

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

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| GALT CAPITAL, LLP, and BRUCE |) | |
| RANDOLPH TIZES, |) | |
| |) | Civil No. 2002-63 |
| Plaintiffs, |) | |
| |) | |
| v. |) | |
| |) | |
| EDWARD A. SEYKOTA, |) | |
| |) | |
| Defendant. |) | |
| |) | |
| |) | |
| |) | |
| EDWARD A. SEYKOTA, |) | |
| |) | |
| Counterclaimant and |) | |
| Third-party Plaintiff, |) | |
| |) | |
| v. |) | |
| |) | |
| GALT CAPITAL, LLP, and BRUCE |) | |
| RANDOLPH TIZES, |) | |
| |) | |
| Counterclaim Defendants, |) | |
| |) | |
| and SYDNEY STERN, |) | |
| |) | |
| Third-party Defendant. |) | |
| |) | |

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| SYDNEY C. STERN, |) | |
| |) | Civil No. 2002-134 |
| Plaintiff, |) | |
| |) | |
| v. |) | |
| |) | |
| EDWARD A. SEYKOTA, |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

Attorneys:

A. Jeffery Weiss, Esq.
 St. Thomas, U.S.V.I.
For Sydney C. Stern,

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 St. Thomas, U.S.V.I.
For Edward A. Seykota.

MEMORANDUM OPINION

Before the Court is the motion of Edward A. Seykota ("Seykota") for summary judgment against Sydney C. Stern ("Stern") on several claims in *Galt v. Seykota*, Civil No. 2002-63 and *Stern v. Seykota*, Civil No. 2002-134.

I. BACKGROUND

Stern and Seykota met in New Jersey in 1997. Shortly thereafter they began a romantic relationship. Stern moved in with Seykota to perform household tasks and care for his two children.

In December, 1997, Stern and Seykota moved to Nevada, where Seykota began his own investment business (the "investment business" or the "business"). Stern alleges that she and Seykota were partners in the business. Stern further alleges that they agreed Seykota would conduct the trading and she would manage the rest of the work.¹ According to Stern, the parties agreed to split the performance profits equally, but she did not receive any payments, because under their agreement Seykota continually reinvested profits.

In August, 2000, Seykota left his investment business to start Galt Capital LLP ("Galt") with Bruce Randolph Tizes ("Tizes"). According to Stern, the nature of her business agreement with Seykota changed when Seykota started Galt. Stern has stated that Tizes took over managing business aspects of the investments, while she continued to perform clerical tasks.

Stern and Seykota relocated to the Virgin Islands in early 2001. Seykota purchased condominiums in Secret Harbor (the "condominiums" or the "property") and began construction on a home in Estate Peterborg.

In May, 2001, Stern alleges that Seykota promised her ownership of the condominiums, where he intended for her to

¹ Stern claims that her tasks included taking care of the clients, researching stock, paying bills for the business, billing clients, investigating hedge fund management, meeting with brokers, and renegotiating brokers' turnaround fees "among a myriad of other things." See Stern Dep., Aug. 27, 2002 at 44.

reside when he moved to Estate Peterborg. In reliance on this promise, Stern claims that she managed renovations on the condominiums while investing \$52,000 of her own money in the improvements.

During their time in St. Thomas, Stern alleges that Seykota became increasingly hostile, causing her to suffer anxiety attacks and depression. Stern further alleges that her condition became so severe that she required counseling and medication.

In February, 2002, Seykota permanently left St. Thomas and returned to Nevada. Shortly after Seykota left, he told Stern to vacate the condominiums.

On April 3, 2002, Galt and Tizes filed Civil No. 2002-63, naming Seykota as the sole defendant. On June 10, 2002, Seykota filed an answer, and a third-party complaint against Stern.¹ Seykota alleged, *inter alia*, that he has a right to recover the condominiums from Stern's possession, and to get damages for wrongful possession. Stern filed a counterclaim against Seykota (the "Stern Counterclaim"). Stern also initiated a separate action in the Virgin Islands Superior Court against Seykota (the "Stern Complaint"). Seykota removed Stern's separate action to this Court, where it was assigned Civil No. 2002-134.

¹ Confusingly, this document is labeled as "counterclaims" and includes its allegations against Stern, a third-party defendant, alongside its claims against the plaintiff.

In the Stern Counterclaim, Stern alleges ten counts against Seykota. With respect to the investment business, Stern claims breach of contract, unjust enrichment, intentional misrepresentation, and detrimental reliance. With respect to the condominiums, Stern claims an equitable lien, unjust enrichment, and breach of contract. Stern also claims that Seykota owes her damages for negligent infliction of emotional distress, intentional infliction of emotional distress and slander. Three of the counts in Stern's Counterclaim are re-alleged in Stern's Complaint.² Stern also alleges a unique claim in Count III of her complaint: intentional misrepresentation with regard to the condominiums.

Seykota seeks summary judgment on his third-party claim for recovery of the condominiums. Seykota also seeks summary judgment on all the claims brought by Stern.

II. DISCUSSION

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P.

² Specifically, Count I of Stern's Complaint is identical to Count V of Stern's Counterclaim; Count II of Stern's Complaint is identical to Count VI of Stern's Counterclaim; and Count IV of Stern's Complaint is identical to Count IX of Stern's Counterclaim.

56(c); see also *Hersh v. Allen Prod. Co.*, 789 F.2d 230, 232 (3d Cir. 1986).

The movant has the initial burden of showing there are no "genuine issues of material fact," but once this burden is met the non-moving party must establish specific facts showing there is a genuine issue for trial. *Gans v. Mundy*, 762 F.2d 338, 342 (3d Cir. 1985). A genuine issue of material fact exists when "there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Anderson*, 477 U.S. at 249. In making this determination, this Court draws all reasonable inferences in favor of the non-moving party. See *Bd. of Educ. v. Earls*, 536 U.S. 822, 850 (2002).

III. ANALYSIS

A. Seykota's Action for Recovery

Seykota argues that he owns the condominiums, and is entitled to eject Stern and recover for damages that he incurred when Stern refused to vacate the property.

However, because material facts remain in dispute, Seykota is not entitled to summary judgment on his recovery claim.

B. Stern's Counterclaim and Complaint

i. Breach of Contract

In Count I of Stern's Counterclaim, she alleges breach of contract. To succeed on a breach of contract claim, a plaintiff

must show four elements: (1) an agreement, (2) a duty created by that agreement, (3) a breach of that duty, and (4) damages. See *Stallworth Timber Co. v. Triad Bldg. Supply*, 968 F. Supp. 279, 282 (D.V.I. App. Div. 1997); see also Restatement (Second) of Contracts §§ 235, 237, 240 (1965) (defining breach of contract).

Seykota argues that the Statute of Frauds bars Stern from any recovery on her breach of contract claim involving the investment business. He relies on the mistaken belief that Stern's claims involve an agreement for services over one year, and therefore must be committed to writing to have any legal effect. Seykota ignores the Restatement's clear directive that "[c]ontracts of uncertain duration are simply excluded" from the Statute of Frauds. Restatement (Second) of Contracts, § 130 cmt. a (1981).

Stern's claims rely on a contract for services that did not state any clear duration. Accordingly, Seykota cannot succeed on a Statute of Frauds defense with respect to this claim.

Seykota further argues that Stern cannot succeed on her breach of contract claim with respect to the partnership, because the parties never entered the contract she alleges. He relies on his own deposition denying the existence of an agreement.

However, Stern refutes this in her deposition, stating "[t]he deal was that I would handle the business side. . . . He

would do all the trading. . . . And we would split profits, performance profits 50-50." Stern Dep., Aug. 27, 2002, at 60.

Because there are material facts in dispute, Seykota's motion for summary judgment on Count I of Stern's Counterclaim will be denied.

ii. Unjust Enrichment

In Count II of Stern's Counterclaim, she alleges that Seykota was unjustly enriched by her work for the investment business. An unjust enrichment claim requires proof of four elements: (1) a clear and definite verbal agreement, (2) the defendant's knowledge and intent to enter into the agreement, (3) a benefit conferred upon the defendant as a result of the agreement; and (4) that "equity and good conscience" require the defendant return the benefit to the plaintiff. See *Gov't Guar. Fund. Of Fin. v. Hyatt Corp.*, 955 F. Supp. 441, 460 (D.V.I. 1997); *Pourzal v. Marriott Intern'l, Inc*, Civil No. 2001-140, 2006 WL 2471818 at *3 (D.V.I., August 18, 2006)(not for publication).

Seykota argues that Stern cannot show any of these elements. First, Seykota relies upon his deposition, which states that he never agreed to pay Stern fifty percent of the performance profits. This is flatly disputed by Stern in her deposition.

Second, Seykota relies on his deposition as evidence that

Stern did little work for the investment business. Again, Stern disputes this claim in her deposition and affidavit, which state that Stern worked extensively for the investment business.

Seykota's version of events is disputed on almost every point. As a result, his motion for summary judgment on Count II of Stern's Counterclaim will be denied.

iii. Intentional Misrepresentation

In Count III of Stern's Counterclaim, she alleges that Seykota intentionally misrepresented her compensation for work in the investment business.

The Court must consider Stern's claims for intentional misrepresentation in light of the alleged contract she and Seykota entered compensating her for her work in the investment business. When an action in tort accompanies a breach of contract claim, the allegations of tortious conduct must arise from "a duty or obligation... independent of that arising out of the contract itself." *See Jo-Ann's Launder Ctr, Inc. v. Chase Manhattan Bank, N.A.*, 854 F. Supp. 387, 392 (D.V.I. 1994) (granting a motion for summary judgment). In assessing whether such a duty exists, "[t]he gist of the action test is used to 'determine whether tort claims that accompany contract claims should be allowed as freestanding causes of action or rejected as illegitimate attempts to procure additional damages for a breach

of contract." *Charleswell v. Chase Manhattan Bank, N.A.*, 308 F. Supp.2d 545, 567 (D.V.I. 2004)(internal quotations omitted) (granting a motion to dismiss for failure to state a claim).

The gist of the action test requires that the Court consider the essential nature of the claim as distinguished between contract and tort on a basis of the duties allegedly breached. See *Charleswell*, 308 F. Supp.2d at 567. "An independent tort action is not cognizable where there is no duty owed to the plaintiff other than the duty arising out of the contract itself." *Int'l Minerals and Mining Corp. v. Citicorp N. Am., Inc.*, 736 F. Supp. 587, 596 (D.N.J. 1990).

Stern's intentional misrepresentation claim arises entirely from her allegations that Seykota breached their alleged agreement that "all profits from the [investment] business endeavors would be shared equally between [the parties] and that Seykota would take charge of investing all profits...." See Stern Counterclaim, July 26, 2002, at ¶ 58; see also *id.* at ¶ 67 (claiming that as a result of the intentional misrepresentation, Stern "is entitled to money damages representing the monies due from Seykota pursuant to the agreement"). Seykota's alleged duties to share profits with Stern, and manage investment are identical to his duties under the contract. Cf. Stern Dep., Aug. 27, 2002, at 60 (describing the alleged contract).

Stern has failed to allege independent tortious conduct. Accordingly, Seykota is entitled to judgment as a matter of law. His motion for summary judgment on Count III of Stern's Counterclaim will be granted.

iv. Detrimental Reliance

In Count IV of Stern's Counterclaim, Stern alleges that she is entitled to damages because she detrimentally relied on Seykota's promise to give her fifty percent of the performance profits. By itself, detrimental reliance is not a cognizable legal claim. Rather, detrimental reliance is an element of intentional misrepresentation. See Restatement (Second) of Torts, at § 525 (1965) (providing the elements for intentional misrepresentation). At best, Count IV supplements Stern's earlier intentional misrepresentation claim. Significantly, it fails to state a claim. Accordingly, Seykota's motion for summary judgment on Count IV of Stern's Counterclaim will be granted.

v. Equitable Ownership/ Equitable Lien

In Count V of Stern's Counterclaim and Count I of Stern's Complaint, she alleges that Seykota's promise to give her the condominiums prompted her to invest money and labor in renovations. As a result, Stern claims she is entitled to an equitable lien on the property.

"An equitable lien, is, as the name implies, a creature of equity; it is the right, not recognized by law, to have a fund or specific property applied to the payment of a particular debt and is based upon the older equitable doctrine of unjust enrichment." *Am. Fidelity Fire Ins. Co. v. Construcciones Werl, Inc.*, 407 F. Supp. 164, 182 (D.V.I. 1972); see also *United States v. Francis*, 623 F. Supp. 535, 538 (D.V.I. 1985) ("The purpose in granting an equitable lien is not to give [the plaintiff] a profit, but rather to return... the value of the benefit conferred."). To establish an equitable lien case, the plaintiff must show that the parties agreed that the property at issue would be used to satisfy a specific debt. See *Am. Fidelity Fire Ins. Co.*, 407 F. Supp. at 183.

In his deposition, Seykota states that he never intended to use the property as a means of compensating Stern for her work on the renovations.

To counter Seykota, Stern offers her affidavit, which states:

In May 2001, Seykota informed me that the Secret Harbor condominiums would be my home after the completion of renovations.

...

I began to renovate the condominium units in or about June of 2001. In reliance on Seykota's promise, I paid in excess of \$52,000 in renovation costs. All renovations were paid for by me directly, or by me through the distribution of my profits from the partnership.

See Stern Aff., January 25, 2005; Opp. to Summ. J., Ex 2 at ¶¶ 35, 36. It is undisputed that Stern renovated the condominiums under the impression that her labor and investments would directly benefit her. Significantly, however, it is also undisputed that Seykota did not ask Stern to invest her own money to renovate the property; and that Seykota did not agree to convey the condominiums to Stern as payment for the renovations.

As a result, Seykota's motion for summary judgment will be granted on Count V of Stern's Counterclaim, and Count I of Stern's Complaint.

vi. Unjust Enrichment

In Count VI of Stern's Counterclaim and Count II of Stern's Complaint, she alleges that Seykota was unjustly enriched by her work renovating the condominiums.

There are genuine issues of material fact surrounding Count VI of Stern's Counterclaim, and Count II of Stern's Complaint. Accordingly, Seykota's motion for summary judgment will be denied as to these claims.

vii. Breach of Contract

Stern alleges that Seykota breached a contract to give her the condominiums in exchange for her work within one year from their relocation in St. Thomas.

Seykota argues that he is entitled to summary judgment, because, as stated in his deposition, there was never a contract to give Stern ownership of the property in exchange for her work.

Stern responds by presenting her own affidavit, stating that Seykota did, in fact promise to transfer ownership. However, Stern never provides any evidence of consideration. At best, Stern has shown that Seykota promised to give her the condominiums as a gift. Stern conveyed nothing in return.³

It is well-established that "the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration." Restatement (Second) of Contracts, § 17 (1981).⁴ Accordingly, "[m]ere expression of an intention to make a gift of land is not sufficient to entitle a person to specific performance of a contract to convey...." *Stein v. Green*, 128 N.E.2d 734 (Ill. 1995).

Stern has failed to provide any evidence to place in dispute Seykota's statement that there was no contract. Accordingly,

³ For example, according to Stern's deposition, Stern states that in 1999, Seykota told her:

He would provide for me. I didn't have to worry. He was managing our money. He was going to give me a house. I would be well.

See Stern Dep., Aug. 27, 2002, at 146.

⁴ The Restatement outlines limited exceptions to this general rule, such as payment for previous benefits and promises to perform voidable duties. See Restatement (Second) of Contracts, §§ 82-94. However, none of these exceptions apply to Stern's allegations.

Seykota is entitled to judgment as a matter of law. Seykota's motion for summary judgment will be granted on Count VII of Stern's Counterclaim.

viii. Negligent Infliction of Emotional Distress

In Count VIII of Stern's Counterclaim, she alleges that various acts by Seykota, including threatening to turn off the condominiums' utilities and degrading verbal and physical conduct, amount to negligent infliction of emotional distress.

To prevail on a claim of the negligent infliction of emotional distress, the plaintiff must show not merely emotional disturbance, but also bodily harm or other compensable damages. See Restatement (Second) of Torts, § 436A (1965); *accord Lempert v. Singer*, 776 F. Supp. 1356 (D.V.I. 1995) (holding that, absent physical harm, a plaintiff cannot prevail on negligent infliction of emotional distress).

Seykota argues that he is entitled to summary judgment, because Stern has failed to show any physical injury in relation to his conduct.

The record contains no evidence that Stern suffered a physical injury. Indeed, Stern does not even allege that such an injury occurred.

Accordingly, Seykota will be granted summary judgment on Count VIII of Stern's Counterclaim.

ix. Intentional Infliction of Emotional Distress

In Count IX of Stern's Counterclaim and Count IV of Stern's Complaint,⁵ she alleges that Seykota's conduct amounts to the intentional infliction of emotional distress.

The tort of intentional infliction of emotional distress requires "extreme and outrageous conduct [that] intentionally or recklessly causes severe emotional distress to another...." Restatement (Second) of Torts, § 46 (1966). Courts have divided this requirement into four separate inquiries: "(a) deliberate or reckless infliction of mental suffering, (b) outrageous conduct, (c) the conduct must have caused the emotional distress; and (d) the distress must be severe." See, e.g., *Watson v. Bally Mfg. Corp.*, 844 F. Supp 1533, 1536 (S.D. Fla. 1993)(following the Restatement in accordance with Florida law).

Seykota admits that he and Stern had a strained relationship after he left St. Thomas, but he denies that any of his conduct was so outrageous that it would cause the intentional infliction of emotional distress.

The Restatement defines outrageous conduct as "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Restatement (Second) of Torts, § 46 cmt. d (1965);

⁵ Count IV of Stern's Complaint is mislabeled as "Negligent Infliction of Emotional Distress."

see also *Heywood v. Cruzan Motors, Inc.*, 762 F.2d 367, 372 (3d Cir. 1986) (When there is no physical injury, "the conduct is expected to be sufficiently extreme... to guarantee a claim is genuine")(internal quotations omitted).

Stern alleges that several of Seykota's actions amounted to outrageous conduct, including repeated insults about her appearance and references to her as "a grotesque piece of property," as well as a two-to-three hour tirade, in which Seykota yelled that she was "crapping on him" and that he would "break" her. See Stern Aff., January 25, 2005; Opp. to Summ. J., Ex 2 at ¶ 40.

According to Stern's affidavit, Seykota's abuse was both severe and persistent. Several factors from Stern's evidence satisfy the legal requirements for intentional infliction emotional distress.

First, by controlling Stern's living situation and finances, Seykota held a position of power over Stern.⁶ A reasonable jury could find that he abused that power by verbally assaulting her. As a matter of law, "[t]he extreme and outrageous nature of the conduct may arise not so much from what is done as from abuse by

⁶ It is undisputed that Seykota controlled Stern's living arrangements and finances. Indeed, Stern alleges that Seykota used this position to gain leverage over her. See, e.g., Stern Aff., January 25, 2005; Opp. to Summ. J., Ex 2 at ¶ 40 ("When I hesitated to return [to living with Seykota], he... told me that I would never receive my share of the partnership profits if I did not come back to him.")

the defendant or some relation or position which gives him actual or apparent power to damage the plaintiff's interests." *Milton v. Ill. Bell Tel. Co.*, 427 N.E.2d 829, 832 (Ill. App. 1981)(quoting PROSSER ON TORTS, 4th Ed., p. 56); accord Restatement (Second) of Torts, § 46 cmt. e (1965).

Additionally, the evidence suggests that Seykota knew Stern was particularly sensitive to comments about her appearance, and that he intentionally berated her physical faults to belittle her.⁷ When a defendant knows that the plaintiff is peculiarly susceptible to emotional distress, conduct that exploits the plaintiff's sensitivity can give rise to a claim for intentional infliction of emotional distress. See Restatement (Second) of Torts, § 46 cmt. f (1965); see also *Anderson v. Prease*, 445 A.2d 612, 613 (D.C. App. 1982)(applying this principle when a doctor knew his patient's unique susceptibility to anxiety).

⁷ Stern's affidavit contains a detailed account of this abuse:

[After an argument], Seykota developed new tactics to humiliate and hurt me. During 1992...I was involved in a severe automobile accident... I...remain horribly scarred to this day. After the accident I had very little scalp hair, and cosmetically required a wig. Seykota regularly engaged in 'philosophical' discussions with me and the children about my unfavorable physical differences, scars, weight gain, skin and hair. He nearly nightly opined that I could not 'compete against a more perfect woman.' As a punishment 'exercise' he 'philosophized' about a woman less damaged, with thicker hair, nicer and tighter skin and no scars. He catalogued each of my deformities and discussed them one by one....

See Stern Aff., January 25, 2005; Opp. to Summ. J., Ex 2 at ¶ 40.

Finally, in Stern's affidavit, she states that Seykota repeated the offensive conduct regularly over the several months that they resided in St. Thomas. Other courts have noted that "[a]lthough insulting language intended to denigrate a person may not, in and of itself, rise to the required level of extreme and outrageous conduct, liability may be premised on such expressions where... defendants' campaign of harassment and intimidation is constant." See, e.g., *Mitchell v. Giambruno*, 35 A.D.3d 1040, 1040 (N. Y. App. Div. 2006) (holding that neighbors repeated harassment of a same sex couple rose to the level of intentional infliction of emotional distress); accord *Ford v Hutson*, 276 S.E.2d 776, 781 (S.C. 1981) (holding that the defendant's two-year campaign of assailing plaintiff with profane remarks could amount to intentional infliction of emotional distress).

Given this evidence, a reasonable jury could find that Seykota's treatment of Stern was atrocious. Accordingly, Seykota's motion for summary judgment on Count IX of Stern's Counterclaim, and Count IV of Stern's Complaint will be denied.

x. Slander

In Count X of Stern's Counterclaim, she alleges that Seykota slandered her by falsely telling her sister, Tizes and unnamed third parties that Stern had stolen money from Seykota.

A successful defamation claim has four elements: (1) a false and defamatory statement concerning the plaintiff; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) special harm.⁸ See Restatement (Second) of Torts, § 558 (1965). Special harm is defined by the Restatement as "the loss of something having economic or pecuniary value." *Id.* at § 575 cmt. b.

Seykota argues that Stern has not presented any evidence that Seykota made the alleged false statement. He also argues that there is no evidence Stern suffered any special harm. Stern has done nothing to refute Seykota on this point.

Because there is no genuine issue of material fact and because Seykota is entitled to judgment as a matter of law on this count, summary judgment will be granted on Count X of Stern's Counterclaim.

xi. Intentional Misrepresentation

In Count III of Stern's Complaint, she alleges that Seykota intentionally misrepresented his plan to keep the condominiums for himself. As a result, Stern claims she invested money and labor into the property to her detriment.

⁸ Certain types of defamation do not require this fourth element, but none are applicable to Stern's claim. See *generally*, Restatement (Second) of Torts §§ 569-574 (1965) (defining libel and slander pre se, types of defamation for which no special harm is required.)

A successful intentional misrepresentation claims contains four elements: (1) a knowing misrepresentation of a material fact, (2) intent by the defendant that the plaintiff would rely on the false statement, (3) actual reliance, and (4) detriment as a result of that reliance. *See In re Tutu Wells Contamination Litig.*, 32 F. Supp. 2d 800, 802 (D.V.I. 1998).

Seykota uses his deposition to argue that Stern does not meet any of these elements. However, Stern's deposition and affidavit contradict Seykota on every relevant point. Indeed, there are numerous material facts in dispute. Seykota's motion for summary judgment on Count III of Stern's complaint will be denied.

IV. CONCLUSION

For the reasons discussed above, the Court will grant Seykota's motion for summary judgment on Counts III, IV, V, VII, VIII and X of Stern's Counterclaim, and Count I of Stern's Complaint. The Court will deny summary judgment as to all other counts.

An appropriate order follows.

July 18, 2007

s/_____
Curtis V. Gómez
Chief Judge