Times Square Constr., Inc. v Jarvis Mgt. Corp.
2012 NY Slip Op 33494(U)
April 3, 2012
Sup Ct, New York County
Docket Number: 651553/2011
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA
Justice

PART 19

Index Number : 651553/2011

TIME SQUARE CONSTRUCTION, INC.

vs.

JARVIS MANAGEMENT CORP.

SEQUENCE NUMBER : 002

DISMISS ACTION

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

ption to/for ______

No(s). ______

No(s). ______

No(s). ______

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

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

motion ~~and cross-motion are~~ is decided in accordance with accompanying memorandum decision.

Dated: 4/3/12

[signature], J.S.C.
SALIANN SCARPULLA

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19
---X
TIME SQUARE CONSTRUCTION, INC.,
KEVIN O'SULLIVAN and DONAL O'SULLIVAN,

Plaintiffs,

Index No.: 651553/2011

-against-

JARVIS MANAGEMENT CORP., ELI DADOUCH, DAVID YARDEN REAL ESTATE, DAVID YARDEN, ISAAC KRISPIN, ELICHAI PARIENTE, FIRST MANHATTAN DEVELOPMENTS, LLC, BARRY ZAGDANSKI, JEFFREY SCHUMACHER, MIGUEL SINGER and NELLY ZAGDANSKI,

Defendants.
---X

PRESENT: HON. SALIANN SCARPULLA, J.:

This action arises out of an alleged breach of a confidentiality agreement entered into by plaintiffs Kevin O'Sullivan and Donal O'Sullivan ("the O'Sullivan Brothers"), Time Square Construction, Inc. ("Time Square") and defendants Jarvis Management Corp. ("Jarvis Management") and David Yarden Real Estate, by their respective presidents, Eli Dadouch ("Dadouch") and David Yarden ("Yarden") (collectively, "the signatories"). Plaintiffs' causes of action include claims for breach of contract, misappropriation of trade secrets and tortious interference with a prospective economic

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advantage. Motions with sequence numbers 002 and 003 are consolidated herein for disposition.

In motion sequence 002, defendants Isaac Krispin ("Krispin") and Elichai Pariente ("Pariente") move, pursuant to CPLR 3211 (a) (7), for an order dismissing the complaint as against them.

In motion sequence 003, defendants First Manhattan Developments ("First Manhattan Developments"), Barry Zagdanski ("Zagdanski"), Jeffrey Schumacher ("Schumacher"), Miguel Singer ("Singer") and Nelly Zagdanski (collectively, "the First Manhattan Investors") move, pursuant to CPLR 3211 (a) (3) and (7), for an order dismissing the complaint as against them.

Yarden and David Yarden Real Estate cross-move, pursuant to CPLR 3211 (a) (3) and (7), for an order dismissing the complaint as against them. They also seek costs and fees associated with this motion, pursuant to 22 NYCRR 130-1.1.

Plaintiffs cross-move to lift the stay of disclosure pursuant to CPLR 3214 (b).

Background and Factual Allegations

Time Square is a construction and real estate development company owned by the O'Sullivan Brothers. In 2009, Time Square completed a construction job at a property located at 785 Eighth Avenue in Manhattan. At completion, the property was a 43-story residential property which was intended to be sold as condominiums. The O'Sullivan Brothers contributed approximately $7.5 million to obtain a 50% percent ownership

[* 4]

interest in non party 785 Partners, LLC ("785 Partners"), which was the named owner and borrower of the notes securing mortgages on the property. The banks financing the project were PB Capital Corporation and TD Bank, N.A. (together, "the Lenders"). The total value of the notes held by the Lenders was $84,212,506.

In 2009, after the purchase deal fell through, 785 Partners was unable to pay the notes to the Lenders' satisfaction. As a result of the default on the loans, the Lenders filed a complaint for foreclosure in September, 2010. On October 7, 2010, a receiver was appointed by the court to manage the property. According to Time Square, many potential investors had expressed interest in the property, both before and after the foreclosure proceedings. Time Square states that "various entities and individuals" signed a confidentiality agreement with Time Square in order to obtain confidential information on the Property. Complaint, ¶ 32.

On October 28, 2010, Yarden, a real estate broker, introduced Dadouch, a Canadian real estate investor, to Time Square. On October 29, 2010, Dadouch, on behalf of Jarvis Management, and Yarden, on behalf of David Yarden Real Estate, signed a confidentiality agreement with Time Square. The O'Sullivan Brothers were not parties to this agreement nor did they sign on behalf of Time Square. The space where Time Square was supposed to sign, was, in actuality, left blank. According to Time Square, the information protected by the confidentiality agreement was a trade secret. The confidentiality agreement states:

> The confidential non-public information provided by Time Square is related to, among other things, the Property, the relationships among the various entities, existing litigation relating to the Property and Fuerta's investors, the New York State Attorney General investigation regarding those investors and the condominium offering, the financing of the Property, the proposed pricing of units, 421-a tax abatement issues, market analyses, and assessments of the value of the Loans.

Complaint, ¶ 33.

The confidentiality agreement stated that the recipients knew that they were receiving confidential information and in consideration for this, they agreed to refrain from disclosing this information about the "transaction." Plaintiffs' Exhibit 2, at 1-4. In the confidentiality agreement, "transaction" is defined as being a potential agreement with the Property. According to the confidentiality agreement, among other things, "confidential information" did not include information that was available to the public, or would be subsequently available to the public, or information that the recipients gleaned from their own independent sources. *Id.* at 1. Time Square also provided Dadouch with a write-up describing the property and the debt. Time Square also indicated in the complaint that it "specifically asked" Dadouch not to contact anyone at TD Bank.

In early March 2011, according to Time Square, a group of Canadian real estate investors showed interest in the Property. Time Square states that it "became immediately suspicious that there had been an unauthorized disclosure of confidential information relating to the investment opportunity ... ." Complaint, ¶ 51. These Toronto-based investors were, according to Time Square, all directly or indirectly affiliated with

First Manhattan Developments, a New York corporation with a principal place of business in Ontario, Canada. They were working with a New York broker, Pariente, who works at Urban Marketing. Time Square alleges that this new group of investors had "limited, if any, prior experience in the New York real estate investment market." *Id.*

On March 24, 2011, Yarden brought attorneys over to the Property to discuss legal and tax issues. He allegedly told Time Square that he was representing a Korean family interested in purchasing the Property. Then, on March 30, 2011, Pariente gave a tour of the property to the First Manhattan Investors representatives Schumacher and Singer, among other people. On May 3, 2011, Pariente gave a tour to Singer and Barry Zagdanski, among other people.

Time Square states that it asked the First Manhattan Investors how they received information about the Property, and the investors would not disclose that information. Time Square then surmised that Yarden and Dadouch, who were the original parties to the confidentiality agreement, passed on confidential information about the Property to the First Manhattan Investors.

Time Square groups all of the other defendants, as well as the New York-based broker, Pariente, and New Jersey-based Krispin, as the First Manhattan Investors. In reality, the First Manhattan Investors, the ones who had the transaction with the Lenders with respect to the sale of the loans, are Nelly Zagdanski, Barry Zagdanski, Schumacher and Singer.

In support of its allegations, Time Square maintains that the signatories had close familial and personal relationships with the First Manhattan Investors. For instance, Time Square contends that Yarden and Pariente used to own an apartment in the same building in the financial district. Time Square also maintains that Pariente's company is affiliated with another company, owned by defendant Krispin. Time Square then claims that there is a relationship between Krispin and Yarden, because they are allegedly connected via the online networking site, LinkedIn. Krispin, too, used to own an apartment in the same building as Yarden and Pariente.

Time Square claims that Dadouch also had direct connections to some of the First Manhattan Investors. For instance, Dadouch's daughter attends the same school as the son of Barry Zagdanski and Nelly Zagdanski. Time Square also contends that all of the First Manhattan Investors are somehow affiliated with one another. For example, some of them attend the same synagogue or are connected with the same charity organizations. Because of these "connections," Time Square is convinced that Dadouch told the First Manhattan Investors about the Property.

After the confidential information was leaked, according to Time Square:

> Upon information and belief, as a result of the connections between the [signatories] and the First Manhattan Investors, one or more of the [signatories] improperly used confidential information received from Time Square either to inform [Schumacher] (who used to work at TD Bank) or Barry Zagdanski, the representatives of First Manhattan as to the investment opportunity at the Property, and one or both of them then got in touch with Mark Lawler of TD Bank. Mark

> Lawler then negotiated with the First Manhattan Investors to get a more favorable deal than what 785 Partners was offering to refinance the Loans. Alternatively, upon information and belief, Mr. Dadouch contacted TD Bank directly, since he had previously told Time Square that he had close relationships there, to put TD Bank in touch with one of the First Manhattan potential investors. Either way, this conduct violates the Confidentiality Agreements signed by the [signatories].

Complaint, ¶ 65.

In sum and substance, Time Square believed that it had a unique opportunity to buy out the existing note-holder, 785 Partners, of whom Time Square is a member. Apparently, in May 2011, Time Square was negotiating with the Lenders to buy out the loans. However, the Lenders went into contract to sell the loans to another group – the First Manhattan Investors.

In their complaint plaintiffs allege five causes of action. The first cause of action is for breach of contract against Jarvis Management (Dadouch) and Yarden Real Estate (Yarden), the two parties who signed the confidentiality agreement. The second cause of action, also against the same parties, is for misappropriation of a trade secret. The third cause of action, grounded in tortious interference with a prospective economic advantage, alleges that the same parties caused the plaintiffs to lose a unique business opportunity. The fourth and fifth causes of action are against the First Manhattan Investors and the other defendants, and they are for misappropriation of plaintiffs' trade secrets and tortious interference with a prospective economic advantage, respectively.

Plaintiffs moved for a temporary restraining order against the defendants, enjoining any defendant from purchasing the Property. After oral argument the court denied this relief. The court also denied lifting the stay of disclosure pursuant CPLR 3214 (b).

In support of the motion, Barry Zagdanski, an officer of First Manhattan Developments, submitted an affidavit in which he states that there is no proof that the First Manhattan Investors received confidential information. While it is true that the First Manhattan Investors may be related somehow, for example, Nelly Zagdanski is his wife, the First Manhattan Investors claim that the rest of the plaintiffs' allegations are not true. Barry Zagdanski explains that both he and his family members had been traveling to New York City to invest together in properties. He contends that they made other offers, entered into another transaction in New York City, and have spent "a great deal of time and money doing due diligence to investigate potential transactions." Affidavit of Barry Zagdanski, ¶ 12.

Barry Zagdanski continues that, while his family members were in New York, Pariente informed them about the Property. He maintains that he and his company have a strong relationship with TD Bank in Toronto and made direct contact with the bank for information. He states, "[w]e did not need or receive any information from Plaintiff to do this transaction." *Id.*, ¶ 14.

Barry Zagdanski additionally notes that, although Dadouch and he make charitable contributions to some of the same charities, this in no way indicates that they received confidential information from Dadouch, with whom he has no business relationship.

Dadouch also submits an affidavit, in which he states that he never had any involvement in the subject transaction. He continued that his interest and discussions about the property ended in November, 2010. He claims that he did not contact anyone at TD Bank nor did he ever discuss the Property with the First Manhattan Investors. Dadouch maintains that he has never done business with any of the First Manhattan Investors and he has never spoken to, and does not even know, Krispin or Pariente.

Although Dadouch does know the First Manhattan Investors through his community involvement, he explains that approximately 800 other families also attend the same synagogue as they do. On May 22, 2011, Dadouch states that he saw some of the First Manhattan Investors at a bar-mitzvah party. This was months after First Manhattan Investors had been introduced to the Property and had already toured the Property twice. Dadouch states that, although they briefly discussed the Property, "I told them that I had also seen that property. They asked what I had thought of it, and I said it was nice building. We had no further discussion of the [Property], and I made nothing of our conversation." Affidavit of Eli Dadouch, ¶ 18.

Yarden maintains that while he, Pariente and Krispin are all brokers in New York City, "any relationship that we may have is limited to an occasional casual encounter. I

have never done business with either individual (personally or through David Yarden Real Estate) and do not have any sort of personal relationship with them." Affidavit of David Yarden, ¶ 6. He continues that he has not had a conversation with any of the defendants about the Property.

Krispin is alleged to somehow be involved in leaking confidential information, because he has a LinkedIn connection with Yarden, used to live in the same apartment building as Yarden, and knows Pariente. However Krispin denies any involvement in the subject transaction. Although he did, at one point, own a unit in the same building as Yarden, he leased it out and never had any interactions with Yarden as a result of that apartment. His principal place of business is in New Jersey. He does not know Dadouch, nor did he ever receive any confidential information about the Property. Krispin contends that the complaint makes no specific factual allegations about him or any potential wrong doing that he could have committed.

Pariente contends that the complaint must be dismissed as against him because he never signed the confidentiality agreement, nor is he involved in the alleged misappropriation of trade secrets. Pariente also indicates that he had no relationship with Yarden as a result of owning an apartment in the same building. He also states that he rarely speaks to Yarden, and in fact, has never done business with him. Pariente does not know Dadouch.

Pariente explains that he, as a real estate professional, was aware that the Property had gone into foreclosure. In fact, the information was available publicly, because there were foreclosure proceedings as well as newspaper articles written about the Property. Krispin and Pariente's Exhibit B. After Pariente found out, he called the receiver who had been appointed on the Property and discussed the Property with the receiver. The mortgages were also available to the public. Pariente then, almost six months after the public had knowledge of the property's financial situation, contacted his clients in Canada. He states that he is not an agent of any of their entities.

Discussion

The O'Sullivan Brothers' Lack of Standing:

The O'Sullivan Brothers were not parties to the confidentiality agreement at issue here. Despite this undisputed fact, they believe that they have standing in their derivative capacity, as owners of Time Square. However, as set forth in *Truty v Federal Bakers Supply Corp.* (217 AD2d 951, 952 [4th Dept 1995]), if the individual plaintiffs are not parties to the contract to which the action pertains, they have no standing to bring the action. Plaintiffs' claims are not derivative in nature, on behalf of Time Square. Moreover, 785 Lenders, LLC was the named borrower and owner of the notes securing mortgages on the Property, not Time Square or the O'Sullivan Brothers.

A party may not prosecute an action in the absence of standing. *Stark v Goldberg*, 297 AD2d 203, 204 (1st Dept 2002). "Standing is a threshold determination... ." *Society*

of Plastics Industry, Inc. v County of Suffolk, 77 NY2d 761, 769 (1991). Accordingly, because the O'Sullivan Brothers have no standing, they are unable, individually, to pursue any of their claims.

<u>The Breach of Confidentiality Agreement Cause of Action</u>

On a motion to dismiss pursuant to CPLR 3211, the facts as alleged in the complaint are accepted as true, the plaintiff is given the benefit of every possible favorable inference, and the court must determine simply whether the facts alleged fit within any cognizable legal theory. *P.T. Bank Central Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 375 (1st Dept 2003); *see also Mendelovitz v Cohen,* 37 AD3d 670, 671 (2d Dept 2007). Nonetheless, "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration." *Gershon v Goldberg*, 30 AD3d 372, 373 (2d Dept 2006); *see also O'Donnell, Fox & Gartner, P.C. v R-2000 Corp.*, 198 AD2d 154, 154 (1st Dept 1993).

In their complaint, plaintiffs posit, without providing any concrete factual support, that it is highly unlikely that the Lenders would have entered into a transaction with the First Manhattan Investors without the signatories having breached the confidentiality agreement. Instead, this allegation is buttressed by lots of conjecture and surmise. For instance, plaintiffs maintain that because Pariente, the broker, and Yarden, one of the signatories, are connected via LinkedIn (a networking internet site), Yarden must have told Pariente confidential information about the Property. Then, Pariente leaked this

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information to his Canadian clients. Alternatively, or at the same time, Dadouch must have told the Canadian investors about the Property because they have some vague connections in their community.

Time Square also hypothesizes that the signatories wrongfully relayed the information close to the date they signed the confidentiality agreement. In actuality, the confidentiality agreement was signed in October, 2010 and the first visit by any Canadian was in March, 2011. Yarden had no involvement in the Property after December, 2010. Time Square then blindly accuses the Canadian defendants of having no experience in the New York real estate market, when the record demonstrates otherwise.

Moreover, Time Square assumes that, because the Canadian investors did not state how they became aware of the Property, this provides a reasonable inference of wrongdoing on their part. Even if the allegations in the complaint are taken to be true, plaintiffs fail to state a cause of action for breach of the confidentiality agreement against any of the defendants. The allegations in the complaint are conclusory, speculative and consist of "bare legal conclusions as well as factual claims flatly contradicted by the record." *Id.* Accordingly, the Court dismisses the first cause of action for breach of the confidentiality agreement.[1]

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[1] Although Dadouch and Jarvis Management did not submit a motion to dismiss, the court has searched the record and, for the reasons set forth in this decision and order, dismissed the complaint as against all defendants.

<u>**The Trade Secret Causes of Action**</u>

In order to successfully plead a claim for misappropriation of trade secrets, plaintiffs must demonstrate that "1) plaintiff possesses a trade secret and 2) defendant is using that trade secret in breach of an agreement, confidence, or duty, or as a result of discovery by improper means." *DoubleClick, Inc. v Henderson*, 1997 WL 731413, *3, 1997 NY Misc LEXIS 577, *9,[Sup Ct, NY County 1997]; *see also Integrated Cash Management Services, Inc. v Digital Transactions, Inc.*, 920 F2d 171, 173 (2d Cir 1990). "An essential prerequisite to legal protection against the misappropriation of a trade secret is the element of secrecy." *Atmospherics, Ltd. v Hansen*, 269 AD2d 343, 343 (2d Dept 2000). Information that is "readily ascertainable" is not afforded trade secret protection. *Id.*

The information given to the signatories of the confidentiality agreement cannot be considered a trade secret. Pariente, the broker, explained that he, and any other real estate professional, was readily able to find out information about the Property from public sources. And, the confidentiality agreement specifically excludes information about the Property which can be derived from public sources. For instance, the Lenders filed for foreclosure over a month before the plaintiffs even met with the signatories. A receiver was also appointed before the confidentiality agreement was signed, and Pariente contacted him to find out the specifics on the outstanding debt on the Property. There were at least two newspaper articles reporting the Property in foreclosure. Then, at least

six months after the initial public information was released about the Property, First Manhattan Investors contacted the Lenders themselves, as they are experienced real estate investors, to obtain financial information about the Property.

A motion brought pursuant to CPLR 3211 (a) (1) "may be granted where 'documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.'" *Held v Kaufman*, 91 NY2d 425, 430-431 (1998), quoting *Leon v Martinez*, 84 NY2d 83, 88 (1994); *Foster v Kovner*, 44 AD3d 23, 28 (1st Dept 2007). While plaintiffs' allegations are given every favorable inference, the evidence submitted shows that the information received by the signatories was not a trade secret. Accordingly, the second and fourth causes of action for misappropriation of trade secrets are dismissed.

The Tortious Interference With a Prospective Advantage Causes of Action

To successfully plead a cause of action for tortious interference with a prospective advantage, plaintiffs must "demonstrate that the defendant's interference with its prospective business relations was accomplished by 'wrongful means' or that defendant acted for the sole purpose of harming the plaintiff." *Snyder v Sony Music Entertainment, Inc*. 252 AD2d 294, 299-300 (1st Dept 1999).

"'Wrongful means' includes physical violence, fraud, misrepresentation, civil suits, criminal prosecutions and some degree of economic pressure ... ." *Id.* at 300.

Plaintiffs have not identified, nor can they, any sort of "wrongful means" used by defendants to interfere with plaintiffs' alleged unique business opportunity.

Plaintiffs allege that the signatories do not necessarily have to act with wrongful means, only that they have to commit a tort, to be held liable for tortious interference with a prospective advantage. However, the Court finds that plaintiffs have failed sufficiently to plead any tortious conduct, plaintiffs have failed to sufficiently alleged the required "wrongful means."

"Tortious interference with prospective economic relations requires an allegation that plaintiff would have entered into an economic relationship but for the defendant's wrongful conduct." *Vigoda v DCA Productions Plus Inc.*, 293 AD2d 265, 266 (1st Dept 2002). Plaintiffs allege in their memorandum of law that defendants interfered with plaintiffs' relationship with the Lenders. The evidence submitted shows, however, that the plaintiffs were not capable of buying out the existing note holder. Plaintiffs themselves admit that 785 Partners (of which plaintiff Time Square is a partner) defaulted on the loans. Even in May, 2011, nine months after the Property went into foreclosure, the plaintiffs were unable to refinance and pay back the debt. Under these circumstances, plaintiffs cannot sufficiently allege that the Lenders would have entered into a transaction solely with the plaintiffs but for the defendants' wrongful conduct. Accordingly, the third and fifth causes of action are dismissed.

The Non-Signatories – First Manhattan Investors, Krispin and Pariente

As stated above, the Court dismisses the misappropriation of trade secret claim for plaintiffs' failure to allege with supporting facts that any trade secret was divulged by defendants . However, even if it had been, the non-signatories to the confidentiality agreement – the First Manhattan Investors, Krispin and Pariente, had absolutely no duty to plaintiffs. Indeed, Pariente demonstrated how he found out about the Property via public databases. For this additional reason, the fourth cause of action as against the non-signatory defendants must be dismissed.

Yarden and David Yarden Real Estate's Cross Motion for Fees:

Pursuant to 22 NYCRR 130-1.1, the court maintains discretion in awarding costs resulting from frivolous conduct. The court has determined that no frivolous conduct has occurred in this action. Accordingly, defendants' requests for costs are denied.

Plaintiffs' Cross Motion for Lift of the Stay of Discovery:

As the Court is dismissing the complaint in its entirety, plaintiffs' cross-motion for lifting of the stay of disclosure, pursuant to CPLR 3214 (b), is denied as moot.

The court has considered plaintiffs' other contentions and finds them without merit.

In accordance with the foregoing, it is:

ORDERED that the motion of defendants Isaac Krispin and Elichai Pariente to dismiss the complaint herein is granted and the complaint is dismissed in its entirety against said defendants; and it is further

ORDERED that the motion of defendants First Manhattan Developments LLC, Barry Zagdanski, Jeffrey Schumacher, Miguel Singer and Nelly Zagdanski to dismiss the complaint herein is granted and the complaint is dismissed in its entirety against said defendants; and it is further

ORDERED that the cross motion of defendants David Yarden and David Yarden Real Estate to dismiss the complaint herein is granted and the complaint is dismissed in its entirety against said defendants; and it is further

ORDERED that, upon a search of the record, the complaint is dismissed as to the remaining defendants, Jarvis Management Corp. and Eli Dadouch; and it is further

ORDERED that defendant David Yarden and David Yarden Real Estate's request for fees is denied; and it is further

ORDERED that the cross motion of plaintiffs Time Square Construction, Inc., Kevin O'Sullivan and Donal O'Sullivan, is denied in its entirety; and it is further

ORDERED that the Clerk of the Court enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: April 3, 2012

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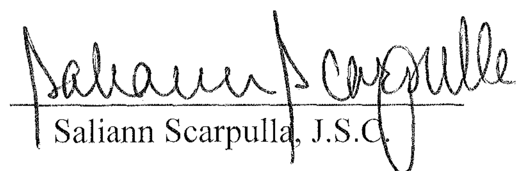

Saliann Scarpulla, J.S.C.