

McIsaacs v Myers
2024 NY Slip Op 35232(U)
April 29, 2024
Supreme Court, Westchester County
Docket Number: Index No. 55674/2020
Judge: Joan B. Lefkowitz
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55674/2020

NYSCEF DOC. NO. 117

RECEIVED NYSCEF: 04/29/2024

Defendants.

SUPREME COURT: STATE OF NEW YORK IAS
 PART WESTCHESTER COUNTY
 PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

-----X
 SHERYL GRANT MCISAACS, as Administratrix of
 the Estate of DANIELLA ELISE NICOLE GORE
 a/k/a DANIELLA GORE-JOHNSON, and SHERYL
 GRANT MCISAACS, individually,

Plaintiff,

-against-

RONALD MYERS, SANDRA MYERS, KRISTEN
 A. LYNN, and ANGELO SANGIUOLO,

The following electronically filed papers (NYSCEF Doc Nos. 88-108; 110-113; and 116) were read on the motion by defendants Ronald Myers ("Ronald") and Sandra Myers ("Sandra") (together, the "Myers Defendants") for an order, pursuant to CPLR 3212, granting the Myers Defendants summary judgment dismissing the Complaint against them as a matter of law.

Motion Sequence No. 3

(1) Notice of Motion; Affirmation in Support and Exhibits A-Q; Statement of Material Facts; and Memorandum of Law in Support; (2) Affirmation in Opposition and Exhibits A-C; and (3) Affirmation in Reply.

Upon reading the foregoing papers, the motion is determined as follows:

Plaintiff Sheryl Grant McIsaacs ("plaintiff") commenced this action in her individual capacity as well as in her capacity as administratrix of the estate of Daniella Elise Nicole Gore a/k/a Daniella Gore Johnson (the "decedent"), in connection with a fatal car accident that occurred shortly after midnight on July 21, 2019 (the "Accident"), which resulted in the decedent's passing.

Specifically, in the Complaint, plaintiff alleges in relevant part that on the evening of July 20, 2019, the Myers Defendants, who are a married couple, hosted a 70th birthday party for Ronald's father, Eugene Sullivan ("Eugene") at their home in Valley Cottage (the "Party") (*see* NYSCEF Doc. No. 1). Plaintiff further alleges that the Myers Defendants

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were negligent in serving and/or providing alcoholic beverages at the Party to defendant Kristen A. Lynn (“Lynn”) while Lynn was visibly intoxicated as a guest at the Party. Plaintiff alleges that the Myers Defendants allowed Lynn to leave the Party while intoxicated and with keys to a motor vehicle. Plaintiff also alleges that after leaving the Party, Lynn drove a motor vehicle owned by co-defendant Angelo Sangiuolo (“Sangiuolo”) while Lynn was intoxicated, and that in the early morning hours of July 21, 2019, her motor vehicle struck the decedent’s vehicle at a rate of speed in excess of 100 miles per hour, which Accident resulted in the decedent’s death.

Based upon the foregoing general allegations as detailed in the Complaint, plaintiff asserts a first cause of action for negligence as against all defendants, *i.e.*, the Myers Defendants, Lynn, and Sangiuolo (collectively, “defendants”); and a second cause of action for wrongful death as against all defendants.

The Myers Defendants furnished an Answer in which they, *inter alia*, denied the material allegations of the Complaint and asserted various affirmative defenses in response thereto (*see* NYSCEF Doc. No. 2). Lynn and Sangiuolo similarly submitted a joint Answer in which they, *inter alia*, denied the Complaint’s material allegations and raised numerous affirmative defenses in response thereto (*see* NYSCEF Doc. No. 6).

In connection with the completion of discovery in this action, the Court issued a Trial Readiness Order dated December 1, 2023 (*see* NYSCEF Doc. No. 86). Plaintiff thereafter filed a Note of Issue and Certificate of Readiness for Trial (*see* NYSCEF Doc. No. 87).

The Myers Defendants subsequently made the instant motion (Seq. No. 3) for an order, pursuant to CPLR 3212, granting the Myers Defendants summary judgment dismissing the Complaint against them as a matter of law (*see* NYSCEF Doc. Nos. 88108). Plaintiff opposes the motion (*see* NYSCEF Doc. Nos. 110-113).

In support of the motion, the Myers Defendants tender: (1) a Statement of Material Facts; (2) a memorandum of law; and (3) an affirmation from their counsel in which he annexes thereto: (a) copies of the pleadings; (b) deposition testimony from Joanne Sullivan (“Joanne”), who is Ronald’s mother and Eugene’s wife and who attended the Party for Eugene’s 70th birthday; (c) deposition testimony from both of the Myers Defendants; (d) deposition testimony from Edward Ventolsilla (“Ventolsilla”), who worked as a bartender at the Party; (e) deposition testimony from Eugene; (f) deposition testimony from Lynn; (f) deposition testimony from Detective Brett Hochron (“Detective Hochron”), who was the

police officer that arrived at the scene of the Accident; (g) deposition testimony from Meagan Leavey (“Leavey”), who attended the Party as a friend of the Myers Defendants and of Ronald’s step-brother, Michael Sullivan (“Michael”); (h) deposition testimony from Karen Hopkins (“Karen”) and Jon Hopkins (“Jon”), who attended the Party as friends of the Myers Defendants; and (i) deposition testimony from Michael and his brother Matthew Sullivan (“Matthew”), both of whom attended the Party as the sons of Eugene and Joanne, and who are also friends of Lynn (*see* NYSCEF Doc. Nos. 89-108).

Based upon the foregoing submissions, the Myers Defendants argue that the two causes of action in the Complaint, namely the first cause of action for negligence and the second cause of action for wrongful death which is grounded in allegations of negligence, should be dismissed as against the Myers Defendants pursuant to CPLR 3212. In particular, they assert that they should not be held liable for Lynn’s apparent drunk driving where, as here, deposition testimony from 12 witnesses collectively and uniformly demonstrates that Lynn was not observed to be acting in any manner reflecting that she was intoxicated at the Party. The Myers Defendants contend that they have no duty to control the conduct of third parties such as Lynn, especially given that Lynn’s behavior gave the Myers Defendants no reason to think that she was intoxicated, and where the Accident occurred approximately twenty miles from the situs of the Party. The Myers Defendants further argue that they had no duty to plaintiff because they were not in control of Lynn when she left the Party, entered Sangiuolo’s vehicle, and drunkenly crashed into the decedent’s vehicle. They assert that after completing discovery and deposing the aforementioned 12 witnesses, there is no evidence whatsoever reflecting that the Myers Defendants knew or should have known that Lynn was intoxicated while on their premises, or that they knew or should have known that Lynn would operate a motor vehicle while intoxicated thereafter. As such, the Myers Defendants contend that the Complaint should be dismissed as against them in its entirety pursuant to CPLR 3212.

In opposition, plaintiff furnishes an affirmation from her counsel in which he annexes thereto: (1) deposition testimony from Michael; (2) deposition testimony from Detective Hochron; and (3) deposition testimony from Ventolsilla (*see* NYSCEF Doc. Nos. 110-113).¹

¹ Plaintiff neglected to submit a response to the Myers Defendants’ Statement of Material Facts in violation of Rule 202.8-g of the Uniform Civil Rules for the Supreme Court and the County Court (*see* 22 NYCRR § 202.8-g), which Rules are expressly incorporated into this Court’s Individual Part Rules (*see* https://www.nycourts.gov/LegacyPDFS/courts/9jd/PartRules/PR_JBLefkowitz.pdf).

Plaintiff contends in her opposition that the Myers Defendants' summary judgment motion should be denied because they have not established *prima facie* entitlement to summary judgment, and that even if they had made such a showing, triable issues of fact regarding the Myers Defendants' negligence require that this Court deny their motion. Specifically, plaintiff asserts that the Myers Defendants' submissions demonstrate that they threw a large party at which alcohol was being served to guests without any cognizable method of regulating how much their guests were drinking. Plaintiff further argues that this negligence directly led to Lynn becoming intoxicated and driving a motor vehicle while drunk, which caused the Accident. Plaintiff also contends that the Myers Defendants should be held liable under New York's Dram Shop Act (GOL § 11-101) and Alcoholic

Beverage Control Law § 65, as the Myers Defendants should be construed to be "sellers" of alcohol under the later statute, such that the Dram Shop Act would impose liability on them for the conduct of their guests, including Lynn. Accordingly, plaintiff asserts that the Myers Defendants' summary judgment motion should be denied in its entirety.

In reply, the Myers Defendants tender a reply affirmation from their counsel (*see* NYSCEF Doc. No. 116). They argue therein that the Dram Shop Act is wholly inapplicable to this action because it provides that a social host's duty extends only to conduct on their premises of which they had an opportunity and need to control, and that based upon testimony from 12 different witnesses, there was nothing in Lynn's behavior that would place the Myers Defendants on notice that Lynn's conduct required control. The Myers Defendants further assert that Alcoholic Beverage Control Law § 65 is similarly inapplicable, as that statute does not apply to non-commercial providing of alcoholic beverages, and has no relevance to the Party, which was a social gathering at the Myers Defendants' home at which the Myers Defendants were not selling alcohol. The Myers Defendants also contend that the three deposition transcripts that comprise the totality of the evidence submitted by plaintiff in opposition do not create any issue of fact that would require the denial of the Myers' Defendants' motion. In fact, the Myers Defendants assert that plaintiff's submissions actually support the Myers Defendants' position, as the testimony therein does not reflect any evidence that would have provided notice to the Myers Defendants that Lynn was acting in such a way that her conduct needed to be controlled at the Party. Therefore, because social hosts are not responsible for the conduct of their non-visibly intoxicated guests once such guests leave the hosts' property, the Myers Defendants assert that they should not be held liable in negligence, and that the Complaint should be dismissed as against them pursuant to CPLR 3212.

On a motion for summary judgment, the court's function is to determine whether triable issues of fact exist or whether judgment can be granted to a party on the proof

submitted as a matter of law (*see* CPLR 3212[b]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). In determining the motion, the court must view the evidence in the light most favorable to the non-movant and is obliged to draw all reasonable inferences in the nonmovant's favor (*see Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]; *Stukas v Streiter*, 83 AD3d 18, 22 [2d Dept 2011]). Such a motion may be granted only if the movant tenders sufficient evidence in admissible form demonstrating, *prima facie*, the absence of triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make a *prima facie* showing requires denial of the motion regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the *prima facie* burden is met, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form establishing the existence of material issues of fact requiring a trial (*see Zuckerman, supra*, 49 NY2d at 562).

As plaintiff's claims against the Myers Defendants sound in negligence, the Court notes that in order to prevail on a negligence claim, "a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (*Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]; *accord Pasternack v Lab. Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016]; *Porcasi v Oji*, 220 AD3d 899, 900 [2d Dept 2023]; *Fernandez v Romero*, 219 AD3d 1407, 1408 [2d Dept 2023]).²

It is well-settled that "[l]andowners, as a general rule, have a duty to exercise reasonable care to prevent harm to patrons on their property" (*Kranenberg v TKRS Pub, Inc.*, 99 AD3d 767, 768 [2d Dept 2012], *citing D'Amico v Christie*, 71 NY2d 76, 85 [1987]; *see also Grogan v Simon Prop. Group, Inc.*, 192 AD3d 769, 772 [2d Dept 2021]). However, "an owner's duty to control the conduct of persons on its premises arises only when it has the opportunity to control such conduct, and is reasonably aware of the need for such control" (*Kranenberg, supra*, 99 AD3d at 768, *citing Giambruno v Crazy Donkey Bar & Grill*, 65 AD3d 1190, 1192 [2d Dept 2009]; *see also Ali v Miller's Ale House, Inc.*, 189 AD3d 966, 967 [2d Dept 2020]).

In *D'Amico, supra*, 71 NY2d at 85, the Court of Appeals made clear that in light of a landowner's "duty to control the conduct of third persons on their premises when they have the opportunity to control such persons and are reasonably aware of the need for such

² The second cause of action for wrongful death is grounded in the same allegation of negligence that underlies the first cause of action, alleging that "[a]s a result of the negligence of [defendants], as aforesaid, The Decedent sustained severe injuries, which resulted in her death" (*see* NYSCEF Doc. No. 1 at ¶¶ 349353).

control . . . a landowner may have responsibility for injuries caused by an intoxicated guest.” However, the Court in *D’Amico* also cautioned that “liability may be imposed only for injuries that occurred on defendant’s property, or in an area under defendant’s control, where defendant had the opportunity to supervise the intoxicated guest” (71 NY2d at 85) (internal citations omitted). In holding that the defendants therein would not be held liable under a theory of negligence for a car accident caused by an individual who had been drinking at the defendants’ picnic, the Court emphasized that “the injuries complained of did not take place on the picnic premises, or [defendants’] property; the accident occurred on a public highway several miles distant” (*id.* at 86). Moreover, the Court in *D’Amico* distinguished the facts of that case from a circumstance in which a defendant in a New Jersey action was appropriately held liable in negligence liability for the acts of a drunk driver who had left the defendant’s home visibly intoxicated. The Court explained that in the New Jersey case, the defendant at his home “served his guest the equivalent of 13 drinks within an hour or two, continued serving him liquor after his guest was visibly intoxicated – actions that were ‘relatively easily corrected’ – accompanied the guest to his automobile, saw him drive off, and was himself sufficiently concerned about the guest’s capacity that he called to see if the guest had arrived home safely. There is simply no parallel here” (*id.* at 86) (internal citations omitted).

Similarly, in *Martino v Stolzman*, 18 NY3d 905, 908 (2012), the Court of Appeals held that defendant party hosts were not liable in negligence when an intoxicated guest left their home and caused a motor vehicle accident while backing out of the hosts’ driveway. In so holding, the Court in *Martino* explained that the defendant hosts “were no longer in a position to control Stolzman when he entered his vehicle and drove away. Furthermore, we agree . . . that ‘requiring social hosts to prevent intoxicated guests from leaving their property would inappropriately expand the concept of duty’” (18 NY3d at 908) (internal citations omitted). Accordingly, the law in New York is well-settled that a social host is not liable in negligence for the conduct of an intoxicated guest where the host is not reasonably aware of the need to control such guest’s behavior and where the guest’s conduct takes place outside of the host’s property (*see Ali, supra*, 189 AD3d at 967; *Kranenberg, supra*, 99 AD3d at 768, *Giambruno, supra*, 65 AD3d at 1192; *see also Stenson v Genting N.Y., LLC*, 185 AD3d 864, 865 [2d Dept 2020] (affirming the Supreme Court’s summary judgment dismissal of a negligence claim against a casino bar that had served a man alcohol, after which such man assaulted the plaintiff at an off-premises location)).

Here, the Myers Defendants’ evidentiary submissions, including the aforementioned deposition transcripts, were sufficient to establish the Myers Defendants’ *prima facie*

entitlement to judgment as a matter of law dismissing the Complaint's negligence and wrongful death claims as against them. In particular, the deposition testimony furnished by the Myers Defendants repeatedly and consistently demonstrates, *prima facie*, that Lynn was not visibly intoxicated at the Party such that the Myers Defendants should not have been reasonably aware of any need to control Lynn's behavior, and that the Accident occurred outside of the Myers Defendants' property and indeed took place approximately a 20-minute drive away from their home.

Specifically, the deposition testimony set forth in the Myers Defendants' moving papers reflects in relevant part as follows: (1) Joanne testified that she briefly said hello to Lynn at the Party, and that Lynn did not show any signs of intoxication; (2) Ronald testified that he was not aware of Lynn – or any other guest – showing any signs of intoxication at the Party; (3) Sandra testified that she did not observe any intoxicated guests at the Party; (4) Ventolsilla testified that he did not serve alcohol to any person at the Party whom he believed to be intoxicated, and that no guests at the Party appeared to be intoxicated; (5) Eugene testified that he did not see any of Michael's friends intoxicated or under the influence of drugs at the Party; (6) Lynn testified that she was not intoxicated at the Party and has no idea how she became intoxicated, but that her blood alcohol content following the Accident reflected that she was intoxicated at the time of the Accident; (7) Detective Hochron testified that his investigation determined that Lynn had a blood alcohol content of .17 following the Accident, which occurred on the Saw Mill River Parkway approximately a 20-minute drive from the Myers Defendants' residence, but that the investigation did not develop proof that Lynn had been drinking at the Party; (8) Leavey testified that Lynn was not drinking alcohol at the Party and that Lynn said that this was because she had work the following day, and Leavey further testified that Lynn was not showing any signs of intoxication when Leavey left the Party; (9) Michael testified that he did not observe Lynn drinking alcohol at the Party; and (10) Matthew testified that he similarly did not observe Lynn consuming alcoholic beverages at the Party (*see* NYSCEF Doc. Nos. 96-103; 106-107).

Accordingly, the burden of going forward shifted to the plaintiff to raise a triable issue of fact (*see Zuckerman, supra*, 49 NY2d at 562).

In opposition, the plaintiff failed to raise a triable issue of fact (*see* CPLR 3212 [b]). Specifically, the plaintiff's submissions, which are entirely comprised of an attorney affirmation that annexes the deposition transcripts of Michael, Detective Hochron, and Ventolsilla – all of which were included with the Myers Defendants' moving submissions – do not cite the presence of triable issues of fact and instead further reflect the Myers

Defendants' entitlement to summary judgment dismissing the Complaint as against them. Indeed, as noted above, in relevant part Michael testified that he did not observe Lynn drinking alcohol at the party; Detective Hochron testified that his investigation determined that Lynn had a blood alcohol content of .17 following the Accident and that the investigation did not develop proof that Lynn had been drinking at the Party; and Ventolsilla testified that he did not serve alcohol to any person at the Party whom he believed to be intoxicated, and that no guests at the Party appeared to be intoxicated (*see* NYSCEF Doc. Nos. 111-113).

As such, even setting aside plaintiff's failure to submit a response to the Myers Defendants' Statement of Material Facts in violation of Rule 202.8-g of the Uniform Civil Rules for the Supreme Court and the County Court as expressly incorporated into this Court's Individual Part Rules, the Court determines that plaintiff in her opposition has failed to meet her burden of producing evidentiary proof in admissible form establishing the existence of material issues of fact requiring a trial (*see Zuckerman, supra*, 49 NY2d at 562; *Hayes v County of Suffolk*, 222 AD3d 950, 953 [2d Dept 2023] (affirming an award of summary judgment dismissing plaintiff's negligence claim where "[i]n opposition, the plaintiffs failed to raise a triable issue of fact"); *Schutt v Dynasty Transp. of Ohio, Inc.*, 203 AD3d 858, 860 [2d Dept 2022] (holding that "[t]he Supreme Court properly granted those branches of [defendants'] motions which were for summary judgment dismissing the cause of action alleging common-law negligence insofar as asserted against each of them" where "[t]he plaintiffs failed to raise a triable issue of fact in opposition"); *Atkins v Beth Abraham Health Servs.*, 133 AD3d 491, 492-493 [1st Dept 2015] (affirming the Supreme Court's award of summary judgment in defendant's favor and holding that "the negligence and wrongful death claims were properly dismissed"); *Bayo v 626 Sutter Ave. Assoc., LLC*, 106 AD3d 648, 650 [1st Dept 2013] (holding that defendant was properly awarded summary judgment dismissing a wrongful death claim "given the absence of evidence of negligence or other wrongful acts on defendant's part"))).

The Court does not credit plaintiff's contention that New York's Dram Shop Act requires the denial of the Myers Defendants' summary judgment motion on the ground that the Myers Defendants should be construed to have engaged in the "unlawful selling" of alcohol thereunder. That statute, which is entitled "Compensation for injury caused by the illegal sale of intoxicating liquor," provides in relevant part as follows:

Any person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxication of any person, whether resulting in his death or not, shall have a right of action against any person

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who shall, by unlawful selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication; and in any such action such person shall have a right to recover actual and exemplary damages (see NY GOL § 11-101[a]) (emphasis added).

The record is clear that the Myers Defendants did not “unlawfully sell” alcohol to Lynn. And even if the Court were to deem the Myers Defendants to have “assist[ed] in procuring liquor” for Lynn at the Party in accordance with the above-cited language of the Dram Shop Act, the aforementioned deposition testimony furnished by both the Myers Defendants and the plaintiff consistently and repeatedly reflects that Lynn was not visibly intoxicated at the Party (see NYSCEF Doc. Nos. 96-103; 106-107; 111; 113). Plaintiff has cited no case law that supports holding a social host liable under the Dram Shop Act where, as here, the social hosts had no indication that a guest was intoxicated, and the Court is aware of no such case law (see *Conigliaro v Franco*, 122 AD2d 15, 16-17 [2d Dept 1986] (awarding defendant social hosts summary judgment dismissing plaintiff’s Dram Shop Act claim where “the plaintiff has not only failed to establish a sale by the appellants, but has also failed to adduce evidence that the [defendants] even served alcohol to Kavanagh”); *Ciambra v Perry*, 2016 N.Y. Misc. LEXIS 4784, **7-8 [Sup. Ct. Suffolk Cty. Oct. 7, 2016] (granting summary judgment dismissing a Dram Shop Act claim and stating that “[p]laintiff and the nonmoving defendants have failed to raise a triable issue of fact as to whether the Perry defendants violated General Obligations Law § 11-101, as their submissions fail to show that the Perry defendants ‘unlawfully sold’ them alcohol by providing liquor to them while they were visibly intoxicated”)).

The Court also does not agree with plaintiff’s argument that the Myers Defendants’ summary judgment motion should be denied in light of Alcoholic Beverage Control Law § 65. As noted by the Myers Defendants, this statute is wholly inapposite as it does not apply to the non-commercial providing of alcoholic beverages such as at the Party (see Alcoholic Beverage Control Law § 65 [stating in relevant part that “[n]o person shall sell, deliver or give away or cause or permit or procure to be sold, delivered or given away any alcoholic beverages to . . . Any visibly intoxicated person”]; see also *People v Taxin*, 11 Misc.3d 45, 46-47 [2d Dept App. Term 2006] (noting that “[i]t is thus clear that any offense contemplated under section 65 is directed against commercial vendors and distributors of intoxicants and not against individuals in their own homes”), citing, *inter alia*, *People v Himmel*, 252 AD2d 273, 276-277 [3d Dept 1999] and *Greer v Ferrizz*, 118 AD2d 536, 539 [2d Dept 1986]).

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Moreover, the statute is further inapplicable because, as noted repeatedly above, the record before the Court on this motion unambiguously demonstrates that Lynn was not a “visibly intoxicated person” at the Party (*see* Alcoholic Beverage Control Law § 65[2]; *see also* NYSCEF Doc. Nos. 96-103; 106-107; 111; 113).

Therefore, the Myers Defendants are entitled to summary judgment dismissing as a matter of law the two causes of action asserted against them in the Complaint pursuant to CPLR 3212 (*see Hayes, supra*, 222 AD3d at 953; *Schutt, supra*, 203 AD3d at 860; *Atkins, supra*, 133 AD3d at 492-493; *Bayo, supra*, 106 AD3d at 650).

All other arguments raised on this motion and all evidence submitted by the parties in connection therewith have been considered by the Court, notwithstanding the specific absence of reference thereto. Based on the foregoing, it is hereby:

ORDERED that the motion by the Myers Defendants is granted such that the Complaint is hereby dismissed as against them in its entirety pursuant to CPLR 3212; and it is further

ORDERED that the remaining parties to this action shall appear for a pre-trial conference on a date and time as set by the clerk.³

E N T E R,

Dated: White Plains, New York
April 29, 2024

HON. JOAN B. LEFKOWITZ, J.S.C.

To:

Counsel of record via NYSCEF

³ To the extent that the Myers Defendants have asserted cross-claims against Lynn and Sangiuolo (*see* NYSCEF Doc. No. 2) and Lynn and Sangiuolo have similarly asserted cross-claims against the Myers Defendants (*see* NYSCEF Doc. No. 6), none of which cross-claims were at issue on this motion, the Myers Defendants remain active parties to this litigation.