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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARTIN SHULMAN J.S.C. PART 1

Justice

Index Number : 103296/2010

H EIGHTH AVENUE ASSOCIATES,

vs.

STESSA CORP.

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. 103296/10

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ... 1-41 Notice of Cross-motion + A-VV	1, 2, 3
Answering Affidavits — Exhibits	4, 5, 6
Replying Affidavits - Exhibits 1-4	7

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED

NOV 07 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: November 4, 2011

MARTIN SHULMAN J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

H EIGHTH AVENUE ASSOCIATES, LLC,

Plaintiff,

-against-

STESSA CORP.,

Defendant.

----------X

Index No.: 103296/10

Decision & Order

Hon. Martin Shulman, J.S.C.:

In this action for declaratory relief and breach of contract, Plaintiff H Eighth Avenue Associates, LLC ("Plaintiff" or "Seller") moves for: 1) summary judgment on its complaint[1] against defendant Stessa Corp. ("Defendant", "Buyer" or "Stessa") and dismissing Defendant's counterclaims; 2) an order striking the notice of pendency filed in connection with this action (Motion at Exh. 4); and 3) sanctions against Defendant's former counsel, Goldberg Weprin Finkel Goldstein LLP ("Goldberg Weprin"), pursuant to 22 NYCRR §130-1.1, *et seq*. Defendant opposes the motion and cross-moves for summary judgment dismissing the complaint and for judgment on its counterclaims.[2]

FACTUAL BACKGROUND

Plaintiff purchased the property located at 585 Eighth Avenue in Manhattan (the "Property") in 2006. Shortly thereafter a dispute arose between Plaintiff and its neighbor, Pennbus Realties, LLC ("Pennbus"), the owner of 575 Eighth Avenue.

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[1] The complaint's first cause of action requests a declaration that Plaintiff validly terminated the parties' contract for the sale of real property. The second cause of action seeks damages in an amount to be determined at trial, but believed to be $200,000 (the amount of the contract deposit), for breach of contract.

[2] The first counterclaim seeks a declaration *inter alia* that the parties' contract remains in full force and effect; the second counterclaim requests specific performance and an abatement of the purchase price; and the third counterclaim seeks injunctive relief.

Pennbus commenced an action before this court[3] asserting *inter alia* a claim for adverse possession of a portion of the Property. The law firm of Goldberg Weprin, Defendant's former counsel in this action, acted as co-counsel with Pennbus' counsel, Jaroslawicz & Jaros, in attempting to settle that litigation.

By Agreement of Sale dated November 5, 2009 (the "Agreement"), Plaintiff contracted to sell the Property to Defendant (Motion at Exh. 5). Non-party Steven Croman ("Croman") signed the Agreement on Stessa's behalf as "V.P." Seller alleges that at the time the Agreement was executed, "it was represented that 'Stessa Corp.' was wholly-owned and controlled by . . . 'Steven Croman'." Hannigan Aff. at ¶7. Additionally, the Agreement lists Defendant's address as being "c/o Steven Croman" and provides at paragraph 17 that "Buyer may assign this Agreement without Seller's consent to a limited liability company controlled by Steven Croman." Croman also paid the contract deposit (the "Deposit") by a check drawn on his personal bank account (Motion at Exh. 16).

The purchase price for the Property was $12,200,000,[4] with the Deposit in the amount of $200,000 placed in escrow at signing. The Agreement called for a due diligence period of ten business days after Buyer was provided access to the Property for inspection. The closing was scheduled to occur sixty days following the expiration of the due diligence period.

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[3] *Pennbus Realties, LLC v. H Eighth Avenue Associates LLC, et al*, N.Y. County Index No. 116376/06 (the "Pennbus action").

[4] A subsequent amendment to the Agreement reduced the purchase price to $12,000,000 (Motion at Exh. 18).

After signing the Agreement, Buyer visited the Property on November 10, 2009, thus commencing the due diligence period and rendering the presumptive closing date January 25, 2010. Thereafter, Buyer sent Seller a notice indicating its desire to close on February 18, 2010. In a notice received February 4, 2010 (though dated February 2, 2010), Seller served Buyer with a "Time of the Essence" closing notice, demanding a closing ten business days later, on February 18, 2010.

Meanwhile, on February 4, 2010, over three years after commencing the Pennbus action and just a few days after speaking to Andrew W. Albstein, Esq. ("Albstein") of Goldberg Weprin, Pennbus' counsel filed a notice of pendency against the Property (Motion at Exh. 22). On February 17, 2010, Buyer provided an updated title report to Seller, revealing the notice of pendency in the Pennbus action as well as 26 violations (Cross-Motion at Exhs. R and S). Buyer requested that Seller withdraw its closing notice until these issues were resolved.

On February 18, 2010, Seller sent a new time of the essence closing notice for March 22, 2010. By letter dated February 26, 2010, Buyer rejected this notice. On March 5, 2010, Seller sent a letter (Motion at Exh. 34) purportedly invoking the election requirements set forth in paragraph 3(c) of the Agreement (the "exculpation clause"). Seller offered to escrow funds sufficient to ensure that all violations carrying a monetary fine were "satisfied in full" and an additional $25,000 for "all other violations" in the event such violations remained open within 120 days after the closing. With respect to the notice of pendency, Seller offered to credit the maximum $200,000 "Cure Cap" required under the Agreement, and offered an additional $50,000 to be used by Buyer to defend the Pennbus action after Buyer takes title. Seller's letter demanded that

Buyer elect to: 1) take such title as Seller was able to convey, with a credit against the purchase price in the amount of the Cure Cap plus the foregoing additional accommodations, or 2) terminate the Agreement and receive a refund of the Deposit, on or before March 12, 2010 (i.e., ten days before closing).

Buyer responded by letter dated March 9, 2010 (Motion at Exh. 35), refusing to make an election and asserting that reliance on the "Cure Cap" provision (paragraph 3[b] of the Agreement) to address these issues was "misplaced" in light of Seller's breach of its warranties at paragraph 5 of the Agreement regarding pending litigation and violations. By letter dated March 12, 2010, Seller purported to terminate the Agreement and commenced this action (Motion at Exh. 36).

Plaintiff alleges that during discovery in this action it learned that Stessa actually was owned and controlled by Goldberg Weprin rather than Croman. Albstein confirms that Goldberg Weprin owns Stessa and explains in his affidavit that "Stessa was never expected to be the ultimate purchaser of the Property." Rather, Stessa was formed long before the transaction at issue here, as a "'nominee' corporation . . . for use by Goldberg Weprin's clients to enter into transactions . . . when it is impractical to create a new entity because of time constraints, expense and uncertainty." Albstein Aff. at ¶7. Further, Albstein avers that he explained the foregoing to Seller's counsel at the time the Agreement was negotiated and signed. *Id.* at ¶8.

SUMMARY OF ARGUMENTS

In support of its motion for summary judgment, Seller argues:

- Plaintiff validly terminated the Agreement pursuant to paragraph 3 thereof;[5]

- Buyer's failure to make an election pursuant to the exculpation clause constituted a breach of contract entitling Seller to cancel the Agreement;

- Buyer cannot obtain specific performance (second counterclaim) of a canceled contract;

- Buyer cannot obtain relief for Seller's purported failure to disclose the Pennbus action's existence because Buyer itself was or should have been aware of that litigation as a result of Goldberg Weprin's role as plaintiff's co-counsel in the Pennbus action;

- Stessa's counterclaims cannot be maintained because the Agreement is unenforceable given Croman's lack of authority to sign it on Buyer's behalf, there being no signed writing conferring such authority upon him as required by General Obligations Law ("GOL") §5-703 and Croman having no affiliation with Buyer;[6]

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[5] Paragraph 3 of the Agreement provides in relevant part:

(b) Title Liens and Objections. . . . Seller shall, at or prior to Closing, cure and remove all monetary liens or encumbrances which are recorded against the Property which are for a fixed monetary sum . . . arising out of the acts or omissions of, Seller against the Property (herein sometimes referred to as "Monetary Liens"). Seller shall also pay all fines and shall expend up to $200,000.00 (the "Cure Cap") to remove all other title objections.

(c) Inability to Convey Title. If Seller is unable to convey title at Closing . . . Buyer shall have the option of taking such title to the Property as Seller is able to convey, with a credit against the Purchase Price in the amount of the Cure Cap above or terminating Buyer's obligations under this Agreement, in which event the Escrow Agent shall refund the [Deposit], together with all interest accrued thereon, if any, to Buyer, and this Agreement shall be null and void and neither party shall have any further obligations hereunder . . . (bracketed matter added).

[6] Croman testified at his deposition *inter alia* that he never had any ownership interest in Stessa, was never an officer thereof and no documents or agreements exist between him and Stessa. Croman now alleges in his affidavit in this round of motion practice that he was unaware at the time of his deposition that Stessa had issued a resolution dated April 22, 2009 (Cross-Motion at Exh. C) appointing him a vice president for the purpose of executing contracts as a nominee for entities to be designated by him. As more fully discussed below, this resolution was produced for the

- Croman, not Stessa, is the real party in interest in this action and thus Stessa has no standing to assert the counterclaims;[7]

- Buyer's unclean hands[8] bar the equitable remedy of specific performance; and

- Buyer cannot obtain specific performance because it was not ready, willing and able to perform, having taken no steps to secure financing.

In opposition to Plaintiff's motion and in support of its cross-motion, Defendant argues:

- Seller cannot invoke the exculpation clause because it breached the warranties contained in paragraph 5 of the Agreement[9], thus rendering its purported termination of the Agreement invalid;

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first time in Defendants' cross-motion but was not produced during discovery.

[7] Croman testified in his deposition that he did not authorize Stessa's counterclaims but retracts this as well as other testimony (see fn. 6, *supra*) in his affidavit.

[8] Seller's claim that Buyer has unclean hands is based upon Goldberg Weprin's knowledge of the Pennbus action due to its representation of conflicting interests and its alleged orchestration of Pennbus' counsel's belated filing of the notice of pendency in that action to avoid closing.

[9] Paragraph 5 of the Agreement contains a series of warranties and representations from Seller to Buyer, including the following which Plaintiff allegedly breached:

> (d) Pending Litigation. There is no action, suit or proceeding pending or, to the best of Seller's knowledge, threatened against Seller or affecting all or any portion of the Property in any court, or before or by any federal, state, county or municipal department, commission, board, bureau or agency or other governmental instrumentality having jurisdiction over the Property.
>
> (j) No Notices of Violations; Use. All notes or notices of violations of law of all governmental agencies, orders or requirements which were noted or issued prior to or subsequent to the date of this Agreement by any governmental department, agency or bureau having jurisdiction as to conditions affecting the Property shall be removed or complied with by Seller including, payment of all fines and penalties associated therewith . . .

- Buyer's purported knowledge of the Pennbus action is irrelevant because a purchaser need not prove reliance on a warranty's truth to recover for its breach;

- the exculpation clause is inapplicable because it is limited to the types of title defects specified in paragraph 3 of the Agreement, and pending litigation and violations concerning the Property are not among the types of title defects specified;

- even if the exculpation clause applied, Seller failed to properly invoke it because Seller took no steps to cure the subject title impediments before invoking it and invoked it prematurely (i.e., before closing);

- the court can award Buyer specific performance and an abatement to address the outstanding violations because the Pennbus action was finally resolved;[10]

- Buyer denies having unclean hands and claims it was ready, willing and able to perform;

- Seller never pleaded its GOL §5-703 claim and improperly raises it for the first time in its motion papers; and

- notwithstanding the foregoing, Croman was authorized to execute the Agreement on Buyer's behalf, as evidenced by resolution dated April 22, 2009 (Cross-Motion at Exh. C) and, in any event, Buyer ratified and partially performed under the Agreement.

Seller replies in relevant part as follows:

- Buyer's argument that Seller was obligated to cure the title defects ignores the "Cure Cap" provision, which expressly limits the actions Seller must take with respect to title impediments;

- the affidavits Croman and Albstein now submit contradict their prior deposition testimony; and

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[10] This court granted summary judgment dismissing the complaint in the Pennbus action by decision, order and judgment dated November 8, 2010. See *Pennbus Realties, LLC v H Eighth Ave. Assoc. LLC*, 29 Misc3d 1224(A), 920 NYS2d 243 (Sup. Ct. NY County 2010). Upon information and belief, Pennbus' appeal therefrom is presently pending.

- the corporate resolution Stessa now relies on to establish Croman's authority to act as its vice president was not produced during discovery, despite Seller's demands for same and court orders directing its production, and as such, it should be disregarded.

SUMMARY JUDGMENT

The law is well settled that the movant on a summary judgment application bears the initial burden of establishing its prima facie entitlement to the requested relief by eliminating all material allegations raised by the pleadings. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986). Where the movant demonstrates its prima facie entitlement to summary judgment, the burden shifts to the other side to raise a material triable issue of fact warranting the motion's denial. *Id.* at 324.

Seller's First Cause of Action for Declaratory Relief

"'[O]n a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and . . . circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where . . . the intention of the parties can be gathered from the instrument itself.'" *Maysek & Moran, Inc. v. S.G. Warburg & Co., Inc.*, 284 AD2d 203, 204 (1st Dept 2001), quoting *Lake Constr. & Dev. Corp. v. City of New York*, 211 AD2d 514, 515 (1st Dept 1995). The court's role in construing a contract is to ascertain the parties' intention at the time they contracted. *Evans v Famous Music Corp.*, 1 NY3d 452, 458 (2004). If such intent can be discerned from the "plain meaning of the language of the contract, there is no need to look further." *Id.* at 458. The contract "should be read as a whole to ensure that undue emphasis is not placed upon particular words and phrases." *Bailey v Fish & Neave*, 8 NY3d 523, 528 (2007).

As set forth above, both parties seek summary judgment on their causes of action for declaratory relief. Seller requests a declaration that it validly terminated the Agreement and Buyer requests the opposite declaration, *viz.*, that the Agreement remains in full force and effect.

Plaintiff's first cause of action for a declaration that it validly terminated the Agreement must be dismissed, as the exculpation clause's plain language does not grant Seller the right to terminate the contract. Rather, this provision grants Buyer the right to elect its remedy where, as here, Seller is unable to convey good and marketable title at closing. Although the effect of the exculpation clause is to limit Seller's liability, Buyer is the party who must invoke it by advising Seller of its choice. Accordingly, that portion of Seller's motion for summary judgment on its first cause of action is denied and the corresponding portion of Buyer's cross-motion to dismiss is granted.

Seller's Second Cause of Action for Breach of Contract

Plaintiff's second cause of action alleges Defendant breached the Agreement by failing to make an election under the exculpation clause. The court must first determine whether Buyer was obligated to make an election under the alleged circumstances.

At the outset, Buyer's argument that the exculpation clause is inapplicable to the claimed title objections here is specifically rejected. Pending litigation and violations against the Property are among the types of title defects to which this provision applies. It cannot be disputed that these objections impair Seller's ability to fulfill its obligation to convey title at closing "free and clear of all liens, encumbrances, easements, restrictions and agreements" as paragraph 3(a) of the Agreement requires. The fact

that these objections' existence also breaches the Seller's express warranties in paragraph 5 of the Agreement does not change this conclusion.

Having determined that the exculpation clause applies notwithstanding Seller's breach of warranties, this court now turns to Stessa's arguments concerning when Buyer's obligation to make an election arose and Plaintiff's alleged obligation to cure. Paragraph 3(b) of the Agreement sets forth Seller's obligations regarding title liens and objections, distinguishing between monetary and non-monetary liens and encumbrances as follows:

> Seller shall, at or prior to closing, cure and remove **all monetary liens or encumbrances** which are recorded against the Property **which are for a fixed monetary sum** . . . (emphasis added)

Seller is further obligated to "pay all fines" and, with respect to "all other title objections", *i.e.*, non-monetary title objections, spend no more than $200,000, the amount of the Cure Cap, to remove same.

The complaint in the Pennbus action sought injunctive and declaratory relief and unspecified damages only "[i]n the event" of harm to Pennbus' property (Motion at Exh. 7). No fixed sum was demanded in the Pennbus action and accordingly its pendency is a non-monetary lien against the Property which Seller was required to spend no more than $200,000 to remove.

However, the exculpation clause goes on to address situations, such as here, where Seller is unable to convey title at closing in accordance with paragraph 3(a)'s requirements. In such event, Seller's obligations end and Buyer has two options: 1) to

take such title as Seller is able to convey with a $200,000 reduction in the purchase price, or 2) to terminate the Agreement and have its Deposit refunded.

Thus, even though Seller breached its warranty with respect to pending litigation, when Seller was unable to remedy this title objection/warranty breach prior to and/or at closing, Buyer's obligation to elect its remedy arose upon Seller advising of its inability to convey clear title at closing. The Agreement does not specify how or when Buyer's obligations under the exculpation clause arise and Stessa's claim that such obligation cannot arise until closing interprets this provision's reference to Seller being unable to convey title "at Closing" too literally. Suffice to say, as of the date of Seller's March 5, 2010 letter advising Buyer that Seller was unable to convey good and marketable title, Plaintiff was aware that the Pennbus action would not be resolved by the scheduled March 22, 2010 closing date. Indeed, a lengthy prior attempt to settle that litigation had ultimately failed. On March 2, 2010, a note of issue was filed and Seller had no way of predicting how or when that litigation would end (see Cross-Motion at Exh. M).

As to Plaintiff's purported obligation to attempt to cure title defects, this court agrees that the parties' inclusion of the Cure Cap in the Agreement distinguishes this case from those Stessa cites for the proposition that Seller was obligated to attempt to cure. The Cure Cap serves to limit Seller's financial obligations to Buyer in the event clear title cannot be conveyed. A contract should be construed to "give meaning to all of its language and avoid an interpretation that effectively renders meaningless a part of the contract." *Helmsley-Spear, Inc. v New York Blood Ctr., Inc.*, 257 AD2d 64, 69 (1st Dept 1999). Here, under Buyer's interpretation of paragraphs 3(b) and (c), Seller could find itself in the position of expending $200,000 in attempting to clear title and, if such

efforts prove fruitless, Buyer could still elect to terminate the Agreement or demand a $200,000 reduction in the purchase price. Such a result would effectively render the Cure Cap meaningless as it flies in the face of the Agreement's expressly negotiated exculpation clause limiting Buyer's remedies and Seller's exposure in the event Seller is unable to convey acceptable title to either $200,000 or termination of the Agreement.

Here, Buyer refused to make the required election (Motion at Exh. 35) and such refusal is a breach of the Agreement. *Mehlman v 592-600 Union Ave. Corp.*, 46 AD3d 338, 343 (1st Dept 2007). However, notwithstanding Defendant's breach, Plaintiff is not entitled to retain Defendant's Deposit, nor has it established any resulting damages.

Upon Seller being unable to convey clear title, the parties contemplated either a reduction of the purchase price or they expected to walk away from the transaction and be restored to the position they were both in before entering into the Agreement. Under these circumstances, the parties never contemplated Seller keeping the Deposit, which would result in a windfall to Seller, who breached an express warranty having been unable to perform as contemplated, and would constitute an unfair penalty to Buyer. Further, Seller fails to establish any damages as a result of Buyer's breach. Accordingly, Plaintiff is directed to instruct the escrow agent to return the Deposit to Defendant forthwith.

Buyer's Causes of Action for Declaratory Relief and Specific Performance

Seller being unable to perform and Buyer having breached the Agreement by failing to make the required election under the exculpation clause, the Agreement cannot be deemed to be in full force and effect. Indeed, after refusing to make the

election Buyer appears to insist that the sale of the Property be put on hold indefinitely until Seller is able to convey clear title. Such a result finds no support in the Agreement's terms or the case law. Accordingly, Defendant's counterclaim for a declaration that the Agreement remains in full force and effect must be dismissed.

Similarly, specific performance cannot be granted where the contract is no longer in effect.[11] Thus, the second counterclaim is also dismissed.

Injunctive Relief

Defendant's third counterclaim seeks injunctive relief enjoining Seller from *inter alia* holding Stessa in default under the Agreement and enjoining the Escrow Agent from releasing the Deposit to Plaintiff until such time as Plaintiff delivers title to the Property to Stessa pursuant to the Agreement. This counterclaim must also be dismissed in light of this court's finding that the Agreement was terminated as a result of Defendant's breach. Further, the Escrow Agent is not a party to this action and as such the court cannot grant such relief.

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[11] That the Pennbus action is now resolved and is no longer an impediment to clear title is of no moment. Buyer would have the court find that Seller was obligated to await the outcome of the Pennbus action. This position was specifically rejected in *Shepard v Spring Hollow at Sagaponack*, 87 AD2d 126 (2d Dept 1982), *app. den.* 58 NY2d 610 (1983), which found that:

> In the absence of controversy concerning the seller's inability to convey in accordance with the contracts, and considering the seller's clear right to set a closing date . . . plaintiffs were not entitled to defer consideration of defendant's right to employ the restricted remedies clause until the matter was reached on the trial calendar. Since defendant's inability to deliver was not self-created, its right to limit its liability should not be further inhibited.

Id. at 131.

The court has considered the parties' remaining arguments and finds them either lacking in merit or moot as a result of the foregoing decision. In particular, Plaintiff's statute of frauds claim is antithetical to the causes of action it asserts, both of which presume the existence of a valid contract.

Conclusion

Having concluded *inter alia* that the Agreement is not in full force and effect and that Seller is neither entitled to retain Buyer's Deposit nor has Seller established any damages resulting from Buyer's breach, nothing further remains to be determined in this action. Accordingly, consistent with this court's authority to search the record and grant judgment declaring the parties' rights as reflected in the foregoing determinations, this court grants judgment dismissing this action in its entirety.

SANCTIONS

The court declines to impose sanctions against Goldberg Weprin. Admittedly, this court is incredulous at Defendant's submission of affidavits from Albstein and Croman expressly contradicting their prior deposition testimony, as well as Defendant's belated production of the purported Stessa Corp. corporate resolution (aptly characterized by Plaintiff's counsel as a "rabbit out of a hat" document) designating Croman a vice president. The proffered argument that Plaintiff did not demand such a document during discovery, but rather demanded only a nominee agreement, is nothing short of disingenuous, it being self explanatory that Plaintiff was seeking written evidence of Croman's authorization to execute the Agreement on Stessa's behalf.

Nevertheless, with respect to the circumstances surrounding the Agreement's execution, both Plaintiff and Goldberg Weprin acted inattentively. For example, despite Plaintiff's manager's claim that the Pennbus action was "not on [his] 'radar'" (see Parikh Aff. in Support at ¶20), arguably it should have been, notwithstanding that Plaintiff claims to have ceded responsibility for this litigation to its then lessee. While Plaintiff states throughout these motion papers that the Pennbus action was settled and inactive at the time the Agreement was signed, the settlement had not been finalized and the representation that no litigation was pending was false.

Similarly, Albstein arguably knew or should have known about the Pennbus action. However, at the time the Agreement was negotiated and signed, he had been out of his office for an extended period for medical reasons and was unable to conduct a conflict search prior thereto. Further, his firm played only a limited role in the Pennbus action, having been brought in as co-counsel for Pennbus for settlement purposes only.

The point is that neither side is free of fault. However, both Plaintiff and Goldberg Weprin offer plausible explanations for their transgressions. There is no basis for the court to conclude that either party acted knowingly or intentionally to the other's detriment.

As to Goldberg Weprin's relationship to Stessa, the ethical implications of a law firm permitting its clients to utilize a specially formed entity as a "nominee" to quickly consummate transactions is not before the court. Obviously, this case demonstrates that perils exist, particularly where, as here, the deal collapses before the intended assignment to the client's newly formed entity can occur.

However, the court's focus here is on whether Plaintiff was the victim of an intentional deception. On this record, the court cannot draw such a conclusion. Albstein, who attended the Agreement's negotiation and signing, avers that he disclosed to Seller's attorneys (who incidentally were not Seller's counsel in this action) that Stessa was acting as a nominee for Croman and ultimately intended to assign the contract to a Croman controlled limited liability company which had yet to be formed. Plaintiff does not submit an affidavit of an individual with personal knowledge refuting that the foregoing disclosure was made. For the foregoing reasons, the request for sanctions is denied.

Accordingly, it is

ORDERED that Plaintiff H Eighth Avenue Associates, LLC's motion and Defendant Stessa Corp.'s cross-motion are determined in accordance with the foregoing decision; and it is further

ORDERED that the complaint and all counterclaims are dismissed; and it is further

ORDERED that Plaintiff shall instruct the escrow agent to return the Deposit to Defendant forthwith; and it is further

ORDERED that, pursuant to CPLR §6514(a) and upon service of a copy of this Decision and Order with notice of entry, the Clerk is directed to cancel the notice of pendency dated March 17, 2010 filed against New York County Block 762, Lot 38 and originally filed under N.Y. County Index No. 103566/10 (now consolidated for all purposes under the within index number).

The Clerk is directed to enter judgment dismissing this action accordingly.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

Dated: New York, New York
November 4, 2011

HON. MARTIN SHULMAN, J.S.C.