172 Van Duzer Realty Corp. v Globe Alumni Student
2010 NY Slip Op 34112(U)
December 3, 2010
Supreme Court, New York County
Docket Number: 113137/2009
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD **PART** 31
Justice

Index Number : 113137/2009
172 VAN DUZER REALTY CORP.
vs.
GLOBE ALUMNI STUDENT
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

NYS SUPREME COURT
RECEIVED
DEC 06 2010
MOTION SUPPORT OFFICE

INDEX NO. _____
MOTION DATE 11.23.10
MOTION SEQ. NO. 002
MOTION CAL. NO. _____
this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ **Yes** ☐ **No**

Upon the foregoing papers, it is ordered that this motion

ORDERED that plaintiff's motion for summary judgment against defendant Association for breach of contract and against defendant Globe Institute for breach of guarantee is granted solely on the issue of liability; and it is further

ORDERED that upon all the papers and proceedings heretofore had, the court refers the issues of the amounts due plaintiff from defendants to a Special Referee to hear and determine (CPLR 4317 [b]) (*see Keeney v Keeney*, 297 AD2d 606 [1st Dept 2002]); and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon defendants and the Clerk of the Trial Support Office (Room 158) within 20 days of entry, file of a note of issue and a statement of readiness and pay the proper fees, if any, for the assessment hereinabove directed.

Dated: This constitutes the decision and order of the Court.
12.3.10

HON. CAROL EDMEAD J.S.C.

Check one: ☑ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

☐ **SUBMIT ORDER/ JUDG.** ☐ **SETTLE ORDER/ JUDG.**

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

172 VAN DUZER REALTY CORP.,

Index No. 113137/09

Plaintiff,

-against-

GLOBE ALUMNI STUDENT ASSISTANCE ASSOCIATION, INC. AND GLOBE INSTITUTE OF TECHNOLOGY, INC.,

Defendants.

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HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action for breach of commercial lease and written guarantee, plaintiff 172 Van Dozer Realty Corp. ("plaintiff") moves for summary judgment against defendants (a) holding Globe Alumni Student Assistance Association, Inc. ("Tenant" or "Association") liable for breach of its lease, (b) holding the Globe Institute of Technology, Inc. ("Guarantor" or "Globe Institute") liable under its Guarantee due to Globe Alumni Student Assistance Association, Inc.'s default under its lease, and (c) awarding damages against defendants in the amount of $1,683,759.32, plus interest and the costs and disbursements of this action.

Factual Background

On September 1, 2006, the Association leased the premises located at 172 Van Duzer Street, Staten Island, New York, (the "premises") from plaintiff pursuant to a lease, dated September 1, 2006 (the "Initial Lease") to use as a dormitory for students of Globe Institute. Globe Institute provided the Association with funds to pay the rent.

The Initial Lease was extended by an "Extension and Modification of Lease" dated May

9, 2007 (the "Lease Extension") (the Initial Lease and Lease Extension are collectively referred to as the "Lease").[1] In connection with the execution of the Lease Extension, the Guarantor executed a "Third Party Guarantee of Lease Obligation" (the "Guarantee"), also dated May 9, 2007, to guarantee the full performance by Tenant, its successors or assigns, of all the obligations of the Tenant under the Lease. It further provides that in the event any action is brought to enforce the Lease or Guarantee, the prevailing party in such action shall be entitled to recover all court costs and reasonable attorneys' fees. Finally, the Guarantee provides that the Guarantor may, at the option of plaintiff, be named as a defendant in any proceeding to enforce the Lease or the Guarantee, or to enforce or collect upon a judgment obtained in such a proceeding.

Months after signing the Guarantee, in October 2007, the Guarantor, Globe Institute, sold all of its assets to 878 Education, LLC ("878 Education"), pursuant to an Asset Purchase Agreement. Subsequent to this transfer of assets, the Association continued to pay rent through January 2008.

According to plaintiff, on October 16, 2007 and January 16, 2008, the New York City Environmental Control Board ("ECB") issued separate violations to Tenant, indicating that Tenant failed to perform repairs to the front door, sheetrock, molding in the lobby, thermostat covers, the exit sign, carbon monoxide/smoke alarms, window screens, vent in the basement bathroom, and doors in the basement bathroom. On January 30, 2008, plaintiff sent to Tenant a Ten (10) Day Notice to Cure pursuant to paragraph 2.2(f) of the Lease to cure the violations by February 27, 2008, alleging that the Association failed to maintain the premises "in good order and repair." Tenant did not do so. The Association then vacated the premises in February 2008.

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[1] The Factual Background is taken in large part from the affidavit of plaintiff's motion.

Thereafter, plaintiff sent the Association a five day termination notice, effective March 24, 2008, based on the Association's failure to cure. On August 28, 2008, plaintiff obtained a judgment of possession from the Civil Court.

In support of summary judgment on its breach of Lease claim against Tenant, plaintiff argues that it performed all of its obligations under the Lease. Plaintiff's president, Samuil Pustilnik ("Pulstilnik"), attests that Tenant (1) failed to pay all required rent during the lease term, and (2) damaged the Premises, both of which alone and together amount to breaches of Tenant's contractual obligations under the Lease. Thus, argues plaintiff, it is entitled to liquidated damages as set forth in the Lease. Under the liquidated damages provision, upon termination of the Lease, plaintiff is entitled to collect (1) the cost of recovering the leased premises, (2) unpaid rent earned at the time of termination, including interest thereon, (3) the balance of rent for the remainder of the term pursuant to the Lease's acceleration clause, and (4) damages reasonably necessary to compensate plaintiff for Tenant's default. Pustilnik calculates that the Association owes $1,685,759.32 in unpaid rent due during the Initial Lease and Lease Extension.

Further, the Guarantee is an absolute, continuing and unlimited guarantee, and provides that the Guarantor's obligations shall continue in full force and effect until plaintiff, its successors or assigns signed a written release of the Guarantor's obligations. The Guarantee also provides that it shall be binding upon the successors and assigns of the Guarantor. Thus, under the clear and unambiguous terms of the Guarantee, which was executed contemporaneously with the Lease Extension, plaintiff is entitled to recover the same amount from the Guarantor that is owed by Tenant.

In opposition, the defendants contend that at the time 878 Education purchased Globe Institute's assets, the principal of 878 Education, Martin Oliner ("Oliner"), assured Globe that it would provide funds for the Association to pay the rent and would assume Globe Institute's responsibilities under the Guarantee. Plaintiff's judgment of possession against the Association provided a money judgment of "0.00" and plaintiff waited a year and a half following receipt of the last rent payment to commence this action. Such facts indicate that plaintiff recognized the transfer of defendants' obligations to 878 Education, and defendants need discovery regarding any oral or written agreements between plaintiff and Oliner or 878 Education to confirm that plaintiff understood that defendants were no longer liable to plaintiff after Globe Institute's business was sold.

Further, argues defendants, assuming that plaintiff did not accept 878 Education as a substitute obligor, the terms of the Lease upon which plaintiff bases its claim for rent for the entire Lease term are unenforceable under the circumstances. The "liquidated damages" clause (¶23(c)) merely provides for an option to receive rental payments through the remainder of the lease term and is not enforceable as an acceleration clause since the Lease was in fact terminated on March 24, 2008. Alternatively, defendants are entitled to discovery to demonstrate the lack of proportionality of the liquidated damages sought to plaintiff's loss, such as the effort undertaken to locate a new tenant, whether a new tenant was found, when such tenant took occupancy, and the amount of rent plaintiff received from such tenant.

Even if the sums sought could be considered rent rather than damages, they cannot be recovered from any period after a warrant of eviction was issued, and the August 28, 2008 order which led to the judgment of possession provided that such a warrant be issued. Further, any

claim for rent, as opposed to liquidated damages, is barred by *res judicata* since the issue of unpaid rent either was, or could have been raised in the Civil Court.

In reply, plaintiff argues that a lessee remains liable for rent even after an assignment of the lease by the lessee to another tenant, even where the lessor consents to the assignee. Further, acceptance of rent from an assignee is not enough to show that the lessor has released the lessee. Defendants' statement that 878 Education agreed to provide funds for the Association to pay the rent and assume Global Institute's obligations under the Guarantee is hearsay and inadmissible to defeat this motion.

Further, 878 Education's agreement to pay rent in and of itself would not release the Association from its lease obligations. And, the Guarantee provides that the Guarantor's obligations shall continue until a written release of Guarantor's obligations has been obtained from Lessor. The payment of rent by 878 Education does not show that plaintiff released defendants from their obligations. Furthermore, the affidavit by the former officer of Globe Institute does not indicate that he has any personal knowledge as to the Association's relationship with plaintiff.

As to the action against the Association in Civil Court, the Guarantee specifically provides that the Guarantor's obligations are independent of the Lessees' obligations and that a separate action may be brought against the Guarantor whether or not an action is commenced against the Tenant. Therefore, the lack of a monetary award in that action against the Association has no bearing on plaintiff's right to proceed against Globe Institute.

Defendants' speculation that there may be evidence of plaintiff's recognition of the transfer of defendants' obligations to plaintiff to 878 Education, and evidence that will "confirm

plaintiffs' understanding that defendants did not continue to be liable to plaintiff after the Guarantor's business was sold" are unavailing since the question is not whether plaintiff "recognized" some agreement between defendants and 878 Education, but whether plaintiff affirmatively released the defendants from the Lease and the Guarantee. Defendants did not assert an affirmative defense in their Answer that plaintiff released them and defendants have not controverted any of plaintiff's factual allegations.

Furthermore, a commercial landlord has no obligation to mitigate its damages after a tenant's abandonment of leased premises. And, the Lease (¶23(c)) expressly permits plaintiff to recover rent for the remainder of the term upon termination of the Lease. The caselaw cited by defendants is distinguishable. Nor is there is any indication of how acceleration of rental payments for the balance of the lease term (or, payment of liquidated damages) would be disproportionate to the loss to plaintiff resulting from Tenant's abandonment of the premises and corresponding failure to pay further installments of rent. The parties contemplated the loss to the plaintiff in the event of the Tenant's abandonment of the Premises. Plaintiff and the Association executed a Student Dormitory Restrictive Declaration (the "Restrictive Declaration") with regard to the premises and with specific reference to the Association. Thus, the parties acknowledged that (a) the premises shall be used only as a student dormitory, (b) plaintiff made the Restrictive Declaration in consideration of issuance of a building permit for the premises, (c) failure to comply with the terms of the Restrictive Declaration could result in revocation of a building permit or certificate of occupancy for the Premises, and (d) the Restrictive Declaration may not be modified, amended or terminated without the prior authorization of the New York City Department of Buildings. Accordingly, in order to provide the Association with dormitory

facilities, plaintiff limited itself in its ability to lease the premises, since the premises can be used only as a student dormitory, and the Association acknowledged that limitation. Enforcement of the acceleration clause would not be unconscionable or against public policy.

Nor does *res judicata* bar this action against Globe Institute, as Globe Institute was not a party to that Civil Court action, which was one for possession against the Association.

Finally, plaintiff points out that defendants do not dispute the amount of unpaid rent ($103,028.13) through the date of the Association's abandonment of the premises and the lease termination as of March 24, 2008 ($92,400 and $10,628.13, respectively). Plaintiff is entitled to an immediate award of $103,028.13. Alternatively, plaintiff is at least entitled to an award in the amount of the rent unpaid at termination of the Lease without prejudice to plaintiff's claim for rent as it comes due through the balance of the Lease term.

Discussion

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by

admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (CPLR §3212 [b]; *Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, 344 NYS2d 925 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]).

Plaintiff established, and it is uncontested, that the Association, the party to the Lease, defaulted in payment of rent pursuant to the terms of the Lease. It is also uncontested that violations were issued against the premises and that the Association failed to keep the premises in good order and repair (Lease, ¶5).

Defendants' claim that 878 Education "assured" Globe that it would provide funds for the Association to pay the rent does not obviate the Association's obligation under the Lease to plaintiff to pay rent. Defendants do not claim that any such assurance was put in writing, or claim that 878 Education entered into any written agreement to assume the Association's Lease obligations. Even assuming there was an assignment of the Association's Lease obligations, it is

well settled that in order to relieve the original tenant from its continuing liability after assignment, it must be expressly shown that the lessor not only consented to the assignment, but accepted the assignee in place of the tenant and such release of the tenant must either be express or implied from facts other than the lessor's mere consent to the assignment and its acceptance of rent from the assignee (*185 Madison Assocs. v Ryan*, 174 AD2d 461, 571 NYS2d 244 [1st Dept 1991] citing 74 N.Y.Jur.2d, Landlord and Tenant, § 692). Where the lease is complete upon its face, defendant's claim of a contradictory oral agreement is insufficient to create an issue of fact or defeat summary judgment (*id.*). Thus, the alleged "assurance" by 878 Education to pay rent for the Association, as Globe Institute did for the Association, is insufficient to modify the Lease, and relieve the Association of its Lease obligations (¶28).[2] It is noted that the Association continued to remain in possession of the premises for four months even after Global Institute's transfer to 878 Education of all its assets, and that knowledge of any written assignment of the Association's Lease to another entity would be in the possession of defendants. Thus, discovery on the issue of liability is unwarranted since defendants do not even claim the existence of a written agreement, but merely speculate that one might exist. Therefore, defendants failed to raise an issue of fact as to the Association's liability for rent due and owing under Lease.

As to the Association's liability for the remaining rents due after termination of the Lease, although the termination of the Lease ends the landlord-tenant relationship, the parties clearly contracted to make the defaulting tenant liable for rent after such termination (*Gallery at Fulton Street, LLC v Wendnew LLC*, 30 AD3d 221, 817 NYS2d 237 [1st Dept 2006] *cf. Holy Props. v*

[2] Paragraph 28 of the Lease, entitled "No oral agreements" provides that "no modification of this Lease and no waiver of any of its terms and conditions shall be effective unless made in writing . . ."

Cole Prods., 87 NY2d 130, 637 NYS2d 964 [1995] ["Although an eviction terminates the landlord-tenant relationship, the parties to a lease are not foreclosed from contracting as they please . . . . If the lease provides that the tenant shall be liable for rent after eviction, the provision is enforceable"]).

Here, it is uncontested that the Lease expressly provides that upon "Lease termination," "Landlord shall be entitled to recover, as liquidated damages a sum of money equal to the total of . . . (ii) the unpaid rent earned at the time of termination, plus interest thereon, (iii) late charges on unpaid rent . . . . [and] (iv) *the balance of the rent for the remainder of the term . . . .*" (¶23(c)). The Lease continues: "In the event of Lease termination *Tenant shall continue to be obligated to pay rent and additional rent for the entire Term* as though this Lease had not been terminated." (Emphasis added).

"Inasmuch as the parties clearly contracted to make defendant liable for damages following termination, the lease provides that defendant shall be liable for rent after eviction, and that provision is enforceable" (*Ring v Printmaking Workshop, Inc.*, 70 AD3d 480, 897 NYS2d 11 [1st Dept 2010]).

Benderson v Poss (142 AD2d 937, 530 NYS2d 362 [4th Dept 1988]) and *Ross Realty v V & A Iron Fabricators, Inc.*, 5 Misc 3d 72, 77 NYS2d 602 [App Term, 2d Dept 2004] (stating that acceleration clauses are not enforceable when the lease does not require that the landlord re-rent the premises upon recovery of possession)), cited by defendants conflict with controlling First Department caselaw, which provides that a lease provision for a tenant's liability for rent continuing after termination of the lease is enforceable (*Ring v Printmaking Workshop, Inc.* (*supra*); *186-90 Joralemon Assocs. v Dianzon*, 161 AD2d 329, 555 NYS2d 94 [1st Dept 1990]).

As to defendants' claim that discovery is necessary to ascertain whether plaintiff relet the premises, and if, at what amounts, it is noted that plaintiff, a commercial landlord, was under no duty to relet the premises once the Association abandoned the premises (*Parsons & Whittemore, Inc. v. 405 Lexington L.L.C.*, 299 AD2d 156, 753 NYS2d 36 [1st Dept 2002] ("In light of the validity of the liquidated damages clause, the landlord's efforts, if any, at re-letting the premises, are irrelevant)). Once the lease is executed, the lessee's obligation to pay rent is fixed according to its terms and a landlord is under no obligation or duty to the tenant to relet, or attempt to relet abandoned premises in order to minimize damages (*Holy Props. v Cole Prods, supra*). When defendant abandoned these premises prior to expiration of the lease, the landlord had three options: (1) it could do nothing and collect the full rent due under the lease, (2) it could accept the tenant's surrender, reenter the premises and relet them for its own account thereby releasing the tenant from further liability for rent, or (3) it could notify the tenant that it was entering and reletting the premises for the tenant's benefit. (*Id.*) (Internal citations omitted). Thus, once the Association abandoned the premises prior to the expiration of the lease, plaintiff is within its rights under New York law to do nothing and collect the full rent due under the lease (*id.*). If the landlord relets the premises for the benefit of the tenant, the rent collected would be apportioned first to repay the landlord's expenses in reentering and reletting and then to pay the tenant's rent obligation (*id.*).

Here, the following facts are uncontested: The Association defaulted in the payment of the monthly rent for October 2006 through July 2007 during the term of the Initial Lease and for October 2007 through December 2007 in the first year of the Lease Extension. Plaintiff applied the three months security deposit to cover the unpaid rent for October through December 2006.

Subsequent to the Globe Institute's transfer of its assets in December 2007, the Association paid to plaintiff the monthly rent owing for October, November, and December 2007. The Tenant also paid the monthly rent for January 2008. It is uncontested that in February of 2008, the Association abandoned the premises and ceased paying monthly rent, and that plaintiff applied the last month's rental payment to cover the rental installment for February 2008. Since it is unclear as to whether the plaintiff relet the premises, the full amount of damages cannot be determined without a hearing on this issue. Therefore, plaintiff is entitled to summary judgment against the Association on the issue of liability.

As to Globe Institute's liability, where, as here, a creditor seeks summary judgment upon a written guaranty, the creditor need prove no more than an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guarantee (*Kensington House Co. v Oram*, 293 AD2d 304, 739 NYS2d 572 [1st Dept 2002] *citing City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71, 681 NYS2d 251)).

It is uncontested that the Guarantee provides as follows:

> The undersigned Guarantor shall be legally bound, jointly and severally, and shall herewith unconditionally guarantee to the Lessor, the full and faithful performance by the Lessee, its successors and assigns, without limitation, all of the obligations of the Lessee under said Lease, including but not limited to payment of rent and all other charges required to be paid and performed by Lessee under the terms of the Lease.

The language of the Guarantee, obligating Globe Institute to the full performance of all monetary obligations under the Lease, incorporates the explicit terms of the Lease (*id.*) Therefore, the clear and unambiguous terms of the Guarantee obligate Globe Institute pay the rent and all other charges owed by the Association pursuant to the Lease. Globe Institute failed to raise an issue of fact as to its liability under the Guarantee.

Defendant's argument that plaintiff's claim against defendants is bar by *res judicata* is (1) based on a portion of a concurring opinion in *Brooks v Haidt*, 59 AD3d 233, 873 NYS2d 563 [1st Dept 2009] which disagrees with the Court's majority opinion therein that *res judicata* did not bar a claim, and (2) misplaced as such claim does not apply to Globe Institute, who was not a party to the underlying Civil Court action (*see Ruth v Shalom Brothers, Inc.*, 276 AD2d 408, 714 NYS2d 482 [1st Dept 2000]). *Res judicata* is designed to limit or preclude relitigation of claims that have already been determined (*Fusco v Kraumlap Realty Corp.*, 1 AD3d 189, 767 NYS2d 84 [1st Dept 2003]). Although plaintiff addressed only the inapplicability of *res judicata* to Globe Institute, defendants failed to establish, as a matter of law, that the issue of the amounts due and owing under the liquidated damage clause was necessarily decided in the underlying Civil Court action.[3]

Conclusion

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment against defendant Association for breach of contract and against defendant Globe Institute for breach of guarantee is granted solely on the issue of liability; and it is further

ORDERED that upon all the papers and proceedings heretofore had, the court refers the issues of the amounts due plaintiff from defendants to a Special Referee to hear and determine (CPLR 4317 [b]) (*see Keeney v Keeney*, 297 AD2d 606 [1st Dept 2002]); and it is further

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[3] It is noted that the five and 10-day notices did not allege nonpayment of rent, and that the Civil Court order indicates that the underlying action involved a holdover claim, in which case, the only issue before the court would be is the landlord's right of possession (*see Jones v Gianferante*, 305 NY 135, 139, 111 NE2d 419 [1953] ["[A] summary proceeding under [former] article 83 of the Civil Practice Act is of purely possessory character, and the only issue before the court was as to the right of possession...."]).

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon defendants and the Clerk of the Trial Support Office (Room 158) within 20 days of entry, file of a note of issue and a statement of readiness and pay the proper fees, if any, for the assessment hereinabove directed.

This constitutes the decision and order of the Court.

Dated: December 3 , 2010

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

HON. CAROL EDMEAD