[* 1]

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

PRESENT: _____ PART 56

Justice

Index Number : 600236/2007

BRIDGE FUNDING

VS.

ESSEX MARKET DEVELOPMENT

SEQUENCE NUMBER : 005

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n this motion to/for _____

	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

FILED
APR 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 4/20/09

_____ J.S.C.

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 56

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BRIDGE FUNDING, INC.,

Plaintiff,

- against -

ESSEX MARKET DEVELOPMENT, LLC,

Defendant.

----------x

Index No. 600236/2007

DECISION AND ORDER

RICHARD B. LOWE III, J.:

Motion Sequences 005 and 006 are herein consolidated for disposition. In Motion Sequence 005, Plaintiff Bridge Funding, Inc., moves pursuant to CPLR § 3212 for summary judgment on its three count complaint, and to strike defendant Essex Market Development, LLC's answer, affirmative defenses and counter-claims. In Motion Sequence 006, defendant also moves pursuant to CPLR § 3212 for summary judgment on its four counter-claims against the plaintiff, and dismissing plaintiff's complaint in its entirety.

BACKGROUND[1]

Defendant is a real estate developer, which in 2005 sought to develop a mixed use condominium located at 378-380 Union Avenue and 11-13 Powers Street, Brooklyn, New York (the "Project"). Plaintiff is either a mortgage broker or a direct lender (the distinction of which is irrelevant for the purposes of the instant motions), from which the defendant sought financing for the Project. Throughout the Spring and Summer of 2005, the parties negotiated terms of a prospective loan agreement. By September 2005, the parties agreed on the parameters of a

[1] The parties failed to provide Rule 19-a statements. As such, the following undisputed facts are derived from the parties various submissions.

proposed loan. This loan is described in detail in a September 8, 2005 letter, drafted on plaintiff's letterhead, executed by both parties, and referred to as the "Term Sheet" (Lawrence Linksman Affidavit in Support of Plaintiff's Motion for Summary Judgment, Oct 17, 2008 ["Linksman Support Affidavit"], Ex D; Howard Eisenberg Affidavit in Support of Defendant's Motion for Summary Judgment, Oct 23, 2008 ["Eisenberg Support Affidavit"], Ex B).

Pursuant to the Term Sheet, on September 8, 2005, defendant executed and delivered the Term Sheet along with a check in the sum of $55,500. The parties dispute whether the $55,500 paid on September 8, 2005 is for earned fees or a good faith deposit. The Term Sheet sets forth the terms for a loan in the amount of $13,500,000, and includes detailed provisions describing the collateral (including a valid first mortgage on the Development), term of the loan (including an option to the borrower), and specific interest rates (Term Sheet at 1-4). Additionally, the Term Sheet includes the following terms that are relevant to the instant motions:

> We are pleased to advise you of our intent to provide financing to An LLC to be Formed ("Borrower") in the amount of $13,500,000.00 . . . . This term sheet contains terms, which are subject to further review, analysis, consideration, and final approval by [BFI], its co-lenders and/or its loan participants . . . . We may modify the terms highlighted below in whole or in part during this review and approval process or the Lenders or Participants may decide to decline the *Loan request*.[2]
>
> GUARANTOR: N/A (The loan is non-recourse and there are no personal guarantees)[3]
>
> ***
>
> ACCEPTANCE OF TERM SHEET: This term sheet and all of its terms and conditions will

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[2] Term Sheet at 1 (*emphasis added*).

[3] Term Sheet at 1.

become effective only upon delivery to BFI of this term sheet executed and, duly accepted by the Borrower, and Borrower agreeing to pay BFI a fee of $1,100,000.00 which is non-refundable and earned to be paid as follows:

A. [$500.00] for the application review and the preparation of this term sheet. This fee is due on signing in addition to such sums set forth in "Letter B" below.

B. [$55,000.00] to be paid at the time Borrower signs this term sheet, before our visit, which signing will be by September 1, 2005.

C. [$1,045,000.00] *to be paid at the closing from the loan proceeds.*

This letter will become effective once signed by all parties and returned with [$55,000.00] as set forth above in A & B. Make all checks payable to [BFI]. This *term sheet will expire October 15, 2005*, if a closing has not yet occurred. BFI will have no obligation with respect to the Loan until Borrower fully executes this letter and returns same to BFI along with the required portion of the fees in A & B.[4]

***

OTHER: If BFI is unable to perform, BFI will only be obligated to [$55,000.00]. Said refund will be the total extent of any liability of obligation of BFI in such a circumstance.[5]

***

15. No Oral Modification: Notwithstanding any course of dealing between the parties, no amendment, modification, recision, waiver, or release of any provision of this term sheet shall be effective unless the same shall be in writing and signed by the Borrower and BFI.[6]

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4 Term Sheet at 3 (*emphasis added*).

5 Term Sheet at 4.

6 Term Sheet at 11.

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17. Survival of the Term sheet: Borrower and BFI hereby acknowledge and agree that this term sheet shall not survive the closing of the Loan. Furthermore, . . . the parties specifically acknowledge and agree that the terms and conditions of this Loan may be modified by mutual agreement at any time up to and including the date of closing and that any such modification shall be incorporated directly into the Loan Documents without the need to amend this term sheet.[7]

After the parties executed the Term Sheet, they continued to negotiate details of the loan agreement. Plaintiff alleges that it was ready to close on the loan set forth in the Term Sheet, at least with respect to the amount, collateral, term and interest rate provisions. Towards that end, plaintiff sent defendant loan documents in November 2005, May 2006, and October 2006. Throughout that period, plaintiff alleges defendant was not satisfied with the loans proposed in the loan documents and defendant kept changing the terms of the loan sought. Plaintiff concedes, however, that each set of loan documents delivered to defendant provided for a loan that included personal guarantees. Finally in October 2006, defendant advised plaintiff it was seeking financing elsewhere, at which time plaintiff requested that the defendant pay a portion of the fees set forth in the Term Sheet. In December 2006, defendant agreed to receive financing from Madison Realty, L.P. Plaintiff alleges that the terms of the loan from Madison Realty, L.P., were substantially similar to the terms provided for in loan documents delivered in November 2005, May 2006, and October 2006.

In January 2007, plaintiff filed its complaint alleging three causes of action: breach of contract for the fees listed in the Term Sheet, or, in the alternative, unjust enrichment for the fees

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[7] Term Sheet at 11-12.

listed in the Term Sheet, and breach of contract for attorney's fees as stated in the Term Sheet. In its answer, defendant alleges four counter-claims (breach of contract, conversion, unjust enrichment, and declaratory judgment) all essentially seeking return of the $55,000.

DISCUSSION

To obtain summary judgment, the movant must establish its cause of action "sufficiently to warrant the court as a matter of law in directing judgment" in its favor (CPLR 3212[b]), and it must "set forth evidence that there is no factual issue" requiring an adjudication on the facts (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]). To defeat summary judgment, the opposing party must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]).

Breach of Contract Claims

Resolution of the breach of contract claims requires consideration of two legal issues, including whether the Term Sheet is an enforceable agreement, and what, if any, are the parties' fee obligations under the Term Sheet.

Defendant argues that the term sheet was an "agreement to agree" because it does not include complete enforceable terms. Plaintiff argues, *inter alia*, that the Term Sheet contains all the essential terms necessary to bind the defendant.

The "fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent, and that the best evidence of what parties to a written agreement intend is what they say in their writing" (*Innophos, Inc. v Rhodia, S.A.*, 10 NY3d 25, 28 [2008], *citing Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]]). "A familiar and eminently sensible proposition of law is that, when parties set down their agreement

in a clear, complete document, their writing should as a rule be enforced according to its terms" (*W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 162 [1990]). "Where the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law and the case is ripe for summary judgment" (*American Express Bank, Ltd. v Uniroyal, Inc.*, 164 AD2d 275, 277 [1st Dept 1990] [*citations omitted*]).

As the court in *Teachers Ins. & Annuity Asso. v Tribune Co.* (670 F Supp 491, 499 [SD NY 1987]), explained:

> In seeking to determine whether such a preliminary commitment should be considered binding, a court's task is, once again, to determine the intentions of the parties at the time of their entry into the understanding, as well as their manifestations to one another by which the understanding was reached. Courts must be particularly careful to avoid imposing liability where binding obligation was not intended. There is a strong presumption against finding binding obligation in agreements which include open terms, call for future approvals and expressly anticipate future preparation and execution of contract documents.

(*Id.*).

Plaintiff fails to argue or allege that, under the Term Sheet, plaintiff was also bound and obligated to provide a loan as described under the Term Sheet. In fact, the complaint lacks any reference to plaintiff undertaking any obligation under the Term Sheet (Complaint ¶¶ 5-25). Plaintiff cannot make such an allegation because the first paragraph of the Term Sheet, quoted above, unambiguously states that the Term Sheet is a "loan request", that plaintiff has not approved the loan, that plaintiff "may modify the terms . . . during the review process," and that plaintiff may still in fact decide "to decline the Loan request" (Term Sheet at 1). By the plain and unambiguous terms set forth in the first paragraph of the Term Sheet, there was no obligation on the part of plaintiff, or its co-lender(s), to provide a loan.

By its own terms, the Term Sheet constituted a "loan request" (or a "loan application" as

indicated on page 17 of the Term Sheet). Loan requests or applications are generally understood as offers to enter into a loan agreement (*Leigh v New York*, 41 AD2d 709, 709-710 [1st Dept 1973], *aff'd* 33 N.Y.2d 774 [1973] [holding that a letter request for a mortgage loan, sent along with a check for $15,000 "good faith deposit", was not an agreement; rather it was "merely an application to the defendant asking that a loan commitment be issued"]; *Parkway Inn, Inc. v First Federal Sav. & Loan Asso.*, 269 NYS2d 730, 732 [NY Sup Ct. 1966] [holding that a loan application, which described specific terms of the loan sought and included a required good faith deposit of $10,000, was an offer to enter into a contract]). The Court finds that the Term Sheet is merely an offer to enter into a loan under the specific terms provided.

Therefore, in order to determine whether the Term Sheet became part of an enforceable agreement, the Court must decide whether the plaintiff accepted defendant's offer. Defendant argues that plaintiff never provided loan documents that complied with the terms of the Term Sheet, specifically plaintiff never offered a non-recourse loan (Howard Eisenberg Affidavit in Opposition of Plaintiff's Motion for Summary Judgment, Nov 25, 2008 ["Eisenberg Opposition Affidavit"] ¶¶ 6, 9, 12; Eisenberg Support Affidavit ¶¶ 5, 8). Additionally, defendant argues that the Term Sheet expired by its terms on October 15, 2005, and the parties never extended the Term Sheet.

Plaintiff argues that defendant breached the Term Sheet by failing to close on the loan documents provided in November 2005, May 2006, or October 2006. Plaintiff concedes that all three sets of loan documents contained personal guarantees of some sort, but argues that it provided loan documents which generally complied with the Term Sheet. Plaintiff also concedes that the first loan documents provided were in November 2005, but argues that the parties agreed to extend the expiration date of the Term Sheet.

According to plaintiff's submissions, none of the loan documents delivered to the defendant in November 2005, May 2006, or October 2006 conform with the plain and unambiguous terms set forth in the Term Sheet. The Term Sheet provided for a non-recourse loan and no personal guarantees. However, all three sets of loan documents contained personal guarantees. Specifically, the November 2005 loan documents contained an "Environmental Indemnity Agreement" (Lawrence Linksman Affidavit in Support of Plaintiff's Motion for Summary Judgment, Oct 17, 2008 ["Linksman Support Affidavit"], ¶ 15, Ex I), and a "Guarantee of Completion and Performance" (*id.* ¶ 16, Ex J); and the May 2006 and October 2006 loan documents contained the same Environmental Indemnity Agreement (*id.* ¶¶ 20, 27) and a "Limited Guaranty of Payment" (*id.* ¶¶ 20, 27, Exs O, S). It is clear that these guarantees do not comport with the provision in the Term Sheet that requires a non recourse loan and no personal guarantees -- regardless of whether or not these guarantees are standard in the industry or whether the defendant ultimately accepted personal liability in its loan with Madison Realty L.P. Therefore, by failing to provide loan documents that comport with the Term Sheet, plaintiff never accepted defendant's offer, and the loan documents delivered in November 2005, May 2006, and October 2006, which all include personal guarantees, were mere counter-offers.

Plaintiff argues that defendant, by email dated May 19, 2006, "conceptually accepted" the guarantees provided for in the May 2006 loan documents. The email states:

> 2. Limited Guaranty -- We understand that in the context of working everything out satisfactorily, the client will consider a payment guaranty that is strictly limited to the amount of the lender fee -- not lender fee plus -- and that in no event will become of purport to become a full recourse guaranty. They will consider a standard carve out guaranty ... the client would like notice from lender for alleged defaults under the guaranty documents (including environmental).
>
> 3. Environmental Indemnity -- This should clearly carve out the Phase I and Phase II information, which has been in lender's possession for several months. Ditto the geotech info [*sic*].

(Linksman Support Affidavit ¶ 22, Ex P). Contrary to plaintiff's characterization of a "conceptual acceptance", the comments quoted above cannot be considered an acceptance of the guarantees included within the May 2006 loan documents. At best, these statements reflect continued negotiations.[8] Additionally, the above quoted email supports the determination that the May 2006 loan documents were counter-offers.

Although the Court finds that the Term Sheet is an offer to enter into a loan agreement, the Court must determine whether the parties have any fee obligations under the Term Sheet. As quoted above, according to the provisions on page 3 of the Term Sheet, the $500 is for the application review and the preparation of the Term Sheet. Therefore, according to the plain and unambiguous terms of the Term Sheet, plaintiff is not entitled to a refund of the $500 paid for the application review and the preparation of the Term Sheet.

Regarding the $55,000, the Term Sheet states that it is to be paid at the time defendant signed the Term Sheet. Additionally, it states that if plaintiff is "unable to perform," plaintiff will "only be obligated to the $55,000" and "[s]aid *refund* will be the total extent of any liability or obligation" of plaintiff in such a circumstance (Term Sheet at 4 [*emphasis added*]). Therefore, according to the plain and unambiguous terms of the Term Sheet, by failing to accept

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[8] The loan document that plaintiff alleges it did provide were delivered to the defendant in November 2005 (Lawrence Linksman Affidavit in Opposition of Defendant's Motion for Summary Judgment, Nov 25, 2008 ["Linksman Opposition Affidavit"], ¶ 15). By the expiration date set forth in the "Acceptance of the Term Sheet" provision, the Term Sheet expired October 15, 2005. Thus, under the plain and unambiguous terms of the Term Sheet, the offer expired before the delivery of the loan documents. However, the parties submitted substantial argument and evidence concerning whether the Term Sheet was extended orally, in writing, or by way of reliance. Because the Court finds that plaintiff never accepted defendant's loan request, at any point before or after the October 15, 2005 expiration, the issue of whether or not the date for expiration of the Term Sheet was extended is moot at this time.

the loan as contemplated, plaintiff is obligated to "refund" the $55,000 deposit.

Regarding the $1,045,000, the Term Sheet states that it is to be paid at the closing from loan proceeds. The Term Sheet unambiguously contemplates that a closing may not occur (*see* Term Sheet at 3). Because the Term Sheet states that $1,045,000 was only to be paid at the closing from loan proceeds, and since there was no closing of the loan contemplated in the Term Sheet, defendant never became obligated to pay the $1,045,000.

Therefore, plaintiff's motion for summary judgment on its first cause of action for breach of contract seeking the fees stated in the Term Sheet is denied. Defendant's motion for summary judgment on its cause of action for breach of contract seeking return of the $55,000 deposit is granted and plaintiff is obligated to refund the $55,000 deposit. Plaintiff's motion for summary judgment seeking dismissal of defendant's breach of contract counter-claim is denied. Defendant's motion for summary judgment seeking dismissal of plaintiff's first cause of action is granted.

Unjust Enrichment Claims

As an alternative to the claim for breach of the Term Sheet, plaintiff seeks to recover the compensation promised in the Term Sheet under the theory of unjust enrichment or quantum meruit. Specifically, Plaintiff argues that because defendant benefitted from plaintiff's continued work in attempting to close the loan, defendant is obligated to pay the value of the services and performance rendered which is the total amount of fees due under a completed loan under the Term Sheet (Complaint ¶¶ 27-28).

Defendant argues that plaintiff fails to state a claim for unjust enrichment because there was no benefit conferred or received during the drawn-out loan negotiations. Furthermore,

according the defendant, the terms of the parties relationship was set out in the Term Sheet, barring any quasi-contract claims.

Quantum meruit is a quasi-contractual doctrine that applies in the absence of an express contract and is imposed in order to prevent a party's unjust enrichment (*Clark Fitz-Patrick, Inc. v Long Island R.R. Co.*, 521 NYS2d 653, 656 [1987]). "The doctrine of unjust enrichment rests upon an equitable principle that a person should not be allowed to enrich himself at the expense of another -- it comes into play when an individual is 'in possession of money or property which in good conscience and justice he should not retain but deliver to another'" (*Songbird Jet, Ltd. v Amax, Inc.*, 581 F Supp 912, 926 [1984]). To recover in quantum meruit for such compensation, Plaintiff must establish "(1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services" (*Longo v Shore & Reich, Ltd.*, 25 F3d 94, 98 [2d Cir 1994] [citations omitted]).

"The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*id.*; *see also City of Yonkers v Otis Elevator Co.*, 844 F2d 42, 48 [2d Cir 1988] [quasi-contractual "relief is unavailable where an express contract covers the subject matter"]). Additionally, "unjust enrichment is not an appropriate remedy for recovery of the expenses of a failed negotiation" (*Chatterjee Fund Mgmt., L.P. v Dimensional Media Assocs.*, 260 AD2d 159, 160 [1st Dept 1999], *citing Songbird Jet v Amax, Inc.*, 581 F Supp at 926).

The Term Sheet does not reflect an enforceable contract because, as discussed above, plaintiff never accepted the terms of the loan. Therefore, the Term Sheet on its own does not bar

recovery of a properly pled and substantiated unjust enrichment claim.

In this case, plaintiff has failed to allege a value of services rendered for the benefit of and accepted by the defendant. Rather, the allegations in the complaint and in its extensive submissions do nothing more than allege a negotiation for a loan that started by way of defendant's loan application, along with a good faith deposit. The Term Sheet includes binding obligations only if plaintiff was able to provide a loan that complied with the Term Sheet. Plaintiff has failed to show how working on this deal at an arms length relationship was a benefit conferred and received by the defendant. Nothing submitted to the Court illustrates services rendered, or money or property delivered, and accepted by the defendant. The extensive submissions evidence that both sides were engaged in a long, drawn out negotiation process. As such, plaintiff's only remedy is to seek recovery of expenses of a failed negotiation, which is inappropriate for an unjust enrichment claim (*Chatterjee Fund Mgmt.*, 260 AD2d at 160). Thus, plaintiff's claim for unjust enrichment is dismissed.

Regarding defendant's claim for unjust enrichment, plaintiff argues that the claim is barred because the subject of the unjust enrichment claim is addressed in the Term Sheet. As discussed above, the Term Sheet dictated that plaintiff must return the $55,000 deposit if plaintiff is unable to provide a loan complying with the Term Sheet. Thus, the unjust enrichment claim is barred because the Term Sheet governs the subject matter of the unjust enrichment claim (*Clark Fitz-Patrick, Inc.*, 521 NYS2d at 656; *City of Yonkers*, 844 F2d at 48). Thus, defendant's claim for unjust enrichment is dismissed.

Defendant's Counter-Claim for Conversion

In its answer, defendant pleads a counter-claim for conversion, alleging that plaintiff was

obligated to return the $55,000 deposit, and plaintiff is liable for conversion by failing to return the funds. Plaintiff argues that defendant cannot maintain a duplicative claim for conversion when seeking damages for breach of contract (Plaintiff's Memo in Support at 21). Defendant fails to refute plaintiff's argument

Defendants' counter-claim for conversion is dismissed because "an action for conversion cannot be validly maintained where damages are merely being sought for breach of contract" (*Peters Griffin Woodward, Inc. v WCSC, Inc.*, 88 AD2d 883, 884 [1st Dept 1982] [citations omitted]).

Defendant's Counter-Claim for Declaratory Judgment

In its answer, defendant pleads a counter-claim for declaratory judgment seeking a declaration that plaintiff is obligated to refund the Deposit, plus interest thereon, and the Term Sheet expired by its own terms on October 15, 2005.

With respect to the deposit, plaintiff argues that defendant's declaratory judgment claim must be dismissed because it merely parallels the breach of contract claim and seeks a declaration of the same rights and obligations as will be determined in the claim for breach of contract.

A "cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract" (*Apple Records, Inc. v Capitol Records, Inc.*, 137 AD2d 50, 54 [1st Dept 1988] [citations omitted]). Therefore, defendant's counter-claim for declaratory judgment concerning the Deposit is dismissed.

As discussed above, the Term Sheet expired by its own terms on October 15, 2005, but

the parties dispute whether the Term Sheet was or was not extended orally, in writing, or by way of reliance. By ruling that plaintiff never accepted defendant's offer, determining whether or not the Term Sheet expired has no significance to the instant motions.

Plaintiff's Claim for Attorney's Fees

Plaintiff's third cause of action is for breach of the provision in the Term Sheet that requires defendant to pay plaintiff's legal fees incurred in connection with the proposed loan agreement. Plaintiff argues that the Term Sheet obligates defendant to pay plaintiff's attorneys fees concerning the transaction and collecting fees due, as well as all costs associated with the loan.

Defendant argues that by failing to provide loan documents that satisfied the provisions of the Term Sheet, plaintiff has no legal basis to claim legal fees incurred in attempting to renegotiate the Term Sheet and in attempting to close the loan.

Page 3 of the Term Sheet states:

> We require that the Borrower pay BFI's attorneys [*sic*] legal fees and expenses for services provided to BFI concerning this transaction. The legal fees of BFI's attorneys will be based upon BFI's attorneys [*sic*] general charged fees.
>
> Borrower agrees that upon final approval of the Loan, by BFI, and the scheduling of the Loan closing, to pay BFI's attorney Five Thousand Dollars ($5,000.00) as a deposit for BFI's counsel costs. The final legal fee will be determined by BFI's counsel.

Page 4 of the Term Sheet states:

> Borrower agrees that the Loan shall be without costs to BFI. Borrower assumes liability for and will pay all costs and expenses required to satisfy the conditions hereof and the making of the Loan. Such costs and expenses shall be paid at or prior to the Loan closing, or upon demand if the Loan does not close or if this term sheet is terminated. Such obligation shall survive termination.

It is the "well-understood rule that parties are responsible for their own attorney's fees"

(*Hooper Associates, Ltd. v AS Computers, Inc.*, 74 NY2d 487, 492 [1989]). However, an award of attorney's fees is proper when the parties expressly provide for it in a contract (*Sempra Energy Trading Corp. v PG&E Tex. VGM, L.P.*, 284 AD2d 253, 254 [1st Dept 2001]).

The provisions concerning repayment of costs and legal fees specifically refer to costs and fees associated with making the loan. Under the Term Sheet, the loan is defined as a non-recourse loan with no personal guarantees. By failing to provide loan documents satisfying this provision, the parties never reached a point where they incurred costs and expenses associated with making the loan as defined by the Term Sheet. Therefore, defendant never became obligated to pay costs, expenses or legal fees associated with a mere offer to enter into a loan agreement that was never accepted.

Plaintiff's motion for summary judgment on its third cause of action is denied. Defendant's motion for summary judgment to dismiss plaintiff's third cause of action is granted.

CONCLUSION

Accordingly, it is hereby:

ORDERED, that plaintiff's complaint is dismissed, and it is further

ORDERED, that defendant's second, third, and fourth counter-claims are dismissed, and it is further

ORDERED, that defendant's motion for summary judgment on its first cause of action for breach of contract is granted, and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendant and against plaintiff in the amount of $55,000, together with interest as prayed for allowable by law until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate.

Dated: April 20, 2009

ENTER:

J.S.C.

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APR 23 2009
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