Santander Bank, N.A. v Diamonds on Madison Inc.
2018 NY Slip Op 32239(U)
September 12, 2018
Supreme Court, New York County
Docket Number: 152558/2017
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHRYN E. FREED** **PART** **IAS MOTION 2**

Justice

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INDEX NO. 152558/2017

SANTANDER BANK, N.A.,

Plaintiff,

MOTION SEQ. NO. 001

- v -

DIAMONDS ON MADISON INC. and SARAH STRAUS,

Defendants.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents, it is ordered that the motion is decided as follows.

In this action sounding, inter alia, in breach of a promissory note, plaintiff Santander Bank, N.A. moves: 1) pursuant to CPLR 3212, to recover monies owed by defendants Diamonds on Madison, Inc. ("DMI") and Sarah Straus ("Straus") (collectively "defendants") arising from their alleged failure to make payments required by a promissory note; 2) to dismiss the affirmative defenses and counterclaims asserted by defendants; and 3) for such other and further relief as this Court deems just and proper. DMI and Straus oppose the motion. After oral argument, and after a review of the parties' motion papers and the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

On January 30, 2015, DMI applied to plaintiff for a $90,000 small business loan. Doc. 20. On February 11, 2015, plaintiff and DMI executed a promissory note ("the note") pursuant to which plaintiff agreed to loan DMI funds in the principal amount of $90,000. Doc. 12, at par. 6; Doc. 16. Pursuant to the note, DMI agreed to pay:

> regular monthly payments of all accrued unpaid interest due as of each payment date, beginning on March 13, 2015 with all subsequent interest payments to be due on the same day of each month thereafter.

Doc. 16, at p. 1.

Pursuant to the note, DMI agreed to pay non-default interest at the greater of 6.50% per annum or a variable rate equal to the Prime Rate plus 3.25% ("the interest rate"). Doc. 12, at par. 9; Doc. 16. In the event DMI failed to make automated payments under the note or closed a checking account with plaintiff, the rate was to increase another .5%. Doc. 12, at par. 9; Doc. 16. In the event of a default, the interest rate was to increase by 8% ("default interest rate"). Doc. 12, at par. 9; Doc. 16. The note reflected that DMI's obligations thereunder were "joint and several." Doc. 16.

The note further provided that DMI's failure to make required payments was an "Event of Default" which entitled plaintiff to, inter alia, accelerate all indebtedness under the note without any notice to DMI. Doc. 12, at par. 10; Doc. 16. In the event of a default under the note, DMI was required to pay outstanding principal, accrued interest, default interest, as well as late charges, costs, expenses and attorneys' fees as follows:

> LATE CHARGES. If any payment due under this Note is not received by [plaintiff] within fifteen (15) days after it is due, [DMI] shall pay a late charge to [plaintiff] equal to Five (5%) percent of the overdue payment, but in no event will the late charge be less than Twenty-Five ($25.00) Dollars. Any such late charge assessed is immediately due and payable.
>
> * * *
>
> EXPENSES. [Plaintiff] shall be entitled to collect all expenses incurred in pursuing any payment due hereunder that is not paid when due, whether in accordance with the terms hereof, or by acceleration or otherwise (including all costs and attorneys' fees incurred in connection with any collection proceedings . . .), and [DMI] agrees to pay all costs of collection including, without limitation reasonable attorneys' fees and costs of in-house counsel and/or outside counsel.

Doc. 12, at par 11; Doc. 16, at p. 2-3.

The original maturity date of the note was February 11, 2016, one year after the date of its execution, and it was then able to be extended for one year periods. Doc. 12, at par. 8. Doc. 16.

Every month during the term of the loan, plaintiff sent DMA monthly statements setting forth the amounts due for each installment, interest charges, and other fees. Doc. 12, at par. 20; Doc. 19. However, DMI defaulted on the note by failing to pay the full amount it owed plaintiff on or about May 20, 2016. Doc. 12, at par. 16. On or about January 23, 2017, plaintiff's attorney wrote to DMI to advise that it had defaulted under the note and to demand that DMI pay plaintiff $88,890.14, the amount owed as of December 22, 2016, plus interest, late charges, and costs, disbursements, and attorneys' fees. Doc. 12, at par. 17; Doc. 18.[1] As of the date of the default, the maturity date of the note was February 11, 2017. Doc. 12, at par. 8. Doc. 16.

[1] Although plaintiff alleges in the complaint that the demand letter was sent on January 23, 2016, it is clear that this is a typographical error, since the demand letter itself, which is annexed as an exhibit to the complaint, reflects that it is dated January 23, 2017. Doc. 4.

Pursuant to an "Unconditional Personal Guaranty of Payment" dated February 11, 2015 ("the guaranty"), Straus agreed to guarantee all obligations assumed by DMI under the note. Doc. 12, at pars. 12-13; Doc. 17. The guaranty provided, inter alia, as follows:

1. "[Straus] guarantees and becomes surety for all amounts owing by [DMI] to [plaintiff] under any promissory note";
2. "The liability of [Straus] is irrevocable, absolute, and unconditional irrespective of . . . any lack of validity or enforceability of the Note . . . [or] any other circumstances which might otherwise constitute a defense available to, or a discharge of, any [b]orrower . . .";
3. [Plaintiff] shall be entitled to collect all expenses incurred in pursuing any payment due hereunder that is not paid when due . . . and [Straus] agrees to pay all costs of collection including, without limitation, reasonable attorneys' fees and costs of in-house and/or outside counsel":
4. [Straus] hereby waives all suretyship defenses and notice of the incurring of indebtedness by [DMI] to [plaintiff and] acceptance of this Guaranty by [plaintiff], presentment and demand for payment, protest . . . and all other notices and demands otherwise required by law which the Guarantor may lawfully waive; and
5. Straus was to be jointly and severally liable with DMI for repayment of the monies owed under the note.

Doc. 12, at pars. 12-15; Doc. 17.

On March 17, 2017, plaintiff commenced the captioned action by filing a summons and complaint. Doc. 13. As a first cause of action, plaintiff alleged that DMI breached the terms of the note. Doc. 13, at pars. 17-20. As a second cause of action against DMI, plaintiff alleged an account stated. Doc. 13, at pars. 22-25. As a third cause of action against DMI, plaintiff alleged unjust enrichment. Doc. 13, at pars. 27-29. As a fourth cause of action, plaintiff alleged that Straus breached the guaranty. Doc. 13, at pars. 31-35. Plaintiff claims that, as a result of DMI's default on the note, and Straus' breach of the guaranty, defendants owe it 1) the outstanding principal

amount of $88,8980.14; 2) interest through and including February 28, 2017 in the amount of $3,053.74; and 3) late fees through and including February 28, 2017 in the amount of $655.37, for a total sum of $92,599.25, plus 4) additional late charges and interest continuing to accrue at the loan default rate commencing March 1, 2017; and 5) plaintiff's reasonable attorneys' fees and costs and disbursements. Doc. 13, at pars. 20; 25; 29; and 35.

DMI was served via the Secretary of State pursuant to BCL 306 on March 31, 2017. Doc. 5. Straus was served by substituted service on "Jane" Straus, her daughter, pursuant to CPLR 308(2) on May 4, 2017. Doc. 7. Additional service of the summons and complaint was made on DMI and Straus pursuant to CPLR 3215 (g) on April 11, 2017 and May 18, 2017. Doc. 13.

On May 29, 2017, defendants filed their verified answer, denying all substantive allegations of wrongdoing. Doc. 8. As a first affirmative defense, defendants asserted a lack of personal jurisdiction. Doc. 8. As a second affirmative defense, defendants asserted that plaintiff improperly alleged breach of contract and unjust enrichment arising from the same occurrence. Doc. 8. The purported third affirmative defense does not actually set forth any defense. Doc. 8. As a fourth affirmative defense, defendants assert that plaintiff breached the note by inducing DMI to sign the same by promising an interest rate of 3% and then unilaterally raising it to 8.9% without DMI's agreement. Doc. 8.

As their first through fourth counterclaims, defendants assert that plaintiff violated the Telephone Consumer Protection Act ("TCPA") and demand damages of $50,000 on each such counterclaim. Doc. 8. The second and third counterclaims demanded punitive damages as well. Doc. 8. Specifically, defendants claim that plaintiff violated the TCPA by, inter alia, calling Straus hundreds of times per day via an "automatic telephone dialing system" with a "prerecorded voice", without her consent, in an attempt to collect a debt. Doc. 8.

Plaintiff responded to the counterclaims on June 15, 2017, denying all substantive allegations of wrongdoing. Doc. 9.

On August 1, 2017, plaintiff filed the instant motion seeking the relief set forth above. Doc. 10. In support of the motion, plaintiff submits the affirmation of its attorney, Andrew S. Muller, Esq.; the affidavit of its Vice-President, Timothy Williams; the pleadings; affidavits of service; the note and guaranty; and the loan application. Defendants oppose the motion.

CONTENTIONS OF THE PARTIES:

Plaintiff claims that it is entitled to summary judgment on the complaint. It asserts that, as a result of DMI's default, defendants owe it 1) the outstanding principal amount of $88,890.14; 2) interest through and including February 28, 2017 in the amount of $3,053.74; 3) late fees through and including February 28, 2017 in the amount of $655.37; 4) additional late charges and interest continuing to accrue at the loan default rate commencing March 1, 2017; and 5) plaintiff's reasonable attorneys' fees and costs and disbursements. Further, defendants argue that, pursuant to the terms of the guaranty, Straus waived her right to assert any affirmative defenses and counterclaims. In any event, asserts plaintiff, defendants' affirmative defenses and counterclaims are without merit and must be dismissed. Docs. 11, 12, and 21.

In an affidavit in opposition to the motion, Straus argues that she was never served with the summons and complaint and that the process server's description of her daughter, who was served as a person of "suitable age and discretion" pursuant to CPLR 308(2), does not match a true description of her daughter. Straus further asserts that defendants did not default; that plaintiff breached the contract; that plaintiff increased the interest rate to 8% for no reason; and that she did not waive any defenses other than "all suretyship defenses and notice of the incurring of

indebtedness by [DMI] to [plaintiff]". Docs. 26. In an affirmation in opposition and an amended affirmation in opposition, counsel for defendants argues that the note and guaranty are improper pursuant to CPLR 4544 given their tiny print. Docs. 26 and 27.

In reply, plaintiff argues, inter alia, that service of the summons and complaint was proper and that defendants fail to submit any documentation establishing that they did not default. Doc. 28.

LEGAL CONCLUSIONS:

A party moving for summary judgment must satisfy its initial burden to "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact," after which the burden shifts to the opposing party "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *see Schmidt v One N.Y. Plaza Co. LLC*, 153 AD3d 427, 428 (1st Dept 2017); *Bartolacci-Meir v Sassoon*, 149 AD3d 567, 570 (1st Dept 2017).

Plaintiff established its prima facie entitlement to summary judgment on its first cause of action asserting that DMI breached the terms of the note by failing to make the payments required by the same. *See Josephthal Holdings, Inc. v Weisman*, 5 AD3d 221 (1st Dept 2004). The note and the affidavit of Williams establish that DMI defaulted on the note on or about May 20, 2016 and that, by letter dated January 23, 2017, plaintiff demanded that DMI immediately pay it $88,890.14, plus interest, late charges, costs, disbursements, and attorneys' fees.[2]

[2] This Court need not address plaintiff's second cause of action for unjust enrichment since it is duplicative of the claim for breach of the note. *See Amrusi v Nwaukoni*, 155 AD3d 814, 815-816 (2d Dept 2017). Similarly, this Court deems the third cause of action for an account stated to be duplicative of the claim for breach of the note since "[a]n account stated has long been defined as an account balanced and

Additionally, plaintiff has demonstrated its prima facie entitlement to summary judgment on its claim for breach of the guaranty as against Straus by producing the note, the unconditional guaranty, and proof of Straus' non-payment of the debt via Williams' affidavit. *See Poah One Acquisition Holdings Ltd. v Armenta*, 96 AD3d 560 (1st Dept 2012); *Reliance Constr. Ltd. v Kennelly*, 70 AD3d 418 (1st Dept 2010), *lv dismissed* 15 NY3d 848 (2010). However, since Williams does not explain how he calculated the amount owed to plaintiff, including what the interest rate was on the note, and what the default interest rate is on the principal remaining on the note, this Court refers the matter of damages, including attorneys' fees, costs, late charges, and expenses, to which plaintiff is entitled pursuant to the note, to a referee for determination. *See generally City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 (1st Dept 1998).

Given plaintiff's showing, the burden thus shifted to defendants to demonstrate the existence of a material fact requiring trial. However, defendants have failed to fulfill this burden. Defendants' arguments in opposition to the motion are considered below.

Service of Process

Straus argues that she was not properly served with process because the process server left the summons and complaint with her then 14 year-old daughter whom, she states, was a child, and could not accept service on her behalf.[3] However, CPLR 308 (2) provides for service on "a person of suitable age and discretion at the . . . actual dwelling place . . . of the person to be served." Neither the statute nor the case law interpreting it provide any minimum age for such a person. *See Room Additions, Inc. v Howard*, 124 Misc2d 19, 19-20 (Civil Ct Bronx County 1984). The

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rendered, with an assent to the balance express or implied; so that the demand is essentially the same as if a promissory note had been given for the balance." *Morrison Cohen Singer & Weinstein, LLP v Ackerman*, 280 AD2d 355, 355-356 (1st Dept 2001) (citations omitted).

[3] Defendants do not challenge service on DMI.

test is whether the individual served is the "type of person contemplated by the statute as one who could reasonably be expected to deliver the legal papers to defendant and, thereby, apprise the interested party of the pendency of the action. *Ulloa v Kuhel*, 19 Misc3d 1110 (A) (Sup Ct Ulster County 2008) (citation omitted) (14 year-old deemed person of suitable age and discretion). Since Straus raised no reason, other than age, why her daughter could not accept service of process on her behalf, she "did not create a triable issue of the daughter's capacity for discretion." *Nyack Hous. Auth. v Scott*, 1 Misc3d 22 (App Term 2d Dept 2003).

Straus further asserts that service on her daughter was improper since the process server failed to properly describe her daughter's appearance in the affidavit of service. However, regardless of whether Straus' daughter was inaccurately described or was too young to be served, Straus has waived any argument regarding improper service by failing to move to dismiss the complaint within 60 days of service of her answer, in which she raised lack of personal jurisdiction as an affirmative defense. CPLR 3211 (e); *Luver Plumbing & Heating, Inc. v Mo's Plumbing & Heating*, 144 AD3d 587 (1st Dept 2016).

Waiver of Defenses

Although Straus maintains that she did not waive any defenses other than "all suretyship defenses and notice of the incurring of indebtedness by [DMI] to [plaintiff]" this Court disagrees. As noted above, the guaranty provided, inter alia, that "[Straus] guarantees and becomes surety for all amounts owing by [DMI] to [plaintiff] under any promissory note"; that the "liability of [Straus] is irrevocable, absolute, and unconditional irrespective of . . . any lack of validity or enforceability of the Note . . . [or] any other circumstances which might otherwise constitute a defense available to, or a discharge of, any [b]orrower . . ."; and that "[Straus] hereby waives all suretyship defenses

. . ." Doc. 17. The Appellate Division, First Department has held that similarly broad waiver language prevented a debtor from escaping liability under a guaranty. *See Acadia Woods Partners, LLC v Signal Lake Fund LP*, 102 AD3d 522, 523 (1st Dept 2013) (defendant debtors failed to raise triable issue of fact as to the enforceability of a guaranty which "explicitly disclaims defenses pertaining to the invalidity, irregularity or unenforceability" of the note on which the guaranty is based). That the face of the guaranty reflects that it is "irrevocable, absolute and unconditional" and "shall remain in full force and effect" until all obligations under the note are satisfied further establishes the breadth of the waiver and militates against Straus' argument. *See Citibank v Plapinger*, 66 NY2d 90, 92 (1985). Even assuming, arguendo, that the foregoing defenses were not waived, each of defendants' affirmative defenses are dismissed for the reasons set forth below.

Other Arguments In Opposition to Plaintiff's Motion

Straus asserts that "the only party who breached the contract was plaintiff", that she did not miss the payment "due on or before May 20, 2016", and that plaintiff "increased the interest rate for no reason". Since these contentions are purely conclusory and not based on any documentary evidence in admissible form, they fail to defeat plaintiff's entitlement to summary judgment. *See Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

Additionally, defendants' contention that the note and guarantee are inadmissible pursuant to CPLR 4544 due to the small size of the font used therein is without merit and borders on frivolity. That statute prevents a party which drafts "an agreement involving a consumer transaction or a lease for space to be occupied for residential purposes" from introducing such a document at a trial or hearing if the font size used in the document does not meet the standards set forth therein. CPLR 4544 defines a "consumer transaction" as one in which "the money, property

or service which is the subject of the transaction is primarily for personal, family or household purposes." However, it is absolutely clear from the "Small Business Loan Application" completed by DMI that it was seeking a loan for "working capital" and not for any personal, family or household purposes. Doc. 20.[4]

Defendants' Affirmative Defenses

Plaintiff correctly asserts that it is entitled to summary judgment dismissing defendants' affirmative defenses. The first affirmative defense, lack of personal jurisdiction, is dismissed based on the proper service on Straus' daughter discussed above. The second affirmative defense, that plaintiff improperly alleged a breach of contract and unjust enrichment arising from the same occurrence, is without merit given that pleading in the alternative is permissible in New York. See CPLR 3014, CPLR 3017 (a). The purported third affirmative defense fails to set forth any actual defense and is thus dismissed. As a fourth affirmative defense, defendants assert that plaintiff breached the note by inducing DMI "to sign the [note] by promising an interest rate of 3%, and then it unilaterally raised it to 8.9%, which defendant never agreed to pay." Doc. 8. Since this affirmative defense is utterly conclusory, summary judgment dismissing the same is granted. *Manufacturers Hanover Trust Co. v Restivo*, 169 AD2d 413 (1st Dept 1991).

Defendants' Counterclaims

As noted previously, defendants' counterclaims assert that plaintiff violated the TCPA (47 USC § 227) by, inter alia, calling Straus hundreds of times per day via an "automatic telephone dialing system" with a "prerecorded voice", without her consent, in an attempt to collect the debt.

[4] The loan application named Straus as president of DMI, as well as owner of 100% of the company. Doc. 20.

Doc. 8. Defendants specifically allege violations of 47 USC § 227 (b) (1) (A) (iii), which provides as follows:

> (b) RESTRICTIONS ON USE OF AUTOMATED TELEPHONE EQUIPMENT
>
> (1) PROHIBITIONS. It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States –
>
> (A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice -
>
> (iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, unless such call is made solely to collect a debt owed to or guaranteed by the United States . . .

In support of that branch of its motion for summary judgment dismissing the counterclaims, plaintiff submits the affidavit of Williams, in which he states, among other things, that plaintiff does not call defaulting borrowers using an automated telephone system, and does not even have an automatic telephone dialing system. Doc. 12, at par. 27. Further, he represents that plaintiff "does not use, and never has used, an automated or pre-recorded voice or message when it places telephone calls to a borrower" (Doc. 12, at par. 27) and that neither DMI nor Straus was contacted in this manner. Doc. 12, at par. 29. Williams also represents that plaintiff's customers are never contacted outside of normal business hours unless they specifically agree to be contacted at such time, and that plaintiff made no calls outside of regular business hours to DMI or Straus. Doc. 12, at par. 28. Thus, Williams has established, prima facie, that the TCPA was not violated. Since

defendants failed to raise a triable issue of fact regarding the violation of the statute, defendants' counterclaims are therefore dismissed.[5]

In light of the foregoing, it is hereby:

ORDERED that the branch of the motion by plaintiff Santander Bank, N.A. seeking summary judgment on it complaint is granted, with respect to liability only, as to its first cause for breach of the promissory note as against defendant Diamonds on Madison, Inc. and on its fourth cause of action for breach of the guaranty as against defendant Sarah Straus, and is otherwise denied; and it is further

ORDERED that the branches of plaintiff's motion for summary judgment seeking dismissal of defendants' affirmative defenses and counterclaims is granted, and the affirmative defenses and counterclaims are hereby dismissed; and it is further;

ORDERED that, within 15 days of the date of entry of this decision and order, plaintiff shall serve a copy of this decision and order with notice of entry upon defendants by NYSCEF, unless any party is exempt, and by overnight mail, and shall e-file proof of compliance within 10 days after the aforesaid service; and it is further

ORDERED that, within 15 days of the date of entry of this decision and order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the Special Referee's Office (Room 119M); and it is further

[5] Although not raised by plaintiff, this Court notes that defendants abandoned their counterclaims arising from alleged violations of the TCPA by failing to oppose that branch of plaintiff's motion seeking summary judgment dismissing the said counterclaims. *See Josephson LLC v Column Fin., Inc.*, 94 AD3d 479, 480 (1st Dept 2012).

ORDERED that the issue of the amount of damages due to plaintiff, including interest and late charges on $88,890.14, the principal amount of the note, through February 28, 2017, as well as default interest and late charges accruing since March 1, 2017, plus attorneys' fees, late charges, costs, and expenses, is respectfully referred to a Special Referee for disposition; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP) which, in accordance with the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/supctmanh at the "references" link under "Courthouse Procedures"), shall assign this matter to an available Special Referee/Judicial Hearing Officer to hear and report or hear and determine as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiffs shall, within fifteen (15) days from the date of entry of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

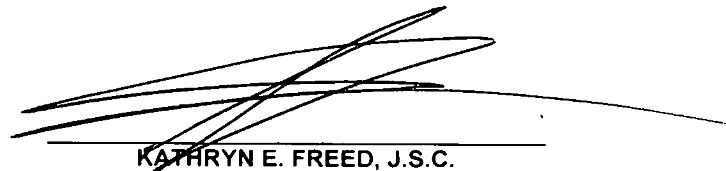
ORDERED that the parties shall appear for the reference hearing with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special

Referee Clerk subject only to any adjournment that may be authorized by the Special Referee Part in accordance with the Rules of that Part; and it is further

ORDERED that the Special Referee is to hear and report with recommendations, or if the parties so-agree, to hear and determine; and it is further

ORDERED that any motion to confirm or reject the Report of the Special Referee shall be made within the time and in the manner specified in CPLR 4403 and 22 NYCRR § 202.44; and it is further

ORDERED that this constitutes the decision and order of the court.



9/12/2018
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION		
		GRANTED		DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE