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At an **IAS** Term, Part 26 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 10'' day of December, **2003**

P R E S E N T :

HON. MELVIN **S.** BARASCH,

Justice.

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34-35TH CORP.,

Plaintiff,

Index No. 17996101

- against -

1-10INDUSTRY ASSOCIATES, LLC.,

Defendant.

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The following papers numbered 1 to 13 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/C oss Motion and Affidavits (Affirmations) Annexed	1-2 5-6 10-11
Opposing Affidavits (Affirmations)	3 7-8 12
Reply Aff davits (Affirmations)	4 9 13
_____ Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers in this action for breach of a lease agreement, plaintiff 34-35th Corp. (plaintiff') moves, pursuant to CPLR 3025 (b), for leave to amend its complaint. Defendart 1-10 Industry Associates, LLC (defendant) moves, pursuant to CPLR 3212 ***(e)***, for partial summary judgment dismissing plaintiff's request for damages constituting **lost** profits. Plaintiff cross-moves, pursuant to CPLR 3212 (e), for partial summary judgment in its favor as to defendant's liability for breach of contract.

Defendant owns a commercial building complex, and from March 11, 1997 through mid-2000, plaintiff, a corporation engaged in the manufacture and processing of precious metals, occupied the basement space of building number 9 in the building complex pursuant to a five-year lease. In February 2000, prior to the expiration of the 1997 lease agreement, defendant notified plaintiff that it wished to regain possession of the leased premises and asked it if it would consent to relocate to another space within the same building complex in the basement of building number 7/8. In consideration for plaintiff's agreement to this move, defendant agreed to relocate plaintiff at defendant's expense, to provide plaintiff with a long term lease, and to perform certain work at the new leased space.

In May 2000, the parties cancelled the lease for building number 9, executed a work letter dated May 18, 2000 which identified the nature of the work to be performed in the new space, and executed a lease dated May 25, 2000 for the space in building number 7/8, which incorporated the terms of the work letter. Article 2 of the lease provided that plaintiff would use and occupy the demised premises for the warehousing of its machinery and for the manufacturing and processing of precious metals. The work letter required defendant to, inter alia, block existing openings and provide a one inch hollow block mounted horizontally for air circulation, install six windows as per plaintiff's specifications (48 x 18 max. size), install a sump pump for drainage, and install and activate 600 amps three phase electric service. On May 25, 2000, plaintiff vacated its original leased space, moved its machinery and equipment, and entered into possession of the second space.

Plaintiff asserts that he is unable to utilize the leased premises because defendant failed to perform the work required in the May 18, 2000 work letter, and that this work was necessary to make this space usable for the purposes of the lease. Consequently, on May 9,

2001, plaintiff commenced this action against defendant. Plaintiff's original complaint set forth causes of action for breach of contract, specific performance, and fraud.

By decision and order dated July 16,2002, due to plaintiff's loss of tape recordings which allegedly captured oral misrepresentations by officers of defendant upon which plaintiff's fraud claim was based, this court granted a motion by defendant for spoliation sanctions to the extent that it precluded testimony regarding any oral agreements between the parties or oral modifications to the written contract, unless the tape recordings were produced within 10 lays, and, if they were not, it dismissed plaintiff's fraud cause of action. Such tape recordings were not produced, resulting in the dismissal of plaintiff's cause of action for fraud.

Plaintiff, by its instant motion, now seeks leave to amend its complaint. In addressing this motion, the court notes that while leave to amend a pleading should be freely granted, such leave must be denied where the proposed amendment is patently lacking in merit ***(West Branch Realty Corp. v Exchange Ins. Co.,*** 260 AD2d 473,473; ***Sharon Ava & Co. v Olympic Tower Assocs.,*** 259 AD2d 315,316). A cause of action totally devoid of merit or palpably insufficient as a matter of law will not be allowed on a motion to amend pleadings ***(Probst v Cacoulidis,*** 295 AD2d 331, 332; ***Pasalic v O'Sullivan***, 294 AD2d 103, 104).

In plaintiff's proposed amended complaint, plaintiff seeks to reassert its fraud cause of action (which, as noted above, was dismissed by this court's July 16,2002 decision and order) by deleting the allegations of oral misrepresentations and maintaining only its allegations of written misrepresentations. "It is well settled [,however,] that **a** cause of action to recover damages for fraud may not be maintained when the only fraud charged relates to **a** breach of contract" ***(Alamo Contract Builders v CTF Hotel Co.,*** 242 AD2d **643,644; *see***

also WIT Holding Corp. v Klein, 282 AD2d 527,528; *Queens Group* v *Martin Packaging Corp.*, 245 AD2d 183, 183). Here, plaintiff's purported fraud cause of action is based solely upon its claim that defendant made false and material written representations that it would perform the work set forth in the May 18,2000 work letter, which is part of the May 25,2000 lease agreement, and that it did not do so.

A misrepresentation of a future intent to perform a contract in the future does not constitute a cognizable cause of action for fraud *(see Non-Linear Trading Co. v Braddis Assocs.*, 243 AD2d 107, 118; *Gordon* v ***Dino*** *De Laurentis Corp.*, 141 AD2d 435, 436). Plaintiff's allegations do not concern any material representation concerning an intention to perform a duty which is collateral or extraneous to the written contract between the parties, but relates only to the breach of those duties and obligations expressly identified in the May 25, 2000 lease agreement and May 18, 2000 work letter *(see Gupta Realty Corp. v* ***Gross,*** 251 AD2d 544, 545; *Germain* v *Staten Is. Boat* ***Sales,*** 248 AD2d 507, 507; *Alamo Contract Builders*, 242 AD2d at ***643).*** Thus, since plaintiff's proposed fifth cause of action for fraud is palpably lacking in merit, plaintiff's motion insofar as it seeks leave to amend its complaint to reassert a fraud cause of action must be denied *(see Non-Linear Trading Co.*, 243 AD2d at 117).

Plaintiff's proposed amended complaint also contains a new third cause of action for negligence, which alleges that the demised premises are unfit for use due to, inter alia, excessive water, moisture, flooding, and inadequate light and ventilation. The underlying allegations upon which plaintiff bases this cause of action, however, concern defendant's alleged failure to properly perform the May 18, 2000 work letter and May 25, 2000 lease agreement. Plaintiff cannot impose tort liability upon defendants "for failure to perform

duties allegedly owed to plaintiff pursuant to the contract between them" (***St. Patrick's Home for the Aged & Injirm v Laticrete Intl.***, 267 AD2d 166, 167; ***see also D'Ambrosio v Engel***, 292 AD2d 564,564-565; ***East Meadow Driving School v Bell Atlantic Yellow Pages Co.***,273 AD2d 270,270).

Therefore, since this proposed third cause of action does not allege any breach of duty of reasonable care by defendant which is distinct from its contractual obligations and inasmuch as plaintiff is merely attempting to recast its breach of contract claim as one in negligence ***(see New York Univ. v Continental Ins. Co.,*** 87 NY2d 308, 316; ***Probst,*** 295 AD2d at 332; ***St. Patrick's Home for the Aged & Infirm,*** 267 AD2d at 166; ***Bank Leumi Trust*** Co. ***v Block 3102 Corp.,*** 180AD2d 588, 589), this proposed cause of action is palpably insufficient as a matter of law, and leave to amend the complaint to assert it must be denied ***(see Probst,*** 295 AD2d at 332; ***East Meadow Driving School,*** 273 AD2d at 271).

Plaintiff's proposed amended fourth cause of action alleges that plaintiff was negligently responsible for two floods in the leased space which occurred on November 27,2001 and February 18,2002 (after this action was commenced), which caused damage to its machinery. Defendant, in opposition to this proposed amendment, does not assert that such proposed amendment is lacking in merit, and plaintiff has demonstrated that this claim can be supported ***(see Castillo v Henry Schein, Znc.,*** 259 AD2d 651, 651) by its reference to the statement of defendant's supervisor of operations and maintenance, at his December 11,2002deposition, that the source of the water which flooded the premises arose from pipes under the control of defendant.

Defendant, in opposing this proposed amendment, contends that it will suffer prejudice due to plaintiff's delay. Plaintiff's delay, however, was not lengthy or excessive.

Since the acts complained of occurred less than three years ago, plaintiff's negligence claim is timely asserted ***(see*** CPLR 214 [4]). Plaintiff's motion to amend the complaint was filed only shortly over one year after the February 18, 2002 flood, and it is undisputed that on February 25,2002, plaintiff had informed defendant about these alleged floods and its future intention to amend its complaint as a result of the floods. Additionally, plaintiff, in its response to defendant's first set of interrogatories, asserted that it was claiming property damage to its machinery caused by moisture. Where a proposed amendment merely adds an additionai theory of recovery based on facts as to which defendant was on notice, leave to amend a complaint should generally be granted ***(see Sheppard v Blitman/Atlas Building Corp.,*** 288 AD2d 33, 34-35; ***Bamira*** v ***Greenberg,*** 256 AD2d 237,239; ***Rogers v South Slope Holding Corp.,*** 255 AD2d 898, 898; ***Aetna Cas. and Sur.*** *Co.* ***v LFO Constr. Corp.,*** 207 AD2d 274,278).

The fact that this amendment may require defendant to conduct additional discovery does not, alone, justify denial of leave to amend ***(Garrison v Wm. H. Clark Mun. Equip.,*** 239 AD2d 742,743; ***Aetna Cas. and Sur. Co.,*** 207 AD2d at 278). Since the note of issue has been stricken, defendant is not precluded from conducting further discovery, if necessary ***(see Prote Contracting Co. v Board of Education of City of New York,*** 249 AD2d 178, 179). Thus, since defendant has failed to demonstrate any prejudice or surprise to it caused by plaintiff's delay in seeking this amendment, such amendment to assert this cause of action should be granted ***(see McCaskey, Davies & Assocs. v New York City Health & Hosp. Corp.,*** 59 NY2d 755,757; ***Noanjo Clothing*** v ***L & M Kids Fashion,*** 207 AD2d 436,437; ***Charter One Bank v Midtown Rochester,*** 191 Misc 2d 154, 156).

Plaintiff also seeks to amend its complaint to assert that it is the assignee of an entity known as Automatic Findings, Inc. (Automatic). Plaintiff claims that it assumed Automatic's manufacturing business and that Automatic transferred its machinery and equipment to it. The proposed amended complaint does not contain any allegations regarding Automatic, and it is undisputed that plaintiff is the party which entered into the lease agreement allegedly breached by defendant. However, inasmuch as this allegation may relate to plaintiff's damages, and defendant does not oppose this proposed amendment and does not assert that it would be prejudiced by it, such amendment should be permitted ***(see*** CPLR 3025 [b]; ***McCaskey, Davies & Assocs.,*** 59 NY2d at 757).

In turning to defendant's motion for partial summary judgment dismissing plaintiff's request for damages constituting lost profits, the court notes that in order to recover loss of future profits, "there must be a showing that the particular damages were fairly within the contemplation of the parties to the contract at the time it was made" ***(Kenford Co. v County of Erie,*** 67 NY2d 257, 261; ***see also RMLS Metals v International Bus. Machs. Corp.,*** 874 F Supp 74, 77 [SD NY]; ***Route 7 Mobil v Machnick Builders,*** 296 AD2d 809, 810; ***Zink v Mark Goodson Productions,*** 261 AD2d 105, 105) and "the alleged loss must be capable of proof with reasonable certainty" ***(Kenford Co.,*** 67 NY2d at 261; ***see also RMLS Metals,*** 874 F Supp at 75; ***Alamanaan Enters. v Seventh Chelsea Assocs., 303*** AD2d 161, 161; ***Route 7 Mobil,*** 296 AD2d at 810; ***Zink,*** 261 AD2d at 105; ***676 R.S.D. v Scandia Realty,*** 195 AD2d 387, 387; ***Long Is. Airports Limousine Sew. Corp. v Northwest Airlines,*** 124 AD2d 711, 713). "[D]amages may not be merely speculative" ***(Kenford Co.,*** 67 NY2d at 261; ***see also Route 7 Mobil,*** 296 AD2d at 810; ***Zink,*** 261 AD2d at 106; ***Grow Tunneling Corp. v Consolidated Edison Co. of N.Y.,*** 157 AD2d 452, 452). "If it is a new business seeking to

recover for loss of future profits, a stricter standard is imposed for the obvious reason that there does not exist a reasonable basis of experience upon which to estimate lost profits with the requisite degree of reasonable certainty" (***Kenford Co.,*** 67 NY2d at 261; ***see also RMLS Metals,*** 874 F Supp at 76; ***Pop Cowboy*** v ***175 West 73rd St. Realty Corp.,*** 292 AD2d **300,** 301; ***Zink,*** 261 AD2d at 106; ***Suffolk Sports. Ctr.*** v ***Belli Constr. Corp.,*** 212 AD2d 241,248; ***Nineteenth New York Props. Ltd. Partnership v 535 5th Operating,*** 211 AD2d 411,412; 676 ***R.S.D.,*** 195 AD2d at 387; ***Lee Kin Chiu v City of New York,*** 174 Misc 2d 422,426).

In support of its contention that damages for lost profits were not within the contemplation of the parties at the time of the entry into the May 25,2000 lease agreement, defendant points to the standard boilerplate clause contained in article 4 of the lease, which states that "[e]xcept as specifically provided . . . in this lease, there shall be no allowance to the Tenant for a diminution of rental value and no liability on the part of Owner by reason of . . . injury to business arising from Owner . . . failing to make any repairs, alterations, additions or improvements in . . . the demised premises" (***see Alamanaan Enters., 303*** AD2d at 161; ***The Gap*** v ***Red Apple Cos.,*** 282 AD2d 119, 124; ***Periphery Loungewear*** v ***Kantron Roofing Corp.,*** 190 AD2d 457,461). Plaintiff, however, asserts that this lease provision was only intended to apply to repairs that became necessary after it had taken possession of the leased prtmises and after the contracted-for work was performed and its obligation to pay rent accrued, and that such provision was not intended to apply to the specific work required to be performed under the May 18,2000 work letter and May 25,2000 lease agreement. This is disputed by defendant.

Regardless, however, of whether defendant's failure to perform the work at issue falls within the ambit of the prohibition on the recovery of lost profits provided by article 4 of the

lease, the lease does not otherwise support plaintiff's argument that the recovery of lost profits was within the contemplation of the parties at the time of its execution. The lease does not contain any clause (other than article 4) which addresses the issue of lost profits or which indicates that lost profits were available to plaintiff in the event of a breach. The lease, in article 60, only provides that the payment of rent would not commence until the work detailed in the May 18,2000 work letter had been reasonably completed. As this full abatement from the obligation to pay rent until the reasonable completion of the required work was the sole remedy specified in the lease, the provisions of the lease do not suggest or provide for such a heavy responsibility on the part of defendant as the imposition of liability for the loss of profits over the length of the lease period. Thus, based upon the proof submittec, plaintiff has not shown that damages for lost profits were within the contemplation of the parties at the time of the entry into the lease agreement ***(see*** *Kenford* Co., 67 NY2d at 262; ***RMLS Metals,*** 874 F Supp at 77; ***Route*** 7 ***Mobil Inc.,*** 296 AD2d at 810).

In any event, plaintiff cannot establish its alleged loss of profits with reasonable certainty. In support of its claim for prospective lost profits, plaintiff asserts that the entity which was to operate the business for which it currently seeks lost profits is Automatic, a corporation, which, like it, is entirely owned by Sheldon Seidman (Seidman). Plaintiff alleges that it is the assignee of Automatic. From 1997 until May 2000, Seidman's business was comprised primarily of obtaining, storing, and refurbishing jewelry-making equipment; he did not manufacture jewelry parts. Copies of the 1997-2001 tax returns for Automatic and copies of the 1997-2000 tax returns for plaintiff establish that neither Automatic nor plaintiff earned any taxable income during this time period.

In support of its claim for lost profits, plaintiff relies upon Seidman's deposition testimony that when plaintiff relocated to the new leased space, he, through Automatic, was preparing to commence jewelry manufacturing operations on a much broader scale. Plaintiff asserts that in furtherance of this new jewelry manufacturing business venture, Automatic had secured a written contract executed by Goldmark Manufacturing, Inc. (Goldmark), which guaranteed Automatic $1.2 million worth of labor charges to be billed by Automatic on its orders per fiscal year for a ten-year period. Plaintiff has also submitted the deposition testimony of Shimshon Jalas, a principal of Goldmark, wherein he testified that he was willing to act in accordance with this agreement, but that Automatic was unable to perform the contract due to flooding problems in the leased space. Seidman also stated at his deposition that the written contract with Goldmark could not be performed due to defendant's failure to provide the required 600 amps of electricity and the needed ventilation and because the space was continually flooded.

Plaintiff further relies upon Seidman's deposition testimony that there were three oral agreements reached with D & W Manufacturing Corp. (D & W), GMI Ltd. (GMI), and EEI Exclusive Enterprises, Inc., and that D & W promised to provide him with between $400,000 to $800,000 per year in labor generated revenue, and that GMI promised to provide him with about $200,000-$300,000 per year in labor generated revenue. Seidman stated that he was unable to perform these contracts due to defendant's failure to perform the required work set forth in the work letter.

The foregoing proof submitted, however, cannot establish plaintiff's claim for lost profits. Since plaintiff's business is a new start-up business with a nominal fiscal history, there is no established track record or operating history of plaintiff's business upon which

to show that plaintiff's business would have generated a profit by the performance of these contracts ***(see RMLS Metals,*** 874 F Supp at 76; 676 ***R.S.D.,*** 195 AD2d at 387). The projection of the profitability of plaintiff's performance of these contracts requires speculation and conjecture ***(see Kenford*** Co., 67 NY2d at 262; ***Lee Kin Chiu,*** 174 Misc 2d at 426). Thus, the calculation of lost profits would necessarily be unduly speculative, making it impossible for plaintiff to satisfy the legal requirement of proof with reasonable certainty ***(see Kenford*** Co., 67 NY2d at 262; ***RMLS Metals,*** 874 F Supp at 76; ***Route*** 7 ***Mobil,*** 296 AD2d at 810; ***Pop Cowboy,*** 292 AD2d at 301; ***Suffolk Sports Ctr.,*** 212 AD2d at 248; ***Nineteen New York Props.,*** 211 AD2d at 412).

In addressing plaintiff's cross motion for partial summary judgment in its favor on its breach of contract cause of action, the court notes that it is undisputed that defendant failed to install and activate 600 amps three phase electric service, failed to block existing openings and provide one six inch hollow block mounted horizontally for air circulation, and failed to install six windows as per its specifications (48 x 18 max. size), as required by the May 18, 2000 work letter. Additionally, defendant does not dispute plaintiff's evidence that although defendant did install sump pumps for drainage, as required by the terms of the work letter, the sump pumps installed were inadequate to ensure proper drainage and *dry* working conditions, and the leased space is constantly inundated with water.

Defendant, in opposition to plaintiff's cross motion, however, argues that it was not able to install the 600 amps of three phase electric service because plaintiff did not designate the location of the installation. Such argument is only supported by defendant's attorney's July 10,28001 letter, written after commencement of this litigation, which does not constitute sufficient evidentiary proof to controvert plaintiff's evidence ***(see Zuckerman*** v ***City*** of ***New***

York, 49 NY2d *557*, 563; *Menekou* v *Crean*, 222 AD2d 418,420; *Pillows v Hawes*, 138 AD2d 472,473).

There is no assertion by any of defendant's employees that plaintiff was required to direct the location where defendant was to install the 600 amps of electricity. Indeed, defendant's employees, Bruce Federman and Ephraim Fruchthandler, who were responsible for negotiating and fulfilling the terms of the work letter, testified at their depositions that plaintiff was told that 600 amps had been installed in accordance with the work letter. Bruce Federman explained that installing the 600 amps was difficult and expensive, and Ephraim Fruchthandler testified that he assumed that the 600 amps service had been installed. Thus, there was no ambiguity in the work letter as to the installation of the 600 amps, and defendant breached its contractual obligation thereunder as a matter of law *(see Zuckerman*, 49 NY2d at 562; *Titan Corp.* v *Cellular Vision Technology & Telecommunications*, 271 AD2d 437,437-438; *My Choice Fashion v Korea Exchange Bank*, 249 AD2d 456,456; *Posh Pillows*, 138 AD2d at 473).

Defendant's additional argument that plaintiff cannot show damages as to this claim, is rejected. Plaintiff has submitted its experts' reports showing that the existing electrical service was inadequate to operate its machinery. In any event, plaintiff has cross-moved for partial summary judgment on the issue of liability only, and will be afforded the opportunity, at trial, to demonstrate the damages sustained by it.

Defendant further argues that it did not mount horizontal blocks for circulation and failed to install the six windows pursuant to the terms of the work letter because plaintiff did not provide it with specifications for the location of the windows. Seidman, however, has submitted his affidavit, wherein he states that a schematic, which was initialed by him and Bruce Federman, on behalf of defendant, contemporaneously with the execution of the lease

and the work letter, identifies the location of the six **48 X 18** windows that defendant agreed to install in the leased premises. He has also submitted the initialed schematic at issue.

Defendant, in response, submits its attorney's affirmation, alleging that the schematic was fabricated. Defendant also relies upon Bruce Federman's deposition testimony. Bruce Federman, at his deposition, however, merely testified that he did not recollect putting his initials on a copy of the schematic, and conceded that the initials "look[ed] like [his]." No sworn affidavit by Bruce Federman has been submitted, in opposition to plaintiff's cross motion, stating that he did not sign the schematic or that the schematic was fabricated, or otherwise rebutting plaintiff's evidentiary proof. Thus, defendant has failed to raise a triable issue of fact as to the genuine existence and authenticity of the schematic ***(see Zuckerman,*** 49 NY2d at 562-563; ***Rotuba Extruders*** v ***Ceppos,*** 46 NY2d 223, 231; ***De Lage Landen Financial Sews.*** v ***Mannetti Assocs.,*** 305 AD2d 365,366).

Defendant also contends that, even if the schematic was not fabricated, it informed Seidman at an October 23,2000 meeting, that the proposed placements of the windows and horizontal blockings that appeared on the schematic were not feasible. Defendant argues that it, therefore, consistent with the covenant of good faith and fair dealing implied in all contracts, cannot be held liable because plaintiff was required to provide reasonable alternative locations, and that since plaintiff did not do so, its performance under the work letter was excused. Such argument is unavailing. There is no evidence that defendant offered feasible alternate locations to plaintiff and that it unreasonably rejected all of the alternate sites it was offered. Thus, there is no showing that plaintiff acted unreasonably or breached a covenant of good faith and fair dealing ***(see*** 1-10***Industry Assocs. v Trim Corp.*** of ***Am.,*** 297 AD2d 630,631-632).

As noted above, defendant does not dispute that the leased premises suffers from water leaks and excessive moisture that seeps through the walls and foundation, but it argues that there is no basis in the lease agreement or work letter for plaintiff's complaint about water problems. Defendant relies upon paragraph 21 of the lease agreement, which contains the standard clause that the tenant agrees to take the demised premises "as is."

Such reliance is misplaced. Article 4 of the May 25, 2000 lease agreement requires defendant to "maintain the exterior of and public portions of the building.'' Plaintiff has submitted the engineering report of Israel Stern, which demonstrates that the source of the leaks and seepage is from the outside walls. Additionally, article 23 of the lease agreement, entitled "Quiet Enjoyment," states that "Owner covenants and agrees with Tenant that . . . Tenant may peaceably and quietly enjoy the premises hereby demised." Article 2 of the lease agreement specifies that plaintiff was occupying the leased premises for warehousing machinery and manufacturing precious metals, and plaintiff has submitted expert reports, detailing that dry working conditions were essential to maintain and operate its machines. Thus, plaintiff has submitted uncontroverted evidentiary proof that defendant has breached these lease provisions ***(see Chan*** v ***1058 Corp.,*** 200 AD2d 434,434; ***Lanin*** v ***Thurcon Props.,*** 197 AD2d 423,424).

Therefore, in view of plaintiff's prima facie showing of its entitlement to judgment as a matter of law on the issue of defendant's liability for breach of contract with respect to the aforementioned lease terms and requirements of the work letter and defendant's failure to raise a triable issue of fact with respect thereto, plaintiff's cross motion for summary judgment in this regard must be granted ***(see*** CPLR 3212 [b]).

Accordingly, plaintiff's motion, pursuant to CPLR 3025 (b), for leave to amend its complaint is granted with respect to its proposed amended fourth cause of action and insofar as it seeks to allege that it is the assignee of Automatic. Said motion is denied in all other respects. Defendant's motion for partial summary judgment dismissing plaintiff's request for damages constituting lost profits, is granted. Plaintiff's cross motion for partial summary judgment in its favor as to defendant's liability for breach of contract, is also granted.

This constitutes the decision and order of the court.

ENTER,
J.S.C.

MELVIN S. BARASCH