IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE INTERLAKE STEAMSHIP COMPANY	:	CIVIL ACTION
v.	:	
ERIE MARINE ENTERPRISES, INC.	:	NO. 95-1695

Newcomer, J. December , 1997

M E M O R A N D U M

Presently before this Court are Plaintiff The Interlake Steamship Company's Motion for Summary Judgment, and Defendant Erie Marine Enterprises, Inc.'s response thereto, and plaintiff's reply thereto. For the following reasons, this Court will deny plaintiff's Motion.

I. Introduction

Plaintiff The Interlake Steamship Company ("ISC") operates a fleet of self-loading bulk carriers that transport cargoes of taconite (pelletized iron ore), limestone, coal and grain throughout the United States Great Lakes. ISC's ships fly the American flag and serve many of the steel mills, power plants and grain distribution centers throughout the midwest. The largest of these ships are the "thousand footers." The MESABI MINER, which is the vessel involved in this case, is a "thousand footer;" she is approximately 1004 feet long, 105 feet abeam and capable of transporting as much as 63,000 gross tons of cargo per load.

Because of the severity of winters in the Great Lakes region, even the thousand footers do not sail the entire year. They "fit-out" and commence sailing in the spring each year after the northern Great Lakes and the "Soo Locks" at Sault Ste. Marie

are free of heavy ice. Navigation continues until the return of ice and winter storms makes sailing hazardous. At the end of the navigation season, the vessels "lay-up," sending their sailors home until the following spring when the entire cycle begins anew.

Winter lay-up is a convenient time for ship owners, such as ISC, to send vessels to shipyards for drydocking and repairs to hull and machinery that can not conveniently be performed during the navigation season. Periodic drydocking, usually every five years, is required by the classification societies, such as the American Bureau of Ships ("ABS"), to permit thorough inspections of the interior and exterior of the hull plating and structure, as well as rudders, screws, shafting and machinery in the engine room. Those inspections are required to ensure that the vessel remains "in class" and eligible for hull insurance coverage. The United States Coast Guard also conducts thorough inspections of the vessel's hull and machinery, as well as life saving and navigation equipment, to ensure that the vessel is ready for service in accord with the particulars of her Certificate of Inspection.

Because of their special expertise in the repair and maintenance of hulls and machinery, shipyards, such as Erie Marine Enterprise, Inc. ("EME"), are routinely engaged by ship operators to drydock, repair and maintain ships in accord with ABS and Coast Guard requirements. As part of its services, the shipyard undertakes the necessary assistance to the owner to ensure that the vessel passes these crucial inspections so that she can resume navigating and transporting cargo. (Dave Motherwell Dep. at 41-

44). Prior to its bankruptcy and subsequent closure, EME was a shipyard and dry dock facility located in Erie, Pennsylvania. EME enjoyed the presumably valuable distinction of being the only dry dock facility on the lower Great Lakes capable of handling thousand footers.

During the late fall and early winter of 1992, ISC engaged EME to perform drydocking and related hull and machinery repair and maintenance work on two identical thousand footers, the JAMES S. BARKER and the MESABI MINER. Although a formal written contract was never drawn up between EME and ISC, EME agreed to perform the various hull and machinery repairs and maintenance work that ISC requested and that were required by the Coast Guard and ABS inspections. The invoices indicate that the value of the work performed on both ships was approximately $2,600,000.00. (Pl.'s Ex. 6). The MESABI MINER, which had sustained hull damage in a grounding, required extensive side shell plating renewal and structural repair, accounting for approximately $1,800,000 of the total invoice price. During the course of these repairs, EME also charged for other services such as shore-supplied electric power, water, and the like.

The repairs on the MESABI MINER were conducted over a period of several weeks, beginning in January 1992, when she was brought in EME's dry dock. After the replacement of hull structure and side shell plating in areas below the (navigating) water line, but before all the repairs were complete, the dry dock was partially flooded on March 22, 1992. (Motherwell Dep. at 54; John

Schermond Dep. at 12). The vessel was floated clear of the supporting blocks and moored with her port side parallel to the west side of the dry dock chamber and her bow facing north toward Lake Erie. (Motherwell Dep. at 54).

The vessel was subsequently moored to bollards along the west side of the dock with a combination of mooring wires and nylon mooring lines.[1] (Steve Nevin Dep. at 23-24, 28). ISC arranged for one of its employees, First Mate Steve Nevin, to attend on board the vessel and supervise the mooring of the vessel. Mr. Nevin chose the placement of the lines and directed the ISC and EME personnel who operated the vessel's winches and secured her mooring lines. (Nevin Dep. at 11-30).

The vessel, during this period, was "light," meaning without ballast and susceptible to reacting to the wind, and the vessel was also a "dead ship," meaning that the officers and the crew were not aboard yet. (Def.'s Mem. at 3). Accordingly, Mr. Nevin directed the placement of fifteen nylon mooring lines and wires, a greater number than that usually used for mooring. (Nevin Dep. at 13-14). Using the vessel's own power and the vessel's winches, Mr. Nevin placed the vessel's mooring lines with the specific intent of preventing the vessel from moving either fore or aft or away from the dock. (Nevin Dep. at 52-54). When Mr. Nevin

[1]Although failing to provide citations to evidence in the record, EME claims that ISC requested that the MESABI MINER remain moored in the dry dock instead of being placed at another berth outside the dry dock. ISC allegedly wanted the vessel moored in the dry dock until all of the inspections had been completed.

was satisfied that the vessel was securely moored against the side of the dock, he informed the vessel's Chief Engineer that the mooring was completed, and he then left the vessel. (Nevin Dep. at 30).

Although inside a closed dry dock chamber, the MESABI MINER had more lines down and was, in the opinion of Richard Wagner, EME's Docking Master, more secure in the dry dock than she would have been while alongside a dock during the regular navigation season. (Wagner Dep. at 16). Although the vessel was securely moored in the dry dock there remained a certain amount of "play" in the lines. (Wagner at 14-15). This play allowed the vessel to shift at her moorings in response to the wind. (Wagner Dep. at 14-15). As Docking Master Wagner concedes, this condition was not unusual because a bigger ship in the dry dock requires more play for the vessel to shift in the wind. (Wagner Dep. at 14-15, 16). Indeed, EME's Marine Superintendent, Robert Mays, acknowledges that it is more dangerous to have a ship's lines "bar tight" than it is to have them with play. (Mays Dep. at 28, 30).

As part of its services, EME supplied a stair tower and brow to communicate between the dock and the ship. (Wagner Dep. at 11, 21-22). The stair tower and brow were constructed so that personnel of EME and ISC could gain ready access to the vessel. This contraption consisted of a steel tower with stairs placed atop a flatbed trailer. (Pl.'s Ex. 11). A gangway or brow was secured to the deck of the vessel on the "ship" end. The opposite or shoreward end of the brow was equipped with a roller that rested on

a platform at the top of the stair tower. The deck of the ship, the horizontal brow, and the top of the stair tower were approximately 25-30 feet above the dock.

The stair tower and brow were designed, constructed, installed and maintained by EME as part of the contract services. (Schermond Dep. at 76; Wagner Dep. at 11; Mays Dep. at 21). At least one employee of EME has conceded that ISC had nothing to do with the design or installation of the stair tower and brow and did not interfere in any way with EME's performance of the contract services. (Wagner Dep. at 34-36).

On March 25, 1992, with the MESABI MINER moored in the dry dock, various seamen assigned to the crew of the vessel for the 1992 navigating season began reporting aboard. (Captain Mitch Hallin Dep. at 30). The vessel's Articles signed by Captain Mitch Hallin indicate that the vessel's complement, on March 25, 1992, was comprised of the Master, four deck officers, the Chief Engineer, five assistant engineers, and sixteen crew members. (Def.'s Ex. D). These crew members were called to begin fit-out preparations for the vessel's sailing, which would occur after the completion of shipyard work and redelivery of the vessel to ISC. (Hallin Dep. at 31, 36).

At the time these crew members were reporting aboard, the MESABI MINER remained in dead ship status. (Motherwell Dep. at 16; Wagner Dep. at 27). She was confined in a partially flooded dry dock that could not be opened. (Mays Dep. at 31-32; Wagner Dep. at 25). The vessel was attached to shoreside water and electrical

connections. (Wagner Dep. at 25). A telephone line was strung to the vessel for shoreside communication. (Wagner Dep. at 26). The required ABS and Coast Guard inspections had not been completed; and shipyard personnel, tools and gear were still employed on the vessel. (Motherwell Dep. at 41, 55-56). EME's work was not completed and the vessel was not redelivered to ISC until March 28, 1992, when she sailed from the dry dock. (Mays Dep. at 31-32).

On March 25, Captain Hallin performed an inspection of the vessel, including an inspection of the mooring lines, that lasted about on hour or more. (Hallin Dep. at 17, 29). Because Captain Hallin noticed that the vessel's mooring lines did not include a bow wire or stern wire, he questioned an EME foreman. Captain Hallin was informed by the EME employee that the bow and stern wires were not in place because they would interfere with EME's crane operations. After considering the placement of the lines, Captain Hallin determined that the vessel was safely moored alongside the dock. (Hallin Dep. at 57). Docking Master Wagner also believed that the vessel was safely moored in the dry dock. (Wagner Dep. at 43-44).

Later on this day, before retiring for dinner, Captain Hallin instructed Third Mate McSweeney to stand a watch at the brow. (Hallin Dep. at 55). During his watch, Third Mate McSweeney observed that the vessel was close to the dockside - within two feet - and that there was a slight wind blowing. However, after a squall line came through the area with strong winds, Third Mate McSweeney noticed that the vessel was now approximately six to

eight feet away from the dock. (McSweeney Dep. at 46-48). McSweeney did not notify anyone about the change in the vessel's position. (McSweeney Dep. at 51-52, 54).

At approximately 1800 hours on March 25, 1992, Betty Davis, a second cook, and Elvin Pennington, an engine crewman, were preparing to leave the vessel for a drive into Erie, Pennsylvania. As Davis and Pennington began to cross the brow, a gust of wind caused the vessel to shift at her moorings. The brow shifted as well. Before Davis and Pennington could get off the brow, the shoreward end of the brow rolled free of the platform on the stair tower. The brow immediately collapsed, throwing Davis and Pennington some 30 feet to the deck. Both crew members sustained severe injuries. Pennington eventually recovered and resumed work with ISC. Davis, the more seriously injured of the two, never returned to work.

After the accident, Captain Hallin ordered his crew to secure the vessel to the dock with the bow and stern lines - the lines which were not previously out because of EME's crane work. A replacement brow was set on the same stair tower and platform, and that same stair tower was used after the accident until the vessel departed.

As required by the General Maritime Law, ISC immediately began paying Mr. Pennington and Ms. Davis maintenance and cure benefits, including the costs of their extensive medical care. Both of the injured parties also presented claims to ISC for injury and damages suffered as a result of the incident of March 25, 1992

under the Jones Act, 46 U.S.C. § 688, and the General Maritime Law.

On April 4, 1992, ISC wrote to EME formally advising it of the occurrence and demanding that EME defend, indemnify and hold ISC harmless from any and all law suits or damages resulting from the accident. EME has failed, to this date, to accept this tender of the defense of these claims. Left to its own devices, and after extensive negotiations, ISC settled both claims. After settlement of the claims, ISC requested EME to reimburse it for the settlement of these claims; EME denied such reimbursement.

As a result of EME's failure to indemnify, ISC brings this action against EME for indemnification in connection with settlements ISC reached with Mr. Pennington and Ms. Davis. In its Complaint, ISC, as assignee of Mr. Pennington's and Ms. Davis' claims, sues EME in negligence for the damages incurred by Pennington and Davis. ISC, in its own capacity, asserts a breach of contract claim and a Ryan indemnification[2] claim against EME.

Presently ISC moves for summary judgment solely on its Ryan indemnification claim against EME. In its motion, ISC argues that its is entitled to be fully indemnified by EME because the elements of Ryan indemnification have been established as a matter of law. In response, EME argues that ISC is not entitled to summary judgment because the evidence raises issues of fact regarding the scope of the services provided by EME and the extent of ISC's control over the vessel, the vessel's mooring lines and

[2]The Court will describe below the nature of a Ryan indemnification claim.

the means of access at the time of the accident. In addition, EME argues that ISC has not offered any evidence as to the nature of the injuries or the payments made, and thus raises an issue as to the reasonableness of the settlement.

II. Summary Judgment Standard

A reviewing court may enter summary judgment where there are no genuine issues as to any material fact and one party is entitled to judgment as a matter of law. White v. Westinghouse Electric Co., 862 F.2d 56, 59 (3d Cir. 1988). "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a matter of law, prevail over the other." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The evidence presented must be viewed in the light most favorable to the non-moving party. Id. at 59.

The moving party has the initial burden of identifying evidence which it believes shows an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Childers v. Joseph, 842 F.2d 689, 694 (3d Cir. 1988). The moving party's burden may be discharged by demonstrating that there is an absence of evidence to support the non-moving party's case. Celotex, 477 U.S. at 325. Once the moving party satisfies its burden, the burden shifts to the non-moving party, who must go beyond its pleading and designate specific facts by use of affidavits, depositions, admissions, or answers to interrogatories showing there is a genuine issue for trial. Id. at 324. Moreover,

when the non-moving party bears the burden of proof, it must "make a showing sufficient to establish the existence of [every] element essential to that party's case." Equimark Commercial Fin. Co. v. C.I.T. Fin. Servs. Corp., 812 F.2d 141, 144 (3d Cir. 1987) (quoting Celotex, 477 U.S. at 322).

Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." White, 862 F.2d at 59 (quoting Celotex, 477 U.S. at 322). The non-movant must specifically identify evidence of record, as opposed to general averments, which supports his claim and upon which a reasonable jury could base a verdict in his favor. Celotex, 477 U.S. at 322. The non-movant cannot avoid summary judgment by substituting "conclusory allegations of the complaint . . . with conclusory allegations of an affidavit." Lujan v. National Wildlife Found., 497 U.S. 871, 888 (1990). Rather, the motion must be denied only when "facts specifically averred by [the non-movant] contradict "facts specifically averred by the movant." Id.

III. Discussion

Under a judicially created doctrine, first enunciated in Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133 (1956), "stevedores and other contractors give shipowners an implicit warranty that their services will be performed in a 'workmanlike' manner." Cooper v. Loper, 923 F.2d 1045, 1050 (3d Cir. 1991). In the Ryan case, a

longshoreman sustained injuries on board ship when a 3200 pound roll of pulp board broke loose because the loading stevedore had not properly secured it. The shipowner was found liable for the longshoreman's injuries. "The Supreme Court, however, found that a stevedore's contract includes an implied 'warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product[,]' . . . and that because the stevedore breached this warranty, it must indemnify the shipowner for its liability to the injured longshoreman." Id. (citation omitted).

Courts have also found that "[t]his warranty of workmanlike performance also runs from a wharfinger, or dock owner, to a shipowner." Oglebay Norton Company v. CSX Corp., 788 F.2d 361, (6th Cir. 1986) (citing Sims v. Chesapeake & Ohio Railway Co., 520 F.2d 556, 561 (6th Cir. 1975); Medomsley Steam Shipping Co v. Elizabeth River Terminals, Inc., 354 F.2d 476 (4th Cir. 1966); Ammesmaki v. Interlake Steamship Co., 342 F.2d 627 (7th Cir. 1965); National Marine Service, Inc. v. Gulf Oil Co., 433 F. Supp. 913 (E.D. La. 1977); Western Tankers Corp. v. United States, 387 F. Supp. 487 (S.D.N.Y. 1975)). In the Sims case, the Sixth Circuit explicitly stated that:

> The nature of the services performed by the wharfinger determines the extent of the warranty. . . . The implied warranties of a wharfinger relate to the conditions of the berths and the removal of dangerous obstructions or giving notice of their existence to vessels about to use the berths. . . . A wharfinger also owes a duty to furnish a safe means of egress and ingress to berthed ships.

Sims, 520 F.2d at 561 (emphasis added).

Although a stevedore or other contractor impliedly warrants that their services will be performed in a "workmanlike" manner,[3] a stevedore or contractor does not "impliedly contract to provide indemnity under all circumstances, however." Cooper, 923 F.2d at 1050. "If a [contractor] can prove that the shipowner's conduct prevented or seriously impeded the stevedore from performing in a workmanlike manner, then indemnity will be denied." Id. at 1050-51 (citing Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563, 567, 78 S. Ct. 438, 440, 2 L. Ed. 2d 491 (1958); Humble Oil & Refining Co. v. Philadelphia Ship Maintenance Co., 444 F.2d 727, 733 (3d Cir. 1971)).[4]

Because Ryan indemnification claims "rest on the theory that the [contractor] has an implied contractual duty to render workmanlike service, tort principles of contribution do not apply." Cooper, 923 F.2d at 1051 (citing Italia Societa, 376 U.S. at 321). Ryan indemnification actions are not resolved by apportioning fault pursuant to some vague notion of equity:

The Ryan doctrine is not, however, a precision instrument

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[3]In subsequent cases, the Supreme Court also found that "the warranty of workmanlike service can be breached and indemnity awarded even if the contractor has not acted negligently when furnishing latently defective equipment." Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315, 84 S. Ct. 748, 11 L. Ed. 2d 732 (1964).

[4]The Supreme Court has stated that the goal of the Ryan indemnification doctrine is to ensure that "liability . . . fall[s] upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury." Italia Societa, 376 U.S. at 324.

> for allocating the burden according to the relative amounts of fault, but a rough all-or-nothing device. Even where the shipowner and the contractor are both at fault, under the Ryan warranty doctrine indemnity will be allowed wholly or not at all . . . .

Parfait v. Jahncke Service, Inc., 484 F.2d 296, 302 (5th Cir. 1973). See also Dobbins v. Crain Bros., Inc., 567 F.2d 559 (3d Cir. 1977); Gilchrist v. Mitsui Sempaku K.K., 405 F.2d 763, 768 (3d Cir. 1968). Thus, a shipowner's own negligence, whether construed as active or passive, will not preclude recovery under Ryan indemnification unless the shipowner's conduct "prevented or seriously impeded" the contractor from performing in a workmanlike manner.

Applying these principles to the facts of this case, the Court finds that although ISC sets forth a strong case against EME on its Ryan claim, the Court must still deny ISC's motion because there exist some genuine issues of material fact.

Although the Court is denying plaintiff's motion for summary judgment, such a motion is not denied on the grounds that ISC failed to establish that EME's provision and maintenance of the stair tower and brow was within its scope of services or that there existed no implied warranty. Despite EME's implied argument to the contrary, the Court finds that the provision and maintenance of the stair tower and brow, permitting ingress and egress from the MESABI MINER while in dry dock, was within the scope of services that EME owed to ISC.

As a matter of law, a wharfinger or dock owner owes a shipowner a duty to furnish a safe means of ingress and egress to

berthed ships. Ogelbay, 788 F.2d at 365 (citations omitted). In this case, the MESABI MINER was in the dry dock of EME for the purpose of allowing EME to perform drydocking and related hull and machinery repair and maintenance work. Under the law, EME, as the shipyard and dock owner, owed a duty to furnish a safe means of ingress and egress from the MESABI MINER which was moored in its dry dock. Id. This conclusion is also supported by the deposition testimony of EME's own employees. Indeed, employees of EME testified that the stair tower and brow were designed, constructed, installed and maintained by EME as part of the services that it provided to ISC. (Schermond Dep. at 76; Wagner Dep. at 11; Mays Dep. at 21). There exists nothing in the summary judgment record that would suggest that EME did not agree to provide and maintain the stair tower and brow as part of its services owed to ISC. Thus, the Court finds as a matter of law that EME agreed to provide and maintain the stair tower and brow as part of its services.

Because EME agreed to provide the services of designing, constructing and maintaining the stair tower and brow, EME also gave ISC, as the shipowner of the MESABI MINER, an implicit warranty that its services would be performed in a workmanlike manner. Cooper, 923 F.2d at 1050. The essence of a contractor's Ryan warranty of workmanlike performance is to perform its work "properly and safely." Ryan, 350 U.S. at 133. In this case, EME thus had to provide and maintain the stair tower and brow in a reasonably proper and safe manner.

On this ground, ISC has satisfied its initial burden of

identifying evidence which shows an absence of a genuine issue of material fact concerning EME's failure to provide and maintain the stair tower and brow in a reasonably proper and safe condition. First, evidence indicates that EME "had the watch" on setting up and maintaining the stair tower and brow. (Mays Dep. at 21). Second, evidence indicates that EME employees were aware that even a moored ship in dry dock must have some "play" in its mooring lines and that the ship must be permitted to move while it is moored. (Mays Dep. at 28). Thus, EME had knowledge that the MESABI MINER would and must be able to move while moored in dry dock. Third, Ronald Peterson, an expert in Great Lakes shipyard operations, opines that good shipyard practice required the brow connected to the MESABI MINER to be "fail safe," that is, there must have been a means of ensuring that, if the shoreward end of the brow became separated from the stair tower, the brow would remain in the horizontal position. (Pl.'s Ex. 12). Based on these facts, ISC has established that there is no genuine issue of material fact that the stair tower and brow were not reasonably safe.

Because ISC has satisfied its summary judgment burden with respect to the issue of whether EME breached its warranty of workmanlike services, EME must identify evidence that demonstrates that there is a genuine issue of material fact. Although EME has not produced much evidence on this issue, EME has identified some evidence which puts into dispute the question as to whether EME breached its warranty of workmanlike services by failing to provide

and maintain the stair tower and brow in a reasonably safe manner. In this regard, EME points to a report of its expert, Captain William Abernathy, in which Captain Abernathy opines that the stair tower and brow were "safe" and that the accident occurred not due to conduct on the part of EME but rather due to conduct of ISC in mooring the MESABI MINER. (Def.'s Ex. F). This evidence puts into dispute the issue as to whether the stair tower and brow were in a reasonably safe manner or whether it was in such an unsafe condition that EME can be found to have breached its warranty of workmanlike performance.

In addition to this factual dispute, EME has also produced some evidence that would support its contention that ISC prevented or seriously impeded it from performing in a workmanlike manner. As stated above, if a contractor can prove that a shipowner's conduct prevented or seriously impeded it from performing in a workmanlike manner, indemnity will be denied. Cooper, 923 F.2d at 1050-51 (citation omitted). In this case, EME has identified evidence, in the form of Captain William Abernathy's proposed testimony, that ISC's conduct in mooring the MESABI MINER and failing to adjust the position of the vessel after noticing its movement on the day of the accident caused the underlying accident. This evidence, if credited by the jury, may be enough to establish that ISC prevented or seriously impeded EME in performing in a workmanlike manner.

Although this Court recognizes that ISC has identified a great deal of evidence that would establish that the MESABI MINER

was under the control of EME while in dry dock, and thus ultimately responsible for the mooring of the vessel, this Court cannot conclude as a matter of law that ISC did not prevent or seriously impede EME from performing in a workmanlike manner. This issue is not one for the Court but rather one for the finder of fact.

Because ISC has failed to demonstrate there exists no genuine issues as to any material fact and that it is entitled to judgment as a matter of law, the Court will deny ISC's motion for summary judgment.

IV. Conclusion

Accordingly, for the foregoing reasons, the Court will deny plaintiff's Motion for Summary Judgment.

An appropriate Order follows.

Clarence C. Newcomer, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE INTERLAKE STEAMSHIP COMPANY	:	CIVIL ACTION
v.	:	
ERIE MARINE ENTERPRISES, INC.	:	NO. 95-1695

O R D E R

AND NOW, this day of December, 1997, upon consideration of Plaintiff The Interlake Steamship Company's Motion for Summary Judgment, and Defendant Erie Marine Enterprises, Inc.'s response thereto, and plaintiff's reply thereto, it is hereby ORDERED that said Motion is DENIED.

AND IT IS SO ORDERED.

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Clarence C. Newcomer, J.