Metz v Roth
2012 NY Slip Op 33510(U)
October 16, 2012
Sup Ct, NY County
Docket Number: 103414/09
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD PART 35
Justice

Index Number : 103414/2009
METZ, MARY
vs.
ROTH, STEVEN
SEQUENCE NUMBER : 005
DISMISS

INDEX NO. _____
MOTION DATE 9-14-12
MOTION SEQ. NO. 005

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 branch of Habib's motion to dismiss the cross-claims of Berardi is granted, and Berardi's cross-claims are hereby severed and dismissed; and it is further

ORDERED the branch of Habib's motion to dismiss the cross-claims of Bovis is granted solely to the extent that Bovis's cross-claims for failure to procure insurance cross-claim and contractual indemnification are hereby severed and dismissed; and it is further

ORDERED that Habib shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

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

Dated: 10-16-2012

J.S.C.
HON. CAROL EDMEAD

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: PART 35

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MARY METZ,

Plaintiff,

Index No. 103414/09

Motion Seq. 005

-against-

STEVEN ROTH, VORNADO REALTY TRUST, VORNADO MANAGEMENT CORP., BEACON COURT CONDOMINIUM, BOARD OF MANAGERS OF BEACON COURT CONDOMINIUM, ROSE ASSOCIATES INC.,

Defendants.

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STEVEN ROTH, VORNADO REALTY TRUST, VORNADO MANAGEMENT CORP., BEACON COURT CONDOMINIUM, BOARD OF MANAGERS OF BEACON COURT CONDOMINIUM, ROSES ASSOCIATES INC.,

Third-Party Plaintiffs,

Third Party Index No. 590683/09

-against-

PELLI CLARKE PELLI ARCHITECTS, LLP, SLCE ARCHITECTS, LLP, BERARDI STONE SETTING INC., & BOVIS LEND LEASE LMB, INC., and PHILIP HABIB & ASSOCIATES,

Third-Party Defendants.

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HON. CAROL R. EDMEAD, J.SC.

MEMORANDUM DECISION

In this personal injury action, third-party defendant Philip Habib & Associates ("Habib") moves pursuant to CPLR 3211 (a)(7) to dismiss the cross-claims of third-party co-defendants Berardi Stone Setting, Inc. ("Berardi") and Bovis Lend Lease LMB, Inc. ("Bovis") as asserted against Habib, with prejudice, and to stay discovery pursuant to CPLR Rules 3211 and 3214(b) pending this motion.

Factual Background[1]

Plaintiff Mary Metz ("plaintiff") commenced this action against defendants Steven Roth, Vornado Realty Trust, Vornado Management Corp., Beacon Court Condominium, Board of Managers of Beacon Court Condominium and Rose Associates (collectively, the "Owner") for personal injuries she allegedly sustained on March 13, 2006 when she fell on a "private" sidewalk and/or ramp of the "courtyard" located at 151 East 58th Street, New York, New York, owned, maintained, managed and controlled by the Owner (Complaint, ¶¶15-18, 22). The Owner previously retained Bovis as the construction manager for the courtyard construction at the subject location (the "project"). Bovis retained Berardi as a subcontractor to construct the sidewalk and ramp at issue. The Owner also retained Habib pursuant to an October 7, 2999 letter proposal (the "Habib contract") to provide certain civil engineering services in connection with the project.

After the commencement of this action, the Owner commenced a third-party action against Pelli Clarke Pelli Architects, LLP ("Pelli") and SLCE Architects, LLP ("SLCE"), Berardi, Bovis, and Habib. The third-party complaint alleges claims for common law indemnification, contribution, contractual indemnification, and failure to procure insurance for the benefit of the Owner.

Berardi and Bovis then asserted cross-claims against Habib sounding in common law indemnification, contractual indemnification, contribution and failure to procure insurance.

After discovery was completed, plaintiff's claims were settled at mediation through monetary contributions from the Owner, Pelli and SLCE. Bovis and Berardi declined to

[1] The Factual Background is taken from Habib's motion.

participate in the mediation. Stipulations of Discontinuance were effectuated in favor of the settling parties. Additionally, plaintiff provided the settling parties with a General Release. The Owner then discontinued the third-party action against Habib with prejudice, but continues to prosecute the third-party action against Berardi and Bovis.[2]

In support of dismissal, Habib argues that due to plaintiff's settlement with and release of claims against the Owner, the Owner's contribution claims against Berardi and Bovis were extinguished under the General Obligations Law §15-108. Thus, the Owner's remaining claims against Berardi and Bovis are limited to its claims for common law indemnification, contractual indemnification and failure to procure insurance. To this end, Berardi and Bovis cannot derivatively recover from Habib for any of the Owner's surviving claims as a matter of law.

Indemnification involves a shifting of the entire loss from one who is, or has been, compelled to pay for a loss, without regard to his own fault, to one who more properly bears responsibility for that loss because he was the actual wrongdoer. The Owner discontinued its claims against Habib, reflecting the fact that the Owner is not seeking any recovery relating to any service provided by Habib. Since the Owner is suing Berardi and Bovis for their own active negligence and is not seeking to hold them vicariously liable for Habib's actions, Berardi and Bovis cannot maintain a common law indemnification claim against Habib.

Further, the plaintiff's settlement extinguished the Owner's contribution claim against Berardi and Bovis, leaving only the Owner's indemnification claims. For the Owner to prevail

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[2] According to Habib, Berardi agreed to discontinue its claims against Habib. However, Bovis requested that Habib produce its project file for review. Habib contends that Bovis' request is disingenuous since: (1) the project documents are immaterial to the requested discontinuance, and (2) the project file was made available for inspection to all counsel in August.

on its indemnification claims against Berardi and Bovis, the Owner must prove that Berardi and Bovis were entirely liable for the loss. Thus, if the Owner proved that Berardi and Bovis were entirely liable for the loss, Berardi and Bovis cannot recover contribution from Habib; there would be nothing for Berardi or Bovis to seek from Habib for contribution. However, if the third-party plaintiffs proved that either Berardi or Bovis were responsible for the entire loss since either or both were the actual wrongdoers (as required for indemnification), they also could not recover anything from Habib. Thus, under every scenario, there can be no recovery against Habib, as a matter of law, through a contribution claim.

Further, a review of the Habib contract shows that it was not contractually obligated to indemnify Berardi or Bovis, or obligated to procure insurance for either. According to the affidavit of Sue McCoy, a principal of Habib, Habib had no contractual obligation to indemnify any party, or to procure insurance for any party. Also, Habib had no contractual relationship with Berardi or Bovis for this project. As such, Berardi's and Bovis' cross-claims for contractual indemnification and failure to procure insurance must be dismissed.

In opposition, Bovis contends that in letters dated September 24, 2003 and October 21, 2003 to Robyn Sandberg of Pelli (the architect on the project), Habib warned that the proposed paving plan for the courtyard had potential liability issues relating to pedestrian safety because the pavers for the curb, the sidewalk, and the roadway were the same material and color, which would make it difficult for pedestrians to distinguish the elevation change between the sidewalk and the courtyard (Exhibit B). Habib was hired to prepare and submit builder's pavement plans. When it did so, it knew about one potential pedestrian safety problem with the sidewalk: the use of a single color without visual uses. Habib may have failed to address another issue: the ramp's

slope. Thus, Habib was responsible to ensure that the sidewalk and ramp were safely designed and built in accordance with applicable law. It was due to these defects in the ramp that the Owner and architects settled with plaintiff.

Bovis argues that the Owner has not dismissed its claims against Bovis for what it paid to plaintiff in settlement. As the Owner is suing Bovis, and Bovis is, in turn, seeking judgment against Habib for whatever liability Bovis may have to the Owner, if Bovis is held responsible to the Owner for Habib's design of the courtyard, then Bovis would be entitled to recover against Habib for any liability of Bovis to the Owner.

Habib's contention that Bovis does not have a contribution claim against it is incorrect. Habib did not pay anything to the Owner get a release from the Owner, and so Bovis's contribution claim against Habib is not extinguished by statute. Similarly, Habib's argument that Bovis must be either entirely at fault or not at fault at all (which has something to do with Bovis's right to indemnity from Habib) involves matters of fact that cannot be decided on this motion.

Further, although there is no indemnity clause in the Habib contract, such contract states that Habib "will prepare the contract document for the work along with an engineer's cost estimate," and Habib failed to provide its project file as requested because it says "the project documents are immaterial." However, should the project documents contain a contract between the Owner and Habib that included a provision requiring Habib to indemnify third parties for its fault (which is typical in construction contracts) such document would provide a basis for a claim of contractual indemnity. Since discovery is not completed, Habib's deposition has not been held, and Habib's project file has not been provided, dismissal of the contractual indemnification

claim is premature.

Habib's argument is based on the proposition that (1) that the owner's claim against Bovis is for common-law indemnity only and (2) that the owner may recover from Bovis if and only if Bovis is found entirely at fault, is erroneous. Nothing precludes a contractual indemnitor, such as Bovis, from seeking indemnity or contribution from an actually negligent third party. Thus, if the Owner succeeds on its contractual indemnity claim against Bovis, Bovis is entitled to either indemnity from Habib or contribution for Habib's share of liability, assuming, of course, that the finder of fact finds Habib responsible. Nor must Bovis be found fully at fault in order for the Owner to succeed against Bovis in its common-law indemnity claim. No case cited by Habib suggests that a party sued for indemnity cannot seek contribution from a joint wrongdoer. Bovis may seek contribution from Habib should Bovis prove that Habib was partially or even fully at fault for the plaintiff's injury.

In reply, Habib points out that Berardi did not oppose its motion. Further, Bovis does not oppose Habib's request to dismiss the cross-claim for failure to procure insurance.

Habib argues that Bovis's assertion that Habib is responsible for plaintiff's injury is false, unsupported by any evidence, and irrelevant to Habib's motion to dismiss. Bovis failed to review Habib's project documents when made available and never requested to inspect such documents or compel the production of same. Similarly, neither Bovis nor Berardi, ever requested Habib's deposition. The mere hope that evidence sufficient to defeat a motion may be uncovered during the discovery process is insufficient to defeat a defendant's summary judgment motion. Since Habib moves to dismiss as a matter of law, the documents and depositions are irrelevant, as no set of documents and no deposition testimony will change the outcome. In any

case, the only contract between the Owner and Habib was already provided with Habib's instant motion, which is devoid of any provision requiring Habib to indemnify Bovis. Finally, as shown by the Habib contract, Habib was hired to prepare a builder's pavement plan, pertaining to the public sidewalks only, and the courtyard is not public and was not included within the builder's pavement plan. Habib's only services regarding the courtyard area were limited to specifying the street grades and identifying curb elevations for drainage purposes only. The design of the courtyard itself, including specifying the stones and ramp in issue, was done by SLCE and Pelli. And, the letters written by Habib referenced by Bovis merely point out to Pelli (the design architect) that the sidewalk and roadway were the same color.

Since Bovis is being sued by the Owner for Bovis' own active negligence, Bovis is not entitled to common law indemnification from Habib. In this case, the Owner is seeking indemnity from Bovis. As such, it is seeking to shift the entire loss to Bovis. If it cannot shift the entire loss to Bovis, the Owner's common law indemnification claim against Bovis will be dismissed. Alternatively, if the Owner shifts the entire loss (not a portion) to Bovis, it will be because it proved that Bovis was the actual wrongdoer. If any party other than Bovis is found to be any percent liable as an actual wrongdoer, the Owner cannot recover on its common law indemnification claim against Bovis because it would not have succeeded in shifting the entire loss to Bovis. In addition, if a fact finder finds that the Owner is entitled to common law indemnification from Bovis, there will be a finding that Bovis was responsible for the entire loss. Based upon such a finding, Bovis cannot seek to have a separate determination made that Habib is also responsible. Thus, Bovis's claim for common law indemnification against Habib should be dismissed as a matter of law.

Also, Bovis cannot seek contractual indemnification from Habib, absent some contractual obligation to do so, and here there is no contractual right of indemnity as is evidenced by the Habib Contract.

And, the cross-claims against Habib for contribution should be dismissed. A defendant who is being sued for indemnification only (*i.e.*, Bovis) cannot seek contribution from another. Significantly, the cases cited by Bovis are not analogous to the facts in this case and, therefore, are easily distinguishable. Here, the Owner does not have a negligence or breach of contract claim against Bovis, but only claims indemnification since its contribution claim against all parties, including Bovis, was extinguished when it settled with the plaintiff. Therefore, the Owner can only seek to shift the entire loss (not a portion of the loss) to Bovis. Assuming the Owner can demonstrate it is entitled to indemnification (contractual or common law) from Bovis, it will have succeeded in shifting the entire loss to Bovis. Under such a scenario, the fact-finder would have determined that Bovis was responsible for the entire loss and therefore, must indemnify the Owner. Thus, Bovis could not then seek contribution from Habib. Alternatively, if the fact-finder determined that Bovis was not responsible for the entire loss, the Owner's indemnification claims would fail against Bovis and, therefore, Bovis would not be seeking to recover from Habib. The scenario that Bovis seems to be confused with is that, had the Owner's contribution claim not been extinguished, the Owner could seek contribution from Bovis who, in turn, could seek contribution from Habib. However here, the Owner is only seeking to recover from Bovis on indemnification. As a result, Bovis' contribution claim is extinguished and Habib is entitled to dismissal of Bovis' contribution claim as a matter of law.

Discussion

At the outset, it is noted that Berardi did not oppose Habib's motion, and as such the dismissal of all of Berardi's cross-claims against Habib is granted. And, given that Bovis did not oppose dismissal of its cross-claim against Habib for failure to procure insurance, dismissal of such cross-claim is granted.

Furthermore, Habib did not move for summary judgment, but moved pursuant to CPLR 3211 (a)(7) for dismissal of the complaint for failure to state a cause of action. In determining a motion to dismiss pursuant to CPLR 3211 (1)(7), the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on such a motion is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR § 3026), and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]).

And, where the parties have submitted evidentiary material, including affidavits, or where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence" the pertinent issue is whether claimant has a cause of action, not

whether one has been stated in the complaint (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977] (emphasis added); *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS2d 532 [1st Dept 1989]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279 [1996]). Here, the parties have submitted affidavits and documentary evidence, *i.e.*, the pleadings, Stipulations of Discontinuance, General Release, and the Habib contract, and thus, the Court will assess whether Bovis has causes of action for contribution, contractual indemnification, and common law indemnification against Habib.

As to Bovis's contribution claim against Habib, CPLR 1401 codified the concept of common-law contribution, which dictates the "circumstances in which a party may seek contribution from another party" as follows:

> "*Except as provided in sections 15–108 and 18–201 of the general obligations law*, . . . two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought."
> *(Children's Corner Learning Center v A. Miranda Contracting Corp.*, 64 AD3d 318, 879 NYS2d 418 [1st Dept 2009] (emphasis added)).

Under General Obligations Law § 15–108(c), "A tortfeasor [*i.e.*, the Owner] who has obtained his own release from liability shall not be entitled to contribution from any other person" [*i.e.*, Bovis and Bernardi]. Thus, as pointed out by Habib, once the Owner settled plaintiff's underlying claim and obtained the General Release, *the Owner's* right to seek contribution from either Bovis or Berardi extinguished by operation of law pursuant to General Obligations Law § 15–108(c) (*HRH Const. Corp. v Commercial Underwriters Ins. Co.*, 11 AD3d

321, 783 NYS2d 351 [1st Dept 2004] ("The right of HRH and American Casualty to seek contribution from Atlantic Heydt and its insurer terminated upon their settlement of the underlying personal injury action whereupon they obtained a release from liability pursuant to General Obligations Law § 15–108(c)")). However, General Obligations Law § 15–108(c)'s restriction placed on a party's right to contribution applies to the "tortfeasor who has obtained his own release from liability" and Bovis did not obtain a general release from liability.

Thus, as proposed by Bovis, "Should the owner succeed in proving that Bovis was at fault," the Owner cannot recover under a theory of contribution, but is limited to its claims for contractual and common law indemnification. However, while the Owner's claims against Bovis (and Berardi) may be limited to theories of indemnification, the same cannot be said as to Bovis's right to recover against Habib losses Bovis may sustain as a result of the Owner's indemnification claims. Therefore, dismissal of Bovis's contribution claim against Habib is denied.

As to Bovis's contractual indemnification claim against Habib, a party is entitled to full contractual indemnification provided that the intention to indemnify can clearly be implied from the language and purpose of the entire agreement and the surrounding facts and circumstances *(Drzewinski v Atlantic Scaffold & Ladder Co Inc.*, 70 NY2d 774,777 521 NYS2d 216 [1987]; *Masciotta v Morse Diesel International, Inc.*, 303 AD2d 309, 758 NYS2d 286 [1st Dept 2003]). It is uncontested that the Habib contract does not contain any indemnification provision, and that discovery thus far failed to yield any contract requiring Habib to indemnify Bovis. It is also noted that Habib's principal attests that there are no contracts with either Bovis or Berardi regarding the project, and neither Bovis nor Berardi submitted any contract documentation

contradicting Habib's contentions.

Bovis also failed to explain how any additional discovery would yield relevant information to support its contractual indemnification claim against Habib. In this regard, the scope of the Habib contract for design services was limited to the "on-site transportation elements - parking, loading and traffic circulation" and "for the adjacent streets and sidewalks" (Habib contract, Page 1). Further, while the Habib contract contemplates the preparation of further contract documents, such preparation of "final design and contract documents" were "for the adjacent streets and sidewalks" and plaintiff's accident occurred in the courtyard. There is no indication or claim that plaintiff's accident occurred on such adjacent streets and sidewalks as referred to in the Habib contract. And, Habib's reference to "potential liability issues relating to pedestrian safety" resulting from the use of materials that were the "same material and therefore the same color" concerned the "granite pavers for curb, sidewalk and roadway" and the difficulty pedestrians would have in distinguishing "the elevation change between the sidewalk and the roadway." In opposition, Bovis failed to establish that such letter pertained to the private courtyard area in which plaintiff fell. Therefore, Bovis's contractual indemnification claim lacks merit and is dismissed.

As to Bovis's common law indemnification claim against Habib, "it is well settled that common-law indemnification is available to a party that has been held vicariously liable from the party who was at fault in causing plaintiff's injuries" (*Structure Tone, Inc. v Universal Services Group, Ltd.*, 87 AD3d 909, 929 NYS2d 242 [1st Dept 2011]; *Martins v Little 40 Worth Associates, Inc.*, 72 AD3d 483, 899 NYS2d 30 [1st Dept 2010] ("Common-law indemnification requires proof not only that the proposed indemnitor's negligence contributed to the causation of

the accident, *but also that the party seeking indemnity was free from negligence*") (emphasis added)). Given that the Owner is pursuing a common law indemnification claim against Bovis based on Bovis's active negligence, any recovery Bovis seeks from Habib, based on Bovis's liability to the Owner accordingly would not be based on vicarious liability, but would necessarily arise out of Bovis's own negligence. Under such circumstances, Bovis could not seek common law indemnification from Habib (*see Consolidated Rail Corp. v Hunts Point Terminal Produce Co-op. Ass'n, Inc.*, 11 AD3d 341, 783 NYS2d 30 [1st Dept 2004] ("Plaintiff has no claim for common-law indemnification because its liability in the underlying settled personal injury action, if any, would not have been vicarious but would have been premised upon its own acts or omissions"); *Williams v New York City Transit Authority*, 9 AD3d 308, 780 NYS2d 580 [1st Dept 2004] ("since the liability of the [bus defendants] Manhattan and Bronx Surface Transit Operating Authority and the New York City Transit Authority in the underlying personal injury action is not derivative as between themselves and Henao [the driver of the offending vehicle], they may not seek common-law indemnification from him [Henao]")). Thus, Bovis cannot seek common law indemnification from Habib under such circumstances.

However, the Owner is *also* seeking contractual indemnification against Bovis, and under this theory, "the one seeking indemnity [the Owner] need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. *Whether or not the proposed indemnitor [i.e., Bovis] was negligent is a non-issue and irrelevant" (Correia v Professional Data Mgt.*, 259 AD2d 60, 693 NYS2d 596 [1st Dept 1999] *citing Brown v Two Exch. Plaza Partners*, 76 NY2d 172 [1990]) (emphasis added)). As pointed out by Bovis, although the Owner must be 100% free from fault to seek indemnity from Bovis, Bovis need not

be found 100% liable to be held liable to the Owner for contractual indemnification. Therefore, Bovis *may* be held liable to the Owner irrespective of a finding of negligence on Bovis's part. In this regard, Bovis may then have a viable common-law indemnification claim because under such circumstances, Bovis need only prove that Habib's negligence contributed to the causation of plaintiff's accident, and that Bovis was free from negligence. Therefore, Habib's motion to dismiss Bovis's common law negligence claim is unwarranted, at this juncture, and denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of Habib's motion to dismiss the cross-claims of Berardi is granted, and Berardi's cross-claims are hereby severed and dismissed; and it is further

ORDERED the branch of Habib's motion to dismiss the cross-claims of Bovis is granted solely to the extent that Bovis's cross-claims for failure to procure insurance cross-claim and contractual indemnification are hereby severed and dismissed; and it is further

ORDERED that Habib shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: October 16, 2012

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD