

2230767

DISTRICT COURT OF THE COUNTY OF SUFFOLK, FIRST DISTRICT

Present:

HON James P. Flanagan
JUDGE

Motion Date October 9, 2007

NEW YORK MERCHANTS PROTECTIVE CO., INC.

Plaintiff

-Against-

JOHN EMCHEK

Defendant

Upon the following papers numbered 1 to 4 read on this motion for leave to amend the answer
Notice of Motion/xxxxxxxxxxxxxxxxxxxx and supporting papers 1, 2
Notice of Cross Motion and supporting papers _____
Answering Affidavits and supporting papers 3
Replying Affidavits and supporting papers _____
Filed papers _____ ; Other Exhibits- 4

(and after hearing counsel in support of and opposed to the motion) it is,

ORDERED that this motion by the defendant for leave to amend his answer to interpose a counterclaim for intentional infliction of emotional distress is denied. First, the defendant's motion papers fail to allege, even potentially, a prima facie case for intentional infliction of emotional distress (see *Howell v. New York Post Co.*, 81 NY2d 115, 122). Second, the contract entered into by the parties specifically precludes the interposition of a counterclaim by the defendant. Such contractual provision is enforceable (*Fleet Bank v. Petri Mechanical Co., Inc.*, 244 AD2d 523; *New York Merchants Protective Co., Inc. v. Raia*, 5 Misc.3d 1011(A)).

Dated: October 18, 2007

Decision to be published on line Yes No

James P. Flanagan
J.D.C. #82
Mailed OCT 26 2007