SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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MARTIN TOPOLI and DAGMARA TOPOLI,

Plaintiff,

-against-

77 BLEECKER STREET CORP., and GREENLIGHT CONSTRUCTION MANAGEMENT CORP.,

Defendants.

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77 BLEECKER STREET CORP.,

Third-party Plaintiff,

-against-

REBECCA DIXON and ADAM DIXON,

Third-party Defendants.

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Index No. 150062/16
Motion Seq. Nos. 002, 003, 004

DECISION AND ORDER

CAROL R. EDMEAD, J.S.C.:

In a Labor Law action, third-party plaintiffs Rebecca and Adam Dixon (together, the Dixons) move, pursuant to CPLR 3212, for summary judgment dismissing all claims as against them (motion seq. No. 002). Defendant/third-party plaintiff 77 Bleecker Street Corp. (77 Bleecker) moves for summary judgment dismissing all claims and cross claims as against them; in the alternative, 77 Bleecker seeks summary judgment on their contractual indemnity claim against the Dixons (motion seq. No. 003). Defendant Greenlight Construction Management Corp. (Greenlight) also moves for summary judgment dismissing all claims and cross claims as against them (motion seq. No. 004). Plaintiffs Martin Topoli (Plaintiff or Topoli) and Dagmara

Topoli cross-move for summary judgment as to defendants' liability on the Labor Law § 240 (1) and 241 (6).[1] The motions are consolidated for disposition.

BACKGROUND

Plaintiff alleges that he was injured, on January 28, 2015, while installing motorized blackout shades on a two-story window in the living room a cooperative apartment on Bleecker Street in lower Manhattan (Plaintiff's transcript at 61, NYSCEF doc No. 49). The Dixons acquired the apartment through a proprietary lease with 77 Bleecker, the cooperative corporation, in 2013. Prior to moving in, the Dixons hired Greenlight, pursuant to a standard form construction contact, to perform renovations on the unit (NYSCEF doc No. 65). The Dixons also entered into an alteration agreement by which 77 Bleecker permitted renovations to the apartment.

The Dixons contend that the renovation was completed in late 2014, while Plaintiff contends that his work was part of the renovation project. The Dixons allege that after the renovation work ended, they hired nonparty Distinctive Windows Treatment Plus (Distinctive Windows) to install blackout shades in their living room. This work was performed on January 25, 2015, the day of Plaintiff's accident.

Plaintiff was employed by Distinctive Windows on the day of the accident. Plaintiff testified that he, along with a co-worker at Distinctive Windows, brought both the shades they were to install, as well the hand tools and scaffold needed to install them (NYSCEF doc No. 49 at 68). Together with his co-worker, Plaintiff assembled a Baker's scaffold to perform the installation of the shades (*id.* at 70-71).

[1] Plaintiffs only refers to Labor Law § 240 (1) in their notice of cross motion, but the supporting affirmation argues as to both Labor § 240 (1) and Labor Law § 241 (6).

While Rebecca Dixon let Plaintiff and his co-worker into the unit, she left within ten minutes of their arrival and returned after Plaintiff's accident. Plaintiff and his co-worker completed the installation of the shades within two hours, and his accident took place as he was trying to descend one of the scaffold's side-ladders (*id.* at 86). With one foot on the side-ladder and one foot on the top platform of the scaffold, Plaintiff testified that he fell after the scaffold began to shake (*id.* at 89-92). Plaintiff attributes the shaking of the scaffold to the floor being "off level" (*id.* at 92). At his deposition, Plaintiff explained the basis of his belief that the floor in the Dixons unit was off-level: "[a]fter the accident I checked the floor and the four-foot level showed me that the floor is off level about one to one and a half inches" (*id.*).

Plaintiffs filed a verified complaint on January 5, 2016 (the Complaint). It alleges that 77 Bleecker and Greenlight are liable under Labor Law §§ 240 (1) and 241 (6), as well as Labor Law § 200 and common-law negligence. Additionally, plaintiff Dagmara Topoli brings derivative claims for the loss of her husband's services and society. By a third-party complaint filed on August 15, 2018, 77 Bleecker Street brought a third-party claim against the Dixons alleging that they are liable to it for contribution, common-law negligence, contractual indemnification and attorney's fees.

DISCUSSION

"Summary judgment must be granted if the proponent makes '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,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI*

Indus., Inc., 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

I. Labor Law § 240 (1)

Labor Law § 240 (1) provides, in relevant part:

> "All contractors and owners and their agents ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

The Court of Appeals has held that this duty to provide safety devices is nondelegable (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]), and that absolute liability is imposed where a breach has proximately caused a plaintiff's injury (*Bland v Manocherian*, 66 NY2d 452, 459 [1985]). A statutory violation is present where an owner or general contractor fails to provide a worker engaged in section 240 activity with "adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Where a violation has proximately caused a plaintiff's injuries, owners and general contractors are absolutely liable "even if they do not have a continuing duty to supervise the use of safety equipment" (*Matter of East 51st St. Crane Collapse Litig.*, 89 AD3d 426, 428 [1st Dept 2011]).

Plaintiff argues that he is entitled to summary against 77 Bleecker and Greenlight, as they failed to provide adequate protection from a significant gravity-related risk, as they were obligated to do as an owner and general contractor on the subject project.

The Dixons

The Dixons argue that they are statutorily exempt from the application of Labor Law §§ 240 (1) and 241 (6). However, this argument is superfluous as Plaintiff has no direct claims

against the Dixons. As there are no Labor Law claims against the Dixons, the Court will disregard the portion of their papers that argue for their dismissal.

Greenlight

Greenlight's argument is twofold. First, it contends generally that it is not subject to Labor Law liability as Plaintiff's accident did not arise from the renovation work on which it served as a general contractor. Second, Greenlight argues that Plaintiff's work does not, in any event, constitute construction or alteration under the statute and Plaintiff is, therefore, not entitled to the protections of section 240 (1).

As to the scope of work argument, the contract between Greenlight and the Dixons provides that Greenlight was to "[s]upply & Install Horizon dual shade, solar & blackout motorized" shades (NYSCEF doc No. 65, ¶ 47). Greenlight contends that the parties, by oral modification, removed this provision from the contract. Greenlight submits the deposition testimony of Matthew Tritt (Tritt), its principal, who stated that although window treatments were initially within the scope of Greenlight's contract with the Dixons, this item was removed from the scope of work before such work was performed. Tritt testified that while the contract called for Greenlight to install motorized shades (Tritt tr at 70-71; NYSCEF doc No. 48), Tritt testified that the Dixons instructed Greenlight to remove installation of the shades from the scope of work:

> "It was considered a furnishing, and was to be carefully designed by their interior designer, and they considered it to be more of, like, a couch, and something … of [an] art work that would come in after construction was complete, and they also wanted to work closely with their preferred vendor"

(*id.* at 74-75).

Greenlight also submits the deposition testimony of Adam Dixon, who testified that window shade installation was taken out of the contract (NYSCEF doc No. 70 at 42). Adam

Dixon also testified that change in the scope of work should have been reflected in "Taskr," an electronic accounting system used by Greenlight. However, Greenlight does not submit any Taskr documents reflecting a change order for paragraph 47 of the construction agreement between the Dixons and the Greenlight.

Tritt testified that Greenlight never hired its preferred window-treatment subcontractor, nonparty Horizon, "or any window treatment company and at no time did I ever pay a window treatment company for this project" (*id.* at 76). Moreover, Tritt testified that Greenlight finished the project and "demobilized" from the Dixon's apartment in December 2014, over a month before Plaintiff's accident (*id.* at 59-60).

Greenlight directs the court to certified records supplied by Distinctive Windows, Plaintiff's employer. For example, to further its argument that Distinctive Window's work was not under its control, Greenlight points to an email sent by Distinctive Window's Ellen Cosgrove to 77 Bleecker inquiring about 77 Bleecker's certificate of insurance requirements (NYSCEF doc No. 84). Greenlight stresses that, if Distinctive Window was its subcontractor, it would not have communicated directly with 77 Bleecker about this matter.

While it is relatively clear that Distinctive Window was not Greenlight's subcontractor, at least in the traditional sense where the general contractor hires the trades working below it, the certified records point to a murkier set of circumstances than the one Greenlight suggests to the court. For example, the records include a draft contract between Greenlight and Distinctive Windows, as well as an email from Greenlight's project manager, Nicholas DeRosa (DeRosa), sent on January 26, 2015, two days before the accident and over a month after Greenlight claims to have finished work on the project (*id.*). DeRosa's email was sent to Gerry Parker (Parker), Distinctive Window's principal, and Rebecca Dixon is copied. It states: "Is everything cleared up

with the additional shade rollers? I need to schedule guys to remove the teak valences before you install. Please advise" (*id.*).

The Dixons apparently micromanaged the window treatment, working in concert with nonparty Tinatin Kilaberiadze Design Inc. (Tinatin), an interior decorator (Rebecca Dixon tr at 63-64; Adam Dixon tr at 42). Distinct Windows sent an invoice for the window treatment work to Tinatin and marked paid on June 11, 2014, a time when it is undisputed that Greenlight was still on the job (NYSCEF doc No. 84). Distinctive Window's certified records contain a copy of a check that indicates that Rebecca Dixon's parents paid for some of the window treatment charges (*id.*).

The record reflects that Dixons changed course on the window treatments as renovations were ongoing. At her deposition, Rebecca Dixon referred to these vicissitudes:

"Q: "...at first you had the bottom blackout and then you added months later the top blackout, right?

A: "Yes."

(NYSCEF doc No. 46 at 70).

Greenlight relies on the *Ortiz v Igby Huntlaw LLC* (146 AD3d 682 [1st Dept 2017]). In *Ortiz,* the First Department held that the general contractor defendant was entitled to dismissal, as the plaintiff was injured while painting and the general contractor's contract with the owner "specifically excluded painting" (*id.* at 683). Thus, as the plaintiff's painting work was "outside the scope of what has been contracted for by the owner and the general contractor, the general contractor has no right to control the work, and therefore cannot be liable under Labor Law § 240 (1) or § 241 (6)" (*id.*).

Plaintiff is correct that *Ortiz* is distinguishable. Most importantly, unlike *Ortiz*, where painting was explicitly excluded from the contract, window treatments were explicitly included in the contract between Greenlight and the Dixons. While the Dixons may have micromanaged the work, the record reflects that they did so in hurly-burly fashion, rather than by any written modification of the contract. While the Dixons and their parents may have paid for the window treatments directly, and have hired Distinctive Window directly or through their interior decorator, questions remain as to Greenlights involvement.

For example, DeRosa's email -- in which he states that Greenlight needs "to schedule guys to remove the teak valences" before Distinctive Window could do the shade installation during which Plaintiff was injured – raises a question of fact over as to whether Greenlight had the right to control Plaintiff's work. The touchstone of the analysis here is whether Greenlight had "the authority to supervise or control the work" (*Butt v Bovis Lend Lease LMB, Inc.*, 47 AD3d 338 [2007]). Much of the rest is noise. As there is a question of fact as to this question of control, Greenlight is not entitled to summary judgment on this basis. Nor, as a corollary, is Plaintiff entitled to summary judgment, as he cannot make a *prima facie* showing as against Greenlight when the question of Greenlight's control over his work remains.

As to the issue of whether Plaintiff's work is covered, Greenlight argues that the work is not covered by the statue as it was merely a decorative modification. Greenlight tacitly concedes, as it must, that its work on the project fits snugly within the zone of statutorily covered activity, as its renovation contract with the Dixons plainly called for it to alter the apartment. The Court of Appeals has held generally that, when evaluating the issue of whether a worker's activity is covered, "it is neither pragmatic nor consistent with the spirit of the statute to isolate the moment

of injury and ignore the general context of the work," (*Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882 [2003]).

As there a question of fact here as to whether Greenlight can separate its own work from the window treatments, as discussed above, the branch of Greenlight's motion that seeks dismissal of Plaintiff's 240 (1) claim on the basis that Topoli was not engaged in activity covered under the statute must be denied. While the Court need not reach Greenlight's decorative-modification argument to arrive at this conclusion, this argument is discussed below as 77 Bleecker makes the same argument.

77 Bleecker

77 Bleecker argues that Plaintiff's section 240 (1) claims should be dismissed, as Topoli was not engaged in covered activity. In support, 77 Bleecker cites to *Amendola v Rheedlen 125th St., LLC* (105 AD3d 426 [1st Dept 2013]), a case it describes as being "on all fours with the instant matter" (NYSCEF doc No. 52, ¶ 49). In *Amendola*, the First Department

Plaintiff cites to the Court of Appeals decision in *Saint v Syracuse Supply Co.* (25 NY3d 117 [2015]), which involved a worker who fell while installing a new advertisement on a billboard. *Saint* held that the plaintiff was engaged in work alteration work covered by the statute, rather than "decorative modification," as the work involved "a change to the billboard's size and an adjustment of the frame to accommodate the unique shape of the advertisement" (*id.* at 126).

Amendola held that the act of installing shades does not, in itself, constitute altering under the statute (*id.* at 427). The First Department noted that "[t]he evidence shows that the shade installation work essentially entailed securing brackets with screws to the ceiling or pan protruding from the wall, and inserting shades into the bracket" and that this work was not

"performed in the context of the larger construction" (*id.*).

Here, as discussed above, there is a question of fact as to whether Plaintiff's work was performed in the context of the larger construction. Thus, 77 Bleecker's application for dismissal of Plaintiff's section 240 (1) claim must be denied.

Plaintiff

Plaintiff seeks partial summary judgment as to liability against Greenlight and 77 Bleecker on his section 240 (1) claim. The Court has already decided that this application must be denied as against Greenlight, as there is a question of fact as to whether Plaintiff's work was performed in the context of the larger renovation work for which Greenlight was the general contractor.

As to 77 Bleecker, Plaintiff argues that even if the shade installation work is viewed in isolation, Plaintiff argues that it amounts to alteration, as the subject work more closely resembles the work in *Saint*, rather than *Amendola*. That is, Plaintiff, without making specific citation to the record, argues that "the installation required a great deal of work, including rewiring the area, removing the window frame area, and doing both carpentry and electrical work for the installation of the motorized items" (NYSCEF doc No. 104, ¶ 22).

In opposition, to Plaintiff's cross motion, 77 Bleecker contends Greenlight, rather than Plaintiff's employer, Distinctive Window, provided the wiring for the shades. In support of this contention, Plaintiff cites to Greenlight's Tritt's testimony that "our responsibility was to provide power to the locations of future shades" (NYSCEF doc No. 64 at 112). 77 Bleecker argues that Plaintiff's work was indistinguishable from the shade installation that, in *Amendola*, was insufficient to trigger the protections of the statute.

Here, Plaintiff fails to make a *prima facie* showing of entitlement to judgment on the

issue of 77 Bleecker's liability on the section 240 (1) claim. As Plaintiff did not cite to the record to substantiate his claims as to the complexity of the work, the Court is not in a position to make a finding with respect to his allegations of alteration. Accordingly, the branch of Plaintiff's cross motion seeking summary judgment as to liability on section 240 (1) must be denied.

II. Labor Law § 241 (6)

Labor Law § 241 (6) provides, in relevant part:

> "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

It is well settled that this statute requires owners and contractors and their agents "to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241 [6]). While this duty is nondelegable and exists "even in the absence of control or supervision of the worksite" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]), "comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]).

To maintain a viable claim under Labor Law § 241 (6), plaintiff must allege a violation of a provision of the Industrial Code that requires compliance with concrete specifications (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). The Court of Appeals has noted that "[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" (*St. Louis,* 16 NY3d at 416).

Plaintiff argues that Greenlight and 77 Bleecker violated 12 NYCRR 23-5.3, while Greenlight and Bleecker argue that Plaintiff's section 241 (6)

Greenlight

Greenlight's only argument as to section 241 (6) refers to the threshold issue as to whether it was involved with Plaintiff's work. As a question of fact remains as to Greenlight's authority to control and coordinate Plaintiff's work, the branch of Greenlight's motion seeking dismissal of Plaintiff's section 241 (6) claim as against it must be denied.

77 Bleecker

Similarly, 77 Bleecker relies here on the same arguments that failed in the section 240 (1) context. Accordingly, the branch of 77 Bleecker's motion that seeks dismissal of plaintiff's section 241 (6) claims must be denied.

Plaintiff

Plaintiff argues that defendants violated 12 NYCRR 23-5.3, which is entitled "General provisions for metal scaffolds." More specifically, Plaintiff alleges that defendants violated 12 NYCRR 23-5.3 (e), which requires safety railings in compliance with the regulation, as well as 12 NYCRR 23-5.3 (g), which provides certain requirements for scaffold footings.

While 12 NYCRR 25-5.3 has been held to be sufficiently specific to serve as a predicate to section 241 (6) liability (*see Abreo v URS Greiner Woodward Clyde*, 60 AD3d 878 [2d Dept 2009]), Plaintiff does not point directly to any evidence in the record that it was violated. Nor does Plaintiff provide an expert affidavit supporting his attorney's conclusory statements as to a violation. In these circumstances, Plaintiff has failed to make *prima facie* showing of entitlement to partial summary judgment as his Labor Law section 241 (6) claim. Thus, Plaintiff's cross motion must be denied.

III. Labor Law § 200 and Common-Law Negligence

Labor Law § 200 is a codification of the common law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

Where the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, "liability cannot be imposed on [a defendant] unless it is shown that it exercised some supervisory control over the work" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or] contractor controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed" (*id.*).

In contrast, where the defect arises from a dangerous condition on the work site, instead of the methods or materials used by plaintiff and his employer, an owner or contractor "is liable under Labor Law § 200 when [it] created the dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive notice" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]; *see also Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675, 675 [1st Dept 2010]). In the dangerous-condition context, "whether [a defendant]

controlled or directed the manner of plaintiff's work is irrelevant to the Labor Law § 200 and common-law negligence claims . . ." (*Seda v Epstein*, 72 AD3d 455, 455 [1st Dept 2010]).

Here, Plaintiff alleges that there was a dangerous condition on the premises: an unlevel floor that caused the scaffold to rock back and forth.

Bleecker 77

Bleecker 77 argues that Plaintiff's section 200 and common-law negligence claims should be dismissed as against it, as it did not have supervisory control over Plaintiff's work. As 77 Bleecker does not make a showing as to notice, it fails to make a *prima facie* showing (*see Jahn v. SH Entertainment, LLC*, 117 A.D.3d 473, 473 [1st Dept 2014]). Accordingly, the branch of Bleecker 77's motion seeking dismissal of plaintiff's Labor Law § 200 and common-law negligence claims must be denied.

Greenlight

Greenlight makes no specific arguments as to the section 200 and common-law negligence claims outside of the threshold arguments that the court rejected in the section 240 (1) and section 241 (6) contexts. Accordingly, the branch of Greenlight's motion seeking dismissal of these claims must be denied.

IV. Indemnification

77 Bleecker seeks summary judgment on its contractual indemnification claims as against the Dixons, while the Dixons seek dismissal of all indemnification claims as against them. The alteration agreement between 77 Bleecker and the Dixons contains the following indemnification provision:

> "I agree to indemnify the Owner, the Board, the tenants, and occupants of the building, the Managing Agent, and the Owner's architects, engineers and attorneys against any loss, cost or expense or expense including, without limitation, reasonable attorney's fees and disbursements suffered by reason of any

> injuries or damages to person or property as a result of the work performed hereunder, or the omission of any work contained in the plans and specifications contained herein, or the failure by my architects or professional engineer to include any work normally or reasonably required in alteration of this type, whether or not caused by negligence. I shall procure a bond or agreement from an insurance company reasonably acceptable to the owner, ensuring payment and performance by me of this clause"

(NYSCEF doc No. 50, § C).

77 Bleecker argues that, if the court finds that the work arose out of the alteration, then it is owed in contractual indemnification, as the indemnification provision clearly calls for reimbursement for costs arising from the work that was the subject of the alteration agreement. Here, the court has not made such finding. Instead, the court has found that there is a question of fact as to this issue. As such, 77 Bleecker's application for contractual indemnification is premature. 77 Bleecker's citation to *Dwyer v Central Park Studios, Inc.* supports this conclusion (98 AD3d 882, 884 [1st Dept 2012] [holding that the cooperative corporation was entitled to indemnification "[s]ince there is no question that plaintiff's injuries arose out of the alterations"]).

As there is a question of fact as to whether Plaintiff's injuries arose under the alteration agreement, the Dixons are not entitled to dismissal of 77 Bleecker's claims for contractual indemnification. As such, the branch of the Dixons motion seeking dismissal of the third-party complaint must be denied.

CONCLUSION

Accordingly, it is

ORDERED that third-party plaintiffs Rebecca and Adam Dixon (the Dixons) motion for summary judgment (motion seq. No. 002) is denied; and it is further

ORDERED that defendant/third-party plaintiff 77 Bleecker Street Corp. (77 Bleecker)

motion for summary judgment is denied; and it is further

ORDERED that defendant Greenlight Construction Management Corp. motion for summary judgment is denied; and it is further

ORDERED that counsel for the Dixons is to serve a copy of this decision, along with notice of entry, on all parties within 10 days of notice of entry.

Dated: January 28, 2019

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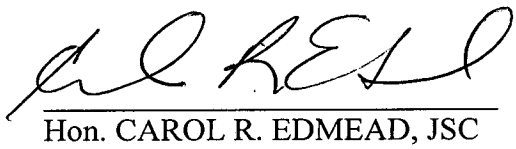

Hon. CAROL R. EDMEAD, JSC

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J.S.C.