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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,

Justice

TRIAL/IAS, PART 14
NASSAU COUNTY

MURRAY BREIDBART,

Decision and Order

Plaintiff,

MOTION SEQUENCE:02
-against- **INDEX NO.: 003610-12**

MORTON L. OLSHAN, MALL PROPERTIES, INC., JANOFF & OLSHAN, INC., BOUNDARY REALTY ASSOCIATES, AND AUDREY ROSENBERG,

Defendants.

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Cross Motion	**1**
Affidavit in Support	**2**
Memorandum of Law in Support	**3**
Affidavit of Seth Kobay	**4**
Memorandum of Law in Opposition	**5**
Affirmation in Opposition	**6**
Affidavit in Opposition	**7**
Memorandum of Law in Further Opposition	**8**
Affirmation in Reply	**9**
Memorandum of Law in Further Support	**10**
Reply Memorandum of Law	**11**

In an action to recover damages for, *inter alia*, breach of fiduciary duty, Defendants[1] move for an order pursuant to CPLR 3212 dismissing the complaint.

Factual Background

On May 2, 1977, Murray Breidbart, Morton L. Olshan, and Alan Rosenberg entered into an agreement (the "Agreement") forming Boundary Realty Associates (the "Partnership"). The purpose of the Partnership "was to acquire and develop a certain office building in Lake Success" (the "Building"). Construction of the Building was completed in 1978 and is presently known as Lakeview Medical Center. The tenants of the Building are primarily medical doctors and other health-care service providers (Ex "A" to Affirmation in Support of Motion at ¶¶ 5-7).

The Agreement provides that the cash flow of the Partnership from operations shall be distributed as follows: Morton Olshan 50%; Alan Rosenberg 25%; and Murray Breidbart 25% (Ex. "3" to Cross Motion at ¶ 11[a]).

The Partnership Agreement provided that the Partnership would employ Defendant Janoff and Olshan ("J&O") as managing agent for the first three years following the commencement of occupancy to manage the day-to-day operations of the Building. J&O's management was to terminate upon both Joseph Moses and Olshan ceasing to be associated with J&O (Ex "3" to Cross Motion at ¶ 6[a]).[2]

With respect to the management of the Building, the Agreement sets forth that "all business decisions of the partnership outside of routine operations, which may be delegated in writing to the managing agent, shall be concurred in by a Majority in Interest of the Partners" (Ex "3" to Cross Motion at ¶ 6[c]).

Paragraphs 13 and 14 of the Partnership Agreement also provide:

> Complete and accurate books of account in which shall be entered, fully and accurately, each and every transaction of the Partnership shall be maintained at the

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[1] All Defendants with the exception of Audrey Rosenberg. The complaint states: " Defendant Audrey Rosenberg is a named defendant solely because all partners are necessary parties to an action for partnership accounting. No claims are asserted against her" (Amended Complaint at ¶ 4).

[2] Olshan founded J&O in 1957 to manage residential and commercial real estate properties. He served as director and treasurer (Affidavit in Support dated at February 5, 2015 at ¶ 4). Joseph Moses was J&O's vice president until he left J&O in 2001 (Olshan Affidavit in Support dated April 25, 2014 at ¶ 11).

principal office of the Partnership (or at such other office as the partners may designate). The books shall be kept on a cash or accrual basis of accounting as the Partners shall determine, and the fiscal year of the Partnership shall be the calender year. An audit shall be made as of the end of each accounting year by a certified public accountant, and each Partner shall be entitled on or before April 1 of each year to a copy of the audit report, including a balance sheet and profit and loss statement (and to a statement also prepared by said certified public accountant showing a capital account of each Partner, the distributions to each Partner and the amount reportable for federal, state or local income tax purposes).

The Partners, jointly and severally, shall have the right to visit the Property, the offices and properties of the Partnership and, at their own expense, to examine, personally or by an accountant, the books of account and records of the Partnership during reasonable business hours.

Dissolution of the Partnership, as set forth in paragraph 20(a) of the Agreement, may occur prior to the natural expiration of the Partnership's term (December 31, 2020), upon, *inter alia*, at least one month's prior written notice by a majority in interest of the partners" (Ex "3" to Cross Motion at ¶ 20).

Procedural History

In February 2012, the Plaintiff commenced the instant action asserting claims for breach of fiduciary duty, waste, breach of contract, and an accounting. Specifically, the Plaintiff alleges that the Building has been managed by Defendant Mall Properties, Inc.[3] and/or J&O, both under the control of Olshan; "Olshan, Mall Properties and/or J&O have failed to undertake reasonable efforts to maximize tenant occupancy of the Lakeview Medical Center, maximize revenues, and enhance the value of the property," and, as a result of this mismanagement, occupancy in the building has declined by 40% and the fair market value of the property is "significantly lower than it would have been if proper real estate management practices had been diligently pursued" (Amended Complaint at ¶¶ 12-21).

The Plaintiff further alleges, "upon information and belief": 1) that Olshan has "pursued this course of conduct for the purpose of making the property less attractive and lowering its fair market value so as to induce his partners, including the plaintiff, to agree to sell him their interests in the partnership at a depressed value"; and Olshan has "caused the partnership to fail

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[3] Olshan owns a majority of the shares of Mall Properties and serves as the Chairman of its Board of Directors. Mall Properties was initially employed by the Partnership to develop the property. J&O is a wholly owned subsidiary of Mall Properties (Amended Complaint at ¶¶ 2, 3, 10).

to account for the full amount of items of income of the partnership and to remit them to the partners" (Amended Complaint at ¶¶ 16, 17).

Mismanagement is also premised upon Olshan's purported unilateral decision making notwithstanding the express language of the Agreement providing for a concurrence by a majority in interest for all business decisions other than routine operations (Amended Complaint at ¶ 18).

In early 2013, after the commencement of this action, the Partnership retained a new management company, Majestic Properties ("Majestic") and listed the Building for sale with CB Richard Ellis ("CBRE"). Notwithstanding, the Plaintiff claims that Olshan has hindered, delayed and frustrated the securing of new tenants for the Building and has refused multiple offers to purchase the Building (Amended Complaint at ¶¶ 19-21).

The Plaintiff subsequently moved for an order pursuant to CPLR 3025(b) granting him leave to file an amended complaint to add a cause of action for dissolution of the Partnership. The Defendants opposed the motion and cross-moved for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the amended complaint in its entirety.

In an order dated November 28, 2014, the court granted the Plaintiff's motion to amend the complaint and converted the cross motion to dismiss the amended complaint as one for summary judgment. Following subsequent application by the parties, the court granted an extension of time in which to serve additional submissions on the motion for summary judgment (DeStefano, J. Order dated December 4, 2014).[4]

For the reasons that follow, the motion is granted in part and denied in part.

The Court's Determination

In order to prevail on a motion for summary judgment, the movant must make a *prima facie* showing of entitlement as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case (*Winegrad v New York University Medical Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The evidence submitted by the moving party must be viewed in a light most favorable to the non-moving party (*Marine Midland Bank v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]). Failure to make such showing requires denial of the motion, regardless of the sufficiency

[4] The parties stipulated to extend the briefing schedule with reply papers to be served by February 6, 2015.

of the opposing papers (*Winegrad v New York University Medical Ctr.*, 64 NY2d at 853, *supra*).

Once the requisite showing has been made, however, the burden shifts (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). To defeat a motion for summary judgment, the opposing party must establish issues of fact sufficient to require a trial and must make this showing by producing evidentiary proof in admissible form (*Id*; *Friends of Animals v Associated Fur Manufacturers*, 46 NY2d 1065, 1067-1068 [1979]).

With this standard in mind, the court considers each of the causes of action asserted in the amended complaint.

Breach of Fiduciary Duty and Waste

In the first cause of action, which is asserted against Defendants Mall Properties, J&O, and Olshan, the Plaintiff alleges that: Olshan, as a partner in the Partnership, owes a fiduciary duty to his partners; Mall Properties and J&O, as managing agents of the Partnership, "undertook a position of trust in the management of its business and financial affairs and thus owed fiduciary duties" to the partners of the Partnership; and that through their "course of action in mismanaging" the Building, Olshan, Mall Properties, and J&O violated their fiduciary duties to the partners of the Partnership (Amended Complaint at ¶¶ 22-25).

Also, according to the Plaintiff, the Defendants have wasted Partnership assets inasmuch as the Defendants' acts, or failure to act, with respect to the Building resulted in the loss or damage of Partnership assets (Amended Complaint at ¶¶ 27-28).

The elements of a cause of action to recover damages for breach of fiduciary duty are: 1) the existence of a fiduciary relationship; 2) misconduct by the defendant; and 3) damages directly caused by the defendant's misconduct (*Varveris v Zacharakos*, 110 AD3d 1059 [2d Dept 2013]; *Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804 [2d Dept 2011]. A cause of action sounding in breach of fiduciary duty must be pleaded with the particularity required by CPLR 3016(b) (*Parekh v Cain*, 96 AD3d 812, 816 [2012]; *Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d at 808, *supra*).

Plaintiff's claim for breach of fiduciary duty is predicated upon the following factual allegations: Mall Properties continued to manage the day-to-day operations of the Partnership and the Building until January 2013 "despite the lack of any contractual basis for its exercise of such control"; Olshan made unilateral decisions related to improvements, expenses, lease renewals, and the valuation and sale of the Building; Defendants failed to maximize tenant occupancy in the Building; Defendants have neglected the physical structure of the Building; Olshan has refused to accept offers to purchase the Building - offers which the Plaintiff and

Audrey Rosenberg[5] consider acceptable; Defendants have maintained control of the Partnership since its inception notwithstanding Plaintiff's objection to the management of the Partnership assets by Mall Properties[6]; and the Defendants have "taken steps to remove all transparency from their management of the Partnership, to which Plaintiff has repeatedly objected" (Ex. "2" to Plaintiff's Affidavit in Opposition at pp 8-12, 14).

These allegations, without more, do not constitute bad faith. Rather, the complained-of conduct - mismanagement of the Building which has significantly lowered the fair market value of the Building - is not conduct which is so egregious that it could not have been the product of sound business judgment (*see Yudell v Gilbert*, 99 AD3d 108 [1st Dept 2012]). In this regard, the court notes that the only allegation concerning misconduct, disloyalty or bad faith is in paragraph 16 of the amended complaint wherein Plaintiff alleges, "upon information and belief", that Olshan has "pursued this course of conduct for the purpose of making the property less attractive and lowering its fair market value so as to induce his partners, including the plaintiff, to agree to sell him their interests in the partnership at a depressed value". However, this assertion of Plaintiff's wrongdoing lacks probative value inasmuch as it is based upon "information and belief" and does not derive from Plaintiff's personal knowledge (*L.K. Comstock & Co., Inc. v Duffy*, 43 AD2d 704 [2d Dept 1973] [summary judgment should have been granted where affidavit in opposition was made on information and belief and not personal knowledge]). Morever, it is irrational that Olshan would recklessly risk his own investment (*see HF Lexington KY LLC v Wildcat Synergy Manager LLC*, 35 Misc3d 1210(A) [Sup Ct New York County 2012]).[7]

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[5] The Partnership consented to the withdrawal of Alan Rosenberg and the admission of his wife, Audrey Rosenberg, as a partner although Alan continued to act informally on behalf of Audrey from time to time in connection with Partnership affairs (Olshan Affidavit dated April 25, 2014 at ¶ 6).

[6] To support this claim, Breidbart states in his affidavit that "[b]eginning at some point over the last 30 years and until late 2012, Mall Properties served as the managing agent over the Property" and that he "complained to Mr. Olshan for several years that Mall Properties had no right or authority to manage the property, but these complaints went unheeded" (Breidbart Affidavit dated April 9, 2014 at ¶ 9). Breidbart's self-serving statement, however, is not supported by the record.

[7] In his affirmation in opposition, Breidbart's attorney wrote:

> Mr. Olshan seems to imply that his company, Mall Properties, Inc., which he terms the 'successor' to Janoff & Olshan, has a perpetual right to manage [the Partnership] so long as he continues to be associated with [Mall Properties]. This is not the case . . . J & O itself only had the right under the Partnership Agreement to serve as managing agent. In the absence of any authorization from [the Partnership] allowing [Mall Properties] to continue to manage the property, and [Mall Properties] being one of Mr. Olshan's family-owned corporate entities, Mr. Olshan clearly engaged in self-dealing in violation of his fiduciary

Accordingly, the cause of action for breach of fiduciary duty and waste is dismissed.

Accounting

The Plaintiff seeks a formal accounting in accordance with Partnership Law § 44 based upon the Defendants' purported breach of their fiduciary duties and Olshan's "practical control of the management of the partnership" (Amended Complaint at ¶¶ 30–32).[8]

According to the Plaintiff, at some point in 2009, he stopped receiving the Partnership's monthly financial statements which he had been receiving for 30 years. Notably, in an email dated September 8, 2010, Richard Vilaboy of Mall Properties responded to Plaintiff's and Rosenberg's request for monthly statements and wrote to them that the monthly statements were "very taxing" on the accounting department; therefore, they would "have to stick to the terms" of the Partnership Agreement and provide Partnership records accordingly (Ex. "B" to Breidbart Affidavit dated May 2, 2014). In a subsequent email dated December 8, 2010, Mall Properties informed the Plaintiff that the "office and files are always open for" review of any lease information or financials (Ex. "C" to Breidbart Affidavit dated May 2, 2014). While not literally denied access, the Plaintiff considers Defendants' actions - refusing to provide Plaintiff with copies of the Partnership's financial statements and records and, instead, allowing the Plaintiff to "examine the books and records in person" - constitute a constructive denial given Defendants' knowledge that the Plaintiff is a resident of California and has health issues limiting his ability to travel.

In order to enlist the aid of a court of equity in vindicating the right to an accounting, a plaintiff must show a demand for an accounting and a failure or refusal by the partner with the books, records, profits or other assets of the partnership in his possession to account to the other

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duties to [the Partnership] (Affirmation in Opposition at ¶ 4 [citations omitted]).

This assertion of self-dealing alleged in counsel's affirmation is insufficient to rebut Defendants' *prima facie* showing that the purported self-dealing was fair (*see Limmer v Medallion Group*, 75 AD2d 299 [1st Dept 1980] [in instances of self dealing, defendants have burden of demonstrating the fairness of the transactions]). First, the Partnership agreed to employ J&O as managing agent for the first three years of the Partnership's existence (Ex "3" to Cross Motion at ¶ 6[a]). Moreover, the management fee paid to J&O/Mall Properties has remained the same - 4% of the gross rental income - as that set forth in the Partnership Agreement more than 30 years earlier (Olshan Affidavit dated February 5, 2015 at ¶ 35).

[8] Section 44 of the Partnership Law provides that any partner shall have the right to a formal accounting with respect to partnership affairs, *inter alia*, if "he is wrongfully excluded from the partnership business or possession of its property by his copartners", if "the right exists under the terms of any agreement", or "[w]henever other circumstances render it just and reasonable".

partner or partners (*see Conroy v Cadillac Fairview Shopping Center Properties (Maryland), Inc.*, 143 AD2d 726 [2d Dept 1988]; *Raymond v Brimberg*, 99 AD2d 988 [1st Dept 1984]; *Arrants v Dell Angelo*, 73 AD2d 633 [2d Dept 1979]; 15A NY Jur2d Business Relationships § 1877).

Inasmuch as the Plaintiff does not allege that he made a demand for an accounting prior to commencing this action, the court grants the Defendants' motion for summary judgment dismissing this cause of action (*see Kaufman v Cohen*, 307 AD2d 113, 124 [1st Dept 2003]).[9]

Breach of Contract

In the fourth cause of action, the Plaintiff alleges the following: "Upon information and belief, Mall Properties and J&O entered into a contract with" the Partnership to provide management services for the Building; Mall Properties and J&O breached their contractual obligations, thereby damaging the Partnership; and "[u]pon information and belief" the Partnership "has fully performed each of its obligations under the contract, except to the extent such performance has been hindered, frustrated, or prevented by Mall Properties' and/or J&O's breaches" (Amended Complaint at ¶¶ 33-36).[10]

The court concludes that the Defendants made a *prima facie* showing that no contract for management services existed between the Partnership and J&O and/or Mall Properties (*see Moulton Paving, LLC v Town of Poughkeepsie*, 98 AD3d 1009 [2d Dept 2012] [the existence of a binding contract is an essential element of a cause of action to recover damages for breach of contract]; *Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 806 [2d Dept 2011]; *Furia v Furia*, 116 AD2d 694 [2d Dept 1986]). In this regard, the court notes: 1) the Plaintiff's Response to Defendants' First Set of Interrogatories wherein the Plaintiff stated that Mall Properties "continued to manage the day-to-day operations of [the Partnership] and the Property until January 2013, despite the lack of any contractual basis for its exercise of such control" (Ex. "2" to Affidavit in Opposition at p 8); and 2) Breidbart's affidavit wherein he stated that he was "unaware of any written management agreement between [the Partnership] and Mall Properties" (Breidbart Affidavit dated April 9, 2014 at ¶ 9).

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[9] Contrary to the Defendants' contention - that the claim for accounting should be dismissed because there is no evidence that Olshan breached any fiduciary duty to Breidbart - an allegation of wrongdoing is not an indispensable element of a demand for an accounting where the complaint indicates a fiduciary relationship between the parties or some other special circumstance warranting equitable relief (*Morgulas v J. Yudell Realty, Inc.*, 161 AD2d 211 [1st Dept 1990]).

[10] In 2009, Olshan transitioned J&O into Mall Properties before formalizing a merger in 2010 in which Mall Properties became J&O's successor (Olshan Affidavit dated April 25, 2014 at ¶ 16).

In opposition to the motion, the Plaintiff does not assert the existence of a written contract but, rather, argues that the Defendants' breached their obligations in performing management services, including failing to take reasonable efforts to maximize tenant occupancy, failing to maximize revenues, failing to enhance the value of the property, failing to diligently pursue and negotiate new leases, and failing to make cost effective upgrades that would make the Building "more attractive" to tenants and prospective tenants (Amended Complaint at ¶¶ 12-21). The fact that J&O and Mall Properties have provided management services to the Partnership and served as managing agent for the Building for over 30 years raises a question of fact as to whether: 1) a contract implied in fact arose by virtue of the parties' acts - and not by any verbal or written words (*Jemzura v Jemzura*, 36 NY2d 496, 503-504 [1975] ["A contract implied in fact may result as an inference from the facts and circumstances of the case, although not formally stated in words . . . and is derived from the 'presumed' intention of the parties as indicated by their conduct"]; *Matter of Boice*, 226 AD2d 908 [3D Dept 1996] ["an agreement by conduct does not differ from an express agreement except in the manner by which its existence is established"]); and, if so, whether Mall Properties and J&O breached that contract (23 Williston on Contracts § 63:15 [4th ed]). Accordingly, the branch of the motion seeking dismissal of the breach of contract cause of action is denied.

Dissolution

With respect to the fifth cause of action for dissolution, the Plaintiff asserts that "it has become apparent that the partners are unable to reach agreement as to critical partnership matters", a "deadlock exists among the partners", and "dissolution is appropriate under Partnership Law §§ 63(1)(c), (d), and (f)" (Affirmation in Support of Motion at ¶ 7).

Specifically, the Plaintiff argues the following in favor of dissolution:

> Given that all business decisions of the Partnership outside of routine operations require a concurrence by a majority in interest of the Partnership, a deadlock exists between myself and Ms. Rosenberg, who collectively hold a 50% interest in the Partnership, and Mr. Olshan, who also holds a 50% interest in the Partnership, on crucial business decisions of the Partnership, not least of which is the sale of the building. Simply put, I have not faith or trust in Mr. Olshan's business decisions regarding the Partnership or that of Mall Properties. I do not want to be in business with him any longer (Breidbart Affidavit dated April 9, 2014 at ¶ 19).

Audrey Rosenberg's affidavit was similar in that she wrote as follows:

> I have reviewed the contents of Mr. Breidbart's affidavit that I understand will be submitted in support of a motion to permit him to seek dissolution of [the

> Partnership], and I concur with his statements therein. In short, I am prepared as a partner in [the Partnership] to accept the highest of the offers obtained by CBRE for the sale of the building owned by the Partnership, and I believe that because of Mr. Olshan's conduct, it is no longer reasonably practical to carry on the business in partnership with him. I therefore agree that [the Partnership] should be dissolved (Rosenberg Affidavit at ¶ 3).

In seeking dismissal of the dissolution claim, the Defendants argue that an agreed-upon third party (Majestic) is "now managing the Building and seeking to procure new tenants without any Court supervision, and there are no facts before this Court evincing that it cannot practically do so during the finite term remaining on the partnership's sublease from Lakeville (through 2024)".[11]

Pursuant to section 63 of New York's Partnership Law, the court shall decree a dissolution upon the application by or for a partner, *inter alia*, whenever: a "partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business"; a "partner wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him"; and/or "[o]ther circumstances render a dissolution equitable" (Partnership Law §§ 63[1][c][d][f]).

In *Seligson v Russo* (16 AD3d 253 [1st Dept 2005]), the First Department unanimously affirmed the trial court's order which dissolved a partnership pursuant to Partnership Law § 63(1)(f) "[i]n light of the 50–50 deadlock between the parties and the consequent inability of the partnership to make any decisions". According to the Appellate Division, "[e]ven though the partnership agreement was for a definite term, it foresaw the possibility of early dissolution; moreover, '[n]o one can be forced to continue as a partner against his will'" (*Id.* quoting *Napoli v Domnitch*, 18 AD2d 707, 708 [1962] *affd* 14 NY2d 508 [1964]). The court also found that the fact that the "sale of the building owned by the partnership may have adverse tax consequences to some parties is not dispositive" (*Id.* citing *Krulwich v Posner*, 291 AD2d 301, 303 [1st Dept 2002]).

Here, as stated in the Partnership Agreement, the formation and specific purpose of the Partnership was to "acquire, develop, construct, own, operate and maintain" the Building (Ex. "3" to Cross Motion at ¶ 1[a]). Given the parties' deadlock as to whether the Building should be sold, coupled with the fact that the Partnership Agreement contemplated an early dissolution

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[11] The Partnership Agreement provides that the Partnership "shall terminate on the 31st day of December 2020".

under certain circumstances (see Ex. "3" to Cross Motion at ¶ 20), the court denies that branch of the Defendants' motion seeking dismissal of the fifth cause of action for dissolution of the Partnership (see *Harshman v Pantaleoni*, 294 AD2d 687 [3d Dept 2002] [in a partnership that did not have a definite duration, the court ordered dissolution where the parties' deadlock concerning the sale of real property warranted termination, rather than continuation, of the partnership]; *Landsman, Inc. v Grand-Perridine Development Corp.*, 169 AD2d 460 [1st Dept 1991] [summary judgment dissolving partnership was proper where partnership, which was formed for purpose of constructing homes, had exhausted its funds and partners were unable to agree on either a sale of partnership interest or the property, or the means to raise additional capital and, subsequently defaulted on the mortgages]).

Conclusion

Based on the foregoing, it is hereby

Ordered that the Defendants' motion for an order granting them summary judgment dismissing the amended complaint is granted except for the fourth and fifth causes of action, which are not dismissed; and it is further

Ordered that the counsel for all parties are directed to appear before the undersigned for a conference at 9:30 a.m. on June 18, 2015.

This constitutes the decision and order of the court.

Dated: May 27, 2015

Hon. Vito M. DeStefano, J.S.C.