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| <b>Carrington Mtge. Servs., LLC v Morain</b>   |
| 2018 NY Slip Op 33184(U)   |
| December 4, 2018   |
| Supreme Court, Queens County   |
| Docket Number: 700605/2016   |
| Judge: Mojgan C. Lancman   |
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**JEFFREY A. KOSTERICH, L.L.C.**

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December 5, 2018

**Via NYSCEF and First Class Mail**

Myrtle Jones, Esq.  
Queens Legal Services  
8900 Sutphin Blvd, 5<sup>th</sup> FL  
Jamaica, NY 11435

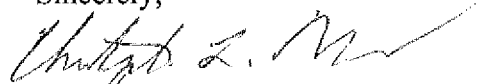
**RE: CARRINGTON MORTGAGE vs. MORAIN, ET AL. Index# 700605/2016**

Dear Ms. Jonas:

Our firm represents Plaintiff, in the above-referenced matter. Per the directive of the Decision and Order, enclosed please find the Decision and Order after Hearing dated December 4, 2018.

Should you have any questions please do not hesitate to contact me.

Sincerely,



Christopher L. Marshall  
Paralegal

Enclosure

cc:

**Via NYSCEF and First Class Mail (w/encl.)**

John and Jasmin Morain  
107-31 Watson Place  
Jamaica, NY 11433

John Doe Number 1-10  
107-31 Watson Place  
Jamaica, NY 11433

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. MOJGAN C. LANCMAN,

IAS PART 5

-----X  
CARRINGTON MORTGAGE SERVICES, LLC,

Index No. 700605/2016

Plaintiff,

**DECISION AND  
ORDER AFTER  
HEARING**

-against-

JOHN MORAIN, *et al.*,

Defendants.

-----X  
This matter was referred to the undersigned for a bad faith hearing pursuant to CPLR § 3408, which was conducted on June 6, 2018.

**Issues Presented**

The principal issues raised at the hearing were whether the plaintiff failed to negotiate in good faith pursuant to CPLR § 3408 by:

- 1) Insisting that Ms. Shirene Phillip ("Ms. Phillip") sign a permanent loan modification agreement, despite the fact that the plaintiff had previously waived this requirement through its attorneys when faced with a bad faith hearing in June 2017; and accepted three (3) payments from the defendant Jasmin Morain ("Ms. Morain") pursuant to a trial payment plan ("TPP") and an additional payment; and/or
2. Sending two materially different TPP agreements, one to Ms. Morain's attorneys and one directly to Ms. Morain, despite the fact that the plaintiff was aware that Ms. Morain was represented by counsel and had been ordered by a Referee not to have direct contact with her; and/or,
3. Failing to comply with Referee Evans' directive issued on February 22, 2018 to provide, on or before March 18, 2018, legal authority for the demand that Ms. Phillip sign a Request for Mortgage Assistance ("RMA"); and/or
4. Interpreting HUD guidelines to require assumption of the note and mortgage by Ms. Phillip, a non-owner of the property and non-borrower; and/or
5. Failing to timely respond to Ms. Morain's completed RMA, which was submitted on June 27, 2017, until October 25, 2017, nearly 120 days thereafter.

### **The Hearing**

At the hearing, four witnesses testified. The plaintiff, Carrington Mortgage Services, LLC (the "plaintiff" or "CMS"), called one witness, Mr. Clayton Gordon ("Gordon"). Gordon works in the plaintiff's Anaheim, California office as a Default Litigation and Mediation Supervisor. Gordon had no personal knowledge of the facts, had not attended any of the Court appearances in this matter prior to the hearing and had not been involved in the modification application review process relative to the subject loan.

Three witnesses were called on behalf of Ms. Morain: Ms. Morain herself, her daughter, Ms. Phillip, and Ms. Morain's attorney, Myrtle Jonas, Esq. ("Jonas"), who had represented Ms. Morain at most, if not all, of the conferences and appearances before the Court, and had personal knowledge of the facts she testified to.

Following the hearing, the parties filed post-hearing submissions.

The Court sets forth below its findings of fact and conclusions of law, which are based on the credible testimony adduced and the documentary evidence admitted into evidence at the hearing.

### **Findings of Fact**

To finance the purchase of the property known as 107-31 Watson Place, Jamaica, New York 11433 (the "Property"), the defendants John Morain ("Mr. Morain") and Ms. Morain (collectively, the "defendants") borrowed the sum of \$476,215.00 from the plaintiff, Carrington Mortgage Services, Inc. ("CMS" or the "plaintiff").

The defendants executed two documents on March 6, 2014 relative to the loan. The first was a note in favor of the plaintiff. The second was a mortgage in favor of Mortgage Electronic Registration Systems, Inc., as Nominee for CMS, which encumbers the Property. The loan was insured by the Federal Housing Administration ("FHA"), which is part of the Department of Housing and Urban Development ("HUD"), and thus subject to HUD regulations.

In 2015, Ms. Morain became ill, and the marital relationship between the defendants came to an end. Ms. Morain, who continued to live at the Property after the marriage ended, fell behind on the loan payments to the plaintiff.

Ms. Morain is now the sole owner of the Property because by deed, dated November 20, 2015 and recorded on November 27, 2015, Mr. Morain transferred his interest in the Property to her. (See, Exhibit "I", the RMA to which the quitclaim deed is attached).

Ms. Morain's daughter, Ms. Phillip, lives at the Property, and contributes the sum of \$800.00 per month towards household expenses, including the mortgage. (See, Exhibit "I", the RMA and the hearing transcript (the "Transcript") at p. 30).

The plaintiff commenced this action on January 19, 2016, contending that the defendants defaulted relative to the mortgage and the note by failing to make the payment due on July 1, 2015 and all subsequent payments.

Settlement conferences began in September 2016, and Queens Legal Services represented Ms. Morain at same. The Court takes judicial notice of Referee Evans' notes from a December 7, 2016 conference which directed and reminded the plaintiff "not to contact D [Ms. Morain] directly."

At the start of efforts to settle this matter, the plaintiff requested that Ms. Phillip submit an RMA. However, Ms. Morain's attorney, Jonas, testified at the hearing that doing so would be fraudulent because the RMA would indicate that Ms. Phillip was a borrower, which she was not. (*See*, Transcript at pp. 69-70). The plaintiff's witness at the hearing, Gordon, testified that by including Ms. Phillip's monthly contributions of \$800.00 in the RMA, Ms. Phillip would have to assume the loan with her mother. (*See*, Transcript at pp. 41-43). Gordon's statement finds no support in the record, and is flatly contradicted by the testimony of both Ms. Morain and Ms. Phillip. Furthermore, Gordon's testimony on this issue is undermined by CMS' own letter dated April 7, 2017. The subject letter, which is discussed below, indicates that CMS required that a non-borrower sign an RMA, but no requirement that the non-borrower assume the loan. Moreover, as explained below, the plaintiff, through its attorneys, waived the requirement that Ms. Phillip sign an RMA.

The plaintiff provided Ms. Morain with a Request for Mortgage Assistance ("RMA") package, which she later filed. In response thereto, the plaintiff, in November 2016, sent an Incomplete Information Notice to Ms. Morain, requesting that Ms. Phillip submit an additional RMA.

The plaintiff ultimately denied Ms. Morain's RMA in January 2017 because of Ms. Phillip's refusal to comply with the request that she file an RMA. In response to the plaintiff's denial, Morain's counsel filed a complaint with the Consumer Financial Protection Bureau ("CFPB"). By letter, dated April 7, 2017, CMS responded to the complaint, stating *inter alia*, that its policy is to require a non-borrower to sign an RMA:

... CMS requires all non-borrower(s) to complete an RMA form. This requirement confirms the non-borrower contributor's understanding and agreement that their income and expenses will be used towards the review and qualification of a loan modification. Additionally, the form provides authorization to CMS to obtain a credit report for the non-borrower, and includes a signed certification that all information provided is truthful. (*See*, Exhibit "F").

The subject letter further states that due to the failure to submit an RMA from Ms. Phillip, Ms. Morain's application was deemed incomplete, and her request for assistance was "declined/cancelled." (*Id.*) Jonas testified that this requirement was not supported by the RMA. In any event, even if a non-borrower were required to complete an RMA, by the clear terms of the plaintiff's letter to the CFPB, there is no requirement for a non-borrower to eventually assume the

loan. Because CMS deemed the application incomplete, the denial was not eligible for an internal appeal. (*Id.*)

At a settlement conference on April 24, 2017, Ms. Morain argued that Ms. Phillip, a non-borrower contributor, did not need to submit an RMA. The plaintiff took a contrary position, contending that HUD guidelines require a non-borrower contributor, such as Ms. Phillip, to submit an RMA. Ms. Morain then requested a bad faith hearing. The plaintiff opposed this request, stating that because it had not received a completed RMA from Ms. Phillip, the hearing should not go forward.

On April 24, 2017, over the plaintiff's objections, Referee Evans set this matter down for a bad faith hearing in June 2017 before Referee Tracy Catapano-Fox. When the parties appeared before Referee Catapano-Fox, the plaintiff's attorney, Robyn Goldstein, Esq., represented to the Referee and Ms. Morain's counsel that Ms. Phillip did not have to submit an RMA. (*See*, Jonas' testimony at p.77 of the Transcript).

Based upon Attorney Goldstein's representation, the bad faith hearing did not go forward. Referee Catapano-Fox directed: the plaintiff to send a non-borrower contribution form by June 15, 2017; Ms. Morain to submit a new RMA by June 30, 2017; the plaintiff to send a missing documents letter by July 14, 2017; and Ms. Morain to respond to the subject letter by July 28, 2017. The case was remanded back to the Settlement Conference Part before Referee Evans and adjourned to August 11, 2017.

On June 9, 2017, the plaintiff, through its attorneys, Jeffrey A. Kosterich, LLC, by Robyn Goldstein, Esq., memorialized and confirmed the plaintiff's waiver of its demand that Ms. Phillip submit an RMA. The plaintiff did so through an e-mail from Attorney Goldstein to Ms. Morain's counsel, which states as follows:

My client has advised that the new Contributor RMA form which was discussed at the last conference in this matter is not yet available for distribution. However, in light of our discussion at the last Court appearance in this matter, and since *the non-borrower is unwilling to complete the regular RMA form* [emphasis added]...my client has agreed to accept [Ms. Morain's completed RMA, along with Ms. Phillip's bank statements, proof of income, and authorization for a credit report] ... (*See*, Exhibit "I")

In other words, the plaintiff, through its counsel, agreed that an RMA from Ms. Phillip was not required.

In accordance with said waiver by the plaintiff, Ms. Morain submitted an entirely new and complete RMA, dated June 27, 2017. The subject RMA submitted by Ms. Morain included Ms. Phillip's income, but not an RMA from Ms. Phillip. Furthermore, the RMA was signed by Ms. Morain, but not Mr. Morain. The plaintiff thereafter offered Ms. Morain a JPP.

Through an e-mail to Ms. Morain's counsel transmitted on October 25, 2017, which attached a letter addressed to Mr. Morain and Ms. Morain, the plaintiff notified Ms. Morain that she was found eligible for a "permanent Loan Modification under the Federal Housing Administration Home Affordable Modification Program [FHA-HAMP] with Carrington Mortgage Services, LLC ["CMS"] ..." The letter further went on to explain that to accept the offer, the defendants needed to sign and return the attached TPP, and make the first payment by December 1, 2017. (*See*, Exhibit "J").

Inexplicably, Jonas and Ms. Morain received materially different versions of the TPP from the plaintiff. (*See*, Exhibits "J" and "M").

Gordon testified that one version of the TPP, which the plaintiff prepared, contained two signature lines, one for Ms. Morain and the other for Mr. Morain, but none for Ms. Phillip. (*See*, Transcript at pp. 54-55).

The second version of the TPP, which the plaintiff prepared and then improperly and impermissibly mailed to Ms. Morain, contained signature blocks for Ms. Morain, Mr. Morain and Ms. Phillip. By mailing the TPP directly to Ms. Morain, the plaintiff was thus requesting, *inter alia*, that Ms. Phillip also sign the document. The version of the TPP the plaintiff improperly sent directly to Ms. Morain was signed by her, Mr. Morain and Ms. Phillip, and then mailed directly back to the plaintiff.

Ms. Morain testified that Ms. Phillip signed the TPP because both believed it was going to be for the trial period and no one explained that the plaintiff sought to have Ms. Phillip to assume the loan. Ms. Phillip similarly testified that as a contributor to the household income, she thought she had to sign the TPP, but was never informed that she would later have to assume the loan. The Court concludes that the testimony of both Ms. Morain and Ms. Phillip on these issues is credible in all respects.

After Ms. Morain, Mr. Morain and Ms. Phillip signed the TPP, all three monthly payments prescribed thereby were made by Ms. Morain. Ms. Morain made two additional payments, in March 2018 and April 2018, respectively. However, CMS rejected and returned the April 2018 payment to her.

In February 2018, after all the payments required by the TPP were made, the plaintiff sent Ms. Morain a permanent loan modification agreement, together with other documents. Among these documents was an assumption and modification agreement relative to the mortgage, which the plaintiff contended also had to be signed by Ms. Phillip. (*See*, Exhibit "K").

Under the assumption and modification agreement, Ms. Phillip would have been obligated to assume the mortgage. However, there is no dispute that Ms. Phillip had never been and was not an owner of the Property, and thus could not give a mortgage on the Property. The plaintiff nonetheless contended that Ms. Phillip was required to sign the subject agreement because her income was used in the review and approval of the final loan modification.

At a settlement conference with Referee Lance Evans in February 2018, Ms. Morain



explained that she declined to sign the permanent modification agreement and related documents because doing so would have required Ms. Phillip to assume the loan, *i.e.*, be a co-borrower, a condition, which, as stated above, the plaintiff had previously waived.

Referee Evans directed the plaintiff to provide legal authority for its demand that Ms. Phillip execute the permanent loan modification agreement by March 22, 2018. (*See*, Transcript at p. 83) The plaintiff failed to comply with said directive in a timely manner. (*Id.*)

Ultimately and belatedly, on April 25, 2018, plaintiff presented legal authority for its demand, contending that Ms. Phillip was obligated to sign the permanent loan modification agreement because of applicable HUD guidelines. Ms. Morain, through counsel, again contended that the guidelines did not impose such a condition, and reiterated a request for a hearing pursuant to CPLR § 3408. Referee Evans granted said application, and thus referred this matter to the undersigned for a hearing.

At the hearing, Gordon admitted to errors contained in the assumption and modification agreement and related documents prepared by the plaintiff. One error was that Ms. Phillip was listed as an original mortgagor. (*See*, Exhibit "K"). The other is that the proposed partial claims mortgage, which was prepared by the plaintiff for Ms. Morain and Ms. Phillip to execute, indicated that both were able to mortgage, grant, and convey the Property (*id.*). However, because Ms. Phillip has never been an owner of the Property, she has no right to mortgage, grant or convey the Property. Gordon had no explanation for these mistakes.

Ms. Morain testified that prior to her receipt in March 2018 of the permanent loan modification and related documents, the plaintiff had never indicated that Ms. Phillip would have to assume the loan. Ms. Morain further testified that she did not want to share ownership of the Property with Ms. Phillip, and that she does not want her daughter to have the responsibility of a loan. Thus, the permanent loan modification agreement was not signed by either Ms. Morain or Ms. Phillip.

On the issue of whether Ms. Phillip was required to assume the loan, Gordon testified that the requirement that a non-borrower contributor sign the permanent loan modification agreement is in compliance with the FHA Handbook Rules 4000.1. (*See*, Exhibit "1"). Gordon further testified that although the plaintiff's counsel waived, in June 2017, the requirement that Ms. Phillip submit an RMA, the plaintiff was nonetheless permitted to insist that Ms. Phillip assume the loan.

The Court finds Gordon's testimony that Ms. Phillip was required to assume the loan to be contradictory to CMS' position in its letter response to the CFPB complaint, and without a basis in fact or law. The Court further finds that his entire testimony was wholly incompetent and lacked any probative value. Gordon had no personal knowledge of the facts of this case, and had not been involved in the evaluation of Ms. Morain's application or the issuance of any of the plaintiff's document requests or notification letters. Moreover, even though Gordon testified to being an attorney, he refused to testify to legal definitions, opinions and interpretations when asked. He was, in all respects, evasive in his answers to the questions posed by Ms. Morain's counsel.



### Conclusions of Law

Based upon the court's records, and the credible testimony adduced and the documentary evidence admitted into evidence at the hearing, the Court concludes that the record amply supports a finding that the plaintiff did not negotiate in good faith pursuant to CPLR § 3408 on numerous grounds.

First, the plaintiff failed to negotiate in good faith because of its insistence that Ms. Phillip execute an RMA, and assume the note and mortgage. "Waiver is an intentional relinquishment of a known right and should not be lightly presumed" (*Gilbert Frank Corp v Federal Ins. Co.*, 70 NY2d 966, 968 [1988]). Here, even if the HUD regulations may have required Ms. Phillip, a contributor and non-borrower, to submit an RMA, the plaintiff waived this requirement through its attorneys. The plaintiff's attorneys orally agreed that Ms. Phillip would not have to submit an RMA in June 2017, and thereafter memorialized and formalized this agreement in an e-mail to Ms. Morain's counsel. (*See*, Exhibit "H"). In view of these undisputed facts, the Court concludes that Ms. Phillip was not required to submit an RMA and assume the mortgage as a condition for Ms. Morain to obtain a permanent loan modification. Furthermore, the plaintiff's insistence that Ms. Phillip submit an RMA and assume the mortgage, despite the waiver of these conditions by its own attorneys, constitutes bad faith within the meaning of CPLR § 3408.

Second, the plaintiff failed to negotiate in good faith by transmitting a TPP directly to Ms. Morain, despite its full knowledge that she was represented by counsel and had been previously directed by Referee Evans not to contact her directly.

Third, the plaintiff's transmittal of two materially different versions of the TPP, one directly to Ms. Morain and the other to her counsel, also constitutes bad faith. The version of the TPP sent by the plaintiff directly to Ms. Morain was to be signed by her, Mr. Morain and Ms. Phillip, despite the plaintiff's prior waiver of any alleged requirement that Ms. Phillip submit an RMA. Moreover, the version of the TPP the plaintiff transmitted to Ms. Morain's counsel was materially different as it was to be signed by Ms. Morain and Mr. Morain, only.

Fourth, contrary to the plaintiff's argument, the Court concludes, on the facts and the law, that the guidelines stated in the FHA Single Family Housing Policy Handbook 4000.1 do not require that Ms. Phillip assume the loan. The plaintiff's insistence that she do so is yet another example of its bad faith.

Fifth, the plaintiff is guilty of bad faith by failing, without any explanation, to timely comply with Referee Evans' directives on February 22, 2018 to exchange with opposing counsel the legal authority for its demand that Ms. Phillip sign an RMA.

Sixth, consistent with Attorney Goldstein's e-mail, the last loan modification application was submitted on June 27, 2017, without Ms. Phillip's signature, but with a contribution letter from her. The plaintiff then offered the TPP, nearly 120 days later, on October 25, 2017. The plaintiff has offered no explanation for the length of time it took to evaluate Ms. Morain's application, which is also consistent with the plaintiff's failure to negotiate in good faith.

Seventh, once Ms. Morain successfully completed the TPP based on an RMA which did not include Ms. Phillip as an applicant, the plaintiff, as required by HUD regulations, was obligated to offer Ms. Morain a permanent loan modification without the precondition that Ms. Phillip assume the mortgage (*see*, FHA Single Family Housing Policy Handbook 4001.1 § III.A.2.v.(E)(5)(a)). Thus, the plaintiff's refusal to offer Ms. Morain the permanent loan modification constitutes another example of its failure to negotiate in good faith.

Eighth, the actions of the plaintiff and its agents, including its attorneys, constitute, at best, incompetence, which somehow led to them to the mistaken belief that Ms. Phillip was the co-owner of the Property with Ms. Morain. At worst, the actions of the plaintiff and its agents, including its attorneys, constitute a concerted effort to deny Ms. Morain the permanent loan modification agreement that she is entitled to. This conclusion is predicated upon the written representation of one of the plaintiff's attorneys, Robyn Goldstein, Esq., who when faced with a bad faith hearing in June of 2017, represented to Referee Catapano-Fox, Ms. Morain and her attorney that a loan modification application would be considered without an RMA from Ms. Phillip, meaning that an assumption of the loan from Ms. Phillip was not necessary.

The Court also finds that the defenses advanced by the plaintiff at the hearing had no basis in either fact or law, and were thus frivolous. Here, the plaintiff could not and did not escape the consequences of, *inter alia*, its waiver of the alleged requirement that Ms. Phillip assume the loan, and its transmittal of two materially different versions of the TPP to Ms. Morain and her counsel.

Despite the foregoing, the plaintiff made the frivolous argument at the hearing that the Court should limit the plaintiff's clear waiver of an RMA from Ms. Phillip to the application for a TPP only, but not to the permanent loan modification agreement resulting therefrom. This position would make the whole application process an exercise in futility. Furthermore, the plaintiff had long been aware that both Ms. Morain and Ms. Phillip did not want Ms. Phillip to assume the mortgage, which is why they refused to, *inter alia*, submit an RMA from Ms. Phillip. Moreover, any assumption of obligations under the original note and mortgage by Ms. Phillip is impossible because Ms. Phillip has never been and is not an owner of the Property.

Sanctions may be imposed, *inter alia*, on the Court's own initiative for frivolous conduct (*see*, *Khan-Soleil v Rashad*, 111 AD3d 727 [2d Dept 2013]). Conduct is frivolous where, *inter alia*, it is completely without merit in law or is undertaken to primarily to delay or prolong the resolution of an action (*Strunk v New York State Bd. of Elections*, 126 AD3d 779 [2d Dept 2015]). "The decision to award ... sanctions, and the nature of those costs and sanctions, is generally entrusted to the trial court's sound discretion [internal quotation marks and citations omitted]" (*Notaro v Performance Team*, 161 AD3d 1092, 1093 [2d Dept 2018]).

For the reasons expressed above, the plaintiff's position that it negotiated in good faith pursuant to CPLR § 3408 is without merit. On the contrary, on both the facts and the law, the plaintiff's position during the course of this hearing is factually and legally without merit.

Before a sanction may be imposed on a party or its counsel, a reasonable opportunity to be heard must be accorded (*see*, *Khan-Soleil v Rashad*, 111 AD3d 727). The Court therefore schedules

this matter, as directed below, for a sanctions hearing on the issues of whether the conduct of the plaintiff and its counsel, Jeffrey A. Kosterich, LLC, that is described above: is without merit in fact and law; has prolonged and delayed this action; and the amount, if any, of sanctions to be imposed upon the plaintiff and the plaintiff's counsel.

Accordingly, for the reasons stated above, it is hereby:

ORDERED, that all interest and late charges relative to the loan at issue in this case are hereby tolled from May 1, 2017 to the date of this Decision and Order After Hearing; and it is further,

ORDERED, that all attorneys' fees incurred by the plaintiff relative to this action are hereby tolled from May 1, 2017 to the date of this Decision and Order After Hearing; and it is further,

ORDERED, that the plaintiff provide an updated and detailed payoff statement, excluding the interest, late charges and attorneys' fees that are tolled above, to Ms. Morain's counsel within 10 (ten) days hereof; and it is further,

ORDERED, that because the plaintiff waived any requirement that Ms. Phillip assume the loan; offered Ms. Morain a TPP without the condition that Ms. Phillip assume the loan; accepted the three payments prescribed by the TPP from Ms. Morain; and as prescribed by applicable HUD guidelines, the plaintiff is directed to offer Ms. Morain a permanent loan modification without the conditions that Ms. Phillip sign the permanent loan modification agreement and assume the loan on or before January 10, 2019; and it is further,

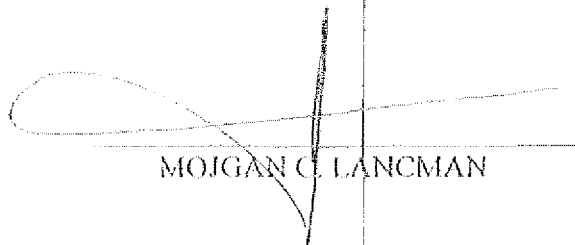
ORDERED, that a hearing will be conducted on February 7, 2019 at 10:00 a.m. in Courtroom 45 of the Courthouse located at 88-11 Sutphin Boulevard, Jamaica, New York 11435 relative to the following issues: whether the conduct set forth above of the plaintiff and its counsel, Jeffrey A. Kosterich, LLC, is without merit in fact and law and has prolonged and delayed this action; and the amount, if any, of sanctions to be imposed upon the plaintiff and its counsel, Jeffrey A. Kosterich, LLC; and it is further,

ORDERED, that Ms. Morain is awarded attorneys' fees in connection with the defense of this action from May 1, 2017 to the present, and that the hearing on February 7, 2019 shall also relate to the reasonable amount of the attorneys' fees to be awarded to her; and it is further,

ORDERED, that the plaintiff's counsel shall serve a copy of this Order on all parties on or before December 14, 2018, and submit proof of service thereof at the hearing.

This constitutes the Decision and Order of the Court, a copy of which is being transmitted via e-mail to the attorneys for the plaintiff and Ms. Morain.

Dated: Jamaica, New York  
December 4, 2018

  
MOJGAN C. LANCMAN