SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

----------x

FIVE STAR ELECTRIC CORP.,

Plaintiff,

-against-

FEDERAL INSURANCE COMPANY and ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Defendants.

----------x

Index No.: 602781/2007

Mtn Seq. No. 16

DECISION AND ORDER

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Third-Party Plaintiff,

-against-

E.A. TECHNOLOGIES, INC., TRANSIT TECHNOLOGIES, LLC, PETROCELLI ELECTRIC CO., INC., FMSS, LLC, PEC REALTY CORP., PETROCELLI ELECTRIC CO OF NJ, INC., SIEMENS INDUSTRY, INC., SUCCESSOR-BY-MERGER TO SIEMENS TRANSPORTATION SYSTEMS, INC., and SIEMENS AKTIENGESELLSCHAFT,

Third-Party Defendants.

----------x

JEFFREY K. OING, J.:

In the underlying action, plaintiff Five Star Electric Corp. ("Five Star") sought recovery against defendants, St. Paul Fire and Marine Insurance Company ("St. Paul") and Federal Insurance

Company ("Federal"), for sums owed for work, labor, and services performed under a contract to which St. Paul and Federal were co-sureties.

St. Paul, in turn, commenced a third-party action for indemnity against various parties including E.A. Technologies, Inc. ("E.A. Tech"), Transit Technologies, Inc. ("Transit"), Petrocelli Electric Co., Inc. ("Petrocelli"), FMSS, LLC ("FMSS") and PEC Realty Corp. ("PEC") (collectively, the "Indemnitors").

St. Paul now moves for summary judgment on Counts I and IV of its Second Amended Third-Party Complaint (the "Complaint") in the amount of $930,382.91 against the Indemnitors, representing attorney's fees and costs allegedly incurred in connection with a bond issued for the work.

Third-Party defendant PEC cross moves for summary judgment dismissing the claims as against it. The remaining third party defendants against whom this motion was brought have defaulted.

Background

Some of the facts relevant to this motion are set forth in a prior Decision and Order of this Court dated May 6, 2016 (Five Star Elec. Corp. v Federal Ins. Co., 2014 WL 1831107 [Sup Ct, NY County 2014], affd as modified 127 AD3d 569 [1st Dept 2015])(the "Prior Order") (NYSCEF Doc. No. 179). Familiarity is presumed.

Briefly, this action arises out of a construction contract for a Public Address and Consumer Information Systems Contract W-32658 for the Metropolitan Transit Authority ("MTA")(the "MTA Contract") in New York City (St. Paul's Rule 19-a statement ["19-a Statement"] [NYSCEF Doc. No. 372], ¶ 1; Santo Petrocelli, Jr. Aff. 4/4/2016 Aff. [NYSCEF Doc. No. 389], ¶ 6).

The 1999 Indemnity Agreement

On or about January 6, 1999, Petrocelli as the "Undersigned" entered into a General Agreement of Indeminity (the "1999 GAI") with St. Paul (Rule 19-a statement, ¶ 9; William Cowan Aff. 10/30/2014 [NYSCEF Doc. No. 351], Ex. 1 [NYSCEF Doc. No. 354]). The "whereas" clause recited that the Undersigned or "any partnership, association, corporation, successor, assign, affiliate, any related entity, subsidiary, and/or division of the [Undersigned] whether now existing or hereafter formed or acquired" might procure bonds from St. Paul. Paragraph 1 of the the 1999 GAI provides as follows:

> This Agreement binds each UNDERSIGNED to SURETY with respect to all BONDS executed or procured for any UNDERSIGNED executing this Agreement and for any CONTRACTOR as defined below. If any BOND or BONDS shall be executed or procured for any Joint Venture to which any CONTRACTOR is or may become a party, the liability and obligations of the UNDERSIGNED to the SURETY shall be the same as if such BOND or BONDS had been executed for the CONTRACTOR acting alone,

notwithstanding any agreement between or among the Joint Venturers. CONTRACTOR as used in this Agreement shall mean any UNDERSIGNED and any other person who obtains BONDS from the SURETY at the request of any UNDERSIGNED.

Furthermore, paragraph 3 of the 1999 GAI stated:

This Agreement shall apply to any and all BONDS requested by the CONTRACTOR, whether such BONDS were executed before or following the date of this Agreement and, further, this Agreement shall apply to any and all BONDS executed, or the execution of which has been procured, by the SURETY for any CONTRACTOR, whether or not there shall be any written application thereto executed by one or more of the UNDERSIGNED.

The UNDERSIGNED will indemnify the SURETY and hold it harmless from and against all liability, losses, costs, damages, attorneys' fees, disbursements and expenses of every nature from which the SURETY may sustain or incur by reason of, or relating to, having executed or procured the execution of any such BOND, or that may be sustained or incurred by reason of making any investigation of any matter, or prosecuting or defending any action in connection with any such Bond ... The UNDERSIGNED shall pay to the SURETY all money which the SURETY or its representatives may pay or cause to be paid and shall pay to the SURETY such sum as may be necessary to exonerate and hold it harmless with respect to any liability which may be asserted against the SURETY as soon as liability exists or is asserted against the SURETY, whether or not the SURETY shall have made any payment therefor. In the event of any payment by the SURETY, the UNDERSIGNED further agree that in any accounting between the SURETY and the UNDERSIGNED, the SURETY shall be entitled to charge for any and all disbursements made by it in good faith under the belief that it is or was liable for the sums and amounts so disbursed, or that it was necessary or expedient to make such disbursements, whether or not such liability, necessity or expediency existed. As used herein, "payments made in good faith" shall be

> deemed to include any and all payments made by the SURETY except those made with deliberate and willful malfeasance.

Finally, section 9 of the 1999 GAI stipulates that "[t]he vouchers or other evidence of payments made by the SURETY shall be prima facie evidence of the fact and amount of the liability of the UNDERSIGNED to the SURETY."

The signature page of the 1999 GAI was dated January 6, 1999. Also attached to the 1999 GAI and made a part thereof was a "Resolution and Certification," dated February 11, 1999, which confirmed that the GAI had been ratified and approved by Petrocelli's directors.

The Riders to the 1999 GAI

(i) December 11, 2001 Rider

Thereafter, various entities became parties to the 1999 GAI upon the execution of three separate riders between 2001 and 2003. On or about December 11, 2001, Petrocelli and PEC executed a "Rider to General Agreement of Indemnity" (the "12/11/2001 Rider") (19-a Statement ¶ 18; Cowan Aff., Ex. 3 [NYSCEF Doc. No. 355] [the "12/11/2001 Rider"]). The Rider designated Petrocelli as an "Existing Undersigned" and recited that "the Existing Undersigned entered into a General Agreement of Indemnity ... on or about February 11, 1999" (12/11/2001 Rider, first "Whereas"

clause). The Rider designated PEC as the "New Undersigned", and provided that:

> 1. The New Undersigned is added as a party to the General Agreement of Indemnity, each in the capacity of Undersigned, as that term is defined in the Agreement, for all Bonds executed or procured on or after the date of this Rider on behalf of the Undersigned or the Contractor, as that term is defined in the Agreement. Further, this Rider shall apply to any and all such Bonds executed or procured by SURETY on behalf of the Undersigned or the Contractor, whether or not there shall be any written application for such Bonds.
>
> 2. It is understood and agreed that the New Undersigned, as a party to the Agreement, assumes all the obligations and responsibilities of an Undersigned under such Agreement for all Bonds executed or procured on or after the date of this Rider on behalf of the Undersigned or the Contractor, and all such obligations and responsibilities shall continue until SURETY is released from all obligations under said Bonds.
>
> 3. This Rider to the Agreement shall not take effect unless and until every and all of the Undersigned to the Agreement shall approve such Rider by way of signature affixed hereto.

(ii) The August 11, 2003 Rider

On or about August 11, 2003, Petrocelli, Transit Tech and FMSS executed a "Rider to General Agreement of Indemnity" (the "8/11/2003 Rider") (Cowan Aff., Ex. 4 [NYSCEF Doc. No. 357]). In it, Petrocelli was identified as the "Existing Undersigned" and Transit Tech and FMSS were designated collectively as the "New Undersigned." It recited that the Existing Undersigned had

entered into the 1999 GAI, and contained language essentially identical to the 12/11/2001 Rider making the New Undersigned parties to the 1999 GAI (8/11/2003 Rider, ¶ 2). It also provided that it would not become effective unless executed by "every and all of the Undersigned" to that GAI (Id., ¶ 4).

(iii) The October 22, 2003 Rider

On or about October 22, 2003, Petrocelli, Transit Tech, FMSS and E.A. Tech executed a "Second Rider to General Agreement of Indemnity" (the "10/22/2003 Rider") (Cowan Aff., Ex. 6 [NYSCEF Doc. No. 358]). Petrocelli, Transit Tech and FMSS were identified collectively as the "Existing Undersigned" and E.A. Tech was referred to as the "New Undersigned." Pursuant to the 10/22/2003 Rider, E.A. Tech assumed "all the obligations and responsibilities of a Principal and Undersigned under [the 1999 GAI] for all bonds executed or procured on behalf of any joint venture in which it is a joint venture partner on or after January 6, 1999, and all such obligations and responsibilities shall continue until SURETY is released from its obligations under all such Bonds" (10/22/2003 Rider, ¶ 2). As with the previous riders, it provided that it would not become effective unless executed by all other Undersigneds to the GAI (Id., ¶ 3).

The 2002 Consortium Agreement

On August 7, 2002, Siemens Transportation Systems, Inc. ("Siemens") and E.A. Technologies/Petrocelli, J.V., L.L.C. ("EA Tech/Petrocelli") entered into a Consortium Agreement (the "Consortium Agreement") (Nancy K. Feinrider Aff. 7/24/2013 [NYSCEF Doc. No. 33], Ex. 1 [the "Consortium Agreement"] [NYSCEF Doc. No. 38]) to form a consortium to complete the MTA Contract. EA Tech/Petrocelli was a limited liability company whose performance obligations were guaranteed by E.A. Tech and Petrocelli (Consortium Agreement, p. 4). At some time between August 7, 2002 and January 1, 2003, EA Tech/Petrocelli changed its name to Transit Technologies, LLC ("Transit Tech")(St. Paul's Reply to PEC's Counterstatement of Facts [Reply to Counterstatement] [NYSCEF Doc. No. 413], ¶ 3). On January 1, 2003, Petrocelli sold all of its interest in Transit Tech to FMSS (Id., ¶ 4).

The Bond

On or about September 2, 2003, St. Paul, Federal, Siemens and Transit Tech executed a payment bond (the "Bond") (Cowan Aff., Ex. 5 [NYSCEF Doc. No. 357]) in which they agreed to be bound jointly and severally to the MTA and the New York City Transit Authority in the sum of $111,861,849. The "Contractor"

and "Principal" under the Bond was identified as the "Consortium of Siemens Technologies" (the "Consortium"), which was defined as a consortium of Siemens and Transit Tech (Bond, pp. 7, 10). The contract provided separate signature lines for Siemens and Transit Tech, and representatives from each of those entities executed it on behalf of their respective principals (Bond, p. 10).

The 2003 MTA Contract

On or about September 17, 2003, the MTA entered into the MTA Contract with the Consortium named as the "Contractor" (Reply to Counterstatement, ¶ 2; Feinrider Aff., Ex. 2 [NYSCEF Doc. No. 39] [MTA Contract], p. 6). Like the Bond, the MTA Contract was executed separately by Siemens and Transit Tech (Id., p. 92).

The 2003 Indemnity Agreement

On or about October 22, 2003, Petrocelli, Transit Tech, E.A. Tech, PEC, and FMSS as Undersigneds executed a General Indemnity Agreement (the "2003 GAI") (Sarah K. Simmons Aff. 2/1/2016 [NYSCEF Doc. No. 353], Ex. 16 [NYSCEF Doc. No. 368]). As relevant here, the 2003 GAI provided that the undersigneds would "indemnif[y] Surety from all loss and expense in connection with any Bonds of a Principal ... which Surety has executed or hereafter executes" (2003 GAI, introductory paragraph). The 2003

GAI defines "Principal" as one or a "combination of the individuals, corporations or other business associations of any nature whatsoever in which any one or a combination of the Undersigned shall have a beneficial interest as owner, subsidiary, affiliate, co-venturer, spouse of any of the foregoing, or otherwise" (Id., section A [Definitions]). A "Surety" is defined in the 2003 GAI as "Federal ... and any ... company joining it in executing any Bond" (Id.). The Undersigneds specifically agreed to pay "[a]ll loss and expense, including attorney fees, incurred by Surety by reason of having executed any Bond or incurred by it on account of any breach of this agreement by any of the Undersigned or in enforcing any of the covenants of this agreement" (Id., Section B[1]). The 2003 GAI further provided that "[a]n itemized statement of the loss and expenses incurred by the Surety, sworn to by an officer of Surety, shall be prima facie evidence of the fact and extent of the liability of the Undersigned to the Surety in any claim or suit by the Surety against the Undersigned." Finally, the parties to the 2003 GAI agreed that their agreement would be governed by New Jersey law (Id., Section E[10]).

The Demand Letters

By letter dated August 27, 2012, Watt, Tieder, Hoffar & Fitzgerald ("Watt Tieder"), a law firm representing St. Paul

advised PEC, Siemens, Transit Tech, E.A. Tech, Petrocelli, and FMSS that Five Star had won an arbitration award exceeding $11 million and would likely seek summary judgment against St. Paul once the award was confirmed (Bruce L. Corriveau Aff. 2/1/2016 [NYSCEF Doc. No. 352], Ex. 7 [NYSCEF Doc. No. 359]). The letter asserted that St. Paul was entitled to indemnnity for any liability arising from the award, including attorney's fees, but did not specify or attach any indemnity agreement (Id.) In letters dated January 24 and 29, 2013, Watt Tieder also alluded to St. Paul's entitlement to indemnity under the Bond (Corriveau Aff. 2/1/2016, Ex. 8 and 9 [NYSCEF Doc. Nos. 360 and 361]). Neither of those two letters was addressed to PEC or its counsel.

St. Paul commenced this third party action on June 3, 2013 and filed the operative pleading, the Second Amended Third Party Complaint (the "Complaint"), on June 30, 2014. As relevant here, Counts I and IV seek unspecified damages for PEC's failure to indemnify St. Paul under the 1999 GAI and the 2003 GAI (Complaint ¶¶ 38-56, 75-87).

In moving for summary judgment, St. Paul contends that PEC is an indemnitor for losses under the Bond pursuant to the 12/11/2001 Rider to the 1999 GAI, and as a party to the 2003 GAI. In opposition, PEC argues that the 1999 GAI does not cover consortiums, that the various riders did not add PEC as an

undersigned to the 1999 GAI and/or did not take effect, and that St. Paul was not a beneficiary of the 2003 GAI. PEC also argues that the attorney's fees sought are unreasonable and unsubstantiated by the record.

Discussion

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (see, CPLR 3212[b]; Alvarez v Prospect Hosp., 68 NY2d 329 [1986]; Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (Alvarez, supra; Olan v Farrell Lines, 64 NY2d 1092 [1985]; Zuckerman v City of New York, 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible

form sufficient to require a trial of material issues of fact (Kaufman v Silver, 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (see, Negri v Stop & Shop, Inc., 65 NY2d 625 [1985]), summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (Rotuba Extruders, Inc v Ceppos, 46 NY2d 223, 231 [1978]).

In an action to recover attorney's fees under an indemnity agreement such as the one in issue, the plaintiff can make its prima facie case by submission of the agreement, the bond, and the itemized statement of the fees and expenses (Utica Mut. Ins. Co. v Cardet Const. Co., 114 AD3d 847, 849 [2d Dept 2014]). The right of a party to recover indemnification on the basis of a contractual provision depends on the intent of the parties and the manner in which that intent is expressed in the contract (Suazo v Maple Ridge Assocs., L.L.C., 85 AD3d 459, 460 [1st Dept [2011]) and an indemnity agreement will be enforced where it is clear and unambiguous (Espinal v City of New York, 107 AD3d 411, 412 [1st Dept 2013]). Extrinsic evidence may be used to interpret a contract only where it is ambiguous, and the determination as to ambiguity is a question of law to be answered

by the court (Greenfield v Philles Records, Inc., 98 NY2d 562, 570 [2002]).

Breach of the 1999 GAI (Count I)

As a preliminary matter, this Court concurs with St. Paul that neither the alleged misdesignation of the 1999 GAI in the 12/11/2001 Rider, nor the failure of the 1999 GAI to reference "consortiums", would be a defense to liability. Similarly, nothing in the 8/11/2003 and 10/22/2003 riders are relevant to PEC's liability under the 1999 GAI. First, the rider's reference to a GAI entered into "on or about" February 11, 1999 is unequivocally referable to the 1999 GAI. Even assuming that the GAI was technically "entered into" on January 6, 1999, the February 11, 1999 date appears in the Resolution and Certification annexed to the GAI, and that was the date on which the GAI was actually ratified by Petrocelli's directors. PEC's speculation that there might exist a different GAI dated February 11 is a feigned issue.

Second, the absence of a reference to consortiums in the GAI is irrelevant. The actual signatories to the Bond were the individual Consortium parties, Siemens and Transit Tech. As noted in the Prior Order, the term "consortium" has no legal relevance other than to make Siemens and Transit Tech co-principals (Five Star v Federal Ins. Co., 2014 WL 1831107, *4).

Third, the fact that PEC was not a signatory to the 8/11/2003 and 10/22/2003 riders, or identified as an Existing Undersigned in them, has no bearing on its obligations under the 12/11/2001 Rider. St. Paul does not invoke the 2003 riders as a basis for liability as against PEC. Nor does PEC dispute that it executed the 2001 rider, or allege that it was subsequently released from it. Moreover, in identifying Petrocelli and other parties as Existing Undersigneds, the two 2003 riders do not expressly state that they are the only parties with that designation.

Nevertheless, PEC cannot be held liable under the 1999 GAI. The 1999 GAI only applies to bonds executed or procured by or on behalf of any Undersigned or Contractor. Although St. Paul conclusorily asserts it issued the Bond at the request of Petrocelli and/or Petrocelli-related entities, it has provided no substantiation of that claim. While Petrocelli once did have an interest in one of the signatories to the Bond, Transit Tech, it is undisputed that it had divested itself of that interest well before the execution of the Bond. St. Paul's reference to other bonds that Petrocelli had requested, or to its general involvement with the project and earlier bond applications, do not establish that it requested the Bond at issue.

Finally, even were PEC liable under the 1999 GAI, this Court could not grant summary judgment at this juncture as to the nearly $1 million in attorney's fees demanded. In interpreting fee provisions in indemnity agreements such as the one at bar, the appellate courts have enforced the requirement that the surety submit a detailed, itemized statement of the expenses, supported by an affidavit of personal knowledge, so that a determination can be made that the fees were reasonable and incurred in good faith (Prestige Decorating & Wallcovering, Inc. v U.S. Fire Ins. Co., 49 AD3d 406, 406-07, [1st Dept 2008]; Int'l Fid. Ins. Co. v Kulka Const. Corp., 100 AD3d 967, 968 [2d Dept 2012]; see also Colonial Sur. Co. v Millennium Century Const., Inc., 2014 WL 3929159, *3 [Sup Ct, NY Co 2014]). Here, St. Paul has merely submitted copies of the fronts and backs of twenty-seven checks totaling approximately $1.2 million made payable to two law firms between November 2012 and August 2015 (Bruce Corriveau Aff. 2/1/2016 [NYSCEF Doc. No. 352], Ex. 1 [NYSCEF Doc. No. 362]), some of them issued after the filing date of the Complaint. No documentation has been proffered indicating the nature of the services rendered or whether they were attributable to work in connection with the Bond, and St. Paul's vice president's attestation to the fees gives no explanation of the "offsets" he claims reduced the balance owed

to $930,000 (Corriveau Aff. 2/1/2016 ¶¶ 6-7). Such a showing is insufficient to establish entitlement to the fees (Cent. Ins. Co. v 4-A Gen. Contracting Corp., 2006 WL 2829790, *6 [Sup Ct, Kings Co 2006]).

St. Paul nevertheless contends that it provided PEC with "minimally redacted invoices" demonstrating the legal work performed. PEC disputes that the invoices were adequate to resolve the issue, asserts that some of the work was in connection to an unrelated Bond, and argues that in any event the amount claimed is excessive in view of the issues actually litigated. Whatever the case, neither the invoices nor the evidence relevant to the parties' various contentions is in the record. Accordingly, as St. Paul ultimately concedes, "the quantum of [its] damages [would] best [be] left for trial" (St. Paul's Reply Memorandum, p. 24).

Breach of the 2003 GAI (Count IV)

St. Paul is entitled to a judgment as to liability under the 2003 GAI. PEC's defense rests primarily on the agreement's definition of a surety as "a company joining [Federal] in executing any Bond." PEC argues that the use of the present participle (i.e. "joining" and "executing") expresses an intention to bind PEC only to bonds executed in the future, not to retroactively obligate PEC to the Bond executed several weeks

before the date of the GAI. This Court rejects this construction.

PEC's interpretation ignores the GAI's expansive language protecting St. Paul "from all loss and expense in connection with any Bonds of a Principal ... which Surety has executed or hereafter executes." Read in context, St. Paul was a company "joining" Federal in the earlier Bond. This Court concurs with St. Paul that the cases cited by PEC under New Jersey law (the law required to be applied by the 2003 GAI) do not support a contrary conclusion. The one case that addresses the construction of contract (Warwick v Monmouth County Mut. Fire Ins. Co., 44 NJ 83 [1882]) indicates that the present participle can implicate either past or future conduct, and that case, along with the remaining cases which all deal with statutory construction (Cullum v County of Hudson, 2015 WL 2458180 [Super Ct, App Div 2015]; State Dept of Envtl. Protection v Exxon Corp., 151 NJ Super 464, 481 [Ch Div 1977]; Verizon New Jersey Inc. v Hopewell Borough, 26 NJ Tax 400 [Tax Ct 2012]) make clear that the interpretation is entirely dependent on the overall context in which the present participle is employed. In view of this conclusion, PEC's allegations regarding the intent and conduct of the parties around the time the 2003 GAI was executed are irrelevant. "[Wh]ere the language employed has an ordinary

meaning or where the meaning is plain and unambiguous on its face ... parol or extrinsic evidence is inadmissible" (Cent. Hanover Bank & Trust Co. v Herbert, 1 NJ 426, 429 [1949]).

For the reasons explained, supra, this Court cannot grant St. Paul's an award of the attorney's fees at this time. New Jersey courts also scrutinize legal fees for reasonability, and will deny an excessive award even where the expenditures are made in good faith (Int'l Fid. Ins. Co. v Jones, 294 NJ Super 1, 5 [App Div 1996] ("failure to oversee the reasonableness of such awards could result in inequities if not promote corruption").

Accordingly, St. Paul will be granted a judgment as to liability only, as against PEC in connection with the 2003 GAI (Count IV), and as against the defaulting third-party defendants in connection with both GAIs (Counts I and IV).

Accordingly, it is

ORDERED that the motion of third-party plaintiff St. Paul Fire and Marine Insurance Company for summary judgment is granted, upon default, as to liability only as against third-party defendants E.A. Technologies, Inc., Transit Technologies, Inc., Petrocelli Electric Co., Inc., and FMSS, LLC on Counts I and IV of the Second Amended Third Party Complaint, and against third-party defendant as to liability only as against PEC Realty Corp. on Count IV, and it is further

ORDERED that the cross-motion of third-party defendant PEC Realty Corp. to dismiss Count I as against it is granted, and that claim is severed and dismissed, and it is further

ORDERED that the issues of attorney's fees and costs are respectfully referred to a Judicial Hearing Officer or Special Referee; and it is further

ORDERED that the above-noted reference to the Special Referee or Judicial Hearing Officer is to hear and report with recommendations, or if the parties so-agree, to hear and determine; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at th 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 at the "references" link under "Courthouse Procedures") shall assign this matter to an available Special Referee to hear and report or hear and determine as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiffs shall, within fifteen (15) days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be

accessed at the "References" 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 Referee Part; and it is further

ORDERED that any motion to confirm or reject the Report of the Special Referee shall be made within the time and in the manner specified in CPLR 4403 and 22 NYCRR § 202.44.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 6/7/17

HON. JEFFREY K. OING, J.S.C.

JEFFREY K. OING
J.S.C.