Med-Mac Realty Co., Inc. v Modell
2018 NY Slip Op 30409(U)
March 9, 2018
Supreme Court, New York County
Docket Number: 652351/2014
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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MED-MAC REALTY CO., INC.,

Plaintiff,

- v -

LESLIE MODELL AS TRUSTEE OF THE SHAWN M. ZIMBERG 1997 TRUST, CHARLES A. LUBITZ AS TRUSTEE OF THE SHELBY MODELL 2003 TRUST NO. 1, SHAWN MODELL, ALEXANDER MODELL, ANDREW MODELL, MITCHELL MODELL AS TRUSTEE OF THE SHAWN M. ZIMBERG 1997 TRUST

Defendants.

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INDEX NO. 652351/2014

MOTION DATE

MOTION SEQ. NO. 007

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 120, 123, 124, 125, 147, 148, 149, 150, 151, 152, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 218, 219, 220, 221, 222, 223, 224, 225, 226, 229, 230, 231, 232, 233, 234, 236

were read on this application to/for SUMMARY JUDGMENT (AFTER JOINDER) & Amend Caption/Pleadings

HON. SALIANN SCARPULLA:

In this intra-family dispute, plaintiff Med-Mac Realty Co., Inc. ("Med-Mac") moves for summary judgment on its complaint, and one the defendants, Leslie Modell ("Leslie"), opposes the motion and cross-moves for summary judgment dismissing the complaint. Leslie also moves, pursuant to CPLR 3025(b), for leave to amend her answer, which Med-Mac opposes. The motion for summary judgment, cross-motion for summary judgment, and motion for leave to amend her answer are consolidated for disposition herein.

Background

This action concerns four life insurance policies held by The Shawn M. Zimberg Trust ("Shawn Zimberg Trust") and The Shelby Modell 2003 Trust No. 1 ("2003 Trust") (collectively referred to as the "Trusts"). The Trusts were created pursuant to the Modell family estate planning process. William Modell ("Bill"), the patriarch of the Modell family, organized and oversaw the estate planning, and the insurance policies at issue insured the life of Shelby Modell ("Shelby"), the matriarch of the Modell family.

Shelby and Bill had three children, Leslie, Mitchell B. Modell ("Mitchell"), and Michael Modell ("Michael").[1] Bill was the Chief Executive Officer of Med-Mac when the life insurance policies were purchased. Mitchell became Med-Mac's Chief Executive Officer after Bill died in 2008.[2]

In 1997, Shelby, as grantor, and Mitchell and Leslie, as trustees, entered into a trust agreement ("1997 Trust Agreement") establishing the Shawn Zimberg Trust. Defendant Shawn M. Zimberg ("Shawn"),[3] Leslie's daughter, was named as the beneficiary of this trust. The 1997 Trust Agreement authorized trustees Mitchell and Leslie to purchase and pay premiums for life insurance policies on Shelby's life.

[1] Michael died in 2011.

[2] The ownership interest in Med-Mac is as follows: Bill's estate owns a 51% interest, Mitchell owns a 24.5% interest, and Michael's estate owns a 24.5% interest.

[3] Shawn has appeared in this action but has not interposed an answer. After her attorney withdrew as counsel, she did not retain new counsel. However, Leslie's new counsel has submitted two affirmations joining Shawn in Leslie's opposition to Med-Mac's motion for summary judgment and in support of Leslie's cross-motion for summary judgment.

Leslie and Mitchell obtained an insurance policy on Shelby's life from the Berkshire Life Insurance Company ("Berkshire Policy"), and the Shawn Zimberg Trust, by Leslie, and Med-Mac entered into a split-dollar life insurance agreement ("Split-Dollar Agreement"). Under the Split-Dollar Agreement, Med-Mac agreed to loan money to the Shawn Zimberg Trust for insurance premium payments on the Berkshire Policy, which the Shawn Zimberg Trust agreed to repay, upon Shelby's death, from the Berkshire Policy insurance proceeds.

In 2003, Shelby, as grantor, and defendant Charles A. Lubitz ("Lubitz") and Martin L. Edelman ("Edelman"), as trustees, entered into a trust agreement ("2003 Trust Agreement") establishing the 2003 Trust. Shawn and Leslie are beneficiaries of the 2003 Trust. Under the 2003 Trust Agreement, the trustees have the authority to purchase and pay premiums for life insurance policies on Shelby's life. [4]

The trustees of the 2003 Trust obtained two life insurance policies on Shelby's life: one for $10,000,000 from Mass Mutual ("Mass Mutual Policy") and the other for $14,000,200 from Jefferson Pilot Life Insurance Company, n/k/a Lincoln Life ("Lincoln Life Policy"). No split-dollar life insurance agreement or written loan agreement between Med-Mac and the 2003 Trust was executed for either the Mass Mutual Policy or the Lincoln Life Policy. Nevertheless, Med-Mac paid the premiums on both policies from 2003 through 2011.

[4] Edelman resigned as trustee, effective September 1, 2006, and no substitute trustee was appointed, thus Lubitz is the sole remaining trustee of the 2003 Trust.

In January 2005, the 1997 Trust Agreement was amended and restated ("2005 Trust Agreement"). Bill was added as a grantor of the Shawn Zimberg Trust and defendants Alexander Modell and Andrew Modell were added as beneficiaries to the Shawn Zimberg Trust.[5] Under the 2005 Trust Agreement, Mitchell and Leslie, as trustees, were granted the authority to purchase and pay premiums for life insurance policies on the grantors' lives.

Pursuant to the 2005 Trust Agreement, the trustees cancelled the Berkshire policy and obtained a new life insurance policy insuring Shelby's life from AXA Equitable ("Equitable Policy"). While there was no split-dollar life insurance agreement between Med-Mac and the Shawn Zimberg Trust executed with the Equitable Policy, Med-Mac paid premiums on the Equitable policy from 2005 through 2011. Med-Mac alleges that, upon the cancellation of the Berkshire Policy, the Shawn Zimberg Trust repaid some of the loans that were made pursuant to the Split-Dollar Agreement, but there is still a $154,507 balance which remains due and owing.

In 2011, Mitchell informed Leslie (regarding the Shawn Zimberg Trust) and Lubitz (regarding the 2003 Trust) that Med-Mac would stop making insurance premium payments unless they each: (1) provided written acknowledgment of past and any future loans; and (2) executed a collateral assignment of the Mass Mutual Policy, Lincoln Life Policy, and Equitable Policy (collectively referred to as the "Policies"). Lubitz initially agreed to acknowledge the premium payments as loans and to execute collateral

[5] Defendants Alexander Modell and Andrew Modell have appeared in this action but have not interposed an answer nor have they opposed any of the pending motions.

assignments of the Mass Mutual Policy and Lincoln Life Policy, but later withdrew his consent after Leslie and Shawn objected.

By letter dated October 10, 2011, Leslie refused to acknowledge any of the premium payments as loans and to execute a collateral assignment of the Equitable Policy. She stated that "there is an agreement since the inception of all of Shelby's life insurance policies that the premiums be paid by [Med-Mac]." Leslie further stated that "[t]here have always been sufficient funds in [the Shawn Zimberg] Trust which were protected and never used to pay the premiums because it is [Med-Mac's] responsibility to pay these insurance premiums." Waters Aff., Ex. H at 3. By letter dated November 21, 2011 to Leslie, Mitchell replied that he was unaware of any such agreement and that, "[a]lthough review of the financial records of [Med-Mac] indicates that loans have been made to some of the trusts over the past several years, these loans have been discretionary." Waters Aff., Ex. H at 5-6.

Approximately three years later, in July 2014, Med-Mac commenced this action. In its verified complaint, Med-Mac asserts four causes of action, seeking declarations that: (1) upon Shelby's death, Med-Mac is entitled to repayment of all past sums loaned to the Shawn Zimberg Trust, and that the Equitable Policy is deemed to have been assigned to Med-Mac as collateral security for the repayment of the sums loaned and interest; (2) Med-Mac has no legal, equitable, or other obligation to make any further loans to the Shawn Zimberg Trust; (3) upon Shelby's death, Med-Mac is entitled to repayment of all past sums loaned to the 2003 Trust, and that the Mass Mutual Policy and the Lincoln Life Policies are deemed to have been assigned to Med-Mac as collateral

security for the repayment of the sums loaned and interest; and (4) Med-Mac has no legal, equitable, or other obligation to make any further loans to the 2003 Trust.

Lubitz filed a verified answer which asserted a laches affirmative defense and statute of limitations affirmative defense. Leslie filed a verified answer in November 2014, which did not contain any affirmative defenses. Over the next two years the parties engaged in and completed discovery. Med-Mac filed a first note of issue on June 9, 2016 and a second note of issue on September 7, 2016.[6]

Med-Mac moved for summary judgment in November 2016. Leslie's third set of attorneys then moved to be relieved in December 2016, which motion was granted in January 2017. In March 2017 Leslie's fourth set of attorneys put in a notice of appearance and, in April 2017, Leslie moved to amend her answer to include the following affirmative defenses: (1) statute of limitations; (2) laches; (3) statute of fraud; and (4) that payments made by Med-Mac during Bill's lifetime were gifts, not loans. Leslie also opposed Med-Mac's motion for summary judgment and cross-moved for summary judgment based solely on the laches, statute of frauds, and statute of limitations proposed affirmative defenses.

In support of Leslie's motion seeking leave to amend the answer, Leslie argues that Med-Mac cannot be surprised or prejudiced by Leslie asserting the defenses of laches and statute of limitations, because they were asserted by Lubitz in his answer.

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[6] The June 9, 2016 note of issue was vacated to give Med-Mac the opportunity to complete Leslie's deposition.

Leslie also argues that Med-Mac cannot be prejudiced or surprised by the proposed defense that the life insurance premium payments were a gift and not a loan because Med-Mac explicitly addresses this issue in its memorandum of law in support of summary judgment. Leslie concludes that, because Med-Mac cannot be prejudiced or surprised, any delay in seeking leave to amend the answer to assert these affirmative defenses is immaterial.

Leslie further argues that she should be able to interpose the statute of frauds defense at this juncture because she only became aware of the applicability of this defense when Med-Mac failed to submit a written agreement in support of its motion for summary judgment and, instead, relied on affidavits.

Med-Mac, in opposing Leslie's motion seeking leave to amend her answer, argues that Leslie is attempting to further delay adjudication of this case by filing the motion almost eight months after the completion of discovery, more than five months after Med-Mac moved for summary judgment, and less than one month before the summary judgment motion was scheduled for oral argument.[7] Med-Mac further argues that Leslie failed to meet her burden of explaining the delay in seeking to amend the answer, and that the proposed amendments lack merit and evidentiary support.

In support of its motion for summary judgment, Med-Mac asserts that – pursuant to Bill's estate planning intentions – it had an agreement with the Trusts that any insurance premium payments made on the Policies by Med-Mac were discretionary loans

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[7] Oral argument was rescheduled several times at Leslie's request.

to be repaid upon the death of Shelby, from the proceeds of the Policies. To prove the existence of this loan agreement, Med-Mac submits affidavits of the four remaining individuals involved in the Modell family estate planning, Mitchell, Lawrence Brustein ("Brustein"),[8] Peter L. Klausner ("Klausner"),[9] and Stephen B. Wechsler ("Wechsler").[10] These affiants all averred that they assisted in establishing the Trust and purchasing the life insurance policies and that they have knowledge of the loan agreement.

Further, these affiants consistently state that: everyone involved in establishing the Trusts intended that any premium payments that Med-Mac made were to be treated as discretionary loans that were to be repaid from the proceeds of the Policies; Shelby did not participate and was not involved in the establishment of either Trusts, in purchasing any of the Policies, or the premium payments pursuant to the loan agreement; and Leslie did not have any involvement or personal knowledge regarding the loan agreement.

Med-Mac also submits the 1997 Trust Agreement and the 2005 Trust Agreement, which have provisions indicating that the premium payments made were intended to be loans. Paragraph 3(A) of the 1997 Trust Agreement provides, in part, that upon Shelby's death, "[t]he trustees shall pay [Med-Mac] . . . the amount due, if any, to [Med-Mac], as

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[8] Brustein oversees Plaintiff's financial matters, including premium payments on the Policies.

[9] Klausner provided legal counsel and advice to Bill regarding estate planning and tax-related matters.

[10] Wechsler, who through his independent insurance brokerage firm assisted the Model family with both business and personal life insurance needs, assisted in establishing and maintaining the Policies.

set forth in the . . . Split-Dollar Agreement by and between [Med-Mac] and Shelby Modell with respect to any life insurance policy owned by The Shawn M. Zimberg 1997 Trust." Paragraph 3(A) of the 2005 Trust Agreement provides, in part, that upon Shelby's death, "[t]he trustees shall pay to [Med-Mac] . . . the amount due, if any, with respect to any loans payable to it." Finally, Med-Mac submits its company balance sheets, which record the insurance premium payments as loans.

In opposition, Leslie denies the existence of the loan agreement and argues that Med-Mac failed to make a *prima facie* showing that the loan agreement exists. Leslie argues that Mitchell is the only trustee with knowledge of the loan agreement, and she contends that the submission of Med-Mac's internal balance sheets documenting the premium payments as loans cannot – without any additional documentation regarding the loan agreement prior to Mitchell's 2011 correspondence – evidence a meeting of the minds.

Leslie also submits balance sheets for the Shawn Zimberg Trust and the 2003 Trust, neither of which show outstanding loan balances from Med-Mac's insurance premium payments that accrued prior to 2012. Leslie argues that the affidavits submitted by Med-Mac in support of its motion for summary judgment are conclusory, and the affiants failed to supplement their statements regarding Bill's intentions with supporting documents or recollections of conversations.

Discussion

I. **Leslie's Motion to Amend**

A motion seeking leave to amend a pleading pursuant to CPLR 3025(b) is generally "freely granted absent prejudice or surprise resulting from the delay." *Antwerpse Diamantbank N.V. v Nissel*, 27 AD3d 207, 208 (1st Dept 2006); *Cseh v. New York City Transit Authority*, 240 AD2d 270, 271 (1st Dept 1997). "Prejudice may be demonstrated . . . where the amendment is sought after discovery has been completed." *Lattanzio v Lattanzio*, 13 Misc 3d 1241(A) (Sup Ct, NY County 2006), *affd*, 55 AD3d 431 (1st Dept 2008) (citations omitted). Prejudice may also exist where an amendment is sought after the parties have made "substantial progress" in litigating the matter. *Seda v New York City Hous. Auth.*, 181 AD2d 469, 470 (1st Dept 1992); *Antwerpse Diamantbank N.V.*, 27 AD3d at 208.

The party seeking leave to amend is required to "show that the proffered amendment is not palpably insufficient or clearly devoid of merit." *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 AD3d 499, 500 (1st Dept 2010) (internal citations omitted). "However, where there has been an extended delay in moving to amend, the party seeking leave to amend must establish a reasonable excuse for the delay." *Oil Heat Inst. of Long Is. Ins. Tr. v RMTS Assoc., LLC*, 4 AD3d 290, 293 (1st Dept 2004) (internal citations and quotation marks omitted); *Wassfam L.L.C. v Palacios*, 107 AD3d 493 (1st Dept 2013).

Here, Leslie seeks to amend her answer almost two and a half years after she filed the original answer, after two years of discovery, seven months after Med-Mac filed the

second note of issue, and five months after Med-Mac moved for summary judgment. Clearly, Leslie waited an extensive, unexplained period before moving to amend. *See, e.g.*, *Oil Heat Inst. of Long Is. Tr.*, 4 AD3d at 293 (extended delay where party moved to amend third party complaint more than two and a half years after commencement of lawsuit) (internal citations and quotation marks omitted); *Wassfam L.L.C.*, 107 AD3d at 493 (extended delay where party moved to amend answer after the note of issue was filed and one year after filing the original answer); *Anna O. v State*, 37 Misc 3d 1209(A) (Ct Cl 2012) ("waiting 18 months, until almost the eve of trial, is an extended delay in moving to amend the Answer").

With respect to the proposed statute of frauds defense, Leslie claims that her extensive delay is due to the fact that she only became aware of the statute of frauds defense when Med-Mac failed to submit a written loan agreement in support of its motion for summary judgment. However, this proffered excuse is belied by the record.

First, Leslie was on notice that there was no written loan agreement as far back as 2011, when Mitchell wrote Leslie the letter stating that Med-Mac "will consider making further loans **provided that both past and future loans are acknowledged in writing** by the trustees . . . to whom these loans have been, or will be, made . . .." Waters Aff., Ex. H at 5-6 (emphasis added). Second, Med-Mac never plead the existence of a written agreement in its complaint, and its position regarding the loan agreement has been consistent throughout the litigation. All through the two years of discovery taken in this action, Leslie was never provided with a written loan document.

Indeed, Leslie was directly informed that the loan agreement was oral during discovery. On February 26, 2016, during Leslie's deposition of Brustein, Brustein testified that there is no written loan agreement. *See* Waters Aff., Ex. G at 73-74, 80, 91. On March 23, 2016, Leslie wrote a letter[11] requesting permission to depose Mitchell Modell; soon after, I granted Leslie permission to take a deposition limited to the issue of the verbal agreement that Leslie referred to in her letter.

Even if Leslie first learned that the purported loan agreement was oral and not written at the February 26, 2016 deposition of Brustein, Leslie failed to proffer any excuse as to why she waited more than a year – during which time discovery was completed, two notes of issue were filed, and Med-Mac moved for summary judgment – in seeking leave to file an amended complaint to include statute of frauds as an affirmative defense. At bottom, Leslie's proffered excuse for her delay in asserting the statute of frauds defense is meritless.

Leslie has offered no excuse at all for her extensive delay in seeking to add the statute of limitations/laches defenses, and therefore has not met her burden in support of

[11] "It is the contention of the Model Defendants that there was a verbal agreement between Mitchell Modell and William Modell ("Bill") . . . that the insurance premiums at issue in this action were to be paid by a Modell company . . .. The contested verbal agreement directly impacts upon how past premium payments should be treated, which is the subject of plaintiff's declaratory judgment request, as well as whether future payments must continue to be paid by Modell companies rather than by the trusts that are the insurance policy beneficiaries." Letter/Correspondence to Judge Requesting Permission to Depose Mitchell Modell at 2 (March 23, 2016) (NYSCEF No. 38).

her motion to add these defenses. *See Wassfam,* 107 AD3d at 493; *Oil Heat Inst. of Long Is. Ins. Tr.*, 4 AD3d at 294.[12]

Also, Med-Mac would be significantly prejudiced if Leslie were permitted to amend her answer at this late stage of litigation, *i.e.*, where discovery has been completed, a note of issue has been filed, and the parties have cross-moved for summary judgment. *See, e.g., Lattanzio v Lattanzio*, 55 AD3d 431, 432 (1st Dept 2008) ("Plaintiffs demonstrated that they would be prejudiced if leave to further amend were granted because discovery had been closed.") (internal citation omitted); *Arias-Paulino v Academy Bus Tours, Inc.*, 48 AD3d 350 (1st Dept 2008) (denying motion to amend answer after defendant delayed more than two and a half years, during which time "plaintiffs not only litigated the matter extensively but also prepared for and participated in a mediation"); *Green v Fischbein, Olivieri, Rozenholc & Badillo,* 135 AD2d 415, 420 (1st Dept 1987) (finding that plaintiff would be prejudiced by allowing defendant to amend its answer one year after filing an amended answer because "plaintiff already spent years of considerable time, effort and expense in prosecuting a lawsuit which could largely be rendered meaningless should the [newly proposed] defense succeed").

For the foregoing reasons, Leslie's motion for leave to amend her answer is denied. Consequently, Leslie's cross-motion for summary judgment – which is based

[12] Further, I agree with Med-Mac that because Med-Mac seeks a declaration that the loan agreement provides that the Trusts must pay back the alleged loans upon Shelby's death, an event which has not yet occurred, Leslie does not have a meritorious statute of limitations defense.

solely on the laches, statute of frauds, and statute of limitations proposed affirmative defenses – is also denied.[13]

II. Med-Mac's Motion for Summary Judgment

The party moving for summary judgment "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case," *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851, 853 (1985) (internal citations omitted). Once the movant has established its prima facie entitlement to summary judgment, the burden shifts to the opposing party "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact." *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986) (internal citations omitted).

Further, "where questions of fact and credibility exist with respect to the existence of a binding oral agreement, and the terms thereof, summary judgment in favor of either side is inappropriate." *Kramer v Greene*, 142 AD3d 438, 440 (1st Dept 2016) citing *Sabre Intl. Sec., Ltd. v. Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 436 (1st Dept 2012).

Here, Med-Mac has failed conclusively to establish the existence of the loan agreement with the Trusts and to eliminate all factual issues from the case. *See, e.g.*, *Asabor*, 102 AD3d at 527; *Kramer*, 142 AD3d at 440; *Sabre Intl. Sec., Ltd.*, 95 AD3d at

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[13] By failing to assert the statute of frauds, laches, and statute of limitations defenses in her answer, Leslie has waived these affirmative defenses and I will not consider these arguments in her opposition to Med-Mac's motion for summary judgment. However, the defense that the payments were a gift need not be pled affirmatively and may be considered in opposition to Med-Mac's motion for summary judgment. *See generally* CPLR 3018(b).

436. Leslie denies the existence of the loan agreement and Med-Mac admits that none of the other trustees (aside from Mitchell) knew about the loan agreement. Also, Shelby – as grantor on all the Policies – did not participate in any discussions regarding the loan agreement, and Leslie disputes the credibility of Med-Mac's four affiants, who claim that they are the only individuals with knowledge of Bill's intentions regarding the loan agreement.

Moreover, Further, neither Med-Mac's financial statements, which list the premium payments as loans, nor the Shawn Zimberg Trust balance sheets[14] conclusively establish the existence of the alleged oral loan agreement. Similarly, the 2005 Trust Agreement, which Med-Mac submits, does not establish that the premium payments were loans – it simply acknowledges that if there are loans payable to Med-Mac, the trustees of the Shawn Zimberg Trust will repay the loans upon Shelby's death. Accordingly, I deny Med-Mac's motion for summary judgment.

In accordance with the foregoing, it is

ORDERED that plaintiff Med-Mac Realty Co., Inc.'s motion for summary judgment is denied; and it is further

ORDERED that defendant Leslie Modell's cross-motion for summary judgment dismissing the complaint is denied and it is further

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[14] Plaintiff refers to the "allocations" section of the Shawn Zimberg Trust balance sheets – which provides a list of categories, including two entitled "gifts" and "loan repayment" – to argue that this proves that the premium payments were loans and not gifts.

ORDERED that Defendant Leslie Modell's motion seeking leave to amend her answer is denied; and it is further

ORDERED that the parties are directed to appear for a pretrial conference on April 18, 2018 at 2:15 pm.

This constitutes the decision and order of the Court.

3/9/18
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED			[X]	NON-FINAL DISPOSITION		
APPLICATION:	[ ]	GRANTED	[X]	DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
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