Alvarao v Rower
2020 NY Slip Op 30428(U)
January 29, 2020
Supreme Court, Kings County
Docket Number: 520718/16
Judge: Pamela L. Fisher

At an IAS Part 94 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 29th day of January, 2020 (PF).

PRESENT:

HON. PAMELA L. FISHER,
Justice.

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LUIS ANGEL ALVARADO,
PLAINTIFF,

-AGAINST-

Index No. 520718/16

Motion seq #'s 9-13

ALEXANDER S.C. ROWER, ROWER PROJECT OFFICE, LLC, STEPHANIE GOTO DESIGN GROUP LLC AND HEADLEY LLC,
DEFENDANTS,

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ALEXANDER S.C. ROWER,
THIRD-PARTY PLAINTIFF,

-AGAINST-

EUROSTRUCT, INC.,
THIRD-PARTY DEFENDANT.

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The following papers numbered one to 22 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2,3-4,5-6,7-8,9-10
Opposing Affidavits (Affirmations)	11,12,13,14,15,16
Reply Affidavits (Affirmations)	17,18,19,20,21,22

Upon the foregoing papers, defendant/third-party plaintiff Alexander S.C. Rower (Rower or Mr. Rower) moves, in motion (mot.) sequence (seq.) 9, for summary judgment pursuant to CPLR 3212, dismissing plaintiff Luis Angel Alvarado's (plaintiff) complaint against him. Rower further moves for summary judgment against third-party defendant

Eurostruct, Inc. (Eurostruct) under his third-party contractual indemnification claim and for summary judgment dismissing Eurostruct's counterclaims against him. Defendant Headley LLC (Headley) moves, in mot. seq. 10, for summary judgment dismissing plaintiff's complaint and all cross claims and counterclaims against it. Defendant Stephanie Goto Design Group (SGDG) moves, in mot. seq. 11, for summary judgment dismissing plaintiff's complaint and all cross claims and counterclaims against it. Defendant Rower Project Office, LLC (RPO) moves, in mot. seq. 12, for summary judgment dismissing plaintiff's complaint and all cross claims and counterclaims against it. Eurostruct moves, in mot. seq. 13, for summary judgment dismissing Rower's third-party complaint against it. Eurostruct further moves for summary judgment dismissing plaintiff's complaint in its entirety.

Background Facts and Procedural History

The instant action arises out injuries sustained by plaintiff during a construction project when the scaffold that he was standing on collapsed. At the time of the accident, plaintiff was employed by Eurostruct as a mason. The underlying construction project involved the gut renovation of a six-story premises located at 5 Grammercy Park in Manhattan (the building or the premises) whereby the building was to be converted from multifamily housing to a single-family residence. Prior to the accident, in a written agreement dated April 14, 2014, Rower, who owned the building, hired Eurostruct to perform the renovation work. Rower also hired SGDG to serve as the project "designer," although SGDG's principal, Stephanie Goto, testified at her deposition that there was no written contract between Rower and SGDG.

At the time of the accident, the renovation project was still in its initial phase, which involved demolition work and miscellaneous repairs to the building. On the day of the accident, plaintiff arrived at the job site at approximately 6:45 a.m. and received instructions from his Eurostruct supervisor, Jose Mendez, to lay bricks around a doorframe on the second floor of the building. In order to carry out this work, plaintiff and his Eurostruct coworker, Carlos Valdez, assembled a five-foot scaffold that consisted of four metal pieces which formed a frame, and a piece of plywood laid on top of the frame, which served as the scaffold's platform. The scaffold was owned by Eurostruct. Between 7:00 a.m. and 10:00 a.m., plaintiff laid cement and bricks around the doorframe while standing on the scaffold platform. At 10:00 a.m., plaintiff climbed down the scaffold and took a 15-minute coffee break. The accident occurred when plaintiff returned from his break. In particular, after climbing back up the scaffold and stepping onto the scaffold platform, one side of the scaffold and the scaffold platform collapsed, thereby causing plaintiff to fall to the floor and sustain injuries.

By summons and complaint dated November 15, 2016, plaintiff commenced the instant action against Rower, RPO, SGDG, and Headley (collectively, the defendants). Among other things, the complaint alleges that the defendants violated Labor Law §§ 240 (1), 241 (6), 200, and were otherwise negligent and that these statutory violations and negligence proximately caused the injuries sustained by plaintiff in the accident. After being served with the complaint, the defendants interposed their respective answers, which

generally denied the allegations in the complaint. In addition, Rower commenced a third-party action against Eurostruct seeking contractual indemnification. In its answer to the third-party complaint, Eurostruct interposed counterclaims against the defendants seeking common-law and contractual indemnification, as well as damages for breach of contract.

During the discovery phase of this case, depositions of plaintiff, Mr. Rower, and Ms. Goto were conducted. In addition, Andrew Graves, who served as Eurostruct's project manager on the underlying project, appeared for a deposition on Eurostruct's behalf. The instant motions are now before the court.

Claims Against Headley and RPO

Headley moves for summary judgment dismissing all claims against it. In so moving, Headley maintains that there is no basis for any of the claims asserted against it by plaintiff or its codefendants inasmuch as Headley did not own or manage the building, did not hire any parties to perform work on the project, and did not itself perform any work on the project. In short, Headley maintains that it did not have anything to do with the renovation project. In support of this argument, Headley relies upon Mr. Rower's deposition testimony. In particular, Rower testified that Headley is a company owned by him and his brother which was formed in order to resolve issues involving their late father's estate. Rower further testified that Headley did not serve as the building's managing agent and was not involved in the renovation project.

RPO also moves for summary judgment dismissing all claims against it. In so moving, RPO maintains that it had no involvement with the underlying renovation project. In support of this argument, RPO points to the deposition testimony of Mr. Rower, wherein he stated that RPO is an art dealing enterprise that buys and sells art and that the entity had no role with respect to the renovation work. RPO also notes that plaintiff testified that he was never given any instructions by persons from RPO. Finally, RPO points to the testimony of Ms. Goto and Mr. Graves, both of whom stated that, although they had heard of this entity, they were unfamiliar with its purpose and had no direct dealings with RPO.

In opposition to Headley and RPO's respective summary judgment motions, plaintiff concedes that he cannot point to any facts which contradict Mr. Rower's testimony which the movants rely upon in support of their motions. However, plaintiff maintains that Headley and RPO's summary judgment motions must be denied inasmuch as Mr. Rower is an interested party and his own self-serving testimony is insufficient to establish a right to summary judgment.

It is well-settled that only owners, contractors, and their agents are subject to liability under Labor Law §§ 240 (1) and 241 (6) (*Russin v Louis N. Picciano & Son*, 54 NY2d 311 [1981]). It is equally well settled that, where as here, an accident arises out of alleged defects or dangers in the methods or materials of the work, a defendant may only be held liable under Labor Law § 200 or a common-law negligence theory when that defendant had the authority to control or supervise the performance of the work (*Ortega v Puccia*, 57 AD3d 54, 61

[2008]). Here, Headley and RPO have made a prima facie showing that they did not own the building, or otherwise act as a contractor or agent for purposes of the Labor Law. Headley and RPO have further made a prima facie showing that they did not have any authority or control over plaintiff's work. In this regard, it is clear from Mr. Rower's testimony, as well as the other witnesses who testified in this case, that Headley and RPO had no involvement whatsoever with the underlying renovation work. Under the circumstances, Headley and RPO are entitled to summary judgment dismissing plaintiff's complaint against them, as well as all cross claims and counterclaims asserted by their codefendants.

In reaching this conclusion, the court finds no merit to plaintiff's argument that Mr. Rower's testimony is insufficient to support the motions inasmuch as he is an interested witness. Plaintiff had a full and fair opportunity to cross-examine Rower and conduct discovery in this case. However, by plaintiff's own admission, he has failed to uncover any admissible evidence such as a construction contract or deed linking Headley or RPO to the renovation project or establishing that they had an ownership interest in the building at the time of the accident.

Claims Against SGDG

SGDG moves for summary judgment dismissing all claims against it. In so moving, SGDG maintains that it is not subject to liability under the Labor Law as it merely served as a designer on the renovation project, and does not qualify as an owner, contractor, or agent. In this regard, SGDG contends that it did not obtain or exercise any authority or control over

the work carried out by plaintiff or any other Eurostruct workers. In support of these contentions, SGDG points to plaintiff's own deposition testimony, wherein he stated that he was supervised by a Eurostruct coworker, Jose Mendez, and that Ms. Goto never instructed him where to work, or how to carry out his work. In addition, SGDG notes that Mr. Graves testified that the only individuals who provided tools and equipment, or who instructed plaintiff, were other Eurostruct employees. Finally, SGDG points to the deposition testimony of Ms. Goto. In particular, Ms. Goto testified that SGDG did not hire any subcontractors and did not direct or control any construction work performed by Eurostruct. In addition, Ms. Goto testified that her sole role on the job site was to observe the completed work from an aesthetics perspective in order to confirm that it followed the design plan.

In opposition to SGDG's motion for summary judgment, plaintiff notes the contract between Rower and Eurostruct specifically identifies SGDG as the Rower's "representative" at the job site. Plaintiff also notes that this contract specifically states that the project architect "will not have control over or charge of and will not be responsible for acts or omissions of the contractor . . . or any entities performing portions of the work." However, the contract does not identify SGDG as the project architect. According to plaintiff, this implies that SGDG had control over the work. Finally, plaintiff notes that Ms. Goto admitted at her deposition that she was present at the job site on a regular basis in order to observe the work. Under the circumstances, plaintiff maintains that there are issues of fact regarding whether or not SGDG is subject to liability under the Labor Law as a statutory agent.

As an initial matter, it is undisputed that SGDG did not hold any ownership interest in the building and that it was not hired to perform construction work as a contractor on the renovation project. Accordingly, the only issue is whether or not SGDG was an agent for purposes of Labor Law §§ 240 (1), 241 (6). "To hold a defendant liable as an agent of the general contractor [or owner] for violations of Labor Law §§ 240 (1) and 241 (6), there must be a showing that it had the authority to supervise and control the work" (*Van Blerkom v America Painting, LLC*, 120 AD3d 660, 661 [2014] [citations omitted]). "Thus, unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law" (*Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005] [citations omitted]).

Here, SGDG has made a prima facie showing that it is not subject to liability as a statutory agent under the Labor Law. In particular, Ms. Goto, Mr. Grave, and plaintiff's own deposition testimony conclusively establishes that SGDG did not assume any supervisory control or authority over the work performed by Eurostruct, including the work that plaintiff was carrying out at the time of the accident. In opposition to this prima facie showing, plaintiff has failed to raise a triable issue of fact. In particular, the fact that the contract between Rower and Eurostruct did not specifically state that SGDG did not have authority over the work, and that the contract identified SGDG as Rower's representative is insufficient to raise an issue as to whether it had such authority given the uncontroverted deposition testimony of numerous witnesses indicating that SGDG had no authority over the

work. Under the circumstances, there is no basis for plaintiff's Labor Law §§ 240 (1) and 241 (6) claims against SGDG. Further, given SGDG's lack of authority and control over the work, plaintiff's Labor Law § 200 and common-law negligence claims against this defendant must be dismissed as well (*Marquez v L&M Development Partners, Inc.*, 141 AD3d 694, 698 [2016].

As a final matter, Eurostruct opposes that branch of SGDG's motion which seeks summary judgment dismissing Eurostruct's cross claims/counterclaims against SGDG. In particular, Eurostruct maintains that SGDG has not met its prima facie burden in seeking this relief. However, inasmuch as the court has already determined that SGDG did not control or supervise the work, and was not otherwise negligent, it necessarily follows that there is no basis for Eurostruct's common-law indemnification claims against SGDG. Moreover, in the absence of any agreement between these parties, Eurostruct's contractual indemnification and breach of contract claims against SGDG are baseless as well. Accordingly, SGDG is entitled to summary judgment dismissing all cross claims and counterclaims against it.

Claims Against Rower

Mr. Rower moves for summary judgment dismissing all claims against him. In so moving, Rower contends that he is exempt from liability under Labor Law §§ 240 (1) and 241 (6) inasmuch as he is a single-family homeowner who did not direct or control the work that caused the accident. In support of this contention, Rower points to his own deposition testimony, as well as the testimony of Eurostruct's project manager Mr. Singer, both of which

indicate that the goal of the renovation project was to convert the building from a multifamily premises into a single-family residence in which Rower would reside once the work was completed. Rower also maintains that it is clear from the deposition testimony of all the parties in this case, including plaintiff's own testimony, that Rower did not direct or control the work performed by plaintiff, or otherwise supervise the method or manner in which the work was carried out. Further, Rower points to the undisputed fact that he did not own or supply plaintiff with the scaffold that collapsed inasmuch as the apparatus was owned by Eurostruct. As a final matter, Rower argues that, given his lack of control and supervision over the work, plaintiff's Labor Law § 200 and common-law negligence claims must be dismissed against him as well.

In opposition to Rower's motion, plaintiff initially contends that, in the absence of the one- and two-family homeowner exception to Labor Law §§ 240 (1) and 241 (6), he would clearly be entitled to summary judgment against Rower given the fact that he was injured while performing renovation work when the scaffold that he was standing on collapsed. Further, plaintiff maintains that there are issues of fact regarding whether or not the subject building was a one- or two-family residence at the time of the accident. In support of this contention, plaintiff submits a copy of the building's deed recording and endorsement cover page, which indicates that the building is a six-family dwelling. Plaintiff also submits copies of the New York City Department of Finance's tax records for the building, which list the building class for the premises as, "C2 - Five to Six Families." Plaintiff also notes that

Rower has failed to submit any building plans or permits supporting his claim that the premises was being converted to single-family use at the time of the accident. According to plaintiff, in the absence of such evidence, Mr. Rower's self-serving testimony regarding the conversion of the building is insufficient to support his summary judgment motion. Finally, plaintiff maintains that there is an issue of fact regarding whether or not Rower controlled and supervised the work. In support of this argument, plaintiff points to a provision in the contract between Rower and Eurostruct in which Mr. Rower retained the right to stop Eurostruct's work.

Both Labor Law §§ 240 (1) and 241 (6) exempt owners of one- and two-family dwellings who do not direct or control the work being performed (*Torres v Levy*, 32 AD3d 845 [2006]; *McGlone v Johnson*, 27 AD3d 702 [2006]; *Siconolfi v Crisci*, 11 AD3d 600, 601 [2004]). Thus, "in order for a defendant to receive the protection of the homeowners' exemption, the defendant must satisfy two prongs required by the statutes . . . that the work was conducted at a dwelling that is a residence for only one or two families [and] . . . that the defendants [did] not direct or control the work" (*Chowdhurry v Rodriguez*, 57 AD3d 121, 128 [2008] [citations omitted]). The "direct and control" requirement is strictly construed, and requires that an owner actually direct and control the work that caused the accident (*Torres*, 32 AD3d at 846). The authority to stop the work, which an owner always has, is insufficient to establish direction and control of the work (*Sandals v Shemtov*, 138 AD3d 720, 721-722 [2016]). Further, with respect to the issue of whether or not a dwelling is one

or two family, the key is whether the "site and purpose of the construction were solely related to renovating the building for one-family [or two-family] use" (*Stejskal v Simons III*, 309 AD2d 853, 855 [2003], *affd* 3 NY3d 628 [2004]). Thus, if the site and purpose of the renovation work that caused the accident is to convert a dwelling to one- or two-family use, the exemption applies even if three or more families were living in the dwelling at the time of the accident (*id.*).

Here, Rower has made a prima facie showing that he is exempt from liability under Labor Law §§ 240 (1) and 241 (6). In particular, Mr. Rower and Mr. Grave's uncontroverted deposition testimony indicates that the purpose of the renovation work that plaintiff was carrying out at the time of the accident was to convert the building from multifamily use to a single-family dwelling. Further, the deposition testimony of Mr. Rower, Mr. Graves, as well as plaintiff, demonstrate that Rower did not direct or control plaintiff's work.

In opposition to Rower's prima facie showing, plaintiff has failed to raise a triable issue of fact. In particular, given the fact that the purpose of the work was to convert the building to single-family use, the fact that the building's deed and tax records indicate that the premises was for five- or six-family use is irrelevant (*Stejskal*, 309 AD2d at 855). Indeed, given the purpose of the work, the exemption would still apply even if there were three or more families actually residing in the building at the time of the accident (*id.*).[1] Further, contrary to plaintiff's argument, Mr. Rower's sworn deposition testimony is

[1]No one was living in the building at the time of the accident as Rower vacated the premises prior to the commencement of the renovation work.

sufficient to establish that the purpose of work was to convert the premises to single-family use. In any event, this testimony is supported by the deposition testimony of the project manager, Mr. Graves. Finally, the fact that Mr. Rower had the right to stop the work is insufficient to raise a triable issue of fact regarding his direction and control of the work *(Sandals*, 138 AD3d at 721-722). Accordingly, Rower is entitled to summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims against him.

Turning to plaintiff's Labor Law § 200 and common-law negligence claims against Rower, as previously noted, the accident, which involved a scaffold collapse, arose out of alleged defects or dangers in the methods or materials of the work. Further, it is undisputed that Rower did not own or supply the scaffold and the uncontroverted deposition testimony before the court conclusively demonstrates that he did not have the authority to control or supervise plaintiff's work. Accordingly, Rower is entitled to summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against him (*Chowdhury*, 57 AD3d at 129-130).

Rower also moves for summary judgment dismissing all cross claims and counterclaims asserted against him. Eurostruct opposes this portion of Rower's motion, and argues that Rower has failed to meet his prima facie burden with respect to Eurostruct's common-law indemnification counterclaim. However, given the court's prior determination that Rower did not own the scaffold and did not direct, control, or otherwise have any authority over plaintiff's work, it necessarily follows that Eurostruct's common-law

indemnification counterclaim against Rower must be dismissed. Accordingly, Rower is entitled to summary judgment dismissing all cross claims and counterclaims against him.

Third-Party Claims Against Eurostruct

Rower moves for summary judgment under its third-party contractual indemnification claim against Eurostruct. At the same time, Eurostruct moves for summary judgment dismissing Rower's third-party complaint against it.[2] In support of its motion for contractual indemnification against Eurostruct, Rower points to his contract with Eurostruct. Specifically, Rower notes that under Paragraph 3.18.1 of the General Conditions of the Contract, Eurostruct agreed to indemnify Rower for any claims and expenses, including attorney's fees, for injuries caused by the negligent acts or omissions of Eurostruct and its employees. Rower also points to Paragraph 32 of the Rider to the contract, in which Eurostruct agreed to indemnify Rower for any claims and expenses, including attorney's fees and costs, arising from any act, error, omission or breach by Eurostruct employees in connection with the performance of the work. Here, inasmuch as plaintiff was a Eurostruct employee who was injured while performing the work when the Eurostruct-owned scaffold that he was standing upon collapsed, Rower maintains that he is clearly entitled to be indemnified under the terms of the contract and rider.

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[2]Eurostruct also moves for summary judgment dismissing plaintiff's complaint in its entirety. However, this branch of Eurostruct's motion is moot inasmuch as the court has already dismissed plaintiff's claims against all of the first-party defendants.

In opposition to this branch of Rower's motion, and in support of its own motion for summary judgment dismissing Rower's third-party claims, Eurostruct maintains that Rower's indemnification claims against it are barred under Workers' Compensation Law § 11 inasmuch as plaintiff did not sustain a "grave injury" as defined under the statute. Eurostruct also argues that Rower is not entitled to costs and attorney's fees under its indemnification claims inasmuch as he failed to mitigate these damages. Specifically, Eurostruct notes that Rower tendered his defense and indemnification to Eurostruct on September 26, 2017, and on October 18, 2017, Eurostruct's insurance carrier, State National Insurance Company (SNIC), agreed to represent and defend Rower in this action as an additional insured under Eurostruct's liability policy. However, Rower declined to accept this offer of defense and retained his own counsel.

In opposition/reply to Eurostruct's arguments, Rower contends that Eurostruct's argument regarding the lack of a grave injury is irrelevant and inapplicable inasmuch as he has not asserted a common-law indemnification claim against Eurostruct and Workers' Compensation Law § 11 does not apply to contractual indemnification claims. Further, Rower maintains that Eurostruct's argument regarding SNIC's offer to defend him in this case is without merit. Specifically, Rower notes that under the terms of the contract, Eurostruct agreed to indemnify him for all legal fees and costs. However, SNIC's tender offer was subject to a self-insured retention fee of $10,000 and Eurostruct never agreed to

satisfy this self-insured retention fee. Under the circumstances, Rower maintains that he had every right to refuse SNIC's tender offer.

Turning first to Eurostruct's motion for summary judgment dismissing Eurostruct's third-party complaint, the court notes that the only cause of action in the third-party complaint sounds in contractual indemnification. Thus, that branch of Eurostruct's motion which seeks dismissal of a common-law indemnification claim must be denied as moot, as no such claim exists. Further, while it is undisputed that plaintiff was employed by Eurostruct and did not suffer a grave injury under Workers' Compensation Law § 11, by its very terms, this statue does not apply to an employer's contractual agreement to indemnify another party (*Rodrigues v N&S Building Contrs., Inc.*, 5 NY3d 427, 431-432 [2005]). Accordingly, that branch of Eurostruct's motion which seeks summary judgment dismissing Rower's contractual indemnification claim is also denied.

Turning to Rower's motion for summary judgment on its contractual indemnification claim against Eurostruct, the court notes that it has already granted Mr. Rower's motion for summary judgment dismissing plaintiff's claims against it. Thus, any contractual indemnification claim that Rower has against Eurostruct only remains relevant with respect to attorney's fees and costs. With respect to the claim itself, as noted above, Eurostruct agreed to indemnify Rower for any claims arising out of the actions of its employees while performing the renovation work. Here, plaintiff's claims clearly arose out of the actions of Eurostruct's employees while performing the work inasmuch the scaffold was owned by

Eurostruct, assembled by Eurostruct employees, and it collapsed while plaintiff was performing renovation work while standing on the scaffold. Moreover, the indemnification provision is fully enforceable inasmuch as the court has already determined that the accident was not caused by any negligence on Mr. Rower's part (*Reisman v Bay Shore Union Free School Dist.*, 74 AD3d 772, 774 [2010]). As a final matter, there is no merit to Eurostruct's argument that it is not responsible for indemnifying Mr. Rower for the attorney's fees and costs he has incurred in this matter inasmuch as Rower declined SNIC's offer to defend him as an additional insured under its policy. In particular, this offer was conditioned on the payment of the self-insured retention fee of $10,000 and the underlying contractual indemnification clause unconditionally required that Eurostruct indemnify Rower for all attorney's fees and costs. Accordingly, Rower is entitled to summary judgment under his third-party contractual indemnification claim against Eurostruct. However, such costs and fees do not include those Rower incurred in prosecuting his contractual indemnification claim against Eurostruct (*546-552 West 146th Street, LLC v Arfa*, 99 AD3d 117, 122 [2012]; *Klock v Grosodonia*, 251 AD2d 1050 [1998]).

Summary

In summary, the court rules as follows: (1) Headley's motion, in mot. seq. 10, for summary judgment dismissing plaintiff's complaint and all cross claims and counterclaims asserted against it is granted; (2) RPO's motion, in mot. seq. 12, for summary judgment dismissing plaintiff's complaint and all cross claims and counterclaims asserted against it is

granted; (3) SGDG's motion, in mot. seq. 11, for summary judgment dismissing plaintiff's complaint and all cross claims and counterclaims asserted against it is granted; (4) Rower's motion, in mot. seq. 9, for summary judgment dismissing plaintiff's complaint and all cross claims and counterclaims asserted against him and for summary judgment under his contractual indemnification claim against Eurostruct is granted; (5) that branch of Eurostruct's motion, in mot. seq. 13, which seeks summary judgment dismissing Rower's third-party action against it is denied; and (6) that branch of Eurostruct's motion which seeks summary judgment dismissing plaintiff's complaint is granted.

This constitutes the decision, order, and judgment of the court.

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J. S. C.

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Hon. Pamela L. Fisher, J.S.C.