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

PRESENT: EMILY JANE GOODMAN PART 17

Index Number : 603809/2006

CITADEL BROADCASTING

VS.

RENAISSANCE 632 BROADWAY, LLC

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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 and cross motion are decided per attached

FILED
JUN 15 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/7/10

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 17

----------X

CITADEL BROADCASTING COMPANY,

Plaintiff,

-against- Index No.: 603809/06

RENAISSANCE 632 BROADWAY, LLC,

Defendant.

----------X



**EMILY JANE GOODMAN, J.S.C.:**

Plaintiff seeks to recover for damages it alleges it suffered from the breach of an agreement to enter into a lease with defendant. Defendant moves for summary judgment dismissing the complaint. Plaintiff cross-moves for summary judgment on liability, and for the case to be set down for an inquest as to damages.

*Background*

Defendant Renaissance 632 Broadway, LLC (Renaissance) owns commercial property, and specifically, a building, located at 632 Broadway, in Manhattan. Plaintiff, Citadel Broadcasting Company (Citadel), owns and operates radio stations, and sought to lease commercial office space in Renaissance's building. After lengthy negotiations, the parties executed a document, dated August 28, 2006, and entitled "Deal Sheet:632 Broadway" (the Deal Sheet).

The Deal Sheet provides that the defendant agreed to lease the entire twelfth floor to plaintiff for a seven-year term. The Deal Sheet states in bold letters, "This deal[] sheet

constitutes a legally binding Offer to lease space, and does legally bind all parties. THIS IS NOT A LEASE." The Deal Sheet also lists various terms, including the rent, space, extension option, additional costs (water, sewage, and sprinkler charges), annual charges, commencement date and certain fees due upon a lease signing.

The Deal Sheet contains a term providing for a $50,000 construction reimbursement, from the tenant to the landlord, that was due on December 1, 2006, and a list of "Landlord's work," which was to be substantially completed before September 30, 2006. The list of the landlord's work, along with items such as painting the premises and striping the floors, includes the construction of up to three offices according to the tenant's architect's plan, and states that if the plan substantially delayed the landlord's work, that the lease commencement date would not change. The landlord was also to conduct demolition work as to four rooms, with the demolition plan to be provided by the plaintiff's architect. Under the heading "Tenant's Work," the Deal Sheet provides that the tenant was not under any obligation to do interior improvements, but that if it desired such improvements, it agreed to submit a plan to the landlord for approval that was to be filed with the NYC Department of Buildings.

The Deal Sheet included an "Additional Notes" section which provided that the tenant had the right to sublet or assign the lease according to provisions in the lease document, with all profits to be shared "50/50%" with the landlord, and that the landlord was to have the right of recapture. In addition, provision number five of the Additional Notes states:

> "Please sign below indicating your agreement to the terms and conditions outlined above, and [r]eturn to Kenneth Fischel along with a check for $3,000.00 made out to Renaissance 632 Broadway LLC, which is required to draw leases. This fee is fully refundable ONLY in the event agreement on the wording of the lease cannot be reached; not in the event the Tenant has a unilateral change of heart. The deposit will

be deducted from the security deposit at the time the lease is executed"

(Pl. Exh. 2).

Plaintiff and defendant executed the Deal Sheet in late August. On September 6, 2006, defendant's counsel, Richard Pilson, forwarded a proposed lease (Draft Lease), to a member of plaintiff's in-house legal staff, on a Standard Real Estate Board form. Pilson also forwarded what defendant states was its standard lease rider. On September 20, 2006, 10 days before defendant was to have completed the work, plaintiff delivered to defendant a floor plan for the space prepared by its architect (the Architect's Plan). There is no dispute that the Architect's Plan differed from the Deal Sheet concerning the construction, or the "build out," of the space, as it apparently provided for seven offices, rather than the three referenced in the Deal Sheet.

Also on September 20, 2006, Kenneth Fishel, who, on behalf of defendant Renaissance, had conducted the Deal Sheet negotiations with plaintiff, sent an e-mail message to Judith Ellis, of Citadel, indicating that the scope of the Architect's Plan encompassed more than the landlord's obligation under the Deal Sheet (Pl. Exh. 27), and suggesting that Citadel do the work with a fixed landlord monetary contribution. By e-mail dated September 22, 2006, Pilson sent a letter to plaintiff's attorney asserting, among other things, that the plaintiff had substantially increased the scope and cost of construction, that the scope of work would take much longer than 30 days, that a complete set of plans was needed for filing in order to obtain a work permit, and that the right of recapture term must remain if the tenant wanted to sublet or assign in excess of 50% of the space. Three days later, on September 25, 2006, Fishel sent Ellis an e-mail stating that the original deal required the owner's work to be done within 30 days, that he did not think that was enough time when the additional work was taken into account, that the commencement

of the rent and the rent deal was important and not negotiable, and that he preferred to grant Citadel a $75,000 credit for all of the landlord's work, with Citadel doing the construction work with its own contractors.

On or about September 26, 2006, plaintiff's attorney, Michael Fein, sent Pilson a marked-up version of the Draft Lease. While the attorneys for the respective parties discussed the Draft Lease, it is not entirely clear whether or not, or how, they ultimately concluded their discussions.

On September 27, 2006, Fishel sent to Ellis a lease exhibit for review with a cover e-mail message to Ellis and Farid Suleman, Citadel's chairman, asking that they review the exhibit and let him know if he forgot anything. This exhibit, entitled "Lease Exhibit 'A'" has a compilation of tasks and responsibilities listed under the heading of "Landlord's Work" and "Tenant's Work." Under the heading "Tenant's Work," the document provides that the landlord agreed to construct additional offices, with the tenant reimbursing to the landlord the cost, to include the costs of ceiling tiles and many other associated items (Pl. Exh. 29).

On September 29, 2006, by e-mail, the parties discussed rent credits, as plaintiff had asked for two months' additional free rent, and wished to confirm that the day before, Fishel had offered a particular increase in rent credits, apparently of less than two months. Citadel also asserted that it was incurring huge costs from the delay (Def. Exh. P). Defendant Renaissance maintained that the delay was caused primarily because Citadel decided to build additional offices. Plaintiff submits Fishel's October 2, 2006 e-mail to his counsel, Pilson, in which Fishel states that *plaintiff* found the rent credit offer unacceptable, but it appears, from Fishel's testimony, that this may have been Fishel's assumption based on Ellis's failure to immediately respond to Fishel's earlier message (Pl. Exh. 32).

On October 3, 2006, Pilson sent a letter to plaintiff's counsel terminating negotiations and returning the $3,000.00 fee that Citadel had earlier paid to Renaissance, pursuant to the Deal Sheet. While, thereafter, the parties negotiated concerning the space, it is undisputed that Citadel kept the $3,000.00. Ellis avers that Citadel held the check, but did not cash it until 2007. Also on October 3, 2006, Suleman contacted Fishel in order to try to get the deal "back on track," and the parties apparently had a discussion (*see* Def. Exh. G, at 104). That evening, Fishel sent an e-mail to Ellis stating that his contractor required more detailed plans from the architect, that a meeting with the architect on site would be a good idea, and that "[w]e are available" (Pl. Exh 35).

On or about October 6, 2006, Fishel sent Ellis an e-mail with a revised Lease Exhibit A, with some changes to the work, including that defendant was to provide a new air conditioning and heating system (HVAC System), and that the landlord's work was to be substantially completed by December 31, 2006. The October 6, 2006 e-mail includes notes about the work, that the tenant would pay to the landlord 50% of the tenant's cost of $154,667 upon the signing of the lease, with the other 50% to be paid prior to the move in, on the condition that the interior was substantially complete (Def. Exh. V). In the message, Fishel also notes certain rent concession credits by the landlord and that the original lease rent schedule and start/end dates would remain unchanged. Finally, Fishel asked Ellis to advise if she wished to proceed with the deal based upon the terms therein, and stated that there was inadequate time for additional negotiations, and that work must commence immediately if the space was to be finished within eight weeks.

The record also contains another e-mail dated October 6, 2006, from plaintiff's architect

to Ellis, in which the architect stated that he was trying to get close to "50/50," concerning the relative costs to the landlord and tenant for the work. The architect also stated that "this is not a negotiation - it is cost estimating ... creative cost estimating" (Def. Exh. X).

On October 17, 2006, Fein sent an e-mail to Pilson stating that the rent commencement would be pushed back if the landlord did not timely complete its work. The next day, plaintiff's architect sent an e-mail to Fein, discussing, among other things, modifications to the work to be done (Def. Exh. Y). The architect's e-mail states that there were two plans, "the existing and the proposed" and that, subsequently, a scope, and division of scope, negotiation had taken place which was captured in a preliminary cost analysis of October 12, 2006, and that the architect was designing to those modifications, and to a division of landlord and tenant work clearly outlined. The architect also stated that he, at every opportunity, mentioned to the landlord that it was all his scope and work, but that "we are reimbursing for part of the overall work he will undertake in the leasehold" (*id.*).

On October 18, 2006, Fishel wrote to Ellis that the lease must be presented, with funds due, by the close of business on October 20, 2006, and that he would not consider the deal after that deadline. Fishel also stated that he would not be able to meet the construction deadline if the deal was not signed by then (Pl. Exh. 39). Ellis responded that plaintiff was waiting for a redraft of the lease from defendant's lawyer, and could not sign the lease until they got and read it. On or about October 19, 2006, Fein sent to Pilson what plaintiff contends was a clean copy of the lease schedule, describing the construction work, which Fein stated showed the revisions made to the last draft of the document and reflected Pilson's comments made during a phone call the day before. Fein also inquired as to when plaintiff could expect to receive "the final lease draft" (Pl.

Exh.17). On October 23, 2006, Ellis sent another e-mail message to Fishel stating that plaintiff did not have the lease redraft, and that Fein had called but not heard back from Pilson (Pl. Exh, 16). There is no evidence in this record that, after advising plaintiff that the lease must be presented with funds by close of business on October 20, 2006, defendant forwarded the most recent re-draft of the lease to plaintiff.

On October 26, 2006, Pilson sent plaintiff an e-mail message stating that defendant had decided to terminate all further negotiations "on the proposed leasing" to plaintiff (Pl. Exh. 6), and would be pursuing numerous unsolicited offers, for substantially more, received during the course of the parties' negotiations. Defendant admits that, prior to sending plaintiff this message, it had demolished the space, at a cost of $120,000, but maintains that this was done in good faith, and on the assumption that the negotiations would culminate in a signed lease.

Plaintiff commenced this action in November 2006 and asserts a claim for breach of contract. Plaintiff seeks damages in an amount to be determined at trial, but not limited to the costs associated with securing replacement space, holdover rent plaintiff allegedly paid under its then-current lease, additional architectural fees, and other expenses, including legal fees allegedly incurred as a result of being denied possession of the premises.

*Discussion*

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to

require a trial of material questions of fact'" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion" (*id.* at 544; *Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]). "If there is any doubt as to the existence of a triable issue, the motion should be denied" (*F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186, 188 [1st Dept 2002]).

The parties dispute whether there was mutual intent to enter into an agreement to enter into a binding lease, through the Deal Sheet, and whether it contained all of the material terms of the deal and was a binding contract. The parties also dispute whether, after the Deal Sheet was executed, they resolved the construction issue (and whether it was material). Further, the parties dispute whether the agreement was terminated on October 3, 2006, with negotiations re-starting thereafter, or on October 26, 2006. The parties also dispute whether or not plaintiff breached the Deal Sheet. In addition, each of the parties explicitly, or implicitly, accuses the other of failing to act in good faith.

Ordinarily, where the parties contemplate the further negotiation and execution of a formal instrument, a preliminary agreement does not create a binding contract (*see Prospect St. Ventures I, LLC v Eclipsys Solutions Corp.*, 23 AD3d 213 [1st Dept 2005] [letter agreement expressly conditioned on execution of definitive agreement was an agreement to agree]; *Aksman v Xiongwei Ju*, 21 AD3d 260, 261-262 [1st Dept 2005]; *but see Bed Bath & Beyond Inc. v Ibex Constr., LLC*, 52 AD3d 413, 414 [1st Dept 2008] [language "subject to" in a letter of intent and reference to a definitive contract not an express reservation of the right not to be bound]; *Conopco, Inc. v Wathne Ltd.*, 190 AD2d 587, 588 [1st Dept 1993] [fact that the parties may

intend to negotiate a fuller agreement does not negate the formation of a binding agreement]). The provision in a preliminary agreement that addresses the obligations of the parties in the event that they fail to enter into a formal agreement (i.e., here, the refundable fee in provision number five of the Additional Notes) may establish that the parties did not intend to be bound to the proposed transaction by the preliminary agreement but intended to have the option of not proceeding (*Zohar v 3 West 16th Street Associates*, 52 AD3d 208 [1st Dept 2008]).

In some circumstances, however, preliminary agreements can create binding obligations (*see Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 298 [1st Dept 2003]; *Cornfeld v Urfirer*, 5 AD3d 178, 180 [1st Dept 2004]). Courts have found that the intent of the parties to be bound, and if such intent is found, the extent and nature of it, to be key in determining whether a preliminary agreement is binding (*Trade & Industry Corp. (USA), Inc. v Euro Brokers Inv. Corp.*, 222 AD2d 364, 368-369 [1st Dept 1995]). Furthermore, the Court of Appeals has recently stated that the issue should be asked in terms of "whether the agreement contemplated the *negotiation* of later agreements and if the consummation of those agreements was a precondition to a party's performance" (*IDT Corp. v Tyco Group, S.A.R.L.*, 13 NY3d 209, 213 n 2 [2009] [emphasis supplied]). The question of contractual intent, however, may be a fact issue (*see Weinstein v Barnett*, 219 AD2d 77, 80-81 [1st Dept 1996]; *Four Seasons Hotels v Vinnik*, 127 AD2d 310, 318 [1st Dept 1987]; *Anderson v Source Equities*, 43 AD2d 921 [1st Dept 1974]).

Here, there is an issue of fact as to whether the parties entered into a binding, enforceable agreement. While the Deal Sheet contains many explicit terms, is signed, and states that it is legally binding, it also states that it is a "binding offer," which is at best ambiguous, and that

"THIS IS NOT A LEASE," raising an issue as to whether the parties had the intention to convey an immediate possesory interest and exclusive control of the premises to plaintiff through the Deal Sheet. The Deal Sheet provides that the $3,000.00 fee was refundable in the event that the "wording" of the lease (as opposed to the terms of the lease) could not be reached, but not in the event that plaintiff unilaterally had a change of heart about entering into a lease. This language suggests that the parties' intended to negotiate further, at least as to the "wording" of the lease and if attempts to negotiate regarding such "wording" fail, to terminate the relationship. In addition, the Deal Sheet includes language concerning assignments and subletting, "according to provisions in the lease document," indicating the parties' intention to negotiate those terms further.

Furthermore, although the Deal Sheet did not contain all of the matters generally included in a commercial office lease in New York City and the parties' counsel negotiated language to be included in the lease after the Deal Sheet was signed, the court cannot decide, as a matter of law, that the parties did not intend to be bound by the Deal Sheet. The Deal Sheet does not contain an explicit and express reservation of rights not to be bound until a lease was signed, but only some language indicating that the parties did not intend to be bound, and other language to the contrary. In arguing that the Deal Sheet is not binding, defendant appears to ignore the detail expressed in the Deal Sheet, in which the parties agreed to rent, duration and space terms, as well as water, sewer and sprinkler charges, construction reimbursement, and the number of coats of polyurethane involved in the refinishing of the floors, and that the parties changed the

document's language to state that it is legally binding.[1] As plaintiff notes, the Deal Sheet is arguably tantamount to a lease because it includes all of the material terms of a lease, including the space, the rent and the lease's duration (*see Bernstein v 1995 Assoc.*, 185 AD2d 160 [1st Dept 1992], *but see Deli of Latham, Inc. v Freije*, 101 AD2d 935 [3d Dept 1984] [plaintiff's desired renovations to premises to be submitted for defendant's approval through a drawing when a full store became available for leasing indicated that additional terms were left to be negotiated and writing did not satisfy statute of frauds]). However, one of the things that distinguishes this case from the leasing cases cited by plaintiff, is that the parties' proposed deal was not for only space rental, but also for construction work, and such work is part of the subject matter of the contract. Plaintiff characterizes the issue of the scope of construction work, and which party was to do it or, perhaps, bear certain costs and risks associated with it, as *not* concerning the terms under the Deal Sheet, "but only arrangements to carry out those terms" or "effectuate" them (Pl. Op. Memo., at 10). It is unclear how plaintiff appears to come to this conclusion, or the conclusion that this matter was not material to the parties' endeavor, where the Deal Sheet provided for the construction of three, not seven, offices.[2]

Plaintiff also points to the parties' conduct in changing the language of the Deal Sheet to indicate that it was binding, after exchanging earlier drafts which stated that they were not

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[1]There is no bar to the review of parol evidence where the issue under consideration is contract formation.

[2]In addition, while Ellis testified that plaintiff intended to stick to the deal, and that defendant was not responsible for paying for anything beyond the agreement, the Deal Sheet does not require the defendant to *perform the construction* of anything other than three offices, or to *perform* any additional work that plaintiff may have wanted.

binding.[3] This conduct is evidence of the parties' intention to be bound in some manner, but is not conclusive in light of the rest of the language of the Deal Sheet.[4] Also regarding the parties' conduct concerning the Deal Sheet, plaintiff submits Fishel's testimony that he was told by Ellis and Suleman that they did not want him to be free to negotiate a deal with anyone else, but this does not demonstrate *defendant's* objective manifestation of an intention to be bound to enter into a lease absent actually entering into a lease. In addition, Suleman's testimony that *he* considered the Deal Sheet to be binding (Pl. Exh. 7, at 52, Exh. 10, at 58, 63-64), demonstrates only his own unexpressed state of mind. A party's intention to be bound, however, is determined by its conduct *that manifests* what its intentions are, and not that party's "actual or real intention" that remains unexpressed (*Conopco, Inc.*, 190 AD2d at 588; *see also Four Seasons Hotels*, 127 AD2d at 317). In light of all of the foregoing, neither party has demonstrated entitlement to summary judgment on the issue of whether the parties intended to be bound through the Deal Sheet to enter into a lease, or to be bound to negotiate, exclusively with each other, in good faith, material terms.

There are also fact issues as to whether or not the renovation or construction issue was later resolved between the parties, and whether it was material. Plaintiff argues that after the Deal Sheet was executed, defendant agreed to perform additional renovation work, at plaintiff's

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[3]Plaintiff also points to the language of the decision on the motion to dismiss, but the court in that decision necessarily only tested the sufficiency of the complaint.

[4]Certainly, the question of whether the parties expected that the Deal Sheet would be binding as an agreement to enter into a lease on the terms stated therein, or merely that the parties would be bound to exclusively negotiate only with each other, but did not intend to be bound by a lease unless a lease was executed, remains.

cost,[5] that Fishel acknowledged this, and that this does not change or terminate the binding nature of the Deal Sheet, but is a contract modification. Plaintiff's characterization of the evidence that it submits in support of its motion, especially defendant's deposition testimony, however, is neither as comprehensive, nor as accurate, as it might have been. Moreover, on plaintiff's motion, the court cannot view this evidence as plaintiff appears to, in a light favorable to it, as plaintiff bears the burden of proof on its motion. This means that the court cannot find that Fishel's testimony demonstrates that defendant agreed to undertake Citadel's work at Citadel's cost (*see* Pl. Exh. 9, at 171-172, 174-175, 239-241), or that Fishel "issued [a] rent credit" (Pl. Memo. of Law, at 18).[6]

While plaintiff, on its motion, argues that defendant had no right to terminate the deal on October 3, 2006, plaintiff's retention of the $3,000.00 check sent to it by defendant raises an issue of fact as to plaintiff's acquiescence to the abandonment of the original Deal Sheet, followed subsequently by the start of negotiations anew, on a deal with a far-increased scope of construction. Conversely, defendant has not demonstrated that the parties did not merely agree to

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[5]The court has reviewed every page of deposition testimony cited by plaintiff. While plaintiff concludes that the scope of the construction work, or who did the work, was an issue that did not concern the contract terms under the Deal Sheet, but only arrangements to carry out the terms (Pl. Mem. of Law, at 10), this conclusion is not self-evident, especially when the testimony to which plaintiff cites in its memorandum is reviewed.

[6]Plaintiff argues that Fishel acknowledged that he consented to undertaking Citadel's work at Citadel's cost, even though he was not required to do so, but plaintiff's presentation of Fishel's testimony is truncated and, in fact, distorted (*see* Pl. Exh. 9, 172-173). In addition, despite plaintiff's contention otherwise, Fishel's e-mail to his, or Renaissance's, attorney informing him that the Architect's Plan called for "SUBSTANTIALLY MORE WORK than the landlord agreed to perform in the deal sheet" and that Ellis from Citadel assured him that Citadel would be paying for the cost of the extra work, cannot be said to indicate Fishel's acceptance of plaintiff's offer to modify. An acceptance of an offer generally must be communicated to the offeror, and there is no indication that Fishel's communication was to plaintiff.

modify the Deal Sheet terms.

Defendant contends that, assuming arguendo that a binding agreement was reached, plaintiff materially breached the agreement by demanding rent concessions, due to delays that plaintiff caused, thereby excusing defendant's performance, and justifying the October 3, 2006 termination.[7] What defendant does not demonstrate, and cannot demonstrate, is that it was not free to say no to such increased demands. However, the record does reveal that, in the event that the Deal Sheet is ultimately determined to be binding as an enforceable contract, there is an issue of fact as to whether Citadel was willing to go forward with the Deal Sheet according to its terms (*see* Pl. Exh 9, at 147-148).[8]

Plaintiff argues that defendant's claim that it refused to proceed because of unresolved construction claims is false because the parties expressly agreed to the construction plans and budgets, and that all issues between the parties were resolved before defendant pulled out of the deal. This however cannot be determined, as a matter of law, on this record.[9] While plaintiff states that there was eventually agreement on these matters, the support it provides for this

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[7]Regarding certain alleged later delays the parties dispute whether or not such delays were caused by defendant's work concerning the replacement of the HVAC System or by plaintiff.

[8]Defendant contends that after the Deal Sheet was executed, the additional negotiations were merely unaccepted counteroffers. If the Deal Sheet is binding, there would be no issue of counteroffers thereafter.

[9]To support its contention that Fishel acknowledged that he was "not aware of any wording or language issues that could not be resolved" plaintiff cites Fishel's deposition response of "I don't know. I don't think so but I don't know" to the question "[w]as there ever an issue, do you know, between Citadel and you that couldn't get resolved" (Pl. Memo. of Law, at 13) Fishel's testimony, however, refers to a subleasing issue, and in any event, is not support for anything.

assertion is an e-mail message sent by Fishel to Ellis which asks Ellis to advise if Citadel wished to proceed with the deal based upon the terms therein, stating that there was no time for additional negotiations and that the work must begin in eight weeks (Pl. Exh. 37). This document could also be interpreted to be Fishel's proposal to plaintiff, and the record does not indicate that plaintiff agreed to it.

Plaintiff also contends that it is clear that the lease discussions were not finalized solely because defendant simply chose not to do so, and that Fein, in significantly marking up the Draft Lease, was just trying to work out language issues, but that there were no disputes with respect to the wording of the lease that prevented the deal from proceeding. In support, plaintiff asserts that "[t]o the best of [Pilson's] memory these matters pertained to non-material issues not covered by the Deal Sheet," but submits Pilson's testimony in which he appeared merely to state that he *would not have agreed* to certain of Fein's proposed changes to the document (*see* Pl. Memo. of Law, citing to Pl. Exh. 15, at 17-19). Also in support, plaintiff points to Pilson's testimony that he did not send a redraft of the Draft Lease to Fein with changes or proposed modifications because it was a lot of work, but leaves out Pilson's testimony to the effect that he had not redrafted the lease because the parties had not come to an agreement, and that Fein never got back to him (*id.* at 19-22). While defendant offers other contentions concerning the Draft lease, it has not pointed to evidence in the record to support its contentions.

In reply, defendant argues, among other things, that the Deal Sheet does not contain all of the essential terms because the construction term was left to the subsequent preparation of an architect's plan. In its moving papers, defendant argued only that the Deal Sheet called for timely production of plans (which defendant claims is too general for enforcement) and did not

detail the construction and finishing materials to be used, and that the September 20, 2006 delivery of the "non-conforming" Architect's Plan demonstrated that the Deal Sheet lacked the required specificity. Regarding these contentions, the Deal Sheet states that defendant was to construct three offices according to the tenant's architect's plan, which is not, on its face, incomplete, and the court's review of the record reveals that there is some evidence which may indicate that the intended renovation work was not extensive, and therefore, that the term was not essential or material.

That the tenant did not supply a plan for the construction of only three offices does not demonstrate that the term itself was unenforceable, as defendant contends. The question is whether or not the construction term was material, and whether, when the parties executed the Deal Sheet, they intended to continue negotiations as to it. In their motions, the parties do little to focus on the conduct before, and contemporaneous with, the signing of the Deal Sheet, including their discussions with each other then. While the parties' conduct after the execution may point to many things, including that the parties agreed to certain modifications as to construction, as is claimed by plaintiff, such inferences may not be drawn here as a matter of law.[10]

As to damages, defendant contends that there were none, and that plaintiff is not entitled to the damages it seeks. Plaintiff's moving papers are based on numerous proffered facts,

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[10]On another note, while defendant is not precluded from moving to amend its answer, upon proper presentation of its entitlement to such relief, its request to have its answer deemed amended in the event that summary judgment is denied is improperly made in a footnote in a reply brief, where plaintiff has not had the opportunity to respond. In addition, to the extent that defendant seeks to raise the statute of frauds here, it did not adequately brief the issue in its moving papers (*Ritt v Lenox Hill Hosp.*, 182 AD2d 560 [1st Dept 1992]).

without any reference to evidence supporting those facts, and its motion is denied, with the matter of damages to be addressed at trial, if required.[11]

*Conclusion*

Accordingly, it is

ORDERED that the defendant's motion for summary judgment is denied; and it is further

ORDERED that the plaintiff's cross motion for summary judgment is denied; and it is further

ORDERED that the parties appear for trial on July 19, 2010 at 10 AM Room 422.

Dated: June 7, 2010
New York, New York

**ENTER:**

J.S.C.

EMILY JANE GOODMAN



[11]Defendant states that plaintiff has no basis for attorney's fees in this action, and it is not clear that plaintiff has demanded such fees.