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

PRESENT: JOAN M. KENNEY PART 8

Justice

Index Number : 104355/2009

PANASIA ESTATE

VS.

BROCHE, AGNES M.

SEQUENCE NUMBER : 007

PARTIAL 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

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

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

Dated: 8/23/10

JOAN M. KENNEY J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

----------X

PANASIA ESTATE, INC.,

Plaintiff,

Index No.: 104355/09
DECISION/ORDER

-against-

DANIEL R. BROCHE, as Ancillary Executor of the Estate of Agnes M. Broche, PROPERTY 51, LLC, and PROPERTY 215, LLC,

Defendants.

----------X

HON. JOAN M. KENNEY, J.S.C.:

Papers considered in review of this motion and cross motions seeking partial summary judgment:

Papers	**Numbered**
Notice of Motion, Affidavit, Affirmation, Exhibits and Memorandum of Law	1-17
Notice of Cross Motion, Affidavits, Affirmation Exhibits	18-44
Reply Affidavits, Affidavits in Opposition, Affirmation, and Exhibits	45-53

Plaintiff's Counsel:
Robinson Brog Leinwand Greene Genovese & Gluck, P.C.
875 Third Avenue, 9th Floor
New York, NY 10022
(212) 603-6300

Defendant's Counsel:
Steinberg Fineo Berger & Fiscoff P.C.
40 Crossways Park Drive
Woodbury, New York 11797
(516) 747-1136

In this action for specific performance on a contract for the sale of real property and ancillary relief, plaintiff moves for partial summary judgment on the amended complaint, and three of the defendants cross-move for summary judgment to dismiss the complaint or, in the alternative, for injunctive relief (motion sequence number 007). For the following reasons, the motion is granted, and the cross motion is denied.

BACKGROUND

This action concerns the sale of two residential apartment buildings (the buildings) that are located, respectively, at 51 West 19th Street and 53 West 19th Street, in the County, City and State of New York. The estate of the late Agnes M. Broche (the Broche Estate) is the owner of the buildings. *See* Notice of Motion, Exhibit 1 (second amended complaint), ¶ 4. Defendant Daniel R. Broche (Broche), a New York resident, is sued here in his capacity as ancillary executor of the Broche Estate, on behalf of which he undertook to sell the buildings. *Id.*, ¶ 2. Plaintiff Panasia Estate, Inc. (Panasia), a New York corporation, contracted to purchase the buildings on January 23, 2009 via an amendment (the Panasia contract) to an earlier contract of sale (the West 19th contract) that the Broche Estate had executed on October 30, 2008 with non-party 51-52 West 19th, LLC (West 19th). *Id.*, ¶¶ 1, 5, 6. However, on March 16, 2009, the Broche Estate also executed a second contract for the sale of the buildings (the 215 contract) with defendant Property 215, LLC (Property 215), a New York corporation that is wholly owned by one Maria Tai (Tai). *Id.*, ¶¶ 3, 45. Afterwards, on April 6, 2009, Property 215 assigned its interest in the buildings via yet another contract (the 51 contract) to defendant Property 51, LLC (Property 51), a second New York corporation that is also wholly owned by Tai. *Id.*, ¶¶ 54-56.

Panasia presents copies of the Panasia contract, the 215

contract and the 51 contract to bear out its claims. *Id.*; Exhibits 6, 8, 12. The relevant portions of the Panasia contract provide as follows:

Section 7 - Responsibility for Violations

***

7.02 If the reasonably estimated aggregate cost to remove or comply with any violations or liens which Seller is required to remove or comply with ... shall exceed the Maximum Amount specified in Schedule D ... Seller shall have the right to cancel this contract, in which event the sole liability of the Seller shall be as set forth in § 13.02, unless Purchaser elects to accept title to the Premises subject to all such violations or liens, in which event Purchaser shall be entitled to a credit of an amount equal to the Maximum Amount against the monies payable at the Closing.

***

Section 13 - Objections to Title, Failure of Seller or Purchaser to Perform and Vendees Lien

***

13.02 If Seller shall be unable to convey title to the Premises at the Closing in accordance with the provisions of this contract, ... Purchaser, nevertheless, may elect to accept such title as Seller may be able to convey with a credit against the monies payable at the Closing equal to the reasonable estimated cost to cure the same (up to the Maximum Expense described below), but without any other credit or liability on the part of the Seller.

***

Section 17 - Gains Tax and Miscellaneous Provisions

***

17.02 This contract embodies and constitutes the entire understanding between the parties with respect to the transaction contemplated herein, and all prior agreements, understandings, representations and statements, oral or written, are merged

into this contract. Neither this contract nor any provision hereof may be waived, modified, amended, discharged or terminated except by an instrument signed by the party against whom the enforcement of such waiver, modification, amendment, discharge or termination is sought, and then only to the extent set forth in such instrument.

***

Schedule D - Miscellaneous

***

13. Maximum Amount which Seller must spend to ure violations, etc. (§7.02): $1,000.00.

14. Maximum Expense of Seller to cure title deficits, etc. (§13.02): $5,000.00.

***

Rider

***

10. Seller represents, to the best of his knowledge, that all space as listed on the annexed rent roll for 53 W 19th Street is legally occupied and that the existing use and occupancy is in accordance with the C of O and that a permanent Certificate of Occupancy for the building as presently constituted is in existence or that the premises predate the requirement for a Certificate of Occupancy and the premises use complies with applicable law. Seller represents that the premises are legal for occupancy for the number of families/apartments specified in the rent roll for each property and Seller will deliver a Certificate of Occupancy for each property at closing of title or predate letter acceptable to Purchaser's title company and lender. Concerning 51 West 19th Street, the same is an interim multiple dwelling and therefore there is no Certificate of Occupancy for residential use in place at this time.

Id.; Exhibit 5.

The relevant portions of the 215 contract provides as follows:

Rider

***

45. Seller [i.e., the Broche Estate] advised Purchaser [i.e., Property 215] that it is presently under contract with a third party purchaser ("Original Contract"). This contract shall be pending written termination of the original contract.

Id.; Exhibit 6.

Panasia's vice president, Hemant Mehta (Mehta) summarizes the differences between the Panasia contract and the 215 contract as follows: 1) paragraph 5 of the 215 contract does not require the seller to deliver certificates of occupancy for both buildings; 2) paragraph 44 of the 215 contract sets forth a $1,000,000.00 liquidated damages provision should the contract fail to close within one year; 3) paragraph 40 of the rider to the 215 contract provides for the purchaser to make an interest-free $1,000,000.00 loan secured by a first mortgage to the buildings; and 4) paragraph 40 of the rider to the 215 contract provides for the purchaser to enter into a $15,000.00 per month triple net lease for a period of one year (or until the closing date, which was scheduled to fall one year after the 215 contract's execution date). *Id.*; Mehta Affidavit; ¶ 7. Mehta further notes that paragraph 45 of the rider to the 215 contract states that:

> Seller advised Purchaser that it is presently under contract with a third party purchaser ("Original Contract"). This contract shall be pending acceptance of written termination of the Original Contract.

Id.; Exhibit 8.

Mehta summarizes the additional differences between the 215 contract and the 51 contract as follows: 1) the seller has no obligation to maintain insurance on the buildings; 2) the seller makes no representations as to attempts to convert the premises; 3) the seller makes no representations that the equipment at the buildings is new; 4) the seller makes no representations about the transfer of air or development rights; 5) the seller makes no representations as to environmental compliance; 6) the purchaser and seller (i.e., Broche and Tai) agree to enter into a joint defense agreement; 7) the purchaser agrees to close despite the existence of a *lis pendens* against the buildings; 8) the purchaser agrees to an immediate, same-day closing with a purchase price of $1,000,000.00; 9) the purchaser agrees to accept the surrender agreements that the buildings' tenants had executed; 10) the purchaser agrees to advance $50,000.00 to the seller; and 11) Tai agrees to personally guaranty the purchaser's mortgage. *Id.*; Mehta Affidavit; ¶ 15.

Panasia also presents an affidavit from Mehta, as well as the deposition testimony of Broche, of Tai, and of Tai's attorney, David Pour (Pour). *Id.*; Mehta Affidavit; Exhibits 9, 10, 14. Mehta asserts that, on March 11, 2009, he and his attorney, Arthur Panoff (Panoff), attended a meeting with Broche and Broche's attorney, Andrew Weltchek (Weltchek), at which Mehta and Broche discussed Mehta's "misgivings" about Broche's ability to deliver

certificates of occupancy for the buildings, and "negotiated an oral modification of the [Panasia] contract" that included a lower purchase price and changes to the certificate of occupancy delivery requirement. *See* Notice of Motion, Mehta Affidavit, ¶ 5. Mehta also states that, on March 12, 2009, Weltchek sent Panoff an e-mail that contained a proposed amendment to the Panasia contract that provided that:

> The parties hereby agree that Seller may market the premises and offer to sell them to third parties until March 31, 2009. If Seller accepts an offer on or before March 31, 2009, orally or in writing, from a third party to purchase the premises, which he may do at his absolute discretion, then the parties agree that the [Panasia] Contract, as amended, shall be terminated, the down payment returned promptly to Purchaser, and the parties shall have no other claims, rights or obligations to each other.

See Mehta Reply Affidavit, ¶ 2; Exhibit 15. However, Mehta states that he refused to sign this proposed amendment. *Id.*, ¶ 2. Mehta further states that Weltchek mailed him a letter on March 17, 2009, that purported to terminate the Panasia contract, that he did not receive that letter until March 19, 2009, and that he attended a second meeting with Broche on March 18, 2009, during which Broche continued to negotiate with him for the sale of the buildings, but failed to mention either having terminated the Panasia contract, nor having executed the 215 contract a day earlier (on March 16, 2009). *See* Notice of Motion, Mehta Affidavit, ¶ 5. The March 17, 2009, termination letter states, in pertinent part, as follows:

> Seller cannot comply with Purchaser's demand that Seller convey title in accordance with § 10 of the Rider to the [Panasia] Contract. Therefore, seller is liable to refund the Down Payment. Purchaser has not provided Seller with a report of any title examination.
>
> Enclosed is my escrow check payable to Purchaser in the amount of the Down Payment plus interest, less those amounts released to Seller pursuant to the Contract. Pursuant to the Contract, upon this refund, the Contract is null and void and the parties are relieved of all further obligations and liability.

See Notice of Cross Motion, Exhibit P. Mehta states that, as a result of the March 18, 2009 meeting, he directed his attorneys to obtain lease surrender agreements from the buildings' regular tenants, and "no harassment" certificates from the buildings' SRO tenants, in order to empty the buildings and obviate the need for Broche to obtain certificates of occupancy showing that the tenants' occupancy of the buildings was legal. *See* Notice of Motion, Mehta Affidavit, ¶ 5. Mehta voices the opinion that Broche tricked him into doing this while still harboring the plan to sell the buildings to defendants. *Id.* Mehta finally states that he, Broche, Panoff and Weltchek had a third meeting on March 27, 2009, where the parties signed an agreement not to admit any written memoranda of that meeting in any subsequent litigation. *Id.*, ¶ 10. Mehta alleges, however, that he and Broche signed a "letter of intent" at that meeting, pursuant to which Broche agreed to "terminate" the 51 contract and consummate the Panasia contract.

Id. Mehta states that this was merely another subterfuge, and that Broche simply changed his mind the next day. *Id.*, ¶ 11.

In their deposition testimony, both Tai and Pour admitted knowing that the Panasia contract existed, and had not been terminated, at the time that they were negotiating the 215 contract and the 51 contract with Broche. *See* Notice of Motion, Exhibits 9, at 31; 10, at 17. Both also assert that they believed that Broche either had, or shortly would, obtain a termination of the Panasia contract. *Id.*

For his part, Broche acknowledges: 1) having met with Mehta; 2) that the buildings had no certificates of occupancy; 3) that he sought Mehta's help in removing the buildings' tenants; 4) that he executed the Panasia, 215 and 51 contracts; and 5) that he received $1,000,000.00 from Tai. *Id.*; Exhibit 14. However, Broche also notes that the "letter of intent" that Mehta referred to was actually a letter of understanding that Weltchek prepared in advance of the March 27, 2009 meeting that merely recited that the parties would meet to attempt to settle their differences and would neither record or memorialize the substance of the meeting, or attempt to admit any record of their discussions in any subsequent litigation. *See* Notice of Cross Motion, Exhibit S. Broche denies that the March 27, 2009 meeting produced a "letter of intent" wherein he agreed not to pursue an attempt to sell the buildings to defendants.

Panasia initially commenced this action on March 26, 2009 by filling a summons and complaint with a notice of pendency. Thereafter, on April 6, 2009, Panasia moved, by order to show cause, for a temporary restraining order which defendants opposed via cross motion (motion sequence numbers 001 and 002). In a decision dated August 31, 2009 that disposed of those motions, this court (Hon. Shafer, J.), found that:

> The defendant has offered nothing more than its own misrepresentations to justify disregard of its contractual obligations, rendering success on the merits unlikely. The questions raised regarding the legitimacy of the transfer were known, or should have been known, to Property 51 LLC, tipping the balance of equities in favor of the plaintiff.

Id.; Exhibit 3.

Panasia's second amended complaint (dated June 12, 2009) now sets forth causes of action for: 1) specific performance (against Broche); 2) detrimental reliance (against Broche); 3) breach of the implied covenant of good faith and fair dealing (against Broche); 4) anticipatory breach of contract (against Broche); 5) tortious interference with contract (against Property 215); and 6) tortious interference with contract (against Property 51). *Id.*; Exhibit 1. On July 7, 2009, defendants filed a joint answer with affirmative defenses that also included five counterclaims for declaratory relief. *Id.*; Exhibit 2. In this latest series of motions, plaintiff seeks summary judgment on its third, fifth and sixth causes of action, and defendants cross-move for summary judgment to

dismiss the entire complaint (motion sequence number 007).

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 (1st Dept 2003). Here, for the reasons discussed below, the court finds that Panasia is entitled to a grant of partial summary judgment, on the issue of liability only, with respect to its third, fifth and sixth causes of action, and that defendants are not entitled to summary judgment on their cross motion to dismiss the complaint.

Panasia's third cause of action seeks damages against Broche for breach of the implied covenant of good faith and fair dealing. *See* Notice of Motion, Exhibit 1, ¶¶ 36-41. The Appellate Division, First Department, has recently reaffirmed that "[i]t is well settled that all contracts imply a covenant of good faith and fair dealing in the course of performance, and [that] 'neither party

shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" *Security Pacific Natl. Bank v Evans*, 62 AD3d 512, 514 (1st Dept 2009), quoting *Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 (1995), quoting *Kirke La Shelle Co. v Armstrong Co.*, 263 NY 79, 87 (1933).

Here, Panasia alleges four instances of Broche's purported bad faith: 1) Broche's conducting negotiations with Property 215 for the sale of the buildings while the buildings were already under contract with Panasia; 2) Broche's conducting concurrent negotiations with Panasia to reduce the building's purchase price in exchange for Panasia's agreement to forego the contractual requirement that Broche deliver valid certificates of occupancy for each building and for Panasia's assistance in inducing the tenants of 53 West 19th Street to vacate their apartments; 3) Broche's failure to terminate the 215 contract, despite the inclusion in that contract of a clause which made it subject to the "accepted termination" of the Panasia contract; and 4) Broche's conducting negotiations with Property 51 for the sale of the buildings while the buildings were already under contract with Panasia, and despite the letter of intent that Broche had sent to Panasia. *See* Plaintiff's Memorandum of Law, at 10-13. Panasia asserts that Broche committed these acts with the intent to destroy Panasia's right to receive the fruits of the Panasia contract. *Id.*

Defendants respond that Panasia's allegations are merely duplicative of its breach of contract claim, and cite the decision of the Appellate Division, First Department, in *Jacobs Private Equity, LLC v 450 Park LLC* (22 AD3d 347 [1st Dept 2005]) to support their argument that such duplicative claims should be dismissed. *See* Notice of Cross Motion, Fischoff Affirmation, ¶ 126. That case does support that proposition; however, defendants' argument must fail, because Panasia's complaint clearly does *not* include a breach of contract claim. Thus, Panasia's cause of action for breach of the implied covenant of good faith and fair dealing is clearly tenable. Moreover, defendants have not advanced any other argument as to why the four instances of Broche's behavior that Panasia recounted above should not be deemed evidence of Broche's intent to destroy Panasia's right to receive the fruits of the Panasia contract. This is, perhaps, unsurprising, since the court can envision no other light in which to view Broche's actions. Therefore, the court finds that Panasia has borne its burden of proof with respect to its claim that defendants breached the implied covenant of good faith and fair dealing subsumed in the Panasia contract, and that defendants have failed to raise any triable issues of fact with respect to the viability of this claim. Accordingly, the court grants so much of Panasia's motion as seeks summary judgment with respect to the issue of liability on its third cause of action, and denies so much of defendants' cross

motion as seeks summary judgment to dismiss that cause of action.

Panasia's fifth and sixth causes of action seek damages against Property 215 and Property 51, respectively, for tortious interference with contract. *See* Notice of Motion, Exhibit 1, ¶¶ 53-61, 62-69. To demonstrate a claim of "'[t]ortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom.'" *Havana Central NY2 LLC v Lunney's Pub, Inc.*, 49 AD3d 70, 76 (1st Dept 2007), quoting *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 (1996). Here, Panasia asserts that it has demonstrated all of these criteria. *See* Plaintiff's Memorandum of Law, at 3-10. Panasia specifically asserts: 1) the existence of the Panasia contract; 2) that both Property 215 and Property 51 knew of the Panasia contract via Tai's negotiations with Broche; 3) that Tai intentionally procured Broche's breach of the Panasia contract on two occasions - i.e., by executing first, the 215 contract and then, the 51 contract; 4) that Broche *did* actually breach the Panasia contract on those same two occasions by executing the competing contracts; and 5) that Panasia has suffered an as yet indeterminate amount of damages as a result of the foregoing. *Id.* at 4-10. Defendants dispute each of these points. *See* Notice of Cross Motion, Fischoff Affirmation,

¶¶ 100-124. The court will consider each element in turn.

With respect to "the existence of a valid contract between the plaintiff and a third party," Panasia refers to the January 23, 2009 Panasia contract, and avers that "at all times [it] was ready willing and able to close title in accordance with the terms" thereof. *See* Plaintiff's Memorandum of Law, at 4-5. Defendants respond that, at the meeting between Mehta and Broche on March 11, 2009, Mehta orally cancelled the Panasia contract. *See* Notice of Cross Motion, Fischoff Affirmation, ¶¶ 101-104. Defendants specifically allege that this cancellation came about when Broche made Mehta a "good faith offer to reduce the purchase price [of the buildings] to five million dollars," which Mehta rejected and responded to with a counter that Broche also rejected. *Id.* Defendants assert that "Mehta was obligated to accept [Broche's initial reduction offer] in accordance with § 7.02 in order to avoid termination of the Panasia contract by the seller." *Id.* Mehta replies that he never signed any written agreement to terminate the Panasia contract, and that any alleged oral termination of the Panasia contract was ineffective. *See* Mehta Reply Affidavit, ¶¶ 2-6. Defendants reply that, pursuant to section 7.02 of the Panasia contract, Mehta's only two options were to accept title to the buildings, knowing that there were problems with the certificates of occupancy, or to terminate the contract, and that his refusal to accept the contract modifications that

Broche offered at the March 11, 2009 meeting was also a refusal to exercise the first option, which resulted in the "de facto cancellation of the Panasia contract at [that] time." *See* Fischoff Reply Affirmation, ¶¶ 21-25. The court disagrees.

It is well settled that "'on a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and ... circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where ... the intention of the parties can be gathered from the instrument itself.'" *Maysek & Moran, Inc. v S.G. Warburg & Co., Inc.*, 284 AD2d 203, 204 (1st Dept 2001), quoting *Lake Constr. & Development Corp. v City of New York*, 211 AD2d 514, 515 (1st Dept 1995). Here, it is clear that sections 7.02 and 13.02 of the Panasia contract afford the purchaser (i.e., Panasia) the right to elect to accept title to the buildings even in the event that the seller (i.e., the Broche Estate) is unable to deliver certificates of occupancy or other acceptable proof that the buildings are lawfully occupied. It is also clear that section 7.02 specifically makes the seller's right to terminate the contract subject to the purchaser's right of election. Finally, section 17.02 of the Panasia contract specifically disallows any possibility of oral termination of the contract. In light of these provisions, defendants' arguments that the Panasia contract had been lawfully terminated before Broche and Tai executed the 215

contract cannot stand. Mehta specifically declined to sign Weltchek's March 12, 2009 email that purported to give the Broche Estate the right to unilaterally terminate the Panasia contract. *See* Mehta Reply Affidavit, ¶ 2; Exhibit 15. Thus, the Broche Estate's right to terminate remained subject to Panasia's right to elect to accept title to the buildings "as is," with the appropriate monetary deductions to be taken at closing. However, Weltchek's March 17, 2009 termination letter is plainly another attempt at a unilateral termination, on the ground that "Seller cannot comply with Purchaser's demand that Seller convey title in accordance with § 10 of the Rider." *See* Notice of Cross Motion, Exhibit P. Defendants offer no documentary evidence that Mehta ever gave them a written waiver of Panasia's right of election. Indeed, Mehta categorically denies ever having waived that right, and asserts that he commenced this action on behalf of Panasia in order to secure it. *See* Notice of Motion, Mehta Affidavit, ¶¶ 6, 10, 13-14. In light of the foregoing, the court rejects defendants' arguments, and finds that Panasia has borne its burden of proving that the Panasia contract was a valid contract existing between itself and the Broche Estate at the time of the events that gave rise to this action.

With respect to defendants' knowledge of the Panasia contract, Panasia argues that both Property 215 and Property 51 are chargeable with knowledge of the Panasia contract via Tai's and

Pour's negotiations with Broche. *See* Notice of Motion, Mehta Affidavit, ¶ 6. Defendants respond that paragraph 45 of the rider to the 215 contract, which states that "Seller advised Purchaser that it is presently under contract with a third party purchaser," is too ambiguous to serve as proof that the principals of Property 215 and Property 51 had the requisite knowledge of the Panasia contract. *See* Notice of Cross Motion, Fischoff Affirmation, ¶¶ 105-113. Panasia does not specifically reply to this argument. However, as was recounted earlier, in their deposition testimony, both Tai and Pour *admitted* knowing that the Panasia contract existed and had not been terminated at the time that they were negotiating the 215 contract and the 51 contract with Broche. *See* Notice of Motion, Exhibits 9, at 31; 10, at 17. The court further notes that both also *admitted* to knowing that Panasia had filed a *lis pendens* against the buildings. *Id.*, Exhibits 9, at 45; 10, at 31-32. That they possessed knowledge of the existence of the Panasia contract is therefore obvious, and there is no need for the court to construe the effect of the rider provisions of the 215 contract. Instead, the court simply rejects defendants' arguments, and finds that Panasia has borne its burden of proving that defendants possessed knowledge of the existence of the Panasia contract at the time of the events that gave rise to this action.

With regard to the element of Tai's intentional procurement of Broche's breach of the Panasia contract without justification,

Panasia refers to the terms that differed between its contract and those contained in the 215 and 51 contracts. *See* Notice of Motion, Mehta Affidavit, ¶ 15. With respect to the 215 contract, Mehta refers to: 1) paragraph 5, which does not require the seller to deliver certificates of occupancy for both buildings; 2) paragraph 44, which sets forth a $1,000,000.00 liquidated damages provision should the contract fail to close within one year; 3) paragraph 40 of the rider, which provides for the purchaser to make an interest-free $1,000,000.00 loan secured by a first mortgage on the buildings; and 4) paragraph 40 of the rider, which provides for the purchaser to enter into a $15,000.00 per month triple net lease for a period of one year (or until the closing date, which was scheduled to fall one year after the 215 contract's execution date). *Id.*; Exhibit 8. With respect to the 51 contract, Mehta refers to the provisions that: 1) permitted the seller not to maintain insurance on the buildings; 2) permitted the seller not to make any representations regarding attempts to convert the premises; 3) permitted the seller not to make any representations that the equipment at the buildings is new; 4) permitted the seller not to make any representations about the transfer of air or development rights; 5) permitted the seller not to make any representations as to environmental compliance; 6) the purchaser and seller would enter into a joint defense agreement in any litigation by Panasia; 7) the purchaser would close despite

Panasia's *lis pendens* against the buildings; 8) the purchaser would close immediately, on the same day for a purchase price of $1,000,000.00; 9) the purchaser would accept the surrender agreements that the buildings' tenants had executed; 10) the purchaser would advance $50,000.00 to the seller; and 11) Tai would personally guarantee Property 51's mortgage. *Id.*; Exhibit 12. Panasia argues that the inducements offered to Broche by these provisions are "obvious," because they relieved him of the obligation to legalize the tenants' occupancy of the buildings in order to obtain certificates of occupancy, and provided him with funds for his personal use and certain guarantees. *See* Notice of Motion, Mehta Affidavit, ¶ 15. Defendants respond that "it was Mehta who invited (induced) the estate of Broche to speak with other buyers." *See* Notice of Cross Motion, Fischoff Affirmation, ¶ 115. However, defendants have presented no evidence whatsoever to corroborate this allegation, and Mehta certainly denies having authorized defendants to seek other buyers for the buildings. The court finds that defendants' argument consists entirely of an unjustified inference that they drew from Mehta's attempt to renegotiate the price term of the Panasia contract, and therefore rejects it as meritless. Defendants also argue that the five million dollar purchase price of the 51 contract was $500,000.00 less than the purchase price set forth in the Panasia contract. *Id.*, ¶ 118. Panasia replies that, between the time the Panasia and

51 contracts were executed, the buildings' tenants were removed, which meant that Property 51 would have the opportunity to simply install new tenants at higher rents, whereas it had been initially contemplated that Panasia would bear the costs of renovating and legalizing the buildings. *See* Mehta Reply Affidavit, ¶¶ 12-13. Defendants do not address this argument in their own reply papers. The court finds that the terms of the 51 contract, which provided for essentially an "as is" sale of the buildings with an immediate closing at a $5,000,000.00 purchase price ($1,000,000.00 of which was advanced on the spot and the remainder of which was personally guaranteed), offered Broche with a substantial inducement to breach the Panasia contract (which contemplated an extended closing period and probable reduction of the purchase price). Therefore, the court finds that Panasia has borne its burden of proving that defendants - through Tai - intentionally procured Broche's breach of the Panasia contract without justification.

With respect to Broche's actual breach of the Panasia contract, Panasia argues that the issue has already been determined, and that Justice Shafer's August 31, 2009 decision provided that:

> The defendant has offered nothing more than its own misrepresentations to justify disregard of its contractual obligations, rendering success on the merits unlikely. Further, the attempted termination of the contract of sale by letter dated March 17, 2009, one day after defendant [Broche] entered into a contract of sale with defendant [Property 51] was not only ineffective to terminate the contract, as this court has held, but,

> with defendant [Property 51] was not only ineffective to terminate the contract, as this court has held, but, further, was itself a breach of the contract and a rejection of its absolute obligation to close title and deliver, at the closing, certificates of occupancy for both buildings.

See Plaintiff's Memorandum of Law, at 5. However, a perusal of Justice Shafer's decision reveals that it said *no such thing*. Instead, as Panasia's own exhibits make clear, Justice Shafer found that:

> The defendant has offered nothing more than its own misrepresentations to justify disregard of its contractual obligations, rendering success on the merits unlikely. The questions raised regarding the legitimacy of the transfer were known, or should have been known, to Property 51 LLC, tipping the balance of equities in favor of the plaintiff.

See Notice of Motion, Exhibit 3. Justice Shafer made *no* finding that defendants had breached the Panasia contract. Panasia appears to have fabricated the language that it quotes in its memorandum of law. To make an intentional misrepresentation to the court, if such it be, is completely unacceptable. Although, for the purposes of this decision only, the court will presume that Panasia's conduct was unintentional, it must warn Panasia against such potentially culpable behavior, and invites defendants to review the matter and seek whatever relief they deem appropriate.

Panasia also asserts the foregoing matter in the form of an argument - i.e., that "the execution of the [51 contract] was itself a breach of the [Panasia] contract inasmuch as it was made at a time when no attempted termination of the [Panasia] contract

had yet been made," and that defendants' "attempted termination" was ineffective. *Id.* at 5-6. In their cross motion, defendants merely repeat their earlier argument regarding the propriety of their attempt to terminate the Panasia contract. *See* Notice of Cross Motion, Fischoff Affirmation, ¶ 122. However, the court has already considered and rejected that argument. Therefore, the court finds that Panasia has borne its burden of proving that defendants breached the Panasia contract.

Panasia's motion does not seek to establish a definite figure representing damages, and requests that the issue of damages be determined at trial. However, Panasia does assert that: 1) it must now pursue costly litigation to secure its ownership of the buildings; 2) because the buildings are now empty of tenants, Panasia has lost the opportunity to realize any profit from its former rent rolls; and 3) it will continue to suffer loss of income until it can realize its plan to renovate, legalize and re-rent the buildings. *See* Plaintiff's Memorandum of Law, at 10. In their cross motion, defendants dispute these points, but offer no legal argument. *See* Notice of Cross Motion, Fischoff Affirmation, ¶ 124. Panasia does not further develop its argument in its reply papers. Nonetheless, it is clear that Panasia is correct to assert that it should be afforded the opportunity to demonstrate its alleged damages at trial. *See e.g. Manhattan Center for Early Learning Inc. v New York Child Resource Center, Inc.*, 59 AD3d 365 (1st Dept

2009). Therefore, the court finds that the issue should be revisited then.

In conclusion, the court finds that Panasia has borne its burden of proof with respect to its claims that defendants tortiously interfered with the Panasia contract. The court further finds that defendants have failed to raise any triable issues of fact with respect to the viability of these claims. Accordingly, the court grants so much of Panasia's motion as seeks summary judgment with respect to the issue of liability on its fifth and sixth causes of action for tortious interference with contract, and denies so much of defendants' cross motion as seeks summary judgment to dismiss those causes of action. This disposes of Panasia's motion.

The court notes, however, that defendants' cross motion also purports to seek summary judgment to dismiss Panasia's entire second amended complaint. Defendants present their first argument in support of such relief in their reply papers, which request that "the preliminary injunction imposed on the premises should be vacated (or, at a minimum, modified) and the plaintiff's specific performance cause of action should be dismissed." *See* Fischoff Reply Affirmation, ¶¶ 38-50. However, defendants' argument consists entirely of claims that, should the court modify said preliminary injunction to permit defendants to re-rent the buildings, it would restore an income stream from the rent rolls.

rationale as to why the court should modify the preliminary injunction, and do not explain how such modification would result in a justification for dismissing Panasia's specific performance claim. Indeed, defendants' memorandum does not cite a single case or touch on a single element of specific performance. Therefore, the court deems that defendants' argument is patently meritless, and rejects it.

With respect to Panasia's second and fourth causes of action that allege, respectively, detrimental reliance and anticipatory breach of contract, neither defendants' moving nor their reply papers sets forth any legal argument whatsoever. Therefore, the court deems that defendants have abandoned their request with respect to those claims. Accordingly, the court denies the balance of defendants' cross motion.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of plaintiff Panasia Estate, Inc. is granted to the extent of granting partial summary judgment in favor of said plaintiff and against defendants Daniel R. Broche (i/h/c/a Ancillary Executor of the Estate of Agnes M. Broche), Property 51, LLC, and Property 215, LLC as follows:

1. Defendants are found liable to plaintiff on the third, fifth and sixth causes of action set forth in the second amended complaint, and the issue of the amount of a judgment to be entered thereon shall be determined at the trial herein; and

2. The action shall continue as to the first, second and fourth causes of action set forth in said complaint; and it is further

ORDERED that the cross motion, pursuant to CPLR 3212, of defendants Daniel R. Broche, Property 51, LLC, and Property 215, LLC is, in all respects, denied.

Dated: August 23, 2010

E N T E R:

Hon. Joan M. Kenney
J.S.C.