

<b>Broome St. Lot LLC v 432 Broome St. LLC</b>
2012 NY Slip Op 33489(U)
May 21, 2012
Sup Ct, New York County
Docket Number: 651102/11
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Broome Street

INDEX NO. 651102/11

-v-

MOTION DATE 9/8/12

432 Broome Street

MOTION SEQ. NO. 001

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ ] No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ ] No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ ] No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

In accordance with the accompanying Memorandum Decision, it is hereby ORDERED that the motion, under motion sequence 001, for an order dismissing the complaint and cancelling the notice of pendency is denied without prejudice; and it is further ORDERED that the motion, under motion sequence 002 is granted to the extent that: (1) Broome Street Owner LLC is hereby substituted as plaintiff without prejudice to the proceedings heretofore; (2) the names of Broome Street Lot LLC and Crosby Street Lot, LLC are hereby deleted from the caption; (3) Broome Street Owner LLC is directed to serve a copy of this order with notice of entry upon the Clerk of the Court and upon the Clerk of the Trial Support Office (Room 158), who are directed to amend their records to reflect such change in the caption herein; and (4) incoming counsel for Broome Street Owner LLC is directed to serve a notice of appearance pursuant to CPLR 321 (b) with the Clerk of the Trial Support Office (Room 158) and the Clerk of the Part forthwith; and it is further

ORDERED that the caption is amended to read as follows:

-----X

BROOME STREET OWNER LLC
Plaintiff,

-against-

432 BROOME STREET LLC AND LPARK 1, LLC,
Defendants.

-----X

And it is further

Dated: \_\_\_\_\_, J.S.C.

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

- 1. CHECK ONE: ... CASE DISPOSED ... NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ... MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: ... SETTLE ORDER ... SUBMIT ORDER ... DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

ORDERED that the defendant 432 Broome Street LLC is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that a Judicial Hearing Officer (JHO) or Special Referee shall be designated to hear and report with recommendations on the following issues of fact, which are hereby submitted to the Special Referee for such purpose:

(1) whether and/or to what extent a partition and sale prior to the expiration of the Lease would interfere with the rights 432 Broome currently enjoys under the Lease including whether partition by sale of the entire Property or by physical partition would cause it to suffer a loss of income/proceeds, and if so, in what amount; (2) whether and/or to what extent the rights of the majority interest holder are affected by defendant's refusal to sell at this juncture; and (3) whether the Property can be physically partitioned, pursuant to RPAPL §§ 921 and 922, without causing great prejudice to its owners; and it is further

ORDERED that the Special Referee may direct the parties to engage in such disclosure proceedings as will expedite the disposition of these issues; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Motion Support Office, Room 119, 60 Centre Street, New York, New York; 646-386-3028 or [spref@courts.state.ny.us](mailto:spref@courts.state.ny.us)) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult with one another and that counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (which can be accessed at the "Referees" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further


ORDERED that, the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320 [a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that, unless otherwise directed by this Court in any Order that may be issued together with this Order of Reference to Hear and Report, the issues presented in any motion identified above shall be held in abeyance pending submission of the Report of the JHO/Special Referee and the determination of this Court thereon.

This constitutes the decision and order of the Court.

Dated 5/29/12

ENTER:  J.S.C.

**HON. CAROL EDMEAD**

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION

Check if appropriate:     DO NOT POST             REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

-----X  
BROOME STREET LOT LLC and CROSBY STREET  
LOT, LLC,

Plaintiffs,

-against-

Index № 651102/11

432 BROOME STREET LLC and LPARK 1, LLC,

Defendants.

-----X  
CAROL R. EDMEAD, J.:

In this property dispute, defendant 432 Broome Street LLC (432 Broome) moves, under motion sequence 001, for an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing the complaint, and pursuant to CPLR 6514, cancelling the notice of pendency filed by plaintiffs Broome Street Lot LLC and Crosby Street Lot, LLC (together, Broome-Crosby) with respect to real property, consisting of land and a building, located at 432 - 436 Broome Street, New York, New York (Property). Under motion sequence 002, putative plaintiff Broome Street Owner LLC (Owner LLC or Assignee, as appropriate) moves for an order, pursuant to CPLR 1018 (a), substituting it as plaintiff, substituting Greenberg Traurig, LLP as counsel for plaintiff, and amending the caption accordingly, by deleting the names of Broome-Crosby and substituting that of Owner LLC as plaintiff. The motions, under motion sequence numbers 001 and 002, are hereby consolidated for disposition.

The history of the Property, as relevant to the motions, is as follows. This relatively small, uniquely situated parcel is a rare piece of undeveloped land in the historic SoHo section of lower Manhattan. Broome-Crosby are tenants-in-common fee owners of shares of the Property. They are the successors-in-interest to the prior owners, the estates of Catherine Kelly and

Elizabeth Kelly (Estates). 432 Broome is also an owner of shares of the Property. A dispute between the executors of the Estates and 432 Broome over ownership of the Property was resolved by the judgment of the Hon. Herman Cahn, under New York County Index Number 121702/95 (Judgment). In the Judgment, dated March 9, 1999 and entered on March 12, 1999, Justice Cahn ruled that the Estates, and their successors and assigns, were the collective owners of a 77.78% interest in the Property and that 432 Broome Street, and its successors and assigns, was the owner of the remaining 22.22% interest.

By Agreement of Lease (Lease) dated July 1, 2004, the Property was leased to defendant LPARK 1, LLC (LPARK) for use as a parking garage/lot. The Lease, which identifies Broome-Crosby and 432 Broome, collectively, as Landlord, and LPARK as Tenant, provides, in relevant part, that the Leasehold runs from July 1, 2004 until June 30, 2019, both dates inclusive (Article 1, § 1.1), and that Tenant pays 50% of the monthly rent to Broome-Crosby,<sup>1</sup> and 50% of the monthly rent to 432 Broome. The equal monthly rent payments are notable because they are inconsistent with the 77.78% - 22.22% interests held by the co-owners.

It is undisputed that the Property is extremely valuable and it is also undisputed that the possibility of its development, prior to June 30, 2019, was contemplated by the parties at the time they executed the Lease. In this respect, the Lease specifically provides:

Section 35. 1: Tenant hereby expressly acknowledges that it has been informed and understands that Landlord is and, prior to the Lease commencement date, has been actively considering the development of the premises by construction of a commercial or residential building on the premises. Tenant further acknowledges and agrees that the Landlord's option to cancel this Lease . . . is of the essence to

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<sup>1</sup>The Lease provides that the Tenant make certain, albeit unequal, monthly rent payments to Broome Street and to Crosby Street, which, when added together, are equal to the amount of monthly rent being paid to 432 Broome.

this transaction; that Landlord would not have entered into this Lease without an option to cancel this Lease . . . (original in all capitals).

Section 35.2: In the event at any time during the Term of this Lease, Landlord intends to construct a building on the Premises, Landlord shall have the right to terminate this Lease, provided Landlord has filed plans with the Department of Buildings of the City of New York for such construction and gives Tenant at least sixty (60) days written notice prior to the termination date of this Lease set forth in said notice . . .

(Lease, Notice of Motion, Exhibit C).

At some unspecified time after the Lease was executed, Broome-Crosby began the process of finding a developer to purchase the Property. However, the managing and controlling member of 432 Broome, Max Isaacs (Isaacs), did not want to sell his shares, preferring instead, to continue receiving income from the Tenant's monthly rent payments.

Due to this impasse and wanting to sell the Property, Broome-Crosby commenced the instant action for partition by filing their summons and complaint in the office of the New York County Clerk on April 26, 2011. Plaintiffs take the position that, as tenants-in-common fee owners of the Property, and in the absence of a specific contractual agreement not to partition, they have an absolute right to this remedy under Real Property Actions and Proceedings Law (RPAPL) § 901 (1). This statute, which identifies who may maintain a partition action, states:

[a] person holding and in possession of real property as joint tenants or tenants in common, in which he has an estate of inheritance, or for life, or for years, may maintain an action for the partition of the property, and for a sale if it appears that a partition cannot be made without great prejudice to the owners.

The requested relief is an order and judgment of partition, pursuant to RPAPL §§ 901 and 915, directing a court-ordered sale and conveyance of the entire Property without physical partition, and directing that the proceeds of the sale be divided and paid to the parties according to their

respective interests. In the alternative, Broome-Crosby seeks an order, pursuant to RPAPL § 921, permitting them to elect actual partition prior to any interlocutory judgment being entered under RPAPL § 915.

According to the complaint, Broome-Crosby received an offer from a developer to purchase the entire Property for \$22 million “on beneficial terms” (Complaint, ¶¶ 11, 17, 19), but 432 Broome held up the sale by refusing to sell its 22.22% interest. Broome-Crosby claim that Isaac’s stubborn refusal to sell or negotiate for the sale of the Property is in bad faith and is based solely upon his “desire to cause undue hardship,” and to deprive their “senior principals of their right to sell the Property and enjoy the economic benefits of the Property during their remaining lifetimes” (*id.*, ¶¶ 11, 21).

Broome-Crosby also explain that the particular characteristics and circumstances of the Property, together with its Landmark status and applicable zoning requirements, make physical partition, according to the parties’ respective rights and interests, prejudicial to plaintiffs because it would significantly lower the value of their interest (*id.*, ¶¶ 5, 23, 26, 32). Nonetheless, they alternately seek the right to elect physical partition in the event they are denied a court-directed sale of the entire Property.

In response to the complaint, 432 Broome served the instant pre-answer motion to dismiss, on or about June 3, 2011. In addition to pointing out that development would be difficult because the Property is landmarked, necessitating permission from the New York City Landmarks Commission, as well as permits from the Department of Building (DOB) and zoning variances, 432 Broome’s chief objections to plaintiff’s proposed partition/sale are that: (1) early termination of the Lease is not possible without its consent, which 432 Broome will not give



because three generations of Isaac's family rely on the monthly income generated by the Lease; (2) under the terms of the Lease, only 432 Broome and Broome-Crosby acting together, can terminate the Lease for development of the Property; (3) the partition/sale of the Property to a third-party developer would subject it (432 Broome) to possible litigation for breach of contract; (4) the Lease contains an implied agreement not to partition; and (5) it is Broome-Crosby who seek, through partition, to deprive it (432 Broome) of its contractual right to 50% of the rental income, and not as plaintiffs assert, 432 Broome/Isaacs who seek to deprive them (and their aging principals) of the benefits of a sale.

432 Broome explains that the Lease prohibits early termination for development by anyone other than the Landlord, which is defined on page one, as "Crosby Street Lot, LLC, having an office c/o Newhouse & Shey LLP, 420 Lexington Avenue, New York, New York 10170, Broome Street Lot, LLC, having an office c/o Newhouse & Shey LLP, 420 Lexington Avenue, New York, New York 10170 and 432 Broome Street, LLC, having an office at 218 Lafayette Street, New York, New York 10012," and asserts that this right is not transferable to another party, including a proposed developer, as the definition does not include the words "and successors and assigns." 432 Broome also asserts that Landlord can only terminate the Lease prior to June 30, 2019, if it, as defined, has filed plans for construction with the DOB. This, 432 Broome contends, has not occurred and will not occur as it does not, and will not, consent to the requisite filing. Therefore, the requested partition and sale would result in a breach of the express terms under which only the Landlord, as defined, is permitted to seek an early termination of its Lease with LPARK.

Although 432 Broome acknowledges that the existence of a commercial lease does not

automatically bar partition, it contends that the rights it enjoys under the Lease impose a reasonable limitation on plaintiffs' right to partition the Property. 432 Broome argues that where, as here, partition would interfere with its bargained-for right to receive 50% of the rent until June 30, 2019, and, in the process, cause a breach of terms contained in the Lease, the rule favoring partition yields "to the well-recognized exception that equity will not award partition to a party in violation of his own agreement" (*McNally v McNally*, 129 AD2d 686, 687 [2<sup>nd</sup> Dept 1987]; see also *Chew v Sheldon*, 214 NY 344, 348 - 349 [1915]).

With respect to the parties' disagreements over the term "Landlord," and whether the definition is so limited as to include only Broome-Crosby and 432 Broome and to preclude the possibility of a sale and/or an assignment of interest by either of the co-Landlords, defendant's arguments have been considered, and upon examination of the entire Lease, have been found to be without merit.

The parties executing the Lease clearly contemplated this possibility and added, at the very end of the Lease, Section 38.7, which states:

The term "Landlord" on the date as of which this Lease is delivered shall mean the Landlord first named herein, but thereafter "Landlord" shall mean only the holder of Landlord's interest in this Lease at the time in question so that if the Landlord named herein or any successor to its interest hereunder ceases to have any interest in the Premises or there is any transfer or transfers of Landlord's interest in the Premises, the transferor shall be and hereby is entirely freed and relieved of all agreements, covenants and obligations of Landlord hereunder to be performed on or after the date of such transfer, and it shall be deemed and construed without further agreement between the parties and the person who acquires Landlord's interest in this Lease that such person has assumed and agreed to carry out any and all agreements, covenants and obligations of Landlord hereunder accruing from and after the date of such transfer and Tenant will be entitled to rely upon such state of facts as if Landlord had made a representation and warranty thereof at the time of such transfer.

It is clear from the language that the Lease does not prohibit Broome-Crosby from transferring their tenancy-in-common fee interest in the Property to another entity.

While the instant motion for a dismissal of the complaint was pending, Owners LLC served its motion for substitution, informing the court that on November 10, 2011, it purchased all of Broome-Crosby's tenancy-in-common right, title and interest in the Property. As the assignee of their 77.78% interest, Owners LLC seeks, and is entitled to, an order, pursuant to CPLR 1018, substituting it as plaintiff in this action and permitting it to substitute counsel of its choosing for that of Broome-Crosby. Although the assignment renders moot Broome-Crosby's argument that partition is necessary so that their senior principals are not deprived of the significant proceeds they would receive as majority interest holders if the Property were sold, as a whole, for the \$22 million it was offered, and the assignee is, admittedly, a developer, the assignment alone, does not mandate a dismissal of the complaint.

The same provision of the Lease, section 38.7, also makes it clear that, upon such transfer, all rights and obligations of Broome-Crosby would be assumed by Owners LLC, as the transferee/assignee. This includes the requirement, set forth under section 35 of the Lease, for Owners LLC and 432 Broome to act together as "Landlord," should they decide to construct a building on the Property prior to the termination date of LPARK's leasehold.

With respect to plaintiffs' contention that Article 9 of RPAPL grants tenants-in-common "an absolute right to partition, either physically or by sale of property" (Plaintiff's Reply Aff., at n 1), that contention is incorrect. As set forth above, RPAPL § 901 (1) merely grants standing to joint tenants or tenants-in-common to seek partition of a property in which they hold legal title (*see also Manganiello v Lipman*, 74 AD3d 667, 668 [1<sup>st</sup> Dept 2010]). Having met this

threshold, the question, therefore, is not whether plaintiff is entitled to seek partition, by either sale of the entirety or by physical division, but whether partition, which is equitable in nature (*Hunt v Hunt*, 13 AD3d 1041, 1042 [3<sup>rd</sup> Dept 2004], can be forced upon defendant prior to the expiration of the Lease.

Both parties acknowledge that a tenant-in-common's statutory right to partition is "subject to the equities between the parties [citation omitted]" (*Graffeo v Paciello*, 46 AD3d 613, 614 [2<sup>nd</sup> Dept 2007], *lv denied* 10 NY3d 891 [2008], *rearg denied* 11 NY3d 749 [2008]; *Ripp v Ripp*, 38 AD2d 65, 68 [2<sup>nd</sup> Dept 1971], *affd* 32 NY2d 755 [1973]), and both parties argue that the equities are in its favor.

Broome-Crosby contends, and presumably Owners LLC, upon substitution, also contends, that the equities favor their position because they are the majority interest holders of the Property and no longer wish to own the Property with Isaacs/432 Broome, whose obstinance is preventing them from receiving the maximum value from for the Property. For its part, 432 Broome contends that if the Property were partitioned, it would, among other things, be deprived of its contractual right to receive 50% of LPARK's monthly rent payments until June 30, 2019. The record, however, is unclear as to why Broome-Crosby agreed to enter into a Lease under which they would receive only 50% of the monthly rent, despite the fact that they held a 77.78% ownership interest, and to do so for a period of 15 years, unless certain, limited preconditions were met. The record is also unclear as to why 432 Broome<sup>2</sup> insists on continuing the Lease arrangement with LPARK despite (alleged) lucrative offers for its 22.22% share of the Property.

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<sup>2</sup>It appears from the plaintiffs' papers, and not disputed by defendant, that Max Isaacs died on June 26, 2011.

As indicated above, the complaint adequately sets forth plaintiffs' ownership interest and basis for seeking partition (*Manganiello v Lipman*, 74 AD3d at 668; RPAPL § 901 [1]). The documentary evidence submitted in support of the motion, consisting chiefly of copies of the 1999 judgment and the Lease, does not establish a complete defense to partition of the Property (CPLR 3211 [a] [1] and [7]). Whether partition is appropriate requires an assessment of the equities as between the parties, which necessarily involves scrutiny of the facts particular to this case (*see Arata v Behling*, 57 AD3d 925, 926 [2<sup>nd</sup> Dept 2008]). The resolution of this action will also include an assessment as to: whether and/or to what extent a partition and sale prior to the expiration of the Lease would interfere with the rights 432 Broome currently enjoys under the Lease, including whether partition would cause it to suffer a loss of income/proceeds; whether and/or to what extent the rights of the majority interest holder are affected by defendant's refusal to sell; and/or whether the Property can be physically partitioned without causing great prejudice to its owners. It is appropriate to refer this matter to a special referee to direct the parties to engage in such disclosure proceedings as necessary to hear and report on these issues.

Accordingly, it is

ORDERED that the motion, under motion sequence 001, for an order dismissing the complaint and cancelling the notice of pendency is denied without prejudice; and it is further

ORDERED that the motion, under motion sequence 002 is granted to the extent that: (1) Broome Street Owner LLC is hereby substituted as plaintiff without prejudice to the proceedings heretofore; (2) the names of Broome Street Lot LLC and Crosby Street Lot, LLC are hereby deleted from the caption; (3) Broome Street Owner LLC is directed to serve a copy of this order with notice of entry upon the Clerk of the Court and upon the Clerk of the Trial Support Office

(Room 158), who are directed to amend their records to reflect such change in the caption herein; and (4) incoming counsel for Broome Street Owner LLC is directed to serve a notice of appearance pursuant to CPLR 321 (b) with the Clerk of the Trial Support Office (Room 158) and the Clerk of the Part forthwith; and it is further

ORDERED that the defendant 432 Broome Street LLC is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that a Judicial Hearing Officer (JHO) or Special Referee shall be designated to hear and report with recommendations on the following issues of fact, which are hereby submitted to the Special Referee for such purpose:

(1) whether and/or to what extent a partition and sale prior to the expiration of the Lease would interfere with the rights 432 Broome currently enjoys under the Lease including whether partition by sale of the entire Property or by physical partition would cause it to suffer a loss of income/proceeds, and if so, in what amount; (2) whether and/or to what extent the rights of the majority interest holder are affected by defendant's refusal to sell at this juncture; and (3) whether the Property can be physically partitioned, pursuant to RPAPL §§ 921 and 922, without causing great prejudice to its owners; and it is further

ORDERED that the Special Referee may direct the parties to engage in such disclosure proceedings as will expedite the disposition of these issues; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Motion Support Office, Room 119, 60 Centre Street, New York, New York; 646-386-3028 or [spref@courts.state.ny.us](mailto:spref@courts.state.ny.us)) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult with one another and that counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (which can be accessed a the "Referees" link

on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320 [a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; and it is further

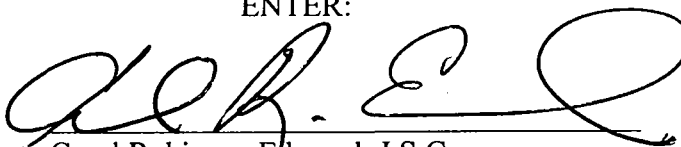
ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that, unless otherwise directed by this Court in any Order that may be issued together with this Order of Reference to Hear and Report, the issues presented in any motion identified above shall be held in abeyance pending submission of the Report of the JHO/Special Referee and the determination of this Court thereon.

This constitutes the decision and order of the Court.

Dated: May 21, 2012

ENTER:

A handwritten signature in black ink, appearing to read 'C.R. Edmead', written over a horizontal line.

Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMEAD**