Bay Assoc. of Lawrnce, Ltd. v John P. Picone, Inc.
2012 NY Slip Op 31108(U)
April 16, 2012
Sup Ct, Nassau County
Docket Number: 004491/10
Judge: Stephen A. Bucaria
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

[* 1]

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA
Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

BAY ASSOCIATES OF LAWRENCE, LTD. and ONE RASON ROAD, LLC,

Plaintiffs,

-against-

JOHN P. PICONE, INC. and 1285 REDFERN ASSOCIATES, LLC,

Defendants.

INDEX No. 004491/10

MOTION DATE: Feb. 17, 2012
Motion Sequence # 001, 002

JOHN P. PICONE, INC. and 1285 REDFERN LLC d/b/a 1285 REDFERN ASSOCIATES, LLC,

Third-Party Plaintiffs,

-against-

ABRAMS, FENSTERMAN, FENSTERMAN, EISMAN, GREENBERG, FORMATO & EINIGER, LLP,

Third-Party Defendant.

The following papers read on this motion:

Notice of Motion.. X
Cross-Motion.. X

BAY ASSOCIATES OF LAWRENCE, LTD., et al **Index no. 004491/10**

Affirmation in Opposition.......................... X
Reply Affirmation..................................... XX
Memorandum of Law.................................. XX
Reply Memorandum of Law....................... X

This matter is before the Court on the motion by defendants/third party plaintiffs, John P. Picone Inc. (Picone) and 1285 Redfern LLC d/b/a 1285 Redfern Associates, LLC (Redfern) for summary judgment and on the cross motion by third party defendant, Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formato & Einiger, LLP (Abrams) to dismiss the third party complaint.

BACKGROUND

The Parties

Plaintiff Bay Associates of Lawrence, Ltd. (Bay Assoc.) is a New York corporation and the owner of a parcel of real property consisting of a small, vacant lot (adjoining parcel).

Plaintiff One Rason Road, LLC (Rason) is a New York corporation and the owner of a parcel of real property consisting of a commercial building and parking lot (Main parcel).

Bay Assoc. and Rason Road are primarily owned and controlled by principal Bill Brooks.

Defendant/third-party plaintiff, Picone, a New York corporation, is a general contractor and construction company.

Defendant /third-party plaintiff, 1285 Redfern LLC d/b/a 1285 Redfern Associates, LLC (Redfern) is a New York limited liability company.

John P. Picone, individually, it the principal of Picone and Redfern.

Third-party defendant, Abrams, is a New York limited liability partnership and a law firm retained by plaintiffs to represent them in the subject real estate transaction. Abrams as attorneys for the plaintiffs/sellers is the holder of the down payment as Escrowee.

Relief Sought

The defendants/third party plaintiffs, Picone and Redfern move, pursuant to CPLR § 3212, for an Order granting them summary judgment against the plaintiffs, Bay Assoc. and Rason, dismissing the plaintiff's complaint against them and granting summary judgment against the plaintiff's on their counterclaims. Picone and Redfern also seek summary judgment on their third party claims against the third party defendant, Abrams.

The third party defendant, Abrams, moves for an Order, pursuant to CPLR § 3211(a) (1) and (7), dismissing the third party complaint.

Factual Background:

On or about April 20, 2009, the plaintiffs/sellers and defendants/buyers, entered into two contracts for the sale of the real property referred to as the Main and Adjoining parcels, for a total purchase price of $5,425,000 ($5,175,000 for the main parcel and $250,000 for the adjoining parcel). The contract of sale for the main parcel was between Rason and Picone. The contact of sale for the adjoining parcel was between Bay Assoc. and Picone.

Pursuant to the contracts, the defendants gave Abrams, the plaintiffs' attorneys and "Escrowee" the sum of $542,000 ($517,000 for main parcel and $25,000 for adjoining parcel) as the down payment for the purchase of the two parcels.

The terms of the two contracts of sale entered into between plaintiffs/sellers and defendants/buyers were essentially identical other than the difference in purchase price for the parcels, the amount of the down payment for the parcel, description of the parcels and the parties.

The contracts provided the defendants with a 30-day due diligence period in which they were entitled to perform environmental, engineering and title investigations, with an unconditional right to terminate the contract in writing, within the due diligence period, if the environmental report revealed environmental conditions the defendant found unacceptable. The contracts also provided an alternate right to perform a second phase of environmental investigation if the first phase revealed potential contamination.

The first environmental investigation was commenced on April 22, 2009 and a report

was issued May 14, 2009. That report identified environmental concerns and recommended a second phase of investigation.

On June 10, 2009 the plaintiffs and defendants executed an Amendment (Amendment) to the Contracts regarding the environmental issues. The Amendment set forth that the defendants/buyers had agreed to conduct a second phase of environmental investigation in accordance with the phase one report and recommendations. The Amendment also provided that if the second phase of investigation indicates the existence of actual environmental contamination the investigator is to prepare a plan for remediation with an estimate of costs. Additionally, the amendment to the contracts set forth the what the parties' rights and obligations were, if actual environmental conditions were found to exist.

The amendment provided that If environmental conditions were found to exist and the cost of remediation was $35,000 or less, the seller at its own cost and expense shall remediate prior to the closing. If the cost for remediation exceeds $35,000, the buyers shall have the option at their sole discretion to terminate the contract or to contribute the amount required for remediation in excess of $35,000. However, if the cost of remediation exceeds $35,000 and the purchasers give notice of their intent to terminate, the seller, within five days of receipt of the notice to terminate, shall have the option to commit to the remediation at the seller's sole cost and expense.

The Phase two report, dated August 6, 2009, identified environmental contamination with an estimated cost to implement the remediation plan at between $139,750 and $155,250.

Thereafter the parties entered into negotiations regarding possible resolutions for the remediation of the environmental issues. One alternative offered by the sellers was to give the buyers a $100,000 credit towards the purchase price with the buyers assuming the costs of remediation. Other resolutions discussed was for the sellers to provide the buyers with a written indemnity against losses due to the contamination, or the seller purchasing environmental insurance for the premises.

No written amendment or modification agreement was entered into between the parties regarding a resolution of the remediation issue.

On October 23 2009, the defendants' attorneys sent a letter to Abrams, the sellers' attorneys, stating that due to the unresolved title issues and the remediation of the premises,

the buyers were exercising their rights to terminate the contracts. Pursuant to that letter, the buyers provided the sellers with notice that the contracts shall terminate in five days, if the sellers do not commit in writing to remediating the premises within five days. On the same day, the sellers' attorneys, Abrams, sent a reply letter stating that the remediation issue had been resolved, as the sellers agreed to allow the purchasers to conduct the remediation in return for a $100,000 reduction in the purchase price. The letter also stated that the sellers' broker has provided damage insurance to cover the property and will be discussing on the following Monday the extent of insurance needed to make it easier to agree to indemnification of the purchasers.

On November 16, 2009, purchasers' attorneys sent follow up letter to Abrams referring to its October 23, 2009 notice of termination letter. In the November 16, 2009 letter, the buyers' attorney stated that the contacts automatically terminated five days after the October 23, 2009 letter since the sellers did not commit in writing to remediate the property within five days of receipt of the purchasers' notice. It was also stated in the letter that it was apparent from the marked up, Post-Closing Environmental Indemnity Agreement that purchasers' attorney received on November 10, 2009 that there was no agreement on the sellers' part to remediate the premises and no agreement between the parties with respect to remediation. In the letter, the buyers formally demanded a return of their down payment.

The down payment was not returned to the buyers. However, the parties' attorneys continued to have discussions regarding the outstanding title issues and the remediation.

On December 29, 2009, Abrams sent a letter to the buyers' attorneys stating that they had cleared all exceptions to title and that the sellers were ready to convey title and setting January 21, 2010 as the closing date. That letter did not mention the environmental conditions or remediation.

On January 8, 2010, the buyers' attorneys sent a letter to Abrams rejecting the closing date, asserting that the contracts terminated as set forth in their November 16, 2009 letter, and again demanded the return of the buyers' down payment.

On January 25, 2010, Abrams sent a letter to the buyers' attorneys again stating that the exceptions to title were cleared, it was ready to convey title and that if the buyers did not proceed to closing, they had been instructed by the sellers not to return the down payment.

Additional letters were exchanged between the parties in February 2010, without any resolution.

The parties attorneys also exchanged numerous emails both before and after the purchasers' attorneys notice to terminate letter dated October 23, 2009.

The Lawsuit

The plaintiffs, Bay Assoc. and Rason, commenced this action in April 2010, asserting one cause of action against defendants, Picone and Redfern, for breach of contract.

Defendants served a verified amended answer dated May 18, 2010 with three counterclaims. The first counterclaim is for a declaratory judgment declaring that the defendants lawfully terminated the contracts and are entitled to return of the down payment with interest from October 28, 2009. The second counterclaim is for breach of contract, and the third counterclaim asserts a vendee's lien against the main and adjoining parcels.

The plaintiffs submitted a verified reply to amended answer with counterclaims, dated June 4, 2010.

On May 19, 2010 the defendants commenced a third party action against third party defendant, Abrams, asserting three causes of action against Abrams. The first, is for a declaratory judgment declaring that the defendants lawfully terminated the contracts and are entitled to return of the down payment with interest from October 28, 2009. The second is for breach of contract, and the third is for breach of fiduciary duty.

Third party defendant, Abrams appeared and interposed its verified answer to the third party complaint dated, June 4, 2010.

Parties' Arguments

With regards to the main action, the defendants contend they are entitled to summary judgment against the plaintiffs dismissing the plaintiffs' complaint against them and on their counterclaims against the plaintiff pursuant to the clear terms of the contracts and amendment. Defendants contend that, in accordance with the contacts and amendment, they exercised their right to cancel the contract based upon the environmental contingency clause and the plaintiffs wrongfully refused to return their down payment on the cancelled contracts.

Pursuant to section 17.01 of the original contracts, the buyers had a thirty day due diligence period in which to perform environmental, engineering and title investigations of the premises. Section 17.02 provided the buyers with an unconditional and unilateral right to cancel the contracts, in writing, if the environmental investigation revealed environmental conditions that the buyers found to be unacceptable. However, pursuant to section 17.04 of the contracts, the buyers had an alternate right to perform a second phase of environmental testing as an alternative to terminating the contracts, which they also chose to do.

The defendants assert that with regards to agreeing to go forward with the second phase of environmental testing they entered into an Amendment to the Contracts with the plaintiffs, on June 10, 2010, which addressed the parties' rights and obligations should the second phase of environmental testing disclose actual contamination.

That Amendment provided in pertinent part as follows:

> If the cost of the Remediation is $35,000.00 or less, the Remediation shall be completed at Seller's sole cost and expense prior to Closing. If the cost of the Remediation exceeds the sum of $35,000.00, then Purchaser shall have the option at its sole discretion of terminating the Contract or contributing to the amount required to complete the Remediation in excess of $35,000.00 and in such event, the Remediation shall be completed. If the Remediation exceeds $35,000.00 and the Purchaser gives notice of its intent to terminate the Contract, then Seller, within five (5) days of receipt of Purchaser's notice to terminate, shall have the option of performing the remediation at Seller's sole cost and expense.

The defendants assert that since the second phase of environmental investigation revealed environmental contamination with a remediation cost that well exceeded the threshold $35,000, they had the right to terminate the contracts, if the plaintiffs would not remediate the property. The defendants argue that despite negotiations with the plaintiffs/sellers regarding the resolution of the remediation issues, no agreement was reached. Accordingly, pursuant to the terms of the Amendment, on October 23, 2009, purchasers exercised their unequivocal, unilateral right to terminate the Contract as the costs to remediate exceeded $35,000. The notice to terminate letter was received by plaintiffs' attorneys, Abrams, on the same day, as evidenced by their letter in reply of same date. Defendants aver that since the plaintiffs/sellers did not remediate or commit

in writing to remediate at their sole cost, within five days after receiving the notice of intent to terminate, the contracts automatically terminated on October 28, 2009, at which time their down payment should have been returned.

The plaintiffs oppose, asserting that the defendants' notice to terminate was disingenuous, as the defendants continued to work with the plaintiffs regarding the outstanding title issues and there was no issue regarding remediation, as the defendants agreed to accept a $100,000 credit toward the purchase price. Plaintiffs argue that, despite the purported notice of termination, the parties continued to proceed towards closing and thus there was a recision of the purported termination and the defendants should be equitably estopped from asserting the contracts were terminated.

In reply, the defendants argue that the clear terms of the contracts and amendment provided them with the absolute right to terminate, which could be overcome only by the plaintiffs committing in writing to remediate the property at their sole costs and expense. Defendants argue that, contrary to the plaintiffs' assertions, there was no agreement to remediate. Defendants argue that the issue regarding indemnification for the environmental contamination had not been resolved, as any amendments to the contract had to be in writing, which was not done with regards to the remediation issue. Defendants assert that while the issue of their receiving a credit toward the purchase price was discussed, it was conditioned on the plaintiffs giving them a written indemnity agreement or providing insurance regarding the environmental conditions, which was never actually agreed to by the plaintiffs.

In their reply, defendants also reiterate their contention that they are entitled to summary judgment against the plaintiffs as they properly exercised their absolute right to terminate when they sent the notice of intent to terminate, which the plaintiffs failed to abate by committing to remediation at their sole cost and expense.

With regards to the branch of their motion against the third party defendant, Abrams, the defendants assert that the third party defendants, breached their duty as escrowee, in failing to return the down payment to defendants after the contracts were terminated and in failing to advise the sellers in writing of the purchasers' demand for the return of the down payment.

Abrams opposed and cross moved for summary judgment, averring that the defendants' contention that they failed to provide written notice to plaintiffs is without

merit as the defendants themselves served written notice on the plaintiffs demanding the return of the down payment. Further, Abrams asserts that pursuant to the terms of the contracts, in particular section 2.06(a), the escrowee for any other reason acting in good faith can determine not to release the down payment to either party. Abrams asserts that it did not release the down payment to the defendants, at the direction of their clients, and based upon its good faith belief that the defendants breached the contracts.

Section 2.06 (a) of the Contracts of Sale, provides as follows:

> "If for any reason the Closing does not occur and either party makes a written demand upon Escrowee for payment of such amount, Escrowee shall give written notice to the other party of such demand. If Escrowee does not receive a written objection from the other party to the proposed payment within 10 business days after the giving of such notice, Escrowee is hereby authorized to make such payment. **If Escrowee does receive such written objection within such 10 day period or if for any other reason Escrowee in good faith shall elect not to make such payment, Escrowee shall continue to hold such amount until otherwise directed by written instructions from the parties to this contract or a final or non-appealable judgment of a court"** (emphasis supplied).

Abrams also contends that in accordance with the aforenoted section of the contracts and pursuant to section 2.06(b), it as Escrowee, cannot be held liable to either party, "for any act or omission on its part unless taken or suffered in bad faith, willful disregard of this contract or involving gross negligence."

Section 2.06(b) of the Contracts of Sale, provides as follows:

> "The parties acknowledge that Escrowee is acting solely as a stakeholder at their request and for their convenience, that the duties of Escrowee hereunder are purely ministerial in nature and shall be expressly limited to the safekeeping and disposition of the Down payment in accordance with the provisions of this contract, that Escrowee shall not be deemed to be the agent of either of the parties, and that **Escrowee shall not be liable to either of the parties for any act or omission on its part unless taken or suffered in bad faith, in willful disregard of this contract or involving gross negligence.** Seller and Purchaser shall jointly and

severally indemnify and hold Escrowee harmless from and against all costs, claims and expenses, including reasonable attorneys' fees, incurred in connection with the performance of Escrowee's duties hereunder, except with respect to actions or omissions taken or suffered by Escrowee in bad faith, in willful disregard of this contract or involving gross negligence on the part of Escrowee " (emphasis supplied).

Abrams argues that since there is no allegation in the third party complaint that it acted in either bad faith, willful disregard of the contracts or was grossly negligent, Sec.2.06 compels the dismissal of the third party complaint.

Legal Standards

Summary Judgment

"On a motion for summary judgment pursuant to CPLR § 3212, the proponent must make a *prima facia* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." ***Sheppard-Mobley v. King***, 10 AD3d 70, 74 [2nd Dept. 2004], aff'd as mod., 4 NY3d 627 [2005], *citing* ***Alvarez v. Prospect Hosp.***, 68 NY2d 320, 324 [1986]; ***Winegrad v. New York Univ. Med Ctr.***, 64 NY2d851, 853 [1985]. "Failure to make such *prima facia* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." ***Sheppard-Mobley v. King***, **supra** at 74; ***Alvarez v. Prospect Hosp.***, **supra**; ***Winegrad v. New York Univ. Med Ctr.***, **supra**. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. ***Alvarez v. Prospect Hosp.***, **supra** at 324. The evidence presented by the opponent of summary judgement must be accepted as true and must be given the benefit of every reasonable inference. See, Demishick v. ***Community Housing Management Corp.***, 34 AD3d 518, 521 [2nd Dept. 2006] *citing* ***Secof v. Greens Condominium***, 158 AD2d 591 [2nd Dept. 1990].

Dismissal

A complaint may be dismissed based upon documentary evidence, pursuant to CPLR § 3211(a)(1), only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby (see ***Yew Prospect, LLC v. Szulman***, 305 AD2d 588 (2nd Dept. 2003); ***Sta-Bright Services, Inc. v. Sutton***, 17 AD3d 570 (2nd Dept. 2005). "On a motion to dismiss the complaint pursuant

to CPLR § 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (quotations omitted)." ***East Hampton Union Free School Dist., v. Sandpebble Builders, Inc.***, 66 AD3d 122, 125 (2nd Dept 2009), *aff'd* 16 NY3d 775 (2011), *quoting* ***Breytman v. Olinville Realty, LLC.***, 54 AD3d 703, 303-304 (2nd Dept. 2008), *lv dism.*, 12 NY3d 378 (2009), *citing* ***Leon v. Martinez***, 84 NY2d 83, 87 (1994); ***Smith v. Meridian Technologies, Inc.***, 52 AD3d 685, 686 (2nd Dept. 2008). "Thus, a motion to dismiss made pursuant to CPLR § 3211(a)(7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law (quotations omitted)." ***East Hampton Union Free School Dist., v. Sandpebble Builders, Inc.*,supra** at 125, *quoting* ***Shaya B. Pacific, LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP***, 38 AD3d 34,38 (2nd Dept. 2006); ***Leon v. Martinez*, supra** at 87-88; ***Fisher v. DiPietro***, 54 AD3d 892, 894 (2nd Dept. 2008; ***Clement v. Delaney Realty Corp.***, 45 AD3d 519, 521(2nd Dept. 2007). It must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. ***Guggenheimer v. Ginzburg***, 43 NY2d 268 (1977); ***511 W. 232nd Owners Corp. v. Jennifer Realty Co.***, 98 NY2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. ***Leon v. Martinez*, supra**. However, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. ***Palazzolo v. Herrick, Feinstein***, 298 AD.2d 372 (2nd Dept. 2002).

Breach of Contract

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the parties, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. ***Furia v. Furia***,116 AD2d 694, 695 (2nd Dept. 1986). *See also* ***JP Morgan Chase v. JH Electric***, 69 AD3d 802 (2nd Dept. 2010); *see also* ***Elisa Drier Reporting Corp., v. Global Naps Networks, Inc.*** 84 AD3d 122,127 (2nd Dept. 2011).

When parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms. ***Henrich v. Phazar Antenna Corp.***, 33 AD3d 864 (2nd Dept. 2006). A contract will be interpreted in accordance with the intent

of the parties as expressed in the language of the agreement. ***Greenfield v. Philes Records, Inc.***, 98 NY2d 562, 569 (2002). The best evidence of what parties to a written agreement intend is what they say in their writing. ***Greenfeld***, **supra** at 569 *quoting* **Slamow v. Del *Col***, 79 NY2d 1016, 1018 (1992). A written agreement that is complete, clear and unambiguous on its face must be enforced according to the language of the agreement and the plain meaning of its terms. ***South Road Assoc., LLC v. International Business Machines Corp.***, 4 NY3d 272, 277 (2005); ***WW Assoc., Inc. v. Giacontieri***, 77 NY2d 157, 162 (1990). The interpretation of an unambiguous contract provision is a matter for the court. ***Greenfeld***, **supra** at 569; ***WW Assoc., Inc.***, **supra** at 162. On a claim of equitable estoppel, "[t]he elements of estoppel are, with respect to the party estopped, (1) conduct which amount to a false representation or concealment of material facts; (2) intention that such conduct will be acted upon by the other party; and (3) knowledge of the real facts, (***First Union Nat'l Bank v. Tecklenburg***, 2 AD3d 575, 577 (2nd Dept. 2003)).

Courts' determination

The defendants/third party plaintiffs have established their entitlement to summary judgment as against the plaintiffs which has not been rebutted. Under the clear terms of the contracts and the amendment to the contracts the defendants/buyers had an absolute and unequivocally right to unilaterally cancel the contract based upon the environmental contingency clause contained in the contracts and written amendment, as the cost of remediation of the environmental contamination exceeded $35,000. The defendants/buyers exercised that right when they gave notice of their intention to terminate to the sellers. Thereafter, it was up to the plaintiffs/sellers to determine if the sale should go forward by, within five days, agreeing to conduct the remediation of the environmental contamination at their sole cost and expense, which they did not do.

Despite the parties continuing negotiations and efforts to clear title, there was no agreement regarding the remediation and, thus, no recission of the notice of termination. Nor have the plaintiffs' established that defendants should be estopped from terminating the contract based upon their actions after sending the notice of termination letter. By their attorneys' letter of October 23, 2009, the defendants clearly put the plaintiffs on notice that they intended to terminate, if the plaintiffs did not agree to remediate the property. This was further confirmed by the defendants' letter of November 16, 2009 demanding return of the down payment.

Accordingly, based upon the clear, unequivocal terms of the contracts and amendment, the buyers' termination of the contacts became effective on October 28, 2009. *See* ***AD1 Great Neck, LLC v. Commander Oil Corp.***, 81 AD2d 759,760 (2nd Dept. 2011); ***Chana E. Devorah Realty, Inc., v. Degliuomoini***, 25 Misc 3d 1209[A] (Sup Ct. Kings County, Oct 5, 2009) and the defendants were entitled to the return of their down payment at that time.

As the down payment was not returned to the defendants when the contracts were terminated, they are entitled to statutory interest on the amount they were due for the return of the down payment from October 28, 2009, the date the termination became effective. (See CPLR § 5011; ***Chana E. Devorah Realty, Inc.***, **supra** at 38. The defendants, pursuant to the terms of the contracts, are entitled to a vendees' lien against both parcels.

As to the third party defendants' motion to dismiss the third party complaint, the contracts clearly provided that third party defendant, Abrams, as Escrowee, could not be held liable to either party for its acts or omissions unless taken or suffered in bad faith, in willful disregard of the contracts or gross negligence.

The third party defendant is correct that the failure of the third party plaintiffs to allege that its acts or omissions were the result of bad faith, willful disregard of the contracts or gross negligence is fatal. Accordingly the third party defendant's motion to dismiss the third party complaint is **granted**. Therefore it is hereby

ORDERED, that the branch of defendants/third party plaintiffs' motion for summary dismissing the plaintiff's complaint as against it and granting summary judgment on their three counterclaims against the plaintiffs is **granted**, and the Clerk is directed to enter judgment accordingly, and it is further

ORDERED, that defendants/third party plaintiffs are awarded judgment against plaintiffs Bay Associates and Rason in the amount of $542,000, plus interest at the statutory rate from October 28, 2009, plus costs and disbursements as taxed by the Clerk, and the Clerk is directed to enter judgment accordingly, and it is further

ORDERED, that the cross-motion of third party defendant to dismiss the third party complaint, is **granted** and the third party complaint is **dismissed** in its entirety without prejudice.

So ordered.

Dated APR 16 2012

J.S.C.

ENTERED
APR 19 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE