SUPREME COURT OF THE STATE OF NEW YORK

COUNTY

Index Number : 650769/2011

DANNY Z, LLC

vs.

303 REALTY LLC

SEQUENCE NUMBER : 001

DISM ACTION/INCONVENIENT FORUM

HON. ANIL C. SINGH
SUPREME COURT JUSTICE

PART 61

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 6, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2, 3, 4

Answering Affidavits — Exhibits _____ | No(s). 5, 6

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 10/21/11

_____, J.S.C.
HON. ANIL C. SINGH
SUPREME COURT JUSTICE

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

----------X

DANNY Z, LLC,

Plaintiff,

-against-

303 REALTY LLC and BPD BANK,

Defendants.

----------X

DECISION AND ORDER

Index No. 650769/11

ANIL SINGH, J.:

In this action involving an attempt by plaintiff Danny Z, LLC (Danny Z) to purchase real property located at 303 West 123rd Street in Manhattan (the Property), defendant BPD Bank (BPD) moves for an order, pursuant to CPLR 3211(a)(1), (3), (5) and (7), and CPLR 6514, dismissing the complaint and canceling the Notice of Pendency. Plaintiff opposes the motion and cross-moves for an order, pursuant to CPLR 3215, granting a judgment of default against defendant 303 Realty LLC (303 Realty).

The Property is currently owned by defendant 303 Realty and is the subject of a foreclosure action pending in Supreme Court, New York County (*see Grupo Popular Investments v 303 Realty LLC*, Sup Ct, NY County, index number 600926/10) (Foreclosure Action). The plaintiff in the Foreclosure Action is nonparty Grupo Popular Investments Corporation (Grupo Popular).

Danny Z commenced this action for specific performance, declaratory and injunctive relief, and monetary damages based upon the failure and refusal of defendants to execute and deliver a signed contract for the sale of the Property in accordance with the parties' negotiated terms. Central to BPD's motion is its contention that it neither owns, nor holds, any interest in

the Property or the mortgage encumbering it. Therefore, even if plaintiff were entitled to some or all of the relief it seeks, BPD does not have the power, authority or ability to deliver a fully executed contract for the sale of the Property.

The underlying facts are as follows.

On May 2, 2008, 303 Realty and/or BPD executed, as necessary, the following documents: the Mortgage Consolidation Modification and Extension Agreement, Consolidated Mortgage Promissory Note, Consolidated Mortgage and Security Agreement and Affidavit Under Section 255 of Article II of the Tax Law of the State of New York. By means of those documents, 303 Realty and BPD consolidated and refinanced a previously existing mortgage on the Property, with BPD lending an additional principal sum of $495,132.23, and combining it into a single consolidated mortgage lien in the total sum of $1,200,000.00. Accordingly, as of that date, BPD became the owner and holder of the consolidated mortgage and mortgage note (Mortgage) encumbering the property. The Mortgage was recorded in New York County Office of the City Register (City Register) on October 20, 2008.

Approximately 16 months later, by Assignment of Mortgage, dated February 11, 2010, BPD assigned the Mortgage to Grupo Popular in exchange for consideration in the amount of $618,512.00. The Mortgage assignment was recorded with the City Register on February 22, 2010. As the assignee/new lender, Grupo Popular acquired the same rights, title and interest in the Mortgage as had been held by assignor/old lender BPD. According to BPD, pursuant to a service agreement between itself and Grupo Popular, BPD became, and continues to be, authorized to act as the servicing agent on behalf of Grupo Popular with respect to Grupo Popular's loans, including the Mortgage.

It is undisputed that 303 Realty then failed to make its Mortgage payments and that, for the purpose of this motion, the outstanding principal balance owed by 303 Realty to Grupo Popular as of April 1, 2010, totaled $1,186,315.55.

On April 14, 2010, Grupo Popular commenced the Foreclosure Action against 303 Realty, The City of New York Environmental Control Board and John Does 1-10, seeking a judgment of foreclosure on the Property. On the same date, Grupo Popular also filed a notice of pendency upon the Property with the Clerk of New York County. The law firm of Feldman & Associates PLLC (Feldman PLLC), which represents BPD in this action, also represents Grupo Popular in the Foreclosure Action and was responsible for the filing of the notice of pendency on Grupo Popular's behalf.

As part of efforts made to settle the Foreclosure Action, Grupo Popular and 303 Realty discussed proposals for selling the Property, including the possibility of accepting offers for a "short sale."[1] BPD claims to have been involved in the discussions, but only as Grupo Popular's service agent for the Mortgage.

Initially, Danny Z expressed an interest in purchasing the Mortgage rather than the Property. Grupo Popular accepted Danny Z's offer and by letter contract, dated April 28, 2010, it was agreed that Grupo Popular would sell the Mortgage to Danny Z for $700,000. The letter contract also provided for, among other things, a $70,000 deposit and a period of time for the

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[1]A "short sale" of real estate occurs when a defaulting property owner (here, 303 Realty) agrees to allow the lender/mortgagor (here, Grupo Popular) to sell the property at fair market value which is less than the current amount owed on the mortgage, and the mortgagor agrees to accept the sale price in full satisfaction of the outstanding mortgage. A mortgagor may sometimes opt for a short sale so as to mitigate an impending loss (*see Raiolo v B.A.C. Home Loans*, 29 Misc 3d 1227 (A), 2010 NY Slip Op 52065 [U] 2010 [Civ Ct, Richmond County]).

purchaser, Danny Z, to conduct due diligence (Notice of Cross Motion, Exhibit A). According to Danny Z, discussions were held during the period of due diligence regarding Grupo Popular's possible financing of a portion of the purchase price for the Mortgage. However, as evident from correspondence between counsel on behalf of Grupo Popular and Danny Z, dated June 4, 2010 and June 11, 2010, the parties mutually terminated the letter contract, and the $70,000 deposit was returned.

Approximately six months later, Danny Z made an offer for a "short sale" purchase of the Property in the amount of $710,000. At that time, the total outstanding debt on the Mortgage, including interest and fees, was over $1,350,000. According to Danny Z's managing partner Theodore Zucker (Zucker), he began negotiating with BPD's vice president Paul Lafata (Lafata) in December 2010 for a short sale purchase of the Property. Lafata reportedly advised him that BPD's written approval would be needed in the case of a short sale because the balance due on the Mortgage exceeded the value of the property. Lafata also, purportedly, informed him that BPD would finance 65%, or $461,500, of the accepted purchase price of $710,000 (Notice of Cross Motion, Zucker Aff. in Opp., §§ 5, 6).

Feldman PLLC prepared a Contract of Sale (Contract) for the purchase of the Property at the agreed upon price of $710,000, and forwarded it to Danny Z (Notice of Cross Motion, Exhibit F). With respect to financing, the Contract provides, at section 12 of its rider, that the "transaction is subject to a mortgage contingency in the amount of $461,500" (Rider Page 3), and, at schedule C, that Danny Z would pay a down payment of $35,500, and pay the balance of $674,500 at the closing.

In January 2011, Zucker signed the Contract on behalf of Danny Z, and returned it to

Feldman PLLC, together with the $35,500 down payment check made out to "Feldman & Associates, PLLC as Attorneys." Feldman PLLC acknowledged receipt of the down payment and, as required under the terms of the Contract, deposited the check into the firm's escrow/Interest on Lawyer Account (IOLA) (Notice of Cross Motion, Exhibit H).

In January or February 2011, an unrelated third party submitted a higher, all-cash offer for the Property in the amount of $750,000. This modestly higher offer, according to Danny Z, caused BPD to try to find a way out of their arrangement. By e-mail, dated February 25, 2011, Feldman PLLC informed counsel for plaintiff:

> This will confirm that my client has consented to the sale of the property under the original contract with the understanding that it will NOT be providing any financing, but will give your client 40 days from receipt of the signed contract to obtain its own financing.

(Notice of Cross Motion, Exhibit I) (emphasis in original). Four hours later, Feldman PLLC sent counsel for plaintiff a second e-mail stating:

> I have been instructed by the bank to advise you that the 40 days for the signing of the contract cannot be open ended. The contract must be signed and delivered no later than March 4, 2011 and the time will begin to run from that day forward. In the event, the contract is not signed and delivered with a copy to my office by that date the bank will not approve the short sale at $710,000 and will advise that the short sale offer of $750,000 be accepted. In order for the bank to accept a short sale the asset must be sold by the end of April 2011. Otherwise no short sale will be accepted and the foreclosure shall proceed to sale.

(Notice of Cross Motion, Exhibit J).

According to Danny Z, it set about to meet the new demand that it obtain outside funding in the abbreviated time period, but that despite its efforts, and despite its due demand, 303 Realty failed and refused to deliver a fully executed Contract by March 4, 2011, or at any time thereafter, thereby frustrating both the Contract and the ability of Danny Z to meet the

requirements set forth in the latter e-mail.

As a result, Danny Z served and filed a summons and complaint with the New York County Clerk on or about March 22, 2011, commencing the instant action against 303 Realty and BPD. Danny Z's complaint demands a judgment and order directing: 303 Realty to deliver a fully executed copy of the Contract for the agreed upon sum of $710,000; BPD to afford Danny Z 45 days from the date it (Danny Z) receives the fully executed Contract, to obtain a mortgage commitment for the purchase of the Property; upon tender of the $710,000 to the appropriate party, BPD to consent to the sale of the Property to Danny Z and deliver all necessary documents to permit the Property to be conveyed free and clear of its Mortgage; specific performance of the sale of the Property to Danny Z; a money judgment against defendants, jointly and severally, in the amount of $400,000; punitive damages against defendants, jointly and severally, in the amount of $1 million; and a preliminary injunction, enjoining BPD[2] from foreclosing on the Property until such time as Danny Z's time to purchase the Property expires.

Feldman PLLC responded by sending a letter, dated March 25, 2011, to plaintiff's counsel which states, in relevant part:

> I am returning the $35,500 deposit for the captioned transaction.... As you are ... aware, this was to be a short sale, with my client waiving a substantial portion of the mortgage debt. My client has absolutely no obligation to consider, much less accept a short sale. My client's consent to consider a short sale was and is contingent upon the borrower [303 Realty] entering into a written agreement concerning this property and another property also subject to foreclosure. Further, it is my client's stated position that it will only approve the highest and best offer so as to minimize its losses.
> As of today, my client has not entered into any settlement agreement with [303 Realty]. Although a proposed Stipulation has been drafted, its terms remain the subject of discussion. Additionally, my client, as lender, has received offers at a

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[2]Grupo Popular and not BPD is the plaintiff in the Foreclosure Action.

> higher price than offered by your client, with no financing contingency and providing for an immediate (as opposed to delayed) closing, as compared to your client's offer. Based upon this my client, which is not a party to any agreement or contract with your client, at this time disapproves the short sale presently proposed by your client and [303 Realty]. Thus, any purported contract between the parties would be unenforceable by reason of impossibility of performance....

Plaintiff continues, nevertheless, to pursue the legal and equitable relief set forth in its complaint, and BPD has responded by serving the instant motion demanding a dismissal of the complaint on the grounds that: (1) it is not a proper party to the action, as it is neither an owner or holder of either the Property or Mortgage, and plaintiff has no contract or other agreement with BPD with respect to either the Contract or Mortgage (CPLR 3211[a][1] and [3]); (2) the Property cannot be sold without both the written agreement of its owner, 303 Realty, and the written approval of the Mortgage's owner, Grupo Popular, which, for the reasons set forth below, has been withheld; (3) the alleged oral agreement is barred by the statute of frauds (CPLR 3211[a][5]); and (4) plaintiff does not state a cause of action against BPD (CPLR 3211[a][7]). 303 Realty has not answered, appeared or moved with respect to the complaint.

Danny Z responded by cross-moving for a default judgment against 303 Realty, and opposing BPD's motion on the ground that defendants acted improperly in rejecting its previously accepted offer of $710,000 and canceling the Contract when it received the higher offer. Danny Z offers the following as evidence that it had a legally enforceable agreement with defendants: the fact that defendants sent out the Contract, which, after further negotiations and a few revisions, was executed by Zucker on behalf of Danny Z (Notice of Cross Motion, Exhibit F) and returned to Feldman PLLC along with the $35,500 down payment check; Feldman PLLC's faxed receipt of the check and proof that Feldman PLLC deposited the check into its IOLA; and

the two February 25, 2011 e-mails by which defendants gave plaintiff 40 days from receipt of an executed Contract, which would occur by March 4, 2011, to obtain its financing (Notice of Cross Motion, Exhibits E, F, G, H, I and J). Finally, Danny Z submits documents confirming its financial ability to proceed to the closing at the agreed upon purchase price of $710,000 (Plaintiff's Attorney's Aff., Exhibit A).

Central to BPD's motion are its contentions that the entire complaint must be dismissed, not only because is it not a proper party to this action, but because neither the Property owner nor the mortgagor were obligated to sell the Property to Danny Z at any terms, including those proffered by Danny Z. BPD points out that Danny Z never obtained a binding, fully executed and delivered agreement from either BPD, 303 Realty or Grupo Popular with respect to the sale of the Property, and asserts that the sellers were entitled to sell the property to any prospective buyer or to proceed with foreclosure.

BPD supports its motion with the sworn affidavit of its vice president, Herbert Ochoa (Ochoa), who clarifies what each participant to the proposed transaction did or had the authority to do. He asserts that, as the sole owner of the Mortgage, Grupo Popular is the only entity which could approve a "short sale," and that as servicing agent on the Mortgage, BPD was responsible for fielding and handling all proposals and offers for a possible "short sale."

Ochoa denies the existence of a fully executed and delivered contract of sale between Danny Z and 303 Realty, and denies plaintiff's assertion that an agent or representative of BPD, acting on behalf of Grupo Popular, at any time, consented – in writing or otherwise – to the terms of sale proposed by Danny Z (Ochoa Aff., ¶ 25). He also explains why Grupo Popular rejected Danny Z as a purchaser of the Property. Specifically, he states that Danny Z's request for

$461,500 in financing was turned down because Grupo Popular did not want to risk investing more money into this particular Property. He also states that, because of the pending Foreclosure Action and the ramifications of permitting a short sale, Grupo Popular prefers the third party's higher, all cash offer, which would enable it to close within weeks (*id.*, ¶¶ 19 - 25), rather than accept Danny Z's offer which would involve both financing and a 45-day financing contingency clause included in the Contract.

BPD also submits the affirmation of attorney Edward S. Feldman, of Feldman PLLC, who states that, as counsel to both BPD and Grupo Popular, he can confirm that it is Grupo Popular, and not its servicing agent BPD, which owns the Mortgage and has the right and authority to decide which, if any, offer to approve in its effort to minimize its losses.

It is well settled that on a motion to dismiss, pursuant to CPLR 3211(a)(1), a "plaintiff is benefitted by the rule that every favorable inference must be afforded the facts alleged in the complaint and in the various motion papers submitted by him" (*Held v Kaufman*, 91 NY2d 425, 432 [1998], citing 7 Weinstein-Korn-Miller, NY Civ Prac ¶ 3211.36). However, it is also well settled under New York law, that a CPLR 3211 dismissal may be warranted where "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). The defenses asserted here are that BPD is not a proper party to the action, and that the action may not be maintained because of lack of compliance with the Statute of Frauds.

It is commonplace for lending institutions to trade, sell or otherwise deal with packaged mortgage loans, and "[i]n many instances, although title and ownership of the mortgage is transferred, servicing remains in the transferror" (*Harris v Crossland Mtge. Corp.*, 160 Misc 2d

520, 522 [Nassau Dist Ct 1994]). According to movant, BPD and Grupo Popular followed this common practice, as BPD became the servicing agent for the Mortgage following the assignment of the Mortgage to Grupo Popular, and it no longer held an ownership interest in the Mortgage or Property as of the date of the assignment. Therefore, it is not a proper party to this action.

To this end, BPD submits copies of the above-listed Mortgage documents and deeds confirming that the Mortgage, which had been acquired by BPD and recorded with the City Register on October 20, 2008, was then assigned to Grupo Popular and recorded again on February 22, 2010. The documents, which were recorded in compliance with New York's recording statutes (*see* Real Property Law §§ 290 as Amended by 2011 Sess Laws of NY ch 549 [S. 2373-A], 291 et seq) and which qualify as documentary evidence under CPLR 3211(a)(7), establish that Grupo Popular had, in fact, obtained and recorded the assignment of the Mortgage prior to the time Danny Z expressed an interest in purchasing the Property.

Furthermore, New York has long recognized that the recording of an instrument affecting property constitutes constructive notice to subsequent purchasers and lienors of its existence and contents (*Cambridge Valley Bank v Delano*, 48 NY 326 [1872]; *People v Luhrs*, 195 NY 377 [1909]). Therefore, Danny Z was on notice that the entity whose consent it needed to purchase the Property from 303 Realty, was that of Grupo Popular. BPD no longer has an interest in the Mortgage which encumbers 303 Realty's property.

Also, and especially problematic for Danny Z with respect to his complaint as against both defendants, is the lack of a fully executed and delivered contract for the sale of the Property. The Statute of Frauds, as codified in New York's General Obligations Law (GOL), provides at GOL § 5–703:

> 1. An estate or interest in real property ... cannot be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing.
>
> 2. A contract for ... the sale, of any real property, or an interest therein, is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing.

As referenced above, plaintiff has submitted a copy of the Contract it executed, a down payment check, correspondence with defendants and/or counsel, and evidence of plaintiff's ability to close.

An examination of these documents and electronic communications (e-mails and fax) along with two additional e-mails annexed to movant's papers (Defendant's Aff. of Edward S. Feldman, Exhibit C) reveals ongoing negotiations between the parties to the proposed sale, and their respective counsel. The Contract was never signed by 303 Realty or consented to by Grupo Popular, and there is also no evidence that the check, which contains the words "303 West 123rd St Deposit" in the memo portion but lacks any other notation, was intended to be anything "more than earnest money to show plaintiff's good intentions and was not intended to evidence a completed contract" (*H. Rothvoss & Sons v Estate of Neer*, 139 AD2d 37, 40 [3rd Dept 1988]).

The electronic communications are also unavailing. The email, dated December 13, 2010, from Zucker to Lafata states "Danny Z papers attached. Where r we at with contracts" Thanks, Ted," and the email, dated December 14, 2010, from Feldman PLLC to Lafata states "Here is a draft contract to send on."

Contrary to plaintiff's contention, these e-mails do not create or reference an existing,

legally enforceable agreement for the sale of the Property to Danny Z. Rather, they constitute evidence that the parties and their counsel contemplated that they would reduce the terms of their negotiated agreement to a binding, written contract. Likewise, the two February 25, 2011 e-mails also demonstrate that the Contract had not been finalized. They confirm that, even as of late February, no resolution had been reached as to the issue of financing, as Grupo Popular made it clear that it was not willing to finance any portion of the sale, and that Danny Z had a limited time period in which to arrange for alternate financing. At best, these communications constitute an agreement to agree, but they do not bind plaintiff, 303 Realty, Grupo Popular or BPD to a property sale.

> Real estate negotiations are often characterized by a series of tentative oral agreements between the parties. The parties are nonetheless free to decide against entering into the sale, until the final terms are reduced to writing. The very purpose of the Statute of Frauds, as applied to real estate sales, is to distinguish these provisional "agreements to agree" from the final, binding contract (*see*, *Henry L. Fox Co. v. William Kaufman Organization*, 74 NY2d 136, 140, 544 N.Y.S.2d 565 [1984] ["[t]he purpose of Statutes of Frauds is to avoid fraud by preventing the enforcement of contracts that were never in fact made"]).

(*Sonnenschein v Elliman-Gibbons & Ives*, 274 AD2d 244, 248 - 249 [1st Dept 2000] *affd* 96 NY2d 369 [2001]).

Neither the $35,000 down payment, nor the steps Danny Z took to obtain financing, obligate any party to proceed with the proposed sale. These actions "are merely preliminary steps which contemplate the future formulation of an agreement" and they are "insufficient to create a contract or serve as part performance and avoid the statute of frauds" (*2004 Bowery Partners, LLC* v *E.G. West 37th LLC*, 32 Misc 3d 1210 (A), 2011 NY Slip Op 51243 [U] 2011 [Sup Ct, NY County 2011] [internal quotations and citations omitted]). Until the Contract was fully executed

and delivered with Grupo Popular's written consent, 303 Realty and Grupo Popular, with or without the assistance of its servicing agent, was free to accept offers from other interested parties.

In view of the foregoing, the action as against BPD must be dismissed, and all of the relief that plaintiff seeks in connection with its cause of action against BPD is denied as moot.

Turning to plaintiff's cross motion for a default judgment against 303 Realty, the motion is denied. Plaintiff served 303 Realty with a copy of the complaint on or about April 12, 2011 by service upon the Secretary of State, and 303 Realty has not answered, appeared or otherwise moved with respect to the complaint. Despite the fact that the allegations contained in the complaint are deemed admitted by the defaulting party, plaintiff is not entitled to a default judgment against 303 Realty. Where, as here, plaintiff has failed to demonstrate that it has a viable cause of action with respect to the proposed property sale, the requested default must be denied (*Resnick v Lebowitz*, 28 AD3d 533, 534 [2nd Dept 2006], *Green v Dolphy Constr. Co.*, 187 AD2d 635 [2nd Dept 1992]; CPLR 3215).

BPD also moves for an order directing the Clerk of New York County to cancel the notice of pendency filed by Danny Z pursuant to CPLR 6514. Danny Z filed the notice of pendency in connection with its action against 303 Realty and BPD in order to hinder defendants' ability to transfer the Property before a judgment could be reached in plaintiff's favor which would affect title to, and possession of, real property (*see 5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313, 320 [1984]; CPLR 6501).

CPLR 6514(a) provides for the cancellation of a notice of pendency ". . . if the action has been settled, discontinued or abated; or if the time to appeal from a final judgment against the plaintiff has expired; or if enforcement of a final judgment against the plaintiff has not been

stayed pursuant to section 5519." Based upon this court's decision to dismiss the complaint in its entirety, the notice of pendency must be cancelled upon the expiration of thirty days from service of a copy of this Order unless an appeal is taken and cancellation is stayed pursuant to CPLR 5519 (*see Zafarani v Gluck*, 10 Misc 3d 1073 (A), 2006 NY Slip Op 50056 [U] [Sup Ct, Kings County 2006], *affd* 40 AD3d 1082 [2d Dept 2007]).

Accordingly, it is

ORDERED that the motion of defendant BPD Bank to dismiss the complaint herein is granted, and the complaint is dismissed in its entirety with costs and disbursements to defendant BPD Bank as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendants BPD Bank and 303 Realty LLC; and it is further

ORDERED that the motion to cancel the notice of pendency under New York County index number 650769/11 is granted and provided that no timely appeal is taken, the New York County Clerk is directed to cancel the notice of pendency thirty (30) days from the date a copy of this order is served upon plaintiff Danny Z; and it is further

ORDERED that the cross motion of plaintiff Danny Z, LLC is denied.

Dated: 10/25/11

ENTER:

J.S.C.

HON. ANIL C. SINGH
SUPREME COURT JUSTICE