Lawsuit Funding LLC v Lessoff
2013 NY Slip Op 33066(U)
December 4, 2013
Sup Ct, New York County
Docket Number: 650757/2012
Judge: Eileen Bransten

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
PRESENT: Hon. Eileen Bransten, Justice PART 3

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LAWSUIT FUNDING LLC, and LAWSUIT CAPITAL ADVISORS, LLC,

Plaintiffs,

- *against* -

JEFFREY LESSOFF and THE LAW FIRM OF JEFFREY LESSOFF,

Defendants.

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Index No.: 650757/2012
Motion Date: 07/23/13
Motion Seq. No.: 002

The following papers, numbered 1 to 3, were read on this motion for Summary Judgment.

Notice of Motion/Order to Show Cause - Affidavits - Exhibits No(s). 1

Answering Affidavits - Exhibits No(s). 2

Replying Affidavits No(s). 3

Cross-Motion: X Yes ☐ No

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

DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Dated: December 4, 2013

Eileen Bransten, J.S.C.
Hon. Eileen Bransten

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

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

2. CHECK AS APPROPRIATE: Motion Is: ☐ GRANTED ☐ DENIED X GRANTED IN PART ☐ OTHER

3. CHECK AS APPROPRIATE: Cross-Motion Is: ☐ GRANTED ☐ DENIED X GRANTED IN PART ☐ OTHER

4. 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: IAS PART THREE

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LAWSUIT FUNDING, LLC, and LAWSUIT CAPITAL ADVISORS, LLC,

Plaintiffs,

- *against* -

JEFFREY LESSOFF and THE LAW FIRM OF JEFFREY LESSOFF,

Defendants.

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Index No. 650757/2012
Motion Date: 07/23/2013
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BRANSTEN, J.

This case, involving alternative litigation financing, comes before the Court on Plaintiff Lawsuit Funding, LLC ("Funding") and Plaintiff Lawsuit Capital Advisors, LLC's ("Advisors," collectively, "Plaintiffs") motion for partial summary against Defendant Jeffrey Lessoff and Defendant The Law Firm of Jeffrey Lessoff (collectively, "Defendants"). Defendants oppose and cross-move for leave to amend their Answer to assert a statute of limitations defense and to dismiss the Complaint. For the reasons stated below, Plaintiffs' motion is granted, as to liability, and Defendants' cross-motion is granted, in part, and denied, in part.

Background[1]

Defendant Lessoff is an attorney, admitted to practice law in New York, who receives legal fees on a contingency basis. (Plaintiffs' Rule 19-a Statement of Undisputed Facts ("Stat.") ¶¶ 2, 3.) On January 16, 2007, Defendants entered into a litigation-funding agreement with Plaintiffs entitled "Sale of Contingent Proceeds Agreement" (the "Sale Agreement"). (Stat. ¶ 3.) The Sale Agreement called for Plaintiffs to receive a portion of the contingent legal fee that Defendants were expected to receive if five specifically named lawsuits were adjudicated in favor of Defendants' clients. (Affirmation of Matthew S. Aboulafia in Support of Plaintiffs' Motion ("Aboulafia Affirm.") Ex. C.) In exchange, Defendants received $108,500 as an advance on those expected legal fees. (Aboulafia Affirm. Ex. C.)

Defendant Lessoff failed to make any payments under the Sale Agreement. (Stat. ¶ 5.) On November 14, 2008, Plaintiff Funding filed an arbitration claim, pursuant to the Sale Agreement, seeking to compel Lessoff to surrender legal fees received in connection with the five named lawsuits. (Aboulafia Affirm. Ex. F at 1.) Lessoff unsuccessfully attempted to stay the arbitration. (Aboulafia Affirm. Ex. F at 1.) In August 2009,

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[1] Some facts in this section are derived from Plaintiffs' Rule 19-a Statement of Undisputed Facts. Due to Defendants' failure to submit a counter-statement, Plaintiffs' 19-a Statement has been deemed admitted in its entirety by Defendants for purposes of this motion. *See* 22 N.Y.C.R.R. § 202.70 (Rule 19-a(d)). The remaining facts are derived from the Affirmation of Matthew S. Aboulafia in Support of Plaintiffs' Motion.

Funding and Lessoff settled the arbitration claim with a Stipulation of Settlement ("Stipulation") and a Consent Award ("Award"). (Aboulafia Affirm. Ex. F.)

In the Stipulation, Defendants acknowledged that they received $48,000 in legal fees from a named lawsuit and failed to pay Plaintiffs. (Aboulafia Affirm. Ex. F at 3 n.1.) Further, Defendants agreed to pay $7,000 plus interest to Advisors within two years of signing the Stipulation, as well as to pay Funding up to $238,700 based on legal fees Defendants expected to receive from eight specifically named lawsuits. (Aboulafia Affirm. Ex. F at 3.) Defendants also agreed to pay 25% of any other legal fees received from unrelated cases until the $108,500 advancement was fully paid. The Stipulation additionally provided that Defendants would pay $5,000 in liquidated damages, attorney's fees and other collection fees if they defaulted on the Stipulation. (Aboulafia Affirm. Ex. F at 3.) Finally, the Stipulation stated that the Award would not be final, and Plaintiffs would not be entitled to confirm the Award, until Defendants defaulted under the Stipulation. (Aboulafia Affirm. Ex. F at 4.)

In August 2011, Defendants defaulted under the Stipulation by failing to pay the $7,000 owed to Advisors. (Stat ¶ 12.) Plaintiffs commenced this action on March 12, 2012, seeking to enforce the Sale Agreement and the Stipulation. The Complaint asserts (i) that the Law Firm of Jeffrey Lessoff breached the Sale Agreement; (ii) that Jeffrey Lessoff personally breached the Sale Agreement; (iii) that Jeffrey Lessoff and the Law

Firm of Jeffrey Lessoff damaged Advisors by breaching the Stipulation; and (iv) that Jeffrey Lessoff and the Law Firm of Jeffrey Lessoff damaged Funding by breaching the Stipulation.

On June 5, 2012, Plaintiffs served Defendants with a Notice to Admit, pursuant to CPLR 3123, seeking admissions regarding the attorney's fees in the eight cases delineated in the Stipulation. Defendants failed to respond to the Notice to Admit.

Plaintiffs now move for partial summary judgment on their third and fourth causes of action, seeking to enforce the terms of the Stipulation against Defendants. Defendants oppose the motion and cross-move to amend their Answer to assert a statute of limitations defense, and to dismiss the Complaint.

Analysis

I. Defendants' Cross-Motion for Leave to Amend

Pursuant to CPLR 3025(b), leave to amend should be freely given. However, leave to amend may be denied if there is either "prejudice or surprise resulting directly from the delay," or if the proposed amendment "is palpably improper or insufficient as a matter of law." *McGhee v. Odell*, 96 A.D.3d 449, 450 (1st Dep't 2012) (internal citations omitted).

Defendants propose to amend their Answer to assert a statute of limitations defense. Defendants argue that the statute of limitations to confirm an arbitration award is one year, and that over one year has passed since the Award was rendered. In essence, Defendants contend that Plaintiffs' motion for summary judgment to enforce the Stipulation is an attempt to confirm the Award and circumvent the one-year statute of limitations.

Under New York law, "a stipulation is an independent contract which is subject to the principles of contract law." *Adelsberg v. Amron*, 103 A.D.3d 571, 572 (1st Dep't 2013). Therefore, the Stipulation is not subject to the one-year statute of limitations for confirmation of awards, but rather the six-year statute for contracts. *See* CPLR § 213. The parties entered into the Stipulation in August 2009, and Plaintiffs commenced this action in 2012. Plaintiffs commenced this action within the six-year statute of limitations, and the portion of Defendants' cross-motion seeking leave to amend is denied as palpably insufficient.

II. Summary Judgment Standard

The standards for summary judgment are well-settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." CPLR 3212(b); *Zuckerman*

v. City of New York, 49 N.Y.2d 557, 562 (1980). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once such proof has been offered, to defeat summary judgment "the opposing party must show facts sufficient to require a trial of any issue of fact." CPLR 3212(b); *Zuckerman*, 49 N.Y.2d at 562.

III. Defendants' Cross-Motion for Summary Judgment

Defendants move for summary judgment against the entire Complaint. Based upon the doctrine of release, Defendants are entitled to summary judgment on the first and second causes of action that seek to enforce the Sale Agreement. The first paragraph of the Stipulation states that the "Stipulation . . . settles any and all claims that [Plaintiffs] and [Defendants], as the parties to the present arbitration proceeding, had, have or may have in the future against each other arising out of or relating to the [Sale Agreement]." *See* Aboulafia Affirm. Ex. F at 1.

"A release 'is a jural act of high significance without which the settlement of disputes would be rendered all but impossible' . . . It is well established that further litigation following a release should not be permitted 'except [to prevent] . . . a grave injustice.'" *See Gibli v. Kadosh*, 279 A.D.2d 35, 38 (1st Dep't 2000) (quoting *Mangini v. McClurg*, 24 N.Y.2d 556, 563 (1999)). Therefore Defendants are entitled to summary

judgment on the Complaint's first and second causes of action regarding the Sale Agreement.

IV. Plaintiffs' Motion for Partial Summary Judgment

Plaintiffs' motion for partial summary judgment on the third and fourth causes of action seeks to enforce the Stipulation against Defendants and seeks additional discovery to discern Plaintiffs' full amount of damages. Plaintiffs submit the Stipulation and the unanswered Notice to Admit, showing that Defendants breached their obligations under the Stipulation.

The elements of a breach of contract claim are "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." *Harris v. Seward Park Housing Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010). Plaintiffs have demonstrated, and Defendants do not contest, the existence of a contract, the Stipulation, because "a stipulation is an independent contract which is subject to the principles of contract law." *Adelsberg v. Amron*, 103 A.D.3d 571, 572 (1st Dep't 2013). Further, Plaintiffs have shown that they performed under the contract by paying Defendants $108,500. *See* Stat. ¶ 3. Finally, Plaintiffs have shown that Defendants did not perform and that Plaintiffs have been damaged thereby. *See* Stat. ¶ 5 ("Defendant has obtained settlements in all the actions covered by the [Sale Agreement] . . . but has failed

to pay"). Therefore, Plaintiffs have carried their burden to submit proof, in admissible form, entitling them to summary judgment.

Defendants make four arguments against Plaintiffs' summary judgment motion. First, Defendants argue that the Notice to Admit cannot be used in support of Plaintiffs' motion for summary judgment. Second, Defendants contend that the transactions at issue here are usurious loans that cannot be enforced by the Court. Third, Defendants argue that Plaintiffs are non-lawyers seeking to improperly share attorney's fees. Finally, Defendants contend that the Sale Agreement and Stipulation are unconscionable.

1. *Admissions*

First, Defendants argue that the Notice to Admit cannot be used to grant summary judgment to Plaintiffs and that "Plaintiff must prove his case." *See* Affirmation of Jeffrey L. Lessoff in Opposition to Cross-Motion ("Lessoff Affirm.") ¶ 3. However, failure to timely respond to a notice to admit results in admitting the facts contained therein. *See* CPLR § 3123(a); *Hernandez v. City of New York*, 95 A.D.3d 793, 794 (1st Dep't 2012) ("Defendant is deemed to have admitted the facts contained in plaintiff's notice to admit, as it did not timely respond to the notice"). Therefore, Defendants have admitted, for the purposes of this action, that Defendants received in excess of $100,000 in attorney's fees in each of the eight cases delineated in the Stipulation. *See* Aboulafia Affirm. Ex. D

("[Defendants] received attorneys fees in excess of $100,000 as a result of the resolution of [various] matter[s]").

2. *Not Subject to Usury Laws*

Second, Defendants argue that the Stipulation is a usurious loan that cannot be enforced. However, courts in similar cases have held that agreements nearly identical to the Sale Agreement and Stipulation are not loans and therefore are not subject to usury laws. *See Kelly Grossman & Flanagan, LLP v. Quick Cash, Inc.*, 35 Misc.3d 1205(A) (Sup. Ct. Suffolk Cnty. March 29, 2012) (holding advancement of money to fund lawsuit, and contingent right to receive attorneys' fees as repayment, was not loan subject to usury laws); *Lynx Strategies, LLC v. Ferreira*, 28 Misc.3d 1205(A) (Sup. Ct. N.Y. Cnty. July 6, 2010) (involving Defendant Jeffrey L. Lessoff and holding advancement of money to fund lawsuit, and contingent right to receive attorney's fees as repayment, was not loan subject to usury laws).

In *Lynx Strategies*, the court held that "usury applies to loans . . . [while] the instant transaction, by contrast, is an ownership interest in proceeds for a claim, contingent on the actual existence of any proceeds." *Lynx Strategies*, 28 Misc.3d 1205(A) at *2. As in the instant case, the *Lynx Strategies* court noted that "[h]ad respondent been unsuccessful in negotiating a settlement or winning a judgment,

petitioner would have no contractual right to payment." *Lynx Strategies*, 28 Misc.3d 1205(A) at *2.

The Sale Agreement states that "[Funding] desires to purchase a contingent interest in Proceeds . . . that may be recovered from any and all of the Claim(s)." *See* Aboulafia Affirm. Ex. C at 1. The use of the words "contingent" and "may" show that if there had been no recovery on the underlying actions, then Plaintiffs would not be entitled to any payment. Further, the Stipulation was not a loan, as no money passed from Plaintiffs to Defendants, but rather was a settlement of an underlying claim. Therefore, the Sale Agreement and the Stipulation are not loans, but investments, and are not subject to usury laws.

3. *No Improper Sharing of Attorney's Fees*

Defendants third argument against summary judgment is that the instant transactions constitute improper sharing of attorney's fees with a non-lawyer. The two New York cases involving lawsuit funding through the sale of an attorney's right to receive fees, while upholding the agreements, did not discuss ethical issues or potential violations of New York Rule of Professional Conduct 5.4(a).

However, courts in several other jurisdictions have addressed the interplay of alternative litigation financing and Rule 5.4(a). In *PNC Bank, Delaware v. Berg*, No.

94C-09-208-WTQ, 1997 WL 529978, at *10 (Del. Super. Ct. January 21, 1997), the court explained:

> The Tighe defendants suggest that it is "inappropriate" for a lender to have a security interest in an attorney's contract rights. Yet it is routine practice for lenders to take security interests in the contract rights of other business enterprises. A law firm is a business, albeit one infused with some measure of the public trust, and there is no valid reason why a law firm should be treated differently than an accounting firm or a construction firm. The Rules of Professional Conduct ensure that attorneys will zealously represent the interests of their clients, regardless of whether the fees the attorney generates from the contract through representation remain with the firm or must be used to satisfy a security interest. Parenthetically, the Court will note that there is no suggestion that it is inappropriate for a lender to have a security interest in an attorney's accounts receivable. It is, in fact, a common practice. Yet there is no real "ethical" difference whether the security interest is in contract rights (fees not yet earned) or accounts receivable (fees earned) in so far as Rule of Professional Conduct 5.4, the rule prohibiting the sharing of legal fees with a nonlawyer, is concerned. It does not seem to this Court that we can claim for our profession, under the guise of ethics, an insulation from creditors to which others are not entitled.
>
> *PNC Bank, Delaware*, at *10 n.5.

The *PNC Bank* decision has been quoted by the First Circuit, several federal district courts, and the Court of Appeals of Ohio. *See Cadle Co. v. Schlichtmann*, 267 F.3d 14, 18 (1st Cir. 2001) (upholding a security interest in a law firm's anticipated contingency fees); *Core Funding Grp., L.L.C. v. McDonald*, No. L-05-1291, 2006 WL 832833, at *11 (Ohio Ct. App. Mar. 31, 2006) (quoting *PNC Bank* and holding that "at this juncture, we cannot claim for appellees, under the guise of ethics, an insulation from

appellant-creditor"). *See also* ACF 2006 Corp. v. Merritt, No. CIV-12-161, 2013 WL 466603, at *3 n.1 (W.D. Ok. Feb. 7, 2013); *U.S. Claims, Inc. v. Yehuda Smolar, PC*, 602 F.Supp.2d 590, 597 (E.D. Pa. March 9, 2009); *U.S. Claims, Inc. v. Flomenhaft & Cannata, LLC*, 519 F.Supp.2d 515, 521 (E.D. Pa Nov. 13, 2006).

There is a proliferation of alternative litigation financing in the United States, partly due to the recognition that litigation funding allows lawsuits to be decided on their merits, and not based on which party has deeper pockets or stronger appetite for protracted litigation. *See* A.B.A. Comm. on Ethics 20/20, *Informational Report to the House of Delegates* 2 n.6 February 2012, *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf; Sandra Stern, *Borrowing from Peter to Sue Paul: Legal & Ethical Issues in Financing a Commercial Lawsuit* ¶ 27.02[3] (2013). Therefore, this Court adopts the *PNC Bank* Court's reasoning and finds that the Stipulation does not violate Rule 5.4(a) and is not unenforceable as against public policy.

4. *Not Unconscionable*

Finally, Defendants contend that "[t]he amount of the loan, the terms, the fees, everything is unfair, unconscionable, not at arms length!" *See* Lessoff Affirm. ¶ 12. In

addition, Defendants argue that "the only thing [Plaintiffs] do not do is break your legs what do you call them." *See* Lessoff Affirm. ¶ 12.

"A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable, i.e., 'some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.'" *Warburg, Pincus Equity Partners, L.P. v. Keane*, 22 A.D.3d 321, 322 (1st Dep't 2005) (quoting *Gillman v. Chase Manhattan Bank*, 73 N.Y.2d 1, 10 (1988)).

Defendants fail to carry their burden to show procedural and substantive unconscionability, or to raise an issue of fact precluding summary judgment. Defendants state that they "were desperate borrowers at the time of the loan, or else they would have received a much better rate," and that Defendants "had never not paid any debt, like this before. He has paid off any of these companies back." *See* Lessoff Affirm. ¶¶ 7, 8.

Defendants' conclusory assertions, without more, do not rise to the level of a procedurally and substantively unconscionable contract. "[A]n unconscionable contract has been defined as one which is so grossly unreasonable as to be unenforceable because of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *King v. Fox*, 7 N.Y.3d 181, 191 (2006).

Here, Defendants received $108,500 to assist in prosecuting the delineated cases, with no guaranteed obligation to repay. Further, Defendants affirmed the allegedly "unconscionable" terms of the Sale Agreement by expanding upon the Sale Agreement's provisions in the Stipulation. Therefore, the agreements at issue here are not unconscionable.

Plaintiffs have established entitlement to summary judgment regarding Defendants' liability for breach of the Stipulation. Further, Defendants have failed to carry their burden to raise a genuine issue of material fact precluding entry of judgment.

VI. Damages

The single remaining issue to be determined is the amount of damages to which Plaintiffs are entitled under the Stipulation. The Stipulation contains multiple clauses defining Defendants' obligations to Plaintiffs, which will be considered in turn.

First, Section 2.2 of the Stipulation provides that Plaintiffs shall receive the attorneys fees that Defendants receive in eight named cases, up to an aggregate amount of $238,700. *See* Aboulafia Affirm. Ex. F at 2. Given that Defendants failed to timely respond to Plaintiffs' Notice to Admit, Defendants have admitted receiving in excess of $100,000 in attorney's fees in each of the eight cases defined in the Stipulation, or at least $800,000. *See* CPLR §3123(a); *Hernandez v. City of New York*, 95 A.D.3d 793, 794 (1st

Dep't 2012) ("Defendant is deemed to have admitted the facts contained in plaintiff's notice to admit, as it did not timely respond to the notice"). Therefore, Defendants are liable for the maximum amount of $238,700.

Second, Section 2.3 provides that Defendants must remit received fees within ten business days of receipt. *See* Aboulafia Affirm. Ex. F at 3. Further, Section 2.3 states that if Defendants fail to timely remit the fees, then the debt accrues interest at a rate of 3% per month, compounded monthly. There has been no evidence regarding when Defendants received legal fees in the eight cases. Therefore, further discovery is needed regarding this issue.

Third, Section 5 of the Stipulation provides for a penalty of $50 for each late payment made by Defendants under Section 2. *See* Aboulafia Affirm. Ex. F at 5. A payment is considered late fifteen days after Defendants' receipt of attorney's fees. *See* Aboulafia Affirm. Ex. F at 5. Therefore, each time Defendant's received attorneys fees subsequent to signing the Stipulation, and failed to remit that amount to Plaintiffs, a penalty of $50 should be assessed. This issue also requires further discovery regarding when fees were received by Defendants.

Fourth, Section 6.1(i) provides for $5,000 liquidated damages in the event Defendants default on the Stipulation. *See* Aboulafia Affirm. Ex. F at 5. As Defendants have defaulted on the Stipulation, Defendants are entitled to $5,000.

Finally, Section 6.2(ii) provides for full reimbursement of all reasonable legal and collections fees incurred due to Defendants' default. *See* Aboulafia Affirm. Ex. F at 5. The amount of attorneys and collection fees requires further discovery.

Defendants' remaining arguments have been considered and are not persuasive. Plaintiffs' other arguments are rendered moot.

CONCLUSION

Accordingly, it is hereby

ORDERED that Defendants' cross-motion for leave to amend the Answer is DENIED; and it is further

ORDERED that Defendants' cross-motion for summary judgment dismissing the Complaint is GRANTED in so far as it seeks to dismiss the first and second causes of action, and is otherwise DENIED; and it is further

ORDERED that the first and second causes of action are dismissed, the first and second causes of action are severed, and the Clerk is directed to enter judgement accordingly; and it is further

ORDERED that Plaintiffs' motion for partial summary judgment on the third and fourth causes of action is GRANTED as to liability; and it is further

ORDERED that the branch of Plaintiffs's motion seeking additional discovery is GRANTED, and Plaintiffs are granted leave to serve additional disclosure demands on Defendants, within 30 days of the date of this Order, regarding the dates when Plaintiffs received legal fees in the eight cases listed in Section 2 of the Stipulation; and it is further

ORDERED that counsel for the parties are directed to appear for a status conference in Room 442, 60 Centre St, on Wednesday, February 5, 2014, at 10:45 a.m.

This constitutes the decision and order of the Court.

Dated: New York, New York
December 4, 2013

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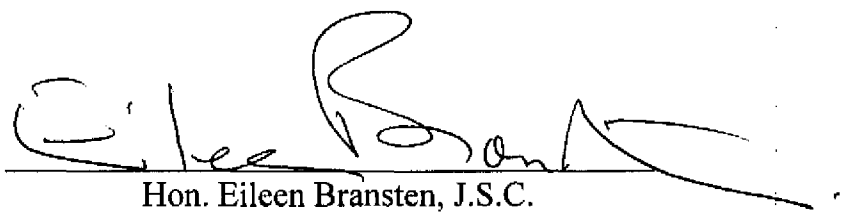

Hon. Eileen Bransten, J.S.C.