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

PRESENT: BARBARA R. KAPNICK Justice PART 39

Index Number : 650345/2008
INTERNATIONAL AIR CARGOCENTRE
vs.
PORT AUTHORITY OF NEW YORK
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 650345/08
MOTION DATE
MOTION SEQ. NO. 001
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 ACCOMPANYING MEMORANDUM DECISION

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

Dated: 8/21/13

BARBARA R. KAPNICK J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NEW YORK : IAS PART 39**

----------X

JFK INTERNATIONAL AIR CARGOCENTRE, LLC,
a Delaware Limited Liability Company,

Plaintiff,

- against -

THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY,

Defendant.

----------X

**DECISION/ORDER**
Index No. 650345/08
Motions Seq. Nos.
001 and 002

**BARBARA R. KAPNICK, J.:**

Plaintiff JFK International Air CargoCentre, LLC ("Air Cargo") commenced this action to recover damages arising out of defendant The Port Authority of New York and New Jersey's ("Port Authority") alleged breach of a contractual obligation to provide Air Cargo with a ground lease to develop and operate a new cargo facility at John F. Kennedy International Airport ("JFK"). In motion sequence number 001, the Port Authority moves for summary judgment dismissing plaintiff's complaint. In motion sequence number 002, Air Cargo moves for summary judgment on its first cause of action for breach of contract or, alternatively, its second cause of action alleging promissory estoppel. The two motions are consolidated for disposition herein.

**BACKGROUND**

The following facts are not in dispute.

On February 12, 2001, the Port Authority issued a Request for Proposals ("RFP") for the development and operation of a new cargo

facility at the site of hangars 3, 4, and 5 at JFK Airport (*see* Majorie Aff. Exh. 12). The RFP states that the successful bidder would be responsible for the development, construction, management, operation and maintenance of the cargo facility for the term of a ground lease to be executed between the Port Authority and the selected respondent. A draft form of the proposed ground lease was included as part of the RFP.

The RFP also provides that, upon the selection of a development proposal, the Port Authority staff would recommend the selected development team and development proposal to the Port Authority's Board of Commissioners ("Board") for approval. The RFP further states that "[a]ny recommendation or authorization to enter into a lease agreement with the successful Proposer, and to subsequently proceed with construction, will be subject to approval by the Port Authority's Board of Commissioners and the veto powers of the Governors of the States of New York and New Jersey." (*id.* at Part 1, section A).

In addition, the RFP provides that the Port Authority's legal relationship with the selected development team would be developed in two stages: (1) the execution of "[a] non-binding Memorandum of Understanding (MOU) ... within 30 days after the development team is selected"; and (2) the subsequent negotiation and execution of

the Final Project Agreements which would include the ground lease, and would address the construction, financing, operation, and maintenance of the new facility (*id.* at Part III, section C 11). The RFP additionally states that

> [t]he Port Authority assumes that design work for the Project will proceed while the Final Project Agreements are being negotiated. The Port Authority expects the Respondent to assume responsibility for funding design and other project costs after the MOU is executed and while negotiation of the Final Project Agreements is under way. The Respondent will assume all financial obligations related to the Project.

(*id.*). As a further condition, term and limitation, the RFP provides:

> Unless and until an agreement covering the design, financing, construction, and operation of the Cargo Facility is finally executed by the Port Authority and your organization, either the Port Authority or your organization may withdraw from any discussions or negotiations which may be pending between them, and from any commitments made by either party in any manner, at any time, and for any reason whatsoever, and no party shall be liable to the other for any damages or costs of any kind in such event.

(*id.* at Part VI, section 5). The draft form of the proposed ground lease also states, in capital letters at the top of the first page, that:

> THIS AGREEMENT SHALL NOT BE BINDING UPON THE PORT AUTHORITY UNTIL DULY EXECUTED BY AN EXECUTIVE OFFICER THEREOF AND DELIVERED TO THE LESSEE BY AN AUTHORIZED REPRESENTATIVE OF THE PORT AUTHORITY

(*id.* Appendix F).

By letter dated February 6, 2002, the Port Authority advised Air Cargo that it had been selected as the most qualified proposer to undertake the project, and that a meeting would be scheduled to discuss the next steps in proceeding with the development (*see* Miller Affirm. Exh. 5). Thereafter, the parties began negotiating and exchanging drafts of the proposed form lease agreement. However, as of 2004, no lease agreement for the development project had been executed. Meanwhile, the costs of the proposed development project had increased. In addition, although Air Cargo's original proposal had been made in contemplation that the entire project site would be vacant, the Port Authority had since permitted Jet Blue Airways ("Jet Blue") to continue occupying Hanger 3 until the end of June 2005, while its own maintenance facility was being completed. The Port Authority had determined that moving Jet Blue to an alternative site during this period would have required an expenditure of over $1 million dollars just to make the site suitable for Jet Blue's temporary needs.

As a result of these ongoing developments, in 2004, the parties entered into negotiations to modify the terms of Air

Cargo's development proposal to address the increased costs of the project, as well as to provide accommodation to Air Cargo for the delays and disruption to the project caused by Jet Blue's continuing occupancy of Hanger 3. The Port Authority staff and Air Cargo reached agreement on modified project terms by the Fall of 2004. In December 2004, the Port Authority staff presented Air Cargo's modified development proposal to the Port Authority Board with the recommendation that it authorize the Port Authority to enter into a lease agreement with Air Cargo to develop and operate the new air cargo facility at Hangers 3-4-5 pursuant to the modified terms.

According to the Board minutes, under the terms of the proposed ground lease, which was anticipated to commence on or about July 1, 2005, Air Cargo "would pay the Port Authority an aggregate rental of approximately $112 million over a 27-year period in guaranteed ground rents and an estimated $39 million in participatory rents and sublease fees" (Majorie Aff. Exh. 23-A). As in the original, the modified proposal called for rental fees at the rate of 5% per annum of all rentals and other gross receipts received by Air Cargo from subtenants, and sublease fees at the rate of 10% per annum of all sublease rentals (*see* Majorie Aff. Exhs. 12 at Part III, section C; 23-A). However, the modified terms and conditions also provided that

> [t]he lease will not be executed by the Port Authority until [Air Cargo] has secured lease commitments for the first 68% of the total warehouse space. These lease commitments will be subject to Port Authority consent and must be secured by no later than twelve months after Jet Blue's relocation or December 31, 2006, whichever is sooner. These commitments must be for a term of at least ten years. The Port Authority will also have the right to review and consent to all prospective lessees of [Air Cargo] to determine whether there will be negative revenue impacts to the Port Authority.

(*id.* Exh. 23-B).

By resolution dated December 9, 2004, the Board authorized the Port Authority to enter into a lease with Air Cargo substantially in accordance with the terms and conditions that had been outlined to the Board (*id.* Exh. 23-A). Specifically, the resolution stated

> that the Executive Director be and he hereby is authorized, for and on behalf of the Port Authority, to enter into a 27-year lease with [Air Cargo] for the development and operation of an air cargo facility on a 27-acre site at [JFK] and to reimburse [Air Cargo] approximately $4.8 million for certain work necessary for the development of the site, substantially in accordance with the terms and conditions outlined to the Board; the form of the agreement shall be subject to the approval of General Counsel or his authorized representative.

Following Board authorization, Air Cargo began pursuing various subtenant prospects. During 2006, Air Cargo entered into detailed discussions to sublease space at the new facility with two prospective subtenants: Aeroground/Menzies ("Menzies"), for

approximately one-third of the space, and Delta Airlines ("Delta"), then in the process of emerging from bankruptcy, for the bulk of the remaining space. By September of 2006, Air Cargo had reached an understanding with Anthony Bonino ("Bonino"), the representative negotiating on behalf of Menzies, and Raymond Moore ("Moore"), the representative negotiating on behalf of Delta, as to the sublease rates that each of these companies would be willing to pay to sublease space at the new cargo facility. However, the record reflects that, also beginning in September 2006, Delta was requesting that the Port Authority eliminate or reduce various fees, including the participatory rental and sublease fees to which Air Cargo had agreed in 2004, in order for Delta to gain the necessary internal approvals to move forward with the project (*see* Miller Affirm. Exh. 20: Deposition of Steven D. Bradford ["Bradford"], [a vice president of Trammell Crow Company ("TCC"), a diversified commercial real estate services company, which formed plaintiff Air Cargo as part of a strategic alliance to develop airport and industrial properties,] at 73-76, 184; Majorie Aff. Exh. 31). In a memorandum addressed to the Port Authority staff dated October 25, 2006, the TCC Airport Facilities Development Team reiterated the terms that it stated were necessary for Delta and Menzies to obtain the internal approvals needed for the project to move forward, which included the elimination of the 5%

participatory rental and 10% sublease fees, among others (*see* Majorie Aff. Exh. 42-D).

The record also reflects that by letter dated December 15, 2006, the Port Authority responded to the request to eliminate these fees by proposing to modify the deal, approved by the Board in 2004, to reduce the participatory rental and sublease fees and to modify the ground rent due under the agreement (*id.* Exh. 43). The Port Authority specifically stated therein that, "[w]e are prepared to advance this new development proposal forward for approval by the Board". Air Cargo, through Bradford at TCC, responded to the Port Authority's proposed modifications by letter dated January 18, 2007, which stated that, "[u]pon careful consideration of your Proposal and review of the Project Budget with [Delta] and [Menzies] we have determined that in order to move forward with the Development of the Hangars 3-4-5 our subtenants will require" an additional "necessary modification" to the terms and conditions originally approved by the Board in 2004, to further reduce the percentage rental and sublease fees (*id.* Exh. 44). The Port Authority responded to this letter on February 2, 2007, by proposing amendments to Air Cargo's January 18, 2007 proposed modifications; the letter noted that the Port Authority staff had been "unable to garner support internally" for Air Cargo's proposed revisions, but that if agreement were reached on the Port

Authority's modifications of those revisions, it could gain acceptance and approval internally (Miller Aff. Exh. 14). By letter dated February 7, 2007, TCC responded that they were prepared to move forward with the Port Authority's proposal, subject to certain additional clarifications and modifications (*id.* Exh. 15).

The parties allegedly reached an agreement with respect to, *inter alia*, the modification of the participatory and sublease fees toward the end of February 2007. The record reflects that through much of 2007, the parties continued exchanging drafts of the proposed form lease agreement and discussing and preparing for presentation of the newly modified development proposal to the Board. Ultimately, however, these modifications were never presented to the Port Authority Board for approval, and no lease agreement was executed by the Port Authority and Air Cargo.

On February 29, 2008, Bradford wrote to Moore, requesting that Delta reconfirm to the Port Authority its commitment to the project. The letter stated, inter alia,

> [w]e specifically request that [Delta] agree to meet with the [Port Authority] to communicate [Delta's] commitment to the Project as the long term solution to its cargo facility requirement at [JFK] and request that the Port Authority finalize a Ground Lease pursuant to the terms negotiated by [Air Cargo/TCC] on behalf of [Delta].

(*id.* Exh. 16). In a letter on behalf of Delta dated March 3, 2008, Moore responded:

> As you are aware, [Delta] has not made a commitment to this project. In fact, you and I have discussed on numerous occasions throughout our negotiations related to the [Air Cargo] project that Delta has continued to explore other possible options during this time... . We continue to make a diligent, thoughtful review of all our viable options for cargo at JFK, and that includes doing nothing. If Delta has a further interest in pursuing discussions with [Air Cargo/TCC] regarding the [site], I will contact you

(*id.* Exh. 17).

By letter dated April 3, 2008, the Port Authority provided written notice to Air Cargo that it would not be pursuing any further discussions regarding redevelopment of Hangars 3-4-5, as it had decided to make other plans for the site (*id.* Exh. 18). The letter states that, despite the Port Authority's continued efforts to accommodate Air Cargo, the key condition set forth in the 2004 Board resolution had not been met, as Air Cargo had failed to secure a commitment from Delta by the December 31, 2006 deadline, and had not identified any other tenant(s) that would meet the 68% requirement.

Air Cargo then commenced the instant action on September 18, 2008, asserting causes of action against the Port Authority for (1) breach of contract, (2) promissory estoppel, (3) quantum meruit,

(4) unjust enrichment, and (5) tortious interference with prospective business relations. In essence, plaintiff alleges that (1) Air Cargo and the Port Authority reached an agreement in 2004, under which defendant would lease cargo space to Air Cargo at JFK, and Air Cargo would build, operate, and manage an air cargo facility; (2) the Port Authority's Board approved that agreement in writing on December 9, 2004; (3) Air Cargo obtained two tenants committed to sublease the space under economic terms that met the Board approved agreement; (4) the Port Authority thereafter failed to deliver the ground lease document contemplated by the parties' agreement, and otherwise delayed implementation of the project, interfered with one of plaintiff's committed subtenants, and eventually repudiated the agreement; and (5) the Port Authority's conduct caused plaintiff to suffer damages comprised of either lost profits, or the costs and expenses it incurred in connection with attempting to implement this transaction.

The Port Authority now moves for summary judgment dismissing all of Air Cargo's causes of action. Air Cargo opposes defendant's summary judgment motion, and moves for summary judgment in its favor on its first cause of action for breach of contract or, alternatively, its second cause of action based on promissory estoppel.

**DISCUSSION**

A motion for summary judgment will be granted only where a movant has made "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once a movant has made such a showing, the burden shifts to the party opposing the motion to produce evidentiary facts sufficient to raise triable issues of fact *(see Zuckerman v City of New York*, 49 NY2d 557 [1980]); "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*id.* at 562). Rather, the opponent of a summary judgment motion "must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist"; "reliance upon mere suspicion and surmise is insufficient" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" ( *Kornfeld v NRX Tech.*, 93 AD2d 772, 773 [1st Dept 1983], *affd* 62 NY2d 686 [1984] ).

The Port Authority argues that plaintiff's first cause of action for breach of contract must be dismissed because the evidence establishes that no written lease agreement was ever executed by the parties, as expressly required by the RFP and the Statute of Frauds. The Port Authority argues that the December 9,

2004 Board resolution, which authorized the Port Authority's Executive Director to enter into a lease with Air Cargo, expressly contemplated that there would be negotiation of more definite lease terms, and that a written lease would then be executed; thus, the agreement is, at best, merely an unenforceable agreement to agree. Defendant argues that Air Cargo's contention that the terms and conditions approved by the 2004 Board resolution constitute a final binding agreement, is directly at odds with Air Cargo's subsequent conduct in 2006 and 2007, when it proceeded to negotiate for the modification of various economic terms of the deal that had been approved by that Board resolution.

The Port Authority further argues that even if the 2004 Board resolution could be considered an enforceable agreement, the resolution only authorized the Executive Director to enter into a lease agreement with Air Cargo if it obtained sublease commitments for 68% of the space by no later than December 31, 2006. Defendant argues that the evidence establishes that Air Cargo failed to secure the requisite sublease commitments by such date.

The Port Authority also argues that all of plaintiff's equitable claims should be dismissed, as they are merely an attempt to circumvent the Statute of Frauds. Defendant argues that dismissal of these claims is further warranted because a claim

based on promissory estoppel may not be invoked against a government agency, absent unusual circumstances not present here, and because plaintiff has failed to establish the essential elements of its promissory estoppel, quantum meruit, unjust enrichment, and tortious interference with prospective business relations claims.

Air Cargo argues that the Port Authority's motion to dismiss Air Cargo's breach of contract claim should be denied, and its motion for summary judgment on this cause of action should be granted, because the 2004 Board resolution did not merely authorize the Port Authority to negotiate a lease, but rather required the Port Authority to enter into a lease, i.e., to execute and deliver a signed ground lease to Air Cargo, on specific terms and conditions approved by the Board, once the requisite lease commitments had been obtained. Plaintiff notes that New York's Statute of Frauds does not require that there be a single formal lease agreement signed by both parties, only that there be some note or memorandum "comprised of one or more documents authored by the party to be charged with sufficient specificity to allow the Court to determine if the parties intended to be bound" (*see* Plaintiff's Memorandum of Law in Further Support of Motion for Summary Judgment at 4). Plaintiff argues that here, the Board resolution and minutes, when read in conjunction with a detailed

executive term sheet that purportedly was referenced in, and attached to, the Board minutes, contain all of the material terms of the parties' lease agreement: the identity of the parties; the location of the premises; the term of the lease; and the rent to be paid during the lease term.

Plaintiff further contends that other than requiring that the form of the lease be subject to the approval of the General Counsel or his authorized representative, the Board resolution anticipated no further approvals by the Board, and that nothing further was required of the Port Authority staff but to execute the lease agreement, once Air Cargo had secured the requisite subtenant commitments. Plaintiff contends that any subsequent correspondence and discussions between the parties regarding the terms of the ground lease involved either non-essential terms, or amounted to delay tactics by the Port Authority, and does not evidence a failure to have agreed on the lease's material terms.

Plaintiff also argues that contrary to defendant's contention, the evidence establishes that in September of 2006, Delta and Menzies each had committed to becoming a subtenant of the facility under the economic terms of the agreement that had been approved by the Board in 2004. Plaintiff argues that the Port Authority thereafter breached the express terms of the Board resolution by

failing to deliver an executed ground lease to Air Cargo once the requisite subtenant commitments had been secured, and breached the agreement's implied covenant of good faith and fair dealing by failing to cooperate or participate in the finalization of the documents contemplated by the parties' agreement, by proposing additional modifications to the terms of the lease in order to delay its execution, and by attempting to induce Delta to move to other cargo space at JFK.

Alternatively, plaintiff argues that should this Court determine that the Board resolution is not a valid and enforceable agreement between the parties, Air Cargo should be awarded summary judgment on its cause of action based on promissory estoppel, as the Board resolution contained a clear and unambiguous promise that the Port Authority would deliver a signed lease agreement once plaintiff had secured sufficient committed tenants. Plaintiff alleges that the resolution clearly contemplated that plaintiff would spend time and resources to obtain those commitments in order to implement the agreement, and that in reliance on that promise, it expended those resources.

The Statute of Frauds provides that an agreement is void if it is not in writing and "subscribed by the party to be charged therewith" when the agreement "[b]y its terms is not to be

performed within one year from the making thereof" (General Obligations Law ["GOL"] § 5-701 [a] [1]). Similarly, GOL § 5-703 (2) requires that

> [a] contract for the leasing for a longer period than one year ... of any real property, or an interest therein, is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing.

A contract to enter into such a lease is also subject to the Statute of Frauds *(see Farash v Sykes Datatronics,* 59 NY2d 500, 503 [1983]; *Geraci v Jenrette*, 41 NY2d 660, 664 [1977]).

It is undisputed that the Port Authority and Air Cargo never executed a finalized lease agreement. Nevertheless, plaintiff argues that the 2004 Board resolution, when read in conjunction with the Board minutes and the executive term sheet, is a sufficient writing to evince the intent of the parties to be bound and to move forward under the terms of the deal approved by the Board.

While "an agreement sufficient to satisfy the statute of frauds may be pieced together from separate writings" ( *Chan v Shew Foo Chin*, 62 AD3d 471, 471 [1st Dept 2009]); the writing or writings relied upon "must contain substantially the whole agreement, and

all its material terms and conditions, so that one reading it can understand from it what the agreement is" (*Kobre v Instrument Sys. Corp.*, 54 AD2d 625, 626 [1st Dept 1976], *affd* 43 NY2d 862 [1978] [internal citations omitted]). Here, it is clear that from the very inception of this transaction, a major part of the parties' lease negotiations involved the exchange and revision of the draft form lease agreement, originally included with the RFP. This 78-page form lease agreement contains numerous terms, conditions, and obligations that clearly are material to a commercial lease agreement of this size, length, and subject matter, and that go well beyond those terms and conditions that were outlined in the Board resolution and minutes, even when read in conjunction with the executive term sheet. Since, absent the inclusion of the form lease agreement, the Board resolution, minutes, and executive term sheet do not, in and of themselves, contain "substantially the whole agreement, and all its material terms and conditions," they are not writings sufficient to satisfy the Statute of Frauds.

Moreover, even were the form lease agreement to be included as one of the writings evidencing the alleged lease agreement, dismissal of plaintiff's breach of contract claim would still be required, as the form lease agreement expressly states on its face that it shall not be binding on the Port Authority until duly executed by an executive officer and delivered to the lessee.

"'[I]t is well settled that, if the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed'" *(Jordan Panel Sys. Corp. v Turner Constr. Co.*, 45 AD3d 165, 166 [1st Dept 2007], quoting *Scheck v Francis*, 26 NY2d 466, 469-470 [1970]). The determination of whether the parties intended to be bound prior to an executed, written agreement is based upon "the parties' expressed intentions, the words and deeds which constitute objective signs in a given set of circumstances" *R.G. Group, Inc. v Horn & Hardart Co.*, 751 F2d 69, 74 [2d Cir 1984] [applying New York law]). The "principle ... recognizes that 'when a party gives forthright, reasonable signals that it means to be bound only by a written agreement, courts should not frustrate that intent'" (*Jordan Panel Sys. Corp.*, 45 AD3d at 169, quoting *R.G. Group, Inc.*, 751 F2d at 75; *see also Winston v Mediafare Entertainment Corp.*, 777 F2d 78, 80 [2nd Cir 1985] ["if either party communicates an intent not to be bound until he achieves a fully executed document, no amount of negotiation or oral agreement to specific terms will result in the formation of a binding contract"]).

Here, it is clear from the draft copies of the proposed lease agreement, as well as from the terms of the RFP, that the Port Authority expressed an unequivocal intent not to be bound unless

and until a formal lease agreement was executed and delivered *(see Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423 [1st Dept 2010]; *ADCO Elec. Corp. v HRH Constr., LLC*, 63 AD3d 653 [2nd Dept 2009]). While the Board resolution may have authorized the Port Authority's Executive Director to enter into such a lease with Air Cargo "substantially in accordance" with the outlined terms and conditions once the requisite sublease commitments were obtained, there is no evidence that the Port Authority explicitly waived the condition that a formal lease agreement be executed, or otherwise stated an intent to be bound absent such execution. Accordingly, having clearly expressed its intent not to be bound by the terms and conditions of the lease agreement prior to its execution, the resolution authorizing the Port Authority to enter into such an agreement constitutes, at most, an unenforceable "agreement to agree" (*see Prospect St. Ventures I, LLC v Eclipsys Solutions Corp.*, 23 AD3d 213 [1st Dept 2005]).

Dismissal of plaintiff's contract claim would be required, in any event, as there is evidence that, by late 2006, Air Cargo and the Port Authority had re-entered negotiations to modify the terms and conditions approved by the Board in the 2004 resolution. Although plaintiff contends that the proposed modifications involved only non-essential terms, and were purposely proposed by

the Port Authority late in December 2006 with the intent to delay finalization of the lease agreement past the December 31, 2006 deadline, plaintiff previously admitted that the Port Authority's December 15, 2006 proposal was made in response to Delta's request for the elimination of the rental and sublease fees (see Miller Affirm. Exh. 20: Bradford Deposition at 168-170, 184). Additionally, the evidence establishes that Air Cargo, thereafter, undertook to negotiate these modifications of the lease agreement on Delta's behalf, in order that Delta could obtain the internal approvals necessary to go forward with the project (*id.* Exhs. 13, 15, and 16). The evidence of subsequent negotiations serves to refute not only plaintiff's contention that, as of 2004, the parties had reached a binding agreement as to all material terms of the lease, but its contention that, as of September 2006, Delta had committed to becoming a subtenant of Air Cargo under the economic terms and conditions of the proposed lease agreement that had been approved by the Board in 2004.

Moreover, to the extent that the 2004 Board resolution gave rise to any obligation on the part of the Port Authority to execute a final lease agreement with Air Cargo, such obligation was conditioned expressly upon Air Cargo's first securing the requisite sublease commitments. Although there is evidence that the representatives of Menzies and Delta had negotiated sublease rates

with Air Cargo as of September of 2006, there is no evidence that either of these companies *committed* to sublease cargo space under these negotiated rates.

Specifically, while Bonino testified that he was authorized to negotiate on behalf of Menzies for sublease terms that would be proposed to its board (*see* Miller Aff. Exh. 22: Bonino Deposition at 25-26, 58), he further testified that he was not authorized to commit Menzies to leasing the facility (*id.* at 57). Plaintiff has proffered no evidence that the negotiated sublease terms were ever presented to the Menzies board for consideration, or that such a commitment was either sought or obtained.

Additionally, although there is evidence establishing that Moore reached an understanding with Air Cargo as to what the sublease rental rates would be if Delta went forward with the deal (*id.* Exh. 21: Moore Deposition at 80, 105-106), and that Moore had submitted documentation regarding these sublease rates to the Port Authority as part of its discussion over the elimination of sublease and rental fees (*id.* at 80, 108), plaintiff has proffered no evidence that Delta ever committed to a sublease under these terms. On the other hand, the Port Authority has proffered evidence that negotiations between Delta and Air Cargo had never reached the point at which Delta was prepared to take the deal to

its board (*id.* at 153-154), and that Delta had never put the deal forward to the Port Authority for its consent (*id.* at 80-81).

Plaintiff's alternative relief, for summary judgment on its claim of promissory estoppel, is also denied, and defendant's motion to dismiss this claim is granted. To succeed on a promissory estoppel claim, plaintiff must establish: (1) a clear and unambiguous promise; (2) reasonable and foreseeable reliance by the party to whom that promise is made; and (3) an injury sustained in reliance on that promise (*see Braddock v Braddock*, 60 AD3d 84, 95 [1st Dept 2009], *app wdn* 12 NY3d 780 [2009]). Plaintiff argues that it is entitled to summary judgment on this cause of action, since "[t]he 2004 Board resolution contained a clear and unambiguous promise that the Port Authority would deliver a signed 27-year ground lease of the Hangar 3, 4, 5 space for $47.9 million of net-present-valued rent, as long as the Plaintiff had tenants who would lease 68% or more of the space" (Plaintiff's Memorandum in Further Support at 11). Plaintiff contends that by expending resources to obtain the requisite subtenant commitments, it was injured in reliance on that promise.

The legal insufficiency of plaintiff's cause of action for breach of contract requires dismissal of plaintiff's promissory estoppel claim as well. As the Port Authority clearly expressed

its intent not to be bound unless and until a finalized lease agreement was executed and delivered to plaintiff, plaintiff could not reasonably have relied on the Board resolution as a clear and unambiguous promise to execute and deliver a lease agreement pursuant to the terms and conditions approved by the Board (*see Jordan Panel Sys. Corp.*, 45 AD3d at 179-180; *Prospect St. Ventures I, LLC v Eclipsys Solutions Corp.*, 23 AD3d at 214; *Prestige Foods v Whale Sec. Co.*, 243 AD2d 281 [1st Dept 1997]).

That portion of defendant's motion seeking summary judgment dismissing plaintiff's quantum meruit cause of action is also granted. "In order to establish a quantum meruit claim, plaintiff must show 'the performance of services in good faith, acceptance of the services by the person to whom they are rendered, an expectation of compensation therefor, and the reasonable value of the services'" *(Georgia Malone & Co., Inc. v Ralph Rieder*, 86 AD3d 406, 410 [1st Dept 2011], *aff'd* 19 NY3d 511 (2012), quoting *Freedman v Pearlman*, 271 AD2d 301, 304 [1st Dept 2000] ).

Here, however, plaintiff was aware from the terms and conditions set forth in the RFP, that it assumed responsibility for all project costs and financial obligations during negotiation of the Final Project Agreements. Moreover, the RFP also provides that unless and until a final agreement is executed, neither party would

be liable to the other for any damages or costs of any kind. Thus, although plaintiff may have performed extensive work in anticipation of, and to advance and facilitate these contract negotiations, it could have had no reasonable expectation of payment in the absence of an executed agreement (*see Jordan Panel Sys. Corp.*, 45 AD3d at 180; *Metropolitan Steel Indus. v Citnalta Constr. Corp.*, 302 AD2d 233, 233-234 [1st Dept 2003]).

Plaintiff's unjust enrichment claim must also be dismissed, since under New York law, "unjust enrichment is not an appropriate remedy for recovery of the expenses of a failed negotiation" (*Chatterjee Fund Mgt. v Dimensional Media Assoc.*, 260 AD2d 159, 160 [1st Dept 1999]; *Metal Cladding, Inc. v. Brassey*, 159 AD2d 958, 959 [4th Dept 1990]). Our courts have held that any work that was merely preparatory to performance of the contemplated agreement can not constitute the basis for restitution based upon unjust enrichment (*Absher Constr. Corp. v Colin*, 233 AD2d 279, 280 [2nd Dept 1996]).

Plaintiff argues, nevertheless, that under the circumstances present here, it would be against equity and good conscience to allow defendant to retain (1) the $1 million that defendant saved by not having to relocate Jet Blue to a different terminal, and (2)

the rents that defendant has received since Delta's relocation to another JFK cargo facility in late 2008.

To recover on a claim of unjust enrichment, however, "[a] plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks and citations omitted]). A "cause of action for unjust enrichment is stated where plaintiffs have properly asserted that a benefit was bestowed ... by plaintiffs and that defendants will obtain such benefit without adequately compensating plaintiffs therefor" (*Wiener v Lazard Freres & Co.*, 241 AD2d 114, 119 [1st Dept 1998] [internal quotation marks and citations omitted]. "[T]he receipt of a benefit alone ... is insufficient to establish a cause of action for unjust enrichment" (*id.* at 120). As these savings and rents were not benefits bestowed on defendant by plaintiff, or to which plaintiff would otherwise be entitled, they do not establish the basis of a claim for unjust enrichment.

Finally, that portion of defendant's motion seeking to dismiss plaintiff's claim for tortious interference with prospective business relations is granted. To recover on a claim for tortious

interference with a prospective business relationship, plaintiff must establish "(1) the defendant's knowledge of a business relationship between the plaintiff and a third party; (2) the defendant's intentional interference with the relationship; (3) that the defendant acted by the use of wrongful means or with the sole purpose of malice; and (4) resulting injury to the business relationship" *(see 534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 542 [1st Dept 2011] ). As a general rule, "wrongful means" is conduct that is criminal or otherwise tortious, including physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degree of economic pressure beyond simple persuasion (*Carvel Corp. v Noonan*, 3 NY3d 182, 191 [2004]). Additionally, the alleged wrongful conduct must have been directed by defendant at the third party with whom a plaintiff has or has sought a business relationship, and not against the plaintiff itself (*id.* at 192; *see also Havana Cent. NY2 LLC v Lunney's Pub, Inc.*, 49 AD3d 70, 74 [1st Dept 2007], *app wdn* 10 NY3d 761 [2008]).

Plaintiff argues that defendant's motion for summary judgment dismissing this claim should be denied, because triable issues of fact exist as to whether defendant, by inducing Delta to locate elsewhere, and thereby undermining Air Cargo's business relationship with Delta, wrongfully violated the duty of good faith

and fair dealing imposed in connection with the 68% sublease requirement. However, while plaintiff has produced evidence of numerous discussions between members of the Port Authority staff and Delta representatives about various cargo space options at JFK, plaintiff has produced no evidence that the Port Authority engaged in any wrongful conduct directed at Delta, or that the Port Authority, in fact, induced Delta to relocate to a different site. Defendant, on the other hand, has produced evidence that no one at the Port Authority encouraged Delta to relocate to its current site, as opposed to Hangars 3-4-5 (Miller Aff., Exh. 21: Moore Deposition at 154).

Accordingly, defendant's motion for summary judgment is granted, and the Complaint is dismissed with prejudice, and without costs or disbursements. Plaintiff's motion is, consequently, denied.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of this Court.

Dated: August 21, 2013

BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.