SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

ATLANTIC DEVELOPMENT GROUP, LLC, Plaintiff, -against- 605 WEST 42nd LLC, Defendant.	:	Index No. 650249/09 DECISION AND ORDER Sequence Nos. 001 and 002
605 WEST 42nd LLC, Third-Party Plaintiff, -against- PETER FINE and MARC ALTHEIM, Third-Party Defendants.	:	

MELVIN L. SCHWEITZER, J.:

This matter arises out of the interpretation of terms of transaction documents executed in connection with the transfer of certain real property rights. In short, plaintiff, Atlantic Development Group, LLC (Atlantic) agreed in February 2008 to transfer to defendant, 605 West 42nd LLC (605), air rights issued by the New York City Department of Housing, Preservation and Development (HPD) to promote the development of affordable housing. Consideration for the transfer was set at $40,998,698. The air rights were to be used by 605 in connection with the planned development of an over 60-story residential tower at 605 West 42nd Street. To secure its performance under the transaction documents, 605 deposited in escrow $3,075,000, which was to be replaced in November 2008 by a $20,499,348 letter of credit in favor of Atlantic. The

letter of credit was never delivered and Atlantic now seeks to be paid the $3,075,000 deposit. 605 argues that Atlantic breached the transaction documents, thus excusing 605's obligation to deliver the letter of credit and, consequently, entitling 605 to return of the $3,075,000. 605 has asserted counterclaims arising out of an alleged default under the transaction documents by Atlantic, and has asserted third-party claims against individual guarantors of Atlantic's performance.

Background

Atlantic is a developer of residential real estate in New York City, primarily focused on the development of affordable housing. It has developed affordable housing in the City since its formation in 1995. Peter Fine (Mr. Fine) and Marc Altheim (Mr. Altheim) are the founders and principals of Atlantic. Among Atlantic's planned affordable housing developments was a project referred to as "Harborview," which was to be constructed on a site bounded by W. 55th and 56th Streets and 10th and 11th Avenues in Manhattan and bearing the street address 513 W. 55th Street.

605 is an affiliate of The Moinian Group, a privately-held real estate firm, which owns and manages substantial real estate assets and which was seeking to develop an over 60-story residential tower at 605 West 42nd Street in the "Hell's Kitchen" or "Clinton" section of Manhattan, not far from Harborview.

Effective February 13, 2008, Atlantic, as seller, and 605, as purchaser, entered into an Inclusionary Air Rights Purchase Agreement (the Agreement) governing Atlantic's sale of air rights – transferable incentives offered by HPD to promote the development of affordable housing – to 605 to increase the floor area of its development at 605 West 42nd Street. Specifically, under the Agreement, Atlantic agreed to sell, and 605 agreed to purchase, 231,762

square feet of "Floor Area Development Rights" (Rights) at a purchase price of $176.90 per square foot or a total of $40,998,698. The Rights were to be generated from Atlantic's development of lower income housing at Harborview.

Under the Agreement, 605 was obligated to deliver to a specified escrow agent a cash deposit, consisting of three payments, a first deposit, a second deposit and a third deposit, in the total amount of 10% of the purchase price, or $4,100,000. By September 1, 2008, 605 then was obligated to deliver a letter of credit in the amount of 50% of the total purchase price to the escrow agent ($20,499,348), upon whose receipt, Atlantic was obligated to direct the return of the cash deposit to 605.

At the closing of the sale of the Rights, which was to occur no earlier than December 31, 2009 and no later than December 31, 2010, Atlantic was to deliver to 605 a Certificate of Eligibility issued by HPD and endorsed by Atlantic, transferring the Rights to 605. The Rights were to be delivered free and clear of all liens, claims or other encumbrances. 605, in turn, was to deliver the entire purchase price ($40,998,698) to Atlantic.

In the event of default by either party, the Agreement contained extensive provisions governing the remedies therefor. Section 10(c), which Atlantic seeks to enforce in this proceeding, provided:

> In the event that Purchaser fails to deliver the Letter of Credit as required herein and such default is not cured within twenty (20) Business Days after notice, time being of the essence with regard to such extended date, then, as Seller's sole remedy, this Agreement may be terminated by Seller upon written notice to Purchaser, in which event, Seller shall cause Escrow Agent to disburse the Deposit to Seller as its sole and liquidated damages, whereupon neither party shall then have any other rights or claims against the other arising from or through this Agreement (other than those rights or claims which are expressly provided herein to survive the Closing), it being agreed that Seller's damages are impossible to

ascertain with certainty and said amount represents an agreed upon liquidation of any and all claims by Seller hereunder. *Id.* at § 10(c)

The Agreement also contained a prevailing party clause, which provided that, "[i]n the event a dispute arises between the parties and any litigation, arbitration or other proceeding is commenced to enforce the provisions of this Agreement, the prevailing party in litigation, arbitration or proceeding shall be entitled to seek, claim and receive from the non-prevailing party reasonable attorneys' fees and disbursements, including court costs through all appeals, incurred by the prevailing party with respect thereto."

Contemporaneously with the execution of the Agreement, Atlantic's principals, Mr. Fine and Mr. Altheim, executed a Guaranty (Guaranty), in favor of 605. Under the Guaranty, Mr. Fine and Mr. Altheim jointly and severally guaranteed "the full and prompt payment of all damages that are due and owing from Seller to Purchaser pursuant to its obligations under Paragraphs 10(e) and 10(f) of the Agreement to pay liquidated damages in connection with Seller's default." Section 10(e) of the Agreement provided in relevant part:

> "In the event that . . . (ii) Purchaser [605] is ready, willing and able to perform in full its obligations hereunder and Seller [Atlantic], despite its best efforts, is unable or fails, for any reason whatsoever, to deliver the Final Purchased Amount on or prior to the Outside Date, time being of the essence with regard to such a date and such failure to perform shall not be cured within ten (10) Business Days after notice of such default from Purchaser to Seller, then Purchaser shall have the right to terminate this Agreement and upon such termination, receive a return of the Letter of Credit, be paid as liquidated damages, an amount equal to twenty percent (20%) of the Purchase Price (it being agreed that Purchaser's damages are impossible to ascertain with certainty and said amount represents an agreed upon liquidation of any and all claims by Purchaser hereunder as a result of such default (other than those rights or claims which are expressly provided herein to survive the Closing), whereupon neither party shall then have any rights or claims against the other arising from or through this Agreement (other than those rights or claims which are expressly provided herein to survive the Closing)."

Section 10(f) provided in relevant part:

> "In the event Purchaser is ready, willing and able to perform in full its obligations hereunder and (i) Seller obtains the Final Purchased Amount, (ii) willfully fails to convey the Final Purchased Amount to Purchaser in accordance with the terms of this Agreement and/or (iii) conveys the Final Purchased Amount to another purchaser and (iv) such failure to perform shall not be cured within ten (10) Business Days after notice of such default from Purchaser to Seller, time being of the essence with respect to such extended date, then Purchaser shall have the right to terminate this Agreement and upon such termination, receive a return of the Letter of Credit and elect either to (x) pursue such remedies a[s] it may have at law or at equity (including the right to seek specific performance) or (y) be paid as liquidated damages an amount equal to fifty percent (50%) of the Purchase Price (it being agreed that Purchaser's damages are impossible to ascertain with certainty and said amount represents an agreed upon liquidation of any and all claims by Purchaser hereunder as a result of such default, other than those rights or claims which are expressly provided herein to survive the Closing).

Effective August 7, 2008, the parties executed an amendment to the Agreement. Among other things, the Amendment eliminated the obligation of 605 to pay the third deposit, resulting in the deposit being a total of $3,075,000, and extended the deadline by which 605 was obligated to provide the letter of credit to no later than November 1, 2008.

On November 1, 2008, 605 had not delivered the letter of credit, as it was contractually required to do. Consequently, three days later, on November 4, 2008, Atlantic delivered a notice of default to 605, indicating that, unless 605 cured its default within the time frame specified in the Agreement (twenty business days), Atlantic would exercise its rights to terminate the Agreement and obtain the deposit as liquidated damages under Paragraph 10(c) of the Agreement.

During the twenty business days that followed, 605 did not cure its default. Thus, by letter dated December 5, 2008, Atlantic delivered notice to the escrow agent that Atlantic had terminated the Agreement because 605 failed to deliver the letter of credit as required by the

Agreement, and directed the escrow agent to deliver to Atlantic the deposit in the amount of $3,075,000, together with all interest on such deposit.

By letter dated December 15, 2008, 605 informed the escrow agent that it rejected Atlantic's purported declaration of default and objected to the release to Atlantic of any of the escrowed property. In a separate letter to Atlantic's counsel, dated December 17, 2008, 605's counsel explained that it believed that "Atlantic had participated in and acquiesced to the encumbering of the Rights, by agreeing with the City that the Rights are not available for use in any sites within the "Hudson Yards," "West Chelsea" or future "11th Avenue rezoning" areas.

Procedural History

On April 30, 2009 Atlantic commenced this action by filing a complaint. Atlantic asserts a single cause of action for breach of contract. It seeks a declaration that 605 defaulted under Section 10(c) of the Agreement and that, therefore, Atlantic is entitled to receive the $3,075,000, plus interest, held in escrow for its benefit (in addition to recovering its attorneys' fees and costs under Section 10(h) of the Agreement).

605 filed a Verified Answer, Counterclaims and Third Party Complaint. 605 asserts three counterclaims against Atlantic and two third-party claims against Mr. Fine and Mr. Altheim, as guarantors. 605 alleges that Atlantic breached the Agreement by failing to obtain the Rights "free of all liens, claims, or other encumbrances" and thus is liable for liquidated damages under Sections 10(e) and (f) of the Agreement, while Mr. Fine and Mr. Altheim also are liable, as guarantors.

Atlantic, has moved for summary judgment, pursuant to CPLR 3212, against 605 on the single claim in its complaint[1] and has moved to dismiss each counterclaim asserted by 605. Mr. Fine and Mr. Altheim have also moved to dismiss the claims asserted against them.

Discussion

Summary judgment "is a drastic remedy which will be granted only when the movant establishes that there are no triable issues of fact." *Andre v Pomeroy*, 35 NY2d 361, 364 (1974). *See also Adirondack League Club v Sierra Club*, 92 NY2d 591, 605 (1998). Courts require the party seeking summary judgment to make a *prima facie* showing of entitlement to judgment as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). *See also Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 852 (1985).

When deciding a motion for summary judgment, the court should determine if triable issues of fact exist. *Stillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). The motion should be denied if the court has any doubt as to the existence of a triable issue of fact. *Udoh v Inwood Gardens*, 70 AD3d 563, 564 (1st Dept 2010).

When deciding a motion for summary judgment, the court should view the evidence in a light most favorable to the non-moving party and must give the non-moving party all of the

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[1] According to the court's Individual Practice Rules, a motion for summary judgment is required to be made within 30 days after the note of issue was filed. Atlantic became focused on the rule on the 31st day and contacted the court and 605 on the next business day, requesting permission to make a filing after the 30 day period. 605 refused to consent to a late filing, and Atlantic promptly brought an order to show cause for leave from the court to file its summary judgment motion. For good cause shown, including Atlantic's counsel's absence from the country for a portion of the 30-day period, the court exercised its discretion and permitted Atlantic to file its motion. Atlantic promptly filed its motion, well within the 120-day period set forth in CPLR 3212 (a). 605 now argues that the court was in error and renews its objection to Atlantic's late filing. The court confirms its prior ruling. *See Brill v City of New York*, 2 NY3d 648 (2004) where the Court of Appeals held that good cause required a showing of "good cause for delay in making the motion – a satisfactory explanation for the untimeliness – rather than permitting meritorious, nonprejudicial filings, however tardy." The court here has found a satisfactory explanation for the untimeliness, and has not based its holding on the merits of the filing or the fact that defendant would not be prejudiced.

reasonable inferences which can be drawn from the evidence. *Gulf Ins. Co. v Transatlantic Reinsurance Co.*, 69 AD3d 71, 86-87 (1st Dept 2009); *F. Garofalo Elec. v N.Y. Univ.*, 300 AD2d 186, 188-89 (1st Dept 2002); *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 205 (1st Dept 1990). The "evaluation of competing evidence falls within the province of the trier of fact at trial, but is beyond that of the IAS Court on a summary judgment motion." *Mercafe Clearing, Inc. v Chemical Bank*, 216 AD2d 231, 232 (1st Dept 1995).

However, a motion for summary judgment shall be granted if the movant establishes its claim or defense "sufficiently to warrant the court as a matter of law in directing judgment" in its favor. *See* CPLR Rule 3212 (b); *see also Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). "The interpretation of a clear and unambiguous agreement is a matter of law, appropriate for disposition by this court on summary judgment." *See American Cap. Access Serv. Corp. v Muessel*, 11 Misc 3d 1066 (A), 2005 WL 3878980, at *5 (Sup Ct NY Cnty Oct. 18, 2005.

The central issue in this matter is whether Atlantic, in November 2008, when 605 was required to deliver the letter of credit, had taken actions which would prevent it from fulfilling its obligation under Section 4(i) of the Agreement to deliver the Rights to 605 free and clear of all liens, claims or other encumbrances so that it was entitled to terminate the Agreement and obtain the deposit as liquidated damages. For the reasons set forth below, the court is of the opinion that Atlantic is indeed entitled to recover liquidated damages here.

Atlantic, in connection with its performance under the Agreement was to deliver to 605 a Certificate of Eligibility issued by the HPD and endorsed by Atlantic transferring the Rights to 605. As noted above, Atlantic was developing buildings on the Harborview site which would

include affordable housing that would generate the Rights granted by HPD pursuant to its Inclusionary Housing Program. The Rights could be transferred in connection with the development of market rate housing at other circumscribed areas in New York City. The arrangement, however, was contingent upon the approval by the New York City Council of the Harborview project. In connection with voting to approve the Harborview project, a letter dated November 19, 2008 (Letter), was sent by Douglas Apple, General Manager of New York City Housing Authority (NYCHA) and Robert Lieber, Deputy Mayor of the City of New York to Daniel Garondnick, Chair of the Planning, Dispositions & Concessions Committee of the New York City Council and Gail Brewer, Council Member of the New York City Council, which included a paragraph 8 which stated:

> "HPD agrees that the developer will not be permitted to sell inclusionary bonus development rights from the Harborview development to any sites within the Hudson Yards, West Chelsea or future 11th Avenue rezoning areas. This will be memorialized in an HPD regulatory agreement."

605 alleges that the restrictions in the Letter constitute an encumbrance of the Rights and, thus, made it impossible for Atlantic to perform its obligations under Section 4(i) of the Agreement. Furthermore, 605 asserts that this restriction on the use of the Rights limited their ability to assign the Agreement for use of the Rights, thus adversely affecting the marketability and value of the Rights. This, 605 argues, also violates the Agreement.

605 asserts that it needed to have flexibility with respect to the rights that would allow it to use them not just for its planned project at 605 West 42nd Street, but also at other potential sites or for sale to other developers. 605 states that it understood this to mean that the Rights would be delivered as they existed at the time of execution of the Agreement. To accomplish

this, Section 4(i) of the Agreement provided that the Rights be delivered free and clear of all liens, claims or other encumbrances. At issue, then, is whether the restriction set forth in paragraph 8 of the Letter constituted a lien, claim or other encumbrance.

The court, for purposes of this opinion, assumes as correct that 605's argument that the language of paragraph 8 of the Letter constitutes a restriction on the geographical areas in which the rights could be used, which was not in effect at the time the parties entered into the Agreement. The fundamental question, then, is whether such a restriction constituted an encumbrance[2] which prevented Atlantic from performing its obligations under Section 4(i) of the Agreement.

Black's Law Dictionary 547 (7th Ed. 1999) defines encumbrance as follows:

> "A claim or liability that is attached to property or some other right and that may lessen its value, such as a lien or mortgage; any property right that is not an ownership interest."
>
> "'Encumbrance' means a right, other than an ownership interest, in real property. The term includes a mortgage or other lien on real property." UCC § 9-102(a)(23).

It also defines encumbrancer as "one having a legal claim, such as a lien or a mortgage against property." Thus, in order to be an encumbrance, the definition in Black's Law Dictionary requires there be a claim or liability that is attached to property or some other right. That is simply not the case here. Rather, the relevant paragraph of the Letter imposes a geographical limitation or restriction by a governmental agency on the use of a property right. This is similar to commercial zoning restrictions on the use of real property imposed by governmental authorities in metropolitan areas in New York State, including New York City. 605 tellingly

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[2] The court is of the opinion that the Letter is not a lien or a claim and 605 does not posit that it is.

cites no example of such restrictions being treated as encumbrances in transfer documentation relating to real property in New York State.

The parties here are prominent, highly sophisticated real estate developers, and were represented in contract negotiations by experienced counsel. At the time the Agreement was entered into, the parties and their counsel were fully aware of the complex, politically sensitive process pursuant to which Rights were granted in New York City. It was always a possibility that conditions. limitations or restrictions would be imposed on the Rights or their use. Here, the Agreement reflected a clear understanding that 605 intended to use the air rights at its project located at 605 West 42nd Street, and that 605 designed a contract to protect this right. The Agreement, in Section 1(m), defined 605's property as "Purchaser's Premises" [which] shall mean property at 605 West 42nd Street, New York, New York which shall utilize the Rights." The portion of the Letter which 605 characterizes as an encumbrance in no manner affected plaintiff's ability to use the Rights at Purchaser's Premises, as defined in the Agreement. This strongly underscores the fact that the limitation or restriction contained in the Letter did not constitute a lien, claim or encumbrance on the Rights.

605 also contends that the Letter interferes with its right set forth in Section 8(b) of the Agreement that provided that it "shall have the right to assign all or a portion of this Agreement to a party other than an Affiliate. . . ." The court disagrees with this contention. The Agreement remained at all relevant times fully assignable both to real estate developers or others providing a market for Rights. It is the use of the Rights which was restricted by the Letter, not the power to assign them or the Agreement. The court accepts as a fact that 605 desired liquidity or flexibility with respect to the Rights at the time the Agreement was entered into. In fact, 605 argues that

Rights are a commodity that are bought and sold and that it was important that 605 be able to transfer the rights to another site should it need or desire to. The court does not take issue with 605's position.

However, in the first instance, paragraph 8 of the Letter was not a blanket prohibition on transfer and, second, if it was important to have unfettered flexibility in this respect, the Agreement certainly would have been constructed so as to protect this right. The parties, both experienced and sophisticated, did not do so, obviously because 605 intended to use the Rights at the Premises and did not devote significant attention to negotiating a prohibition on a limited restriction on the use of the Rights. Consequently, a bare assignment provision cannot be said to have been materially diminished by a governmental authority attaching conditions on the scope of the use of the Rights.

605 also argues that Atlantic participated in negotiations with HPD, NYCHA and the New York City Council in order to appease the concerns of community activists and obtain the City Council's approval of the Harborview Project. This, 605 asserts, caused the compromise set forth in paragraph 8 of the Letter, which imposed a significant restriction on the use of the Rights. In essence, 605, relying heavily on the reasoning of *Computer Possibilities Unlimited, Inc. v Mobil Oil Corp.*, 301 AD2d 70 (1st Dept 2002), contends that Atlantic had an obligation to ensure that the Rights were not limited in use and that it repudiated its future obligations under a bilateral contract by assisting in negotiating the Letter.

605's reliance on *Computer Possibilities* is misplaced. There, a software provider agreed to sell certain products at prices agreed to in an endorsement agreement, in consideration for the endorsement of the products by a major natural resource company. The software provider then

entered into a software marketing and distribution agreement which granted a third-party the right to set the prices at which the products would be sold. The natural resource company terminated the agreement and the software provider filed suit. The court held that the software provider's actions repudiated the contract by putting it out of its power to keep its contract or, put another way, when it voluntarily disabled itself from complying with its contractual obligations.

That is not what is alleged to have occurred in this case. Viewing the facts in the light in which defendant has cast on them, plaintiff can be said to have participated in structuring an approval of the Harborview project by the New York City Council which contained a restriction or limitation on the use of the Rights. Atlantic did not participate in the placing of an encumbrance on the Rights, thereby violating the Agreement. Nor did Atlantic render the Agreement unassignable. Consequently, Atlantic does not stand in the position of the defendant in *Computer Possibilities*. Atlantic did not repudiate the Agreement.

605 next argues in its Memorandum of Law that, due to the constriction of the financial markets, Atlantic suspected that it was not going to be able to develop Harborview and effectively abandoned the project, thus repudiating the Agreement, by failing to take steps necessary to ensure that the project moved forward. 605 argues that, facing strong resistance from the New York City Council, Atlantic did not set up an alternative property from which it could generate Rights for delivery pursuant to the Agreement. Also, 605 argues that although Atlantic early on expected 605 to default, it did not attempt to market the Rights elsewhere. Likewise, Atlantic is said to have made only desultory efforts to attempt to arrange necessary construction financing. Taking these factors into account, 605 argues that "[b]y not taking these steps, Atlantic voluntarily disabled itself from being able to perform its obligations under the

Agreement and was thereby setting itself up to repudiate the Agreement." The court is of the opinion that 605's arguments do not raise a material issue of fact that would defeat plaintiff's motion for summary judgment.

In order to properly invoke the doctrine of anticipatory repudiation it is necessary that the repudiation be either "a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach or a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach." *Norcon Power v Niagra Power*, 92 NY2d 458, 463 (1998), quoting Restatement [Second] of Contracts Section 251 [1981]. Furthermore, there must be an "unqualified and clear refusal to perform with respect to the entire contract." *O'Connor v Sleasman*, 37 AD3d 954, 956 (2007) quoting *DeLorenzo v BAC Agency*, 256 AD2d 906, 908 (1998). Calamari & Perillo, The Law of Contracts at 525 (3d ed. 1987). Taken in the light most favorable to 605, the facts set forth in its Memorandum paint Atlantic's behavior only as hesitant in the face of constricting financial markets. Accordingly, 605 has not recited facts which meet the test for anticipatory repudiation.

In sum, 605's argument is that since the financial markets were disordered and constricting in 2008, Atlantic was not going to be able to perform its future obligations in 2009-2010, one to two years *after* Atlantic was entitled to terminate the Agreement by its terms, and, therefore, 605 should get its deposit back. 605's speculation that future market conditions would block Atlantic's performance and, consequently, that Atlantic behaved in such a fashion that one could infer that Atlantic recognized this, is clearly not sufficient to meet the test with respect to repudiation cited above. Furthermore, the parties could have dealt with the eventuality

of adverse conditions in the financial markets by inserting a provision in the Agreement that released the parties from their obligations in such circumstances. They did not.

Due to constricting financial market conditions, questions surrounded each parties ability to finance their projects. This, however, did not release 605 from its obligation to deliver the Letter of Credit on November 1, 2008. It did not do so and, consequently, Atlantic was entitled to terminate the Agreement and claim the Deposit from the Escrow Agent.

605 next argues that the $3,075,000 deposit should not be payable to Atlantic pursuant to Section 10(c) of the Agreement, as it constitutes an unenforceable penalty. Liquidated damages provisions in contracts negotiated by sophisticated business people are generally given deference by New York courts. *Addressing Sys. & Prods., Inc. v Friedman*, 59 AD3d 359 (1st Dept 2009); *NYCTL 1996-1 Trust v Viola*, 2003 WL 22174414 at *5 (Sup Ct Kings County 2003). In order to defeat plaintiff's motion for summary judgment on this point, defendant, in the first instance, must show that the liquidated damages are a penalty, *JMD Holding Corp. v Congress Financial Corp.*, 4 NY3d 373 by demonstrating either that actual damages were calculable at the point of execution of the contract, or that the amount payable was disproportionate to the prospective loss. *Unibal Title Agency, Inc. v Surfside-3 Marina, Inc.*, 65 AD3d 1184 (2d Dept 2009). Here, 605 offers no evidence that the damages due to a default were ascertainable at the time the contract was entered into, nor does it offer evidence that the deposit is disproportionate to plaintiff's actual loss. In fact, plaintiff makes a plausible argument that damages, calculated by the Rights loss of market value, would have been far greater. In any event, 605 has failed to carry its burden of proof on this point.

Accordingly, summary judgment is granted to Atlantic enforcing the liquidated damages provision and requiring it to be paid the $3,075,000 and reasonable attorneys' fees, disbursements and costs.

Counterclaims

605's First and Second Counterclaims

605's first and second counterclaims allege that as a result of the limitations placed on the Rights, as set forth in the November 19, 2008 Letter, Atlantic breached Section 4(i) of the Agreement which required the Rights to be free and clear of all liens claims or other encumbrances. For the reasons set forth above, the court is of the opinion that Atlantic did not breach Section 4(i) of the Agreement, and, accordingly, grants Atlantic summary judgment on these counterclaims.

605's Third Counterclaim

In order to prevail on its counterclaims for fraudulent concealment, 605 must show that there was a duty on the part of Atlantic to disclose the Letter to 605, and that 605 relied to its detriment on such failure to disclose. Whether or not there was a duty to disclose the Letter is unimportant here, as the fact is that 605 had a copy of the Letter within three days of its being sent. Furthermore, 605 has not alleged that it changed its position or acted in a fashion that it would not have, had it known of the Letter prior to receiving it. Accordingly, Atlantic's motion for summary judgment on the third counterclaim is granted.

Third Party Claims

Mr. Fine and Mr. Altheim are guarantors of any damages payable by Atlantic pursuant to Sections 10(e) and 10(f) of the Agreement. As the court has found that no such damages are

payable, Mr. Fine and Mr. Altheim are entitled to summary judgment dismissing 605's third-party claims against them.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment awarding plaintiff the $3,075,000 deposited in escrow together with interest earned on such deposit, is granted; and it is further

ORDERED that plaintiff's motion to dismiss the counterclaims asserted against plaintiff is granted; and it is further

ORDERED that third-party defendants' motion to dismiss the counterclaims asserted against them is granted; and it is further

ORDERED that within 30 days of the service of this Decision and Order with Notice of Entry, plaintiff shall submit to the court its evidence in support of its application for reasonable attorneys' fees, disbursements and costs; and within 30 days thereafter defendant shall submit its response thereto.

Dated: November 8, 2010

ENTER:

J.S.C.