SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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MICHAEL C. WEISS, as Executor of the Estate of ABRAHAM WEISS and MICHAEL C. WEISS, Individually,

Plaintiffs,

-against-

DENNIS KONNER, ESQ.,

Defendant.

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DECISION AND ORDER
Motion Seq. Nos.: 004

Index No.: 117716/2009

O. PETER SHERWOOD, J.:

BACKGROUND

Plaintiff Michael Weiss (Weiss) is the executor of the estate of Abraham Weiss. The estate included a property at 234-236 Mullberry Street (the Property). 234-236 Mullberry Realty LLC (the Buyer) had contracted to buy the Property from the estate. Defendant Dennis Konner (Konner) was counsel to the Buyer. The closing on the Property was scheduled for December 30, 2008 (the Closing). Plaintiff alleges that the Buyer was looking for an excuse not to close and that Konner, in pursuit of that goal, made defamatory statements at the Closing causing the title company, First American Title Insurance Company (First American), to refuse to provide complete title insurance, and abort the Closing. The Buyer then sued Weiss for the return of the deposit, and settled in 2010.

In this action, Plaintiff Weiss and the estate (as well as former plaintiff Joseph Trenk, attorney for the estate) sued Konner, the Buyer's principals, and First American, seeking to recover the difference between the contract price for the Property ($8,000,000) and the value of the Property as established by the IRS in November, 2009 ($5,468,270), as well as $9 million in punitive damages. In response to a motion to dismiss the complaint pursuant to CPLR 3211, Justice Lowe dismissed all claims. The First Department reinstated the first claim (slander *per se* of Weiss), third claim (slander of title) and fifth claim (slander *per se* of Trenk) against Konner. It affirmed dismissal of all other claims. Joseph Trenk subsequently passed away, his estate's executor withdrew from this action, and the fifth claim was dismissed, leaving only the first (slander *per se*) and third (slander of title) causes of action. Konner now moves for summary judgment dismissing all remaining claims.

The following facts are taken, except as noted, from the undisputed facts in the parties' Rule 19-a statements.

Abraham Weiss died on March 30, 2008. Prior to his death, on February 15, 2008, the New York City Department of Finance and Revenue issued property tax assessment notices for the Property, which valued the Property at $4.05 million. In the probate petition, filed on April 4, 2008, plaintiff swore that the value of the estate's real property holdings (including the Property) was approximately $3 million. The parties dispute whether Weiss was aware that this was not the true value of the real estate holdings. On May 8, 2008, the estate contracted with the Buyer to sell the Property for $8 million. The Buyer paid a deposit. On June 16, 2008 Weiss signed a tax form valuing the estate's real property (including the Property) at $8.75 million. On December 23, 2008, Weiss filed an estate tax return with the IRS, which valued the Property at $4.1 million as of March, 2008 (in which it was noted that on September 30, the Property had been worth $4 million, at the same time as the Buyer was in contract to buy the Property for $8 million). The estate was subsequently audited by the IRS, and the Property was valued at $5.5 million, pursuant to a settlement between the estate and the IRS.

Defendant points out that, as of the December 30, 2008 Closing date, estate taxes had not been paid. According to plaintiff, the taxes were not yet due. Weiss complains that at the Closing, Konner accused Trenk and Weiss of perjury and fraud when the estate filed the probate petition in the Surrogate's Court valuing the estate's real estate holdings at $3 million shortly before it contracted to sell the property to defendant's client for $8 million. Plaintiffs also asserts that defendant said that Trenk could not be trusted to follow through on his undertakings and accused Weiss of untrustworthiness by extension. Weiss states that Konner made these statements at the Closing in order to help the Buyer get out of the contract, because the Buyer knew it was overpaying for the Property.

Konner, the Buyer's principals, Weiss, Joseph Trenk (counsel to the estate), Richard Kaplowitz (counsel to the estate), the manager of the Property, Liza Zeppieri (a title closer) and Jeffrey Mitzner (a VP of First American) attended the Closing. It is disputed who at First American decided not to insure the title, and for what reason. Konner claims it was Mr. Jason Goebel, underwriting counsel for First American, who, it is undisputed, was not present at the Closing and did not hear the allegedly defamatory statements. Weiss claims the decision had already been made

while Goebel was trying to reach Mitzner, First American's representative at the Closing, but does not say by whom (only contending that Mitzner, who was present, had the authority to grant an omission of the estate tax objection thereby allowing First American to insure the title, and permitting the Closing to proceed). Weiss acknowledges that Mitzner had stated at the Closing that "First American was being pressured by its clients into rescinding title clearance" (Opp. at 7). Weiss alleges he had offered to place the entire $8 million in sale proceeds in escrow to cover any federal estate taxes. He states that the proposal was acceptable to Goebel, but that no one present at the Closing responded to it. Goebel subsequently sent plaintiff's counsel, Kaplowitz, a letter declining to omit the exception and refusing to insure title. Konner then handed Kaplowitz a letter demanding return of the down payment, based on Weiss' inability to deliver title.

The estate sold the Property to another buyer in August, 2009, for $6.625 million. Weiss commenced this action in December, 2009.

Konner moves for summary judgment, arguing that there is no material issue of fact as to whether: (1) he made allegedly defamatory statements; (2) the statements alleged to have been made were true; (3) there was no malice; and (4) the statements alleged to have been made did not cause any damage.

A. Whether the Statements were Made

Weiss alleges three statements by Konner as the basis for the two defamation claims: (1) that Weiss was dishonest and/or untrustworthy; (2) Weiss "committed perjury" by signing the "fraudulent" petition; and (3) that the estate had not paid the necessary taxes.

Konner disputes plaintiffs' version of what was said at the Closing. He argues that none of the witnesses who were present at the Closing testified at deposition that anyone called Weiss either dishonest or untrustworthy. Konner also points out that none of these witnesses testified to having heard Konner make any statements about perjury or fraud, except for the plaintiff and his counsel, Kaplowitz, and that those two witnesses contradicted each other. Weiss testified, vaguely, that he and Trenk had been accused of perjury of committing fraud. Kaplowitz testified that Trenk had been accused of perjury and Weiss of fraud. In its opposition, defendant focuses on the deposition testimony of Mr. Kaplowitz, who stated:

> "Mr. Konner stated to my client, Mr. Weiss, and to Mr. Trenk, that they had filled out a document fraudulently, and it would be considered perjurious because it was inaccurate, and as a result they couldn't trust Mr. Trenk to follow through on any of his undertakings and that they were not going to close"

(Haskel Affirm. Exhibit M, Kaplowitz Tr. 33:13-34:25).

Konner argues that none of the attendees at the Closing testified as to his having made a statement at the Closing that Weiss had not paid estate taxes. Weiss provides no evidence of Konner having made such a statement.

B. Whether the Statements were Opinion

Konner maintains that, if the statements as alleged were made, they were opinions, and therefore non-defamatory (Memo at 14, *citing Mann v Abel,* 10 NY3d 271, 276 [2008]). He argues that those present at the Closing would have known the statements to have been opinion, given the context in which the statements were made, and that the supporting facts were known at the time.

Weiss responds that the First Department considered and rejected this argument when it reinstated these causes of action, and that the statements were actually (incorrect) statements of fact, not opinion.

C. Assertions as to the Truth of the Statements

Defendant Konner argues that Weiss was actually both dishonest and untrustworthy, as he had sworn to a falsely reduced valuation for the estate's real property. He also asserts that the Surrogate's Court petition was fraudulent and that swearing to the petition was, in fact perjury, because Weiss swore that the value of the estate's real property was approximately $3 million, with a total value of $5 million, when the value of the estate's assets, without the real property, exceeded $5 million. Konner also argues that Weiss had to have been aware that the estate's real property was valued at more than $3 million, since the Department of Finance and Revenue had issued property-tax assessment notices two months before the death of Abraham Weiss, which valued the Property, alone, at more than $4 million.

Weiss replies that the petition could not have been fraudulent, because whether the assets of the estate were $3 million or $8 million was not material to the petition, as the estimate was merely for the purpose of establishing the filing fee, and the fee would have been the same for an estate of

either value. Weiss also claims that signing the petition was not perjury, as he had not known, at that time, that the value was incorrect, a required element of perjury.

Konner argues that the statement that the estate had not paid the appropriate estate tax was true, as it is undisputed that the estate had not, in fact, paid the tax at the time of the Closing. Weiss points out that the tax was not yet due, but does not otherwise dispute the truth of this statement.

D. Whether the Alleged Statements Caused Damage

Konner argues that the alleged statements could not have caused Weiss or the estate any damage, as Goebel, the underwriting counsel at First American, never heard the alleged statements, and that the estate had not provided the required estate tax clearances. Weiss argues that the decision by First American not to approve the omission of the exception for federal estate taxes in the title insurance policy was a direct result of the alleged statements, despite Weiss' offer to have the sale proceeds held in escrow. The First American witnesses disagree about what happened during the Closing and who made the decision not to approve the omission.

E. Privilege

Konner claims that in any event, any statements he might have made at the Closing were protected by a privilege, either because they were made by a lawyer in the course of representing a client or because the were made by and to people regarding a subject in which all shared an interest (Memo of Law, NYSCEF Doc. No. 82, at 14, *citing Dillon v City of New York,* 261 AD2d 34, 38 [1st Dept 1999]).

Weiss argues that the First Department rejected these arguments when it reinstated these claims. Specifically, Weiss claims that the common interest privilege does not apply because the people at the Closing did not have interests which were "directly aligned" with Konner's, rather than merely coinciding (Opp. at 18, *quoting Silverman v Clark*, 35 AD3d 1, 11 [1st Dept 2006]). Weiss adds that the privilege provided a lawyer representing a client does not apply here, because Konner's statements were not "made in a reasonable manner and for a proper purpose," as the contract for the Property required objections to be made thirty days before the Closing, rather than at the Closing itself. (Opp. at 17, *quoting Blackman v Stagno*, 35 AD3d 776, 778 [2nd Dept 2006]).

To overcome a qualified privilege, plaintiff must show that Konner acted either with actual malice (*i.e.*, he made a statement with the knowledge that it was false or with reckless disregard as

to whether it was false), or with common law malice (*i.e.*, he made a defamatory statement solely with the desire to injure the plaintiff) (*Liberman v Gelstein*, 80 NY2d 429, 437–39 [1992]; *Present v Avon Products*, 253 AD2d 183, 188–89 [1st Dept 1999]).

Konner argues that there has been no showing of the existence of malice. Konner asserts that the mere allegation that Konner's motive in making the alleged statements was to help the Buyer avoid the closing and thereby avoid overpaying for the Premises is not evidence of malice. Weiss claims that the "motivation to abort the Closing" is sufficient to show malice. He adds and that Konner also recklessly disregarded the falsity of his statements because the petition was neither fraudulent nor perjurious.

DISCUSSION

A. Standard for Summary Judgment

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation,* 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez v Prospect Hosp., supra*; *Olan v Farrell Lines,* 64 NY2d 1092 [1985]; *Zuckerman v City of New York,* 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver,* 90 NY2d 204,208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]), and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see, Rotuba Extruders, Inc. v Ceppos,* 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "a shadowy

semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *see, Zuckerman v City of New York, supra; Ehrlich v American Moninga Greenhouse Manufacturing Corp.,* 26 NY2d 255, 259 [1970]).

Lastly, "'[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility'" (*Ruiz v Griffin,* 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.,* 294 AD2d 348 [2d Dept 2002]).

B. Defamation

The elements of a defamation claim are: "(1) a defamatory statement of fact; (2) regarding the plaintiff; (3) published to a third party by the defendant; (4) falsity; (5) some degree of fault; and (6) injury to the plaintiff" (Pattern Jury Instructions, §3:23, Vol. 2A at 224 [2nd ed 2014]).

Slander *per se* is slander which is actionable without any proof of financial loss (*see Edelstein v Farber,* 27 AD3d 202 [1st Dept 2006]; *Harris v Hirsh*, 228 AD2d 206 [1st Dept 1996]). There are four categories of this cause of action: "statements imputing incompetence or dishonesty in plaintiff's profession or trade; words imputing the commission of a serious crime; words imputing that plaintiff suffers from a loathsome disease; and words imputing serious sexual misconduct to another" (Pattern Jury Instructions, §3:24, Vol. 2A at 311). In the first category, the statement must be a reference to a significant business matter, and not a general statement about the plaintiff's character (*Liberman v Gelstein*, 80 NY2d 429, 436 [1992]). Statements imputing the commission of a serious crime must allege a specific and sufficiently serious, crime (Pattern Jury Instructions, §3:24, Vol. 2A at 314). For example, adultery and harassment do not qualify, but stalking is a serious enough crime to qualify (*Cavallaro v Pozzi,* 28 AD3d 1075 [4th Dept 2006], *Warlock Enters. v City Ctr. Assocs.*, 204 AD2d 438 [2nd Dept 1994], *DeFilippo v Xerox Corp.*, 223 AD2d 846 [3rd Dept 1996]).

The elements of a claim for slander of title are "(1) a communication falsely casting doubt on the validity of [the] complainant's title, (2) reasonably calculated to cause harm, and (3) resulting in special damages" (*39 College Point Corp. v Transpac Capital Corp.*, 27 AD3d 454, 455 [2nd Dept 2006] *quoting Brown v Bethlehem Terrace Assoc.*, 136 AD2d 222, 224 [3rd Dept 1988]).

C. The Statements

1. Regarding Payment of Estate Tax

Konner argues that no witness testified at a deposition to his having made a statement at the Closing about the estate's failure to pay estate taxes. Plaintiff Weiss does not dispute this. Instead he states that "Weiss and Kaplowitz were not questioned directly" about this statement. As defendant has provided deposition testimony that people in attendance had no recollection of defendant making any statement about estate taxes, Konner has made out a *prima facie* case demonstrating that no such statement was made. The burden then shifts to the plaintiff to rebut the *prima facie* showing by producing evidentiary proof in admissible form sufficient to require a trial to consider whether Konner made this statement and if so, whether the statement was defamatory (*see Kaufman v Silver,* 90 NY2d 204,208 [1997]). Plaintiff has provided no admissible evidence showing that Konner made a statement at the Closing about the estate's failure to pay taxes. Accordingly, this claim fails.

2. Regarding Being Dishonest/Untrustworthy

It is undisputed that no witness testified at a deposition to Konner's having made a statement at the Closing that Weiss was "dishonest" or "untrustworthy" (Parties respective 19-a statements, ¶ 22). Plaintiff points to the Kaplowitz deposition in which Kaplowitz testified that Konner said "they couldn't trust Mr. Trenk to follow through on any of his undertakings and that they were not going to close" (Opp. at 6; Haskel Affirm. Exhibit M, Kaplowitz Tr. 37:16-18). Plaintiff then argues, without citation that since Trenk represented the estate, the assertion of untrustworthiness is imputed to the estate and to Weiss, personally (Plaintiff's 19-a Statement, ¶ 22). Plaintiff provides no law to support the argument that a statement about one person can constitute defamation against another person. There is no evidence that Konner called Weiss "dishonest" or "untrustworthy." Unlike the standards applicable on a pre-answer motion to dismiss, upon a motion for summary judgment, unsupported allegations cannot support either of the plaintiff's claims.

3. Regarding Fraud/Perjury

None of the non-party witnesses recalled Konner making any statements at the Closing to the effect that Weiss had committed fraud or perjury. However, Weiss and Kaplowitz testified on this point. Weiss testified:

> "And then, rather abruptly, Dennis Konner stood up with a piece of paper in his hand, he started waving it theatrically in the air and said that it's come to my attention that – it's just come to my attention or it comes to my attention that there is this serious issue. He said a – I cannot give a verbatim quote, but he said was I aware that there was – that perjury was a serious criminal offense. . . . He also used the word 'fraud,' which I believe he used – he applied to Joseph Trenk, and at that point there was commotion"

(Bates Affirm. Exhibit 4, Weiss Tr. 88:24-89:9). Kaplowitz testified: "Mr. Konner stated . . . that they had filled out a document fraudulently, and it could be considered perjurious because it was inaccurate" (Bates Affirm. Exhibit 9, Kaplowitz Tr. 37:12-15). The "perjurious" comment was specifically directed at Trenk, not Weiss (*Id.* at 45:15-21):

> Q. So to the best of your recollection Mr. Konner was specifically referring to Mr. Trenk when he made the perjurious comment?
>
> A. Yes and not to Weiss correct.

Looking at the record in the light most favorable to the non-moving plaintiff, and giving plaintiff the benefit of every favorable inference, there is a disputed issue of material fact as to whether Konner made statements during the Closing suggesting Weiss and Trenk had filled out the petition fraudulently and that it could be considered perjurious.

4. Opinion

The only remaining basis for either claim, the statement allegedly made by Konner that the plaintiff "had filled out [the Surrogates Court petition] fraudulently, and it could be considered perjurious because it was inaccurate," was a statement of opinion, and cannot be the basis for either slander claim, as "expressions of opinion receive absolute constitutional protection" (*Steinhilber v Alphonse*, 68 NY2d 283, 290 [1986]).

While plaintiff argues that the First Department addressed and rejected this argument, the question of whether this statement was a non-actionable opinion was not discussed in either the opinion of Justice Lowe (NYSCEF Doc. No. 32), or in the decision of the First Department (*Weiss v Lowenberg*, 95 AD3d 405 [1st Dept 2012]).

"Expressions of opinion . . . are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation" (*Mann v Abel*, 10 NY3d 271, 276 [2008]). "Whether a particular statement constitutes an opinion or an objective fact is a question of law" (*Id.*, *citing*

Rinaldi v Holt, Rinehart & Winston, 42 NY2d 369, 381 [1977], *cert denied* 434 US 969 [1977]). "The essential task is to decide whether the words complained of, considered in the context of the entire communication and of the circumstances in which they were spoken or written, may be reasonably understood as implying the assertion of undisclosed facts justifying the opinion" (*Steinhilber*, 68 NY2d at 290, citations omitted, *citing* Restatement [Second] of Torts § 566 comment c). The Court of Appeals subsequently set the following test:

> In determining whether an alleged perjurious statement is non-actionable opinion or an actionable false statement of fact, the court must consider "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact"

(*Mann*, 10 NY3d at 276, *quoting Brian v Richardson*, 87 NY2d 46, 51 [1995], *quoting Gross v New York Times Co.*, 82 NY2d 146, 153 [1993], *quoting Steinhilber*, 68 NY2d at 292 [internal quotation marks omitted]). "[C]ourts must consider the content of the communication as a whole, as well as its tone and apparent purpose" and in particular "should look to the over-all context in which the assertions were made and determine on that basis 'whether the reasonable [listener] would have believed that the challenged statements were conveying facts about the . . . plaintiff' " (*Brian*, 87 NY2d at 51, *quoting Immuno AG. v Moor-Jankowski*, 77 NY2d 235, 254 [1991]). However, only "an expression of pure opinion" receives this protection. (*Steinhilber*, 68 NY2d at 289).

> "A "pure opinion" is a statement of opinion which is accompanied by a recitation of the facts upon which it is based. An opinion not accompanied by such a factual recitation may, nevertheless, be "pure opinion" if it does not imply that it is based upon undisclosed facts. When, however, the statement of opinion implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, it is a "mixed opinion" and is actionable"

(*Id.* at 289-90, citations omitted).

Here, Weiss testified that Konner "rather abruptly . . . stood up with a piece of paper in his hand [and] started waving it theatrically in the air" (Bates Affirm. Exhibit 4, Weiss Tr. 88:24-89:9). Kaplowitz testified that "Mr. Konner stated . . . that [Weiss and Trenk] had filled out a document

fraudulently, and it could be considered perjurious because it was inaccurate" (Bates Affirm. Exhibit 9, Kaplowitz Tr. 37:12-15).

These statements are opinion. Even Kaplowitz, the only witness who recalled any specific statement, acknowledged that Konner was merely stating his opinion (Bates Affirm. Exhibit 9, Kaplowitz Tr. 38:4-6 ["he directed his comments regarding the perjurious nature, *in his opinion*, of the document and untrustworthiness to Mr. Trenk" (emphasis added)]). Additionally, plaintiff has offered no evidence to suggest that Konner made a statement that the plaintiff "committed fraud." The specific language as recalled by Kaplowitz (that the plaintiff "filled out a document fraudulently") lacks a defined meaning. "Fraudulent" can invoke legal fraud, or merely mean "deceitful" (The American Heritage Dictionary of the English Language 699 [4th ed 2000]).

Plaintiff argues that the statement was a mixed opinion, and that the motion for summary judgment on this ground should fail because Konner has not presented evidence to show that he set forth supporting facts at the Closing regarding Weiss' knowledge of the value of the Property. However, the issue is whether the statement "implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it" (*Steinhilber*, 68 NY2d at 289-90). Here, the statement does not imply an additional factual basis beyond the language in the petition. The petition was supplied. It stated the value of the Property which the estate was selling for a much greater amount than the value sworn to in the petition. Therefore, this statement, if made, was pure opinion, and cannot provide a basis for either of Weiss's claims.

Finally, even if the statement suggesting that Trenk was "untrustworthy" could be considered to reflect on Weiss and to provide the basis for a defamation claim, that statement is also an opinion, made in the same context, referencing the same document and facts for its basis as the statement about Weiss. It cannot be the basis for a defamation claim.

For the reasons discussed above, summary judgment must be granted to the defendant. There is no evidence that Konner made two of the alleged statements. Although, there is a disputed issue of material fact as to whether Konner made a statement that Weiss and Trenk "had filled out a document fraudulently, and it could be considered perjurious because it was inaccurate," the statement itself, and the context in which it was made, makes it clear (as was admitted by the estate's Closing attorney) that the statement was an opinion. This statement cannot support a defamation claim. Accordingly, the complaint must be dismissed.

It is hereby,

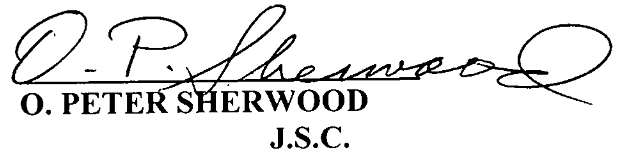
ORDERED that defendants motion for summary judgment (motion sequence number 004) is GRANTED in its entirety and the complaint is ordered DISMISSED; and it is further

ORDERED that the Clerk of the court is directed to enter judgment against plaintiffs and in favor of defendant, Dennis Konner, together with costs and disbursements upon presentation of a proper bill of costs.

This constitutes the decision and order of the court.

DATED: November 12, 2014

E N T E R,



O. PETER SHERWOOD
J.S.C.