Prestige Plumbing & Heating, Inc. v B&B Constr., Inc.
2013 NY Slip Op 32262(U)
September 18, 2013
Supreme Court, New York County
Docket Number: 650467/2012
Judge: Melvin L. Schweitzer

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice PART 45

PRESTIGE PLUMBING + HEATING et al

-v-

B+B CONSTRUCTION, INC. et al

INDEX NO. 650467/2012

MOTION DATE

MOTION SEQ. NO. 002

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is by plaintiff for partial summary judgment on the first cause of action (breach of contract) as against defendant B+B construction, Inc. is GRANTED as to liability only;

plaintiff's motion for partial summary judgment on the fourth cause of action (trust fund diversion) as against B+B CONSTRUCTION, but not against individual defendant Richard Jacobsen is GRANTED as to liability only;

Plaintiff's motion seeking leave to amend its complaint is GRANTED,

all as per the attached Decision and Order.

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

Dated: September 18, 2013

J.S.C.
MELVIN L SCHWEITZER

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 45

PRESTIGE PLUMBING & HEATING, INC., on behalf of itself and on behalf of all persons entitled to share in the funds received by B&B CONSTRUCTION INC. in connection with the improvements to real property identified as Units 12A, 12C, 12G, 7C, 8K, PH12H, PHA, PHC, PHG and PHH at 28 East 10th Street, New York, New York, Plaintiff, -against- B&B CONSTRUCTION, INC., RICHARD JACOBSEN, DEVONSHIRE ASSOCIATES, LLC, et al., Defendants.	Index No. 650467/2012 DECISION & ORDER Motion Sequence No. 002

MELVIN L. SCHWEITZER, J.:

This action is commenced by plaintiff Prestige Plumbing & Heating, Inc. (Prestige), a subcontractor, to collect sums allegedly owed to it for labor and material furnished to B&B Construction, Inc. (B&B), the general contractor that agreed to renovate certain apartment units of Devonshire Associates, LLC (Devonshire), the sponsor-owner of the condominium building located at 28 East 10th Street, New York City. The complaint asserts four causes of action: breach of contract, unjust enrichment, mechanic's lien foreclosure and trust fund diversion.

In the instant motion (sequence number 002), Prestige seeks (i) partial summary judgment, pursuant to CPLR 3212, on its first and fourth causes of action, as to liability only, that B&B breached its subcontract with Prestige, and that B&B and its principal, Richard Jacobsen (Jacobsen), diverted trust funds; and (ii) leave of court to amend its complaint, pursuant to CPLR 3025, so that it may (1) add certain parties to its third cause of action of lien

foreclosure; (2) allege that the fund deposited by Devonshire with the clerk of the court discharges Prestige's lien such that a judgment on the lien foreclosure can be charged against the fund, instead of the real property; and (3) add Quadrant Construction Ltd. (Quadrant) as a party defendant, against whom Prestige alleges served as B&B's alter ego.

As discussed fully below, while B&B and Jacobsen oppose the instant motion in its entirety, Devonshire interposes a limited objection. On the other hand, 3-G Services Limited (3-G), as to whom Prestige asserts is one of the necessary parties to its lien foreclosure action because 3-G provided carpentry services to B&B in connection with the Devonshire project, supports the motion. Based on the court record, 3-G filed a mechanic's lien against the Devonshire building, and Devonshire deposited a separate fund with the clerk of court for 3-G's lien. On January 17, 2013, 3-G commenced a separate action against B&B, Jacobsen, Devonshire and others, which bears index number 650162/2013.

For the reasons stated herein, the relief requested in the Prestige motion is granted to the extent set forth below.

Background

In February 2009, Devonshire, as sponsor-owner, entered into a construction agreement with B&B, as general contractor, to renovate certain apartment units which, at that time, were occupied by tenants while the building underwent condominium conversion. In or about April 2009, B&B and Prestige entered into an agreement, whereby Prestige was to furnish labor and materials for the installation of various plumbing and heating fixtures, in exchange for the payment of $508,300. The base subcontract, a one-page document in the form of a purchase order signed by both parties, set forth a list of labor and materials Prestige was to furnish, as well

as certain work that Prestige was not required to perform, including valve-outs (known as shut-off valves and/or back-flow preventers) that were to be installed by others. David Pfeffer affirmation in support of motion dated January 30, 2013 (Pfeffer Affirmation), Exhibit L (subcontract).

In its complaint, Prestige alleges that from April 2009 through May 2011, B&B asked Prestige to perform additional work, including the installation of valve-outs. Prestige also alleges that the parties issued written proposals and purchase orders to confirm the additional work, or verbally agreed to the quantities and prices for such work. Prestige further alleges that it performed the work under the base subcontract as well as the additional work, and the total cost was $1,362,390. In the complaint, Prestige asserts that B&B paid $944,639 and left an unpaid balance of $417,751, plus interest. Complaint, ¶¶ 10-14.

Pursuant to the instant motion, Prestige asserts that it is owed $491,952, plus interest. Pfeffer Affirmation, ¶ 2. This greater amount is based upon the sworn statements made by the secretary of Prestige, Joseph Pietracatella, in his affidavit dated January 30, 2013 (Pietracatella Affidavit). Prior to the commencement of this action, in December 2011, Prestige filed a mechanic's lien against the Devonshire building in the lesser amount of $375,680, due to a calculation error made in haste. Pietracatella Affidavit, ¶ 12. After commencing this action, Prestige learned that, in February 2012, Devonshire deposited $385,197 with the court to discharge Prestige's lien from the lien docket for the building. In October 2012, Prestige prepared and served upon B&B a further itemized statement of lien, which showed that the scope and cost of the subcontract was more than tripled, from $508,3000 to $1,655,684, due to the

additional work, but Prestige was only paid $1,164,032 by B&B, leaving an unpaid balance of $491,952. *Id.*, ¶ 19.

In October 2012, Prestige received a notice from 3-G, which stated that it is the trust beneficiary as to the deposit made by Devonshire with the court to discharge 3-G's lien. Thereafter, Prestige conducted a search for the parties having interests in the apartment units against which the Prestige lien was filed. The search revealed these parties: 3-G, Bank of America and Architectural Wood Floors Inc. Prestige now seeks leave of court to amend its complaint to name such parties in foreclosing its mechanic's lien. Prestige also seeks leave to add Quadrant, which is allegedly under Jacobsen's control, as B&B's alter ego.

Discussion

I. Devonshire's Limited Objection

Devonshire's limited objection to the motion is based on two grounds: (1) the motion to amend should not be granted because the relief sought is tantamount to a consolidation of the Prestige action with the 3-G action; and (2) summary judgment on the breach of contract claim should not be granted in favor of Prestige because it failed to perform its work properly.

1. The motion to amend. As an initial matter, Devonshire asserts that the motion to amend the complaint to name 3-G as a defendant should be denied because the Prestige and 3-G actions involve two separate deposits paid into court pursuant to Lien Law § 20, and the motion to amend, in its essence, seeks to consolidate the two separate actions involving different factual and legal issues into one action. In support of its assertion, Devonshire maintains that, on February 16, 2012, it deposited $385,197 with the clerk of the court to discharge the Prestige lien, and on December 12, 2012, it deposited $156,925 with the clerk of the court to discharge

3-G's $149,780 lien filed in September 2012, and that in each case, the clerk issued a certificate discharging each lien pursuant to Lien Law § 20. Devonshire argues that because both lienors, Prestige and 3-G, have access to separate funds that can satisfy their respective liens, Prestige will not be prejudiced if the court denies the motion to amend, to the extent that it seeks to add 3-G as a party, in an attempt to consolidate the two actions into one. Devonshire relies on the case of *First Fed. Sav. & Loan Assn. of Rochester v Burdett Ave. Props.* (41 AD2d 356 [3d Dept 1973]), for the proposition that 3-G, as a subsequent lienor, cannot be joined as a defendant party in the Prestige action, because a subsequent lienor (3-G) has no valid claim for a pro rata share in the Prestige deposited fund, until after the lien of the prior lienor (Prestige) has been fully paid and discharged.

Devonshire's argument is unpersuasive. Its proposition of law that 3-G cannot partake a pro rata share in the Prestige fund is valid only in the context as to whether payments to a prior lienor should be restrained before a subsequent lienor gets paid. This was the first issue presented to the Court in *First Federal Savings,* and the Court answered in the negative. *Id.* at 359. In fact, the Court explained that after the prior lienors were paid, any residual amount left in the deposit fund would be trust assets held for the benefit of the subsequent lienors, if their subsequent liens were perfected. *Id.* at 360. Importantly, the Court also stated that "Section 44 of the Lien Law provides that in [a foreclosure] action all lienors, prior and subsequent, are necessary parties," because all lienors "must bring the same type of court proceeding to establish [their] liens as if [they] were proceeding against the property," since the "money deposited is a substitute for real property as security of the lien. . . ." *Id.*

In this case, Prestige is doing what the Lien Law requires, which is to amend its complaint so as to name the additional lienors, whose identities were discovered after this action was commenced, as "necessary parties" to its lien foreclosure action. The fact that 3-G has a separate action and a separate fund for its benefit is of no moment. 3-G is required to prove its claim, and be paid only after its filed lien is judicially established. Notably, 3-G is not entitled to a "double recovery" even when its lien has been judicially established in its separate action, and that any shortfall after having been paid from the 3-G trust fund may be satisfied from the Prestige fund, if and only if Prestige has been fully paid from such fund. Further, Devonshire's assertion that the instant motion to amend is equivalent to a motion to consolidate is not borne out by the facts of the case nor the statements made or positions taken by Prestige or 3-G. Hence, Devonshire's objection is without merit.

2. The breach of contract claim. Devonshire argues that Prestige's motion for summary judgment on its breach of contract claim should be denied. Devonshire takes the position that Prestige failed to install the check-valves properly, which caused certain apartments in the building to encounter issues in getting hot water in various plumbing fixtures. Based on the report of its hired engineer, Rand Engineering & Architecture PC (the Rand Report), Devonshire asserts that "flow suppressors and check valves . . . should have been installed during the initial installation by plaintiff as B&B's subcontractor." Karl Smolarz affidavit in opposition to plaintiff's motion for partial summary judgment, dated March 6, 2013 (Smolarz Affidavit), ¶ 6. Thus, Devonshire argues that "[b]ased on the Rand Report, plaintiff's installations were defective and, to the extent it performed extra work to try to remediate the defective work, plaintiff is not entitled to additional compensation." *Id.*, ¶ 7.

Devonshire's argument is flawed. Notably, the breach of contract claim is only asserted against B&B, not Devonshire, as there is no contractual privity between Prestige and Devonshire. Thus, Devonshire lacks the requisite standing to challenge the breach of contract claim. Moreover, the base subcontract between Prestige and B&B specifically stated that "valve-outs assumed to be installed during Riser installation (by Others)." Pfeffer Affirmation, Exhibit L (subcontract). It is noteworthy that because the installation of valve-outs were excluded by the subcontract, "no check-valves were included in the plans and specifications provided to Prestige by B&B." Pietracatella Affidavit, ¶ 6. Also, it is undisputed that B&B later requested Prestige to perform additional work, "including, but not limited to the installation of numerous valve-outs and check-valves." *Id.*, ¶ 7. Thus, Devonshire's assertion that the check-valves "should have been installed during the initial installation by plaintiff as B&B's subcontractor" is unsupported by the facts. If any check-valves were improperly installed, the installation would likely have been performed by others, not Prestige, as specified in the base subcontract, and as corroborated in the Pietracatella Affidavit. Thus, Devonshire's contention that the breach of contract claim should be denied is misguided.

II. B&B and Jacobsen Objections

B&B and Jacobsen object to every aspect of the various relief requested by Prestige in the instant motion, including the breach of contract claim, the trust fund diversion claim, the request for leave to amend the complaint to add Quadrant as an alter ego of B&B, as well as to add 3-G as a necessary party.

1. The breach of contract claim (first cause of action). For a breach of contract cause of action, the necessary elements are: existence of a contract, plaintiff's performance of the contract;

defendant's nonperformance or material breach; and damages. *Noise In The Attic Prods. Inc. v London Records*, 10 AD3d 303 (1st Dept 2004); *Furia v Furia*, 116 AD2d 694 (2d Dept 1986). In this case, the complaint and moving papers state a prima facie case for a breach of contract claim.

In contravention, Jacobsen, B&B's president, asserts that he was "advised by" Devonshire that Prestige "had failed to follow the manufacturer's instruction" in installing the check-valves, which created "a very serious problem because once walls had been closed, it was difficult and expensive to install the check valves, which Prestige should have installed in the first place." Jacobsen supplemental affidavit dated March 8, 2013 (Jacobsen Affidavit),[1] ¶ 12. Jacobsen also asserts that in order to mitigate the problem, B&B installed boosters pumps at its own expense, and asked Prestige to install many of the check-valves. *Id.*, ¶¶ 12-13. Jacobsen further asserts that "he believes most of the charges which Prestige is now seeking are for its work in trying to correct Prestige's defective work," and that "B&B never agreed to pay Prestige for such work and [thus the] change orders it has submitted are unsigned." *Id.*, ¶ 13. Jacobsen argues that because issues of fact exist as to whether Prestige is entitled to compensation for its defective work, summary judgment should be denied as to the breach of contract claim. *Id.*

The above argument is unpersuasive. Jacobsen, on behalf of B&B, has not presented any evidence to rebut Prestige's assertion that the subcontract does not require it to install check valves, because they were "assumed" to be installed by others. Jacobsen never addressed this specific provision of the subcontract. Nor did he deny Prestige's assertion that B&B had asked

---

[1] Jacobsen's prior affidavit dated March 6, 2013 was not notarized and thus should be disregarded. Also, although the Jacobsen Affidavit was submitted two days after its due date, this court may still consider it because Prestige does not appeared to have been prejudiced by the short delay.

Prestige to perform additional work, which included the installation of check-valves that others did not install, thus requiring Prestige to reopen the walls to install them, thus making the additional work more difficult and expensive. B&B's bald allegation that Prestige performed defective work is not an adequate defense to the breach of contract claim, because Prestige has presented a prima facie case that B&B breached the contract by failing to pay Prestige for the additional work. *Zuckerman v City of New York*, 49 NY2d 557 (1980) (opponent of a summary judgment motion must present evidentiary proof in admissible form sufficient to raise a triable issue of fact to preclude entry of summary judgment).

In its reply to B&B's opposition, Prestige points out that: (1) it has listed, in a filed exhibit, all of its additional work proposals that were signed by B&B and for which B&B assigned purchase order numbers; and (2) it has given B&B a credit of $1,164,024 and both parties agreed that the amount had been paid. Pfeffer reply affirmation dated March 20, 2013 (Pfeffer Reply), ¶ 21 (referencing Pietracatella Affidavit, Ex. O). Prestige further asserts it has compiled a table summarizing the above, and based on the table, it is owed for the signed purchase orders alone, in the amount of $281,897. *Id.*, ¶ 22 (referencing Ex. B to the Pfeffer Reply). Hence, Prestige requests entry of a partial summary judgment in its favor in the sum of $281,897, plus interest, for the breach of contract claim. However, B&B has not been afforded an opportunity to review and/or contest the Pfeffer Reply and the exhibits attached thereto, and any entry of summary judgment in favor of Prestige in the requested amount is improper and premature at this point in time.

Accordingly, partial summary judgment, as to liability only, is granted in favor of Prestige on the breach of contract claim. The amount of resulting damages will be determined in a trial.

2. Diversion of trust fund claim (fourth cause of action).

Article 3-A of the Lien Law is enacted "to provide a means of ensuring that there [are] sufficient funds available to pay subcontractors for work performed by creating a statutory trust for funds received in connection with the improvement of real property." *NY Professional Drywall of OC, Inc. v Rivergate Dev., LLC*, 100 AD3d 216, 219 (3d Dept 2012)(*citing* Lien Law § 70 [1]). The owner of the real property or the general contractor is a fiduciary of the assets received to complete the construction project and "any use of those assets for a purpose other than the costs associated with that project constitutes a diversion of the funds and a breach of the fiduciary's duty." *Id.* at 218 (*citing* Lien Law §§ 70-72). The fiduciary is required to maintain books and records available for inspection at monthly intervals by the trust beneficiaries, and at the option of the beneficiaries, they are entitled to request "a verified statement setting forth the entries with respect to the trust contained in such books or records." *Id.* (citing Lien Law § 76). A fiduciary unable to account for its use of the trust funds required by the Lien Law is presumed to have use them improperly. *Medco Plumbing, Inc. v Sparrow Constr. Corp.*, 22 AD3d 647, 648 (2d Dept 2005).

In this case, Prestige asserts that B&B's supplemental verified statement dated October 16, 2012 (the Supplemental Statement), which supplemented an earlier statement dated March 23, 2012, does not contain sufficient information as required by Lien Law § 75. Prestige also asserts that, based on the items described below, B&B failed to keep accurate books and records, and there is evidence which demonstrates that B&B diverted trust funds. Specifically, Prestige points to, among other things, the following: (a) Devonshire states that it paid B&B $13.8 million for the project but B&B states that it received $16.4 million, a difference of over

$2.5 million; (b) B&B paid more than $184,000 from the trust funds for work performed at certain apartments in the building that is not within the scope of the project (i.e. non-trust work) and Jacobsen knew about it; and (c) the payroll cost reported by B&B for the relevant years is highly inflated, as it is inconsistent with historical payroll costs.

In response, B&B asserts, by way of the Jacobsen Affidavit, that: (a) earlier in the case, B&B's books and records reflected that it received $16.4 million from Devonshire, paid $14.5 million to subcontractors, $436,000 for insurance, and $4 million for payroll, which resulted in a loss of $2.5 million on the project; (b) after reviewing the payroll, B&B concluded that about $2 million (not $4 million) was directly related to the project; and (c) even if $184,000 of the trust funds were paid for work unrelated to the project, there is still a loss of over $450,000 on the project, which constitutes an affirmative defense to the fund diversion claim because the full amount of trust funds was disbursed for valid Lien Law purposes. In such regard, B&B contends that the motion for summary judgment as to the fund diversion claim should be denied. Jacobsen Affidavit, ¶¶ 15-17.

B&B's contentions are flawed. First, B&B does not deny that it had inflated its payroll expense by about $2 million, and that it had used more than $180,000 of the trust funds to pay for non-trust work, which is a diversion of trust funds under the Lien Law. Indeed, the case relied on by B&B in defense of the trust fund diversion claim states that "the transfer of any part of these [trust] funds to [the transferee] before payment or discharge of all trust claims was a diversion of trust assets [under Lien Law § 70.]" *Raisler Corp. v Uris 55 Water St. Co.*, 91 Misc 2d 217, 220 (Sup Ct, NY County 1977). Yet, B&B argues that "there was no diversion of trust funds because B&B actually spent for valid Lien Law trust purposes more than it actually received from

[Devonshire] for improvements to the Building." Jacobsen Affidavit, ¶ 5. The payment for non-trust work using trust funds is undisputedly not a payment for valid Lien Law trust purposes. Moreover, B&B admits that Devonshire has deposited $370,000 into an escrow with B&B's counsel, and the money is purportedly dedicated to settle outstanding claims with subcontractors who are willing to settle their unpaid claims. Yet B&B takes the position that it is not required to disclose the specific uses of such $370,000, including the identities of the settling parties and the settlement amounts. Jacobsen Affidavit, ¶ 4, n 1. The $370,000 payment made by Devonshire to settle subcontractor claims is clearly a part of the trust funds, and using such payment but not fully disclosing the details of its usage is a violation of Article 3-A of the Lien Law.

Further, the affidavits of Steven Parmigiani (3-G's manager who was B&B's former supervisor for the Devonshire project), Derrick Sukhlal (3-G's foreman for the project) and Thomas Carchietta (3-G's president-CEO with personal knowledge of the dealings with B&B on the project) that are submitted in support of the instant motion state that: (1) the report attached to the Jacobsen Affidavit included payroll for certain employees who did not work on the Devonshire project, and (2) B&B's payroll tax withholding for the relevant periods was grossly exaggerated. Prestige asserts that when the above information is taken into consideration, B&B did not suffer a loss, but made a profit of over $230,000 instead. Pfeffer Reply, ¶¶ 30-35. In view of the foregoing, B&B has not sustained its burden of proof as to its affirmative defense to the trust fund diversion claim. *Island ADC, Inc. v Baldassano Architectural Group, P.C.*, 49 AD3d 815, 816 (2d Dept 2008)(defendant bears the burden of proof on the affirmative defense); CPLR 3018 (b).

On the other hand, there are issues of fact as to whether Jacobsen can be held personally liable for B&B's fund diversion, even though it is alleged that he had knowledge of the diversion. *Forest Elec. Corp. v Karco-Davis, Inc.*, 259 AD2d 303 (1st Dept 1999)(while the presumption of trust fund diversion is applicable against the corporate defendant, it is inapplicable against the individual who had control over its finances, as no conclusive case of the individual's liability was made out). Summary judgment against Jacobsen is not warranted at the present time. Accordingly, partial summary judgment on the fund diversion claim against B&B (but not Jacobsen), as to liability only, is granted.

3. Amend complaint to add Quadrant as defendant. Prestige seeks leave of court to amend its complaint to add Quadrant as a defendant, based on the allegation that Quadrant is B&B's alter ego. Leave to amend "shall be freely given." CPLR 3025 (b). Moreover, "in considering the proposed amendment, the court should examine, but need not decide, the merits of the proposed new pleading unless it is patently insufficient on its face." *Pier 59 Studios, L.P., v Chelsa Piers, L.P.*, 40 AD3d 363, 366 (1st Dept 2007)(internal citation and quotation marks omitted).

In its moving papers, Prestige alleges that B&B and Quadrant are closely related companies because Jacobsen, the owner of B&B, also exercised significant control over Quadrant. Prestige also alleges that while B&B is a non-union construction company and Quadrant employs union trained labor, Jacobsen used B&B as a means to hire union laborers without paying them union wages. It is also alleged that Jacobsen operates B&B and Quadrant from the same office, and that they share much of the same assets as well as many of the same officers and employees. It is further alleged that Jacobsen transferred money and services from

B&B to enrich himself and Quadrant while stripping B&B of its assets, thus making it judgment proof. Pfeffer Affirmation, ¶¶ 68-74; Parmigiani Affidavit, ¶¶ 5-13. Based on the foregoing, Prestige asserts that Quadrant is B&B's alter ego, and should be found liable to the same degree as B&B with respect to the causes of action asserted in the instant action.

Generally speaking, in order to pierce the corporate veil and impose alter ego liability, a plaintiff must allege that "the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequence." *TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 (1998). In this case, plaintiff's moving papers sufficiently pleaded facts in support of its allegation that Quadrant is B&B's alter ego. Indeed, "[o]nce a prima facie basis for the amendment has been established, that should end the inquiry, even in the face of a rebuttal that might provide the ground for a subsequent motion for summary judgment." *Pier 59 Studios*, 40 AD3d at 366 (internal quotation marks and citation omitted). Accordingly, the motion seeking leave to amend the complaint is granted in all respects, including leave to add Quadrant as a defendant.

Conclusion

Based on all of the foregoing, it is

ORDERED that plaintiff's motion for partial summary judgment on the first cause of action (breach of contract) as against defendant B&B Construction, Inc., as to liability only, is granted; and it is further

ORDERED that plaintiff's motion for partial summary judgment on the fourth cause of action (trust fund diversion) as against B&B Construction, Inc., but not against individual defendant Richard Jacobsen, as to liability only, is granted; and it is further

ORDERED that plaintiff's motion seeking leave of court to amend its complaint is granted in all respects, and the amended complaint in the form annexed to the moving papers shall be served upon the defendants named therein, along with the service of a copy of this order with notice of entry; and it is further

ORDERED that the defendants shall serve an answer to the amended complaint, or otherwise respond thereto, within 20 days from the date of such service; and it is further

ORDERED that the remainder of this action shall continue, and counsel for the parties are directed to appear for a status conference before this court on Oct. 30, 2013, at 2pm @ 26 Bdway, 10th Fl.

Dated: September 18, 2013

ENTER:

J.S.C.

MELVIN L. SCHWEITZER