that it owed BDC $5,080,000 for the Return Amount. (NYSCEF 35-2, October 7, 2008 email.) On October 8, 2008, Barclays transferred $5 million to BDC, citing processing issues as the reason for the one day delay. (NYSCEF 35-3, October 8, 2008 Wire Instructions.)

On October 8, 2008, Barclays issued to BDC an additional collateral call for $20.5 million. (NYSCEF 451, Decision/Order After Trial at 13/41.) Also on October 8, 2008, BDC sent Barclays a Notice of Failure to Transfer Return Amount based on Barclays' failure to pay the entire Return Amount of $5,080,000 on time. (NYSCEF 35-4, October 8, 2008 email.) On October 8 and 9, 2008, BDC paid collateral calls made by Barclays "under protest and without prejudice." (NYSCEF 35-6, emails.)

Barclays sent BDC further collateral calls on October 10 and 14, 2008. (NYSCEF 488, October 10, 2008 collateral Call; NYSCEF 489, October 14, 2008 Collateral Call; NYSCEF 495, October 8-14, 2008 emails.) BDC declined to pay those collateral calls, essentially responding that Barclays had defaulted on the $40 million collateral call, and that any outstanding transactions had been terminated. (NYSCEF 496, October 16, 2008 Letter from BDC to Barclays.)

On October 14, 2008, BDC emailed Barclays a Notice of Designation of Early Termination Date, stating an "'Event of Default' has occurred under the Master Agreement by virtue of Barclays' failure to transfer the Return Amount reflected in the Return Demand on or prior to the second business day after the date of the Notice of Failure." (NYSCEF 35-5, October 13, 2008 Notice.) Barclays responded, contesting the claim of default and contending that it had complied with the dispute resolution procedure under the CSA and had promptly disputed BDC's $40,000,000 collateral call. (NYSCEF 497, October 16, 2008 Letter from Barclays to BDC.) On October 23, 2008, Barclays sent BDC a letter terminating the CSA due to BDC's alleged default. (NYSCEF 499, October 23, 2008, Barclays Letter to BDC.)

DISCUSSION

"A trial court, upon remittitur, lacks the power to deviate from the mandate of the higher court." (*Berry v Williams*, 106 AD3d 935, 937 [2d Dept 2013] [internal quotation marks and citations omitted].) Furthermore, the language in the decretal paragraph controls the extent of the remittitur remanding the matter to this court. (*Daniele v Pain Mgt. Ctr. of Long Is.*, 189 AD3d 1351, 1352 [2d Dept 2020].)

Here, the Appellate Division, First Department determined that:

> "The parties' agreement provides the nondefaulting party (defendant) with the discretion to make its loss calculation 'reasonably' and 'in good faith.' We find that plaintiff's expert evidence raised an issue of fact as to the reasonableness and good faith of defendant's loss calculation … . Thus, we remand the matter for a trial of whether the calculation was 'reasonable under the circumstances'."

(NYSCEF 689, *BDC Fin. LLC*, 201 AD3d at 459 [citations omitted].) The parties sharply disagree as to the scope of the remittitur.

BDC contends that the First Department reversed and remanded for trial of BDC's affirmative claim that Barclays, as the non-defaulting party, improperly calculated loss under the CSA. BDC maintains that the claim has never been adjudicated in any court since it is predicated on BDC being the defaulting party. BDC also asserts that it properly pleaded its claim arising from Barclays' improper loss calculation as an alternative breach of contract claim; that the alternative claim is not precluded; and that the claim is now ripe for adjudication.

Barclays counters that the remittitur confirms that only its counterclaims are left to be tried. Barclays asserts that BDC is barred from advancing its "alternative claim" after the Appellate Division, First Department affirmed that Barclays is not liable to BDC. Barclays also asserts that throughout the litigation, BDC repeatedly confirmed that it does not have an alternative claim left to be tried, and that BDC cannot now pursue the alleged alternative claim. Resolution of this discrepancy requires a review of the procedural history in this action.

PROCEDURAL HISTORY

On October 17, 2008, BDC commenced this action for breach of contract (first cause of action), alleging "Barclays failed to return to BDC the Posted Collateral and Interest Amount on October 14, 2008 and to date has not transferred to BDC the Posted Collateral and Interest Amount" for which Barclays owes BDC $302 million, and for a declaratory judgment (second cause of action) "that an Event of Default occurred under the Agreements as a result of Barclays' conduct, that an Early Termination Date occurred on or about October 14, 2008, that BDC is the Non-defaulting Party under the Agreements and that Barclays is required to pay BDC all amounts required under the

Agreements." (NYSCEF 2, Complaint ¶¶21-25.) In May 2010, BDC amended to expand on its breach of contract (first cause of action) and add a claim for reformation due to scrivener's error (third cause of action).[3] (NYSCEF 98, Amended Complaint.) BDC alleges six specific breaches. (*Id.*) Relevant here is BDC's ¶57(f) in which BDC alleges that "Barclays was obligated to: [i]n the event that Barclays was entitled to calculate the amount payable on Early Termination (which as the defaulting party it was not), calculate reasonably and in good faith the net amount payable on Early Termination pursuant to the terms of the Agreements," and its failure to do so was an independent violation of the CSA. (*Id.* ¶¶57-58.) Barclays denied the allegations in the amended complaint, asserting multiple affirmative defenses and alleging counterclaims for breach of contract (first counterclaim) and declaratory judgment (second counterclaim). (NYSCEF 100, Answer to Amended Complaint, Defenses and Counterclaims.) Each party essentially claimed that the other breached the CSA by failing to pay or properly dispute the other party's collateral calls. Thereafter, the parties engaged in extensive motion practice.

In motion seq. no. 008, BDC moved for summary judgment[4] on its first cause of action for breach of contract focusing on essentially one of its six specific breaches: Barclays failure to timely "transfer $40 million in response to BDC's October 6, 2008 demand for a Return Amount" and to dismiss Barclays's counterclaims. (NYSCEF 148, BDC's MOL in Support of Summary Judgment.)

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[3] This third cause of action was resolved at trial. (NYSCEF 248, Trial Decision at 24-25.)

[4] BDC did not designate its motion as one for partial summary judgment.

In motion seq. no. 009, Barclays moved for summary judgment dismissing BDC's complaint and for summary judgment on Barclay's counterclaims. (NYSCEF 154, Barclay's MOL in Support of Summary Judgment.)

Justice Bransten denied BDC's motion for summary judgment on the issue of liability on its breach of contract claim, granted the portion of Barclay's motion that sought summary judgment dismissing that claim, and denied Barclay's motion as to Barclay's breach of contract counterclaim. (NYSCEF 247 & 248, Decision and Order [mot. seq. nos. 008, 009].) The court concluded that factual issues existed as to whether Barclays intended its communications with BDC, following BDC's October 6th collateral call, to be a notice of dispute under the CSA and whether those emails provided sufficient notice to impart actual knowledge of the dispute on BDC. (*Id.*) The court also interpreted the CSA as providing that, in the event of a dispute, the parties need only pay the undisputed amount of a collateral call prior to the resolution of the dispute. (*Id.*) The court further determined that nothing in the CSA permitted a party to unilaterally terminate the contract without resorting to the dispute resolution mechanism, without providing the other party with a notice of default and giving the other party an opportunity to cure.[5] (*Id.*) Thus, the court concluded that, since BDC failed to follow the

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[5] In opposition to Barclay's motion for summary judgment, and in support of BDC's motion for summary judgment on its breach of contract claim, BDC also asserted breach of contract for Barclays' failure to "[c]alculate Exposure for purposes of its collateral calls based on its estimate at mid-market of the amounts that would be paid for Replacement Transactions as if there were two Affected Parties." (NYSCEF 98, Amended Complaint ¶57(b).) Justice Bransten denied BDC's breach of contract claim, and as a defense, because BDC failed to assert this breach as a basis for BDC's termination of the contract independent of Barclay's failure to pay BDC's October 6, 2008 collateral call and BDC failed to trigger the dispute mechanism. (NYSCEF 247 & 248, Decision and Order at 23 [motion seq. nos. 008, 009].)

CSA, it cannot seek to avoid the CSA's requirements and retroactively challenge Barclays' calculation of its post-September 15th collateral calls. (*Id.*)

The Appellate Division, First Department modified to grant BDC's motion for summary judgment on its breach of contract claim, deny both Barclays' motion to dismiss BDC's contract claim and for summary judgment on Barclays' counterclaim for breach of contract, and otherwise affirmed. (NYSCEF 259, First Department Decision and Order [110 AD3d 582 (1st Dept 2013)].) The Court stated:

> "BDC's default notice stated that in order to have properly disputed the collateral call, Barclays was required to have both notified BDC of the dispute and transferred the undisputed amount of $5,080,000 by October 7, 2008. The evidence in the record establishes as a matter of law that Barclays did not do this. Barclays' payment of $5 million on October 8, 2008 was a day late. Accordingly, BDC notified Barclays that it had two business days to pay the Return Amount. Still, Barclays did not remit the $40 million, placing it in default. Barclays' default, in turn, entitled BDC to terminate the transactions and demand return of its collateral … . Because Barclays did not return BDC's collateral, it breached the agreements, and summary judgment on liability should have been granted to BDC… .
>
> Barclays is not entitled to summary judgment on its counterclaims alleging that BDC failed to meet Barclays' collateral calls made on October 10 and 14, 2008. BDC was not required to meet those calls because at the time they were due, Barclays was already in default and BDC had terminated the transactions… ."

(*Id.* at 8-9, 14.)

By order entered January 23, 2014, the Appellate Division, First Department denied Barclays' motion for reargument, and granted its motion for leave to appeal to the Court of Appeals, certifying the question, "Was the order of this Court, which modified the order of Supreme Court, properly made?" (NYSCEF 263, Order.)

The Court of Appeals modified answering the certified question in the negative. (NYSCEF 283, Court of Appeals Order [25 NY3d 37 (2015)].) The Court essentially concluded that neither party was entitled to summary judgment, stating:

> "With regard to the dispute resolution mechanism, under the CSA, the first step requires that the disputing party must notify the other party of the dispute. BDC does not deny that Barclays gave notice that it disputed the collateral call ... .Next, the disputing party must transfer the 'undisputed amount', if any, to the other party ... . We conclude that questions of fact exist as to whether Barclays complied with the undisputed amount provision. The record reflects that Barclays and BDC spoke with one another about the dispute, including at least two telephone conversations on October 6 and 7, 2008. The undisputed amount, Barclays maintains, reflected an agreement about the outstanding collateral calls made by both parties. Barclays then undisputedly transferred $5 million to BDC on October 8. A question of fact exists as to whether BDC received the full benefit of the amount it was owed when Barclays paid the $5 million and reduced the amount of its collateral call to DBC by the additional $80,000.
>
> Finally, because questions of fact exist as to whether Barclays defaulted, Barclays is not entitled to summary judgment on its counterclaims alleging that BDC failed to meet the October 10 and 14 collateral calls."

(25 NY3d at 44.)

Thereafter, both parties sought clarification of the Court of Appeal's remittitur. BDC moved to enforce the Court of Appeals' remittitur and clarify the scope of the trial, which BDC claimed must be a full trial on the merits since the Court denied both motions for summary judgment. (NYSCEF 280, BDC's Notice of Motion to Enforce Remittitur and to Clarify the Scope of the Trial.) Barclays opposed a full trial and cross-moved arguing that the decision limited the scope of the trial to a single issue, whether Barclays defaulted, which did not require a full trial. (NYSCEF 313, Notice of Cross-Motion to Enforce the Court of Appeals' Mandate.)

On April 15, 2016, Justice Bransten denied BDC's motion and Barclay's cross-motion, concluding that "the sole issue on liability remaining and to be resolved at trial is

whether Barclays defaulted."[6] (NYSCEF 362, Decision and Order Motion and tr at 16:8-18:4 [mot. seq. no. 010].) There was no appeal.

On April 18-19, 2017, Justice Bransten conducted a bench trial to consider the issue remitted by the Court of Appeals. She declared that "[t]he claim at issue in this trial revolves around a collateral call issued by BDC on October 6, 2008, which ultimately resulted in the termination of the entire TRS transaction on October 14, 2008." (NYSCEF 451, Decision & Order After Trial at 41.) She held that "Barclays is not liable to BDC as BDC cannot show that it did not have the full benefit of the dispute resolution clause available to it." (*Id.*) She concluded:

> "Barclays substantially complied with the contract. The failure of Barclays to transfer the additional $80,000 did not prejudice BDC's rights under Paragraph 5 of the CSA given that the next logical step would have been to re-evaluate the disputed amount. This had no bearing on whether the parties could continue its engagement of the dispute resolution process by failing to show it re-evaluated the collateral call pursuant to Paragraph 5 of the contract. Instead the record reflects that BDC transferred the $5 million back to Barclays as part of its payment on Barclays' subsequent collateral calls as the parties continued to perform under the terms of the agreement. In fact, the court also notes that but for BDC's properly disputed demand of $40.1 million -- which formed the basis of this lawsuit -- the failure to provide the additional $80,000 would likely have been overlooked by the parties ... . Therefore, BDC has failed to prove by a preponderance of the evidence that it did not receive the full benefit of the contractual provisions available to it."

(*Id.* at 40-41)

[6] BDC sought a "full trial of the facts" while Barclays opposed a full trial and cross-moved for a trial "limited to one issue, whether Barclays defaulted, which does not require a full trial." (NYSCEF 362, Decision and Order Motion and tr 12:9-16 [motion seq. no. 010].) Justice Bransten effectively granted Barclays' motion.

On October 8, 2019, the Appellate Division, First Department unanimously affirmed, stating:

> "A fair interpretation of the evidence supports the trial court's conclusion that, although it was due on October 7, 2008, Barclays' October 8, 2008 transfer to BDC of $5 million and its reduction of the amount of its collateral call by $80,000 substantially complied with its collateral obligation and provides BDC with the full benefit of the amount that was owed. BDC's arguments that the trial court should have strictly enforced the contractual provisions regarding the timing of the payment of the undisputed amount and should have found that Barclays engaged in equivocal and willful conduct that misled BDC as to whether it had given notice of a dispute and its intention to pay the undisputed amount, are foreclosed by the rulings of the court of Appeals."

(NYSCEF 463, *BDC Finance LLC v Barclays Bank PLC*, 176 AD3d 454, 455-456 [1st Dept 2019].)

On December 12, 2020, this court granted Barclays's motion for summary judgment on its counterclaims (seq. 016), denied BDC's motion to dismiss those counterclaims (seq. 015), and granted Barclays' request for attorneys' fees. (NYSCEF 588 & 589, Decision and Order [motion seq. nos. 015, 016]; NYSCEF 595, Transcript.) The court issued a judgment in Barclays' favor for $3,382,789.97 and severed the issue of the amount of expenses, including legal fees and costs. (NYSCEF 679, April 22, 2021 Judgment [docketed).]

The Appellate Division, First Department reversed and vacated the April 22, 2021 judgment, denied Barclays's motion for summary judgment <u>as to damages</u>, and remanded the matter for further proceedings. (NYSCEF 688, Remittitur [201 AD3d 458 (1st Dept 2022)].) The Court dismissed the appeal of the December 12, 2020 decision as subsumed by the reversal. As the Appellate Division reversed the judgment "as to damages" only, this court's decision on BDC's default stands and the only issues are damages on Barclays's counterclaims and BDC's defenses to the counterclaims, if any.

Thereafter, this court restored the action to the trial calendar. (NYSCEF 691). BDC now moves to "enforce" the remittitur.

DISCUSSION

The summary judgment motion that triggered the trial decision, and appellate decision affirming that decision, was BDC's partial motion for summary judgment on its breach of contract as to two breaches. (NYSCEF 148, BDC's MOL; NYSCEF 247, Decision and Order [motion seq. no. 008].) If BDC was successful on its summary judgment theory, there would be no need for a trial. If BDC was unsuccessful on its partial motion for summary judgment, it could proceed to trial on its remaining claims for breach of contract. BDC was not required to make a motion at all. Instead, BDC could have gone to trial on its breach of contract claim and asserted one or more of its six breaches. It is axiomatic that moving for summary judgment does not waive claims that are not asserted as part of that motion.

While BDC's contract claim, alleging six breaches, was viable after the February 19, 2015 Court of Appeals decision denying summary judgment to both Barclays (009) and BDC (008) (NYSCEF 265), BDC waived those claims when it failed to appeal this court's decision on motion 010 denying BDC's motion for a full trial. (NYSCEF 362, Decision and Order [motion seq. no. 010].) BDC lost a second opportunity to appeal. Instead of a trial, Justice Bransten proceeded to hold a framed issue hearing as she believed that was the direction of the Court of Appeals. She did not take testimony on BDC's contract claim based on six breaches, which is consistent with her ruling on motion 010. Likewise, she did not take testimony or rule on Barclay's counterclaims. BDC also failed to appeal the trial decision for failure to hold a full trial on BDC's

contract claim from all six breaches. (NYSCEF 456, Notice of Appeal of Trial Decision at 5/47.)

The court rejects BDC's assertion that the amended complaint's ¶57(f) issue was not ripe until this court granted summary judgment on Barclays's counterclaims. Rather, it was ripe when the Court of Appeals denied both motions for summary judgment. "The denial of a motion for summary judgment establishes nothing except that summary judgment is not warranted at th[e] time." (David D. Siegel, New York Practice § 287 [5th ed. 2015].)

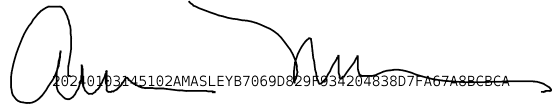
Furthermore, on appeal from this court's decision on the summary judgment motions, BDC acknowledged that its claims were resolved in Barclays' favor: (1) "Following resolution of BDC's claims in Barclays' favor, both parties moved for summary judgment on the counterclaims." (NYSCEF 634, Notice of Appeal of NYSCEF 588 and 589 at 4/8 [motion seq. nos. 015, 016].) BDC also admitted that its contract claim was based on one breach: "BDC has asserted claims against Barclays for breach of contract arising from Barclays' failure to return approximately $300 million in BDC's cash collateral following Barclays' default under certain swap derivative transactions." (NYSCEF 456, Notice of Appeal of Trial Decision at 5/47.)

Finally, even if BDC's contract claim on the remaining alleged breaches was viable, the calculation would be the same. The amount of BDC's collateral would be deducted from Barclays's damages on its counterclaims.

The court has considered the parties' remaining arguments and finds them unavailing without merit or otherwise not requiring an alternate result.

Accordingly, it is

ORDERED that BDC's motion is denied, and the trial on whether Barclays' loss calculation was reasonable under the circumstances will be scheduled at a trial scheduling conference on January 22, 2024 at 2:30 pm.



1/3/2024		ANDREA MASLEY, J.S.C.
DATE		

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION	
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER	
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