SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
PRESENT: Hon. Eileen Bransten, Justice PART 3

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GARBER ET AL.,

Plaintiffs,

-against-

STEVENS, JR. ET AL.,

Index No.: 601917/05
Motion Date: 6/6/11
Motion Seq. No.: 017

Defendants.

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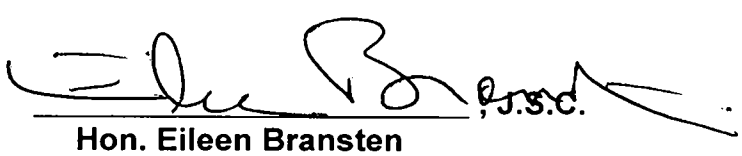
The following papers, numbered 1 to 3, were read on this motion for summary judgment.

	Papers Numbered
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	1
Answering Affidavits - Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes X No

Upon review of the foregoing papers, this motion is decided in accordance with the accompanying memorandum decision.

Dated: August 10, 2011



Hon. Eileen Bransten, J.S.C.

Check One: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE ☐ SETTLE/SUBMITORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(s): _____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

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HAROLD E. GARBER, RONALD SEIDEN, SEYMOUR C. NASH, ROBERT C. MAGOON, GORDON MILLER, STEPHEN M. KULVIN, STEVEN ZARON and LEE DUFNER, as limited partners of and in the right of KINPIT ASSOCIATES, L.P., a New York limited partnership,

Plaintiffs,

-against-

TROY D. STEVENS, JR., Individually and d/b/a DEVELOPMENT CO., KINPIT REALTY CORP., KINPIT REALTY, INC., KINPIT REALTY CO., KINPIT MANAGEMENT and DAWMICH INDUSTRIES, INC.,

Defendants.

Index No.: 601917/05
Motion Date: 6/6/11
Mot. Seq. Nos: 017-018

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EILEEN BRANSTEN, J.:

Motion sequence numbers 17 and 18 are consolidated for disposition.

In motion sequence number 17, plaintiffs Harold E. Garber, Ronald Seiden, Seymour C. Nash, Robert C. Magoon, Gordon Miller, Stephen M. Kulvin, Steven Zaron and Lee Dufner, as limited partners of and in the right of Kinpit Associates, L.P., a New York limited partnership (the "limited partnership") (collectively, "plaintiffs") move, pursuant to CPLR 3212, for summary judgment on liability on the complaint.

In motion sequence number 18, defendants Troy D. Stevens, Jr. ("Stevens"), individually and d/b/a Development Co., Kinpit Realty Corp., Kinpit Realty, Inc., Kinpit Realty Co., Kinpit Management and Dawmich Industries, Inc. (collectively, "defendants")

cross-move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and for judgment on liability on their first counterclaim.

BACKGROUND

The amended and supplemental complaint alleges that, in December 1975, Kinpit Associates, L.P., the limited partnership, acquired title to an apartment building in Brooklyn, N.Y. (the "property"). Stevens and Kinpit Realty, Corp. a/k/a Kinpit Realty, Inc., an entity Stevens wholly-owned, are the general partners of the limited partnership.

Plaintiffs claim that, in November 1975, prior to the acquisition of the property, the parties entered into a Limited Partnership Agreement (the "Agreement") that states, inter alia, that 51% of the limited partners must consent to any refinancing of the property (Safran Aff., Ex. A, Complaint, (Ex. A) (hereinafter, "Agreement"), ¶ 14 (C)(7)); that the general partners may not be compensated for services rendered to the partnership (Agreement, ¶ 14 (F)); that each limited partner is to have access to the partnership books; and that a certified accounting is to be made to each limited partner at the end of each fiscal year and monthly reports of receipts and disbursements are to be submitted to the limited partners. *Id.* ¶ 11. In addition, the Agreement states that the limited partners are entitled to certain distributions of profits and refinancings. *Id.* ¶ 10.

The complaint alleges that, in violation of the Agreement, Stevens refinanced the property six times without the consent of the limited partners and that the limited partnership

received $4,600,000 from the refinancings, with no accounting to the limited partnership for the funds received. The complaint also alleges; that, in violation of paragraph 10 (C) of the Agreement, no distributions from the refinancings were made to the limited partners. Instead, plaintiffs allege, Stevens diverted some or all of the proceeds from the refinancings to his own use and/or caused disguised and unlawful payments to be made to his wholly-owned, affiliated entities, including more than $5,000,000 that the limited partnership paid to Dawmich Industries, Inc. for repairs to and maintenance of the property. Plaintiffs also allege that, from 1997 through 2008, Stevens failed to provide the limited partners with certified annual accountings and monthly reports of receipts and disbursements.

Plaintiffs further contend that from 1995 to the present Stevens and Kinpit Realty Corp. managed the property, negotiated leases and acted as rental agent without a valid New York Real Estate Broker's license, all in violation of Article 12 of the New York Real Property Law.

The complaint states causes of action for an accounting, breach of contract requiring reformation, breach of fiduciary duty and the return of management fees earned in violation of Article 12 of the Real Property Law.

Stevens answered and counterclaimed. Stevens alleged that the Agreement was modified to remove the requirement that the limited partners consent to refinancing and to permit Stevens to take management fees. He also contends that he made loans to the

partnership which were necessary to fund the expenses of the partnership. Stevens' first counterclaim alleges that the partnership owes him more than $1,500,000 for loans he made to the partnership.

CONTENTIONS

In support of plaintiffs' motion for summary judgment on liability on the complaint, plaintiffs contend: that they are entitled, as limited partners, to an accounting of their interests in the partnership; that they have submitted documentary evidence that the partnership agreement required the limited partners' consent for refinancing; that the agreement provided that Stevens was not entitled to collect management fees and that Stevens breached the agreement by refinancing the property six times without consent and paying himself and his wholly-owned entities allegedly exorbitant fees for managing the property. Plaintiffs contend that Stevens, Kinpit Realty, Inc. and Dawmich Industries, Inc. are jointly and severally liable for breach of fiduciary duty. Plaintiffs contend that together, these defendants facilitated the general partners' self-dealing, at the expense of the limited partnership, and that these defendants placed the limited partnership in financial jeopardy by incurring more than $5,000,000 in unnecessary debt.

Plaintiffs also claim that the management fees paid to the general partners must be recouped because the Real Property Law requires the manager who is collecting rents and leasing premises to be a licensed real estate broker.

Defendants, in opposition, argue that the equitable doctrines of waiver, estoppel and/or laches bar plaintiffs' claims. Defendants argue that plaintiffs made no effort from 1993 to the present to enforce their alleged rights under the Agreement. Defendants also contend that there are questions of fact as to whether the Agreement was modified to permit the general partners to receive management fees and to permit refinancing without the approval of the limited partners. In addition, defendants claim that there are questions of fact about whether Stevens was fraudulently induced to enter into the Agreement.

As to the fiduciary duty claim, defendants argue that plaintiffs were aware that Stevens used companies he owned and managed to repair and maintain the property. Defendants further argue that plaintiffs were aware that Stevens would use the proceeds of refinancing to reimburse himself for loans he made to the limited partnership.

Stevens argues that he did not breach Article 12 of the Real Property Law. Stevens contends that the money Kinpit Realty Corp. collected for renting the property was incidental to its overall services. Stevens contends that plaintiffs are not entitled to an accounting because they have not explained why they didn't demand an accounting from the general partner before commencing this action.

In support of defendants' motion for summary judgment on the first counterclaim, Stevens claims that the documentary evidence demonstrates that he made $499,000 in loans to the limited partnership and that $369,000 remains outstanding.

Plaintiffs oppose defendants' motion on the ground that it is untimely and, even if the motion was not untimely, Stevens has not produced admissible evidence sufficient to establish that he is entitled to judgment on his counterclaim as a matter of law.

DISCUSSION

Summary judgment will be granted if it is clear that no triable issue of fact exists. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). The burden is on the moving party to make a prima facie showing of entitlement to summary judgment as a matter of law. *Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 (1980); *Friends of Animals v. Associated Fur Mfrs.*, 46 N.Y.2d 1065, 1067 (1979). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d at 324; *Zuckerman v. City of New York,* 49 N.Y.2d at 562. Mere conclusions, unsubstantiated allegations or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman v. City of New York,* 49 N.Y.2d at 562.

A. Plaintiffs' Motion for Summary Judgment

Plaintiffs have made a prima facie showing that they are entitled to summary judgment on liability on their second, third and fourth causes of action.

Breach of Contract

The documentary evidence demonstrates that the Agreement, attached to the complaint (Safran Aff., Ex. A), is the Agreement that all of the parties signed in November

1975. No evidence has been shown, admissible or otherwise, to establish that the parties modified that Agreement in December 1975. Indeed, Stevens does not deny that in April 1979, he annexed the unmodified November 1975 Agreement to an affidavit and represented to the court[1] that it was the only Agreement between the parties. Safran Aff., Ex. C.

Stevens's reliance on a purported December 12, 1975 letter agreement with Morris Greenburg that allegedly modified the agreement (Cassell Aff., Ex. C) is without merit. On December 12, 1975, Greenburg was neither a partner in the limited partnership nor an authorized agent of the limited partnership. Thus, Greenburg had no authority to modify the terms of the Agreement. Moreover, none of the limited partners were signatories to the alleged December 12, 1975 letter agreement. *See, e.g. Kluger v. Grube*, 2002 NY Slip Op 40480(U), 2002 WL 31507467, *1 (App. Term, 9th & 10th Jud. Divs. 2002) (landlord's husband was not party to the lease agreement and thus had no authority to modify lease terms).

Because the court finds that the November 1975 Agreement is binding upon the parties, plaintiffs have demonstrated that they are entitled to summary judgment on their breach of contract cause of action. Plaintiff have first shown the validity of the Agreement. The Agreement: (a) prohibits refinancing of the property without the approval of 51% of the limited partners; (b) prohibits compensation to the general partners for services rendered

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[1] Stevens submitted the affidavit in connection an action in this court captioned *Kinpit Realty Corp. v Fiduciary Capital Corp.*, Index No. 4016/1979.

to the partnership; and (c) requires the general partners to provide annual certified accountings to the limited partners. Plaintiffs have also submitted evidence that the general partners breached the agreement by: (a) refinancing the property six times without the approval or knowledge of the limited partners (Safran Aff., Ex. K, Ex. F [Stevens 5/4/09 Dep.], at 139), Ex. G and Ex. L); (b) taking more than $1.7 million in compensation for services rendered to the partnership between 1997 and 2008, (Safran Aff., Exhibit M); (c) failing to provide certified accountings or monthly expense information to the limited partners (Safran Aff., Ex. F 1/30/08 dep., at 428; 5/4/09 dep., at 56, 102); and (d) failing to distribute proceeds, if any, due to the limited partners.

Breach of Fiduciary Duty

Plaintiffs have also established their prima facie case that the general partners breached their fiduciary duty to the limited partnership. Plaintiffs have demonstrated that: (1) defendants owed them a fiduciary duty; (2) defendants committed misconduct that breached that duty; and (3) plaintiffs suffered damages as a result of that misconduct. *See Burry v. Madison Park Owner LLC*, 84 A.D.3d 699, 699-700 (1st Dep't 2011).

In *Appleton Acquisition, LLC v. National Hous. Partnership*, 10 N.Y.3d 250, 258 (2008) the Court of Appeals stated that "general partners always have fiduciary responsibilities to limited partners. . . ." Accordingly, there is no question that Stevens and Kinpit Realty Corp. owed the limited partnership a fiduciary duty. In addition, the evidence

reveals that Stevens and Kinpit Realty Corp. engaged in misconduct by hiring their wholly-owned subsidiary, Dawmich Industries, Inc. to perform all the repair and maintenance on the property. Dawmich earned almost $5 million at the property. The general partners failed to obtain competitive bids for the repair and maintenance work. Safran Aff., Ex. F 11/13/07 tr. at 27, 41, 176; Ex. N showing 47.3% of total rents over 10 years paid to Dawmich. The evidence also shows that the general partners caused the partnership to incur more than $400,000 in expenses in connection with the unauthorized refinancings (Safran Aff., Ex. K) and that Stevens reimbursed himself for more than $1.4 million in undocumented and unsubstantiated loans.

Stevens has failed to come forward with any admissible evidence raising a question of fact regarding the breach of contract and breach of fiduciary duty claims. As discussed above, his contention that the Agreement was modified is belied by his own 1979 affidavit wherein he represents that the unmodified November 1975 agreement was the entire agreement between the parties.

Real Property Law

Plaintiffs next move on their cause of action alleging breach of Article 12, § 440 of the Real Property Law and demanding return of management fees. Stevens does not deny that neither he nor his management company was licensed as a real estate broker during most of the time that he was negotiating leases, collecting rents and acting as a rental agent for the property.

New York Real Property Law requires any entity acting as a real estate broker to be licensed. Real Property Law § 440 (1) provides one definition of a real estate broker as any person, "who, for another and for a fee, . . . collects or offers or attempts to collect rent for the use of real estate . . . ." Pursuant to Real Property Law § 442-e (3), any offender who received any sum of money as commission, compensation or profit by or in consequence of his violation of any provision of this article . . ." is liable to the aggrieved party.

Bleecker Charles Co. v. A & D Harrison, Inc., 37 A.D.2d 935, 935 (1st Dep't 1971), is quite similar to the case at bar. Therein, the First Department held that fees paid for the management of a building owned by a limited partnership were recoverable where the recipient of the fees acted without the partners' consent and was not a licensed real estate broker. The court held so notwithstanding that the person managing the building had a direct or indirect interest in the limited partnership which owned the property. *See, also, Nisenbaum v. Magaw Managment, LLC,* Index No.112492/06, at 2-3 (Sup. Ct., NY County 2006).

Fraudulent Inducement

In opposition to summary judgment, Stevens's belated claims that he was fraudulently induced to enter into the Agreement and that the Agreement is unconscionable are without merit. CPLR 3018 (b), captioned, "Affirmative defenses," requires that "[a] party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or

would raise issues of fact not appearing on the face of a prior pleading such as . . . fraud . . . The application of this subdivision shall not be confined to the instances enumerated."

Defendants have not pled fraud in the inducement or unconscionability as affirmative defenses and, although ordinarily the failure to plead such defenses would result in waiver, on a motion for summary judgment, the failure to plead an affirmative defense does not always preclude the consideration of the defense. *See BMX Worldwide, Ltd. v. Coppola N.Y.C., Inc.*, 287 A.D.2d 383 (1st Dep't 2001). Where summary judgment is involved, the threshold inquiry is whether, in considering the unpleaded defense, the opponent of the defense would be prejudiced thereby.

In this case, the circumstances surrounding plaintiffs' alleged fraudulent inducement are not stated with particularity (CPLR 3016 [b]), and defendants' defenses were not raised on a prior motion or explored in discovery. Accordingly, because consideration of such defense at this late date would cause prejudice and surprise to the plaintiffs, allegations of fraud in the inducement and unconscionability may not be considered. *See Strauss v. BMW Financial Servs. Vehicle Leasing*, 29 Misc. 3d 362, 364-365 (Sup. Ct., Kings County 2010).

Equally unavailing is Stevens's claim that he signed the Agreement without reading it and that, in 1979, he swore that it was the correct document without reading the affidavit or looking at the attached Agreement. It is well settled in this state that where a party to a contract can read the document, not to have read it is gross negligence and, if the party could

not read it, not to have it read to him/her, is equally negligent. In either case, the writing is binding. *Huang v. Cheng*, 182 A.D.2d 600, 600-601 (1st Dep't 1992); *Sterling Natl. Bank & Trust Co. of N.Y. v. I.S.A. Merchandising Corp.*, 91 A.D.2d 571, 571 (1st Dep't 1982)], citing *Pimpinello v. Swift & Co.*, 253 N.Y. 159, 162-163 (1930).

Waiver

Further, there is no evidence that plaintiffs waived their rights under the Agreement. Waiver "is an intentional relinquishment of a known right and should not be lightly presumed." *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 968 (1988). Such intention "must be unmistakably manifested, and is not to be inferred from a doubtful or equivocal act." *Echostar Satellite L.L.C. v. ESPN, Inc.*, 79 A.D.3d 614, 617 (1st Dep't 2010) (internal quotation marks and citations omitted). Defendants' reliance on plaintiffs' silence and inaction is insufficient to establish an intent to waive a known right. *Id.* at 618.

Equitable Estoppel

Neither have defendants established that plaintiffs' claims are barred by the doctrine of equitable estoppel. A party will be estopped from invoking a contractual right where estoppel would:

> in the interest of fairness . . . prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's word or conduct, has been misled into acting upon the belief that such enforcement would not be sought.

Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgt., L.P., 7 N.Y.3d 96, 106 (2006) (internal quotation marks and citations omitted).

Under New York law, the defense of equitable estoppel requires proof of three elements: "(1) conduct which amounts to a false representation or concealment of material facts, . . . ; (2) intention, or at least the expectation, that such conduct will be acted upon by the other party; (3) and, in some situations, knowledge, actual or constructive, of the real facts." *BWA Corp. v. Alltrans Exp. U.S.A., Inc.*, 112 A.D.2d 850, 853 (1st Dep't 1985) (interior quotation marks and citations omitted).

Defendants have failed to submit evidence sufficient to raise a question of fact that plaintiffs concealed facts with the expectation that defendants would act upon the concealment to their detriment. Moreover, defendants have not demonstrated through admissible evidence that plaintiffs knew the true facts and that Stevens did not have knowledge of the facts. Indeed, the evidence establishes that Stevens was the only party with complete knowledge of the limited partnership's business.

Laches

Laches is similarly unavailable as a defense to the claims of breach of contract, breach of fiduciary duty and for the return of management fees. *See Cadlerock, L.L.C. v. Renner*, 72 A.D.3d 454, 454 (1st Dep't 2010) ("[t]he defense of laches is unavailable in [an] action at law commenced within the period of limitations").

Accounting

As to the cause of action for accounting and the request for reformation, defendants have not pled and they have not established how plaintiffs' delay prejudiced them. *Worthen-Caldwell v Special Touch Home Care Servs., Inc.*, 78 AD3d 822, 823 [2d Dept 2010][mere lateness is insufficient to assert laches – it is lateness coupled with significant prejudice to the other side]).

Accordingly, because defendants have failed to come forward with admissible evidence sufficient to overcome plaintiffs' prima facie showing that they are entitled to summary judgment on liability on the second cause of action for breach of fiduciary duty, the third cause of action for breach of contract and the fourth cause of action for the return of management fees, plaintiffs are awarded summary judgment on their second, third and fourth causes of action.

Plaintiff's motion is otherwise denied, including plaintiff's claim for summary judgment on the first cause of action for an accounting. Plaintiffs have failed to plead or prove that they made a demand upon defendants for an accounting, which defendants denied or that they did not make a demand because such demand would have been futile. *Kaufman v. Cohen*, 307 A.D.2d 113, 124 (1st Dep't 2003). Indeed, the record reveals that, in 1993, when plaintiffs demanded certified financial statements and other financial information, the defendants complied with their requests (Cassell Aff., Ex. E and F) and that plaintiffs made no further demands for financial information prior to instituting this lawsuit.

The cross motion for summary judgment on the first counterclaim is timely.

Defendants admit that they filed their cross motion for summary judgment after the court imposed deadline of March 17, 2011. The merits of an untimely motion for summary judgment may be considered by the court only if the movant demonstrates "good cause for the delay in making the motion [and] a satisfactory explanation for the untimeliness . . . ." *Brill v. City of New York,* 2 N.Y.3d 648, 652 (2004). If a movant makes a motion for summary judgment after the expiration of a court-ordered deadline which is shorter than the 120 day deadline as imposed by CPLR 3212 (a), a demonstration of a good cause for the delay is still required. *Mizell v. Eastman & Bixby Redevelopment Co., LLC,* 34 A.D.3d 770, 771 (2d Dep't 2006), citing *Miceli v. State Farm Mut. Auto. Ins. Co.,* 3 N.Y.3d 725 (2004). Good cause has been found where the identical issues raised in the untimely cross motion were already before the court by virtue of a timely motion for summary judgment. *Grande v. Peteroy,* 39 A.D.3d 590, 591-592 (2d Dep't 2007); *Ellman v. Village of Rhinebeck,* 41 A.D.3d 635, 636 (2d Dep't) *lv. denied,* 9 N.Y.3d 812 (2007). That is the case here.

Defendants' cross motion demands payment for loans Stevens allegedly made to the limited partnership. This issue is nearly identical to plaintiffs' claims for an accounting, breach of contract and breach of fiduciary duty. Accordingly, plaintiffs' motion for summary judgment constitutes good cause to overcome defendants' dilatory conduct. *Homeland Ins. Co. of New York v. National Grange Mutual Ins. Co.,* 84 A.D.3d 737, 738-739 (2d Dep't 2011).

That branch of the motion that seeks to dismiss the first cause of action for an accounting is granted because plaintiffs failed to demonstrate that they made a demand for an accounting which was rejected by Stevens as the partner in possession of the books and records. *See Kaufman v. Cohen*, 307 A.D.2d 113, 123-124 (1st Dep't 2003).

However, defendants have failed to establish a prima facie case that they are entitled to judgment as a matter of law for summary judgment on the first counterclaim. Defendants have not presented proof of the loans and failure to make payments according to their terms. *See, HSBC Bank USA, N.A. v. Laniado*, 72 A.D.3d 645, 645 (2d Dep't 2010). In this case, defendants' self-serving statements are insufficient to establish proof of loans, if any, that Stevens made to the limited partnership. *Mitchell v. Abrams,* 21 Misc. 3d 1145[A], 2008 NY Slip Op 52503[U] (Sup. Ct., NY County 2008).

Accordingly, it appearing to the court that plaintiffs, Harold E. Garber, Ronald Seiden, Seymour C. Nash, Robert C. Magoon, Gordon Miller, Stephan M. Kulvin, Steven Zaron and Lee Dufner, as limited partners of and in right of Kinpit Associates, L.P., a New York limited partnership, are entitled to judgment on liability on the second, third and fourth causes of action in the complaint and that the only triable issues of fact on those causes of action arising on plaintiffs' motion for summary judgment relate to the amount of amount of damages to which plaintiff is entitled, it is:

ORDERED that the motion is granted with regard to liability on the second, third and fourth causes of action and it is otherwise denied; and it is further

ORDERED that damages shall be determined at trial; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the Trial Support Office (Room 158) and, a note of issue and statement of readiness having already been filed, the Clerk shall cause the matter to be placed upon the calendar for such trial; and it is further

ORDERED that defendant Troy D. Stevens, Jr., individually and d/b/a Development Co., Kinpit Realty Corp., Kinpit Realty, Inc., Kinpit Realty Co., Kinpit Management and Dawmich Industries, Inc.'s cross motion for summary judgment is granted to the extent that the first cause of action for an accounting is dismissed and the motion is otherwise denied; and it is further

ORDERED that the action shall continue as to the counterclaims.

Dated: New York, New York
August 10, 2011

ENTER:

Hon. Eileen Bransten, J.S.C.