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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x	**TRIAL/IAS PART: 22**
2119 AMSTERDAM AVENUE, LLC,	**NASSAU COUNTY**
Plaintiff,	**Index No: 013356-2009**
	Motion Seq. Nos. 1 and 2
-against-	**Submission Date: 2/16/10**
AMSTERDAM 2119, LLC,	
Defendant.	
----------x	
AMSTERDAM 2119, LLC,	
Third-Party Plaintiff	
-against-	
Berliner & Pilson, Esqs., as escrow agent,	
Third-Party Defendant.	
----------x	

Papers Read on these Motions: [1]

Notice of Motion.....x
Affidavit in Support and Exhibits.....x
Memorandum of Law in Support.....x
Notice of Cross Motion, Affirmation in Support,
Affidavit in Support and Exhibits.....x
Plaintiff's Memorandum of Law.....x
Affidavit in Support/Reply and Exhibit.....x
Defendant's Memorandum of Law in Opposition/Support/Reply.....x
Affirmation of Plaintiff.....x

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[1] In its motion papers, Defendant makes reference to "Defendant's Cross-Motion for Summary Judgment." The Court conferred with counsel and confirmed that this reference was in error and that there is no cross motion by Defendant before the Court.

This matter is before the court on 1) the motion by Defendant Amsterdam 2119, LLC ("Defendant") filed November 17, 2009, and 2) the cross motion by Plaintiff 2119 Amsterdam Avenue, LLC ("Plaintiff") on January 11, 2010, both of which were submitted on February 16, 2010. For the reasons set forth below, the Court 1) denies Defendant's motion; 2) grants Plaintiff's motion for summary judgment in the sum of $375,000 with interest, as well as costs, disbursements and legal fees; and 3) directs Third-Party Defendant Berliner & Pilson, Esqs. Escrow Agent,("Escrow Agent") to release the sum of $375,000, currently in escrow, to Plaintiff on or before May 14, 2010.

BACKGROUND

A. Relief Sought

Defendant moves, pursuant to CPLR § 3001, for a Declaratory Judgment 1) declaring that Defendant is not in default of the material terms of the contract ("Contract") between the parties; 2) declaring Plaintiff to be in default of the material terms of the Contract; and 3) directing the Escrow Agent, Third-Party Defendant Berliner & Pilson, Esqs. ("Escrow Agent") to release the down payment ("Down Payment or "Deposit") to Defendant. Plaintiff opposes Defendant's motion.

Plaintiff moves for an Order 1) awarding judgment to Plaintiff on its First and Second Causes of Action and directing that the $375,000 Down Payment be turned over to the Plaintiff; 2) dismissing Defendant's Verified Answer and Counterclaims in their entirety; and 4) granting Plaintiff judgment on its Third Cause of Action and awarding Plaintiff costs, disbursements and legal fees in an amount to be determined at a hearing.

B. The Parties' History

The verified complaint ("Complaint") (Ex. A to cross motion) alleges as follows:

Plaintiff is a limited liability company ("LLC") with offices located in Great Neck, New York. Defendant is also an LLC with offices located in Manhattan. The Escrow Agent, whose office is in Great Neck, is holding the Down Payment pending the resolution of this action or further direction of the Court.

On or about October 2008, Plaintiff ("Seller") and Defendant ("Purchaser") entered into the Contract pursuant to which Seller agreed to sell the premises 2119 Amsterdam Avenue, New York, New York, Block 2111, Lot 44 ("Premises") to Purchaser for the sum of $2,500,000.00

("$2.5 million"). A Contract deposit in the sum of $250,000 was given to the Escrow Agent where it remains.

Pursuant to the Contract, the closing ("Closing") was scheduled for 10:00 a.m. on February 16, 2009 and designated as "Time of the Essence" against the Purchaser. Prior to February 16, 2009, the parties entered into a modification ("Modification") of the Contract pursuant to which the Closing date was extended for forty-five (45) days ("Extension"). Pursuant to the Modification, $125,000 was added to the deposit, resulting in a total Deposit of $375,000, which remains with the Escrow Agent.

Despite Seller's demand, Purchaser failed to schedule a closing date within the Extension period which expired on April 2, 2009. On April 29, 2009, Seller sent Purchaser a "Time of the Essence" letter scheduling the Closing on May 29, 2009 at 10:00 a.m. Purchaser rejected that letter and Seller sent a responsive letter to Purchaser. The parties subsequently agreed to change the Closing date from May 29, 2009 to June 1, 2009 to accommodate a religious holiday on May 29, 2009.

Seller prepared the deed and other necessary documents in preparation for the June 1st Closing. On or about June 1st, Purchaser advised Seller that it did not have the balance of the purchase price and would not appear at the Closing. Purchaser also told Seller that it was unnecessary for the title company and other necessary parties to appear because the Closing was not going to occur.

Seller canceled the Closing and declared Purchaser in default. By letter dated June 1, 2009, Purchaser acknowledged its failure to appear at the Closing and its understanding that Seller considered Purchaser in Default. On June 4, 2009, Purchaser was notified, pursuant to paragraph 3(a)(iv) of the Contract, that Seller had made a demand on the Escrow Agent for the release of the Deposit as liquidated damages. On June 4, Purchaser objected to the release of the Deposit and demanded that the Deposit, plus all accrued interest, either be returned to Purchaser or retained by the Escrow Agent pending further agreement of the parties or court order.

The Complaint contains three (3) causes of action. In the first, Seller alleges that Purchaser breached the Contract and seeks an Order directing the Escrow Agent to release the Deposit, plus accrued interest, to Seller. In the second, Seller alleges that there is a justiciable controversy between the parties and seeks a declaratory judgment directing that the Deposit be

released to Seller. In the third, Seller seeks legal fees, costs and disbursements it has incurred in the prosecution of this matter, pursuant to relevant provisions of the Contract, in a sum of not less than $5,000.

Purchaser served a Verified Answer with Affirmative Defenses and Counterclaims ("Answer") dated July 23, 2009. Purchaser asserts the following Affirmative Defenses: the claims are barred in whole or in part because 1) the Complaint fails to state a claim on which relief can be granted; 2) the Contract was induced by fraud or misrepresentation in that a) the rent roll that Seller presented was inaccurate; and b) on information and belief, Seller created fictitious leases to inflate the value of the Premises; 3) Purchaser complied with any Contractual conditions; 4) Seller failed to comply with Contractual terms and conditions; 5) Purchaser's alleged conduct was not a proximate cause of any damages that Seller incurred because Purchaser's inability to Close was attributable to Seller's lender's refusal to assign its mortgage, contrary to the provisions in the Contract; 6) Purchaser acted in good faith; 7) the doctrine of estoppel precludes recovery; 8) the doctrine of unclean hands precludes recovery; 9) Seller's actions constitute fraud; and 10) the relief sought would result in Seller's unjust enrichment.

Purchaser alleges the following, *inter alia*, in support of its counterclaims: 1) Seller made misrepresentations regarding a lease ("Lease") for a store at the Premises; 2) Seller entered into the Lease with the intent to fraudulently inflate the value of the Premises; 3) the prospective tenant never intended to occupy the space covered by the Lease; 4) the Contract was subject to Purchaser's assumption of Seller's existing mortgage ("Mortgage"); and 5) Seller provided a Rent Roll Affidavit reflecting rent arrears which resulted in Sovereign Bank, the lending institution that was processing the assignment of the Mortgage, increasing Purchaser's required payments to a sum that Purchaser could not afford.

Purchaser asserts the following counterclaims: 1) Seller breached the Contract and the Court should direct the return of the Deposit to Purchaser, with accrued interest; 2) Seller committed fraud in connection with the Lease for which Purchaser suffered damages; 3) Purchaser is entitled to a declaratory judgment directing the release of the Deposit to Purchaser; and 4) Purchaser is entitled to recover its costs and expenses incurred as a result of Seller's failure to close and seeks judgment in a sum of not less than $5,000.

The Contract (Ex. A to Aggarwal Aff. in Support) contains several relevant provisions, including the following:

Paragraph 2(c) includes the following language:

> Seller makes no representation as to whether the tenants set forth in the Schedule of Tenancies will be in possession on the date of closing.

Paragraph 3(b)(i) provides that the balance of the Purchase Price shall be paid as follows:

> **[I]f** Purchaser agrees to assume that certain mortgage loan made by Sovereign Bank to Seller in January 4, 2007 in the original principal amount of $1,364,000.00 (the "Existing Loan"), then Purchaser shall receive a credit at Closing against the Purchase Price in an amount equal to the outstanding principal balance of the Existing Loan as of the Closing.

(emphasis added).

Paragraph 3(b)(ii) provides:

> [T]he balance of the Purchase Price (i.e. the Purchase Price less the Contract Deposit and, if Purchaser elects to assume the Existing Loan, the principal balance of the Existing Loan as of the Closing, **(subject to adjustments and prorations as herein provided)** shall be paid by (at Purchaser's option) either (x) a cashier's check or checks, certified checks or official bank check or checks of a New York Clearing House Association Bank, payable to the order of Seller or (y) wire transfer of immediately available funds to an account designated by Seller in writing.

(emphasis added)

Paragraph 5 of the Contract, titled "Premises "As-Is,"" includes the following language:

> Seller has not made and does not make any representation as to the physical condition, layout, leases, rents, income, expenses, operation **or any other matter or thing affecting or related to the Premises and this Agreement except as specifically set forth in this Agreement** and that neither party is relying upon any statement or representation made by the other not embodied in writing in this Agreement, and except as herein specifically set forth. . . Seller is not liable or bound in any manner by any verbal or written statements, representations, real estate broker's 'set-ups' or information pertaining to the above property or the operation, payout, expenses, condition, income, leases or rents furnished by any real estate broker, agent, employee, servant or other person, **unless the same are specifically set forth herein.**

(emphasis added)

Paragraphs 8(h) and (i) set forth certain adjustments to be made in the event the Mortgage is assumed or assigned.

Paragraph 8(j) provides, in pertinent part:

> If Purchaser does not assume the existing loan then Purchaser shall be obligated to reimburse Seller for all prepayment fees and penalties due under Sellers [sic] note and mortgage.

Paragraph 10 titled "Remedies" provides as follows

> (a) Seller's Remedies. If Purchaser shall default hereunder by failing to close title in accordance with the terms of this Agreement, the sole and exclusive right and remedy of Seller shall be to retain the [Deposit] with interest thereon as liquidated damages for all losses and damages which may be suffered by Seller as a result of any such default. Seller shall have no right nor shall Seller be entitled to bring any action against Purchaser for specific performance or for any damages in connection with any default of Purchaser under this Agreement or otherwise relating to the Premises. Each of Purchaser and Seller acknowledge that it is difficult to ascertain the actual damages to Seller in the event that Purchaser shall default in its obligation to close title in accordance with the terms of this Agreement and that the [Deposit] represents a fair and reasonable estimate of Seller's damages in the even of such default by Purchaser.
>
> (b) Purchaser's Remedies. If Seller shall be unable to close title to the Premises in accordance with the terms of this Agreement, Purchaser may, at its option (1) terminate this Agreement by written notice to Seller, whereupon Escrow Agent shall pay the [Deposit] with accrued interest thereon to Purchaser and Seller shall reimburse Purchaser for the reasonable cost of its title examination and survey costs ("Title Charges") and thereafter, neither party shall have any further rights or obligations hereunder, except for those obligations which, by their terms, expressly survive the termination of this Agreement[;] or (2) pursue an action for specific performance of this Agreement by Seller. Purchaser shall not be entitled to bring an action against Seller for any damages other than the return of the [Deposit] and the Title Charges.

Paragraph 15, titled "Assumption of Mortgage," provides that:

> Purchaser may elect to assume the Existing Loan. **If Purchaser so elects**, Seller shall cooperate with Purchaser in the execution of any necessary documents or the furnishing of any necessary information in connection with such assumption.
>
> (emphasis added)

In paragraph 17, titled "Warranties and Representations by Seller," subparagraph (i) includes the following language:

> As of the date hereof, the outstanding principal balance on the existing loan is _____. Seller is not in default under the Existing Loan and does not have knowledge of any event which, with or without the giving of notice, the passage of time, or both, may constitute a default under the Existing Loan. Seller has not received notice of a default under the Existing Loan Document, which default remains uncured.

Paragraph 18(a) reflects that the Seller agreed to:

> send to Purchaser copies of any written notices received or sent by Seller with respect to the Premises other than items relating to the normal business operations of the premises.

Paragraph 30, titled "Attorneys' Fees," provides as follows:

> If either party hereto shall commence litigation against the other in connection with the transactions contemplated by the Agreement, the losing party to such action shall reimburse the reasonable attorneys' fees and disbursements of the prevailing party in such action.

Seller had been paying only interest on the Existing Loan. The mortgagee, Sovereign Bank, sent a commitment letter to the Seller and Purchaser preliminarily approving the Purchaser's assumption of the Existing Loan on March 10, 2009. An assumption fee of $13,640.00, representing one percent of the unpaid principal balance, an inspection fee of $400.00 and a processing fee of $1,000.00 were required and were paid by Purchaser. Sovereign Bank required Seller to furnish a mortgage and rent roll prior to the Closing which the Seller provided in the form of an affidavit which stated that 1) the Premises' sole commercial tenant was three months in arrears on March 19, 2009; 2) a five day notice demanding rent had been served on January 23, 2009; and 3) a Notice of Petition and Petition for Non-Payment had been served on February 14, 2009. Copies of these documents were not forwarded to Purchaser.

In light of the Rent Roll Affidavit, Sovereign Bank notified Seller via e-mail dated March 23, 2009 that it was adjusting the terms of the Mortgage and allowing Purchaser to assume only $875,500.00 of the outstanding mortgage, necessitating Purchaser to pay an additional $448,500.00 towards the purchase price. As a result, on May 3, 2009, Purchaser requested that the Contract be cancelled and his down payment be refunded. Seller responded

by scheduling a time is of the essence Closing on May 29, 2009. The Closing never took place and this action ensued.

Finally, Purchaser maintains that the Contract was drafted by Seller's attorney. Seller maintains that both parties' attorneys participated in drafting it.

C. The Parties' Positions

Purchaser maintains that because two options of payment are discussed in the contract, specifically assumption and assignment of the existing loan, no other method was contemplated by the parties and cannot be required. Purchaser also submits that Seller breached paragraph 18(a) of the Contract by failing to notify Purchaser of the tenant's default in rent payment and the ensuing notices and Petition of January 23, 2009 and February 14, 2009, respectively, which precipitated Sovereign Bank's decision to reduce the amount of the Existing Loan that could be assumed. Purchaser argues that, had it been kept apprised of those developments, it might have been able to discuss a resolution with Sovereign Bank. Purchaser also seeks to void the Contract based on mutual mistake on the theory that both parties believed that Purchaser could assume the Existing Loan in the outstanding amount of $1,364,000.

Seller submits that it is entitled to return of the Deposit in light of the facts that 1) Purchaser was not ready, willing and able to close on the original Closing date; 2) the parties negotiated a new Closing date and an increase in the Deposit; 3) Purchaser was again unable to close due to its inability to pay the balance of the purchase price; and 4) there is no support for Purchaser's assertion of a mutual mistake on the basis that the parties intended the Contract to be conditional upon a further mortgage contingency, and the Contract's terms belie that assertion. Thus, Seller is entitled to summary judgment, a declaratory judgment as to its entitlement to return of the Deposit with interest, and counsel fees pursuant to the Contract.

RULING OF THE COURT

A. Summary Judgment Standards

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 384 (2005); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). The Court must deny the motion if the proponent fails to make such a *prima facie* showing,

regardless of the sufficiency of the opposing papers. *Liberty Taxi Mgt. Inc. v. Gincherman*, 32 A.D.3d 276 (1st Dept. 2006). If this showing is made, however, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986).

B. Declaratory judgment

CPLR § 3001 provides, in pertinent part:

> The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds.

C. Applicable Contract Principles

When the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms. *Henrich v. Phazar Antenna Corp.*, 33 A.D.3d 864 (2d Dept. 2006). A contract will be interpreted in accordance with the intent of the parties as expressed in the language of the agreement. *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002). The best evidence of what parties to a written agreement intend is what they say in their writing. *Id.* at 569, *quoting Slamow v. Del Col*, 79 N.Y.2d 1016, 1018 (1992). A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. *South Road Assoc., LLC v. International Business Machines Corp.*, 4 N.Y.3d 272, 277 (2005); *WWW Assoc., Inc. v. Giacontieri*, 77 N.Y.2d 157, 162 (1990). The interpretation of an unambiguous contract provision is a matter for the court. *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d at 569; *WWW Assoc., Inc. v. Giacontieri*, 77 N.Y.2d at 162.

A court should not, under the guise of contract interpretation, imply a term which the parties themselves failed to insert or otherwise rewrite the contract. *Aivaliotis v. Continental Broker-Dealer Corp.*, 30 A.D.3d 446, 447 (2d Dept. 2006), citing *Lui v. Park Ridge at Terryville Ass'n, Inc.*, 196 AD2d 579 (2d Dept. 1993), quoting *Mitchell v. Mitchell*, 82 A.D.2d 849 (2d Dept. 1981). In addition, as a general rule, it must clearly appear from the contract itself that the parties intended a provision to operate as a condition precedent,.and where there is ambiguity in a contractual term, the law does not favor a construction which creates a condition precedent.

Gallo v. Rea Motors, Inc., 34 A.D.3d 635, 635-636 (2d Dept. 2006), quoting *Lui v. Park Ridge at Terryville Ass'n, Inc., supra,* at 582; *Willis v. Ronan*, 218 A.D.2d 794 (2d Dept. 1995).

D. Liquidated Damages

Whether a liquidated damages provision represents an enforceable liquidation of damages or an unenforceable penalty is a question of law, giving due consideration to the nature of the contract and circumstances. *JMD Holding v. Congress Fin.*, 4 N.Y.3d 373, 379 (2005), citing, *inter alia*, *Mosler Safe Co. v. Maiden Lane Safe Deposit Co.*, 199 N.Y. 479, 485 (1910). The burden is on the party seeking to avoid liquidated damages to show that the stated liquidated damages are, in fact, a penalty. *Id.* at 380. Where the court has sustained a liquidated damages clause, the measure of damages for a breach will be the sum in the clause, no more no less. *Id.*, quoting *Brecher v. Laikin*, 430 F. Supp. 103, 106 (S.D.N.Y. 1977). Liquidated damages are in effect an estimate made by the parties at the time they enter into their agreement, of the extent of the injury that would be sustained as a result of breach of the agreement. *Id.*, quoting *Truck Rent-A-Ctr. v. Puritan Farms 2nd*, 41 N.Y.2d 420, 424 (1977). A contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation. *Id.*, quoting *Truck Rent-A-Ctr.* at 425.

E. Counsel Fees

Attorneys' fees may be awarded pursuant to the terms of a contract only to an extent that is reasonable and warranted for services actually rendered. *Kamco Supply Corp. v. Annex Contracting Inc.*, 261 A.D.2d 363 (2d Dept. 1999). Provisions or stipulations in contracts for payment of attorneys' fees in the event it is necessary to resort to aid of counsel for enforcement or collection are valid and enforceable. *Roe v. Smith*, 278 N.Y. 364 (1938); *National Bank of Westchester v. Pisani*, 58 A.D.2d 597 (2d Dept. 1977).

The amount of attorneys' fees awarded pursuant to a contractual provision is within the court's sound discretion, based upon such factors as time and labor required. *SO/Bluestar, LLC v. Canarsie Hotel Corp.*, 33 A.D.3d 986 (2d Dept. 2006); *Matter of Ury*, 108 A.D.2d 816 (2d Dept. 1985). Legal fees are awarded on a *quantum meruit* basis and cannot be determined summarily. *See Simoni v. Time-Line, Ltd.*, 272 A.D. 2d 537 (2d Dept. 2000); *Borg v. Belair Ridge Development Corp.*, 270 A.D. 2d 377 (2d Dept. 2000). When the court is not provided

with sufficient information to make an informed assessment of the value of the legal services, a hearing must be held. *Bankers Fed. Sav. Bank v. Off W. Broadway Developers*, 224 A.D.2d 376 (1st Dept. 1996).

E. Application of these Principles to the Instant Action

The Contract at issue did not contain a mortgage contingency clause, or language making the Contract contingent on the Purchaser's ability to assume the Mortgage. Moreover, the consolidation, extension and modification agreement between the Seller and Sovereign Bank (Ex. D to D's Consolidated Memorandum of Law) left the question of assumption of the Mortgage, and the terms of any assumption, in the discretion of Sovereign Bank.

The Court also rejects Purchaser's contention that, because two options of payment are discussed in the Contract (specifically assumption and assignment of the existing loan), the parties contemplated no other method of payment. Assumption and assignment were options, not conditions, as demonstrated by the fact that Purchaser agreed to be liable for pre-payment penalties in the event that the Existing Loan was not assumed or assigned. Thus, the language of the Contract reflects that the parties did contemplate a form of payment other than assumption or assignment.

The Court also rejects Purchaser's argument that Seller is not entitled to summary judgment in light of the rent roll issue. Even assuming, *arguendo*, that Seller breached the Contract by failing to notify Purchaser of the tenant's default, Purchaser has produced no evidence that this failure was the proximate cause of Sovereign Bank's decision to limit the amount of the Existing Loan that could have been assumed, or that Sovereign Bank would have acted differently if Purchaser had been given notice of the tenant's default.

Thus, the Court declines to interpret the Contract as being contingent on the Purchaser's ability to assume the Existing Loan, in light of contractual provisions that contradict such an interpretation.

The Court also concludes that the liquidated damages provision in the Contract entitling Seller to return of the Deposit with accrued interest, as well as the reasonable cost of its title examination and survey, is enforceable. First, the Court notes that the parties acknowledged that "it is difficult to ascertain the actual damages to Seller in the event that Purchaser shall default in its obligation to close title in accordance with the terms of this Agreement and that the [Deposit]

represents a fair and reasonable estimate of Seller's damages in the even of such default by Purchaser." The Court agrees. The $375,000 Deposit represents 15% of the 2.5 million purchase price, which is not an unreasonable sum. Moreover, given the unpredictability of the real estate market, it would be difficult to determine when Seller would be able to secure another purchaser for the Premises and the price that new purchaser would be willing to pay. Under the circumstances, the Court concludes that the liquidated damages provision in the Contract bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation and is therefore enforceable.

Finally, the Court concludes that Purchaser is the "losing party" within the meaning of the Attorneys' Fees provision in the Contract. Accordingly, the Court determines that Purchaser is obligated to pay the counsel fees incurred by Seller in pursuing the instant motion.

In light of the foregoing, the Court 1) denies Purchaser's motion in its entirety; and 2) grants Seller's motion in its entirety. The Court declares that Purchaser is in default of its obligations pursuant to the Contract and that Seller is entitled to the Deposit in the sum of $375,000 with interest, as well as costs, disbursements and attorney's fees. The Court directs the Escrow Agent to release the $375,000 currently in escrow, representing the Deposit, to Seller's counsel on or before May 14, 2010. The Court further directs counsel for Purchaser to submit an Affirmation to the Court, on notice to Purchaser's counsel, on or before May 14, 2010, attesting to the amounts that Seller seeks for costs, disbursements and attorney's fees.

If the parties are unable to resolve the issues of counsel fees, costs and disbursements, the Court directs counsel for the Seller and Purchaser to appear before the Court for a conference on May 26, 2010 at 9:30 a.m., at which time the Court will schedule a hearing on those issues.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
April 12, 2010

HON. TIMOTHY S. DRISCOLL

J.S.C.