

DISTRICT COURT OF THE COUNTY OF SUFFOLK, FIRST DISTRICT

Present:

HON DENNIS M. COHEN
JUDGE

Date October 15, 2010

NEW YORK MERCHANTS
PROTECTIVE CO., INC.,

Plaintiff,

AGAINST

LEONARD TRINAGEL,

Defendant.

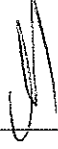
Upon the following papers numbered 1 to 4 read on this motion to strike from trial calendar and cross-motion to strike counterclaims
Notice of Motion/Order to Show Cause and supporting papers 1, 2;
Notice of Cross-Motion and supporting papers 3, 4;
Answering Affidavits and supporting papers _____;
Replying Affidavits and supporting papers _____;
Filed Papers _____; Other _____
(and after hearing counsel in support of and opposed to the motion) it is,

ORDERED that this motion by the defendant for an order striking this action from the trial calendar is granted to the extent that the trial of this action shall be stayed for a period of sixty (60) days from the date of the Court's mailing of a copy of this order. During that time the plaintiff is directed to appear for examination before trial, to be conducted at an EBT room of the First District Court on December 17, 2010, at 10:00 a.m., or at such other time and location as the parties may agree to by written stipulation filed with the Clerk of the Court.

Plaintiff's cross-motion for an order striking defendant's first and second counterclaims is granted in accordance with the counterclaim waiver clause in the contract between the parties. While such a clause is not enforceable for a viable counterclaim sounding in fraud (see *EAB v. Mr. Wemmick Ltd.*, 160 A.D.2d 905 [2d Dept. 1990]), the first counterclaim is not viable as the only fraud alleged therein relates to breach of contract. See, *Mastropieri v. Solmar*, 159 A.D.2d 698 (2d Dept. 1990). The cross-motion is therefore granted.

New Court Date: 11/25/10 9am

Dated: NOV 19 2010



J.D.C.

Hon. Dennis M. Cohen

Decision to be published on line: yes no

MAILED NOV 23 2010