Multitech Mech. & Maintenance v 1764 Majors Path Corp.
2018 NY Slip Op 32970(U)
October 29, 2018
Supreme Court, Suffolk County
Docket Number: 11530-2014
Judge: C. Randall Hinrichs
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SHORT FORM ORDER

Index No 11530-2014

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 49 SUFFOLK COUNTY

PRESENT: HON. C. RANDALL HINRICHS
Justice of the Supreme Court

Motion Date: 005 & 006: 2-8-2018; 007: 5-14-2018
Adjourned Date: 5-17-2018
Motion Sequence.: 005: MotD; 006: MotD; 007: MG

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MULTITECH MECHANICAL & MAINTENANCE, and EMMANUEL PETRINOLIS,

Plaintiffs,

- against -

1764 MAJORS PATH CORP., LEONIDAS LEGAKIS, GAIL DICORCIA, and JPMORGAN CHASE BANK, N.A., and "JOHN DOE INSURANCE COMPANY", the last defendant named in quotation marks being intended to designate the unknown insurance company of the premises described herein or portions thereof, if any there by, said name being fictitious, their true name being unknown to plaintiffs,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion for leave to amend pleadings by plaintiffs, dated May17, 2018, and supporting papers (including Memorandum of Law) (Mot. Seq. 006); (2) Affirmation in Opposition to motion to amend complaint to include Penny Mac Corp. by proposed defendant Penny Mac Corp. dated May 17, 2018 and supporting papers (including Memorandum of Law); (3) Notice of Cross-Motion by the defendant JP Morgan Chase Bank, N.A., dated May 17, 2018, and supporting papers (Mot. Seq. 005); (4) Notice of Plaintiffs' Cross-Motion to File Late reply and Affirmation/Affidavit in Opposition by the plaintiffs, dated May 17, 2018 and supporting papers (Mot. Seq. 007); and (5) Reply Affirmation in Opposition to plaintiffs' Cross-Motion to file late reply by the defendant JP Morgan Chase Bank, N.A., dated May 17, 2018; it is

ORDERED that Plaintiffs' motion to file a late reply is granted (Mot. Seq. 007); and it is further

ORDERED that Plaintiffs' motion for leave to amend the pleadings to add the current deed holder, PennyMac Corp. ("PennyMac"), as a defendant, pursuant to CPLR §3025(b) to its claim of unjust enrichment is granted (006); and it is further

ORDERED that Plaintiffs' motion for leave to amend the complaint to add defendants JP Morgan Chase Bank, N.A. ("Chase") and PennyMac to its claim to foreclose the mechanic's lien is denied (Mot. Seq. 006); and it is further

ORDERED that defendant JP Morgan Chase Bank, N.A.'s ("Chase") Cross-Motion (i) denying leave to amend the complaint filed by plaintiffs, (ii) dismissing the complaint pursuant to CPLR § 3211(a)(7) for failure to state a claim or entering a judgment in favor of defendants; (iii) entering an award of sanctions for frivolous lawsuit; or in the alternative, (iv) entering default judgment against plaintiffs and co-defendants pursuant to CPLR §3215 is denied in part and granted in part (Mot. Seq. 005); and it is further

ORDERED that the mechanic's lien recorded against the subject property in the Office of the Clerk of the County of Suffolk on May 21, 2014, be marked cancelled and discharged of record, and the clerk is hereby directed to do so; and it is further

ORDERED that the non-answering, non-appearing defendants to the counter claims of co-defendant Chase are deemed in default of Chase's counter claims; and it is further

ORDERED that the attorneys for the parties shall appear for a pre-trial conference on **November 27, 2018 at 9:30 a.m.** at IAS Part 49, Arthur M. Cromarty Court Complex, Fourth Floor, Courtroom 16, 210 Center Drive, Riverhead, New York, and it is further

ORDERED that plaintiffs are directed to serve a copy of this order with notice of entry upon all parties who have appeared herein and not waived further notice pursuant to CPLR 2103(b)(1), (2) or (3) within thirty (30) days of the date herein, and to promptly file the affidavits of service with the Clerk of the Court.

This is an action for breach of contract, unjust enrichment and to foreclose on the 2014 mechanic's lien recorded by plaintiff Multitech Mechanical & Maintenance ("Multitech") for repairs on real property located at 1764 Majors Path, Southampton, New York, 11932, in Suffolk County, New York ("subject property") commenced on June 4, 2014.

Prior to commencement of the instant action, Washington Mutual Bank ("WaMu"), defendant Chase's predecessor-in-interest, brought an action to foreclosure the mortgage on the subject property on May 5, 2008 with the filing of a notice of pendency, summons and complaint on that date and named as defendants 1764 Majors Path Corp. ("Majors Path"), Leonidas Legakis and Gail Dicorcia (Suffolk County Index Number 17268/2008). On September 25, 2008, Chase acquired the mortgage loan through a Purchase and Assumption Agreement, becoming the primary lien holder and successor-in-interest in the mortgage foreclosure action. On October 2, 2012, Chase filed a successive Notice of Pendency in connection with the mortgage foreclosure and on February 19, 2013, the Court substituted Chase as the plaintiff in place of WaMu and granted Summary Judgment in its favor. On January 8, 2015, this Court granted Chase a Judgment of Foreclosure and Sale. On February 27, 2015, the subject property was sold to Chase at auction in accordance with the Judgment of Foreclosure and Sale. Lastly, on August 14, 2015, Chase transferred title to the subject property to the subsequent purchaser, PennyMac.

On or about October 21, 2013 and during the pendency of the foreclosure action, defendant Majors Path initiated eviction proceedings against Emmanuel Petrinolis ("Petrinolis"), sole proprietor of plaintiff Multitech, who resided at the subject property and used it as the principal place of business for Multitech. Shortly thereafter, on May 21, 2014, Petrinolis recorded a mechanic's lien with the Suffolk County Clerk against the subject property on behalf of Multitech. During the eviction proceeding and again in the instant action, plaintiffs averred that Majors Path, through its representative defendant Legakis, requested that Petrinolis reside at the subject property rent free in exchange for maintenance and assistance with the expenses related to the subject property. According to the complaint, Petrinolis began residing at the subject property in April 2009 and was

"obligated to maintain the premises and assist in the payment in the expenses to operate" the subject property. Between April 2009 and February 2014, plaintiffs performed numerous construction, repair and renovation services including, *inter alia*, abatement of black mold, replacement of boiler parts, replacement and repair of defects in the plumbing, flooring, Sheetrock, painting, spackling, landscape cleanup and other similar work. Petrinolis maintains that all work done on the subject property was conducted with the consent of Majors Path and Legakis, and resulted in $230,116.00 in expenses for maintenance and construction work done on the property from April 4, 2009 to February 25, 2014. Plaintiffs' complaint claims that all work was undertaken with the consent of defendants Majors Corp and Legakis except on one occasion. On that occasion defendant Chase approved the work needed to abate mold at the subject property and stated that the "'bank or the insurance company' for the premises" would cover the costs of labor and materials. In support, plaintiffs submit copies of correspondence from Multitech to Majors Path, Chase and WaMu and return correspondence from Chase to Petrinolis. The original correspondence from Multitech to Majors Path, Chase and WaMu includes a copy of Multitech's bill listing $530,850.00 for materials and repairs to the subject property. The Chase correspondence indicates that the plaintiffs' bills were sent to the Chase "Property Preservation Department" for "research and review." In addition, a final correspondence faxed from a Chase Foreclosure Specialist to Multitech asked if the outstanding maintenance bills were paid and if the eviction proceedings were complete or, in the alternative, asked for an itemized breakdown of the amount due and to provide a W9.

Chase cross-moved to dismiss the original action and filed counter claims including a claim against Multitech and Petrinolis for filing a frivolous lawsuit and appropriate sanctions. Plaintiffs now seek to amend the original complaint to add current property owner, PennyMac, and Chase to the mechanic's lien foreclosure and also seeks to add PennyMac to its claim for unjust enrichment. Prospective defendant PennyMac filed opposition.

The Court first turns to the branch of plaintiffs' motion seeking to vacate its default in answering the cross-motion and counter claims of defendant Chase. It is well settled that to vacate a default, the moving party must establish both a reasonable excuse for the default and a meritorious defense *(DeRisi v. Santoro*, 262 A.D.2d 270 [2nd Dept. 1999]). Plaintiffs offer the insufficient excuse of "voluminous motions practice and court appearances" and settlement negotiations as reasons for its delay in answering (*id.*). However, the count takes judicial notice that it granted all parties an extension to existing motion practice during the pendency of settlement negotiations. All motions and responses, including plaintiffs' motion to file a late reply to the amended counterclaim, were marked submitted on May 17, 2018. As all papers were marked submitted on May 17, 2018, plaintiffs' request for leave to file a late answer was already granted through operation of the court and is moot (007).

The Court now turns to the cross-motion to dismiss of defendant Chase. "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*see,* CPLR 3026)" *(Leon v. Martinez*, 84 N.Y.2d 83, 87–88[1994]). "We must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Id.*).

Breach of Contract

Under the general business law "[e]very home improvement contract...shall be evidenced by a writing and shall be signed by all the parties to the contract" (Gen. Bus. Law § 771). Plaintiffs' complaint states that defendant Majors Path contracted with plaintiffs to maintain the subject property and pay various expenses in lieu of payment of the rent. Plaintiffs entered into a verbal contract with defendant Majors Path for payment of expenses and maintenance of the subject property. The work included refurbishment and repair of flooring,

Sheetrock, plumbing, grounds upkeep and other maintenance and construction in exchange for rent free housing starting in 2009. As the agreement between Petrinolis for Multitech and Legakis for Majors Path was never reduced to writing and signed by all parities, "the absence of an enforceable written agreement necessarily precludes recovery based on a breach of contract cause of action" *(F & M Gen. Contracting v. Oncel*, 132 A.D.3d 946, 948 [2nd Dept. 2015]). Such recovery sought by plaintiffs in this action is unenforceable. The complaint and amended complaint fail to state a claim for breach of contract as there was no enforceable contract between Mutlitech and any defendant or prospective defendant for home improvement work.

Even if work conducted under this arrangement was not considered a home improvement contract, plaintiffs do not allege sufficient facts to establish an oral contract mutually agreed upon between plaintiffs and Chase. To create a binding contract, "there must be a manifestation of mutual assent to essential terms," (*Express Indus. & Terminal Corp. v. New York State Dep't of Transp.*, 93 N.Y.2d 584, 590 [1999]). In interpreting the manifestation of those terms, "courts should not be 'pedantic or meticulous' in interpreting contract expressions"(*id.*). Unitizing the most liberal interpretation of plaintiffs' claims and drawing every inference in favor of plaintiffs, plaintiffs are only able to establish manifestation of mutual consent through specific performance by both parties between the plaintiffs and co-defendants Legkais and Majors Path from April 2009 to October 9, 2013. The agreement was never reduced to writing but plaintiffs allege sufficient specific performance by those parties to evidence a meeting of the minds and mutual assent to the essential terms specified in the complaint. Namely, that plaintiff Petrinolis would move into the property and maintain the property in exchange for living at the subject property rent free. As Petrinolis lived at the property and maintained the property without objection by Majors Path until the October of 2013 eviction action, plaintiffs' oral agreement is sufficiently alleged. There is sufficient demonstration, at this preliminary stage, of an agreement and meeting of the minds between Petronilis, Multitech, Legakis and Majors Path. Even in that light, however, the plaintiffs fails to make out breach of contract. In fact, plaintiffs' claim for breach of contract flies in the face of the agreement plaintiffs establish. According to the plaintiffs, Petrinolis was to furnish needed construction and maintenance and at the subject property in exchange for rent free occupation which plaintiffs concede occurred. The plaintiffs never claim that there was an expense beyond which such maintenance work would be outside the scope of the agreement or a point at which Multitech was to be reimbursed for maintenance and construction expenses. The work conducted by plaintiffs was consistent with the agreement plaintiffs established with defendants Major Path and Legakis.

Even with inferences drawn in the light most favorable to the plaintiffs, plaintiffs' allegations cannot legally substantiate a contract or breach of contract claim against Chase. Plaintiffs' contract with or possible claim for breach against defendants Majors Path or Legakis cannot somehow be transferred to a contract and breach by co-defendant Chase. Plaintiffs allege that Chase representatives instructed plaintiff Petrinolis to undertake the mold abatement work needed at the subject property. Allegedly, Chase agent "Kimberly" and "Nancy" told Petrinolis to complete the repairs and that it would be covered by the bank, its insurance company or the insurance company for the premises. In addition, Chase representatives expressed their opinion that Multitech and Petrinolis were required to do the work and if the work was not completed Petrinolis would be liable for the damages "as if he vandalized the property." The only inference that can be drawn from these allegations is that the Chase employees thought plaintiff(s)were already obligated to do the work regardless of possible reimbursement by Chase. Plaintiffs further allege that Chase informed Petrinolis that Multitech would be reimbursed by the bank, its insurance company or the owner's insurance company. In furtherance of their claim, plaintiffs point to a February 25, 2013 letter from Multitech to Chase, Majors Path and WaMu. In the letter, Multitech states that it had various conversations with people from "your bank" and that Multitech and others spent money repairing the premises in reliance on promises of payment made by "your employees" and attached a listing of expenses totaling $530,850.00. Plaintiffs have also attached two responses from Chase

dated March 15 and 20, 2013, both indicating that the original requests were forward to the property preservation department for review. Finally, the Chase foreclosure department sent a letter to Multitech's fax number listing the subject property and listing the subject line as "Outstanding bills notice:" naming defendants Dicorcia and Legakis. The letter asks if the account is now current and asks for the status of the eviction proceedings by which the plaintiff Petrinolis was to be evicted. The foreclosure representative also asks to be contacted as soon as possible vial email. Statements in the documents regarding plaintiffs' understanding of who agreed to pay and what was to be paid are vague at best. There are no statements or inferences to be drawn that may indicate that an agreement was reached by Chase itself. The only inference that can possibly be drawn is that Chase was aware of the need to maintain the property and that it was under review at one point. No reasonable inference can be drawn that Chase reached an agreement with plaintiffs to pay the amount requested or entered into an agreement with plaintiffs for work previously done on the subject property. Under such circumstances, the statements of the employees and vague written responses to plaintiffs' request for payment, even if undisputed, are too vague and uncertain to constitute an enforceable contract. (See, *Outrigger Const. Co. v. Bank Leumi Tr. Co. of New York*, 240 A.D.2d 382, 384, 658 N.Y.S.2d 394, 396 [2nd Dept. 1997][bank's request for plaintiff to continue working on the project based on an "agreed price and reasonable value", even if undisputed, is too vague and uncertain to constitute an enforceable contract]). Plaintiffs' complaint fails to demonstrate a sufficient meeting of the minds to substantiate the existence of a contract whereby Chase agreed to reimburse plaintiffs for the mold abatement work or any additional maintenance and upkeep expenses at the subject property. The allegations are insufficient to indicate a manifestation of mutual assent to essential terms between Chase and plaintiffs (see, *Id.*). Defendant Chase's motion to dismiss plaintiffs' claim for breach of contract against defendant Chase is granted. Plaintiffs' cause of action for breach is dismissed against Chase (006).

Foreclose Mechanic's Lien

The Court now turns to defendant's motion to dismiss plaintiffs' action to foreclose upon its mechanic's lien. The mechanic's liens "may be enforced against the property specified in the notice of lien and which is subject thereto and against any person liable for the debt upon which the lien is founded" (Lien Law § 24). A lien for materials furnished or labor performed in the improvement of real property shall have priority over a conveyance, mortgage, judgment or other claim against such property *not* recorded, docketed or filed at the time of the filing of the notice of such lien (Lien Law § 13 [*emphasis added*]). In the instant matter, the plaintiffs filed their mechanic's lien well after the commencement of the foreclosure and filing of the notice of pendency against the subject property. Thus, the recorded mechanic's lien was subordinate to prior recorded mortgage lien (*Makhoul v. 115 96th St. Holding Corp.*, 263 A.D.2d 470, 692 N.Y.S.2d 725 [2nd Dept. 1999]; see Lien Law § 13). It is undisputed that WaMu commenced a mortgage foreclosure action against the defendants Legakis and Major Path on May 5, 2008. Chase continued the action as successor-in-interest, renewed its notice of pendency on October 2, 2012 and prosecuted the action to its conclusion with the foreclosure sale on February 27, 2015. The mechanic's lien was recorded on May 21, 2014, six years after the commencement of the foreclosure action. The mechanic's lienor is bound by all proceedings taken in the pending mortgage foreclosure action where such foreclosure action preceded the mechanic's lien (*id.* [mechanic's lien recorded more than three years after filing of notice of pendency by predecessor-in-interest of mortgagee was bound by all proceedings taken in the pending foreclosure action]). The mechanic's lien is thus void and was extinguished in the foreclosure action (*Id.*) Defendant's motion to dismiss foreclosure of the mechanic's lien against the subject property is granted. Plaintiffs' third case of action is dismissed.

Unjust enrichment

"The theory of unjust enrichment lies as a 'quasi-contract claim'" and contemplates "an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties" (*IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142 [2009], quoting *Goldman v. Metropolitan Life Ins.*

Co., 5 N.Y.3d 561, 572 [2005]). This Court finds that plaintiffs failed to allege sufficient facts to demonstrate that a contract existed between the plaintiffs and defendant Chase as a matter of law. The theory of unjust enrichment is "an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties" (*Georgia Malone & Co. v. Rieder*, 19 N.Y.3d 511, 516, 973 N.E.2d 743, 746 (2012). As no contract existed between the plaintiffs and Chase, an unjust enrichment claim remains available to plaintiffs in this action (see, *id.*)

As stated previously, "when deciding a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), all allegations in the complaint are deemed to be true" (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]). All reasonable inferences that can be drawn from the complaint and the allegations therein stated shall be resolved in favor of the plaintiffs (*id.*]).

To plead unjust enrichment, the plaintiffs must allege "that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (*id.*). Plaintiffs allege $230,116.00 of improvements and maintenance to the subject property over several years for which they were not paid to the benefit of Majors Path. Plaintiffs further allege that Chase induced plaintiffs to conduct certain repairs and that the subject property was subsequently transferred to defendant Chase with those repairs to the ultimate benefit of Chase. Unjust enrichment "does not require the performance of any wrongful act by the one enriched. Innocent parties may frequently be unjustly enriched" (*Cruz v. McAneney*, 31 A.D.3d 54, 59, [2nd Dept. 2006] [internal citations omitted]). Further, plaintiffs properly alleged sufficient facts to establish a "relationship between the parties that could have caused reliance or inducement" to support an unjust enrichment claim (*Philips Int'l Investments, LLC v. Pektor*, 117 A.D.3d 1, 3, 982 N.Y.S.2d 98, 100 [1st Dept. 2014]). At this early stage, plaintiffs have alleged sufficient facts to support a claim of unjust enrichment in that a benefit may have accrued to defendant Chase to the detriment of the plaintiffs. Accordingly, defendant Chase's motion to dismiss the unjust enrichment claim is denied (005).

In the alternative, defendant Chase seeks summary judgment against plaintiffs on its unjust enrichment claim. On this single remaining issue, summary judgment in favor of the defendant must also be denied. Here, plaintiffs clearly allege that there was some communication between defendant Chase and plaintiffs regarding maintenance of the subject property. Chase acknowledges that it took possession of the property in a foreclosure action but claims it had no relationship with plaintiffs and disputes that it authorized or benefitted from the work. Unjust enrichment does not require "complete privity with the plaintiff; rather, the relationship between the parties must not be too attenuated (Georgia Malone & Co., Inc. v Rieder, 86 AD3d 406, 408 [2011]) and the plaintiff must show that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (*Murphy v. 317-319 Second Realty LLC*, 95 A.D.3d 443, 445, 944 N.Y.S.2d 42 [1st Dept. 2012]). There are several triable issue of fact regarding "inducement and reliance" on the conduct of the defendant Chase, the work conducted and the amount of enrichment afforded Chase, if any. (See, *Id.*; *see also*, *Fleetwood Agency, Inc. v. Verde Elec. Corp.*, 85 A.D.3d 850, 851, 925 N.Y.S.2d 576, 578 [2011][finding a triable issues of fact as to whether the defendant had disputed the amount due to the plaintiff for the plaintiff's services]). Defendant's motion for summary judgment in its favor upon the claim of unjust enrichment is denied (005).

Leave to amend the complaint to add an additional defendant PennyMac

As a general rule, "leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit" (*Coleman v. Worster*, 140 A.D.3d 1002 [N.Y. App. Div. 2016]). As to plaintiffs' breach of contract claims, the breach of contract claim was previously dismissed against named defendant Chase because it lacked merit and the claim was not supported as a matter

of law. Any breach of contract claim would fail against PennyMac and is even more tenuously connected to plaintiffs' original argument. Similarly, any claim for breach of contract with PennyMac is entirely lacking in merit. Plaintiffs' motion to amend its breach of contract claim to add PennyMac is denied.

Similarly, plaintiffs' claim to foreclose the mechanic's lien was denied as a matter of law. It is clear that plaintiffs' mechanic's lien against the subject property was extinguished by the mortgage foreclosure by operation of law. Plaintiffs' request to amend the complaint to add PennyMac as a defendant to the mechanic's lien foreclosure claims is thus denied (006).

Plaintiffs' motion to amend the complaint to add PennyMac as a defendant to the unjust enrichment claim survives. As to PennyMac, plaintiffs' allegation establish that the renovations Multitech undertook may arguably benefit the new owner (see, *Murphy v. 317-319 Second Realty LLC, 95* A.D.3d 443, 446 [2012]). What is required generally for a claim of unjust enrichment, "is that a party hold property 'under such circumstances that in equity and good conscience he ought not to retain it' (*Georgia Malone & Co. v. Rieder*, 19 N.Y.3d 511, 522, 973 N.E.2d 743, 750 (2012). Here, the relationship between the current owner and the prior owner, and the liabilities assumed during the transfer of ownership, should be explored before a determination as to the unjust enrichment claim can be made *(Murphy v. 317-319 Second Realty LLC*, 95 A.D.3d 443, 445). PennyMac is now the new owner of property that was improved allegedly to the determent of the plaintiffs. Plaintiffs have plead sufficient facts in the compliant to warrant adding PennyMac as a defendant to its unjust enrichment claim at this early stage. Plaintiffs' motion to amend the complaint to add PennyMac to its unjust enrichment claim is granted (006).

Frivolous law suit

"[C]onduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false" (22 NYCRR § 130-1.1). Plaintiffs' claims are not baseless or so patently without basis to be considered frivolous or warrant sanctions. Plaintiffs have provided sufficient facts to support their claims for unjust enrichment at this stage. Under the circumstances, the plaintiffs' conduct was not frivolous within the meaning of 22 NYCRR 130–1.1" (see, *U.S. Bank, Nat'l Assoc. v. Rosario*, No. 15956/09, 2018 WL 4344488, [2d Dept Sept. 12, 2018]). Chase's cross claim request for sanctions for frivolous lawsuit is denied.

Accordingly, plaintiffs' motion and defendant's cross motion is granted in part and denied in part as set forth herein.

Dated: October 29, 2018

C. Randall Hinrichs

HON. C. RANDALL HINRICHS, J.S.C.

[ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION