SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. J. MACHELLE SWEETING** **PART** **62**

Justice

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CHARLOTTE KALNIT,

Plaintiff,

- v -

141 EAST 88TH STREET, LLC,PHILIP HOUSE CONDOMINIUM, ROCK GROUP NY CORP., DJM NYC, LLC,

Defendants.

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INDEX NO. 155832/2018

MOTION DATE 06/21/2022, 07/11/2022

MOTION SEQ. NO. 014 015

DECISION + ORDER ON MOTION

DJM NYC, LLC

Plaintiff,

-against-

THE CITY OF NEW YORK, DEPARTMENT OF PARKS AND RECREATION OF THE CITY OF NEW YORK

Defendants.

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Third-Party
Index No. 595014/2020

ROCK GROUP NY CORP.

Plaintiff,

-against-

MAGA CONTRACTING CORP.

Defendant.

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Second Third-Party[1]
Index No. 595227/2020

The following e-filed documents, listed by NYSCEF document number (Motion 014) 378, 379, 380, 381, 382, 383, 384, 402, 404, 406, 408, 409

were read on this motion to/for REARGUMENT/RECONSIDERATION.

The following e-filed documents, listed by NYSCEF document number (Motion 015) 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 403, 405, 407, 410, 411, 412, 413, 414

[1] The Second third-party action has been discontinued, and the caption in this case shall be amended accordingly to reflect the same.

were read on this motion to/for JUDGMENT - SUMMARY .

Procedural Background

In the underlying action, plaintiff Charlotte Kalnit ("plaintiff") alleges that on March 31, 2018, she fell outside the premises located at 141 E. 88th Street (the "premises"), in the County of New York, City and State of New York. Plaintiff submitted photos of the alleged accident location (NYSCEF Document #197).

Plaintiff commenced this action on June 21, 2018 against: (1) Philip House Condominium (the "Owner") of the premises; (2) 141 East 88th Street, LLC (the "Manager") for the commercial tenants; and (3) Rock Group NY Corp. (the "Contractor"), which erected the scaffold shed. Plaintiff later filed an Amended Summons and Complaint and added DJM NYC, LLC (the "General Contractor"), as a defendant.

On January 3, 2020, the General Contractor commenced a third-party action against the City of New York and Department of Parks and Recreation of the City of New York (collectively, the "City"), seeking common law indemnification and contribution. On March 4, 2020, defendant Contractor commenced a second third-party action against MAGA Contracting Corp. (the "Subcontractor"), seeking common law indemnification and contribution.

On March 16, 2020, the court (Hon. Laurence L. Love) granted the Manager's summary judgment motion (Motion #005) and dismissed all claims and cross-claims as against the Manager. On June 22, 2021, the undersigned issued a decision that denied the summary judgment motions filed by the Owner, the General Contractor and the Contractor (Motions #006, #007 and #008 respectively). On November 1, 2021, the second third-party action against the Subcontractor was discontinued without prejudice.

Instant Motions

Now pending before the court are two motions:

The first is Motion #014, filed by the General Contractor seeking an order, granting leave under Civil Procedure Laws and Rules ("CPLR") Section 2221(e), to renew and reargue the portion of its motion (Motion #007) that had sought summary judgment pursuant to CPLR 3212.

The second is Motion #015, in which the City seeks an order, pursuant to CPLR 3211(a)(7), dismissing the cross-claims filed against he City on the grounds that the third-party plaintiff General Contractor failed to state a cause of action. The City also seeks summary judgment in its favor, on the grounds that, pursuant to § 7-201 of the Administrative Code of the City of New York, the City did not receive prior written notice of the defect that allegedly caused plaintiff's accident.

General Contractor's Motion to Renew and Reargue (Motion #014)

The General Contractor argues that it now has new facts that were not offered in its prior motion (Motion #007), and tht such facts would change this court's prior determination. Specifically, the General Contractor argues that after Motion #007 was decided, the General Contractor deposed Arthur J. Simpson, III and received discovery from the City that included certified records. The General Contractor argues that based on this discovery, new facts emerged that clarified and confirmed that the City installed, caused and created the alleged hazard that caused plaintiff's injuries. The General Contractor argues that, "As Plaintiff is alleging that she fell in a tree well, and that the subject tree well was the direct cause of her injuries, plaintiff's case is clearly against the City, and DJM should be granted summary judgment dismissal of plaintiff's claims against it."

The Contractor joined in the General Contractor's motion and also argued that plaintiff's alleged trip and fall was the result of her contact with a tree well, and was not caused or created by the sidewalk shed or any portion thereof. The Contractor further argues that regardless of which party was charged with the maintenance of the sidewalk shed, there is no indication on the record that the sidewalk shed had anything to do with the accident. The Contractor contends that plaintiff herself stated that she never made contact with the sidewalk shed and, therefore, all claims and cross-claims against the Contractor should be dismissed.

Similarly, the Owner argued that the subject accident was the result of plaintiff's foot coming into contact with a tree well that is owned and maintained by the City and was not caused by the sidewalk or any portion of the scaffold erected thereon. As such, the Owner argues, all claims and cross-claims against the Owner should be dismissed.

In opposition, plaintiff argues, first, that this motion is untimely, as it was brought outside the 30-day limit set forth in CPLR 2221(d)(3). Second, plaintiff argues that at the time the General Contractor filed its original motion for summary judgment, the third-party complaint had already been filed against the City and discovery in the third-party action was incomplete - yet the General Contractor chose to file its motion anyway. Plaintiff argues that the General Contractor should not be allowed to claim that the subsequent production from the City constituted "new" evidence, as the General Contractor should have either waited for the production of this evidence before making its original motion, or requested that its original motion be held in abeyance pending the completion of discovery from the City. Third, plaintiff argues that even if this motion is properly before the court, it should be denied because the court already found, in its earlier decision, that "While it is clear that defendants had no duty to maintain the tree well . . . it is beyond dispute that Philip House had a duty to maintain the sidewalk in a reasonably safe condition, and that

liability may be imposed on it for personal injuries proximately caused its failure to do so." Therefore, plaintiff argues, any evidence confirming that the City was required to maintain the tree well is immaterial and does not constitute "new" evidence.

As a preliminary matter, on the issue of timeliness, this court's decision was issued on June 22, 2021 (NYSCEF Document #329). However, the current motion was not filed until June 21, 2022, which is almost a full year later, and well beyond the 30-day timeframe provided in CPLR 2221(d)(3) for motions to reargue. Accordingly, dismissal is appropriate on this grounds alone, as plaintiff correctly contends that the motion is untimely.

The crux of the General Contractor's argument to renew is that new evidence definitively shows that it was solely the City who installed and maintained the tree well, and hence, the General Contractor, who had no involvement with the tree well, cannot be liable for plaintiff's accident. Not only was this argument made, and decided, in the original motion, but to argue that a party that had no involvement with the tree well cannot be liable ignores, in its entirety, plaintiff's theory of the case, which is, *inter alia*, that the scaffolding and the narrowing of the sidewalk were instruments of harm that caused plaintiff's injuries. Plaintiff's theory of the case is further set forth in detail in plaintiff's deposition testimony (transcript at NYSCEF Document #103), and a summary of the same that was submitted in opposition to the General Contractor's original motion (NYSCEF Document #271).

City's Motion to Dismiss and/or for Summary Judgment

The arguments made by the City center on prior written notice, or the lack thereof. The City argues that the third-party plaintiff General Contractor failed to state a cause of action against the City insofar as the General Contractor failed to plead that the City had prior written notice of the subject defect. The City also argues that summary judgment should be granted in its favor, because the City did not receive prior written notice of said defect. In support of its argument the City submitted, *inter alia*, five sworn Affidavits (NYSCEF Documents #390-394) from individuals who reviewed certain City records. The City argues that the results of these searches definitively shows that the City had no prior written notice of the defect.

Opposition papers were filed by the General Contractor, the Contractor, and the Owner. None of the opposing parties dispute the fact that prior written notice was not given to the City.

However, the opposing parties argue that in this case, prior written notice is not necessary because the City caused and created the defect at issue. Specifically, the General Contractor argues:

> 4. The evidence is also clear that the City supervised, directed, controlled, and engaged in inspection, installation and maintenance of the subject tree well and pavers installed within the tree well area, upon which the Plaintiff alleges to have fallen, and had an ongoing maintenance requirement, thereby causing and creating said alleged hazard upon which Plaintiff alleges to have fallen (See NYSCEF Doc. Nos. 382 and 381). Namely, on December 3, 2021, Arthur J. Simpson III testified on behalf of the City. (See NYSCEF Doc. No. 382). Most relevantly, Mr. Simpson testified that Certain work was performed on the subject tree well by Olsen's Creative Landscaping, the City's contractor (See NYSCEF Doc. No. 382, P. 36, Ln. 5-22), but the City of New York performed tree removal (Id. at P. 38, Ln. 4-14); and A tree bed was created by cutting concrete, as well as excavation and mulching, including replacing top soil, down two feet into the ground (P. 42-43), and thereafter tree planting was performed, and also block paver installation, followed by tree replacement about two years later, all performed by Olson's Creative Landscaping, as commissioned by the City (See Id. P. 38-40).
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> 5. Mr. Simpson inspected the subject tree well for tree planting on January 26, 2009. (See Id. at P. 77, Ln. 15-25, P. 78, Ln. 2-8, 14-19). The City created a work order for the tree planting. (Id. at P. 79, Ln. 24-24, P. 80, Ln. 2-9; P. 80, Ln. 19-25; P. 81, Ln. 2-23). Additionally, for a period of time thereafter (two-years), Olson's watered the tree once

every two weeks, in between May 15th and October 15th, and they also mulched at that time as well (P. 43).

[...]

7. Additionally, there was an inspection performed by the City following substantial completion of the work of the City's contractors, including following the installation of granite pavers, in whereby the City accepts the site (See Id. at P. 44, Ln. 15-25) and the City continues to take responsibility for and maintain the tree well, indefinitely, whenever maintenance and/or repair is needed (See Id. P. 140, Ln. 19-25).

[…]

22. In the within action, assuming arguendo there was any hazard with regard to the subject tree well as alleged by the Plaintiff, this alleged hazard would have been caused and created by the City (See e.g. Exhibit H of the City's motion), as the City is the only entity which performed work within the tree well and which had the affirmative duty to continue to maintain said tree well, which was installed, excavated, planted, and maintained by the City, as confirmed by the deposition testimony of the City's representative in connection with this lawsuit. […]

23. Henry Hernandez, on behalf of Philip House, testified that the tree well was elongated by the City of New York in approximately 2015 or 2016, and during that process, the City inserted bricks into the tree well. See NYSCEF Doc. No. 210, P. 46. The City affirmation in support confirms that this work took place. (NYSCEF doc. no. 386 ¶ 59). The City also removed the first tree in the well and planted a new tree in its stead. Id. at 52. It is therefore clear that the subject tree well was owned, renovated, planted, excavated for the planting of trees and paver stones, and maintained by the City. (NYSCEF doc. no. 386 ¶ 59).

[…]

29. It is respectfully submitted that Plaintiff's testimony that there was about a two and a half to three inch drop in elevation into the brick area within the City's tree well is clear evidence that the paving stones/bricks which the City installed into its tree well were defectively and negligently installed. Thus, the City caused and created the defect alleged by the Plaintiff, which has absolutely no connection to the sidewalk bridge visible in the photographs exchanged by the Plaintiff.

34. […] the City was negligent with respect to the subject tree well, which it owned, renovated, planted, excavated for the planting of trees and paver stones, and maintained. (NYSCEF doc. no. 386 ¶ 59). It is undisputed that the paver stones were installed in the tree well by the City and Plaintiff's testified that there was about a two and a half to three-inch drop in elevation into the paver stone area within the City's tree well. City installed into its tree well were defectively and negligently installed. Thus, if the Court credit's Plaintiff's testimony, then the City caused and created the defect alleged by the Plaintiff.

The Owner argues:

4. The City has failed to establish that it did not affirmatively create the alleged defect when it performed restoration of the subject sidewalk and tree well. Specifically, the City admits that it performed "tree planting and granite block paver installation, also tree removal and tree replacement as well" at the accident location. See City Aff. in Support, Ex. "H"; NYSCEF Doc. No.: 382, p. 36. The City further admitted that its hired contractor, Olson's Creative Landscaping, replaced a tree in the subject tree well two years after its construction and routinely visited the accident location to continuously mulch and water the tree and tree well. NYSCEF Doc No.: 382, p. 43. Finally, the City exclusively maintains and inspects the subject tree well, and performs repairs when a dangerous/defective condition (i.e. if the granite block pavers have sunk more than standard three inches) exists. See NYSCEF Doc No.: 382, p. 140.

5. In the case at bar, Plaintiff testified that her foot got caught due to the uneven pavers in the tree well. Plaintiff further testified that the pavers had dropped two-and-a-half to three inches into the tree well. See NYSCEF Doc No.: 297, p. 20.

6. The City has failed to demonstrate that the granite block pavers were properly installed and that the City's affirmative acts of installing the tree well did not create the alleged defect. See Zorin v. City of New York, 137 A.D.3d 1116, 1118, 28 N.Y.S.3d 116 (2d Dep't 2016) ("…Administrative Code § 7-210 does not shift tort liability for injuries proximately caused by the City's affirmative acts of negligence…").

7. As stated above, the City did not establish *prima facie* that it did not affirmative create the allegedly dangerous/defective tree well upon which Plaintiff tripped and fell. Accordingly, the City's motion must be denied in its entirety.

The Contractor argues:

4. […] The Philip House representative testified that The City elongated the tree well in approximately 2015 or 2016 and in that process, it inserted bricks into the tree well. See NYSCEF Doc. No. 210, p. 46. The City's representative also confirmed that it continued to perform work on this tree well. See NYSCEF Doc. No. 382. Accordingly, The City's motion for summary judgment must be denied, as there are issues of fact as to whether The City created the alleged defect at issue inside the tree well that it elongated.

Plaintiff, who, notably, did not file a complaint against the City, filed an Affirmation in Response (NYSCEF Document #411) to the City's motion. This Affirmation states, in part:

> Defendant/Third-Party Plaintiff, DJM NYC, LLC's statement that "Plaintiff alleges to have fallen on the tree well and not as a result of the scaffolding," is simply untrue. It is clear from the plethora of Affirmations submitted by Plaintiff in this action that she has repeatedly alleged her fall was precipitated by the narrowing of the sidewalk due to the improperly placed sidewalk shed, erected at the behest of Defendant, ROCK GROUP NY CORP., pursuant to contract with Defendant, DJM NYC, LLC, retained by Defendant, PHILIP HOUSE CONDOMINIUM, to complete repairs of its building's facade. It is irrelevant that Plaintiff did not make physical contact with the sidewalk shed, as the placement of the sidewalk shed support poles left pedestrians with only a three foot wide portion of sidewalk upon which to traverse, in violation of Building Code 3307 which requires a five-foot wide path for pedestrian traffic.
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> […]
>
> Plaintiff has never alleged that Defendants, DJM, PHILIP HOUSE, nor ROCK GROUP were responsible for the condition of the tree-well. […] Even if, arguendo, City of New York was negligent in failing to repair the tree well, the lack of prior written notice to the City of New York precludes any action. Further, Defendant, DJM, has failed to demonstrate that the City had affirmatively created any defect in the tree well since the repairs did not lead to the "immediate" creation of a dangerous condition.

As the New York Court of Appeals stated in Katz v City of New York, 87 NY2d 241 (1995):

> Administrative Code of the City of New York § 7-201 (c) limits the City's duty of care over municipal streets and sidewalks by imposing liability only for those defects or hazardous conditions which its officials have been actually notified exist at a specified location […] ***prior written notice of a defect is a condition precedent which plaintiff is required to plead and prove*** to maintain an action against the City […]. The failure to demonstrate prior written notice leaves plaintiff without legal recourse against the City for its purported nonfeasance or malfeasance in remedying a defective sidewalk. Because this prior written notice provision is a limited waiver of sovereign immunity, in derogation of common law, it is strictly construed.

See also Kales v City of New York, 169 AD3d 585 (1st Dept 2019) ("No action may be maintained against the City of New York as a result of injury arising from a dangerous, defective, unsafe, or obstructed condition on its, *inter alia*, streets or sidewalks unless the City received prior written

notice of such condition and failed to repair it within 15 days of such notice (Administrative Code of City of NY §7-201[c][2]). Failure to 'plead and prove' such prior written notice requires dismissal of the complaint" [emphasis added]); Kelly by Kelly v City of New York, 172 AD2d 350 (1st Dept 1991) ("the failure to plead and prove such written notice requires dismissal of the complaint").

Here, with respect to the branch of the City's motion, pursuant to CPLR 3211(a)(7), a review of the third-party complaint (NYSCEF Document #118) against the City shows that third-party plaintiff General Contractor failed to plead that the City had received prior written notice of the defect, and the General Contractor does not argue otherwise in its opposition filings.

With respect to the branch of the City's motion, pursuant to CPLR 3212, it is undisputed on this record that the City did not receive prior written notice of the subject defect. The relevant caselaw makes clear that once a municipality establishes that it lacked prior written notice, the burden shifts to the plaintiff to demonstrate that the municipality affirmatively created the defect. *See, e.g.* Yarborough v City of New York, 10 NY3d 726 (Ct. of Appeals 2008) ("Where the City establishes that it lacked prior written notice under the Pothole Law, the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule - that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality;" Dunn v City of New York, 206 AD3d 403 (1st Dept 2022) ("The City established its *prima facie* entitlement to summary judgment by submitting proof establishing that it did not have notice of the allegedly defective condition […]. As a result, the burden shifted to plaintiff to establish one of the exceptions to the notice requirement – here, that the City affirmatively created the defect through an act of negligence or did roadwork that would have resulted in an immediately apparent dangerous condition").

Contrary to the arguments made by the opposing parties, the burden here is not on the City, but on the parties opposing the motion to demonstrate that the City affirmatively created the defect through an act of negligence.

The court first emphasizes again that plaintiff does not allege that the tree well was defective or that her injuries were caused by any defect in the tree well. Rather, plaintiff alleges she fell due to the placement of the scaffolding, not due to any defect in the tree well itself. Moreover, the caselaw is clear that the affirmative negligence exception is limited to work by the municipality that "immediately results" in the existence of a dangerous condition. *See., e.g.* Yarborough, *supra* ("The affirmative negligence exception is limited to work by the City that immediately results in the existence of a dangerous condition […] Even assuming the City performed the negligent pothole repair, plaintiffs' expert found that the deterioration of the asphalt patch - the condition that caused plaintiff's injury - developed over time with environmental wear and tear"); Oboler v City of New York, 8 NY3d 888 (2007) ("the affirmative negligence exception is limited to work by the City that immediately results in the existence of a dangerous condition. Here, plaintiff presented no evidence of who last repaved this section of the roadway before the accident, when any such work may have been carried out, or the condition of the asphalt abutting the manhole cover immediately after any such resurfacing"); Bielecki v City of New York, 14 AD3d 301 (1st Dept 2005) ("We understand the affirmative negligence exception to the notice requirement to be limited to work by the City that immediately results in the existence of a dangerous condition. Here, plaintiff's expert did not opine that the subject defect existed immediately upon the completion of the City's repair work. Rather, he opined that the defect developed over time as the result of water seeping into, and freezing within, the City's allegedly negligent patchwork repair of the pathway. If we were to extend the affirmative negligence

exception to cases like this one, where it is alleged that a dangerous condition developed over time from an allegedly negligent municipal repair, the exception to the notice requirement would swallow up the requirement itself, thereby defeating the purpose of the Pothole Law").

The opposition filings quoted above are largely devoid of any dates as to when the City performed the work that they claim allegedly created the defect. To the extent that any dates are cited at all, the most recent date is 2016, when the tree well was supposedly "elongated," and bricks/paver stones were inserted. Given that plaintiff's accident occurred on March 31, 2018, that would mean that the City last performed work on the tree well approximately 15 months before plaintiff's accident. Clearly, the record does support the opposing parties' contention that the city's work "immediately resulted" in the existence of a dangerous condition. *See also*: O'Brien v Vil. of Babylon, 196 AD3d 494 (2d Dept 2021) ("The Village established, *prima facie*, that it did not have prior written notice of a defective condition in the tree well area through the affidavit of the Village Clerk, who averred that her search of the Village's records revealed no prior written notice of any dangerous or defective condition at the subject location […] The only recognized exceptions to the prior written notice requirement involve situations in which either the municipality created the defect through an affirmative act of negligence, or a special use confers a special benefit upon the municipality. The affirmative negligence exception is limited to work by the municipality that immediately results in the existence of a dangerous condition. The Village established, *prima facie*, that it did not commit an affirmative act of negligence that immediately resulted in the existence of a dangerous condition. The affidavit of the plaintiffs' expert was insufficient to raise a triable issue of fact, as it was conclusory and speculative"); Donadio v City of New York, 126 AD3d 851 (2d Dept 2015) ("In order to hold the City liable for injuries resulting from defects in tree wells in City-owned sidewalks, a plaintiff must demonstrate that the City has

received prior written notice of the defect or that an exception to the prior written notice requirement applies. Contrary to the plaintiff's assertions on appeal, the evidence submitted on the motion for summary judgment of the defendants City of New York, New York City Department of Parks and Recreation, and New York City Department of Transportation, dismissing the complaint and all cross claims insofar as asserted against them demonstrated that they did not have prior written notice of the alleged defective condition of the tree well. In opposition to that *prima facie* showing, the plaintiff failed to raise a triable issue of fact as to whether the City defendants had prior written notice or that an exception to the prior written notice requirement applies"); Taustine v Inc. Vil. of Lindenhurst, 158 AD3d 785 (2d Dept 2018) ("Lucie Taustine alleges that she was injured when she tripped and fell while walking on an allegedly uneven sidewalk in Lindenhurst near a tree well and a dedication plaque […] The defendant established its *prima facie* entitlement to judgment as a matter of law by demonstrating that it did not receive prior written notice of the condition upon which Taustine allegedly tripped and fell, and that it did not create the dangerous condition through an affirmative act of negligence […] In opposition, the plaintiffs failed to raise a triable issue of fact. The plaintiffs neither argued in opposition to the defendant's motion at the trial level nor argue on this appeal that the defendant had prior written notice of the condition. Further, the plaintiffs failed to raise a triable issue of fact in opposition as to whether the defendant created the condition through an affirmative act of negligence which immediately resulted in the existence of the defect").

Conclusions of Law

For the aforementioned reasons as set forth herein, it is hereby:

ORDERED that Motion #014 filed by the General Contractor is DENIED in its entirety; and it is further

ORDERED that Motion #015 filed by the City is GRANTED; and it is further

ORDERED that the complaint and any cross-claims are dismissed as against the City of New York and the Department of Parks and Recreation of the City of New York, with prejudice; and it is further

ORDERED that this action is randomly re-assigned to a General IAS part; and it is further

ORDERED that the caption for this action is now:

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CHARLOTTE KALNIT,

Plaintiff,

- v - **INDEX NO.** 155832/2018

PHILIP HOUSE CONDOMINIUM, ROCK GROUP NY CORP., DJM NYC, LLC,

Defendant.

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and it is further

ORDERED that counsel for the City shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

12/16/2022
DATE

J. MACHELLE SWEETING, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:	X	INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE