[* 1]

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

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Index Number : 603886/2006

CLAREMONT PREPARTORY SCHOOL

VS.

LONG ISLAND SWIMMING POOL

SEQUENCE NUMBER : 006

PARTIAL SUMMARY JDUGMENT

INDEX NO.

MOTION DATE 11/2/08

MOTION SEQ. NO.

MOTION CAL. NO.

this motion to/

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that defendant's motion for an order, pursuant to CPLR §3212, seeking partial summary judgment dismissing plaintiff's lost earnings claim arising from breach of contract is granted; and it is further

ORDERED that defendant's motion for an order, pursuant to CPLR §3212, seeking partial summary judgment dismissing plaintiff's lost earnings claim arising from defendant's alleged negligence is granted, except as to those damages pertaining to the four students identified herein; and it is further

ORDERED that defendant serve a copy of this order with notice of entry upon all parties within 20 days of entry.

That constitutes the decision and order of the Court.

Dated: 12/15/08

HON. CAROL EDMEAD J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

----------X

CLAREMONT PREPARATORY SCHOOL, LLC,

Plaintiff,

-against-

Index No. 603886/06

LONG ISLAND SWIMMING POOL SERVICE, INC., and RENOSYS CORPORATION,

Defendants.

----------X

RENOSYS CORPORATION,

Third-Party Plaintiff,

-against-

Third-Party
Index No. 590146/07

OAKLANDER, COOGAN & VITTO, ARCHITECTS, P.C., COW BAY CONTRACTING, INC. and WHITELAW ARCHITECTS,

Third-Party Defendants.

----------X

HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

Plaintiff Claremont Preparatory School, LLC ("plaintiff"), a private elementary school located at 41 Broad Street in Manhattan, seeks to recover monetary damages for, *inter alia*, property damage resulting from a leaking indoor swimming pool, on the grounds of breach of contract, negligence, strict liability and breach of express and implied warranties, including breach of warranty of merchantibility and fitness for a particular use.

Defendant Long Island Swimming Pool, Inc. ("defendant") now moves for partial summary judgment, pursuant to CPLR §3212, dismissing plaintiff's claim for more than $2.5

million in lost earnings allegedly resulting from lost tuition[1].

Defendant's motion

Defendant contends that plaintiff's claim for lost income is related to only four students who allegedly left the school due to the lack of a pool, and despite repeated requests to do so, defendant failed to provide any accounting information regarding the costs, losses or profits per child or a formal business plan related to such loss income claim. The only accounting information provided was the Confidential Offering Materials of Metschools Holdings, LLC, plaintiff's parent company (the "Materials"), which is current only through the third month the school was open and indicates that the school, with "no established history or reputation," was "not profitable and may never become profitable."

Defendant argues that the claim for lost income/lost profits based on the alleged breach of contract was not contemplated by the parties at the time of contracting. It is unlikely "that the defendants assumed or the plaintiff should have assumed that if the pool leaked for a number of months, that the pool company would insure the risk of students withdrawing from the brand new private school." The pool's role in relation to the recruitment or enrollment of students was not discussed in the contract; nor does the contract have a warranty or set forth a completion date.

Further, the alleged lost income/lost profits do not flow from the alleged breach of contract, and cannot be established with reasonable certainty. Plaintiff's witnesses could not state whether the four students would have stayed at the school if the pool had not leaked, and one of the student's parents, Douglas Borden ("Mr. Borden") attests that his son transferred for

---

[1]The background and factual and procedural history of this case appear in the decisions on motion sequence numbers 003, 004, and 005.

reasons not related to the lack of a pool. Two of the other students transferred to schools with either a curriculum for learning disabilities or bilingual education, and none of the schools to which the four students transferred had pools. Thus, these students could have left for other plausible reasons.

Finally, plaintiffs failed to establish how the $2.5 million from lost tuition was determined. According to defendant, plaintiff "does not ask for lost profits, it seeks lost income, suggesting it is unable to specify or calculate what portion of the tuition goes to cover expenses and overhead, and what part would be profit. Clearly, without this information, it is impossible to determine what plaintiff's losses would be." The school, open for only three months before the pool began to leak, has no history of past performance, and plaintiff's parent company, which operates preschools or special education schools, does not operate any similar schools in New York City.

Defendant further argues that plaintiff's lost profits claim based on tort fails for the same reasons. Plaintiff fails to establish its lost profits with reasonable certainty and fails to prove a causal relationship between the defendant's alleged negligence and the damages. As with contracts, the standard is higher for a new business claiming lost future earnings due to an opposing party's negligence, defendant contends. There is no reasonable basis to ascribe any loss of income due to tuition to the alleged breach of contract or negligent acts.

Plaintiff's opposition

Plaintiff contends that defendant failed to establish the absence of a triable issue of fact. First, plaintiff argues that defendant's motion should be denied as procedurally defective because it is missing several exhibits. As a result, plaintiff cannot properly oppose the motion.

Plaintiff also contends that defendant's motion "fails to provide admissible evidence in the form of an expert affidavit which supports Defendant's claim that Plaintiff cannot prove loss of tuition." An attorney affirmation is insufficient to show "scientific support on relevant issues."

Plaintiff also argues that its claim for lost tuition, which arises from the lost enrollment due to the lack of a working swimming pool, is a question for a jury. Plaintiff maintains that its lost tuition claim is not speculative, and the caselaw defendant relies on is not on point.

> In an industry such as the education business, there are many certainties in predicting profit due to the certainty of the success of the venture. At bar, factors supporting a finding that a loss profit claim is not speculative include Plaintiff's extensive experience in owning, modifying and operating over fifty three (53) schools were tuition was garnered and the tuition was not contingent upon any uncertain financing (*id.* at paragraph 16).

Further, at the time of entering the contract with plaintiff, defendant was aware that the pool needed to completed before classes began in September 2005 and "knew of the foreseen risks should the swimming pool not be completed, leak free in a timely fashion." Thus, defendant must be held liable for such risks. Further, plaintiff argues that defendant did not exclude lost profits from its contract with plaintiff. As a result of defendant's breach of contract, plaintiff's business suffered, and liability for such consequential damages was reasonable and contemplated by the parties at the time of contracting.

Plaintiff also maintains that it established its loss of profits with reasonable certainty. Plaintiff argues that the standard is not absolute certainty, and plaintiff will offer further proof of the lost tuition at trial. Defendant has failed to present evidence establishing plaintiff's claim is too speculative as a matter of law. "In fact, Defendant has attempted to couch its argument into one of lost profits when Plaintiff has claimed loss of tuition or missed enrollment projection

which is foreseeable where Defendant was unable to ever provide Plaintiff with a leak free pool." When it comes to general damages, plaintiff is required to establish only the fact of the damage with reasonable certainty, not the amount of damage, plaintiff argues.

In addition, an award for lost profits is not speculative merely because a business is new, plaintiff asserts. Besides, plaintiff has been in the education business for 23 years and operates 11 schools in the metropolitan New York City area and has provided a formula to calculate damages. Thus, plaintiff maintains, the lost profits here do not depend upon "too many undetermined variables" as defendant contends.

Plaintiff distinguishes a demand for lost tuition from a demand for lost profits, and states that it seeks lost tuition and "never requested lost profits." The affidavit of plaintiff's owner, Michael Koffler ("Mr. Koffler"), who has personal knowledge of all aspects of plaintiff's finances, costs, and accounts payable and receivables, is sufficient evidence of lost tuition, and at least raises an issue of fact as to the damages element of plaintiff's claim. Further, plaintiff contends that its claim for lost tuition does not depend solely on the loss of tuition from students who withdrew from the school because of the leaky pool. It also depends on a freeze on tuition, the reduced enrollment due to the leaky pool, and the stigma in the community. It would be premature to dismiss plaintiff's lost tuition damages claim, which includes prejudgment interest based on lost tuition, at this time.

Further, plaintiff has provided the information defendant requested, and complied with all of defendant's demands for discovery, as per the Court's orders. If defendant does not possess certain information, it is because defendant failed to properly demand those documents during discovery. Further, plaintiff would like an opportunity to cross-examine Mr. Borden

concerning his affidavit.

Defendant's reply

Defendant contends that it has now forwarded all missing exhibits to the parties, and that, pursuant to CPLR §2001, the Court can permit an omission to be corrected if a substantial right of a party is not prejudiced. As plaintiff failed to establish that it suffered any prejudice as a result of the missing documents, dismissal of defendant's motion for such omission lacks merit.

Defendant further contends that its motion is properly supported by admissible evidence, "including the pleadings, the deposition testimony, the contract between the parties and an affidavit from a person with personal knowledge of the facts," and need not be supported by an expert affidavit. Defendant points out that plaintiff provides no evidence that plaintiff lost any existing or potential students as a result of the alleged pool leak or that lost tuition was a foreseeable consequence of defendant's alleged breach of contract. Nor has plaintiff refuted Mr. Borden's affidavit; plaintiff can cross-examine Mr. Borden at trial. While property damage is a foreseeable consequence of such a breach, the loss of tuition is not, defendant argues.

Further, defendant argues that Mr. Koffler's "self-serving, conclusory and speculative affidavit" of the estimated loss of potential students is not based on any scientific or empirical evidence. Mr. Koffler provided no data from the other schools or the methodology used to arrive at his predictions. In addition, he unjustifiably assumes that the loss of all potential students is due to the temporary unavailability of the pool in 2006, even though the pool was corrected in January 2007. There is no evidence that defendant was aware of the necessity to complete the swimming pool, leak-free, on time, as the contract is silent on the issue of lost profits.

Analysis

Plaintiff's procedural objections

At the outset, plaintiff's argument that defendant's motion should be dismissed because it is missing exhibits lacks merit. CPLR §2001 instructs the court with regard to mistakes, defects and omissions:

> At any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, *or, if a substantial right of a party is not prejudiced*, the mistake, omission, defect or irregularity shall be disregarded, provided that any applicable fees shall be paid [emphasis added].

Plaintiff's reliance on *Austin v Zaltz* (18 Misc.3d 1101(A), 856 NYS2d 22 [2007] [table; text at 2007 WL 4355458], 2007 NY Slip Op 52367[U] [2007][2] for the proposition that the exhibits missing from defendant's motion robbed plaintiff of the opportunity to properly oppose defendant's motion, is misplaced. Unlike the plaintiff in *Austin*, plaintiff here fails to establish that a substantial right has been prejudiced as a result of the omission. Accordingly, plaintiff's request that the court reject defendant's motion on the ground of the omission is denied.

Similarly, plaintiff's contention, that defendant's motion should be dismissed on the ground that defendant failed to support with "scientific evidence" in support of its motion, lacks merit.[3] Although, as plaintiff argues, the attorney affirmation accompanying defendant's motion

---

[2] "Based on the aforementioned [procedural] deficiencies in [defendants'] motion papers, their joint motion for summary judgment dismissing the complaint must be denied" (*Austin*).

[3] Plaintiff cites *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067-1068, 390 NE2d 298, 29, 416 NYS2d 790, 792 [1979] a libel case, in which the court held that the plaintiff failed to provide evidentiary proof of actual malice. The case makes no reference to "scientific" evidence.

is insufficient as an "expert affidavit" (plaintiff's opposition, paragraph 10), CPLR §3212(b) provides that "a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts." *Zuckerman v City of New York* (49 NY2d 557, 562 [1980]) makes clear that a party can establish entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence. Here, Melissa Freedman ("Freedman"), attorney for defendant, states under oath in her affirmation that she is familiar with the facts and circumstances of the case "having reviewed the files maintained by [her] office" (paragraph 1). Throughout her affirmation, Freedman makes reference to and cites documentary evidence, such as the plaintiff's bill of particulars and various documentary exhibits and depositions in support of defendant's motion. Thus, the court declines to ignore Freedman's affirmation and shall consider the merits of defendant's motion.

Summary Judgment

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985];

Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212[b]). A party can prove a prima facie entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman* at 562). Defendant "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" *(Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1 Dept 1983], *affd*, 62 NY2d 686 [1984]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient *(Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower*

& Gardner, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, 344 NYS2d 925 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]).

Clarification of plaintiff's claim

Plaintiff argues that defendant fails to comprehend plaintiff's claim. "In fact, Plaintiff seeks lost tuition and never requested lost profits. A slight difference that Defendant has attempted to exploit and fashion to her own liking" (plaintiff's opposition, p. 8, paragraph 28). The court finds no mischaracterization of plaintiff's claim. Plaintiff, in its complaint, describes its claim as an effort "to recoup *lost business revenue*" (*emphasis added*) (defendant's Exhibit A, plaintiff's complaint, paragraph 20). Further, in plaintiff's verified Bill of Particulars, plaintiff lists among its damages "estimated *loss of income* . . . in excess of $2,500,000 for loss of tuition from incoming students" (*emphasis added*) (defendant's Exh. E, paragraph 7(d)). This "estimated loss of income" is at issue here. In addition, plaintiff cites numerous cases regarding "lost profits" throughout its opposition to defendant's motion. As plaintiff's alleged lost tuition is merely a basis for plaintiff's lost profits claim, plaintiff's argument lacks merit. Accordingly, the Court will apply appropriate caselaw regarding lost earnings/lost profits.

Loss profits due to breach of contract

A plaintiff claiming lost earnings must establish that 1) the breach actually caused the alleged loss; 2) the parties contemplated such damages at the time the contract was made; and 3) the alleged loss is "capable of proof with reasonable certainty" (*Awards.com, LLC v Kinko's, Inc.*, 42 AD3d 178, 183 [1st Dept 2007], *citing Kenford Co. v County of Erie*, 67 NY2d 257,

261 [1986] ("*Kenford I*")). Here, plaintiff fails to establish one of the three criteria. Therefore, defendant's motion for summary judgment dismissing the lost earnings claim arising from breach of contract is granted.

Breach actually caused the alleged loss of earnings due to tuition

Here, plaintiff is seeking damages in the form of loss of income is in excess of $2.5 million for loss of tuition from incoming students. Plaintiff's submissions indicate that the problems with the pool caused at least two students to leave the school, costing plaintiff those students' tuition. Plaintiff contends, and defendant does not contest, that the school opened in September 2005, at which time the pool was not ready. The pool was filled with water on January 26, 2006; however, because of problems with leaking, it remained inoperative until it was repaired in January 2007. Thus, the school was without a pool for at least the 2005-2006 school year. In response to a defendant's request for forensic accounting, plaintiff provided the amount it charged for tuition in 2005-2006: $27,800, scheduled to increase at a rate of 6% annum (defendant's Exh. I). Plaintiff also provided a list of four students who left the school allegedly because of the problems with the pool, along with their addresses: Sebastian Borden ("the Borden child"), Siri Agren ("the Agren child"), and Sydney and Zoe Ross ("the Ross children") (id.).

Mr. Koffler testified that he had spoken directly to the parents of the Ross children and learned of their unhappiness with the school. The mother of the Ross children ("Mrs. Ross") complained for 45 minutes about the pool, Mr. Koffler said (defendant's Exh. F, p. 187). However, Mr. Koffler conceded that the pool was not the sole reason the Ross children withdrew; specifically, Mrs. Ross also was upset about an argument she had with another child

(*id.* at 185). A letter from the father of the Ross children, Mark E. Ross, dated June 19, 2006, confirms that the parents of the Ross children withdrew their daughters from the school; but the letter states no reason for the withdrawal (defendant's Exh. J). Further testimony from Sergio Alati ("Mr. Alati"), the headmaster of the lower school, supports plaintiff's claim that the Ross children withdrew from the school for several reasons, including the problems with the pool (defendant's Exh. K, p. 44).

Defendant highlights the fact that Mr. Koffler and Mr. Alati testified that the pool was not the sole reason the Ross children withdrew. Defendant also points out that the schools to which the Ross children transferred do not have swimming programs. Thus, to the extent the inoperative pool was at least one of the reasons the Ross children withdrew, an issue of fact exists as to whether the plaintiff's earnings claim resulted from the withdrawal of the Ross children from the school.

Mr. Koffler testified that he learned of the complaints from the parents of the Borden child and the Agren child from Mr. Alati. Mr. Alati testified that he had spoken to the parents of the Borden child, but not to the parents of the Agren child (defendant's Exh. K). Mr. Alati claimed that the Borden child's mother, was "extremely upset" about the lack of a swim program at the school (*id.*, p. 70). However, Mr. Borden, the father of the Borden child, provided defendant with an affirmation that denies that the parents left because of problems with the pool (defendant's Exh. L). "Neither my wife nor I was upset with the lack of a pool or because of the leaks. . . . We simply decided to transfer my son to Friends Seminary so he could be with his older brothers; the lack of a pool or the leaking did not contribute to our rationale for choosing Friends Seminary over Claremont," Mr. Borden wrote (id.). Thus, an issue of fact

exists as to whether the Borden child left the school because of problems with the pool.

Mr. Alati testified that he learned that the parents of the Agren child were upset with the problems with the pool from Shari Silverstein ("Ms. Silverstein"), the former head of the school, who no longer is employed with the school (defendant's Exh. K, pp. 69-70). Ms. Silverstein "said that [the Agren parents] were unhappy. One of the things they were unhappy with was the swim program. . . . She told me they were leaving" (*id.* at 70). As defendant points out, Mr. Alati's testimony regarding the Agren child is based on hearsay. However, according to the First Department, "hearsay evidence may be properly considered by the motion court on a summary judgment motion where it is not the sole basis for the court's denial of summary judgment to the defendant" (*Acevedo v York Intern. Corp.*, 31 AD3d 255, 258 [1st Dept 2006]). Here, the Court does not base its decision solely on the hearsay testimony of Ms. Silverstein. The Court also considers documentary evidence and the testimony of witnesses with first-hand knowledge. Further, defendant has not raised any reason to doubt the hearsay testimony from Ms. Silverstein as a matter of law (*Gryphon Domestic VI, LLC v APP Intern. Finance Co., B.V.*, 18 AD3d 286, 286, 795 NYS2d 43, 44 [1 Dept 2005] ["Absent any reason to doubt the third parties' credibility--and defendants have not proffered any--it was not necessary for plaintiffs to obtain documents from DTC and Euroclear" (*id.*)]). Defendant contends that it was unable to contact the parents of the Agren child, and defendant speculates as to other plausible reasons for the Agren child's withdrawal from the school (defendant's motion, paragraphs 43-44). However, defendant does not provide evidence that contradicts plaintiff's allegation that the Agren child left the school because of problems with the pool. Thus, plaintiff has raised an issue of fact as to whether the Agren child left the school because of problems with the pool.

Plaintiff also provided materials dated January 4, 2006, which announced the offering of promissory notes to "accredited investors" (defendant's Exh. S). The materials comprise detailed information about the school, including an accountant's report for the 11 months ending November 30, 2005, plaintiff's total liabilities and equities, and plaintiff's net income (which was negative $1.1 million). However, this material does not provide relevant evidence that goes toward establishing plaintiff's alleged lost tuition. Based on the testimony of Mr. Koffler and Mr. Alati and the documents listing the students who allegedly left the school because of the pool, plaintiff has indicated that the school lost at least four students because of problems with the pool. Therefore, plaintiff has sufficiently raise an issue as to whether the problems with the pool caused its lost-tuition damages.

Alleged loss of tuition must be capable of proof with reasonable certainty

Plaintiff has also raised an issue of fact as to whether the lost earnings due to lost tuition can be calculated with reasonable certainty. According to *Ashland Management Inc. v Janien* (82 NY2d 395, 403 [1993]), a case that plaintiff cites, the requirement "that damages be reasonably certain, does not require absolute certainty. Damages resulting from the loss of future profits are often an approximation. The law does not require that they be determined with mathematical precision. It requires only that damages be capable of measurement *based upon known reliable factors without undue speculation*"(*id.*) (*emphasis added*). If the proof offered rests on "speculative assumptions and few known factors," it fails to meet the requirement of reasonable certainty (*id.* at 405).[4]

---

[4]The *Ashland* court noted that "[b]efore accepting plaintiff's figures, the court was obliged to assume not only that the stadium had been completed, opened and operated successfully for 20 years, but that it also attracted professional sporting events, concerts and conventions fully supported by the public"[emphasis added] (Ashland at

In the case of a new business seeking to recover the loss of future profits, the standard is stricter "because there is no experience from which lost profits may be estimated with reasonable certainty and other methods of evaluation may be too speculative" (*Ashland* at 404, citing *Kenford I* at 261). The court in *Cramer v Grand Rapids Show Case Co.* (223 NY 63, 68-69 [1918]) explains the need for a stricter standard:

> A distinction exists between the interruption of an established business and a new venture. The owner of an established business may have it in his power to establish with reasonable certainty the amount of capital invested, the monthly and yearly expenses of operating his business, and the daily, monthly, or yearly income he derived from it for a long time prior thereto and for the time during which the interruption of which he complains continued, thereby furnishing a reasonably correct estimate of the nature of the legal injury and the amount of damages which resulted therefrom. While evidence of such facts may be admissible they must not be uncertain or problematical. Dickinson v. Hart, 142 N. Y. 183, 36 N. E. 801. The requirement imposed upon one whose business has been established and interrupted cannot be enforced as to him and made less stringent to one embarking in a new business who cannot furnish data of past business from which the fact that anticipated profits would have been realized can be legally deduced (*id.*) (citation omitted).

Plaintiff argues that it is not a new business, pointing to the broad experience of Mr. Koffler.[5] Mr. Koffler currently owns and operates 11 private schools in New York City (plaintiff's opposition, Exh. A, paragraph 14). However, Mr. Koffler's experience notwithstanding, the Metschools materials describe the school as being "in its first year of operation" with "no

---

405).

[5]All 11 schools, with the exception of plaintiff, "are operating at or near their projected enrollment on pace to reach full capacity, if not already reached, as scheduled. Each school reached its full enrollment capacity within five years of its opening and on schedule" (plaintiff's opposition, Exh. A, paragraph 24). With regard to plaintiff, Mr. Koffler based its enrollment projections on the performance of his other 10 schools, his "extensive experience in owning, modifying and operating" 54 schools in his career, and his awareness of the development and demographics of the lower Manhattan area where plaintiff is located (*id.*). Mr. Koffler faults the problems with the pool for the likelihood that plaintiff will not be operating at maximum capacity by Fall 2009, as he predicted.

established history or reputation" (defendant's Exhibit S, p. 23).[6] If plaintiff's parent company considers the school a new business operation, there is no reason why the Court should not. The distinction is not a significant one. "Whether the claim involves an established business or a new business . . . the test remains the same, i.e., whether future profits can be calculated with reasonable certainty" (*Ashland* at 404).

Plaintiff tries to characterize his damages as "general" as opposed to "specific" to support its contention that a more lenient standard should be applied to its claim (plaintiff's opposition, p. 8, paragraph 24). Citing *Tractebel Energy Marketing, Inc. v AEP Power Marketing, Inc.* (487 F.3d 89 [2d Cir. 2007]), plaintiff argues that "lost profits may be considered general, as opposed to consequential damages, when the non-breaching party seeks to recover the profit it would have earned on the breached contract had the other party fully performed. At bar, Plaintiff seeks the tuition it would have received from incoming students" (*id.*). It is well settled that general damages are damages that naturally flow from an alleged harm *(Keefe v Lee*, 197 NY 68, 70-71 [1909]). Special damages do not naturally flow from an alleged harm, but may have been caused by the alleged harm. Special damages typically include lost profits, which plaintiff here is seeking. *Tractebel* makes clear that in "New York, a party is entitled to recover this form of lost profits only if (1) it is demonstrated with certainty that the damages have been caused by the breach, (2) the extent of the loss is capable of proof with reasonable certainty, and (3) it is established that the damages were fairly within the

---

[6] The materials announced the offering of promissory notes to "accredited investors." Under the heading "Risk Factors," Metschools states that plaintiff has "little history and a minimal reputation" (defendant's Exhibit S, p. 23). Metschools goes on to add: "While working to achieve and sustain a respectable reputation, [plaintiff] will be competing with many other reputable private schools with years of experience" (*id.*).

contemplation of the parties (*Tractebel* at 109). The case goes on to make an exception to this well-established rule and characterize loss profits as general damages "when the non-breaching party seeks only to recover money that the breaching party agreed to pay under the contract" (*id.*). Here plaintiff has not established that defendant agreed to pay plaintiff any money under the contract to build the pool. Therefore, the damages plaintiff seeks to recover here are properly characterized as "special damages' and the Court will apply the appropriate caselaw.

When it comes to calculating lost profits, the courts look for such evidence as a profit record or "benchmark in the form of comparable businesses to permit a factfinder to determine that the claimed lost profits are reliable or demonstrated with reasonable certainty" (*Awards.com* at 185). The *Ashland* court held that the lost profits projected by the defendant were reasonably certain, because the parties relied on the judgment of professionals in financial management, and the figures derived from a formula that enabled the parties to easily compute losses (*Ashland* at 406 ["By applying Ashland's 1% management fee to these sums to determine the revenues derived from them and then allotting defendant 15% of those revenues, as paragraph C(21) provided, Janien's loss could be easily computed" (*id.*)].

Here, lost tuition may be estimated with reasonable certainty. In plaintiff's Bill of Particulars, plaintiff states that it suffered an estimated loss of income in excess of $2.5 million for loss of tuition from incoming students (defendant's Exh. E, paragraph 8d). Plaintiff's school was without a pool for at least the 2005-2006 school year. In response to a defendant's request for forensic accounting, plaintiff provided the amount it charged for tuition in 2005-2006: $27,800, scheduled to increase at a rate of 6% annum. Plaintiff also provided a list of four students who left the school allegedly because of the problems with the pool: Sebastian Borden

(kindergartner), Siri Agren (kindergartner), Sydney Ross (kindergartner), and Zoe Ross (fourth-grader) (defendant's Exhibit I). Plaintiff also states that the school accepts students for grades 1-12. By multiplying the number of students that allegedly left the school by the amount of tuition, plaintiff's lost earnings due to the loss of tuition from the four incoming students in the 2005-2006 school year may be calculated by a fact-finder. Using these same figures, a fact finder can also estimate how much tuition plaintiff would have received (including the 6% tuition increases) if these four students had stayed at the school through grade 12. Plaintiff also provides evidence that it refunded the swimming fees to 26 students (defendant's Exhs. M and R). Plaintiff's submissions indicate that the school froze tuition for students from its first year of operation to its second, as a result of the pool problems (plaintiff's motion, p. 11, paragraph 24). Plaintiff also contends, through Mr. Koffler's deposition testimony, that the school failed to meet its enrollment expectations for September 2007, a missed projection Mr. Koffler attributes to the problems with the pool (defendant's Exh. F, pp. 525-529). Plaintiff maintains that it provided sufficient evidence of lost tuition on the grounds of Mr. Koffler's "personal knowledge of all aspects of Plaintiff's finances, costing, accounts payable and receivables" (plaintiff's reply, paragraph 32). Plaintiff also pledged to provide further proofs at trial. As plaintiff points out, Mr. Koffler's affidavit at least "demonstrates that there is a genuine issue of material fact as to the damages element on Plaintiff's claim" (*id.*). Therefore, at this juncture, plaintiff has submitted sufficient evidence to raise an issue of fact as to whether its lost earnings due to lost tuition may be calculated with reasonable certainty.

Contemplation of lost profits at the time the contract was made

However, plaintiff has failed to establish that the parties contemplated lost profits at the

time the contract with defendant was made. The parties' contract is silent as to liability for damages (defendant's Exh. G). The court in *Kenford Co. v County of Erie* (73 NY2d 312 [1989]) *("Kenford II")* held that the fact that a contract is silent on loss profits weighs against the possibility that the parties contemplated for loss profits (*Kenford II* at 320 ["Similarly, there is no provision in the contract between Kenford and the County, nor is there any evidence in the record to demonstrate that the parties, at any relevant time, reasonably contemplated or would have contemplated that the County was undertaking a contractual responsibility for the lack of appreciation in the value of Kenford's peripheral lands in the event the stadium was not built" (*id.*)]). The court in *Awards.com* (*supra*) explains how to determine the intent of the parties if a contract is silent on the issue of damages: "Where a contract is silent on the subject, courts, employing a 'common sense' approach, must determine what the parties intended by considering 'the nature, purpose and particular circumstances of the contract known by the parties . . . as well as 'what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made"' " (*Awards.com* at 183-184, quoting *Kenford II* at 319) (internal citations omitted). When faced with a contract silent on damages, the court in *Awards.com*, applying a "common sense approach," concluded that it "would be highly speculative and unreasonable to infer an intent to assume the risk of lost profits in what was to be a start-up venture . . . . There is nothing to suggest that, in those circumstances, Kinko's would have entered into an agreement to undertake responsibility for lost profits, a liability with unlimited potential" (*Awards.com* at 184). Even where the court in *Kenford II* found evidence that the parties to the contract had a "hope or expectation" that a project would produce a profit at the time of

contracting, the court held that it could not conclude "that this hope or expectation of increased property values and taxes necessarily or logically leads to the conclusion that the parties contemplated that the [defendant] would assume liability for [the plaintiff's] loss of anticipated appreciation in the value of its peripheral lands if the stadium were not built" (*Kenford II* at 319-320).

Here, plaintiff provides no evidence that at the time of negotiating the contract to build the pool, the plaintiff and defendant contemplated damages in the form of lost earnings due to lost tuition. Further, plaintiff does not establish that at the time of contracting, the parties expressed even a hope or expectation that the pool would ensure plaintiff earnings in the form of tuition. Plaintiff argues that defendant was *aware* the pool needed to be finished before the classes started in September 2005; therefore, defendant "knew of the foreseen risks should the swimming pool not be completed, leak free in a timely fashion." However, the test for whether the parties contemplated loss profits at the time of contracting is not that whether the parties allegedly were "aware" of the plaintiff's expectations. The *Kenford II* court held that:

> Although the County *was aware* that Kenford had acquired and intended to further acquire peripheral lands, this knowledge, in and of itself, is insufficient, as a matter of law, to impose liability on the County for the loss of anticipated appreciation in the value of those lands since the County never contemplated at the time of the contract's execution that it assumed legal responsibility for these damages upon a breach of the contract. As this court noted in [*Booth v Spuyten Duyvil Rolling Mill Co.*, 1875 WL 10676, 1 [1875]] 'bare notice of special consequences which might result from a breach of contract, unless under such circumstances as to imply that it formed the basis of the agreement, would not be sufficient [to impose liability for special damages]'" (*id.* at 320).

Further, in the course of negotiating a contract, the parties usually bargain for the inclusion of certain terms in the contract. Here, plaintiff provides no evidence that it bargained

for damages in the form of lost tuition. As the court stated in *Awards.com*: "If the parties had intended to agree to pay lost profits in the event of a breach, they could have so specified just as they had set forth the payment terms due Kinko's. Thus, plaintiffs are attempting to obtain through litigation what they failed to secure at the bargaining table" (*Awards.com* at 185). Here, it appears that plaintiff is trying to do the same and has failed to submit any evidence indicating that such damages were contemplated at the time plaintiff contracted with defendant to have the pool built. Therefore, having failed to raise a triable issue of fact that the parties contemplated damages in the form of lost earnings due to lost tuition at the time of contracting, defendant's motion for summary judgment dismissing plaintiff's claim for lost earnings based on breach of contract is granted.

Loss profits due to negligence

However, defendant's application for dismissal of plaintiff's claim for lost tuition as a result of defendant's alleged negligence is denied. According to the First Department, lost profits in a negligence claim have to be established with reasonable certainty: "Generally, economic loss from business interruption is not recoverable in damages where the claim is based upon lost profits, revenues or labor productivity which are 'speculative' in nature. But this does not negate the possibility that in a given situation of gross negligence, proof of lost profits might very well be certain and specific enough to warrant recovery in damages" *(Sanwep Restaurant Corp. v Consolidated Edison Co. of N.Y., Inc.*, 204 AD2d 71, 71 [1st Dept 1994]) (citations omitted). The court in *Campbell v Rogers & Wells* (218 AD2d 576, 580 [1st Dept 1995]) expounded on this standard: "While damages for lost profits etc., must be capable of proof with reasonable certainty absolute certainty is not required; such damages must be capable

of measurement based upon known reliable factors without undue speculation" (*id.*, citing *Ashland* at 403).

As discussed above, plaintiff has submitted sufficient evidence from which a trier of fact may determine its lost tuition claim with reasonable certainty. Accordingly, defendant's motion for summary judgment with regard to plaintiff's lost tuition/lost earnings claim based on defendant's negligence is granted, except as to those damages pertaining to the four students identified herein.

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendant's motion for an order, pursuant to CPLR §3212, seeking partial summary judgment dismissing plaintiff's lost earnings claim arising from breach of contract is granted; and it is further

ORDERED that defendant's motion for an order, pursuant to CPLR §3212, seeking partial summary judgment dismissing plaintiff's lost earnings claim arising from defendant's alleged negligence is granted, except as to those damages pertaining to the four students identified herein; and it is further

ORDERED that defendant serve a copy of this order with notice of entry upon all parties within 20 days of entry.

That constitutes the decision and order of the Court.

Dated: 12/15/08

Hon. Carol R. Edmead, J.S.C.