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SCANNED ON 6/25/2009

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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Justice

Index Number : 103372/2008

RBP VENTURES, LTD.

VS

CONCORD ELECTRONICS, INC.

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 9/15/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

C -

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3-6
Replying Affidavits	7-8

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER

FILED

JUN 25 2009

COUNTY CLERK'S OFFICE

NEW YORK

Dated: 6/19/09

_____ 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 54

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RBP VENTURES, LTD.,

Plaintiff,

Index No.: 103372/2008

-against-

DECISION and ORDER

CONCORD ELECTRONICS, INC. a/k/a and/or f/k/a KB-SQUARED INC. a/k/a and/or f/k/a REVERE METAL ART CO., INC.,

Defendant.

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KORNREICH, SHIRLEY WERNER, J.:

This action arises from a contract to sell real property located at 37 Great Jones Street, New York, N.Y. (Property). Defendant Concord Electronics, Inc. (Seller), moves for summary judgment dismissing the complaint and for summary judgment on its counterclaims. Its counterclaims allege: a) a breach of contract, including cancellation of the notice of pendency (1st cause of action); b) seek a declaratory judgment declaring that plaintiff breached the contract and that the escrowee should return the deposit (2nd cause of action); and (c) request reasonable attorneys fees and costs as the prevailing party, pursuant the parties' contract (3rd cause of action). Plaintiff RBP Ventures, Ltd. (Purchaser), opposes the motion and cross-moves to obtain access to the Property.

Background

On June 1, 2006, the Purchaser and Seller entered into an agreement, pursuant to which the Purchaser was to buy the Property for $4,400,000 (Contract).[1] Pursuant to the Contract,

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[1] On March 20, 2007, almost one year after entering into the Contract, Seller changed its name to KB-Squared Inc. Undisputed documentary evidence in the record proves that Seller

Purchaser tendered $735,500 as a down payment to Seller. The down payment currently is being held by an escrowee, the firm representing the Seller, Ferrara, Turitz, Harraka & Goldberg, P.C. (Escrowee). The gravamen of the dispute is the Purchaser's claim that there are environmental hazards on the Property, which the Seller was obligated to disclose and that the cost of removing the hazards should be credited to the Purchaser at the closing.

The Seller made the following representations and warranties in §4.19 of the Contract:

> Without any independent inquiry, Seller has no knowledge or notice that there are any actions, suits, notices, claims, violations, notices of violations or proceedings relating to a violation or non-compliance with any laws or with respect to any laws, rules, regulations, statutes, guidelines, or mandates with respect to the disposal, storage, discharge or release of hazardous materials or toxic substances at, about, around or from the [Property], including without limitation, any of such relating to lead paint and/or asbestos; and (2) without any independent inquiry, Seller has no knowledge or notice of any underground storage tanks or underground fuel or oil tanks located in, upon, about, around or beneath the [Property].

The Contract provides that the phrase "'to Seller's knowledge' shall mean the actual knowledge of the Seller . . . without any special investigation." Contract, §4.24.

The Contract further provided that:

> At the Closing seller shall deliver to Purchaser a certification that all of the representations and warranties as set forth above are true, complete and accurate as of the Closing Date. The representation and warranties made by Seller in this contract shall be deemed restated and shall be true, complete and accurate on the Closing Date and shall not survive the Closing unless such when re-certified as provided above or when made as provided above, were not true, complete and accurate in all respects when made, which would constitute fraud (actual or constructive) or fraud in the inducement, in which case such matter and claims shall survive the closing.

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should be named as KB-Squared Inc., an entity formerly known as Concord Electronics, Inc. and Revere Metal Art. Co., Inc.

Contract, §4.24, p. 7.

The Purchaser also made acknowledgments, representations and warranties in §5 of the Contract. These included that: 1) the Purchaser had "inspected the Premises" and was "fully familiar" with its physical condition and state of repair; that subject to the provisions of §§6.01, 7.01, 8.04 and 17.18.1[2], the Purchaser accepted the Property in its present condition as of June 1, 2006, "without any reduction in Purchase Price." Contract, §5.01. The Purchaser also acknowledged that in entering into the Contract, it did not rely upon any representations, warranties or statements, made by the Seller or anyone acting on the Seller's behalf that were not expressly set forth in the Contract. Contract, §5.02.

The Contract allocated the risk of environmental violations between the parties. The Seller was required to clear any violations noted or issued prior to the date of the Contract. Contract, §6.01. Any violations noted or issued after the date of the Contract were the Purchaser's responsibility, except that, in the event that they exceeded $50,000.00 in the aggregate, the Purchaser had the option to close with a credit of $50,000.00 or terminate the Contract and receive a refund of the downpayment with interest. *Id.*

The Purchaser acknowledged in §16.01 of the Contract that it was acquiring the Property "based solely upon and in reliance on its own inspections, evaluations, analyses and conclusions or those of Purchaser's representatives," except as set forth in the Contract. In bold letters the Contract provided that:

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[2] Sections 6.01, 7.01 and 8.04, respectively, involved the Seller's responsibility for pre-Contractual violations or liens, the General Obligations Law, and real estate taxes. Section 17.18.1, which will be discussed more fully below, related to the Purchaser's right, within thirty days of execution of the Contract, to inspect the Property, terminate the Contract and receive a refund of the down payment.

> PURCHASER WILL BE ACQUIRING THE PROPERTY IN ITS "AS-IS" CONDITION AND STATE OF REPAIR INCLUSIVE OF ALL FAULTS AND DEFECTS, WHETHER KNOWN OR UNKNOWN, AS MAY EXIST AS OF THE DATE OF THIS CONTRACT AND AS OF THE CLOSING, AND PURCHASER EXPRESSLY ASSUMES THE RISK OF ADVERSE PHYSICAL, ENVIRONMENTAL FINANCIAL AND LEGAL CONDITIONS.

Section 16.05 provided that the provisions of §16 were "material and included as a material portion of the consideration given by Purchaser to Seller" and that the Purchaser acknowledged "that the Seller has given Purchaser material concessions regarding this transaction in exchange for the Buyer agreeing to the provisions of this Section 16."

Section 17.18.1 of the Contract gave the Purchaser a thirty-day period to inspect the Property, terminate the Contract and receive a refund of the down payment with interest. The Purchaser contractually waived those rights after the expiration of the thirty-day period:

> Purchaser shall have the right to terminate this contract and upon such termination receive a refund of the Downpayment plus interest earned thereon if within thirty (30) days said time being of the essence after the Effective Date (the period from the Effective Date until 5:00 p.m. Eastern Time on the date thirty (30) days after the Effective Date is herein called the "Inspection Period") the: (a) the [sic] physical and environmental condition of the Property, including, without limitation, the condition of any improvements and all personal property (if any) at the Property and the condition of the soils, subsoil media, and groundwaters at or under the Property (including, without limitations, the presence or absence of any Hazardous Materials [defined in this Contract] at or under the [Property]) is not satisfactory to the Purchaser in its discretion; . . . ; or (h) Purchaser for any reason or no reason whatsoever elects to terminate this contract. If the Purchaser fails to terminate this contract as provided above, time being of the essence, the right to terminate this contract under this section 17.18.1 shall be deemed waived.

The documentary evidence proves that the thirty-day period expired, at the latest, on July 30, 2006. The record contains a chain of e-mails sent in late June 2006 between the Purchaser's, attorney Ira S. Nesenoff, and the Seller's attorney Stanley Turitz. Affidavit of Stanley Turitz, Exh. B. Apparently, the Seller's principal was in China at the time. The Purchaser's attorney,

Mr. Nesenoff, admitted in a June 26, 2006 e-mail that the Purchaser's right to "due diligence" was going to expire at the end of the week and that if the Seller did not grant an extension, the Purchaser would have no choice but to terminate the Contract. In response, Mr. Turitz offered to enter into an agreement to extend the deadline imposed by §17.18.1 to July 30, 2006. The Purchaser has presented no evidence that the deadline was extended beyond July 30, 2006.

The Contract gave the Purchaser the right to enter and inspect the Property after the Inspection Period, to terminate the Contract, and to recover its down payment, if the Seller refused to permit any intrusive test:

> Right Entry. [sic] Seller hereby grants to the Purchaser and Purchaser's agents, contractors, engineers, consultants, employees, attorneys, subcontractors and other representatives (collectively, "Purchaser Representatives") the right, upon reasonable notice at reasonable times, and from time to time, to access the Premises in order to inspect, test or perform borings with respect to the Premises, without unreasonable interference with Sellers business operations at the Premises, and on 24 hours prior notice to Seller's agent, Andover Realty Inc. (which for purposes hereof, such notice may be by telephone), and to enter the Premises at all reasonable times.... Except for testing and investigation conducted in the normal course of Phase I environmental investigations based on accepted industry standards..., Purchaser's may not perform any test or other activity at the premises, which damages the Premises or which is physically intrusive into the ground or into any improvement(s) located on the Premises without the prior written consent of the Seller, which Seller may withhold in its sole discretion. If Seller does not consent to any requested intrusive test or activity pursuant hereto, then at any time during the [sic] or after the inspection Period. Purchaser may give written notice to Seller to terminate this contract whereupon this contract shall be deemed terminated and the Downpayment, plus interest earned thereon shall be delivered to the Purchaser.

Contract, §17.18.2. The Purchaser was contractually obligated to provide proof of insurance, upon the Seller's request, prior to any entry onto the Property. Contract §17.18.4.

There is no dispute that the Purchaser did not terminate the Contract. David Slaven, a principal of Purchaser, submits an affidavit, in which he avers that the Purchaser has never

wanted to terminate the Contract and is not now seeking to terminate it. Slaven Affidavit, sworn to on May 29, 2008, ¶10.

The parties do dispute whether the Seller denied the Purchaser access to the Property. Mr. Slaven and the Purchaser's attorneys have submitted affidavits stating in conclusory fashion that the Seller denied requested access. The Purchaser also submits electronic correspondence in which its attorneys requested the Seller's attorney, Mr. Turitz, to arrange access once during the Inspection Period (as referred to previously), and thereafter on September 18, 2007, February 11, 2008 and March 10, 2008. The requests do not mention why access was requested or whether any intrusive tests or activities were needed. Also in the record is the Phase II Environmental Site Investigation Report, dated October 2007 (Phase II Report), that P.W. Grosser Consulting, Inc. (PWGC), prepared for the Purchaser. The Phase II Report reflects that the Property was examined by PWGC on July 17 and 18, 2007. The Phase II Report states that, in July 2006, Energy and Environmental Analysts, Inc., prepared a Phase I Environmental Site Assessment (Phase I Report). The Phase II Report summarizes the findings of the Phase I Report. The affidavit of the Seller's President, Irving Kuznetzow, states that he recorded seven visits by the Purchaser to the Property between September 12, 2007 and February 19, 2008. He also states that he remembers only two instances when the Purchaser was denied access: one when the Purchaser failed to provide proof of insurance upon demand and another when Mr. Kuznetzow was out of the country.

Although the Purchaser submits affidavits and letters that state that the Seller repeatedly denied access, they do not contradict the Seller's proof that access was given on the dates set forth in the Phase I and II Reports and Mr. Kuznetzow's affidavit. After the closing was

scheduled for March 5, 2008, on February 8, 2008, the Purchaser's attorney wrote to the Seller's attorney that the Seller "refused access to the Premises in violation of the contract." On February 28, 2008, the Purchaser's attorney wrote a letter rejecting the March 5, 2008 closing date, and claiming that the Purchaser was "repeatedly denied access."

After this action was commenced on May 8, 2008, the Purchaser served a discovery demand to inspect the Property pursuant to CPLR 3120, to which the Seller objected due to the stay imposed by service of this motion.

There is no proof in the record that representations and warranties in §4.19 of the Contract were false. There is no evidence, including in the Phase I and II Reports, that there are or were "any actions, suits, notices, claims, violations, notices of violations or proceedings relating to a violation or non-compliance with any laws or with respect to any laws, rules, regulations, statutes, guidelines, or mandates" relating to the environmental condition of the Property. Nor is there proof that there are or were underground storage, oil or fuel tanks on the Property.

The Contract provides that in the event of the Purchaser's default, the Seller may retain the down payment as liquidated damages:

> SELLER AND PURCHASER HAVE DISCUSSED THE POSSIBLE CONSEQUENCES TO SELLER IF THE CLOSING FAILS TO CLOSE ON OR BEFORE THE CLOSING DATE.... THE DOWNPAYMENT, SHALL BE PAID TO AND RETAINED BY SELLER AS LIQUIDATED DAMAGES, AND NOT AS A PENALTY, IF PURCHASER BREACHES THIS CONTRACT AND THIS TRANSACTION FAILS TO CLOSE BY ANY REASON THEREOF. PURCHASER AND SELLER ACKNOWLEDGE AND AGREE THAT SELLER'S DAMAGES IN THE EVENT OF SUCH BREACH BY PURCHASER WOULD BE EXTREMELY DIFFICULT OR IMPOSSIBLE TO DETERMINE, THAT THE AMOUNT OF THE DOWNPAYMENT (PLUS INTEREST EARNED THEREON) IS THE PARTIES' BEST ESTIMATE OF

> THE DAMAGES SELLER WOULD SUFFER IN THE EVENT THIS TRANSACTION FAILS TO CLOSE BY REASON OF PURCHASER'S BREACH OF THIS CONTRACT, AND THAT SUCH ESTIMATE IS REASONABLE UNDER THE CIRCUMSTANCES EXISTING ON THE EFFECTIVE DATE OF THE CONTRACT PURCHASER AND SELLER AGREE THAT SELLER'S RIGHT TO BE PAID AND RETAIN CASH IN THE AMOUNT OF THE DOWNPAYMENT SHALL BE THE SOLE AND EXCLUSIVE RECOURSE AND REMEDY OF SELLER AT LAW OR IN EQUITY IN THE EVENT OF PURCHASER'S BREACH OF THIS CONTRACT.

Contract, §12.04.

The parties agreed that if either one of them brought an action in court arising from the Contract, the prevailing party would be entitled "to recover as an element of its costs of suit, and not as damages, reasonable attorneys' and experts' fees and litigation expenses to be fixed by the court." Contract, §17.12.

The closing date set by the Contract originally was April 1, 2007. Contract §3.01 and Schedule D. However, pursuant to two amendments, the closing was adjourned to on or about August 1, 2007, with the Seller having the right to adjourn the closing for up to thirty days at a time on fifteen days written notice. Contract, 2nd Amendment, dated June 1, 2007. The closing was adjourned again to August 8, 2007 at the Purchaser's request. Affidavit of Stanley Turitz, Exh. E, Letter dated July 12, 2007.

By letter dated February 1, 2008, the Seller's counsel scheduled a closing on the Property to occur at 2:00 PM on March 5, 2008. The letter stated that time was of the essence. On March 3, 2008, the Purchaser's attorney wrote to the Seller's attorney formally notifying him not to release the downpayment he was holding in escrow and claiming that the Seller was in default under the Contract. The Seller and Purchaser's counsel appeared at the closing on March 5,

2008, but the Purchaser did not.

On March 4, 2008, the Purchaser filed a notice of pendency of this action. This action was commenced when the summons and complaint were filed on March 5, 2008, the day scheduled by the Seller for the closing.

The Complaint contains causes of action for breach of contract (1st); anticipatory breach (2nd); specific performance (3rd); fraud in the inducement (4th); and attorneys' fees (5th).

Conclusions of Law

The party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); CPLR 3212(b). Once a movant has met the initial burden, the burden shifts to the party opposing the motion to establish, through admissible evidence, that judgment requires a trial of disputed material issues of fact. *See* CPLR 3212(b); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); *GTF Mktg. Inc. v. Colonial Aluminum Sales, Inc.*, 66 N.Y.2d 965 (1985). The adequacy or sufficiency of the opposing party's proof is not an issue until the moving party sustains its burden. *See Bray v. Rosas*, 29 A.D.3d 422 (1st Dep't 2006). Moreover, the parties' competing contentions must be viewed "in a light most favorable to the party opposing the motion." *Lakeside Constr. v. Depew & Schetter Agency*, 154 A.D.2d 513, 514-15 (2nd Dep't 1989). If it appears "that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion." CPLR 3212(b); *see also Dunham v. Hilco Constr. Co., Inc.*, 89 N.Y.2d 425 (1996) ("[A] court may search the record and grant summary judgment in favor of a nonmoving party only with respect to a cause of action or

issue that is the subject of the motions before the court."); *Besen & Assoc., Inc. v. Besdine Mgmt. Co.*, 266 A.D.2d 105, 105-06 (1st Dep't 1999).

I. Summary Judgment Dismissing the Complaint

A. Breach of Contract

The elements of a claim for breach of contract are: (1) a valid and enforceable contract; (2) performance of the contract by one party; (3) breach by the other party; and (4) damages. *Furia v. Furia*, 116 A.D.2d 694, 695 (2nd Dep't 1986). Anticipatory breach of contract requires evidence of a "clear and unequivocal intention by defendant not to perform or to abandon the contract." *HRL Union Ave. Corp. v. New York City Hous. Auth.*, 223 A.D.2d 486, 487 (1st Dep't 1996).

The Purchaser's first cause of action must be dismissed because there is no evidence to support the alleged breaches by the Seller. The breach and anticipatory breach alleged are the Seller's failure to remove violations and maintain the Property in the environmental condition required for sale. Complaint, §§23 and 25. The Contract limited the Seller's risk of violations to those noted or issued prior to the date of the Contract by a governmental authority with jurisdiction over the Property. Contract, §6.01. There is no evidence that any governmental authority noted or issued a violation prior to June 1, 2006. The Purchase's remedies for violations aggregating $50,000.00 or more were to receive a credit in that amount of $50,000.00 or terminate the Contract. The Seller's alleged failure to maintain the Property also was not a breach. The express terms of the Contract provide that the Purchaser had inspected the Property, was fully familiar with its condition, was taking it in its present condition as of June 1, 2006, and had received material concessions from the Seller in return for taking the Property in that

condition. Contract, §§5.01, 16.01, and 16.05. The remedy that the Purchaser retained if it were dissatisfied with the condition of the Property was termination during the Inspection Period, a right the Purchaser has not chosen to exercise. Contract, §§17.18.1.

The remaining breach alleged by the Purchaser, denial of access, does not appear in the Complaint. However, even if Purchaser had plead that breach and could prove that the Seller did not permit inspection of the Property, the Purchaser's right in that event was to terminate the Contract. Contract, §17.18.2. Moreover, Purchaser's conclusory statements that access to the Property was denied are insufficient to defeat summary judgment. "Bald conclusory assertions, even if believable, are not enough" to defeat a motion for summary judgment. *Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 259 (1970); *see also Physicians' Online, Inc. v. Burnett*, 244 A.D.2d 291 (1st Dep't 1997) (summary judgment granted where movant's overwhelming evidence not controverted by opposing party). Here, the Purchaser failed to controvert the Phase II Report and the Seller's evidence that access was granted on specific dates.

The second cause of action alleges that because the Seller will not be able to deliver the Property in the condition required for sale, the Seller committed an anticipatory breach. As the Purchaser agreed to accept the condition of the Property on the date of the Contract and failed to exercise its right to terminate, this cause of action cannot be sustained. Further, the evidence shows that the Seller did not abandon the Contract; it scheduled a closing.

In sum, the first and second causes of action in the complaint are dismissed because the Purchaser failed to prove that the Seller breached the Contract, or committed an anticipatory breach.

B. Fraud in the Inducement

The fourth cause of action for fraud in the inducement alleges that the Seller's warranties and representations in §4.19 of the Contract were false. The Complaint quotes the language of §4.19 verbatim. To state a cause of action for fraud in the inducement the plaintiff "is required to identify a material representation, known to be false and made with the intention of inducing reliance, and actual reliance resulting in damages." *Nurnberg v. Hobo Corp.*, 30 A.D.3d 359, 360 (1st Dep't 2006).

The fourth cause of action is dismissed because there is no evidence that the Seller had knowledge of "any actions, suits, notices, claims, violations, notices of violations or proceedings relating to a violation or non-compliance with any laws" regarding environmental conditions on the Property or any underground tanks. The Contract provides that the Seller's knowledge meant "actual knowledge without any special investigation." Contract, §4.24. The Purchaser's Phase II Report does note environmental problems that allegedly exist on the Property, but not any underground tanks or governmental actions, lawsuits or claims. Nor have they presented evidence that the Seller had actual knowledge of any problems "without special investigation."

C. Specific Performance

The third cause of action for specific performance is dismissed because the Purchaser has not demonstrated that it is ready, willing and able to close. "It is axiomatic that in order to be entitled to specific performance of a contract, a plaintiff must demonstrate that he is ready, willing and able to perform his obligations under the contract regardless of the defendant's anticipatory breach." *Zev v. Merman*, 134 A.D.2d 555, 557 (2d Dept. 1987), *aff'd* 73 N.Y.2d 781 (1988). In this case, the Purchaser failed to appear for the closing, which had been adjourned

three times prior to the final date set by the Seller, a date nine months after the original closing date set by the Contract. The Seller was within its rights to set a time is of the essence date in March 2008, after granting reasonable adjournments. *Miller v. Almquist*, 241 A.D.2d 181, 185 (1st Dep't 1998)(after granting reasonable adjournment party may unilaterally impose condition that time be of the essence as to rescheduled date); *accord, Sohayegh v. Oberlander*, 155 A.D.2d 436 (2d Dep't 1989). Moreover, the Purchaser demanded a credit in the third cause of action "equal to the reasonably estimated cost to cure the environmental issues evidenced in the [Phase II Report]." The credit demanded negates the Purchaser's willingness to close on the terms of the Contract and, therefore, the third cause of action for specific performance cannot be sustained.

D. Attorneys Fees

The fifth cause of action for attorneys' fees is dismissed. The Purchaser is not a prevailing party in light of the dismissal of its complaint.

II. Summary Judgment on the Counterclaims

The Seller is awarded summary judgment on all of its counterclaims, except the portion of the first cause of action requesting cancellation of the notice of pendency. Summary judgment on the counterclaim for breach of contract is granted as the Purchaser refused to close and its reasons, the alleged misrepresentations, unfit condition of the property, denial of access and right to a credit, have been rejected by the court. However, the notice of pendency cannot be cancelled until the Purchaser's time to appeal has expired. CPLR 6514(a).

The second cause of action declaring that the Purchaser breached and that the escrowee should turn over the deposit with interest and the recordable Termination of Contract to the Seller is granted. The third counterclaim for reasonable attorneys' fees, expert fees and litigation

expenses is granted, pursuant to §17.12 of the Contract and the amount to be awarded shall be determined by a Special Referee.

III. Cross-Motion to Inspect the Property

In light of the reasons of the disposition of the motion, the Purchaser's cross-motion to inspect the Property is denied. Accordingly, it is

ORDERED that the prong of the motion of Concord Electronics, Inc., a/k/a KB-Squared, Inc., and Revere Metal Art Co., Inc. (hereinafter, collectively, "Concord"), for summary judgment dismissing the complaint of RBP Ventures, Ltd. ("RBP"), is granted and the complaint is dismissed with prejudice; and it is further

ORDERED that the prong of Concord's motion for summary judgment on its counterclaims is granted to the extent that it is granted summary judgment on all of its counterclaims (1st through 3rd), except for the portion of the first counterclaim for cancellation of the notice of pendency; and it is further

ORDERED that Concord's motion to cancel the notice of pendency is denied with leave to renew; and it is further

ORDERED, ADJUDGED and DECLARED that the RGP breached the Contract with Concord, dated June 1, 2006 (as amended by a first and second amendment) and the escrow agent, Ferrara, Turitz, Harraka & Goldberg, P.C., is directed to release to Concord, RBP's down payment with interest and the recordable Termination of Contract held in escrow pursuant to §17.15 of the Contract; and it is further

ORDERED that Concord's counterclaim for reasonable attorneys' fees, expert fees, and litigation expenses is granted, and the issue of the reasonable amounts to be awarded is hereby

referred to a Special Referee to hear and report; and Concord shall serve a copy of this order with notice of entry on the Clerk of the Reference Part (Room 119) to arrange a date for the reference to a Special Referee; and the Clerk shall advise the parties of the time and date of the hearing; and it is further

ORDERED that RGP's cross-motion for access to the Property is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly and to sever Concord's third counterclaim for attorneys' fees, expert fees and litigation expenses, which shall continue as a separate action.

Dated: June 19, 2009

ENTER:

J.S.C.