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SHORT FORM ORDER

COPY

INDEX NO.: 25733-99

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 8 SUFFOLK COUNTY

SUPREME COURT - STATE OF NEW YORK

PRESENT: Hon. Elizabeth Hazlitt Emerson

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MARIE PARZIALE JOHS, individually and as Administratrix of the Estate of VINCENT PARZIALE, SR., deceased, VINCENT PARZIALE, JR., DEBRA PARZIALE and the ESTATE OF VINCENT PARZIALE, SR., deceased, on behalf of P.G.S. CARTING CO., INC.,

Plaintiffs,

-against-

P.G.S. CARTING CO., INC., BAY VILLAGE DISPOSAL CORP., JOSEPH PARZIALE, JOSEPH SPADA, STEPHEN B. SCHNEER as escrow agent, and SOUTH SHORE WASTE CORP.,

Defendants.

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DECISION AFTER TRIAL

Factual Background

On January 1, 1986, Vincent Parziale died in an automobile accident. Prior to that date, he had been an equal one-third shareholder with his brother, Joseph Parziale, and his brother-in-law, Joseph Spada, in P.G.S. Carting Co., Inc., a carting and waste removal business operating in Nassau and Suffolk counties ("the Corporation"). Upon Vincent Parziale's death, his shares passed to his estate ("the Estate"). Marie Parziale Johs, the decedent's daughter, was named administratrix of the Estate.

The Agreement

In 1991, the Estate, the Corporation, and Bay Village Disposal Corp. ("Bay Village")[1] entered into a Stock Purchase and Settlement Agreement dated May 25, 1991 ("the Agreement") pursuant to which the Corporation purchased shares held by the Estate. The purchase price for the shares was $900,000, with payment of $50,000 to be made upon execution of the Agreement, $175,000 within 90 days thereafter, and the remaining $675,000 to be paid pursuant to the terms of a promissory note (the "Note"). The note was to be paid in 120 equal monthly installments commencing May 25, 1991. The Note bore interest at an annual rate of 9%. Accordingly, each payment was in the amount of $8,550.70. Upon the execution and delivery of the Agreement, the Estate's shares were to be delivered to the escrow agent and title thereto was to vest in the Corporation, subject to the provisions of the Agreement. The shares purchased from the Estate, however, were to be held as security for the Corporation's performance of its obligations under the Note. At such time as the Estate received payments in the aggregate amount of $225,000, 25% of the Estate's shares were to be released from escrow to the Corporation. On April 1, 1992 and on each anniversary thereafter, so long as the Corporation was not in default, an additional 7½% of the Estate's shares was to be released from escrow to the Corporation.

Notwithstanding the foregoing, the Agreement provided in paragraph 2(b) that upon the occurrence of a "Municipal Takeover" (as defined in the Agreement) the Corporation and [Bay] Village shall have no further obligations to make payments to the Estate from that date forward, except as follows:

> (i) In the event of a termination "in whole" * * * the balance of the payments due to the Estate pursuant to this Agreement shall continue until fully discharged in accordance with all the terms and conditions of this Agreement, except that such payments shall be reduced in each year thereafter where the gross income realized by the Corporation and Bay Village and the stockholders, as the case may be, is less than the sum of $2,500,000.00. In that event, if the gross income for any given year is less than 90% of the sum of $2,500,000.00, the payments for that year shall be adjusted proportionately to reflect the differential between the sum of $2,500,000.00 and the gross income realized for such year. In making this assessment and calculation, it is understood that the percentage differentials, if any, cannot logically be determined until the end of each fiscal year and, accordingly, any adjustments that may be necessitated can be offset by the Corporation and Bay Village in an equal monthly amount during the ensuing 12 months. Should any adjustment be necessary during the tenth and last year of payments, any such sums will be reimbursed, as appropriate, by the Estate or the Corporation and Bay Village or the stockholders, as the case may be * * *.
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> (ii) In the event of a termination "in part", the Corporation and Bay Village

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[1] Bay Village was a separate waste removal company owned by the same parties who owned the Corporation.

> shall not be relieved of any of their payment obligations to the Estate unless by reason of the partial termination the gross income for any subsequent year thereafter realized by the Corporation and Bay Village or the stockholders, as the case may be, is less than $2,500,000.00 * * *. If the gross income for any given year is less than 90% of the sum of $2,500,000.00 by reason of a partial termination, the payments for that year shall be adjusted proportionately to reflect the differential between the sum of $2,500,000.00 and the gross income realized for such year. In all other respects, the provisions of paragraph 2(a)(i)[2] of this Agreement shall apply to a partial, as well as to a whole, termination.
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> (iii) Regardless of whether the termination be "in whole" or "in part", if there are any monies realized by the Corporation or Bay Village by reason of the sale of the Corporation's assets, condemnation, liquidation, litigation, or otherwise, such monies shall be distributed pro rata in accordance with the formula set forth in paragraph 14(s) of this Agreement, and all such sums shall be credited against any monies which may be due and owing to the Estate.

Paragraph 14(s) of the Agreement provides, in pertinent part, that

> in the event that the Corporation or Bay Village makes any distribution of profits or assets of the Corporation or Bay Village, as the case may be, to its shareholders while the Stock is being held in escrow, then the amount of such distribution as equals the proportion of the Stock then held in escrow to the total issued and outstanding shares of the Corporation at the time this Agreement is executed shall be paid to the Estate in payment of the next installment(s), if any, due from the Corporation and Bay Village, such payments not to exceed the balance of the purchase price for the Stock, if any, and any interest due and owing thereon.

The Default

The parties acknowledge that the Corporation made 57 monthly payments of $8,550.70, up to and including January 25, 1996, thus reducing the principal balance due under the note to $428,047.06. The parties also agree that, from and after such date, no further monthly payments were made by the Corporation. The parties also agree that as of January 25, 1996, 55% of the Estate's stock was to have been released to the Corporation in accordance with the terms of the Agreement. This meant that, as of such date, 45% of the Estate's stock, or 15% of the total issued and outstanding shares of the Corporation, remained in escrow.[3] By letter dated March 27, 1996,

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[2] The Court assumes that the parties intended to refer to paragraph 2(b)(i) and not to paragraph 2(a)(i), which provides only for the payment of $50,000.00 upon execution of the Agreement.

[3] While there appears to be some disagreement as to whether any of the Estate's stock was ever actually released from escrow, the Court will, for purposes of computing damages, assume that it was released in accordance with the Agreement.

the attorney for the individual plaintiffs provided notice to the Corporation, Bay Village, and the escrow agent of the Corporation's continued default under paragraph 14(h) of the Agreement. Paragraph 14(h) provides, in relevant part, that

> In the event a payment of any installment due from the Corporation or Bay Village for the Stock is not made within fifteen (15) days from the date it is due, the Estate shall give notice of default to the Corporation, Bay Village and the Escrow Agent. In the event the default has not been cured within twenty (20) days after giving of notice of default by the Estate to the Corporation, Bay Village and the Escrow Agent, written notice to that effect shall be sent by the Estate to the Corporation, Bay Village and the Escrow Agent. Ten (10) days after receipt of such notice, if the Estate exercises its option under paragraph 14(q)(ii) of this Agreement, the Escrow Agent shall forthwith deliver to the Estate the certificates for the Stock then remaining in escrow and the escrow hereunder shall terminate, unless the Escrow Agent shall have received a written notice from the Corporation or Bay Village objecting to the delivery on the grounds that the Corporation or Bay Village are not in default or the default has been cured at any time prior to the expiration of the ten (10) day period, in which case, the Stock shall remain in escrow. Ten (10) days after receipt of such notice, if the Estate exercises its option under paragraph 14(q)(i) of this Agreement, and if the Estate enters judgment in accordance with the provision of paragraph 15 of this Agreement, the Escrow Agent shall forthwith deliver to the Corporation the certificates for the Stock then remaining in escrow and the escrow hereunder shall terminate.

Paragraph 14(q) provides that

> In the event of a default by the Corporation and Bay Village, which shall remain uncured after the applicable periods provided for in paragraph 14(h) of this Agreement, as the case might be, the Estate shall have the option to:
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> (i) accelerate the unpaid balance of the purchase price for the Stock and all unpaid interest thereon (the "Acceleration Amount"), at which time the Acceleration Amount shall become immediately due and payable, and exercise its rights under paragraphs 14 and 15 of this Agreement to enter judgment against the Corporation and Bay Village; or
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> (ii) receive the return of the Stock then remaining in escrow from the Escrow Agent.

No further written notice of default or acceleration was given.

The Sale

On June 1, 1999, all of the Corporation's assets were sold to South Shore Waste

Corporation ("South Shore") for the sum of $785,000, with $250,000 to be paid to the Corporation upon execution of the agreement and the remainder payable in 36 equal monthly installments of $14,941.70, inclusive of interest at an annual rate of 7%, commencing July 1, 2003. At the same time, Joseph Parziale and Joseph Spada entered into separate consulting agreements with South Shore pursuant to which each was to be paid a consulting fee of $357,500, payable in 48 equal monthly installments of $7,447.92 commencing July 1, 1999. The parties have agreed that for purposes of calculating the amount due to the Estate under the Agreement, the consulting fees shall be considered as being paid directly to the Corporation. The total due to the defendants under the three agreements was $1.5 million.

On June 14, 1999, the Corporation tendered payment to the Estate in the sum of $216,240.00. However, the Estate did not accept the tender. This action followed. On November 14, 2000, pursuant to court order, the Corporation paid the Estate the amount of $254,840.63.

Procedural History

The plaintiffs have alleged nine separate causes of action in their complaint. The first is for failure to pay the balance due on the note and seeks damages in the principal amount of $428,000.00; the second, for specific performance of paragraph 15(a) of the Agreement requiring the execution and delivery of a current confession of judgment in the principal amount of $428,000.00; the third, for specific performance of paragraphs 2(b)(iii) and 14(s) of the Agreement requiring the distribution of proceeds of the sale of the Corporation and Bay Village; the fourth, for an accounting of all unauthorized dividends and distributions made by the defendants since February 25, 1996; the fifth, for rescission of the Agreement and an accounting on the ground that the plaintiffs were fraudulently induced to enter into the Agreement; the sixth, as shareholders on behalf of the Corporation, for an accounting and reasonable attorneys' fees pursuant to Business Corporation Law § 626; the seventh, compelling the Escrow Agent to deposit into court the stock held by him in escrow and directing him to account for all prior distributions of stock from escrow; the eighth, declaring that the transfer of assets from the Corporation and Bay Village to South Shore is void, compelling South Shore to account for all assets received and all proceeds arising from the sale of such assets, and enjoining South Shore from disposing or distributing any such assets; and the ninth, as shareholders on behalf of the Corporation, for an accounting of the conduct of the individual defendants as corporate officers in the management and disposition of assets committed to their charge pursuant to Business Corporation Law § 720.

The trial of the matter took place before this Court, without a jury, on April 14, 15, 19, 20, and 23, 2004. At the conclusion of the plaintiffs' case, the defendants moved to dismiss each of the plaintiffs' causes of action. Upon consent of the parties, the fifth and seventh causes of action were dismissed in their entirety, and the eighth cause of action was dismissed as against South Shore only. The Court reserved decision as to the remaining causes of action.

In rendering its determination, the Court has considered the pleadings, the trial memoranda and other arguments propounded by counsel at trial, the testimony of each of the trial witnesses, the trial exhibits, and the parties' post-trial submissions.

Findings of Fact and Conclusions of Law

The plaintiffs, in their post-trial memorandum, contend only (i) that the calculation of damages on their first cause of action for breach of contract should reflect that the defendants, by failing to make monthly payments after January 25, 1996, waived any rights they may have had to reduce the monthly payments following the municipal takeover, (ii) that certain income received by the defendants was improperly excluded from their calculation of gross income for the purpose of determining the amount of the reduction to which they claim entitlement, (iii) that the defendants intentionally diverted income away from the Corporation by creating new companies and opening separate bank accounts in an attempt to circumvent their payment obligations under the Agreement and, in doing so, violated their fiduciary obligations to the Corporation and breached the implied covenant of good faith and fair dealing, and (iv) that the plaintiffs are entitled to payment in the principal amount of $225,000.00, representing 15% of the full purchase price paid by South Shore for the assets of Corporation and Bay Village. The Court deems these arguments addressed solely to the first, third, sixth, and ninth causes of action. As for the second, fourth, and the remaining portion of the eighth causes of action, which are not addressed in the plaintiffs' post-trial memorandum and which have not already been dismissed on consent of the parties, the Court considers them abandoned.

Regarding the claim for breach of fiduciary duty, the Court finds that the plaintiffs lack standing as shareholders to proceed under sections 626 and 720 of the Business Corporation. Paragraph 14(p) of the Agreement provides, in relevant part, that "upon the delivery of the certificates to the Escrow Agent, title to the Stock evidenced by such certificates shall vest absolutely in the Corporation, with all rights attendant to such ownership * * * unless and until delivered to the Estate." Since the plaintiffs transferred their shares and did not exercise their rights under paragraph 14(q)(ii) of the Agreement to obtain the return of their stock upon the defendants' default, they may not be said to have retained any equitable interest in the stock necessary to maintain a derivative action (*see*, Business Corporation Law §§ 626[a], 720[b]). The plaintiffs' sixth and ninth causes of action are, therefore, dismissed, leaving the claims for breach of contract and specific performance pleaded in the first and third causes of action as the plaintiffs' sole remaining claims in the action.[4]

Thus, the only issue left to be determined by the Court is what amount, if any, the Corporation is obligated to pay the Estate under the Agreement.

Notwithstanding that the parties urge different meanings of the relevant contract language, the Court finds that the Agreement is not reasonably susceptible to more than one interpretation and, therefore, is unambiguous (*see*, ***Chimart Assoc. v Paul***, 66 NY2d 570, 498 NYS2d 344 [1986]). Consequently, the Court is required to give effect to the Agreement as written, according

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[4] There is no need to dismiss the plaintiffs' related claim that the defendants breached their implied covenant of good faith and fair dealing, since that claim is subsumed in the contract theories underlying the first and third causes of action (*see*, ***Starrett Acquisition v Starrett Corp.***, 273 AD2d 121, 710 NYS2d 327 [2000]).

to the plain meaning of its terms, without regard either to extrinsic evidence or to what may seem fair or equitable (*see*, ***Greenfield v Philles Records***, 98 NY2d 562, 750 NYS2d 565 [2002]).[5]

The Court finds, therefore, that the defendants were required to continue making payments under paragraph 2(b)(ii) of the Agreement following the municipal takeover, and that their failure to do so constitutes a breach. Since the Estate did not exercise its option under paragraph 14(q)(i) of the Agreement to accelerate the unpaid principal balance of the purchase price for its shares, however, it was only entitled to receive the various payments as they became due. Pursuant to paragraph 14(h), in order to validly exercise the option to accelerate the unpaid balance upon failure to make a payment due within 15 days of the due date, the Estate was required to give notice of the default to the Corporation, Bay Village, and the escrow agent; then, in the event the default was not cured within 20 days after the giving of such notice, paragraph 14(h) required that an additional written notice to that effect be sent to the Corporation, Bay Village, and the escrow agent. The plaintiffs have failed to establish that such additional notice required by paragraph 14(h) was given.

Computation of Damages

The Court's analysis thus proceeds to the amount of the payments. Pursuant to paragraph 2(b), use of the reduction formula set forth in subdivisions (i) and (ii) was conditioned upon all payments being current to the date of the municipal takeover. Absent any dispute that the municipal takeover took place on January 1, 1996, the Court finds that they were.

As to the formula itself, paragraph 2(b)(ii) provides that if the gross income for any given year is less than $2,250,000.00, payments shall be adjusted proportionally to reflect the differential between the sum of $2,500,000.00 and the gross income realized for that year. Based on their accountant's analysis of monthly sales compiled from bank statements, the defendants submit that the annual gross income realized by the Corporation and related entities[6] in each of the years

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[5] The Court notes that the pretrial orders (Cohalan, J.) dated October 4, 2000 and February 11, 2003 denying summary judgment based on issues of fact relating to the valuation and interpretation of the Agreement do not establish law of the case and are not binding on the trial court (*see, e.g.*, ***Wyoming County Bank v Ackerman***, 286 AD2d 884, 730 NYS2d 898 [2001]; ***Cushman & Wakefield, Inc., v 214 East 49th Street Corp.,*** 218 AD2d 464; 639 NYS2d 464; 468; 639 NYS2d 1012, 1015 [1996]; ***Sackman-Gilliland Corp. v Senator Holding Corp.***, 43 AD2d 948, 351 NYS2d 733, *lv denied* 34 NY2d 515, 357 NYS2d 1025 [1974]). "[A] denial of summary judgment on the merits is merely a determination that the moving party has failed to make the requisite showing at that time" (7 Weinstein-Korn-Miller, NY Civ Prac ¶ 3212.13, at 32-198; *see also*, ***Brettschneider v Brettschneider***, 113 Misc 2d 861, 865, 449 NYS2d 912, 916 [1982] [noting that "the reasons for denial of summary judgment in no way bind the trier of fact"]).

[6] The parties agree that the revenues of Bay Village and a third entity, P.G.S. Roll Off Service, Inc., are properly to be included in the required computation of gross income under paragraph 2(b) of the Agreement.

succeeding the municipal takeover is as follows:

1996	$ 1,257,946.88
1997	$ 937,974.03
1998	$ 786,799.23
1999	$ 674,228.77
2000	$ 178,740.00
2001	$ 89,370.00

The plaintiffs, however, dispute that the defendants' figures accurately represent the gross income of these entities. Initially, the plaintiffs note the defendants' admission at trial that certain income received by the Corporation in the form of cash was not included in the defendants' calculation of gross income. According to the trial testimony of defendant Spada, upon which the plaintiffs rely, the cash income amounted to approximately "$50 or so per week" which the defendants "kept in a box in the office" and was used "to buy incidentals around the kitchen" (4/19/04, at 46). Apart from the fact the amounts claimed are negligible, the Court finds the testimony too vague and unsubstantiated to warrant its consideration in computing gross income. The plaintiffs contend that the defendants also failed to include certain income received in connection with a joint venture with Compaction Systems. However, the only trial testimony on the issue, offered by the defendants' accountant, reveals that the Corporation's distributive share of the income from the joint venture, net of expenses, was deposited in the Corporation's bank account and was reflected in the defendants' statement of gross income. Finally, the plaintiffs contend that the defendants neglected to include some $553,000 of gross income reflected on a corporate tax return ostensibly prepared on behalf of P.G.S. Roll Off Service, Inc. for the period December 1, 1995 through November 30, 1996. Since the return was excluded from evidence at the plaintiffs' specific behest, the Court rejects this contention as well. Accordingly, the Court accepts the gross income figures provided by the defendants' accountant for purposes of implementing the reduction formula.

To apply the formula, the Court refers to paragraph 2(b)(i)–incorporated by reference in paragraph 2(b)(ii)–which states that because percentage differentials "cannot logically be determined until the end of each fiscal year," any adjustment in the percentage of reduction that may be required in a given year may be offset "in an equal monthly amount during the ensuing 12 months." The defendants were required, therefore, to continue making monthly payments in the amount of $8,550.70 throughout 1996. However, in January 1997, the amount of the monthly payments would have been adjusted to reflect the fact that gross income in the year 1996 was less than $2,250,000.00 (90% of $2,500,000). Since $1,257,946.88 is 50.3% of $2,500,000.00, the defendants' monthly payments for the year 1997 should have been 50.3% of $8,550.70, or $4,301.00. Likewise, in January 1998, the amount of the monthly payments would have been adjusted to reflect annual gross income of $937,974.03 for the year 1997, i.e., 37.5% of $8,550.70. or $3,206.51; in January 1999, to reflect annual gross income of $786,799.23 for the year 1998, i.e., 31.5% of $8,550.70. or $2,693.47; in January 2000, to reflect annual gross income of $694,228.77 for the year 1999, i.e., 27.0% of $8,550.70, or $2,308.69; and in January 2001, to reflect annual

gross income of $178,740.00 for the year 2000, i.e., 7.2% of $8,550.70. or $615.65.[7]

As to the duration of the payments, the Court finds, based on the provision in paragraph 2(b)(i) relating to adjustments "during the tenth and last year of payments," that the schedule of payments, even if reduced, was not to extend beyond a tenth year, and that final payment was due on April 25, 2001. Additionally, and contrary to the plaintiffs' arguments, the Court finds nothing in the Agreement to require payment of the outstanding principal upon completion of the term. Had the parties intended to include such a provision, they could have done so. A court "may not write into a contract conditions the parties did not include by adding or excising terms under the guise of construction" (***Petracca v Petracca***, 302 AD2d 576, 577, 756 NYS2d 587, 588 [2003]) and "should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include" (***Vermont Teddy Bear Co. v 538 Madison Realty Co.***, 1 NY3d 470, 475, 775 NYS2d 765, 768 [2004]). Thus, the Court will not presume to read such a provision into the Agreement.

As for the distribution of sales proceeds contemplated under paragraphs 2(b)(iii) and 14(s) of the Agreement, the Court rejects the plaintiffs' position that the defendants were required to pay 15% (i.e., the percentage of the total issued and outstanding shares of the Corporation remaining in escrow) of $1.5 million, or $225,000, upon the sale of the business in 1999. Paragraph 2(b)(iii) refers specifically to proceeds "realized," i.e., received, by reason of such a sale. The Estate, therefore, was only entitled to 15% of the sales proceeds when received. Absent proof as to when such proceeds were received, the Court will presume that they were received when due. Thus, the Estate was entitled to payment of 15% of $250,000.00, or $37,500.00, on June 1, 1999, and additional monthly payments of 15% of $14,895.84, or $2,234.38, commencing July 1, 1999 through April 1, 2001. Pursuant to paragraph 2(b)(iii), these payments were to be credited "against any monies which may be due and owing to the Estate." Since the only amounts due and owing to the Estate during this period were the monthly payments required under paragraph 2(b)(ii), the Court will credit the amount of each monthly payment due on the first of the month against the corresponding payment due on the twenty-fifth of the month. Consequently, payment in the amount of $37,500.00 on June 1, 1999 would have relieved the obligation under paragraph 2(b)(ii) to pay the amount of $2,693.47 on June 25, 1999; the remaining monthly payments of $2,234.38 due on the first of the month would have reduced the monthly amounts owed under paragraph 2(b)(ii) from $2,693.47 to $459.09 (July 25, 1999 through December 25, 1999), and from $2,308.69 to $74.31 (January 25, 2000 through December 25, 2000), and would have relieved the obligation under paragraph 2(b)(ii) to make monthly payments of $615.65 (January 25, 2001 through April 25, 2001).

Summarized below are the payments which the Court finds are due from the Corporation to the Estate under paragraph 2(b) of the Agreement, together with a computation of the statutory

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[7] Since it appears that the Corporation's only gross income for the years 2000 and 2001 was monthly consulting fees in the amount of $14,895 received by Joseph Parziale and Joseph Spada, the Court finds that no additional adjustment as contemplated under paragraph 2(b)(i) is required for the year 2001.

interest (9%) from the date each payment was due to the date of decision.

	Payment Amount	Date Due	Interest	
Paragraph 2(b)(ii) Damages				
	$ 8,550.70	2/25/96	$ 7,054.33	
	$ 8,550.70	3/25/96	$ 6,990.20	
	$ 8,550.70	4/25/96	$ 6,926.07	
	$ 8,550.70	5/25/96	$ 6,861.94	
	$ 8,550.70	6/25/96	$ 6,797.81	
	$ 8,550.70	7/25/96	$ 6,733.68	
	$ 8,550.70	8/25/96	$ 6,669.55	
	Payment Amount	Date Due	Interest	
	$ 8,550.70	9/25/96	$ 6,605.42	
	$ 8,550.70	10/25/96	$ 6,541.29	
	$ 8,550.70	11/25/96	$ 6,477.16	
	$ 8,550.70	12/25/96	$ 6,413.03	
Subtotals	$ 94,057.70		$ 74,070.48	$168,128.18
	$ 4,301.00	1/25/97	$ 3,193.49	
	$ 4,301.00	2/25/97	$ 3,161.24	
	$ 4,301.00	3/25/97	$ 3,128.98	
	$ 4,301.00	4/25/97	$ 3,096.72	
	$ 4,301.00	5/25/97	$ 3,064.46	
	$ 4,301.00	6/25/97	$ 3,032.21	
	$ 4,301.00	7/25/97	$ 2,999.95	
	$ 4,301.00	8/25/97	$ 2,967.69	
	$ 4,301.00	9/25/97	$ 2,935.43	
	$ 4,301.00	10/25/97	$ 2,903.18	
	$ 4,301.00	11/25/97	$ 2,870.92	
	$ 4,301.00	12/25/97	$ 2,838.66	
Subtotals	$ 51,612.00		$ 36,192.93	$ 87,804.93
	$ 3,206.51	1/25/98	$ 2,092.25	
	$ 3,206.51	2/25/98	$ 2,068.20	
	$ 3,206.51	3/25/98	$ 2,044.15	
	$ 3,206.51	4/25/98	$ 2,020.10	
	$ 3,206.51	5/25/98	$ 1,996.05	
	$ 3,206.51	6/25/98	$ 1,972.00	
	$ 3,206.51	7/25/98	$ 1,947.95	
	$ 3,206.51	8/25/98	$ 1,923.91	
	$ 3,206.51	9/25/98	$ 1,899.86	

	$ 3,206.51	10/25/98	$ 1,875.81	
	$ 3,206.51	11/25/98	$ 1,851.76	
	$ 3,206.51	12/25/98	$ 1,827.71	
Subtotals	$ 37,478.12		$ 23,519.75	$ 60,997.87
	$ 2,693.47	1/25/99	$ 1,515.08	
	$ 2,693.47	2/25/99	$ 1,494.88	
	$ 2,693.47	3/25/99	$ 1,474.67	
	$ 2,693.47	4/25/99	$ 1,454.47	
	$ 2,693.47	5/25/99	$ 1,434.28	
	$ 0.00	6/25/99	$ 0.00	
	$ 459.09	7/25/99	$ 237.58	
	Payment Amount	Date Due	Interest	
	$ 459.09	8/25/99	$ 234.14	
	$ 459.09	9/25/99	$ 230.69	
	$ 459.09	10/25/99	$ 227.25	
	$ 459.09	11/25/99	$ 223.81	
	$ 459.09	12/25/99	$ 220.36	
Subtotals	$ 16,221.89		$ 8,747.21	$ 24,969.10
	$ 74.31	1/25/00	$ 35.11	
	$ 74.31	2/25/00	$ 34.55	
	$ 74.31	3/25/00	$ 33.99	
	$ 74.31	4/25/00	$ 33.43	
	$ 74.31	5/25/00	$ 32.88	
	$ 74.31	6/25/00	$ 32.32	
	$ 74.31	7/25/00	$ 31.77	
	$ 74.31	8/25/00	$ 31.21	
	$ 74.31	9/25/00	$ 30.65	
	$ 74.31	10/25/00	$ 30.09	
	$ 74.31	11/25/00	$ 29.53	
	$ 74.31	12/25/00	$ 28.98	
Subtotals	$ 891.72		$ 384.51	$ 1,276.23
	$ 0.00	1/25/01	$ 0.00	
	$ 0.00	2/25/01	$ 0.00	
	$ 0.00	3/25/01	$ 0.00	
	$ 0.00	4/25/01	$ 0.00	
Subtotals	$ 0.00		$ 0.00	$ 0.00

Paragraph 2(b)(iii) Damages

	$ 37,500.00	6/1/99	$ 19,912.50	
Subtotals	$ 37,500.00		$ 19,912.50	$ 57,412.50
	$ 2,234.38	7/1/99	$ 1,169.70	
	$ 2,234.38	8/1/99	$ 1,152.94	
	$ 2,234.38	9/1/99	$ 1,136.18	
	$ 2,234.38	10/1/99	$ 1,119.42	
	$ 2,234.38	11/1/99	$ 1,102.67	
	$ 2,234.38	12/1/99	$ 1,085.91	
	$ 2,234.38	1/1/00	$ 1,069.15	
	$ 2,234.38	2/1/00	$ 1.052.39	
	$ 2,234.38	3/1/00	$ 1,035.64	
	Payment Amount	Date Due	Interest	
	$ 2,234.38	4/1/00	$ 1,018.88	
	$ 2,234.38	5/1/00	$ 1,002.12	
	$ 2,234.38	6/1/00	$ 985.36	
	$ 2,234.38	7/1/00	$ 968.60	
	$ 2,234.38	8/1/00	$ 951.85	
	$ 2,234.38	9/1/00	$ 935.09	
	$ 2,234.38	10/1/00	$ 918.33	
	$ 2,234.38	11/1/00	$ 901.57	
	$ 2,234.38	12/1/00	$ 884.81	
	$ 2,234.38	1/1/01	$ 868.06	
	$ 2,234.38	2/1/01	$ 851.30	
	$ 2,234.38	3/1/01	$ 834.54	
	$ 2,234.38	4/1/01	$ 817.78	
Subtotals	$ 49,156.36		$ 21,862.29	$ 71,018.65
Total				$471,607.46

The defendants, however, are entitled to a credit for their payment of $254,840.63 on November 14, 2000.

Accordingly, the Court finds that the plaintiffs are entitled to judgment on their first and third causes of action in the amount of $216,766.83, plus interest to the date of entry of judgment.

Finally, the Court notes, that in its letter reply to plaintiffs' post trial submission, the defendants assert that individual defendant Joseph Parziale and Joseph Spada are not personally liable. Such submission also notes that the plaintiffs have assumed such personal liability. Although the defendants raised the issue of personal liability in their motion to dismiss at the end of plaintiffs' case, neither the plaintiffs nor defendants adequately addressed this important issue at such time or in their post-trial submissions to the Court. Accordingly the Court continues to reserve decision on this issue and directs that the parties appear for oral argument thereon, which

shall be held on June 6, 2005 at 10:00 a.m., Supreme Court, Courtroom 7, Arthur M. Cromarty Criminal Court Building, 210 Center Drive, Riverhead, New York.

A copy of this decision shall accompany any proposed judgment submitted to the court.

Settle judgment.

HON. ELIZABETH HAZLITT EMERSON

DATED: April 25 ,2005

J. S.C.