

No. ~~19-A-~~^{18A} 725

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY CONTE,

Petitioner-Plaintiff,

v.

BOB EMMONS, et al,

Respondents.

**APPLICATION FOR AN EXTENSION OF TIME TO
FILE A PETITION FOR A WRIT OF CERTIORARI**

ANTHONY CONTE
PETITIONER-PLAINTIFF, PRO SE
2 ETHAN ALLAN COURT
SOUTH SETAUKET, NEW YORK 11720
TELEPHONE (631) 949-1660

TO THE HONORABLE RUTH BADER GINSBURG, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SECOND CIRCUIT:

Pursuant to Supreme Court Rules 13.5, 22 and 30, Petitioner Anthony Conte respectfully requests a 60 day extension of time up to and including March 18, 2019, to file a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review that court's decision in *Conte v. Emmons, et al*, No. 17-869 (2nd Cir.). Judgment was entered on October 17, 2018 (Decision and Judgment attached hereto as Exhibit "A"). The Petitioner intends to complete and file a petition seeking review of this judgment by the Supreme Court. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1), and the time to file a petition for a writ of certiorari will expire without extension on January 16, 2019. The Petitioner seeks this extension of time to complete his petition for a writ of certiorari as a result of the recent lengthy hospitalization of a family member in his care couple with the labor intensive nature of the petition. This application is timely because it has been filed approximately 10 days prior to the date on which the time for filing the petition is to expire.

1. This case presents a substantial and important question of federal law: Whether a court of appeals panel can subsequently decide a sufficiency of evidence appeal first raised in a Rule 50(b) motion after trial when a previous Court of Appeals panel determined in a prior appeal, that became law of the case,

that the defendants failed to raise those defenses prior to the end of trial in a proper Rule 50(a) motion and the defendants offered no evidence prior to the second appeal to defeat or reverse that ruling. This ruling by the Second Circuit panel on October 17, 2018 contradicts and violates the Supreme Court's prohibition clearly stated in *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.* (No. 04-597) 375 F. 3d 1341 that Courts of Appeals cannot consider the sufficiency of the evidence underlying a civil jury verdict when a party, such as the defendants in this case, fail to comply with FRCP Rule 50.

2. In Note 4 of the *Unitherm* ruling this court made clear that when a party violates Rule 50 including by failing to make a proper Rule 50(a) motion, the ability of the Court of Appeals to decide a subsequent sufficiency of evidence appeal by that party is foreclosed by authority of this Court:

⁴ The dissent's suggestion that 28 U.S.C. §2106 permits the Courts of Appeals to consider the sufficiency of the evidence underlying a civil jury verdict notwithstanding a party's failure to comply with Rule 50 is foreclosed by authority of this Court. While the dissent observes that §2106 was enacted after *Cone and Globe Liquor Co. v. San Roman*, 332 U. S. 571 (1948) , post, at 2 (opinion of Stevens, J.), it fails to note that it was enacted prior to *Johnson*. *Johnson* explicitly reaffirmed those earlier cases, concluding that "in the absence of a motion for judgment notwithstanding the verdict made in the trial court within ten days after reception of a verdict [Rule 50] forbids the trial judge or an appellate court to enter such judgment." 344 U. S., at 50. Moreover, in *Neely*, this Court observed that §2106 is "broad enough to include the power to direct entry of judgment n. o. v. on appeal," 386 U. S., at 322, but nonetheless reaffirmed that *Cone*, *Globe Liquor*, and *Johnson* "make it clear that an appellate court may not order judgment n. o. v. where the verdict

loser has failed to strictly comply with the procedural requirements of Rule 50(b).” 386 U. S., at 325. Contrary to the dissent’s suggestion, Neely confirms that the broad grant of authority to the Courts of Appeals in §2106 must be exercised consistent with the requirements of the Federal Rules of Civil Procedure as interpreted by this Court. The dissent’s approach is not only foreclosed by authority of this Court, it also may present Seventh Amendment concerns. The implication of the dissent’s interpretation of §2106 is that a court of appeals would be free to examine the sufficiency of the evidence regardless of whether the appellant had filed a Rule 50(a) motion in the district court and, in the event the appellant had filed a Rule 50(a) motion, regardless of whether the district court had ever ruled on that motion. The former is squarely foreclosed by *Slocum v. New York Life Ins. Co.*, 228 U. S. 364 (1913) , and the latter is inconsistent with this Court’s explanation of the requirements of the Seventh Amendment in *Baltimore & Carolina Line, Inc. v. Redman*, 295 U. S. 654, 658 (1935) (explaining that “under the pertinent rules of the common law the court of appeals could set aside the verdict for error of law, such as the trial court’s ruling respecting the sufficiency of the evidence, and direct a new trial, but could not itself determine the issues of fact and direct a judgment for the defendant, for this would cut off the plaintiff’s unwaived right to have the issues of fact determined by a jury” (emphasis added)). Indeed, Rule 50 was drafted with such concerns in mind. See 9A C. Wright & A. Miller, *Federal Practice and Procedure* §2522, pp. 244–246 (2d ed. 1995) (hereinafter *Federal Practice*).

3. Attached hereto as Exhibit “B” is a copy of the original Court of Appeals panel decision dated December 17, 2014 which held that the defendants failed to raise their Rule 50(b) sufficiency of the evidence defense or any other defense in compliance with Rule 50 prior to the end of trial. Attached hereto as Exhibit “C” is a copy of the decision of Judge Bianco of the District Court dated March 3, 2017 who, after an exhaustive examination of the trial record and evidence, affirmed the

ruling by the Court of Appeals on December 17, 2014 that the defendants failed to raise their Rule 50(b) sufficiency of the evidence defense or any other defense in compliance with Rule 50 prior to the end of trial.

4. Further, in *Unitherm* above, this court made clear that a plaintiff cannot waive in any manner his right to have the issues of fact determined by a jury which is opposite to the Court of Appeals panel favorable waiver ruling for the defendants in their decision on October 17, 2018 that the Petitioner waived his opposition to the defendant's improper Rule 50(b).

5. Finally, the Court in *Unitherm* above made it clear that under limited circumstances the Court of Appeals could set aside a verdict respecting the sufficiency of evidence and direct a new trial but it could not itself determine the issues of fact and direct judgment for the defendant without a new trial for the defendant as the Court of Appeals panel did in their decision on October 17, 2018.

Accordingly, the Petitioner respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari for 60 days up to an including March 18, 2019.

Dated: January 7, 2019

Respectfully Submitted;



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Petitioner, Pro Se
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1 Vinal, Individually and as Deputy Commissioner of the Police
2 Department of the City of New York, John and Jane Does, 1-20,
3 Unknown Individuals and Employees of the Nassau County District
4 Attorney's Office, Phillip Wasilausk, Individually and as Assistant
5 District Attorney of Nassau County, New York,

6
7 *Defendants.*
8
9

10 Appeal from the United States District Court
11 for the Eastern District of New York.
12 No. 06-cv-04746 – Joseph F. Bianco, *Judge.*
13

14
15 Before: WALKER AND POOLER, *Circuit Judges*, COTE, *District Judge*.*
16

17 Robert Emmons and William Wallace, prosecutors in the
18 Nassau County District Attorney's Office, and Michael Falzarno, an
19 investigator in the Office, appeal from the denial of their post-trial
20 motion for judgment as a matter of law, and the corresponding entry
21 of judgment following a jury verdict in favor of Plaintiff Anthony
22 Conte, on Conte's claims against them for tortious interference with
23 contract under New York law. Because we conclude that there was
24 insufficient evidence for a reasonable juror to have found at least two
25 elements of Conte's claims—intent and causation—we REVERSE.

26 Judge POOLER dissents in a separate opinion.
27

* Judge Denise Cote, of the United States District Court for the Southern District of New York, sitting by designation.

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ELIZA MAE SCHEIBEL, Wilson Elser Moskowitz
Edelman & Dicker LLP (Peter Meisels, *on the brief*),
White Plains, NY, *for Defendants-Appellants*.

MICHAEL H. ZHU, New York, NY, *for Plaintiff-
Appellee*.

JOHN M. WALKER, JR., *Circuit Judge*:

Robert Emmons and William Wallace, prosecutors in the Nassau County District Attorney’s Office, and Michael Falzarno, an investigator in the office, appeal from the denial of their post-trial motion for judgment as a matter of law, and the corresponding entry of judgment following a jury verdict in favor of Plaintiff Anthony Conte, on Conte’s claims against them for tortious interference with contract under New York law. Because we conclude that there was insufficient evidence for a reasonable juror to have found at least two elements of Conte’s claims—intent and causation—we reverse.

Conte alleged in relevant part that appellants tortiously interfered with his contracts when appellants investigated the activities of I Media, a company Conte founded to produce and distribute *TV Time*, a television magazine. The investigation focused principally on Conte’s possible defrauding of “route distributors,” individuals who paid I Media upfront for the exclusive right to distribute *TV Time* in a given area, and were to receive in return a sum

1 for each magazine they delivered. To state it briefly, I Media faced
2 serious difficulties in its early stages, and certain route distributors—
3 who had paid upfront for their routes but had not received any
4 magazines to distribute—became suspicious. Two distributors made
5 complaints to the District Attorney’s Office, which assigned the
6 investigation to appellants at the Office’s Criminal Bureau.
7 Ultimately, nearly fifty individuals reported their suspicions to the
8 District Attorney’s Office, which assigned the investigation to
9 appellants at the Office’s Criminal Frauds Bureau. Appellants
10 investigated the complaints, which included the issuance of grand
11 jury document subpoenas and significant inquiries to route
12 distributors, printers, and potential advertisers. No charges were
13 ultimately filed, and, when I Media subsequently failed, Conte sued
14 appellants and others for, *inter alia*, tortious interference with contract.

15 Following the close of evidence at a jury trial, appellants moved
16 pursuant to Fed. R. Civ. P. 50(a) for judgment as a matter of law. The
17 district court denied the motion and submitted the claims to the jury
18 which ultimately found in favor of Conte on his tortious interference
19 with contract claims against appellants and subsequently awarded
20 Conte \$1,381,500, which included \$678,000 in punitive damages.¹

¹ Following thorough rulings at the motion to dismiss stage, 2008 WL 905879 (E.D.N.Y. Mar. 31, 2008), and the summary judgment stage, 2010 WL 3924677 (E.D.N.Y. Sept. 30, 2010), trial was narrowed to the following

1 Appellants renewed their motion for judgment as a matter of law
2 pursuant to Fed. R. Civ. P. 50(b), and, following developments not
3 relevant here, *see Conte v. County of Nassau*, 596 F. App'x 1 (2d Cir.
4 2014); *Conte v. Emmons*, 647 F. App'x 13 (2d Cir. 2016), the district
5 court denied the motion and directed entry of judgment in favor of
6 Conte on the relevant claims. This appeal followed.

7 DISCUSSION

8 To warrant post-verdict judgment as a matter of law, the
9 movant must show that the evidence, when viewed most favorably to
10 the non-movant, was insufficient to permit a reasonable juror to have
11 found in the non-movant's favor. *See S.E.C. v. Warde*, 151 F.3d 42, 46
12 (2d Cir. 1998). The standard is a high one, met only in "rare

claims: (i) unlawful arrest under New York law and 42 U.S.C. § 1983 against Assistant District Attorney Philip Wasilausky; (ii) abuse of process under New York law and § 1983 against appellants and Wasilausky; (iii) a *Monell* claim against Nassau County; and (iv) tortious interference with contract under New York law against appellants and Wasilausky. In resolving defendants' motion for judgment as a matter of law under Fed. R. Civ. P. 50(a), the district court dismissed the *Monell* claims against Nassau County but submitted the remaining claims to the jury. As discussed, the jury found against appellants on Conte's tortious interference with contract claims, but it ruled in their favor on Conte's claims against them for abuse of process. The jury separately found Wasilausky liable on Conte's unlawful arrest claims, but not on Conte's claims for abuse of process and tortious interference with contract. The district court granted Wasilausky judgment as a matter of law on Conte's unlawful arrest claims in its first post-trial opinion. *See Conte v. County of Nassau*, 2013 WL 3878738, at *18 (E.D.N.Y. July 26, 2013). We affirmed. *See Conte v. County of Nassau*, 596 F. App'x 1, 3 (2d Cir. 2014).

1 occasions.” *George Basch Co. v. Blue Coral, Inc.*, 968 F.2d 1532, 1536 (2d
2 Cir. 1992). The movant, generally, must be able to show a “complete
3 absence of evidence supporting the verdict [such] that the jury’s
4 findings could only have been the result of sheer surmise and
5 conjecture.” *Luciano v. Olsten Corp.*, 110 F.3d 210, 214 (2d Cir. 1997)
6 (internal quotation marks omitted).² For the reasons that follow,
7 appellants met that strict burden here.

8 The unchallenged jury instructions correctly listed the elements
9 of a tortious interference with contract claim under New York law:
10 (i) the existence of a contract; (ii) defendants’ knowledge of that
11 contract; (iii) defendants’ intentional inducement of a breach of that
12 contract; (iv) a breach; (v) but for the defendants’ actions, that contract
13 would not have been breached; and (vi) damages. App’x 611. After

² Conte argues that appellants relied on contentions in their renewed Rule 50(b) motion that they did not raise in their initial pre-verdict Rule 50(a) motion. Generally, this would require appellants to make an additional showing to obtain their requested relief, specifically, that entry of judgment as a matter of law “is required in order to prevent manifest injustice.” *Kirsch v. Fleet St., Ltd.*, 148 F.3d 149, 164 (2d Cir. 1998). But, on appeal, Conte has not responded to appellants’ argument that he may not challenge the insufficiencies in appellants’ Rule 50(a) motion because he did not bring those issues to the attention of the district court in his opposition to appellants’ Rule 50(b) motion. Conte’s counsel acknowledged the point at oral argument. Contrary to our dissenting colleague’s recollection, *see* dissenting op. at 4, 7 n.3, Conte’s counsel conceded in no uncertain terms that we are to review for sufficiency of the evidence under the general standard of review for judgments as a matter of law that is identified in the text above. Oral Arg. Tr. 9:13–10:08.

1 a careful review of the trial record, we conclude that appellants are
2 entitled to judgment as a matter of law because no reasonable juror
3 could have properly inferred from the evidence that at least two
4 elements were satisfied: intent and causation.

5 *Intent.* The jury was properly instructed that appellants could
6 be liable for tortious interference with contract only if they acted with
7 the “purpose of inducing [a] breach of contract.” App’x 611. *See, e.g.,*
8 *NBT Bancorp Inc. v. Fleet/Norstar Fin. Grp.*, 87 N.Y.2d 614, 621 (1996).
9 In *NBT Bancorp*, the Court of Appeals noted that the requirement of
10 “an existing, enforceable contract” is what distinguishes a claim for
11 tortious interference with contract from a claim for tortious
12 interference with business relations, as to which interference with
13 prospective contracts will suffice, *id.*, a separate tort claim that Conte
14 did not bring. It is clear that New York law emphasizes the
15 requirement that a tortious interference with contract claimant
16 establish that the defendant purposefully intended to cause a contract
17 party to breach a particular contract. *Id.* at 620 (“Ever since tortious
18 interference with contractual relations made its first cautious
19 appearance in the New York Reports . . . our Court has repeatedly
20 linked availability of the remedy with a breach of contract.”). As
21 stated in *NBT Bancorp*, although the contract-based claim carries a
22 lesser culpability requirement than the more general business-
23 relations claim, the contract-based claim is strictly “defined by the

1 nature of the plaintiff's enforceable legal rights." *Id.* at 621 (citing
2 *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 193
3 (1980)); *see also Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 189–90 (2004).

4 Here, there was no evidence presented to permit a reasonable
5 inference that appellants met the standard as set forth by the above
6 authorities. To begin, there was no evidence that appellants had any
7 personal interest in the breach of any contracts that Conte may have
8 had with route distributors, printers, or advertisers. *Rodrigues v. City*
9 *of New York*, 193 A.D.2d 79 (1st Dep't 1993) is instructive. There, the
10 First Department allowed an investigatory subject's tortious
11 interference with contract claim against prosecutors to proceed past
12 the pleading stage, but only on allegations that the prosecutors
13 "sabotage[d]" plaintiffs' contracts "in order to extort bribes from
14 plaintiffs." *Id.* at 88 (internal quotation marks omitted). We are far
15 afield from *Rodrigues*, which is the only instance we know of in which
16 a court recognized with approval a New York law tortious
17 interference with contract claim against prosecutors (or their staff) for
18 their conduct in investigating allegations of criminal activity.

19 Conte's strongest evidence on intent (viewed in his favor) was
20 that one of the appellants, Investigator Falzarno, had a personal
21 animus towards Conte, which manifested itself in an aggressive and
22 harmful handshake on delivery of a document subpoena, stopping a
23 route distributor on the street to tell him that Conte was a "fraud[]"

1 and “scam artist” and threatening that he could be arrested if he told
2 Conte about that conversation, and a comment reflecting Falzarno’s
3 intent to “get” Conte. Conte also relies on the fact that Assistant
4 District Attorney Wallace contacted certain of Conte’s counterparties
5 informing them that Conte was under investigation for fraud, and
6 that the term “Ponzi scheme” may have come up in a conversation
7 Wallace had with an attorney. There was virtually no evidence
8 pertaining to Assistant District Attorney Emmons’ state of mind.

9 For the jury to have inferred that this investigative conduct
10 evinced an ulterior purpose outside of appellants’ law enforcement
11 goals could only have been “sheer surmise and conjecture.” *Warren*
12 *v. Pataki*, 823 F.3d 125, 139 (2d Cir. 2016) (quoting *S.E.C. v. Ginder*, 752
13 F.3d 569, 574 (2d Cir. 2014)). Without evidence to the contrary, *see*
14 *generally Rodrigues*, 193 A.D.2d at 88, these actions cannot reasonably
15 be interpreted as anything but those of public servants pursuing
16 aggressively, and perhaps overly so, their law enforcement mandate.
17 At best, the evidence showed that appellants became passionately
18 invested in effectuating that mandate, but that does not allow for the
19 inference that their intent went beyond their lawful charge. Rather,
20 the record makes clear that any effect the investigation had on the
21 destruction of Conte’s contracts was simply incidental to appellants’
22 intent to get to the bottom of widely reported allegations of
23 fraudulent conduct and, moreover, that appellants never targeted

1 particular contracts. And New York law, for good reason, does not
2 allow tortious interference with contract claims to “rest on conduct
3 that is incidental to some other lawful purpose.” *Aetna Cas. & Sur. Co.*
4 *v. Aniero Concrete Co.*, 404 F.3d 566, 589 (2d Cir. 2005) (per curiam)
5 (internal quotation marks omitted); *see also Montano v. City of*
6 *Waterliet*, 47 A.D.3d 1106, 1110 (3d Dep’t 2008) (dismissing claim
7 where “Plaintiff failed to offer proof that [an official’s] conduct was
8 not in furtherance of his official duties and not motivated by genuine
9 municipal/public health and safety concerns”).

10 In our view, it would be to the detriment of law enforcement to
11 accept the jury’s inferential finding of a purposeful intent on this bare
12 record. It would invite suits against prosecutors (and their staff) any
13 time a plausible allegation that the subject of an investigation lost
14 business as the result of a reasonably triggered investigation is
15 coupled with *some* indication that the investigators were somewhat
16 overzealous in going after the subject. The jury’s intent finding that
17 the appellants purposefully targeted particular contracts is wholly
18 without support.

19 **Causation.** The jury was also properly instructed that for
20 Conte to recover, he must have shown that “but for the defendants’
21 actions, the third party would not have breached.” App’x 611. *See,*
22 *e.g., Cantor Fitzgerald Assocs., L.P. v. Tradition N. Am., Inc.*, 299 A.D.2d
23 204, 204 (1st Dep’t 2002) (“An essential element of such a claim is that

1 the breach of contract would not have occurred but for the activities
2 of the defendant.”). Conte failed to establish this element as well. Our
3 review of the trial record unearths no admissible evidence allowing
4 for a reasonable inference that any of Conte’s contracting
5 counterparties stopped performing under a contract because of
6 anything appellants did or said.

7 Conte’s theory of causation as to his tortious interference with
8 contract claims was that his contracting counterparties breached their
9 agreements with him as a result of appellants’ investigative conduct.
10 At trial, Conte called only one route distributor, with whom he was
11 purportedly under contract, that interacted with any of the
12 appellants. The distributor, Paul Hoppe, testified that Falzarno
13 threatened him and told him and others that Conte was a fraud. But
14 Hoppe’s testimony was unequivocal that his “conversation with []
15 Falzarno had no bearing, whatsoever, on [his] continued business
16 relationship with I Media,” and that he stopped working with Conte
17 simply because “[t]he product wasn’t available.” App’x 141. Others
18 consistently testified similarly about I Media’s unsuccessful
19 relationships with printers and potential advertisers. See App’x 456,
20 486, 540–41. No witness remotely testified that they stopped
21 performing under a contract with Conte because of the statements or
22 actions of *appellants*.

1 Notably, in summation, Conte specifically listed thirty-one
2 non-testifying individuals and entities whose contracts were
3 purportedly interfered with. App'x 582–83. But because not one of
4 them testified, the record is silent as to whether, and, as importantly,
5 why, they stopped performing under their contracts with Conte.
6 Conte acknowledged this deficiency, conceding that “people are
7 reluctant to speak up and testify about what happened in this case.”
8 App'x 581. Aware of his lack of direct evidence, Conte asked the jury
9 to instead rely on “circumstantial evidence,” “and the logical
10 inferences that common sense should lead you to draw.” App'x 581.
11 But to conclude with no direct evidence that third parties breached
12 their contracts with Conte due to the acts of appellants—rather than
13 for business reasons or because of word spreading from the
14 disgruntled individuals with whom Conte battled in the early stages
15 of I Media—was not a permissible inference, but an improper
16 speculation.

17 In short, there was no evidence that anyone stopped
18 performing under a specific contract because of anything said or done
19 by appellants. And, to the extent the jurors relied on Conte's
20 testimony about what Conte's contracting counterparties told him
21 were the reasons for their breach, they relied improperly on hearsay
22 testimony.

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 10th day of October, two thousand eighteen.

Anthony Conte,

Plaintiff - Appellee,

v.

Bob Emmons, Individually and as Assistant District Attorney of Nassau County, New York, William Wallace, Individually and as Assistant District Attorney of Nassau County, New York, Mike Falzarno, Individually and as Special Investigator for the Office of the District Attorney of Nassau County, New York,

Defendants - Appellants,

Larry Guerra, City of New York, Rhoda Zwicker, Individually and as a Clerk in the Nassau County District Attorney's Office, Nassau County, New York, Nassau County District Attorney's Office, Katherine Rice, Individually and as District Attorney of Nassau County, New York, Christina Sardo, Individually and as Assistant District Attorney of Nassau County, New York, Nassau County, New York, Denis E. Dillon, Individually and as Former District Attorney of Nassau County, New York, Lisa Bland, Individually and as Attorney for the Police Department of the City of New York, Tefta Shaska, Individually and as a Detective for the Police Department of the City of New York, New York City Police Department, Robert Vinal, Individually and as Deputy Commissioner of the Police Department of the City of New York, John and Jane Does, 1-20, Unknown Individuals and Employees of the Nassau County District Attorney's Office, Phillip Wasilausky, Individually and as Assistant District Attorney of Nassau County, New York,

Defendants.

ORDER

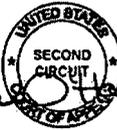
Docket No: 17-869

Appellee, Anthony Conte, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

**Additional material
from this filing is
available in the
Clerk's Office.**