Fact Pattern for January 6, 2022 NYCLA Impasse-Breaking CLE: *Super Plumbing, Inc. v. Zachary/Zena Zorba*

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Introductory Notes

1) *The facts in this fact pattern are based upon a real case filed in Supreme Court, Queens County in December 2020 that settled in July 2021. I have changed the names of the parties, the age of Mr. Zorba, and one or two other details in the interests of confidentiality.*

2) *For purposes of this impasse-breaking CLE, since the role of Mr. Zorba is going to be assumed by someone who identifies with the female gender on January 6th, Mr. Zorba's name will be changed from Zachary Zorba to* ***Zena Zorba****.*

3) *Super Plumbing, Inc., which was a closely held corporation that functioned as a de facto partnership, had two 50-50 shareholder principals, both of whom identified with the male gender, and one of whom was President as well as the only individual authorized to negotiate on behalf of the corporation. That principal's name on January 6th will be* ***Charlene Collins****.*

4) *The mediator for all roleplay scenarios in this CLE, Nelson E. Timken, Esq., who has significant mediation experience in both community and court-annexed mediation environments, has been advised that party and attorney roleplay actors may attempt to exploit (and possibly in a hostile manner) certain personal information that he has chosen to make available via electronic means in real life either to the public or the greater New York dispute resolution community. He has* ***NOT*** *been informed—directly or indirectly—of any further details concerning this personal information.*

5) *The roleplay scenario actors and Mr. Timken have previously met to discuss the impasse scenarios that follow the fact pattern below but only in general terms. This means that there are* ***NO*** *scripted roles such that except as set forth herein, Mr. Timken and the roleplay scenario actors have no advance knowledge of any specific positions or statements that their counterparts will advance or adopt. This information shielding is performed deliberately for purposes of emulating the real-life conditions that parties, attorneys, and mediators face in mediations in all contexts, namely that nobody ever knows what to expect next.*

6) *Dramatis Personae:*

    a. ***Charlene Collins****, Super Plumbing, Inc.'s President – Played by Dorothy Kaldi, Esq.*
    b. ***Christopher Fladgate, Esq.****., Attorney for Super Plumbing, Inc. – Played by himself*
    c. ***Zena Zorba****, Property Owner/Landlady – Played by Federica Romanelli*
    d. ***Elan E. Weinreb, Esq.****., Attorney for Ms. Zorba – Played by himself*
    e. ***Nelson E. Timken, Esq.****., Mediator – Played by himself*

Fact Pattern

In December 2020, Plaintiff Super Plumbing, Inc. ("SPI"), a New York corporation licensed to do business in New Jersey, sued Defendant Zachary "Zach" Zorba, a 47-year-old New York resident of Queens County, in Supreme Court there for $39,150, plus statutory interest from May 2018. SPI asserted three causes of action based upon plumbing services that it had performed in 2017 through 2018: (1) Services Rendered / Unjust Enrichment; (2) Account Stated; and (3) Breach of Contract.

The origins of this lawsuit go back to the end of 2014. Then, Mr. Zorba, via a single-member New York LLC,[1] owned and undertook to renovate a small three-story, multi-family residential apartment building located in New Jersey (the "Building"). By the end of the summer of 2016, Mr. Zorba had seen through enough renovations to require plumbing services for the Building's continued development.

Thus, in September 2016, Mr. Zorba proceeded to invite SPI—partly based upon the recommendation of his father, the architect in charge of the Building's renovation—to submit a quote. Mr. Zorba liked what SPI proposed and proceeded to contract with the company for it to provide plumbing materials and services for a total price of $56,150. In this regard, SPI presented several invoices stating prices of materials and contemplated services, and Mr. Zorba proceeded to sign each of them. The services at issue in SPI's lawsuit included the company:

- providing six Building apartments located on the first through third floors with rough and final plumbing and gas piping; and

- replacing and upgrading gas and water lines.

While SPI initially performed these services in 2017, it did so in a way which allegedly damaged the Building's structure. Specifically, Mr. Zorba claimed that: (i) in running plumbing and gas lines, SPI negligently cut through certain Building joists that had to be repaired at Mr. Zorba's expense, whereupon SPI had to redo most of its initial work on account of the way in which the repairs were performed; and (ii) SPI had reversed the placement of some hot and cold water lines such that these lines had to be extracted and then replaced. See the following images for illustrations of these conditions:

[1] Notwithstanding that it was the entity which wrote checks to SPI, the latter never named Mr. Zorba's LLC in the suit, and had the case not settled, I would have considered a motion to dismiss based upon a theory of failure to join a necessary party. There were also no liens filed by SPI against either Mr. Zorba or his LLC.

Cut Joists

Repaired/Reinforced Joists

Hot/Cold Water Line Mix-Up/Reversal

In response to these allegations, SPI claimed that one of Mr. Zorba's renovation contractors gave it permission to cut through the joists such that it had acted appropriately. However, the company did not have any defensive response concerning reversal of the cold and hot water lines (see third image above).

Consequently, once SPI completely redid the allegedly defective plumbing work, Mr. Zorba paid it only a portion of the $56,150 which the company had invoiced and withheld further payment. In this regard, SPI initially claimed in its lawsuit that it had received $17,000 from Mr. Zorba, but after further investigation, it became clear that Mr. Zorba had paid an additional $2,500 in 2018 such that the most that SPI could have legitimately claimed against him was $36,650 (exclusive of interest), not $39,150.[2]

Not having received payment in full for its services, SPI sent Mr. Zorba a final invoice in May 2018 demanding payment of the shortfall. In response, Mr. Zorba informed SPI that on account of the negligently-performed work, he had incurred construction and delay costs excusing further payment. In this regard, Mr. Zorba was able to produce bills from contractors for approximately $15,000 in remedial work—buttressing and/or reconstructing the joists which SPI had cut through—and took the position that the remaining amount SPI claimed as owed, namely $24,150, was no longer due.

As mentioned above, SPI then proceeded to sue Mr. Zorba for $39,150 in December 2020 and purportedly served him with process in early February 2021. Mr. Zorba retained my firm, The Weinreb Law Firm, PLLC ("TWLF"), in late February 2021, shortly before his time to answer or otherwise respond to SPI's complaint was to expire.

In expeditiously filing and serving an Answer to avoid a default, TWLF asserted the following defense: "With respect to the Complaint and Summons accompanying it, Plaintiff failed to perform service of process in accordance with the provisions of the New York Civil Practice Law and Rules ("CPLR") and other relevant law such that this Court does not have jurisdiction of the person of the Defendant. Pursuant to CPLR 3211(e), Defendant intends to move for judgment in his favor based upon this improper service of process within sixty (60) days of the date of service of this Answer."

This defense was a "shot across the bow" to SPI to come to the proverbial table prior to the parties engaging in potentially expensive motion practice, but unfortunately, SPI did not respond to it. Mr. Zorba thus went forward with making the motion to dismiss described above in late April 2021, just as the sixty-day clock on it was about to expire. Upon being served with the motion, SPI's counsel conceded that the initial service of process on Mr. Zorba was defective such that the company would not oppose the motion. Instead, it would simply commence a new action by re-serving Mr. Zorba.

After relaying this news to Mr. Zorba and informing him of the cost and time savings that he could realize through early direct settlement negotiations—including not having to retain at

[2] This investigative legwork allowed Mr. Zorba to reset the original anchor of $39,150 to $36,650 in settlement negotiations, thereby gaining a measure of control there.

least one expert to establish SPI's negligence in cutting through the Building joists—prior to being served again, he asked me to arrange for such negotiations via Zoom.

While SPI's counsel and her client were surprised by the invitation to negotiate, they agreed to come to the table after I explained the potential cost and time savings that negotiation and other ADR processes offered relative to traditional litigation. In two Zoom negotiation sessions in June and July 2021 lasting about five hours, several topics were discussed, including:

- As discussed above, the reset anchor of $36,650, as opposed to $39,150, for starting any settlement discussion based upon SPI's failure to credit Mr. Zorba $2,500 for a payment he made in 2018.

- The needs and interests of both parties as they stood at the time considering the COVID pandemic and its impact. Specifically, SPI had lost significant potential business on account of the pandemic, and the New Jersey eviction moratorium had hurt Mr. Zorba by preventing him from evicting tenants for their non-payment of rent. Protracted litigation was thus not really in any party's best interests.

- SPI's reputational interest in not having allegations of negligently or poorly-performed work strewn about in publicly-available court documents.

- The possibility of Mr. Zorba asserting counterclaims costing more than the entire adjusted amount-in-controversy in the litigation, resulting in a Pyrrhic victory for him.

- The general inefficiencies and waste of resources for both parties that litigation would create (and here, a risk analysis Excel spreadsheet that I had prepared in advance of the negotiation sessions came in handy).

The parties' settlement discussions resulted in a structured settlement agreement which they executed in late July 2021. That agreement included: (i) Mr. Zorba waiving the personal jurisdiction defense; (ii) mutual general releases exchanged between the parties effective upon full performance of their settlement agreement; (iii) the Court maintaining jurisdiction to enforce the terms of the settlement agreement; (iv) SPI being granted the right to have judgment entered against Mr. Zorba for $36,650 minus any payments made on account in the event of a default; and (v) $21,000 to be paid by Mr. Zorba according to the following schedule:

- $2,035 due on or before July 31, 2021;

- Continuing monthly payments of $1,500 beginning August 31, 2021, due on or before the last day of each consecutive month until November 30, 2021; and

- Remaining payments of $325 due on or before the last day of each consecutive month for 40 months starting December 31, 2021, until the balance of $21,000 would be paid in full.

Impasse Roleplay Scenarios

SPI v. Zorba is a textbook example of what ADR can offer both litigants and attorneys when all are committed to resolving disputes efficiently and expeditiously. The parties here resolved their dispute by themselves through negotiation (as well as my use of some mediator tactics and techniques, including but not limited to risk analysis) in a matter of hours instead of years spent in court, thereby saving themselves not only much time but thousands of dollars in legal fees and expenses. At the same time, their attorneys left the proverbial field of battle knowing they had achieved what the great general and military strategist Sun Tzu (Dze) described as the "acme of skill"—to prevail without fighting.

But what if in some parallel alternate universe, things had not gone so smoothly? What if instead of being able to negotiate a resolution, SPI, Mr. Zorba, and their respective attorneys had to avail themselves of a mediator to assist them or continued with litigation in Supreme Court, Queens County until that court ordered mediation? Enter Mr. Timken with respect to both the private and court-annexed mediation contexts and the following impasse roleplay scenarios . . . .

* * * * * * * *

Scenario 1: "My Way or the Highway"

After the parties and their counsel have signed a mediation agreement and submitted pre-mediation statements (both attached), the initial mediation session commences. For the first twenty minutes of the session, Mr. Timken briefly reviews the mediation agreement with the parties and counsel and makes an opening statement reminding them of the elements of the mediation process (i.e., confidential, facilitated negotiation focusing on needs and interests over positional bargaining, creative option generation potential, risk analysis/reality testing in caucuses, etc.) and the many cost and efficiency advantages of mediation over other dispute resolution processes, including but not limited to litigation.

Having finished his opening statement, Mr. Timken is about to ask the parties as to how they wish to proceed when Mr. Weinreb intercedes.

Scenario 1: Private Mediation Context

"Nelson, thank you for your opening statement, but I want to remind everyone here that we're all on the clock one way or another, and especially so in Nelson's case, where he has already spent billable time preparing for today, for which the parties will be charged.

Neither I nor Ms. Zorba want to sit around singing "koom-ba-yah" and discussing our feelings or anything of a similar nature because this simply is not relevant. In this regard, here's what's relevant and what we all need to focus on, as I already set forth in Ms. Zorba's Pre-Mediation Statement:

1) SPI's case is meritless; its workers were negligent, and the company should not now be rewarded for this negligence.

2) Ms. Zorba has at least one potential counterclaim of significant merit here.

3) To put a quick end to this litigation, Ms. Zorba is prepared to write a check in the amount of $1,000 to SPI.

4) That's our final offer: $1,000 to SPI, plus the parties' exchange of mutual general releases.

Chris, I would imagine that you'll need some time to discuss this offer with your client. Ms. Zorba and I believe five minutes to be sufficient, starting now, and after six minutes, our offer is withdrawn. Time is ticking, so I suggest you move quickly. . . . "

Scenario 1: Court-Annexed Mediation Context

(Mr. Weinreb holds up a newspaper in front of his face to block the Zoom camera (and for those wondering, yes, this really happened at a court-annexed wrongful death mediation back in 2019 where I served as mediator on a "ninety-minute clock")).

"Mr. Timken, you've spent twenty minutes of the ninety that we're required to be here blabbering about the nature and advantages of mediation. I appreciate the CLE time, but Ms. Zorba had to take off time from work today to be here when she could have been attending to building management, and I'm sure that Mr. Fladgate and Ms. Collins also have their respective business commitments to attend to.

You have about seventy more minutes to go, which I'm timing out on a timer that I have going on my phone. Once that time is up, Ms. Zorba—whom I have directed to be as loquacious as a clam—and I will be leaving unless the final offer I'm about to make on her behalf to SPI is accepted. I'll get to that shortly, but first . . . . "

* * * * * * * *

Scenario 2: "A Matter of Trust"

In both the private and court-annexed mediation contexts, the parties have moved along in the process to the point where they are about to exchange offers, and SPI's counsel, in a rare move for a plaintiff's counsel, has been the first to request a caucus.

In the court-annexed mediation context, by virtue of his incredible skill as a mediator and the grace of G-d, Mr. Timken has managed to persuade "Team Zorba" to stick with the mediation process for at least an additional ninety minutes past the minimum ninety minutes provided for by court ADR program rules and procedures by charging one-half of his hourly billable rate to the parties for that time. The "tick tock of the clock" has seemingly stopped (or at least is not as audible as it once was).

However, any joy over progress which has been made up to this point is short-lived, insofar as right before moving to caucus . . . .

Scenario 1: Private Mediation Context

Charlene Collins blurts out the following:

"You know, Mr. Timken, just before we caucus, I do have to say something that I've mentioned to Chris and which I want Ms. Zorba to hear but that she's probably not going to like.

Let's assume—for argument's sake only—that some of SPI's work here was not exactly up to snuff and that Ms. Zorba really did incur costs of $15,000 to fix whatever she thought needed fixing such that a $15,000 deduction off the final invoice we sent was proper (which it was not, but again, this is for purposes of argument). Why didn't she just hold back $15,000 and pay SPI what she legitimately owed then, namely $21,650?[3]

That would have been the honest, honorable, and just plain right thing to do, but as we know, that's not what happened . . . . Instead, what happened was that with no justification whatsoever, Ms. Zorba stiffed SPI on more than 133%—that's $19,950—of the $15,000 she is claiming as bogus repair costs.

[3] *EEW Note: The parties by this point in time in both the private and court-annexed mediation contexts have agreed that Ms. Zorba did make an additional payment of $2,500 in 2018 such that SPI's final invoice amount should have been $36,650, not $39,150.*

It's been clear to me all along that Zena Zorba is a greedy, deceitful bitch who cannot and should never be trusted. As such, even if we were to somehow come to a deal in caucuses, what guarantee is there that she would fulfill her end of the bargain?

I cannot and will not deal with thieves like the one I'm seeing on my screen now. You know what they say, 'Fool me once, shame on you. Fool me twice, shame on me,' and I'm not going to be a sucker twice here.

Thus, Mr. Timken, unless you can give me some really good reason why this process should continue, I think we're at the end of the road."

Scenario 2: Court-Annexed Mediation Context

Mr. Weinreb, finally having put down his newspaper, interjects:

"You know, before we move to caucus, I have something to say. In the course of doing some Internet research in preparation for today's session, I've come across some information that Ms. Zorba and I find to be of extreme concern to the integrity of the mediation process here, putting aside the fact that, as you all know, I'm not a fan of being here today in the first place.

Here's what I found . . . . "

* * * * * * * *

Scenario 3: "Let Me Die With The Philistines!" (Judges 16:30)

EEW Note: While it is possible for the type of impasse described in this scenario to develop in the private mediation context, I have not seen it often in my experience. As such, and since we will only have time at this point in the program for only one 20-minute mediation session/10-minute critique segment, this scenario pertains only to the court-annexed mediation context.

Scenario 3: Court-Annexed Mediation Context

Appearing to be simultaneously frustrated, pained, and exhausted, Zena Zorba states the following:

"Before we proceed any further, I want everyone here to know something: the pandemic has hurt my business badly. Specifically, I have not received any rent from my tenants since April 2020 and have been "running on empty" even with the assistance of state and federal government programs trying to meet expenses and satisfy creditors who, unlike SPI, have legitimate claims for payment. Bottom line: I really do not have more than $1,000 to pay SPI as nuisance value.

Don't get the wrong impression here and think that I'm deliberately making a lowball offer as a shrewd negotiation tactic. I firmly believe that SPI is not entitled to one cent here and that if this case were to proceed in litigation, I would easily win. And believe me, I would much rather see whatever dwindling money I have left going to Mr. Weinreb to mount a valiant defense rather than have it go into SPI's bank account.

But . . . if I should somehow end up losing in court and SPI obtains a judgment in any amount greater than $1,000 against me, know that I will do everything in my power, including but not limited to declaring bankruptcy and representing myself pro se, to ensure that SPI spends more time and money on collecting that judgment than it will be worth, even with 9% statutory interest added.

Ms. Collins, the game is not worth the candle here for SPI. Give up now, and I'll reluctantly give up $1,000 for the simple pleasure of finally getting you out of my hair. Otherwise, I'll fight you tooth and nail both in court and out . . . even if it means my financial death . . . and there's nothing you or your fancy attorney can do about it. If I'm going to go down here, like Samson, I'm taking you with me."

IMPORTANT NOTE FOR COURT-ANNEXED MEDIATIONS: To the extent that this agreement conflicts with any court rules or procedures, the latter shall control.

AGREEMENT TO MEDIATE

This is an Agreement between Super Plumbing, Inc., Zachary/Zena Zorba and Nelson E. Timken, J.D., hereinafter "mediator," to enter mediation with the intent of resolving all issues regarding: Super Plumbing, Inc. v. Zachary/Zena Zorba, No. 555555/2020 (Sup. Ct. Queens County 2020).

The parties and the mediator understand and agree as follows:

1. Nature of Mediation

The parties hereby appoint and retain Nelson E. Timken as mediator for their negotiations. The parties understand that Nelson is an attorney but will in this mediation not serve as any party's nor all parties' legal counsel. The parties understand that mediation is an agreement-reaching process in which the mediator assists parties to reach agreement in a collaborative, consensual and informed manner. It is understood that the mediator has no power to decide disputed issues for the parties. The parties understand that mediation is not a substitute for independent legal advice. The parties are encouraged to secure such advice throughout the mediation process and are strongly advised to obtain independent legal review of any formal mediated agreement before signing such agreement. The mediator may come to require one or both parties to have their agreement reviewed by legal counsel to ensure that party is reaching a reasonably informed agreement. The parties understand that the mediator's objective is to facilitate the parties themselves reaching their best agreement. The parties also understand that the mediator has an obligation to work on behalf of all parties and that the mediator cannot render individual legal advice to any party and will not render therapy nor arbitrate within the mediation.

2. Scope of Mediation

The parties understand that it is for the parties, with the mediator's concurrence, to determine the scope of the mediation, and this will be accomplished early in the mediation process.

3. Mediation is Voluntary

All parties here state their good faith intention to complete their mediation by an agreement. It is, however, understood that any party may withdraw from or suspend the mediation process at any time with or without cause.

The parties also understand that the mediator may suspend or terminate the mediation if the mediator feels that the mediation will lead to an

unreasonable result, if the mediator feels that a fatal impasse has been reached, or if the mediator determines that he can no longer effectively perform his facilitative role.

4. Confidentiality

a. It is understood between the parties and the mediator that the mediation will be strictly confidential. Mediation discussions, any draft resolutions, and any unsigned mediated agreements shall not be admissible in any court, administrative or other contested proceeding. Only a mediated agreement signed by the parties may be so admissible. The parties agree not to summon for any future procedure mediators or observers to testify or to present files, documents, notes, or results of the mediation. In addition, the parties agree that in no way will they record the mediation session(s). The parties further agree to not call the mediator to testify concerning the mediation nor to provide any materials from the mediation in any court or other contested proceeding between the parties.

b. Documents and information otherwise discoverable under the NY Civil Practice Law & Rules and Federal Rules of Civil Procedure shall not be shielded from discovery merely because they are submitted or referred to in the mediation.

c. The mediation is considered by the parties and the mediator as settlement negotiations. All parties also understand and agree that the mediator may have private caucus meetings and discussions with any individual party, in which case all such meetings and discussions shall be confidential between the mediator and the caucusing parties, unless the parties agree otherwise. Exceptions to the obligation of confidentiality: the parties understand and agree that evidence that endangers a minor or another person is not confidential and that the mediator may inform competent authorities of such evidence.

5. Mediator Impartiality and Neutrality

The parties understand that the mediator must remain impartial throughout and after the mediation process. Thus, the mediator will not champion the interests of any party over another in the mediation nor in any court or other proceeding. The mediator is to be impartial as to any party and neutral as to the results of the mediation. The mediator will seek to affirmatively reveal any operative biases and will disclose any and all prior contacts with the parties and their legal counsel.

IMPORTANT NOTE FOR COURT-ANNEXED MEDIATIONS: To the extent that this agreement conflicts with any court rules or procedures, the latter shall control.

6. Mediation Fees

The parties and the mediator agree that the fee for the mediator shall be paid on a pro rata basis $1000 per day for up to 5 hours spent with the parties inclusive of time required to study documents, research issues, correspond, conduct telephone calls, prepare draft and final agreements, and do such other things as may be reasonably necessary to facilitate the parties reaching full agreement. The mediator shall also be reimbursed for all expenses incurred as a part of the mediation process.

A deposit of $2000 toward the mediator's fees and expenses shall be paid to the mediator along with the signing of this agreement. Any unearned amount of this retainer fee will be refunded to the parties. The parties shall be jointly and severally liable for the mediator's fees and expenses.

7. Online Platform

If this mediation is conducted by telephone or videoconference, prior to mediation, the parties agree to disclose if any third party will be present during any such conference. If so, they understand and agree that the presence of such individual(s) requires the prior consent of the parties and mediator, and that such individual will be required to sign a confidentiality agreement. Understanding that the security of any electronic or telephonic platform cannot be guaranteed, the mediator and all participants in a mediation conducted through telephone or videoconference confirm that they will take appropriate security precautions or disclose to the mediator and all participants that they are unable to do so in advance of any session. Such precautions shall include using a secure WiFi/Ethernet connection for all communications related to the mediation session, using secure meeting access codes, taking steps so that only intended participants have access to the session, and locking meetings once all participants have convened.

8. Agreements

The parties understand that each party is free to reach an agreement verbally or in writing, as well as to reject any possible agreement. If they decide to draft a written document reflecting the terms of their agreement, the parties understand and agree that this agreement is not confidential, and any ofthe participants may present the document in court as evidence of our agreement. The parties understand that their agreement may be final and binding on them if a judge concludes that it is enforceable.

IMPORTANT NOTE FOR COURT-ANNEXED MEDIATIONS: To the extent that this agreement conflicts with any court rules or procedures, the latter shall control.

This Agreement may be signed via facsimile or PDF signature, and each such signature shall be deemed an authentic original signature.

The undersigned have read and agree to comply with this agreement.

1) SUPER PLUMBING, INC. ("SPI")

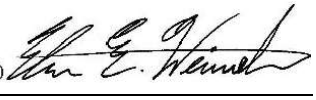
By: Charlene Collins, *President*

2) 

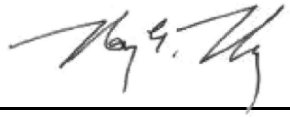
Zachary/Zena Zorba

3) 

Christopher Fladgate, Esq., *Attorney for SPI*

4) (EEW-ES) 

Elan E. Weinreb, Esq., *Attorney for Zena Zorba*

5) 

Nelson E. Timken, J.D., *Mediator*

Dated: December 29, 2021

Pre-Mediation Statement of Zena Zorba

Super Plumbing, Inc. v. Zachary/Zena Zorba
No. 987654/2020 (Sup. Ct. Queens County)
January 6, 2022 NYCLA Impasse-Breaking CLE

Elan E. Weinreb, Esq. – December 22, 2021

Nature of the Case

The Weinreb Law Firm, PLLC, by its Managing Member, Elan E. Weinreb, Esq., represents harassed property owner Defendant Zena Zorba against harassing plumbing contractor Plaintiff Super Plumbing, Inc. ("SPI") in this utterly meritless Supreme Court action involving SPI claims for: (1) Services Rendered / Unjust Enrichment; (2) Account Stated; and (3) Breach of Contract.[1] SPI seeks to recover $39,150, plus statutory interest from May 2018. Ms. Zorba has not asserted any counterclaims (yet), and third-party involvement in this action is not anticipated at this time.

The rest of the factual and procedural background of this case has already been submitted to the mediator in the form of a jointly-submitted fact pattern, familiarity with which is assumed, and which will be cited hereinafter as "FP [Page X]."

The nature of the case is straightforward and is apparent from the images found on FP 3. SPI incompetently and negligently performed substandard plumbing work in: (a) destroying significant structural elements of Ms. Zorba's building, namely certain

[1] If this case is to be litigated, at least SPI's claim for services rendered / unjust enrichment is vulnerable to dismissal as being duplicative of its breach of contract claim. *See Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 388 (1987) ("The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter."). Here, SPI submitted a final invoice in May 2018 to Ms. Zorba detailing its plumbing work (attached to this Pre-Mediation Statement). Ms. Zorba maintains this to be a valid contract upon which any further performance by her is excused, and even if this were not the case, any SPI damages flowing from Ms. Zorba's non-payment are offset on account of SPI's negligence discussed herein.

joists; and (b) reversing hot and cold water lines. These negligent acts required Ms. Zorba to spend approximately $15,000 in mitigating damages and caused her to delay the opening of her building to new tenants by about six months, depriving her of much-needed rent. In bringing suit, SPI completely disregards its negligent, shoddy workmanship, effectively seeking to be rewarded for it. Thus, ironically, if there is any unjust enrichment here, it is that flowing to SPI, and not to Ms. Zorba.

Ms. Zorba also requests the mediator to note that SPI has conceded prior payments on account to it totaling $17,000. (FP 4). Furthermore, a handwritten note from SPI President Charlene Collins, dated August 1, 2018 (attached to this Pre-Mediation Statement), which accompanies SPI's final May 2018 invoice conceding the $17,000 in payments (also attached hereto), indicates a further payment by Ms. Zorba of $2,500 that SPI conveniently seems to have forgotten. It is crystal clear that SPI has already received a total of $19,500 for the work performed on Ms. Zorba's building such that the situation here is distinguishable from one where a contractor or other vendor has collected nothing.

Prior Settlement Discussions and Litigation Considerations

To date, perhaps because this case is in its infancy with no discovery having occurred yet, there have been no settlement discussions.

As for litigation considerations worthy of the mediator's attention, there is a pending CPLR 3211(a)(8) motion to dismiss for want of personal jurisdiction that SPI's counsel has practically conceded. (*See* FP 4). Nonetheless, Ms. Zorba recognizes that official victory on this motion will be hollow since SPI is now in a position to correctly perform service of process. (*See id.*). There are also no statute of limitations or other

procedural defenses to at least SPI's breach of contract claim (*see* n.1 *supra*) such that if SPI and Ms. Zorba are going to duke it out in court, they will do so on the merits.

However, the area of procedural defenses is where Ms. Zorba's litigation weaknesses, if any, begin and end. Images from the webpages of plumbing companies describing the ABS and PEX pipes that SPI installed in Ms. Zorba's building (attached hereto) clearly indicate that proper installation of such piping involves drilling <u>circular</u> holes through joists and other beams, not destroying them completely. Thus, even if one of Ms. Zorba's building contractors had given permission—which was not the case—for SPI to cut through joists (*see* FP 3), the latter <u>still</u> would have acted negligently. Moreover, SPI has never once defended its reversal of the hot and cold water lines.

<u>Moving Forward</u>

With respect to the upcoming, court-ordered mediation session set for January 6, 2022, neither the undersigned nor Ms. Zorba want to sit around singing "koom-ba-yah" and discussing feelings or anything of a similar nature because this simply is not relevant. Rather, as explained above, what is relevant and should be focused upon is the following:

1) SPI's case is meritless; its workers were negligent, and the company should not now be rewarded for this negligence.
2) Ms. Zorba has at least one potential counterclaim of significant merit here based on SPI's negligence.
3) To put a quick end to this litigation, Ms. Zorba is prepared to write a check in the amount of $1,000 to SPI.
4) That's Ms. Zorba's final offer: $1,000 to SPI, plus the parties' exchange of mutual general releases.

EEW Note: Header/footer would normally indicate "Confidential - For Mediator's Eyes' Only" except where, as here, the parties and counsel have decided to exchange their respective statements for educational, strategic, or tactical reasons.

SPI should realistically need no longer than five minutes to consider this offer once it is formally presented on January 6th. And while it is not common for exchanged pre-mediation statements to include final offers, Ms. Zorba is confident enough in the merits of her case—and wants SPI to know this—to provide SPI with advance notice of her position. Hopefully, SPI and its counsel will come to their senses, accept Ms. Zorba's final offer set forth herein, and cement this case's resolution even before the parties meet in cyberspace next month, just over one year since SPI first filed suit.

Respectfully submitted,

(EEW-ES) Digitally signed by Elan E. Weinreb
DN: cn=Elan E. Weinreb, o=The Weinreb Law Firm, PLLC, email=eweinreb@weinreblaw.com, c=US
Date: 2021.12.22 19:14:56 -05'00'
Adobe Acrobat version: 2021.007.20099

THE WEINREB LAW FIRM, PLLC
By: Elan E. Weinreb, Esq.
Attorneys for Defendant Zena Zorba

EEW Note: Header/footer would normally indicate "Confidential - For Mediator's Eyes' Only" except where, as here, the parties and counsel have decided to exchange their respective statements for educational, strategic, or tactical reasons.

SUPER PLUMBING, INC.
123 Somewhere Street
Somewhere, NJ 01234
NJ LICENSE # REDACTED

Tel: (123) 456-7890.
Lic. # REDACTED FOR CONFIDENTIALITY

12345

REDACTED FOR CONFIDENTIALITY

REDACTED FOR CONFIDENTIALITY

SEE 12477 For details

DATE 8/11/18	SERVICE WILL CALL	PHONE
NAME REDACTED FOR CONFIDENTIALITY		MAKE
ADDRESS REDACTED FOR CONFIDENTIALITY		MODEL
		SERIAL
CUSTOMER SIGN		MECHANIC

QUAN.	DESCRIPTION OF PARTS OR MATERIALS	AMOUNT
1	OWES 39150.-	
	Pd CC 2,500.- - 2500	
	REDACTED FOR CONFIDENTIALITY	
	Balance OWES 36,650	
	4 APTS 21,600	
	2 Retail Rest Rooms 4,400.-	
	2 FIRST FLR APTS 11,600.-	
	Draw & water 5,900.-	
	Draw and water Removal 7,200 -	
	Donut Rough 4,250.-	
	REDACTED FOR CONFIDENTIALITY Inserts 1200.-	
	Total 56,150.-	
	Less Payment 9,000 ck 9/16 ck 1023	
	5,000 cc	
	3000 cc	
	2500 cc	
LABOR PERFORMED	DEPOSIT	
	TOT. MATERIAL	

Baldwe 36,650	TAX	
	TOT. LABOR	
	TOT. AMT.	

Phone (123) 456-7890

SUPER PLUMBING, INC.
123 Somewhere Street
Somewhere, NJ 01234
NJ LICENSE # REDACTED

May 14, 2018

Invoice #12477 - Zena Zorba - Summary of All Plumbing Work to Date

- 4 apartments with rough and final plumbing and gas piping, no fixtures or water heaters. **Cost $21,600.00**
- *2 retail restrooms rough and final plumbing, no fixtures or water heaters.* ***Cost $4,400.00*** *– (EEW Note: NOT AT ISSUE IN SPI v. Zorba)*
- 2 first floor apartments rough and final plumbing and gas piping, no fixtures or water heaters. **Cost $11,600.00**
- *Replaced and upgraded drain and water risers.* ***Cost $5,900.00*** *– (EEW Note: NOT AT ISSUE IN SPI v. Zorba)*
- Drain and gas removal for 3 baths, 2 laundry, and reinstallation due to pressure treated lumber removal and reconstruction. (*EEW Note: "Pressure treated lumber removal and reconstruction" refers to the repair or reinforcement of cut joists).* **Cost $7,200.00**
- *Donut shop rough plumbing only.* ***Cost $4,250.00*** *– (EEW Note: NOT AT ISSUE IN SPI v. Zorba)*
- *Furnish 6 Delta posi-temp tub and shower faucets with integral stops, less trim.* ***Cost $1,200.00*** *– (EEW Note: NOT AT ISSUE IN SPI v. Zorba)*

Total: $56,150.00

Less $9,000.00 -- CK 1000 9/26/16
Less $5,000.00 -- MasterCard 12/7/17
Less $3,000.00 -- Master Card 4/1/18

Total Paid: $17,000.00

Total Due: $39,150.00

ABS vs. PVC Piping – Differences and Common Uses

commercial-industrial-supply.com/resource-center/difference-between-abs-and-pvc-pipes

March 19, 2020

This entry was posted on March 19, 2020 by korey.

It's important to understand the differences in pipes before you attempt doing any plumbing projects. Two of the most common types of pipe used for plumbing systems are Acrylonitrile Butadiene Styrene (ABS) and Polyvinyl Chloride (PVC). While ABS and PVC share some common uses, they also have some key differences.

The Difference between ABS and PVC Pipes

The biggest difference between ABS and PVC piping is that ABS pipe contains a chemical called bisphenol A, also known as BPA, and PVC doesn't. BPA is used in various types of plastics and resins because it creates durable pipes. Though there is some disagreement as to the potential health risks of BPA to humans and animals, it is considered safe in certain amounts by the U.S. Food and Drug Administration.

In addition to BPA, there are some other differences between ABS and PVC that will help you decide which is best for your plumbing project. You'll first notice the difference color – ABS is always black while PVC is commonly white (depending on the type). There's another main difference in the way that the two types of pipe are installed. With ABS pipe, connections have to be made with a special cement, while PVC has to be primed and then cemented together, making PVC connections a two-step process rather than one with the ABS piping.

PVC pipe is more flexible than ABS, while ABS is a bit stronger and can resist a higher shock or impact. Additionally, PVC has an advantage in that it's better at muffling the sound of water as it flows through the pipework.

The two types of pipe are similar in cost and they are both resistant to chemical and water degradation.

Applications of ABS Piping

ABS piping is a cost-effective choice for commercial and residential uses. It won't flake, peel, rot, dissolve, fade, or leak (unless it's punctured). It's an ideal choice for use outside, underground, in the extreme cold, and where it isn't in direct sunlight. It's often the choice of plumbers for use in drain, waste, and vent piping systems. You'll also find that ABS pipe is frequently used in sewer systems for drainage and as electrical insulation.

Uses for PVC Pipes

In a home or business, it's important that you use the right type of pipe for the job. PVC pipes are often the pipe of choice for many different applications. It's typically a better choice for indoor uses as it's soundproof, so you won't hear the water flow through the piping system. Regular schedule 40 PVC pipe (here) is perfect for drains and wastewater. Like ABS pipe, PVC pipe is used for drain, waste, and vent piping systems and as insulation for electrical cables. It's versatile and durable and the choice for professionals and DIYers alike.

How to Join ABS and PVC Piping

It isn't recommended that ABS and PVC be joined and used within the same piping system. In fact, many plumbing codes restrict ABS from being glued to PVC, so it's important to check local codes before making an attempt to do so. However, if there aren't any restrictions in your location, ABS and PVC pipes can be joined using fittings (such as the ones we carry), rather than glue.

When you're joining an ABS pipe to a PVC pipe, it can't be done with pipe cement or glue. Instead, the best method uses a rubber sleeve and metal jacket to clamp the connection. The sleeve is positioned over the ends of the two pipes to connect them. The metal sleeve is then used to clamp the rubber sleeve into place. Be sure that you are using a coupling designated as plastic-to-plastic.

When to Use ABS vs. PVC

Both PVC and ABS pipes are useful in residential and commercial plumbing, but it's important to know the differences so you make the best decision of which one to use. ABS pipe is best used for underground situations, where it's extremely cold, and in locations that are not exposed to direct sunlight. PVC, on the other hand, is ideal for indoor plumbing use because it's soundproof.

Be sure that you check building codes before you decide which pipe to use. There are regulations in some areas that dictate the type of piping that has to be used for certain plumbing jobs.

PEX Pipes

repipingspecialist.com/pex-pipes

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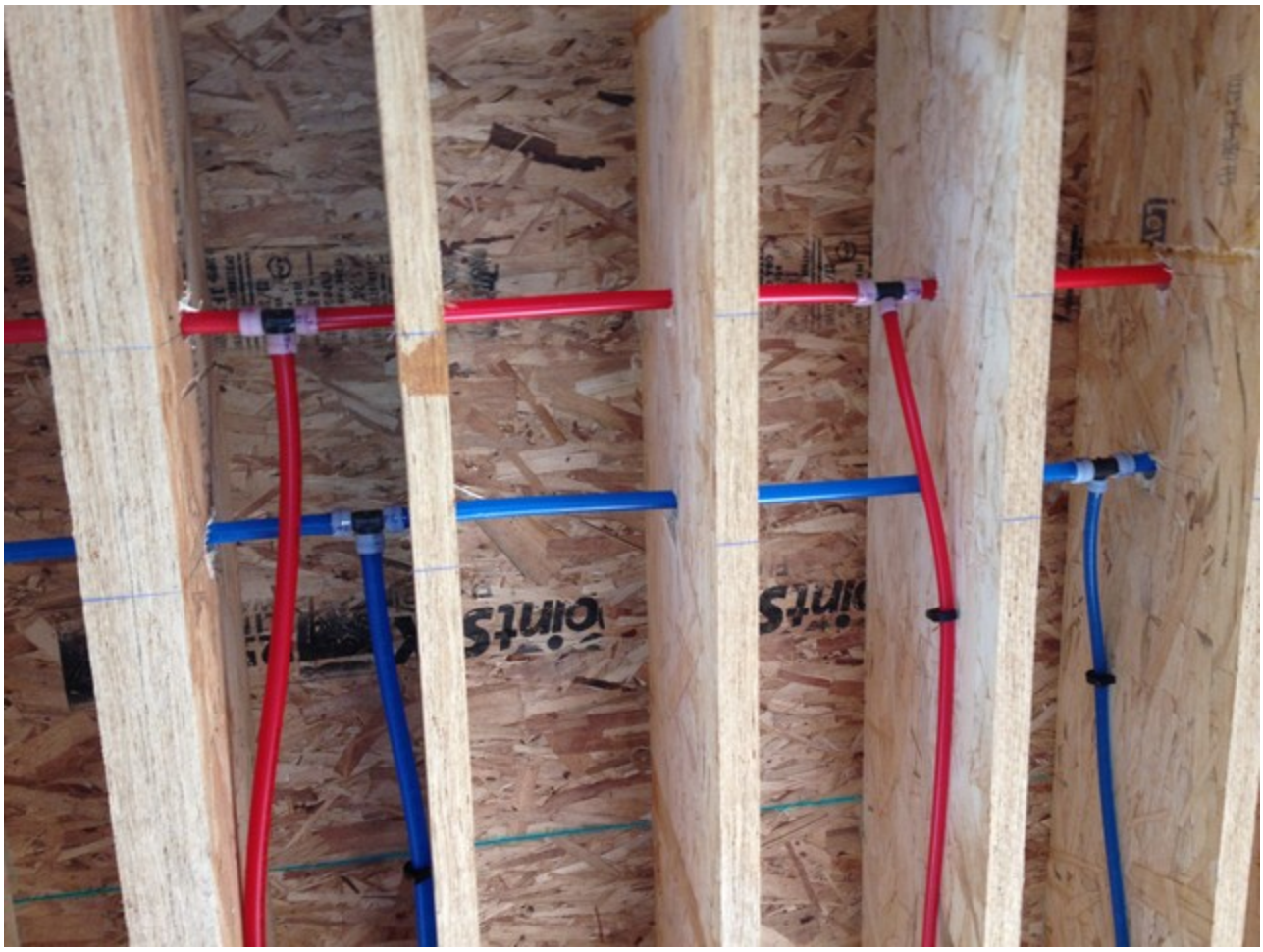
PLUMBING WITH PEX PIPES

PEX Pipes pluming is a flexible and durable alternative to copper pipes plumbing which has been gaining in popularity in recent years. The “PE” in the name stands for polyethylene, and the “X” signifies cross-linking, which is a way of binding the molecules in the plastic in bridge-like shapes, which increases strength and longevity.



Plumbing with PEX Pipes

PEX is an excellent material for plumbing, because it is resistant to temperature extremes and chemical exposure. PEX pipes are also flexible, which makes them easy to install and service.

PEX PIPING BACKGROUND

PEX was first invented in the 1930s, and gained wide usage in radiant heating systems in the 1960s. PEX Pipes were introduced as plumbing material in the United States during the 1980s, and has since become the most widely-used flexible material for home plumbing systems nationwide.

PEX Pipes gained unanimous approval from the California Building Standards Commission in 2009 for plumbing use throughout the Golden State. The Commission's report called the use of PEX tubing "an environmentally superior action with respect to public health, water quality, and air quality."

PEX Pipe Plumbing has been rapidly gaining in popularity. Over 15 billion feet of PEX tubing has been installed worldwide, and evidence suggests it will soon become the dominant plumbing material in homes and businesses.

THE ADVANTAGES OF PLUMBING WITH PEX PIPES

IT'S FLEXIBLE & COST EFFECTIVE

PEX Pipes are flexible, which means they can be installed easily, with fewer joints. In addition, the materials cost for a **PEX repipe** is lower than traditional plumbing materials. This means a **PEX repipe** is highly cost effective for the homeowner.

DESIGN SIMPLICITY

Most plumbing problems occur at joints – since PEX Pipes have fewer fittings, this reduces the chance for leaks.

QUIET

The flexibility of PEX Piping also means it is quieter than rigid piping. With PEX Pipes, you will experience no more "water hammer" or "singing pipes," and the sound of rushing water is reduced.

TEMPERATURE RESISTANT

PEX Pipes are resistant to both high and low temperatures. They also expand and contract as water freezes and thaws, which makes PEX Pipes highly resistant to freeze-breaks.

EFFICIENT

PEX repiping is efficient, retaining heat for longer in hot water lines and resisting condensation in cold-water lines.

CLEAN, FAST-FLOWING WATER

The smooth interior of PEX piping does not corrode and it is immune to mineral buildup as well as pitting or scaling, which means your water stays clean, and PEX piping will maintain its original flow characteristics.

PEX REPIPING CAN REDUCE YOUR UTILITY BILLS!

PEX repiping can also reduce utility costs, cutting water and energy consumption, by using direct PEX lines to the fixtures – the "home run" concept – which reduces the amount of water to be purged before hot water arrives at the fixture.

Faster delivery of hot water cuts down on waste, as well as reducing stress on the water heater.

ENVIRONMENTALLY FRIENDLY

PEX tubing also has a small environmental impact compared with other plumbing materials, making it highly desirable for homeowners interested in using sustainable materials.

IT LASTS A LIFETIME, GUARANTEED

PEX piping has an expected service life as long as copper piping, or any other approved plumbing material. Laboratory testing has shown that PEX pipes should last up to 200 years.

The manufacturer backs PEX pipes plumbing with a 25-year warranty, which Repiping Specialists at Care Plumbing is happy to extend with our lifetime guarantee.

NOW IS AN EXCELLENT TIME TO REPIPE WITH PEX PIPES

John & Mike, Repiping Specialists at Care Plumbing have extensive experience with **PEX repiping**. Our highly-trained staff will be pleased to provide you a trouble-free installation at the best possible price.

Join the thousands of satisfied families who have decided to repipe with PEX pipes from Repiping Specialists at Care Plumbing.

Call or email us today for your Free Repiping Estimate.

Pre-Mediation Statement of Plaintiff, SPI Plumbing

1. Party, Representative & Counsel.

Party: SPI Plumbing, Inc.; **Representative:** Ms. Charlene Collins; **Counsel:** Mr. Chris Fladgate.

2. A brief statement of key legal and factual issues involved in the dispute.

This is a simple dispute. SPI Plumbing, Inc. ("SPI"), was engaged by the Defendant to perform plumbing work at a residential apartment building in New Jersey owned by the Defendant. The parties agreed to a lump sum contract in the amount of $56,150.

Defendant has paid $19,500[1] of the above amount, and SPI seeks the balance, namely $36,650.

SPI performed all of the work and is due the full amount. Defendant cites two alleged mistakes in the work of SPI as the reason for withholding payment, but SPI believes that Defendant acted in bad faith and never intended to pay the full contract price. The two alleged mistakes (and SPI's brief responses) are:

(a) SPI negligently cut certain structural joists in performing its work. SPI's position is that it did, indeed, cut the joists, but only did so at the express instruction and insistence of Defendant's general contractor (who was in charge of the project). SPI is a reputable plumber and would not cut any framework without express instructions. Defendant claims the remedial work cost approximately $15,000; and

(b) In some isolated instances, SPI reversed the hot and cold water lines. Upon notification, SPI promptly corrected this work and – of course – did not seek additional payment from Defendant. Defendant incurred no additional cost due to

[1] SPI's Complaint states that only $17,000 has been paid. This amount inadvertently omitted a subsequent $2,500 payment received from Defendant.

this mistake.

Accordingly, SPI is entitled to full payment of the outstanding balance.

3. In your opinion, the main "sticking points" preventing settlement.

Honestly, SPI doesn't know. Defendant may think it is easier taking $15,000 for remedial joist work from SPI, and not the general contractor who was responsible for the damage.

SPI has no idea how or why Defendant says the hot/cold water reversal has cost it over $21,650 given SPI promptly corrected the work itself. Until Defendant acknowledges it owes this amount to SPI, it is hard to see how the mediation can move forward productively.

4. A description of any important rulings made or pending motions in the case which may affect settlement.

There is Defendant's motion to dismiss alleging improper service of the Complaint. If mediation is unsuccessful, SPI will probably leave the motion unopposed and commence a new action. Hence, reference is made to this motion, purely for informational purposes. SPI does not consider it an important motion.

Relatedly, if SPI does re-file suit, statute of limitations is not an issue for SPI as its claims are grounded in contract. However, the statute of limitations is a big problem for Defendant if it really wishes to proceed with its threats of a negligence counterclaim, whether in the current suit, or a re-filed suit. (The contract was signed in late 2016 and all services were completed in 2017. In New York, the statute of limitations for negligence is 3 years, and 6 years for breach of contract.)

5. The status of settlement negotiations (if any) and the last settlement proposal made to you and by you (if any).

None, due to the fact that Defendant refuses to speak to SPI. That is why the Complaint was filed. SPI is willing to engage in good faith settlement negotiations.

6. A settlement proposal that you would be willing to make in order to conclude the dispute and stop the time, effort, uncertainty and turmoil of continuing the dispute.

$35,000. To the extent it matters, this is approximately 90% of the "joist" deduction being paid to SPI (~$13,500), plus all of the remaining balance ($21,650) for which Defendant has no excuse for not paying.

7. Key documents, and legal concepts necessary for the mediator to understand and analyze the case.

Defendant needs to (a) know that it is bound by the actions of its general contractor, and (b) understand that it has no counterclaim for negligence due to the Statute of Limitations.[*]

8. Briefly state why SPI should prevail and by what amount?

SPI did the work contracted for, fixed its mistakes and followed the express instructions of Defendant's general contractor running the project site. In other words, SPI did nothing wrong and has only been paid about one-third what it is owed. SPI should receive $36,650.

9. Briefly state why Defendant should prevail and by what amount?

If somehow, SPI is wholly or partly responsible for cutting the joists, then the $15,000 to repair this work, could be appropriately apportioned against SPI. That is the only conceivable deduction from $36,650 and such apportionment should be negligible given SPI did this work at the express instruction and insistence of Defendant's general contractor.

[*] Note: This category clearly asks for the response to be directed to the mediator. However, this is an example of counsel deliberately trying to set a tone and convey their client's frustrations by directing the response to the other party.

Supreme Court of the
State of New York
Nassau County

Rules of the Civil Case Alternative Dispute Resolution Program

Effective November 3, 2021

SUPREME COURT – NASSAU COUNTY
Rules of the Civil Case Alternative Dispute Resolution Program

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SUPREME COURT – NASSAU COUNTY

Rules of the Civil Case Alternative Dispute Resolution Program

INTRODUCTION

Alternative dispute resolution ("ADR") refers to a variety of processes other than a trial that parties use to resolve disputes. ADR offers the possibility of a settlement that is achieved sooner, at less expense, and with less inconvenience and acrimony than would be the case in the normal course of litigation. The principal forms of ADR include arbitration, neutral evaluation and mediation. The Court will offer mediation as the default ADR option, however parties are encouraged to determine the most appropriate form of dispute resolution for their case.

Mediation is a confidential dispute resolution process in which a neutral third party – the Mediator - helps parties identify and narrow issues, clarify perceptions and explore options for a mutually acceptable outcome as to some or all issues. In this process, parties have an opportunity to communicate with each other, focus on what is important to them, and to come up with individually tailored solutions. During mediation, each party relates his or her understanding of the dispute. The Mediator may ask the parties clarifying questions. The Mediator will not give legal advice or force solutions on the parties.

Mediation often involves non-legal as well as legal issues. Represented parties are strongly encouraged to discuss the proposed mediation process with their attorneys. Parties may choose to attend sessions without counsel, if all participants agree. Although the mediation process can, and often does, result in an agreement, whether to reach an agreement, and on what terms, is up to the parties themselves. A mediator will not impose a solution on the parties or attempt to tell them what to do; if the parties cannot reach agreement, the case will be returned to the referring Justice.

The Court will also offer neutral evaluation as an ADR option. Neutral evaluation is a confidential, non-binding process in which a neutral third party with expertise in the subject matter relating to the dispute hears abbreviated case presentations by the parties and counsel, provides an informal assessment of the strengths and weaknesses of the arguments and may offer an evaluation of likely court outcomes in an effort to promote settlement. Their assessments and opinions may help parties to analyze the case, facilitate discussion and generate a settlement. The neutral evaluator may also provide case planning guidance and settlement assistance with the parties' consent.

The following Rules shall govern cases sent to mediation and neutral evaluation by Justices of the Nassau County Supreme Court, as well as cases referred upon consent of the parties. Parties whose cases are the subject of an Order of Reference are free at the outset to use the services of a private ADR provider of their choosing, at their own expense, in lieu of taking part in this Program. After a case has been submitted to the Program, parties can terminate the process and proceed to ADR elsewhere.

Rule 1. The Program:

The Supreme Court of the State of New York, Nassau County, operates the Civil Case Alternative Dispute Resolution Program ("the Program"). Cases qualifying for referral to the Program include all civil cases that are not already included in a separate ADR program within this District (i.e. commercial and matrimonial). Personal injuries matters are particularly suitable for the Program.

Rule 2. The Roster:

(a) The Administrative Judge shall establish and maintain a Civil Case ADR Program Roster of neutral evaluators and mediators ("the Roster") who shall possess the qualifications and training required by Part 146 of the Rules of the Chief Administrative Judge (see http://www.nycourts.gov/rules/chiefadmin/146.shtml) as either a mediator or neutral evaluator.

(b) In order to be eligible to serve on the Program's Roster, a person shall possess the following qualifications as either a Neutral Evaluator or Mediator, and such other requirements as may hereafter be promulgated:

1) Neutral evaluator. Neutral evaluators must have successfully completed at least six hours of approved training in procedural and ethical matters related to neutral evaluation and be: (i) a lawyer admitted to practice law who has at least seven (7) years of substantial experience in the area of Civil Practice; or (ii) an individual who has served at least five years as a judge with substantial experience in the specific subject area of the cases that will be referred to them.

2) Mediator. Mediators must have successfully completed at least 40 hours of mediation in a training program sponsored or recognized by the New York State Office of Court Administration ("OCA"), as follows: at least 24 hours of training in basic mediation skills and techniques; and at least 16 hours of additional training in advance mediation techniques. Mediators must also have recent experience mediating Civil cases.

(c) Every member of the Roster, and any other person, who serves as a mediator pursuant to these Rules, shall comply with the Model Standards of Conduct for Mediators (adopted and approved by the AAA; ABA; and ACR).

(d) Every member of the Roster shall complete at least six hours of additional approved training relevant to their respective practice areas every two years in compliance with the Continuing Education requirement of Part 146 of the Rules of the Chief Administrative Judge.

(e) Continuing presence on the Roster is subject to review by the District Administrative Judge. Every member of the Roster serves at the pleasure of the District Administrative Judge, who may terminate a designation to the Roster at any time.

(f) The Roster will be available through the Nassau County Supreme Court's ADR website.

(g) The 10th Judicial District—Nassau County serves a wide variety of litigants, including persons of varying age, race, ethnicity, national origin, gender, sexual orientation, physical or mental ability, religion, socioeconomic and family status. Neutrals with a wide variety of cultural and life experiences enrich the alternate dispute resolution process by bringing diverse perspectives to resolving disputes. To better serve our District's population and instill confidence in participants in the ADR process, Nassau County is committed to attracting and retaining court-approved neutrals who represent a range of personal and professional backgrounds. Qualified applicants of diverse backgrounds and experiences are encouraged to apply for admission to the Roster by submitting a NYS UCS Office of ADR Application to Mediate for the NYS Trial Courts available on the NYS UCS ADR website (https://ww2.nycourts.gov/ip/adr/Application.shtml), and a resume.

Rule 3. Procedure:

(a) **Referrals.** Cases shall be referred to mediation or neutral evaluation as early as is practicable and appropriate. If the assigned Justice decides to refer a case to the Program or if the parties consent to a referral at a conference or in a written stipulation, the assigned Justice shall issue an Order of Reference requiring that the case proceed to mediation or neutral evaluation in accordance with these Program rules. A case not deemed appropriate for referral at its outset may be referred to the Program later in the discretion of the assigned Justice.

(b) **Order of Reference.** The Order of References shall direct that within five (5) business days from receipt of the Order of Reference, the parties shall confer and determine whether they choose to mediate with either an outside ADR provider or a party-selected neutral from the Roster to be paid by the parties, or a court-assigned neutral from the Program's Roster. During this time, the parties shall also execute and submit to the Court the "Civil Case ADR Program Assignment Form" (hereinafter "Assignment Form"), which can be obtained from the Nassau County Supreme Court's ADR website https://ww2.nycourts.gov/courts/10jd/nassau/ADR.shtml. The Order of Reference shall establish a date upon which the parties are to return to Court.

(c) **Assignment of Neutral.** If the parties do not elect to use their own neutral as set forth in Subdivision (d) of this Rule, then within three (3) days of receipt of the parties' executed Assignment Form the Court or its designee shall assign a neutral or Co-Mediators from the Roster and provide the parties with a Court Assignment of Neutral form. Within five (5) business day of the time a neutral is either agreed upon by the parties or assigned by the Court, the parties shall jointly contact the neutral to schedule an initial session. Counsel shall provide the neutral with copies of the Order of Reference and Assignment Form.

(d) **Party-Selected Neutrals.** Parties may select their own mediator, whether they are on the Court's Roster or not. If the parties elect to use a party-selected neutral they shall include on the Assignment Form the name and contact information of the neutral selected and the date of the first session, if known, which date shall be no more than forty-five (45) calendar days from the

date of the Order of Reference. A Party-Selected Neutral shall not be required to, but may agree to, provide the initial ADR session without compensation.

(e) **Substitution of Neutral.** Any neutral selected pursuant to this rule must comply with the conflict check procedures in Rule 8 below. Should the assigned neutral be unable to serve as the neutral, due to a conflict of interest or other circumstances, the parties shall promptly request a substitute neutral. The substitute neutral shall be assigned by the Court or the Court's designee and shall be bound by all the provisions of the Order of Reference, including providing the first ninety (90) minutes of the initial ADR session without compensation.

(f) **Initial ADR Session.** A referral to mediation or neutral evaluation under the Program consists of, but is not limited to, a free ninety (90) minute initial session. The initial ADR session must be conducted within forty-five (45) calendar days from the date of the Order of Reference. This deadline is important and must be met. In the event of any extraordinary difficulties, the neutral shall contact the Court and, if necessary, intervention will occur to expedite the process. If the case is not resolved at the conclusion of the initial session, the parties and neutral may agree to continue the ADR process. Neutral compensation for any additional time beyond the initial ADR session is governed by Rule 6, below.

(g) **Pre-ADR Conference Call.** The neutral may initially request a conference call with both parties regarding any preliminary matters. If the neutral and the parties have agreed to proceed by a remote virtual online platform, the neutral shall, prior to the initial session, discuss the following with the parties: privacy expectations; confidentiality; prohibition on recording; participants' ability to access and use virtual technology, including the availability of a secure internet connection; whether the participant needs an interpreter or other accommodation; safety concerns; any other requests by participants, including a participants' request to have a support person present for the session (to be discussed and agreed to by the other participant).

(h) **Party Participation.** Unless exempted by the neutral for good cause, every party, including counsel must attend and participate in good faith in the initial ADR session either in person or remotely if agreed upon in advance, or, in the case of a corporation, partnership or other business entity, by an official (or more than one if necessary) who is both fully familiar with all pertinent facts and authorized to settle the matter. Any attorney who participates in the ADR process shall be fully familiar with the action and authorized to settle. If an insurance carrier is involved, a representative with full authority to negotiate a settlement must appear or be available by phone at the time of any ADR session. Notwithstanding the foregoing, if a party or counsel fails to schedule an appearance for an ADR session in a timely manner, appear at any scheduled session or otherwise unreasonably fails to comply with these Rules, the neutral may advise the Court and the Court may impose sanctions.

(i) **Pre-ADR Statement.** Unless otherwise directed by the neutral, at least seven (7) business days before the initial session, counsel for each party shall deliver directly to the neutral a concise confidential statement of not more than three pages (12 point font, doubled spaced) setting forth: the essential issues presented; relevant facts, including injuries; assessment of value and

applicable law, if any; the status of settlement negotiations; why the parties are at an impasse; suggestions as to how the matter might be resolved; and any other information concerning the litigation necessary for the effective negotiation and resolution of the issues. Unless otherwise specified by the party, the pre-ADR Statement shall not be served on the adversary or filed in court, shall be read only by the neutral, and shall be destroyed by the neutral immediately upon completion of the proceeding. *Pro se* litigants shall not be required to provide a pre-ADR Statement. Instead, they shall speak directly to the neutral to answer any pre-ADR questions the neutral might have. Such information shall be given to the neutral and treated with the same confidentiality as a pre-ADR Statement.

(j) **Pre-ADR Disclosure**. If requested, counsel must be prepared to provide to the assigned neutral any materials directly relevant to the issues of liability and damages. Counsel are encouraged to provide to the neutral and exchange with opposing Counsel, if not previously exchanged, any documents they believe would be helpful in resolving the dispute. Such documents may include:

1. Documents sufficient to establish the subject contract, statutory cause of action (including the alleged violation), or the relationship between the parties;
2. Preliminary evaluation of damages, including for counterclaims, crossclaims, and third-party actions;
3. Proof of any insurance (including excess) available to satisfy any cause of action, as well as proof of any reservation of rights or disclaimer of coverage;
4. Documents sufficient to show any dispositive affirmative defense;
5. Plaintiff's medical records and examination reports;
6. Bills of Particulars;
7. Relevant photographs, video recordings or accident reports;

(k) **Conclusion of ADR.** Within seven (7) business days after the ADR process has concluded – whether by agreement, or the refusal of one or more parties to continue – the neutral shall complete the Confidential Report of ADR Neutral indicating settlement or lack thereof and transmit the same, along with any written agreement, to the Court and ADR Coordinator. If the ADR process results in a settlement, the parties shall submit an appropriate stipulation to the Part of the assigned Justice.

At the end of an ADR initial session mandated by Subdivision (f) of this Rule, any party or the neutral may terminate the ADR process. If the ADR process has been terminated by one party only, the identity of that party shall not be reported.

Rule 4. Confidentiality:

(a) The ADR process shall be confidential. All documents prepared by parties or their counsel and any notes or other writings prepared by the neutral in connection with the proceeding - as well as any communications made by the neutral, parties or their counsel, for, during, or in connection with the ADR process - shall be kept in confidence by the neutral, the parties and any individual present

during the ADR process, and shall not be summarized, described, reported or submitted to the Court by the neutral or any individual present during the ADR process. No party to the ADR process shall, during the action referred to the ADR process or in any other legal proceeding, seek to compel production of documents, notes or other writings prepared for or generated in connection with the ADR process, or seek to compel the testimony of any other party concerning the substance of the ADR process. Any settlement, in whole or in part, reached during the ADR process shall be effective only upon execution of a written stipulation signed by all parties affected or their duly authorized agents. Documents and information otherwise discoverable under the New York Civil Practice Law and Rules shall not be shielded from disclosure merely because the documents and information are submitted or referred to in the ADR process (including, without limitation, any documents or information which are directed to be produced pursuant to Rule 3 [j] herein).

(b) No party to an action referred to the Program shall subpoena or otherwise seek to compel the neutral or any individual present during the ADR process to testify in any legal proceeding concerning the content of the ADR process. In the event that a party to an action that had or has been referred to the Program attempts to compel such testimony, that party shall hold the neutral harmless against any resulting expenses, including reasonable legal fees incurred by the neutral or reasonable sums lost by the neutral in representing himself or herself in connection therewith. However, notwithstanding the foregoing and the provisions of Rule 4 (a), a party or the Court may report to an appropriate disciplinary body any unprofessional conduct engaged in by the neutral and the neutral may do the same with respect to any such conduct engaged in by counsel to a party.

(c) Notwithstanding these confidentiality provisions, communications and information may be subject to disclosure in any present or future judicial or administrative proceeding in any of the following circumstances:

1) Attendance: Whether the parties and their counsel attended the initial ADR session will be reported to the Program Coordinator who may notify the Court.

2) Session Information: The neutral may report to the Court whether the parties are requesting additional ADR sessions as well as the date of any ADR session and whether the parties reached partial, complete, or no agreement on the issues.

3) Waiver: Parties to the ADR session and the neutral agree in writing to waive confidentiality. The waiver must specify the individual communication(s) and writing that will be disclosed, the person or entity to whom the disclosure will be made, and the purpose of the disclosure. All waivers shall be in writing or on the record. Nothing herein shall be construed to require a neutral to appear in any court.

4) Written Agreement: A writing signed by all parties embodying a negotiated agreement submitted to the court for review. Only those agreements that have become court orders

or decrees may be admissible in any present or future judicial or administrative proceeding.

5) Threats of Imminent, Serious Harm: If communications or information constitute a credible threat of serious and imminent harm to any person or entity, the appropriate authorities and/or the potential endangered person shall be notified.

6) Allegations of Child Abuse or Neglect: The communication or information relates to an allegation of child abuse or neglect as defined in Family Court Act § 1012(e) and (f) and Social Services Law § 412, and for which disclosure is required pursuant to Social Services Law § 413, appropriate authorities may be notified.

7) Mediation Survey: Mediation surveys that elicit participant satisfaction with the mediation process may be shared with the local ADR Coordinator or Administrative Judge. These surveys may be shared to evaluate the program, to determine whether to approve a neutral to join or remain on a roster, to counsel a neutral, if necessary, or to remove a neutral from a roster.

8) Unprofessional Conduct: A party, counsel to a party, or a neutral, may report unprofessional conduct to an appropriate disciplinary body or to the local ADR coordinator.

9) Collection of Fees: The neutral may make general references to the fact of ADR services rendered in any action to collect an unpaid authorized fee for services performed under local court rules.

Rule 5. Immunity of the Neutral:

Any person designated to serve as a neutral pursuant to these Rules shall be immune from suit based upon any actions engaged in or omissions made while serving in that capacity to the extent permitted by law.

Should a party attempt in any legal action to compel the testimony of the neutral concerning the substance of an ADR session, that party shall hold the neutral harmless against any resulting expenses, including reasonable legal fees incurred by the neutral or the reasonable value of time spent by the neutral in representing himself or herself in connection therewith.

Rule 6. Compensation:

(a) **Initial Session.** Parties shall not be required to compensate the Neutral assigned by the Court from the Program Roster for services rendered during the ninety (90) minute initial session, or for time spent in preparation for the initial session. Either prior to or at the beginning of the initial ADR session, the assigned neutral shall disclose to the parties either in writing or verbally the

specific time at which the non-compensable ninety (90) minutes of the initial ADR session will conclude and advise that continuation beyond that time will be billed by the neutral at the agreed upon rate against those parties who continue ADR beyond the initial ninety (90) minute session.

(b) **Amount of Compensation**. Should the parties agree to continue beyond the Initial Session or to schedule additional sessions with the court-assigned Neutral, the court-assigned Neutral shall be entitled to compensation for time spent conducting any mediation session that follows the initial session and time spent reviewing materials submitted by the parties for purpose of subsequent ADR sessions. Should the parties choose to continue beyond the initial session, a neutral shall be compensated at a rate agreed upon between the neutral and parties, which shall not exceed a rate of $450 per hour. A written agreement setting forth the neutral's rate to be charge for compensable time beyond the initial session shall be executed by the parties prior to the start of the initial session and a copy shall be provided to the parties. Neutrals on the Program's Roster are strongly encouraged to work on a sliding fee scale taking into account a party's financial circumstances.

(c) **Continuing or Terminating ADR.** At the expiration of the first ninety (90) minutes of the initial session as previously defined, any party may elect not to continue with ADR, which decision must be immediately communicated orally or in writing to the neutral and all parties. In such situation, despite the fact that one or more parties have opted out of ADR, ADR can continue as to those parties desiring to continue, to the extent that the ADR can be meaningful without participation by the party or parties that opted out. The parties shall promptly advise the referring Justice of the date of any continuing ADR session that is scheduled beyond the next scheduled Court date.

(d) **Allocation of Compensation.** All neutral fees and expenses beyond the initial session shall be split evenly among the parties who continue ADR beyond the initial ninety (90) minute session, unless otherwise agreed upon in writing.

(e) **Agreement of the Neutral and Parties.** Notwithstanding the foregoing, the neutral and the parties may agree upon a rate in excess of the rate for services set forth herein, based upon factors such as the complexity of the case, the number of parties involved, and the experience of the neutral, and may also agree to compensate the neutral for preparation time. All such agreements shall be in writing prior to the initial session.

(f) **Co-Mediation.** The presence of more than one appointed neutral shall not increase the cost of the mediation to the parties. When a case is co-mediated by two appointed Roster Neutrals, the neutrals shall share the agreed hourly rate for services beyond the initial ADR session.

Rule 7. Stay of Proceedings:

(a) Unless otherwise directed by the Justice assigned, referral to an ADR process will not stay the court proceedings in any respect.

(b) Parties committed to the ADR process who conclude that additional time is required to fully explore the issues pertaining to their case may make a request for a stay of any proceedings to the referring Justice. Regardless of whether a stay is granted by the referring Justice, if informal exchange of information concerning the case will promote the effectiveness of the ADR process and the parties so agree, the neutral shall make reasonable directives for such exchange consistent with any pre-existing disclosure order of the Court and in compliance with the deadlines set forth herein.

(c) If the matter has not been entirely resolved within the 45-day period as provided in these rules (see Rule 3 [f]) but the parties and the neutral believe that it would be beneficial if the ADR process were to continue, the process may go forward. However, the ADR process should be completed within 75 days from the date of the Order of Reference unless the assigned Justice specifically authorizes the process to continue beyond the 75 days.

Rule 8. Conflicts of Interest:

(a) **Conflict Check.** In order to avoid conflicts of interest, any person tentatively assigned to serve as a neutral shall, as a condition to confirmation in that role, conduct a review of his or her prior activities and those of any firm of which he or she is a member or employee. Any such conflicts review shall include a check with regard to all parents, subsidiaries, or affiliates of corporate. The neutral shall make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the neutral, including a financial or personal interest in the outcome, and an existing or past relationship with a party or their attorney or foreseeable participant in the ADR session. The neutral shall also avoid an appearance of a conflict of interest.

(b) **Disclosure.** The neutral shall disqualify him or herself if the neutral would not be able to participate fairly, objectively, impartially, and in accordance with the highest professional standards. In the event that any potentially disqualifying facts should be discovered, the neutral shall fully inform the parties and the Court of all relevant details. Unless all parties after full disclosure consent to the service of that neutral in writing, the neutral shall decline the assignment and another neutral shall be assigned in a manner consistent with Rule 3.

Rule 9. Neutral Communication with Referring Justice:

The neutral shall submit a Confidential Report of ADR Neutral to the referring Justice and ADR Coordinator within five (5) business days of the conclusion of the proceeding whether the proceeding produced a resolution of the case in whole or in part. If the parties have utilized a party-selected neutral, within 24-hours of completion of the ADR session(s), the parties shall advise the referring Justice and ADR Coordinator of any settlement reached during ADR. The neutral may communicate with the referring Justice or the referring Justice's staff about administrative details of the processing of any case referred to the Program by that Justice, but shall not discuss any substantive aspect of the case. Upon termination

of the proceeding by a party pursuant these rules, the neutral shall not reveal to the Court which party brought the proceeding to an end.

Rule 10. Further ADR:

(a) While early attempts at alternative dispute resolution may not necessarily result in settlement, follow up attempts at a later date are consistent with the goals of this Program. Accordingly, upon request of a party or upon its own initiative, the assigned Justice may in his or her discretion issue an order directing subsequent referrals to the Program.

(b) Any case subsequently referred to the Program shall proceed in accordance with these Rules. For example, the parties shall not compensate the neutral for services rendered during an initial session or for time spent in preparation for an initial session conducted pursuant to a subsequent Order of Reference to the Program.

(c) Nothing in this Rule shall prohibit the parties from proceeding to mediation, neutral evaluation, arbitration, or another ADR process, without Order of the Court, and at their own expense.

Rule 11. Administration and Assessment of Program:

The Program shall be supervised by the Administrative Judge of the Tenth Judicial District – Nassau County. The Program contact is Yvonne Marin, Esq., ADR Coordinator for the 10th Judicial District, Nassau County, ymarin@nycourts.gov.

To assist in the continued development of the Program, we ask the parties and counsel, if applicable, complete a Post-Mediation Survey within fifteen (15) business days after the final ADR session. The Post-Mediation Survey may be easily completed and submitted online at: https://mediationsurvey.questionpro.com/?custom1=20

Once submitted, the online survey is automatically routed to the Nassau County ADR Coordinator. Neutrals are encouraged to share the survey link with the parties via email or by inserting it into the chat feature at the end of a virtual ADR session.

NEW YORK STATE SUPREME COURT, CIVIL BRANCH
10TH JUDICIAL DISTRICT, NASSAU COUNTY
Effective date: November 3, 2021