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

PRESENT: EMILY JANE GOODMAN PART 17

Index Number : 119060/2006

SOBOROFF, PETER H.

VS

BELKIN BURDIN WENIG

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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 is decided in accord with the attached.

FILED

FEB 10 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 2/7/11

E G

J.S.C.

EMILY JANE GOODMAN

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 17

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PETER H. SOBOROFF, DVM, P.C. d/b/a NEW YORK CAT HOSPITAL,

Plaintiff,

-against-

BELKIN BURDEN WENIG & GOLDMAN, LLP,

Defendant.

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Index No. 119060/06

BELKIN BURDEN WENIG & GOLDMAN, LLP,

Defendant/Third-Party Plaintiff,

-against-

Third Party Index No. 590785/07

MICHAEL DAVIS, ARCHITECTURE & INTERIORS and DESIGN LEARNED, INC.,

Third-Party Defendants.

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EMILY JANE GOODMAN, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

In motion sequence number 001, third-party defendants Michael Davis Architecture & Interiors (Davis) and Design Learned, Inc. (Design Learned), move, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint. In motion sequence number 002, defendant/third-party plaintiff Belkin Burden Wenig & Goldman, LLP (BBWG) moves, pursuant to CPLR 3212, for partial summary judgment dismissing the first cause of action for breach of contract in the complaint of plaintiff Peter H. Soboroff, DVM, P.C., d/b/a New York Cat Hospital (Soboroff).

The complaint alleges that Soboroff retained BBWG to provide

legal services in connection with its plan to lease and develop commercial space in which to open a cat hospital. According to the complaint, the services included reviewing "all applicable laws and regulations and advice [*sic*] whether Soboroff's planned use of any contemplated leased space would comply with legal requirements." Verified Complaint ¶ 5. The complaint alleges that, after searching for an appropriate location, it settled on unfinished commercial space located at 136 Freedom Place[1] in Manhattan, which faced the Westside Highway, and which would, because of its location, provide plaintiff with free visibility and publicity. The complaint further alleges that after consulting with BBWG it decided to lease the premises, and that BBWG negotiated a lease with the landlord. After entering into the lease, Soboroff engaged Davis and Design Learned as architect and engineer, respectively, to prepare drawings and specifications for the interior construction of the cat hospital. The complaint alleges that Davis and Design Learned performed substantial design work, for which Soboroff expended significant

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[1] According to BBWG, the address 136 Freedom Place is a typographical error and the address should actually read 140 Riverside Drive; however, BBWG indicates that the error has no effect on the legal issues. In his affidavit in opposition to BBWG's motion for partial summary judgment, Peter H. Soboroff refers to the address as 140 Riverside Boulevard. That same address is referenced in plaintiff's bill of particulars. For the purposes of this opinion the court will hereafter identify the property as 140 Riverside Boulevard, as stated in Soboroff's affidavit and bill of particulars.

sums of money. The complaint further alleges that, in or about August 2004, when Soboroff applied for a building permit for the construction of the cat hospital at 140 Riverside Boulevard, it was notified by the New York City Department of Buildings that the premises were located in a residential zone, and that a cat hospital would not be permitted at the location. As a result, Soboroff was compelled to find another location, although it was obligated to pay rent under the original lease and had already spent substantial sums for the original design work.

Although Soboroff ultimately entered into a lease on another location and was able to negotiate a surrender of the lease at the original location, the complaint alleges that Soboroff incurred higher expenses and lost revenue when it had to re-locate, because the prior design work was inapplicable to the new space; and, therefore, it had to incur further expenses for design; the rent for the new space was higher; and it lost the publicity value it would have had with signs facing the Westside Highway.

Alleging that BBWG failed to properly research and advise Soboroff regarding the zoning requirements at 140 Riverside Boulevard, the complaint asserts two causes of action, the first, for breach of contract and the second, for legal malpractice.

In its third-party action, BBWG alleges, on information and belief, that Soboroff hired Davis and Design Learned to provide

architectural and engineering services, respectively, which included investigating and assessing zoning issues. BBWG asserts causes of action for contribution and common-law indemnification against Davis and Design Learned.

In motion sequence 001, Davis and Design Learned move for summary judgment dismissing the third-party complaint. They argue that contribution is only permitted under New York law for matters concerning personal injury, injury to property or wrongful death, which, they assert, are not involved here, and that contribution is not authorized when the damages sought are economic in nature. Davis and Design Learned contend that Soboroff is seeking purely economic damages - excess payments, delay and construction costs and lost profits - that were allegedly caused by BBWG's breach of contract, for which contribution is not available. Davis and Design Learned further argue that a party who has actually participated in wrongdoing cannot obtain common-law indemnification, and that since Soboroff alleges that it suffered damages because of BBWG's failure to provide the requisite legal advice in connection with procuring the lease for 140 Riverside Boulevard, Davis and Design Learned cannot be vicariously liable to BBWG.

In motion sequence 002, BBWG moves for partial summary judgment dismissing Soboroff's cause of action for breach of contract. Because Davis and Design Learned argue, at least in

part, that contribution is not permitted for a breach of contract claim, the court will first consider BWWG's motion to dismiss that claim.

BBWG first argues that the breach of contract cause of action must be dismissed because its retainer agreement with Soboroff is devoid of an express promise to obtain a specific result. BBWG cites *Senise v Mackasek* (227 AD2d 184, 185 [1st Dept 1996]), where the breach of contract cause of action was dismissed because, as pleaded, it "did not rest upon a promise of a particular or assured result." BBWG quotes the retainer agreement between Dr. Peter H. Soboroff (Dr. Soboroff) and BBWG, dated February 11, 2003, which states that the firm will represent him "in connection with preparing a lease for your veterinary practice and negotiating the terms of the lease" (*see* Letter to Dr. Peter H. Soboroff, annexed to Affirmation of Arjay G. Yao as Exh. F), and argues that the agreement makes no mention of researching zoning requirements. BBWG further argues that at no time did Soboroff ask BBWG to provide any specific legal services in connection with the property, nor did BBWG indicate it would research zoning laws with respect to the property. *See* Affirmation of Robert A. Jacobs (Jacobs), ¶¶ 6-8. BBWG argues that Soboroff's complaint and bill of particulars merely allege a breach of professional standards, rather than a failure to secure a specific result, and, therefore, the breach of contract claim

cannot stand.

The complaint, however, alleges that plaintiff sought "review of applicable laws and regulations and advice whether Soboroff's planned use of any contemplated lease space would comply with legal regulations" (Complaint ¶ 5), and that plaintiff made that request to Jacobs. In his affidavit opposing BBWG's motion, Dr. Soboroff disputes BBWG's argument regarding the February 11, 2003 retainer agreement, stating that he had entered into that agreement as an individual, and that, as indicated in the subject line of the retainer agreement, it related to property he had previously considered leasing at 208 West 79th Street, not the property at issue in this case. Dr. Soboroff further states that approximately one year after he signed that retainer agreement, he formed a professional corporation, and that the professional corporation, rather than he, as an individual, entered into an oral agreement for legal services with BBWG in connection with its efforts to lease the Riverside Boulevard property. He states that, pursuant to that oral agreement, he specifically asked Robert Jacobs, the BBWG attorney, to review the applicable zoning laws and to advise him whether using the space for a veterinary practice was a permitted use. According to Dr. Soboroff, when he was at Jacobs' office, Jacobs referred to a large bound volume of zoning maps and told Dr. Soboroff that the veterinary practice would be permitted at

the Riverside Boulevard location. Dr. Soboroff contends that, relying on Jacobs' advice, he entered into a lease for the premises and paid for architectural and engineering work in connection with the property.

Attaching an e-mail from Jacobs to his affidavit, Dr. Soboroff states that when he asked Jacobs how the error regarding zoning occurred, Jacobs stated that the zoning map he had was from 1955. The court notes, however, that in the e-mail on which Dr. Sopboroff relies, Jacobs does not actually state that he referred to the 1955 zoning map. Rather, Jacobs states that when he conducts a zoning analysis, his procedure is to locate the particular property on a zoning map and highlight the property and makes the comments, "my land map is from 1955 and does not have the new streets created for this development. I do not see any highlighted land map in my file." E-mail from Robert Jacobs to Peter Soboroff, dated 8/30/2004, annexed to Soboroff affidavit, as Exh. 2.

Opposing BBWG's motion for partial summary judgment, Davis and Design Learned argue that the language of the 2003 written retainer agreement "to represent you in connection with preparing a lease for your veterinary practice and negotiating the terms of the lease" encompasses a promise to produce a lease which can be used for the intended purpose, and that such an agreement was not merely a general agreement to negotiate a lease, but rather, an

agreement to accomplish a specific result.

BBWG argues that the court should not consider Davis and Design Learned's argument concerning the retainer agreement, since they are strangers to that agreement. In light of the fact that Soboroff contends that the legal representation occurred pursuant to an oral agreement, rather than the 2003 written retainer agreement, the analysis by Davis and Design Learned of the written retainer agreement is of little moment.

Jacobs's sworn statement that Soboroff did not ask BBWG to render any specific legal services and that neither BBWG, nor its attorneys or employees represented to Soboroff that they would research zoning laws with respect to the property, and the sworn statement of Dr. Soboroff, that he made such a request to Jacobs and that Jacobs assured him he would do the research and advise him whether the premises could be used for a veterinary practice, create issues of fact regarding whether BBWG agreed to carry out a specific task which it failed to perform. This does not, however, resolve BBWG's motion.

BBWG also argues that the breach of contract cause of action must be dismissed because it is duplicative of the malpractice claim. *See Sage Realty Corp. v Proskauer Rose LLP* (251 AD2d 35 [1st Dept 1998]). BBWG quotes portions of the first and second causes of action in the verified complaint, which allege that defendant failed to use "their best efforts and skills and to

exercise due care in its performance by failing to investigate and determine the zoning classification" (Complaint ¶ 40), and "to excise due care in its performance by failing to investigate and determine the zoning classification." Complaint ¶ 44. BBWG also quotes similar answers in plaintiff's bill of particulars. BBWG argues that both the breach of contract claim and the professional malpractice claim are basically claims that BBWG failed to exercise due care, and arise from the same set of facts and allege similar damages, and, therefore, the breach of contract claim is duplicative of the malpractice claim and must be dismissed.

Although both the complaint and Dr. Soboroff's affidavit state that BBWG agreed to research and advise plaintiff concerning zoning rules applicable to 140 Riverside Boulevard, in response to the bill of particulars questions regarding the breach of contract claim plaintiff replies as follows:

> Request No. 8:
> If it is claimed that defendant breach an alleged contract with the plaintiff, set forth the following:
> (a) Specify what plaintiff will claim the nature of the contract to have been;
> (b) Specify in what way plaintiff will claim said contract was breached;
> (c) Specify when such contract was allegedly breached.
>
> Response No. 8
> (a) Defendant, for fees charged, was engaged to use its best efforts and skills to provide competent legal services to the client and to employ due care in representing them in connection with the incorporation of plaintiff and drafting and negotiating a lease with

the landlord for premises where plaintiff could legally pursue its business.

(b) See Response No. 1.

(c) See Response No. 1.

Bill of Particulars at 4, Annexed to Affirmation of Arjay G. Yao as Exh. E.

The court notes that Response No. 1, referred to in Response No. 8 regarding breach of contract, is the response concerning the nature of the malpractice allegedly committed by BBWG. Thus, as BBWG argues, the contract claim not only arises from the same conduct, it is effectively the same claim. Furthermore, there is no allegation in the complaint or bill of particulars that the damages resulting from the contract claim differ in any way from the damages resulting from the malpractice claim.

Although a breach of contract claim and a professional malpractice claim can coexist where the contract and tort claims are premised on independent legal obligations (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 551 [1992]), as the Court noted in *Sage Realty*, "a breach of contract claim premised on the attorney's failure to exercise due care or to abide by general professional standards is nothing but a redundant pleading of the malpractice claim." 251 AD2d at 38-39. Here, even assuming the truth of Soboroff's allegation that BBWG agreed to research zoning rules,

Soboroff's basic contention is that BBWG failed to carry out that research with due care in a professional, nonnegligent fashion.

See Matter of R.M. Kliment & Frances Halsband, Architects (McKinsey & Co., Inc.), 3 NY3d 538, 542-543 (2004)(even where contract with architect provided that all plans would comply with laws, codes and ordinances, and the plans failed to do so, the claim was essentially one for failure to carry out professional services in a nonnegligent manner, and was treated as negligence, rather than breach of contract case for purposes of statute of limitations). BBWG's motion to dismiss the first cause of action for breach of contract is, therefore, granted.

Turning back to motion sequence 001, Davis and Design Learned move for summary judgment dismissing the third-party complaint, which asserts causes of action for contribution and indemnification.

With respect to the first and second causes of action for contribution, Davis and Design Learned first argue that the underlying action is basically a breach of contract action and that contribution is not available for economic damages resulting from breach of contract. *Children's Corner Learning Ctr. v A. Miranda Contr. Corp.*, 64 AD3d 318, 323 (1st Dept 2009)("Where ... the underlying claim seeks purely economic damages, a claim for common-law contribution is not available"); *see also Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 26 (1987) ("That purely economic loss resulting from a breach of contract does not constitute 'injury

to property' within the meaning of New York's contribution statute is made plain by the legislative history of CPLR 1401").

In motion sequence 002, however, this court has dismissed the breach of contract claim in the underlying complaint. The question remains, therefore, whether contribution is available with respect to the remaining cause of action in the underlying complaint against BBWG for professional malpractice.

Citing *Children's Corner Learning Ctr. v A. Miranda Contr. Corp.* (64 AD3d at 323-324), Davis and Design Learned also argue that contribution is not available for the malpractice claim, because the damages sought by the plaintiff in the underlying complaint are economic in nature. *See also* CPLR 1401 (providing for contribution where "two or more persons ... are subject to liability for damages for the same personal injury, injury to property or wrongful death"). They contend that it does not matter whether the underlying action alleges both breach of contract and malpractice; the decisive factors are whether an independent duty is alleged and the measure of damages sought. Citing *Fidelity & Deposit Co. of Md. v Levine, Levine & Meyrowitz, CPAs, P.C.* (66 AD3d 514 [1st Dept 2009]) and *Children's Corner Learning Ctr. v A. Miranda Contr. Corp.* (64 AD3d 318, *supra*), Davis and Design Learned argue that if the plaintiff in the underlying complaint is seeking purely economic damages, contribution will not lie against a third-party

defendant.

BBWG argues that *Children's Corner Learning Ctr.* only applies where a contract existed that provided for a specific bargained result, which, BBWG contends, does not apply here. Citing *Schauer v Joyce* (54 NY2d 1 [1981]), BBWG argues that contribution is available in legal malpractice claims where a third party also owed a duty to the underlying plaintiff. *See also Patterson, Belknap, Webb & Tyler, LLP v Bond St. Assoc., Ltd.*, 266 AD2d 125 (1st Dept 1999)(permitting a third-party contribution action against attorneys who shared responsibility for any loss defendant/third-party plaintiffs may have incurred by reason of legal malpractice).

There does appear to be a viable breach of contract cause of action in *Children's Corner Learning Ctr.* and the decision does state that "'purely economic loss resulting from a breach of contract does not constitute "injury to property"'" under CPLR 1401 (64 AD3d at 323 [citation omitted]), as BBWG contends. The decision also states with respect to the malpractice claim, however, "[w]here, as here, the underlying claim seeks purely economic damages, a claim for common-law contribution is not available." *Id.* It further states:

> the touchstone for purposes of whether one can seek contribution is not the nature of the claim in the underlying complaint but the measure of damages sought therein. ... That Loheac seeks the same measure of damages for breach of contract as for professional malpractice is confirmed by the fact that the specific

> damages sought in the fifth cause of action for breach of contract are substantially similar to the specific damages sought in the sixth cause of action for professional malpractice.

Id. at 324; *see also Trump Vil. Section 3, Inc. v New York State Hous. Fin. Agency,* 307 AD2d 891, 897 (1st Dept 2003)("the crucial point here is that the damages sought by plaintiff on all of its causes of action are merely for economic loss").

There is an underlying tension between *Children's Corner Learning Ctr.* and its progeny, where breach of contract has been pled along with professional malpractice, and those cases which contain only causes of action for professional malpractice. Examining the question of whether purely economic damages constitute "property" under CPLR 1401, the *Children's Corner Learning Ctr.* court concludes that they do not. The professional malpractice cases on which BBWG relies never even consider this question.

As the Court notes in *Children's Corner Learning Ctr.*, CPLR 1401 is a codification of *Dole v Dow Chem. Co.* (30 NY2d 143 [1972]), which recognized common-law contribution among tort-feasers in a wrongful death action. When CPLR 1401 provides for contribution "for damages for the same personal injury, injury to property or wrongful death" (CPLR 1401), it is not clear, however, what is meant by "injury to property," and whether purely economic loss was intended to be included. The Court in *Lippes v Atlantic Bank of N.Y.* (69 AD2d 127 [1ST Dept 1979])

examines the question in a case involving CPLR 1411, the comparative negligence statute which was enacted shortly after the enactment of CPLR 1401, and was also intended to codify and clarify the rules enunciated in *Dole v Dow*. Noting that the term "property damage," in CPLR 1401 was later replaced by "injury to property," the Court concluded that "any tortious act (other than personal injury) resulting in damage (i.e., 'whereby the estate of another is lessened'; General Construction Law § 25-b) constitutes an 'injury to property' within the contemplation of CPLR 1401 and 1411." 69 AD2d at 141. Thus, according to the Court, purely economic damage can be considered injury to property. This suggests, as BBWG argues, that the bar to contribution claims in malpractice cases articulated in *Children's Corner Learning Ctr.* and its progeny only applies where the breach of contract claim is viable and where the measure of damages is the same for both claims. However, where, as here, the breach of contract claim has been dismissed because it is merely duplicative of the malpractice claim, a claim for contribution is not precluded. The court concludes, nonetheless, that BBWG's claims for contribution must be dismissed.

In order to obtain contribution, the third-party plaintiff must be able to establish that the third-party defendant was also a tortfeasor. In the underlying complaint, Soboroff alleged that it was damaged because BBWG failed to research and advise

plaintiff concerning the zoning regulations applicable to the property in question. In its third-party complaint, BBWG alleges, on information and belief, that Davis and Design Learned were retained by plaintiff to provide architectural and engineering services, respectively, "which included, but were not limited to, the investigation and assessment of zoning regulations for the potential locations for the animal care facilities...." Verified Third Party Complaint, ¶¶ 8 & 10. BBWG further alleges that, if it is held liable to plaintiff, liability was caused by the negligent acts of the architect and engineer.

In support of their respective motions for summary judgment, Michael R. Davis, founder and owner of Michael Davis Architecture and Interiors, P.C., and Scott Learned, P.E., founder and owner of Design Learned, Inc., submit affidavits in which each states that his company was not responsible for researching or advising Soboroff concerning zoning regulations and that their respective work obligations were limited to the services and obligations delineated in their contracts with Soboroff.[2] Both Michael Davis

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[2] BBWG contends that Learned's affidavit has no probative value, because it was sworn to before a notary public in Connecticut and is not accompanied by a certificate required pursuant to CPLR 2309 (c). BBWG does not actually dispute the authority of the Connecticut notary or the veracity of Learned's statements, or show any prejudice from the lack of a certificate. This court is inclined to follow those decisions that hold that failure to include an authenticating certificate with an affidavit sworn to before an out-of-state notary public is not a

and Scott Learned annex copies of their agreements with Dr. Peter Soboroff. Both contracts contain a detailed scope of work. Neither contract states that they have been retained to investigate or assess zoning regulations applicable to the property for which they were hired.

Davis and Design Learned have, therefore, made a prima facie case that they were not responsible for researching and advising Soboroff with respect to zoning regulations. In order to counter Davis and Design Learned's evidence, BBWG must present evidence in support of its conclusory allegations that the architect and engineer had such responsibilities and failed to carry them out, or carried them out in a negligent manner; this BBWG has failed to do. Thus, BBWG's first and second causes of action for contribution are dismissed.

In the third and fourth causes of action in its third-party complaint, BBWG seeks indemnification against Davis and Design Learned, respectively. Common-law or implied indemnification permits a party who has been held vicariously liable for the acts of another to recover from the wrongdoer. *17 Vista Fee Assoc. v Teachers Ins. and Annuity Assn. of Am.*, 259 AD2d 75, 80 (1st Dept 1999). "[A] person who, in whole or in part, has discharged a

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fatal defect, since it can obviously be cured and will merely delay the litigation. *See Citibank (S. D.) N.A. v Santiago,* 4 Misc 3d 138(A), 2004 NY Slip Op 50899 (U)(App Term, 1st Dept 2004); *see also Sparaco v Sparaco,* 309 AD2d 1029 (3rd Dept 2003)(finding absence of certificate not to be a fatal defect).

duty which is owed by him but which as between himself and another should have been discharged by the other is entitled to indemnity." *Id.* (internal quotation marks and citation omitted). However, the party seeking indemnification must have "delegated exclusive responsibility for the duties giving rise to the loss to the party from whom indemnification is sought. *Id.*

Here, in the underlying action, Soboroff alleges that it was injured because BBWG failed to properly research and advise plaintiff concerning the zoning rules applicable to the Riverside Boulevard apartment. Plaintiff makes no allegations against Davis and Design Learned. In fact, BWWG asks in its bill of particulars:

> [i]f it will be claimed that any of the acts or omissions particularized in item 1 above were performed by another for whose acts or omissions the defendant has legal responsibility, state as to each such act or omission the name of the person who performed it, and the person's legal relationship to the defendant."

Bill of Particulars, Request No. 2.

In response to that request, Soboroff answers: "To plaintiff's knowledge, the acts and omissions were not performed by another for whose acts defendant has legal responsibility." Bill of Particulars, response No. 2.

Furthermore, BBWG does not contend that it delegated its responsibility to research the zoning rules Davis and Design Learned. In fact, it does not allege that it has any relationship to the architect and engineer.

Thus, plaintiff has not alleged vicarious liability against BBWG, nor is there is any basis for BBWG to be held vicariously liable to plaintiff. Therefore, if BBWG is found to be liable to plaintiff, it will be for its own alleged failure to carry out its professional responsibilities. Indemnification is not available where the party held liable has itself participated in the wrongdoing. *Id.* BBWG's causes of action for indemnification are, therefore, dismissed.

Accordingly, it is hereby

ORDERED in Motion Sequence No. 001 that the motion for summary judgment of third-party defendants Michael Davis Architecture & Interiors and Design Learned, Inc. for summary judgment is granted and the third-party complaint is dismissed with costs and disbursements to third-party defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED in Motion Sequence No. 002 that defendant/third-party plaintiff Belkin Burden Wenig & Goldman, LLP's motion for partial summary judgment is granted and the first cause of action for breach of contract is dismissed; and it is further

ORDERED that the action shall continue as to the second cause of action.

Dated: February 7, 2011

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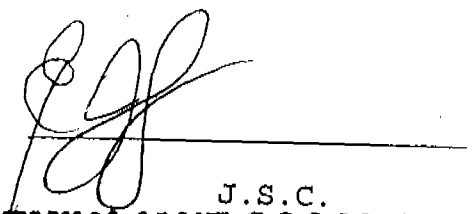

J.S.C.
EMILY JANE GOODMAN

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FEB 10 2011

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