

SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER

Present:

**HON. TIMOTHY S. DRISCOLL**  
Justice Supreme Court

-----X  
BARBARA R. NIMKOFF AS EXECUTRIX OF THE  
ESTATE OF MARTIN B. NIMKOFF, DECEASED,

TRIAL/IAS PART: 11

Plaintiff,

NASSAU COUNTY

-against-

Index No: 5307/09  
Motion Seq. Nos. 13 and 14  
Submission Date: 8/13/18

CENTRAL PARK PLAZA ASSOCIATES, LLC,  
DONALD MONTI, GERARD A. LEVI, ANNA  
ASSANTE AS EXECUTRIX OF THE ESTATE  
OF RALPH F. PARISI, BYRON H. TERK,  
MARIO FRACASSA, LAWRENCE J. PACERNICK,  
FREDERICK KAPLAN, WILLIAM CACCESE,  
JEFFREY GOODMAN, JEFFREY SHERWOOD,  
BERNARD POLATSCH, ILAN ISRAELI,  
STANLEY WEINREB, CHANCHAL SAHA,  
THOMAS SZULZ, RONALD C. RICHMAN,  
JOHN DOE 1, JOHN DOE 2, JOHN DOE 3,  
JOHN DOE 4 and CONCORDE MANAGEMENT  
SERVICES, INC.,

Defendants.

-----X  
The following papers having been read on these motions:

- Notice of Motion, Affirmation in Support and Exhibits.....X
- Affirmation in Opposition and Exhibits.....X
- Reply Affirmation .....X
- Notice of Motion *In Limine*, Affirmation in Support and Exhibits.....X
- Affirmation in Opposition and Exhibits.....X

This matter is before the Court for decision on 1) the motion filed by Plaintiff Barbara R. Nimkoff as Executrix of the Estate of Martin B. Nimkoff, Deceased (“Plaintiff”) on July 2, 2018, and 2) the motion filed by Defendants Central Park Plaza Associates LLC, Concorde Management Services, Inc., Donald Monti, Mario Fracassa, Frederick Kaplan, William Caccese, Ronald C. Richman, Jeffrey Goodman, Chanchal Saha and Anna Assante as Executrix of the

Estate of Ralph F. Parisi (“Defendants”) on July 31, 2018, both of which were submitted on August 13, 2018. For the reasons set forth below, the Court 1) denies Plaintiff’s motion; and 2) grants Defendants’ motion.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order 1) precluding the admission into evidence at the trial of this action of the expert report of James T. Ashe (“Ashe”) dated August 11, 2017; and 2) precluding Ashe from testifying in connection with the trial of this action. Defendants oppose the motion.

Defendants move for an Order precluding Plaintiff from calling Anthony W. Cummings, Esq. (“Cummings”), counsel for Defendants, as a witness at the trial of this action. Plaintiff opposes the motion.

B. The Parties’ History

The parties’ history is outlined in detail in the prior decisions (“Prior Decisions”) of the Court and the Court incorporates the Prior Decisions by reference as if set forth in full herein. As noted in the Prior Decisions, the First Amended Complaint (“Amended Complaint”) alleges as follows:

Plaintiff is legally authorized to bring this action on behalf of the estate (“Estate”) of her deceased husband, Martin B. Nimkoff (“Nimkoff” or the “Deceased”) pursuant to validly issued letters testamentary, and pursuant to New York Limited Liability Company Law (“LLCL”) § 608. Defendant Central Park Plaza Associates LLC (the “LLC”) is a New York limited liability company. Nimkoff was a member of the LLC, and had a 3.602% ownership interest until he passed away on April 15, 2004. The other individual defendants were at all relevant times members of the LLC with varying ownership interests in the LLC, which were as follows: Donald Monti (“Monti”) (4.775%), Gerald A. Levi (“Levi”) (6.551%); Ralph F. Parisi (“Parisi”) (4.790%); Byron H. Terk (“Terk”) (3.602%); Fracassa (11.546%); Pacernick (8.059%); Kaplan (4.400%); Caccese (3.439%); Jeffrey Goodman (“Goodman”) (1.112%); Jeffrey Sherwood (“Sherwood”) (4.690%); Bernard Polatsch (“Polatsch”) (6.551%); Ilan Israeli (“Israeli”) (7.113%); Stanley Weinreb (“Weinreb”) (15.822%); Saha (3.696%); Thomas Szulz (“Szulz”) (4.350%); and Richman (1.112%). Defendants John Does 1-4 represent those unknown members of the LLC that served on the LLC’s management committee and managed the daily affairs of the LLC. Defendant Concorde Management Services, Inc. (“Concorde”) is a New

York corporation.

A partnership known as Central Park Plaza Associates ("Partnership") was created by some or all of the members of the LLC in or about December 1982. The sole purpose of the Partnership was to own real property ("Property") known as 700-760 Old Country Road, Plainview, New York and to improve, manage, operate, lease, sell and mortgage or otherwise encumber the Property.

On April 16, 1991, the partners executed the Second Amended and Restated Partnership Agreement ("Partnership Agreement"). In or about June 1995, the partners, including Monti, Sherwood, Levi, Polatsch, Parisi, Terk, Nimkoff, Fracassa, Israeli, Pacernick, Weinreb, Kaplan, Saha, Caccese, Szulz, Goodman, Polatsch and David Koretz ("Koretz" - now deceased) (collectively the "Members" and, when referred to without Nimkoff and Koretz, the "Defendant Members") 1) executed a conversion agreement to convert the interests of the partners in the Partnership into membership interests in a limited liability company, specifically the LLC; 2) caused a certificate of conversion of the partnership to the LLC to be filed with the New York Department of State; and 3) executed an Agreement governing the terms under which the LLC was to operate ("Operating Agreement"). Through the Operating Agreement, the Members expressly incorporated several provisions of the Partnership Agreement into the Operating Agreement. Under the Operating Agreement, a management committee ("Management Committee") that consisted of Monti and four other Members who were to be elected every three years, managed the daily business and affairs of the LLC.

The Operating Agreement contained a provision (Paragraph 10) concerning the death or expulsion of a member which reads as follows:

The death, insanity, bankruptcy, retirement, resignation, or expulsion of any Member will cause a dissolution of the LLC unless, within 180 days after such event, the LLC is continued by the vote or written consent of a majority in interest of the Remaining Members. In the event the LLC is continued pursuant to vote or written consent of a majority in interest of the remaining Members in accordance with the previous sentence following the death or incompetence of a Member, then the terms and provisions of the Partnership Agreement relating to the death or incompetence of a Member shall be applicable to the LLC and its Members and are adopted herein as if fully set forth herein but made applicable to Members of the LLC as opposed to Partners in the Partnership.

Plaintiff also cites Paragraph VIII of the Partnership Agreement which reads, in pertinent part, as follows:

In the event of the death of any individual Partner...then and in any of those events, the Partnership shall purchase and the Estate of the Deceased Partner shall sell the interest of such Partner...to the Partnership on the following terms and conditions:

The purchase price for such partner's interest...shall be equal to the greater of (i) the last Stated Value (as defined below) of the Partnership (to be agreed upon on an annual basis by the Partners) multiplied (a) in the case of an individual partner, by the deceased partner's percentage interest in the Partnership...The Stated Value shall be deemed to be the Partners' equity in the Property (and other assets if any owned by the Partnership) excluding all mortgages thereon and such amount shall be redetermined annually by the Partners on or about the anniversary date of the establishment of the then current Stated Value. In the event the Partnership shall fail to redetermine the Stated Value in any year, the Last stated value shall be controlling...

Payment for such interest shall be made to the Estate of the Deceased Partners...as follows:...

(iii) The balance of the Stated Value purchase price, if any, shall be paid in equal quarterly installments over a ten year period beginning at the end of the third full month after the six month period...together with interest at the lowest rate necessary to prevent an imputation of interest.

Plaintiff alleges that prior to June 1999, Sherwood filed for bankruptcy. The Defendant Members did not vote, or provide effective written consent of a majority in interest, to continue the LLC, within 180 days following Sherwood's bankruptcy. Accordingly, 180 days after Sherwood's bankruptcy, the LLC dissolved by the terms of the Operating Agreement. Plaintiff alleges that even if the Members voted to continue the LLC following Sherwood's bankruptcy, the LLC nonetheless dissolved.

On April 15, 2004, Nimkoff passed away. The Defendant Members did not vote, or provide written consent of a majority in interest, to continue the LLC, within 180 days following Nimkoff's death, or at all. Accordingly, 180 days after Nimkoff's death, the LLC dissolved by the terms of the Operating Agreement.

Plaintiff alleges that, under the LLC and the Operating Agreement, upon the dissolution, the Defendant Members were required to wind up the LLC by, *inter alia*, liquidating its assets, *i.e.*, selling the Property and paying to each Member, based on his ownership interest, his proportionate share of the value of the Property, after paying creditors. In or about April 2008,

the LLC sold the Property for \$7 million. The Defendant Members received their proportionate share of the proceeds of the sale of the Property, but Nimkoff's Estate was never given its 3.602% proportionate share of the proceeds ("Proceeds") of the sale, amounting to \$252,140. Instead of providing Plaintiff with Nimkoff's proportionate share of the Proceeds, the LLC took the position that the last Stated Value was calculated in early 2001 at \$2,750,000 and that this allegedly "outdated" valuation (Am. Comp. at ¶ 40) was applicable in determining the purchase price at which the LLC should buy Plaintiff out under the Partnership Agreement. The Defendant Members and/or the Management Committee allegedly failed to update the Stated Value in 2002, 2003 or 2004 even though the LLC's attorney notified them, through a letter memorandum in February 2001, that they needed to update the Stated Value regularly for the purpose of properly compensating the estate of deceased members. The fair market value of the Property in 2001 was far less than its fair market value in 2004 but the Stated Value in the LLC's books did not reflect that fact.

The Amended Complaint contains nine (9) causes of action:

- 1) The Defendant Members and the LLC breached the Operating Agreement by refusing to provide the Nimkoff Estate with its proportionate 3.602% share of the Proceeds;
- 2) the Defendant Members, Management Committee and LLC breached their implied duty of good faith and fair dealing;
- 3) the Defendant Members and LLC breached their fiduciary duty of care and loyalty to Nimkoff and his Estate;
- 4) each Member of the Management Committee and the LLC breached their fiduciary duty of care and loyalty to Nimkoff and his Estate;
- 5) the Defendant Members, the LLC and the Management Committee breached their fiduciary duty to Plaintiff by failing to update the Stated Value annually;
- 6) the Defendant Members are liable for conversion of the Nimkoff Estate's right to possess 3.602% of the LLC;
- 7) the Defendant Members are liable for conversion of the difference between 3.602% of the 2001 Stated Value and the fair market value of the Property in 2004;
- 8) Concorde engaged in tortious interference by intentionally procuring the breach of the Operating Agreement; and

9) Concorde aided and assisted the Defendant Members and Management Committee's breach of their fiduciary duties to the Nimkoff Estate.

The Court's Prior Decision dated April 17, 2018 addressed the prior motion ("Prior Motion") by Defendants for an Order, pursuant to CPLR § 3212, dismissing Plaintiff's complaint in its entirety on the grounds that there were no material issues of fact that warranted trial, and that Defendants were entitled to judgment as a matter of law because there was no evidence that the failure to update the "Stated Value" of the "Building" was not in good faith. The Court denied that motion because the motion papers before the Court demonstrated that there were issues of fact regarding the reasonableness and good faith of Defendants' determination regarding the stated value of the Property. The Court concluded that because the stated value was an integral component of the payment made to Nimkoff's Estate upon his death, summary judgment was inappropriate. The Court's Prior Decision dated April 17, 2018 was further informed by Judge Bucaria's prior decision denying Defendants' previous motion for summary judgment, in which Judge Bucaria concluded that Plaintiff had demonstrated a triable issue as to whether the failure to update the stated value was in good faith.

In support of Plaintiff's motion now before the court, counsel for Plaintiff ("Plaintiff's Counsel") provides a copy of Ashe's expert report (Ex. A to Nimkoff Aff. in Supp.) (the "Report"). In the Court's Prior Decision dated April 17, 2018, the Court outlined in detail the substance of Ashe's affidavit in support of Defendants' Prior Motion, as well as his Report which was annexed as an exhibit to that prior affidavit. As noted in the Court's Prior Decision, Ashe provided his opinion that the decision to maintain the 2001 Certificate of Stated Value was not made in bad faith. Plaintiff's Counsel submits that the Court should not permit the Report to be admitted into evidence at trial because there is nothing in the Report, or in Ashe's potential testimony, that reflects professional or technical knowledge that could be helpful to the jury. Plaintiff's Counsel notes that Ashe has asserted that his opinion is based in part on the fact that Defendant Monti met with Tim Mulcahy ("Mulcahy"), the LLC's accountant, at least once annually to discuss the property's performance, and that the accountant would make a recommendation as to whether the stated value should be increased, decreased or remain the same. Plaintiff's Counsel affirms, however, that Mulcahy has denied under oath ever making any such recommendation, and provides a copy of the transcript of Mulcahy's deposition (Ex. E to Nimkoff Aff. in Supp.). Plaintiff's Counsel also submits that the only expertise that Ashe

purports to offer is that he is an “expert in the area of dispute resolution” (Nimkoff Aff. in Supp. at ¶ 7, citing Report at p. 1). Plaintiff’s Counsel submits that this purported area of expertise will not be of assistance to the jury, which is itself responsible for dispute resolution by virtue of its role in deciding whether Defendants’ failure to update the stated value was in good faith. Under these circumstances, Plaintiff’s Counsel submits, Ashe’s testimony would not be based on any professional or technical knowledge beyond the comprehension of a typical juror, and the Court should not permit that testimony, or admit the Report into evidence.

In opposition, Cummings provides specifics regarding Ashe’s education and experience, as outlined by Ashe in his examination before trial (transcript at Ex. A to Cummings Aff. in Opp.). As reflected in Ashe’s biography (Ex. B to Cummings Aff. in Opp.), Ashe has been admitted in court as an expert witness in disputes regarding real estate and real estate valuations. Ashe has also been involved as an expert in cases involving breach of contract, breach of fiduciary duty, and shareholder disputes. In addition, Ashe is familiar with the standards in shareholder/partnership dealings, and has professional or technical knowledge in these matters. Cummings submits that Ashe’s educational background and work experience make him well suited to be an expert. Thus, Cummings submits, the Court should deem admissible Ashe’s expert testimony and Report to clarify the proper practice and standards at issue with respect to Certificates of Stated Value in real estate matters. Cummings submits that Plaintiff’s objections to the Report based on allegedly inconsistent deposition testimony and other matters go to the weight, not admissibility, of Ashe’s testimony and Report.

In reply, Plaintiff’s Counsel submits that Defendants have failed to identify the professional or technical information in the Report and Ashe’s testimony that is beyond the ken of the jury. Plaintiff’s Counsel disputes Cummings’ contention that Ashe can provide an opinion on real estate matters, as the Report does not contain any opinion as to any real estate valuation. Moreover, Plaintiff’s Counsel notes, Ashe has testified that he does not hold himself out as an expert in the area of real estate appraisal or valuation (see Ex. D to Nimkoff Aff. in Supp. at p. 79). Thus, Plaintiff’s Counsel submits, Defendants have failed to demonstrate that Ashe has any professional or technical knowledge that would be beyond the comprehension of a typical juror, and the Court should not permit Ashe’s testimony, or allow the Report to be admitted into evidence.

In support of Defendants' motion, Cummings affirms that counsel for the parties have exchanged witness lists and Plaintiff has identified Cummings, counsel for Defendants, as a witness. Cummings provides a copy of Plaintiff's Witness List (Ex. A to Cummings Aff. in Supp.). Cummings submits that nothing in this record supports the claim that Cummings should be called as a witness. Cummings affirms that the relevant events in this action occurred between 2001 and 2008. During that period, Cummings was never involved in the drafting of any of the agreements at issue in this matter, the decisions concerning the Stated Value of the Building, or the sale of the Building in 2008. Cummings affirms that he has no relevant knowledge of the facts and circumstances surrounding the alleged breach of contract, breach of fiduciary duty, conversion and tortious interference causes of action asserted by Plaintiff in the Amended Complaint. Under these circumstances, Cummings submits, there is no basis for calling him as a witness at trial.

In opposition, Plaintiff's Counsel makes reference to the Court's Prior Decision dated February 10, 2017 (Ex. A to Nimkoff Aff. in Supp.). In that Prior Decision, the Court addressed the prior motion by Plaintiff to strike the answer of Defendants Fracassa, Kaplan, Caccese, Richman and Saha based on their failure to provide discovery. In that decision, the Court denied Plaintiff's motion to strike Defendants' answer and referred to trial the issue of what penalty, if any, is appropriate for Defendants' alleged violations of their discovery obligations. Plaintiff's Counsel submits that Cummings' testimony is necessary and appropriate to "shed light" (Nimkoff Aff. in Opp. at ¶ 3) on whether Defendants' conduct with respect to their discovery obligations warrants the imposition of a penalty. Plaintiff's Counsel submits that Cummings has been involved in Defendants' improper conduct vis a vis their discovery obligations. Thus, he submits, Cummings has information relevant to the Court's determination whether Defendants' failure to produce discovery was attributable to Cummings or Defendants.

### C. The Parties' Positions

Plaintiff submits that the Court should preclude the admission of the Report into evidence at trial, and preclude Ashe from testifying at trial. Plaintiff contends that Ashe's expertise in dispute resolution does not provide him with professional or technical knowledge that could be helpful to the jury. Plaintiff also notes that although Ashe has asserted that his opinion is based in part on the fact that Defendant Monti met with Mulcahy at least once annually and received Mulcahy's recommendation, Mulcahy's testimony was inconsistent with that assertion. Under



these circumstances, Plaintiff submits, Ashe's testimony would not be based on any professional or technical knowledge beyond the comprehension of a typical juror, and the Court should not permit his testimony, or admit his Report into evidence at trial.

Defendants oppose the motion, outlining Ashe's education and experience which has included his expert testimony in disputes regarding real estate and real estate valuations. Defendants assert that Ashe is familiar with the standards in shareholder/partnership dealings, and has professional or technical knowledge in these matters. Under these circumstances, Defendants submit, the Court should deem admissible Ashe's expert testimony and Report to clarify the proper practice and standards at issue with respect to Certificates of Stated Value in real estate matters. Defendants submit that Plaintiff's objections to the Report based on allegedly inconsistent deposition testimony and other issues go to the weight, not admissibility, of Ashe's testimony and Report.

With respect to Defendants' motion, Defendants submit that the Court should preclude Plaintiff from calling Cummings, counsel for Defendants, as a witness at the trial of this action. Cummings affirms that, during the 2001 and 2008 time period involved in this action, he was never involved in the drafting of any of the agreements at issue in this matter, the decisions concerning the Stated Value of the Building, or the sale of the Building in 2008. Cummings affirms that he has no relevant knowledge of the facts and circumstances surrounding the alleged breach of contract, breach of fiduciary duty, conversion and tortious interference causes of action asserted by Plaintiff in the Amended Complaint. Under these circumstances, Cummings submits, there is no basis for calling him as a witness at trial.

Plaintiff opposes the motion, submitting that Cummings has information relevant to the Court's determination at trial as to whether the Court should impose sanctions against Defendants based on their failure to provide discovery. Plaintiff submits that Cummings can provide testimony relevant to that determination, including whether Defendants' failure to produce discovery was attributable to Cummings or Defendants.

#### RULING OF THE COURT

##### A. Expert Testimony

As a time-honored principle, expert opinions are admissible on subjects involving professional or scientific knowledge or skill not within the range of ordinary training or intelligence of the trier of fact. *Hurrell-Harring v. State of New York*, 119 A.D.3d 1052, 1053

(3d Dept. 2014), quoting *Matter of Nicole V.*, 71 N.Y.2d 112, 120 (1987) (citations omitted) and citing *inter alia* *People v. Rivers*, 18 N.Y.3d 222, 228 (2011); *De Long v. County of Erie*, 60 N.Y.2d 296, 307 (1983). This principle applies to testimony regarding both the ultimate questions and those of lesser significance. *Hurrell-Harring v. State of New York*, 119 A.D.3d at 1053, citing *People v. Rivers*, 18 N.Y.3d at 228, quoting *People v. Cronin*, 60 N.Y.2d 430, 432-433 (1983). Notably, expert testimony is appropriate to clarify a wide range of issues calling for the application of accepted professional standards. *Hurrell-Harring v. State of New York*, 119 A.D.3d at 1053, quoting *Selkowitz v. County of Nassau*, 45 N.Y.2d 97, 102 (1978).

#### B. Attorneys as Witnesses

Depositions of opposing counsel are disfavored for three reasons. *Liberty Petroleum Realty, LLC v. Gulf Oil, L.P.*, 2018 N.Y. App. Div. LEXIS 5593, \*8 (1<sup>st</sup> Dept. 2018). First, the practice of attorneys deposing their adversaries hardly seems calculated to assist preparation for trial by sharpening the issues and reducing delay and prolixity. *Liberty Petroleum Realty, LLC v. Gulf Oil, L.P.*, 2018 N.Y. App. Div. LEXIS 5593 at \*8, citing *Equitable Life Assur. Socy. of U.S. v. Rocanova*, 207 A.D.2d 294, 296 (1<sup>st</sup> Dept. 1994), quoting *Allen v. Crowell-Collier Publishing Co.*, 21 N.Y.2d 403, 406 (1968). Second, the practice of calling opposing counsel as a witness at trial is offensive to our conception of the adversarial process. *Liberty Petroleum Realty, LLC v. Gulf Oil, L.P.*, 2018 N.Y. App. Div. LEXIS 5593 at \*9, quoting *Giannicos v. Bellevue Hosp. Med. Center*, 7 Misc. 3d 403, 406-07 (Sup. Ct., N.Y. County 2005). Third, the practice of deposing opposing counsel raises at least the possibility of attorney disqualification. This implicates not only the ethics of the profession but also the substantive rights of the litigants, including the right to counsel of one's choosing and the potential that the proceedings can become stalled and derailed. *Liberty Petroleum Realty, LLC v. Gulf Oil, L.P.*, 2018 N.Y. App. Div. LEXIS 5593 at \*9, quoting *S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.*, 69 N.Y.2d 437, 443 (1987).

Disqualification under the advocate-witness rule may be required only when it is likely that the testimony to be given by the witness is necessary. Testimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence. *Dishi v. Federal Ins. Co.*, 112 A.D.3d 484 (1<sup>st</sup> Dept. 2013), quoting *S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.*, 69 N.Y.2d at 445-46 (citation omitted).

C. Application of these Principles to the Instant Action

The Court denies Plaintiff's motion. The Court concludes that Ashe has expertise that qualifies him to testify regarding the proper practice and standards at issue with respect to Certificates of Stated Value in real estate matters. The issues that Plaintiff's Counsel has identified, including inconsistencies regarding Mulcahy's role in any decision making and Ashe's testimony that he does not hold himself out as an expert in the area of real estate appraisal or valuation, go to the weight, not admissibility, of Ashe's testimony and Report.

The Court grants Defendants' motion. In light of the serious concerns raised by requiring an attorney to testify in a matter in which he represents a party, and the Court's conclusion that Plaintiff has not demonstrated that Cummings' testimony is necessary, the Court will not permit Plaintiff to call Cummings as a witness at trial. Cummings affirms that he was not involved in the drafting of any of the agreements at issue in this matter, the decisions concerning the Stated Value of the Building, or the sale of the Building in 2008. In addition, his testimony is not necessary with respect to the Court's determination, at trial, whether to impose sanctions against Defendants based on their failure to provide discovery. The record, including the Court's Prior Decision denying Plaintiff's prior motion to strike Defendants' answer, supports the conclusion that Defendants have the requisite knowledge regarding the reasons for their delay and/or failure to produce discovery, and that Cummings' testimony on this issue is not necessary.

All matters not decided herein are hereby denied.

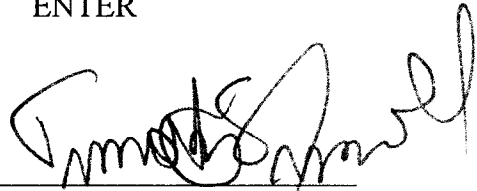
This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance at a pre-trial conference before the Court on September 7, 2018 at 9:30 a.m.

DATED: Mineola, NY

August 23, 2018

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

**ENTERED**

**AUG 27 2018**

NASSAU COUNTY  
COUNTY CLERK'S OFFICE 1