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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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RICHARD GILBERT,

Plaintiff,

TRIAL/IAS PART: 14
NASSAU COUNTY

-against-

Motion Seq. No. 1
Submission Date: 11/16/15

NOEL WEINTRAUB,

Index No: 602290-15

Defendant.

----------x

Papers Read on this motion:

Order to Show Cause, Affirmation in Support,
Affidavit in Support and Exhibits.....x
Affidavit in Opposition.....x
Memorandum of Law in Opposition.....x
Supplemental Affidavit in Further Support and Exhibits.....x
Supplemental Affidavit in Opposition and Exhibits.....x

This matter is before the court on the Order to Show Cause filed by Plaintiff Richard Gilbert ("Gilbert" or "Plaintiff") on April 14, 2015 and submitted on November 16, 2015. For the reasons set forth below, the Court denies the motion and vacates the temporary restraining order issued by the Court on April 14, 2015.

BACKGROUND

A. Relief Sought

Plaintiff seeks an Order, pursuant to CPLR §§ 6301 and 6311, preliminarily enjoining and restraining Defendant Noel Weintraub ("Weintraub" or "Defendant") from 1) engaging in any employment, association, business, or venture involved in competition with Road Runners, LLC and Road Runners Tola, LLC (collectively, the "LLCs"); 2) withdrawing any funds from the bank accounts of the LLCs or signing any checks against the accounts of the LLCs except in the ordinary course of business; 3) issuing any dividends, bonuses, distributions or other payments

except in the ordinary course of the LLCs; 4) diverting, transferring or otherwise causing any property, business, customers or business opportunities of the LLCs to be lost, diverted or transferred to any other person or entity; 5) taking any other action not in the ordinary course of the LLCs; and 6) executing or entering into any agreements or incurring obligations on behalf of the LLCs except in the ordinary course of business.

Defendant opposes the motion.

B. The Parties' History

The Complaint ("Complaint") (Ex. A to Zinner Aff. in Supp.) alleges as follows:

Plaintiff and Defendant are the sole members of Road Runners, LLC ("Road Runners") with equal ownership interests. There is no operating agreement for Road Runners. Plaintiff and Defendant are also the sole members of Road Runners TOLA, LLC ("Tola") with equal ownership interests. There is no operating agreement for Tola.

The LLCs are agencies that represent a wide variety of manufacturers selling merchandise including giftware, stationery, children's gifts and toys, greeting cards, gift books, jewelry, fashion accessories, home fragrance and personal care products. Plaintiff alleges that, by letters dated February 23, 2015 ("February Letter") and March 18, 2015 ("March Letter"), Defendant "threatened to establish a business that competes with the LLCs" (Comp. at ¶¶ 11 and 12). Plaintiff alleges that Defendant has established a business that competes with the LLCs and has undertaken additional actions in furtherance of that business.

The Complaint contains two (2) causes of action: 1) breach of fiduciary duty, for which Plaintiff seeks damages of approximately $250,000, and 2) a request for a permanent injunction restraining, prohibiting and enjoining Defendant from engaging in any employment, association, business or venture involved in competition with the LLCs. On April 14, 2015, the Court granted Plaintiff's application for a temporary restraining order to the extent that the Court issued a temporary restraining order ("TRO") directing that, pending the hearing and determination of this motion, both Plaintiff and Defendant are enjoined and restrained from 1) withdrawing any funds from the bank accounts of the LLCs or signing any checks against the accounts of the LLCs except in the ordinary course of business; 2) issuing any dividends, bonuses, distributions or other payments except in the ordinary course of business of the LLCs; and 3) executing or entering into any agreements or incurring obligations on behalf of the LLCs except in the ordinary course of business.

In support of the motion, Plaintiff affirms that Roadrunners was formed in 2000 and was primarily limited to the New York and New Jersey markets. Roadrunners subsequently expanded its operations into the Southeast and New England regions and, with the formation of TOLC in 2012, the LLCs expanded into Texas, Oklahoma, Louisiana and Arkansas. Plaintiff confirms that the parties never executed an operating agreement with respect to the LLCs and the LLCs' Articles of Organization are silent as to management. Plaintiff affirms that he and Defendant collectively managed the LLCs but had separate daily roles. Plaintiff's primary role was to manage the software and computer work, install the LLCs' showrooms and pay commissions to sales representatives. Defendant's primary role was to interact with vendors, procure new manufacturers to represent, arrange travel accommodations and interact with the New York sales representatives. Plaintiff affirms that the LLCs have been successful, and that success has been fostered through relationships with customers and manufacturers.

Plaintiff affirms that Defendant recently approached Plaintiff and asked him to convey his interest in the LLCs to Defendant. Plaintiff affirms that Defendant has "threatened" (Gilbert Aff. in Supp. at ¶ 12) to establish a business that competes with the LLCs. In the February Letter to Plaintiff (Ex. B to Gilbert Aff. in Supp.), which is written on the stationery of counsel for Defendant ("Defendant's Counsel") and is signed by Defendant's Counsel, Defendant's Counsel advised Plaintiff as follows:

> Dear Mr. Gilbert:
>
> This firm represents Noel Weintraub.
>
> We are writing to you with respect to the ongoing business and operations of [the LLCs].
>
> We have been advised that circumstances have arisen which render it no longer practicable for the LLCs to carry on their business. We are not looking to cast aspersions or assign fault. Business relationships change over time and, when that occurs, certain realities must be addressed. It is best for both sides to leave emotion out of the discussion.
>
> One of the purposes of this letter is to advise you that Mr. Weintraub is interested in discussing the purchasing of your interest in [the LLCs]. I understand that you and Mr. Weintraub have had discussions along these lines in the past, but your estimate of the value of the two LLCs is unrealistically high. That said, if you have any interest in exploring the sale of your membership interests, please let me know.

Please be advised that the alternatives to the purchase and sale of your membership interests in the LLCs are: (i) Mr. Weintraub will terminate his relationship with the LLCs and establish a business on his own to compete with the LLCs; or (ii) he will seek judicial dissolution of the LLCs pursuant to Section 702 of the New York limited liability company law.

As you know, Mr. Weintraub does not have an employment agreement with either of the LLCs and no non-compete or non-solicitation agreements exist (with respect to customers, manufacturers, or sales representatives). Accordingly, Mr. Weintraub has the right to sever his ties with the LLCs and to compete with the LLCs in any manner he desires.

We are not identifying these options as a threat, but so that you will understand that the options available to you are limited. You and Mr. Weintraub can agree on a buy-out of your membership interests, or Mr. Weintraub will take such other actions as are necessary to protect his interests. I can assure you that a negotiated resolution of this type of business dispute is preferable to the alternatives.

I encourage you to consult with counsel about this matter and have that counsel contact me to discuss this matter. If you cho[o]se to proceed without counsel, I look forward to hearing from you directly.

Please note that Mr. Weintraub is willing to allow a reasonable amount of time for you to respond, but he reserves the right to take any actions he deems appropriate without prior notice to you. Without prejudice to that position, we ask that you respond (or have counsel respond) not later than March 3, 2015.

Very truly yours,

David Bolton

In the March Letter (Ex. C to Gilbert Aff. in Supp.), [1] Defendant's Counsel advised Plaintiff *inter alia* that 1) it appeared from Plaintiff's correspondence with Defendant that it would be beneficial for the parties to "part ways;" 2) there were three options available to Defendant, specifically for Defendant a) to purchase Plaintiff's membership interests; b) to stop working for the LLCs and form a competing business; or c) to petition for dissolution of the LLCs; and 3) Defendant's Counsel was providing these scenarios "not as a threat, but so that you

[1] The March Letter contains the language "FOR SETTLEMENT PURPOSES ONLY" at the top of the Letter. Plaintiff affirms that the March Letter has been redacted to remove the actual offers of settlement (Gilbert Aff. in Supp. at n. 1).

see that a negotiated resolution is in all parties' best interest."

Plaintiff submits that the February and March Letters contain "threats" (Gilbert Aff. in Supp. at ¶ 17) that Defendant intends to compete with Plaintiff, in violation of his fiduciary obligations to Plaintiff, and suggest that Defendant has the right to compete with Plaintiff, which Plaintiff disputes. Plaintiff contends that if Defendant were to establish a competing business, he "would be in a great position to divert all of the LLCs' manufacturers to his new entity" (Gilbert Aff. in Supp. at ¶ 18) because Defendant has had extensive contact, and developed relationships with, those manufacturers over the last several years.

In his supplemental affidavit in support, Plaintiff affirms that Defendant has formed a competing business and is "now poaching sales representatives and vendors" from Road Runners (Gilbert Supp. Aff. at ¶ 2). By letter to Plaintiff dated September 22, 2015 ("September Letter") (Ex. A to Gilbert Supp. Aff.), Defendant advised Plaintiff that, effective September 24, 2015, Defendant would withdraw from and cease any position of management or responsibility in the LLCs, and was resigning from any role as an employee in the LLCs. Defendant also advised Plaintiff that his withdrawal was intended to comply with LLCL § 401 which provides that only members who are exercising management powers or responsibilities shall be deemed to be managers, and that as of September 24, 2015, Defendant should not be deemed to be a manager of either LLC. Defendant also reserved all rights available to him under the law, including the right to payment of all commissions due him, the right to participate in the LLCs' profits, and the right to participate in the LLCs' management in the future if and when he chose to do so.

Plaintiff affirms that, subsequent to his receipt of the September Letter, several of the LLCs' sales representatives advised Plaintiff that Defendant had established a competing entity called NWA Sales, Inc. ("NWA"). In support, Plaintiff provides a corporate entity search on the New York State, Department of State's website for NWA (Ex. B to Gilbert Supp. Aff.) reflecting that NWA was established on September 30, 2015 and listing Defendant as the person who would accept process on behalf of NWA. Plaintiff also avers that, beginning in October 2015, he began receiving emails and telephone calls from approximately 15 of the LLCs' vendors who advised Plaintiff that they were terminating their relationship with Road Runners. Plaintiff provides samples of those emails (Ex. C to Gilbert Supp. Aff.). Plaintiff also affirms that the

LLCs' representatives advised him that they were asked to participate in a conference call with Defendant's Counsel regarding the parties' dispute, and that Defendant's Counsel advised the representatives that the LLCs could not prevent NWA or Weintraub from engaging in competition with the LLCs. The representatives also advised Plaintiff that Defendant requested that they sign a letter stating that they would be working for Defendant, and then forwarded that letter to the various vendors in the hopes of encouraging them to use NWA. Plaintiff affirms his belief that Defendant's new company is only competing with the New York division of Road Runner, and not with the New England or Southeast divisions, or Tola's division which is located in Texas.

Plaintiff affirms that it was the parties' ordinary course of business for Plaintiff to make guaranteed payments to Defendant and Plaintiff for services provided by them other than in their official capacity as members. Following Defendant's withdrawal from the LLCs, Plaintiff has performed all of the work of the LLCs. Thus, Plaintiff submits, he is "entitled to absorb the guaranteed payments" (Gilbert Supp. Aff. at ¶ 9) which would otherwise have been payable to Defendant for the work that Defendant previously performed, which Plaintiff is now performing. Plaintiff submits that this would not constitute a payment outside the ordinary course of business, within the meaning of the TRO, because the LLCs ordinarily compensate their members and employees for work performed. Thus, Plaintiff asks the Court to include, as a condition of any injunctive relief, the directive that an increase in guaranteed payments to Plaintiff which is commensurate with the increase in work that he is now performing would not constitute a violation of the injunction.

In his initial affidavit in opposition to the motion, Defendant denies Plaintiff's assertion that Defendant has threatened to establish a business and compete with the LLCs "and, in fact, may already be doing so" (Weintraub Aff. in Opp. at ¶ 2, quoting Zinner Aff. in Supp. at ¶ 3). Defendant affirms that he has not formed a business to compete with the LLCs and has not competed with the LLCs in any way. Defendant submits that Plaintiff has filed this action, and this motion, in an effort to gain leverage in connection with "the inevitable demise of our business relationship" (Weintraub Aff. in Opp. at ¶ 3). Defendant submits that neither Letter contained either a threat or affirmative statement by Defendant that he had formed a competitive

business. Defendant affirms that he has worked in the industry of the LLCs for his entire career and, if he is not permitted to continue to work in that industry, will be unable to support his family.

In his supplemental affidavit in opposition to the motion, Defendant affirms that there is no operating agreement for the LLCs and the parties never executed an employment agreement, non-competition agreement or non-solicitation agreement. Moreover, Defendant did not, and would not, sign any agreement that would prevent him from working as a sales representative in the LLCs' industry because it is the only industry in which he has ever worked, and he needs to work to support his family. Defendant also disputes Plaintiff's characterization of Defendant's conduct, and submits that it is Plaintiff who has spoken falsely about Defendant to manufacturers and threatened to sue those manufacturers if they do business with Defendant.

Defendant submits that he "had no choice" but to withdraw from his role in the LLCs (Weintraub Supp. Aff. at ¶ 6) because Plaintiff rebuffed Defendant's attempts to resolve the parties' disputes and, during a conference before the Court, approached Plaintiff in the hallway of courthouse and threatened that he was "coming after me" and was going to "get" Defendant's wife and family (*id.*). Defendant contends that Plaintiff does not, and should not, have the right to force Defendant to either remain in the parties' "dysfunctional and unhealthy business relationship" (Weintraub Supp. Aff. at ¶ 7) or cease to work in the industry in which he has always worked.

Defendant outlines the difficulties between the parties that prompted Defendant to terminate his relationship with Plaintiff and submits that Plaintiff acknowledged those difficulties. Defendant affirms that, in an email to Defendant dated March 3, 2015 (*see* Weintraub Supp. Aff. at ¶ 14), Plaintiff advised Defendant that he was "upset" to receive the February Letter but did not blame Defendant because "we haven't been communicating at all." Defendant makes reference to subsequent emails between the parties ((*see* Weintraub Supp. Aff. at ¶¶ 15 and 16) which included an email from Plaintiff to Defendant stating that "I hope that I will not be the only one coming up with a course of action. Be prepared to tell me what you would like to do." Following that email, Defendant's Counsel sent the March Letter to Plaintiff with a detailed settlement proposal. Defendant affirms that Plaintiff did not respond to the

March Letter but, instead, called and asked Defendant if they could meet. By email dated March 23, 2015, Defendant suggested that, in lieu of a meeting, Plaintiff put his proposal in writing or schedule a conference call. Plaintiff, instead, filed the instant action. Defendant, however, continued his efforts to resolve his business relationship with Plaintiff and, in support, Defendant provides a September 11, 2015 email from Plaintiff's Counsel to Defendant's Counsel (Ex. D to Weintraub Supp. Aff.) advising Defendant's Counsel that Plaintiff's Counsel had not heard back from Defendant but giving his representation that he had recommended to Plaintiff that the parties' dispute be resolved in the manner suggested by Defendant. After not hearing from Plaintiff for several days, Defendant's Counsel advised Plaintiff's Counsel by email dated September 17, 2015 (Ex. E to Weintraub Supp. Aff.) that all settlement offers would be withdrawn later that day if not accepted. In an email dated September 17, 2015 (Ex. F to Weintraub Supp. Aff.) Plaintiff's counsel *inter alia* requested additional time to consider the offer. In subsequent emails (Exs. G and H to Weintraub Supp. Aff.), it was confirmed that Plaintiff was rejecting Defendant's settlement offer.

Defendant affirms that, following his withdrawal from the LLCs, Plaintiff contacted many of the manufacturers represented by the LLCs and advised them that he could "shut" Defendant down in 48 hours (Weintraub Supp. Aff. at ¶ 32) and advised certain of them that he would sue them if they conducted business with Defendant. Plaintiff also sent many of the manufacturers a letter dated October 1, 2015 (Ex. J to Weintraub Supp. Aff.), authored by Plaintiff's Counsel which advised the recipients *inter alia* that 1) Defendant had resigned from his position of management and responsibility with respect to the LLCs and his role with the LLCs was limited to that of a member "with no management power;" 2) Plaintiff had "the exclusive power to make all management decisions;" and 3) if Defendant were to establish a competing business, as was his stated intent, such competition "would be deemed unlawful" and "would constitute a breach of Weintraub's fiduciary duty" owed to Plaintiff and the LLCs.

Defendant affirms that the LLCs operate in 4 regions of the United States, covering 21 states, and maintain showrooms located in Atlanta and Dallas. NWA operates in only 2 states and has no showroom, and its business varies from that of the LLCs so that it does not pose a threat to the LLCs. Defendant also affirms that Plaintiff suggested a resolution of the parties'

differences whereby Defendant would perform the LLCs' business in New York and New England and Plaintiff would perform the LLCs' business in Dallas, Atlanta and the Northeast, which is essentially what has occurred as a result of Defendant opening NWA. Defendant submits that, as evidenced by the emails provided by Plaintiff, the manufacturers who terminated their relationship with the LLCs did so of their own volition. Defendant submits that NWA does not represent a business threat to Plaintiff, and that Plaintiff's motivation in filing this action, and this motion, is to interfere with Defendant's ability to support himself and his family

C. The Parties' Positions

Plaintiff submits that he has demonstrated his right to the requested injunctive relief by establishing that 1) Defendant, as a member of the LLCs, owed a duty to Plaintiff to refrain from engaging in a competing business; 2) Defendant's operation of NWA, which resulted in Road Runners' New York division losing numerous of its vendors, constituted a breach of his fiduciary duty or, at a minimum, establishes that Plaintiff is likely to succeed on his claim for breach of fiduciary duty; 3) Plaintiff's loss of customers and/or loss of good will constitutes irreparable injury; and 4) a balancing of the equities favors Plaintiff in light of the fiduciary duty that the parties owe to each other, which Defendant has allegedly breached by diverting the LLCs' business to a competing entity.

Defendant opposes the motion submitting that 1) the Letters did not contain threats but, rather, constituted a good faith effort by Defendant to amicably resolve the parties' business relationship; 2) the LLCL does not provide that members of an LLC are prevented from competing with the LLC's businesses and the Court should not imply such a provision; 3) a balancing of the equities does not favor Plaintiff in light of Defendant's affirmation that, if he is enjoined from working the in the industry at issue, he will be unable to support his family; and 4) injunctive relief is inappropriate where, as here, the parties could have executed an employment or operating agreement that limited their right to compete with each other, but did not do so.

RULING OF THE COURT

A. Standards for Preliminary Injunction

A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving papers. *William M. Blake Agency, Inc. v. Leon*, 283 A.D.2d 423, 424 (2d Dept. 2001); *Peterson v. Corbin*, 275 A.D.2d 35, 36 (2d Dept. 2000). Injunctive relief will lie where a movant demonstrates a likelihood of success on the merits, a danger of irreparable harm unless the injunction is granted and a balance of the equities in his or her favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990); *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981); *Merscorp, Inc. v. Romaine*, 295 A.D.2d 431 (2d Dept. 2002); *Neos v. Lacey*, 291 A.D.2d 434 (2d Dept. 2002). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1073 (2d Dept. 2008); *City of Long Beach v. Sterling American Capital, LLC*, 40 A.D.3d 902, 903 (2d Dept. 2007); *Ruiz v. Meloney*, 26 A.D.3d 485 (2d Dept. 2006).

Proof of a likelihood of success on the merits requires the movant to demonstrate a clear right to relief which is plain from the undisputed facts. *Related Properties, Inc. v. Town Bd. of Town/Village of Harrison*, 22 A.D.3d 587 (2d Dept. 2005); *see Abinanti v. Pascale*, 41 A.D.3d 395, 396 (2d Dept. 2007); *Gagnon Bus Co., Inc. v. Vallo Transp. Ltd.*, 13 A.D.3d 334, 335 (2d Dept. 2004). Thus, while the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that subvert the plaintiff's likelihood of success on the merits to such a degree that it cannot be said that the plaintiff established a clear right to relief. *Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd.*, 53 A.D.3d 612 (2d Dept. 2008), quoting *Milbrandt & Co. v. Griffin*, 1 A.D.3d 327, 328 (2d Dept. 2003); *see also* CPLR § 6312(c). The existence of a factual dispute, however, will not bar the imposition of a preliminary injunction if it is necessary to preserve the status quo and the party to be enjoined will suffer no great hardship as a result of its issuance. *Melvin v. Union College*, 195 A.D.2d 447, 448 (2d Dept. 1993).

A plaintiff has not suffered irreparable harm warranting injunctive relief where its alleged

injuries are compensable by money damages. *See White Bay Enterprises v. Newsday*, 258 A.D.2d 520 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record demonstrated that alleged injuries compensable by money damages); *Schrager v. Klein*, 267 A.D.2d 296 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record failed to demonstrate likelihood of success on merits or that injuries were not compensable by money damages).

B. Duties of Members of LLC

LLCL § 409(a) provides that "[a] manager shall perform his or her duties as a manager, including his or her duties as a member of any class of managers, in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances." The acts of working in concert and managing a limited liability company clearly gives rise to a relationship among the members which is analogous to that of partners who, as fiduciaries of one another, owe a duty of undivided loyalty to the partnership's interests. *Willoughby Rehabilitation and Health Care Center, LLC v. Webster*, 2006 N.Y. Misc. LEXIS 3130, *10-11 (Sup. Ct., Nassau Cty. 2006) citing *Birnbaum v. Birnbaum*, 73 N.Y.2d 461, 466 (1989), *rearg. den.*, 74 N.Y.2d 843 (1989). A partner, and by analogy, a member of a limited liability company, has a fiduciary obligation to others in the partnership or limited liability company which bars not only blatant self-dealing, but also requires avoidance of situations in which the fiduciary's personal interest might possibly conflict with the interests of those to whom the fiduciary owes a duty of loyalty. *Willoughby Rehabilitation and Health Care Center, LLC v. Webster*, 2006 N.Y. Misc. LEXIS 3130 at *11 citing, *inter alia*, *Salm v. Feldstein*, 20 A.D.3d 469, 470 (2d Dept. 2005).

C. Application of these Principles to the Instant Action

The Court denies the motion and vacates the TRO. In the February and March Letters, Defendant expressed his desire to terminate his working relationship with Plaintiff, as was his right, and suggested ways to terminate that relationship that would obviate the need for litigation. Although Plaintiff responded to those Letters, no resolution was reached. Plaintiff is apparently taking the position that, notwithstanding the parties' inability to resolve their differences

informally despite Defendant's good faith efforts to do so, and the absence of any operating agreement, non-solicitation agreement or non-competition agreement, Plaintiff has the right to prevent Defendant from moving on professionally in any way. The Letters reflect a reasoned approach to the termination of the parties' business relationship, and nothing in the numerous emails from the vendors (Ex. C to Gilbert Supp. App.) suggests that Defendant engaged in any improper conduct vis a vis Plaintiff, or withheld any material information from Plaintiff. Under these circumstances, Plaintiff has not established a likelihood of success on the merits on his cause of action for breach of fiduciary duty. Moreover, even assuming *arguendo* that Plaintiff has established a likelihood of success on the merits, Plaintiff has also not demonstrated that a balancing of the equities favor Plaintiff, in light of Defendant's ultimately unsuccessful efforts to resolve the parties' business disputes amicably, Defendant's affirmations regarding his need to work to earn his livelihood, and the absence of evidence that the decision of certain manufacturers to continue working with Defendant/NWA was attributable to any improper conduct by Defendant.

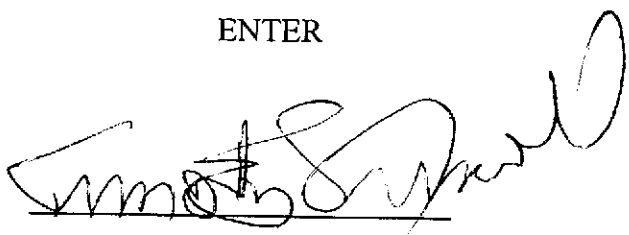
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Compliance Conference on February 23, 2016 at 9:30 a.m.

ENTER

DATED: Mineola, NY
November 24, 2015



HON. TIMOTHY S. DRISCOLL
J.S.C.