

Arbor Leasing LLC v BTMU Capital Corp.

2014 NY Slip Op 30086(U)

January 14, 2014

Sup Ct, New York County

Docket Number: 603151/2006

Judge: Barbara R. Kapnick

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

PRESENT: **BARBARA R. KAPNICK**

PART 39

Justice

ARBOR LEASING LLC

INDEX NO.

603151/06

MOTION DATE

- v -

MOTION SEQ. NO.

006

BTMU CAPITAL CORP.

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

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

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

Dated: 1/14/14


BARBARA R. KAPNICK S.C.
180

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

-----X
ARBOR LEASING, LLC,

Plaintiff-Counterclaim Defendant,

- against -

DECISION/ORDER

Index No. 603151/06

Motion Seq. No. 006

BTMU CAPITAL CORPORATION f/k/a BTM
CAPITAL CORPORATION,

Defendant-Counterclaimant.

-----X
BARBARA R. KAPNICK, J.:

This action involves a dispute arising under a "Consulting and Remarketing Agreement," (the "Agreement") entered into on July 19, 2004 between plaintiff Arbor Leasing, LLC ("Arbor Leasing"), defendant BTMU Capital Corporation ("BTM"), and former defendants Arbor Finance Limited and Copley Capital LLC. Under the Agreement, Arbor Leasing agreed to provide "consulting and advisory services" to BTM. (Agreement, § 2 (a).) Specifically, Arbor Leasing was retained to:

[a]ssist[] in the importation an [sic] customs clearance of two (2) Boeing 767-200 ER aircraft (the "Aircraft") into the Russian Federation for the purpose of a leasing transaction between [BTM] and Krasnoyarsk Airlines ("Lessee") pursuant to the Rental Agreements, and assisting in the structuring, documentation and execution of the Rental Agreements and all related agreements (the "Transaction").

(*Id.*, § 2 (a) (i).) Arbor Leasing also agreed to establish "two single purpose companies, one of which is Arbor Group and the other named Eire Management LLC . . . to act as parties in the

Transaction, and to have Boris Stratievsky, an officer of [Arbor Leasing], to be a .005% shareholder in Arbor Group." (*Id.*, § 2 (a) (ii).)

There is no dispute that Boris Stratievsky ("Stratievsky") was arrested on or about June 1, 2005 pursuant to an indictment that included charges for money laundering.¹ By letter dated June 10, 2005, BTM terminated the Agreement "[p]ursuant to the terms of section 3 (b) (v) of the Agreement," the so-called "morals clause."

The Complaint dated August 31, 2006 originally asserted causes of action for breach of contract, breach of implied contract (in the alternative) and unjust enrichment (in the alternative). Defendants moved to dismiss the Complaint, and by decision dated March 9, 2007 on mot. seq. no. 001, the Court (Freedman, Helen J.) dismissed this action against Arbor Finance Limited and Copley Capital LLC. Justice Freedman also dismissed Arbor Leasing's causes of action for breach of implied contract and unjust enrichment against all the defendants.

BTM's Answer, dated April 16, 2007, asserted counterclaims against Arbor Leasing for breach of contract and breach of fiduciary duty. BTM also asserted a counterclaim against Arbor Leasing's principal, Stratievsky, for breach of fiduciary duty. By

¹ He was not released from prison until November 16, 2008.

decision dated July 26, 2007 on mot. seq. no. 002, Justice Freedman dismissed both counterclaims for breach of fiduciary duty, thereby dismissing the action in its entirety against Stratievsky.

As a result of the parties' prior motion practice, the sole surviving claims in this action are Arbor Leasing's first cause of action for breach of contract and BTM's first counterclaim for breach of contract, both of which are based upon the Agreement. BTM now moves for summary judgment dismissing Arbor Leasing's breach of contract claim and granting it summary judgment on the issue of liability as to its counterclaim.

The facts of this case were discussed in detail in the previous decisions and orders in this action, including the March 9, 2007 decision, *supra*; this Court's Decision and Order on mot. seq. no. 003, *Arbor Leasing, LLC v BTMU Capital Corp.*, 24 Misc 3d 1226(A) (July 10, 2009) and the Appellate Division's decision in *Arbor Leasing, LLC v BTMU Capital Corp.*, 68 AD3d 580 (1st Dept 2009). Therefore, this Court presumes familiarity with the facts, which shall not be restated here. To the extent that additional facts are necessary for purposes of deciding the instant motion, they will be discussed in the following analysis.

Discussion

Arbor Leasing's Breach of Contract Cause of Action

BTM moves for summary judgment dismissing Arbor Leasing's first cause of action for breach of contract based on wrongful termination, arguing that BTM was entitled to terminate pursuant to sections 3(b)(v), (b)(i), and (b)(iii) of the Agreement. Arbor Leasing argues, in opposition, that BTM's termination was improper, because it was based upon acts that predated the Agreement and that Arbor Leasing should have been given an opportunity to cure. Arbor Leasing also claims that its acts were not actually or potentially harmful to BTM's business or reputation, and that BTM can seek termination under section 3(b)(v) of the Agreement only, having failed to raise sections 3(b)(i) and/or b(iii) in its termination letter.

The Agreement provided that it would terminate after five years, unless "extended by an instrument in writing signed by all parties." (Agreement, § 3(a).) The Agreement also permitted BTM to terminate as follows:

[BTM] may by notice in writing immediately terminate this Agreement without any further payments of any kind hereunder to [Arbor Leasing], if [Arbor Leasing] shall:

(i) be in breach of any of the material terms of this Agreement, which in the case of a breach capable of remedy is not remedied by [Arbor Leasing] within fourteen (14) days of receipt by [Arbor Leasing] of a notice from

[BTM], specifying the breach and requiring that it be remedied;

(ii) be guilty of gross negligence and/or willful misconduct;

(iii) engage in fraud or other material dishonesty with respect to [BTM] or any of its Affiliates or customers;

(iv) represent itself as agent or representative of [BTM] in any matter outside the scope of the Services provided for herein; or

(v) otherwise act in a manner that is materially harmful, or potentially materially harmful, to the business interests or reputation of [BTM] or any of its Affiliates.

(*Id.*, § 3(b).)

As stated by the First Department, “[i]t is clear that the acts and knowledge of plaintiff’s sole member/manager, who had complete control over the company, may be imputed to plaintiff for purposes of determining whether it was in default.” *Arbor Leasing, LLC*, 68 AD3d at 580. Moreover, morals clauses will be enforced where based upon an individual’s arrest and accompanying publicity. *Nader v ABC Television, Inc.*, 150 Fed Appx 54, 56 (2d Cir 2005) (“undisputed facts that [television actor] was arrested and that the arrest generated media attention brings his conduct well within any reasonable interpretation of the clause”).

Here, BTM submitted evidence showing that Arbor Leasing, "with knowledge that its principal had committed money laundering, to which he subsequently pleaded guilty, nevertheless placed the principal in full control of the finances and accounts of the parties' venture." *Arbor Leasing, LLC*, 68 AD3d at 580. Arbor Leasing admits that Stratievsky and his father, Lev Stratievsky, "were the sole managers of Arbor Leasing." (Arbor Leasing Rule 19-a Statement, ¶ 29.) It is undisputed that Stratievsky served as general director of Arbor Group IR, one of the subsidiaries established to act as a party in the Transaction. (Stratievsky Dep. 348:8-14, April 6, 2011; Agreement, § 2 (a) (ii).) It is also undisputed that Stratievsky's approval was required for the disbursement of funds from Arbor Group IR's accounts. (Stratievsky Dep. 231:22-232:7, April 5, 2011; Arbor Leasing Rule 19-a Statement, ¶ 15.)

Stratievsky was unable to run or manage Arbor Leasing, its affiliates, or subsidiaries beginning at the time of his arrest; he testified that after his arrest, he had no e-mail access and did not communicate with anyone relating to Arbor Group IR, and that Arbor Leasing had no operations. (Stratievsky Dep. 233:2-234:3, 268:10-15, April 5, 2011.) Also at his deposition, Stratievsky was asked whether he had taken "any steps to supervise the operations of Arbor Group Russia" and he responded that he contacted BTM "to

ask them to reassure the employees that everything is going to be okay. That was pretty much it. It [sic] was really not much else I could do." (Stratievsky Dep. 328:8-18, April 6, 2011.)

Stratievsky's arrest on money laundering charges was published in the Chicago Tribune on June 2, 2005 (Sarkozi Aff. Ex. 42) and the suburban Chicago Daily Herald on June 3, 2005 (*Id.* Ex. 43).² It is undisputed that these articles were forwarded to BTM by another airline industry professional. (O'Brien Dep. 107:22-108:7, April 29, 2011; 302:18-303:2, June 1, 2011.) Stratievsky testified that during his business relationship with BTM, he told people that he worked with BTM. (Stratievsky Dep. 844:9-846:14, April 29, 2011.)

This evidence makes a prima facie showing that the incarceration and absence of Arbor Leasing's principal, and the resulting media attention, was "materially harmful, or potentially materially harmful, to the business interests or reputation of [BTM] or . . . its Affiliates;" constituting a ground for BTM's June 10, 2005 termination of the Agreement under section 3 (b) (v).

² A later article published in February 2008 by the Chicago Sun-Times, referred to Stratievsky as "'a professor' of money-laundering" and "[t]he face of the new Mafia." (Sarkozi Aff. Ex. 44.)

In opposition, Arbor Leasing argues that section 3 (b) (v) applies only if "no other section of § 3 (b) does by its plain language: *otherwise act in a manner*" (Plaintiff's Memo in Response, 12.) Since BTM also identifies bases for termination under sections 3 (b) (i) and (b) (iii), Arbor Leasing contends that it should have been given an opportunity to cure. However, while certain breaches are "capable of remedy" under section 3 (b), the Agreement was terminated under section 3 (b) (v), which does not provide a fourteen day period to cure, unlike a breach under § 3 (b) (i). Moreover, BTM's termination under § 3 (b) (v) does not implicate other contractual breaches, but rather, is an independent ground for termination. Therefore, this argument is without merit.

Arbor Leasing also argues the "morals clause" cannot apply in this case since it only deals with actions occurring after the Agreement was executed, and here, Stratievsky's arrest was for acts which he committed four years before the Agreement was executed. As discussed *supra*, however, Arbor Leasing placed Stratievsky in control of the finances and accounts during the term of the Agreement, even though it knew that he had committed money laundering. *Arbor Leasing, LLC*, 68 AD3d at 580. Clearly, the arrest and incarceration of Arbor Leasing's principal would disrupt its business operations. There was also the risk that those doing business with BTM would associate it with Stratievsky. Arbor

Leasing fails to present any evidence showing that it did not knowingly place Stratievsky in a position of control notwithstanding his prior conduct. Thus, BTM's termination was not based upon Stratievsky's prior acts that led to his arrest, but rather, upon Arbor Leasing's act of placing Stratievsky in control of finances and accounts with knowledge of his prior misconduct. The fact of Stratievsky's arrest merely rendered the "potential[] material[] harm[]" actual harm under section 3 (b) (v) of the Agreement.

For the foregoing reasons, Arbor Leasing fails to raise an issue of fact. Accordingly, BTM is entitled to summary judgment dismissing Arbor Leasing's only remaining cause of action for breach of contract based upon wrongful termination, and the Complaint is now dismissed in its entirety.³

BTM's Breach of Contract Counterclaim

BTM next seeks summary judgment on its first counterclaim for breach of contract, arguing that Arbor Leasing entered into unauthorized transactions in violation of section 5 of the Agreement, and failed to keep BTM informed of its activities and to perform its obligations in BTM's best interest and in a

³ The Court thus need not address BTM's additional bases for termination under the Agreement.

professional manner in violation of section 2 of the Agreement. In opposition, Arbor Leasing argues that numerous disputed factual issues exist as to whether it was even required to obtain BTM's consent to enter into certain transactions. Arbor Leasing also argues that BTM failed to provide notice and an opportunity to cure any purported breaches, as required under section 3 (b) (i) of the Agreement.

Under section 5 of the Agreement, Arbor Leasing agreed not to "incur fees and expenses with respect to the Transaction and payable or reimbursable by [BTM] in excess of Ten Thousand Dollars (\$10,000) unless payment or reimbursement with respect thereto has been expressly authorized in writing by the Senior Vice President - Corporate Finance." Section 2 (a) (v) of the Agreement required Arbor Leasing to "perform its obligations with reasonable care and skill, in a timely and professional manner, and to the best of its ability and in the best interests of [BTM]." Section 2 (a) (v) also required Arbor Leasing to "keep [BTM] informed of its activities under [the] Agreement."

It is undisputed that on July 28, 2004, Arbor Leasing caused Arbor Group IR to make a 3 million ruble (approximately \$100,000) interest-free loan to a company called Danart LLC. (Sarkozi Aff. Ex. 29; Stratievsky Dep. 561:9-24, April 6, 2011; Arbor Leasing

Rule 19-a Statement, ¶ 47.) On September 1, 2004, Arbor Leasing caused Arbor Group IR to enter into a consulting agreement with Vipisan LLC, obligating Arbor Group IR to pay 300,000 rubles (approximately \$10,000). (Sarkozi Aff. Ex. 32; Stratievsky Dep. 574:8-577:8, April 6, 2011; Arbor Leasing Rule 19-a Statement, ¶ 52.) On September 2, 2004, Arbor Group IR entered into a consulting agreement with Arepium LLC, obligating Arbor Group IR to pay a fee of 602,000 rubles (approximately \$20,000). (Sarkozi Aff. Ex. 31.) On November 22, 2004, Arbor Leasing caused Arbor Group IR to enter into an interest-free, 3 million ruble loan agreement with Arepium LLC.⁴ (Sarkozi Aff. Ex. 30; Stratievsky Dep. 532:18-533:8, 610:22-611:6, April 6, 2011.) On May 27, 2005, Arbor Leasing caused Arbor Group IR to loan \$96,209 to a company called OOO Langard PM. (Sarkozi Aff. Ex. 28, at BT029460.) Arbor Leasing also made a 3 million ruble (approximately \$100,000) rent payment to the landlord of Arbor Group IR and Eire Management LLC, even though the

⁴ Based upon the evidence before this Court, it is not clear whether Arepium LLC borrowed or loaned the funds. The loan agreement identified Arepium LLC as the "Lender" and Arbor Group IR LLC as the "Borrower." (Sarkozi Aff. Ex. 30, at 1.) Consistent with the loan agreement, Stratievsky testified on April 28, 2001, that Arepium LLC loaned the funds to Arbor Group IR. (Stratievsky Dep. 611:3-6, April 6, 2011.) However, Stratievsky had also testified earlier that day that Arbor Group IR loaned the funds to Arepium LLC. (*Id.* 532:18-533:2.) In addition, in paragraph 54 of its Rule 19-a Statement, Arbor Leasing does not dispute BTM's assertion that Arbor Group IR loaned the funds to Arepium LLC. At the end of the loan agreement, the "addresses and requisites of the parties" refers to Arbor Group IR as the "Lender" and Arepium LLC as the "Borrower." The parties do not address these discrepancies.

annual rent was only 1.8 million rubles (approximately \$60,000). (Arbor Leasing Rule 19-a Statement, ¶¶ 49, 50; Stratievsky Dep. 789:21-793:17, April 28, 2011.)

Arbor Leasing does not dispute that it did not discuss the Danart LLC, Vipisan LLC, and Arepium LLC transactions with BTM or obtain BTM's written authorization to enter into these transactions, claiming it did not have to. (Stratievsky Dep. 562:10-563:5, 581:12-582:19, April 6, 2011; Arbor Leasing Rule 19-a Statement, ¶¶ 48, 53, 54.) Stratievsky testified that the Danart LLC loan was an investment, not an expense that would implicate paragraph 5 of the Agreement. (Stratievsky Dep. 561:25-563:5, April 6, 2011.) He also testified that the \$20,000 fee under the consulting agreement with Arepium LLC was not an expense, but an agreement to perform services. (*Id.* at 531:2-7.) According to Arbor Leasing, BTM merely speculates that the payment to 000 Langard PM was unauthorized (*id.*, ¶ 56, citing Sarkozi Aff. Ex. 28, at BT029446), but admits that it has been unable to identify this entity or explain the purpose of the transaction with 000 Langard PM. (Arbor Leasing Rule 19-a Statement, ¶ 57.) Further, Arbor Leasing does not dispute that it failed to obtain written authorization from BTM for the payment to Arbor Group IR and Eire Management LLC's landlord. (*Id.*, ¶¶ 49-50.)

"[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Greenfield v Philles Records*, 98 NY2d 562, 569 (2002). The aim of contract interpretation "is a practical interpretation of the expressions of the parties to the end that there be a realization of [their] reasonable expectations. [N]ot merely literal language, but whatever may be reasonably implied therefrom must be taken into account." *Duane Reade, Inc. v Cardtronics, LP*, 54 AD3d 137, 140-141 (1st Dept 2008) (internal quotation marks and citations omitted). "A contract should not be interpreted to produce a result that is absurd, commercially unreasonable, or contrary to the reasonable expectations of the parties." *Matter of Lipper Holdings v Trident Holdings*, 1 AD3d 170, 170 (1st Dept 2003) (internal citations omitted).

Black's Law Dictionary defines "loan" as "[d]elivery by one party to and receipt by another party of sum of money upon agreement, express or implied, to repay it with or without interest." *Biggs v Lyng*, 823 F2d 15, 18 (2d Cir 1987).

Because the loan to Danart LLC was interest-free, once the funds were disbursed, the time-value of that money was lost. The same is true of any interest-free loan made to Arepium LLC. The

parties could not reasonably have expected to issue interest-free loans as an investment strategy, nor would it have been commercially reasonable for them to have done so. Moreover, Arbor Leasing cannot seriously dispute that the consulting agreement with Arepium LLC and the rent overpayment to the landlord of Arbor Group IR and Eire Management LLC were expenditures. Arbor Leasing claims that factual issues exist as to whether it was required to obtain BTM's consent, and "whether there is anything questionable about the transactions at all." (Plaintiff's Memo in Response, 19; Arbor Leasing Rule 19-a Statement, ¶¶ 48, 54.) However, Arbor Leasing provides no legal or factual support for this conclusory statement. *Gelb v Bucknell Press*, 69 AD2d 829, 830 (2d Dept 1979) (neither a "shadowy semblance of an issue" nor "bald conclusory assertions" standing alone, are sufficient to defeat a motion for summary judgment).

The evidence makes clear that Arbor Leasing caused Arbor Group IR "to incur fees and expenses with respect to the Transaction," exceeding \$10,000. (Agreement, ¶ 5.) It is undisputed that BTM owned controlling interests in Arbor Group IR and Eire Management LLC (Schwartz Aff. Ex. 8 [Plaintiff's Objections and Responses to Defendant BTM's Second Set of Interrogatories, Nov. 11, 2009], at 6; *id.*, Ex. 9 [Plaintiff's Supplemental Answers to Interrogatories, Oct. 28, 2010] at 2; O'Brien Aff. [Sept. 12, 2008] ¶ 6; Stratievsky

Dep. 813:16-19, April 28, 2011), and Arbor Leasing does not dispute that these fees and expenses were "payable or reimbursable by [BTM]." (Agreement, § 5.) For the foregoing reasons, Arbor Leasing fails to raise an issue of fact as to whether the loans, consulting agreements, and rent overpayment constituted "fees and expenses . . . payable or reimbursable" by BTM in excess of \$10,000, thereby requiring BTM's authorization under the clear terms of section 5 of the Agreement. As BTM's authorization was never obtained by Arbor Leasing, BTM is entitled to summary judgment on its counterclaim, based upon Arbor Leasing's breach of section 5 of the Agreement.

This evidence also makes a prima facie showing that Arbor Leasing failed to "keep [BTM] informed of its activities under [the] Agreement," as required under section 2 (a) (v). Furthermore, Arbor Leasing's placement of Stratievsky, an individual with a known history of money laundering activities, in a position central to the business of Arbor Leasing and its subsidiaries, also makes a prima facie showing that Arbor Leasing did not "perform its obligations with reasonable care and skill . . . and in the best interests of [BTM]." (Agreement, § 2 (a) (v).)

BTM submits additional evidence in support of its argument that Arbor Leasing did not "keep [BTM] informed of its activities

under [the] Agreement", evidenced by discrepancies in bank statements submitted to BTM. Specifically, BTM submits Arbor Group IR's March 2005 bank statement, sent to BTM in April 2005. Although the bank statement is dated March 2005, it appears to contain entries that had not yet occurred for 2006, 2007, and 2008, and these entries were not contained in the official bank statements provided to BTM's forensic accounting team at KPMG. (Sarkozi Aff. Ex. 17; Arbor Leasing Rule 19-a Statement, ¶ 21.) Arbor Leasing does not dispute that there are discrepancies between the bank statements it provided to BTM and the bank statements obtained by KPMG. (Arbor Leasing Rule 19-a Statement, ¶¶ 39-43.) BTM also refers the Court to bank statements contained in Exhibits 16 and 17 of Sarkozi's Affidavit, and Exhibits 1 and 2 of Grechanik's Affidavit, but these exhibits are in Russian, and BTM only submits translations of portions of the Grechanik Exhibits. As a result, although it appears that these documents may contain discrepancies, the Court cannot determine, as a matter of law, whether they support BTM's summary judgment motion.

Arbor Leasing's argument concerning the notice and cure provision contained in section 3 (b) (i) of the Agreement relates to BTM's right to terminate, without limiting BTM's right to sue for breach of contract. As discussed, *supra*, BTM properly terminated the Agreement under section 3 (b) (v), which does not require BTM to provide notice or an opportunity to cure, whereas BTM's counterclaim for breach of contract is based upon sections 2

(a) and 5. In other words, the Agreement does not limit BTM's right to sue for breach of contract, but rather merely imposes notice and cure obligations in the event that BTM terminates the Agreement based upon certain breaches that are not the basis of this Court's decision herein. Therefore, Arbor Leasing's argument that BTM was required to provide notice and an opportunity to cure is without merit.

Furthermore, Arbor Leasing agreed to:

indemnify and hold harmless [BTM] and its Affiliates . . . from any and all injuries, losses, claims and damages . . . , and all costs and expenses, including without limitation attorneys' fees, and any other liabilities incurred by any of the foregoing as a result of any action or omission by [Arbor Leasing] or any of its Associates.

(Agreement, § 8 (b).) The Agreement contained similar provisions for liabilities arising out of terminating the Agreement under section 3 (b) (Agreement, § 4 [c]), and liabilities relating to Arbor Leasing's "performance of the Services hereunder or any failure on the part of [Arbor Leasing] or any Associate of [Arbor Leasing] to perform or comply with any of the terms of this Agreement." (*Id.* § 16.) Arbor Leasing was required to "give each indemnified party prompt notice of any occurrence, event or condition known to [Arbor Leasing] as a consequence of which any indemnified party may be entitled to indemnification hereunder." (*Id.*)


BTM claims that it had to incur the expense of hiring a forensic accountant as a result of the undisclosed transactions, as well as attorneys' fees and other damages stemming from Arbor Leasing's breach. Having established Arbor Leasing's breach of the Agreement, this Court finds that BTM is entitled to costs, expenses, attorneys' fees, and "any other liabilities incurred" as a result of Arbor Leasing's conduct, pursuant to sections 4 (c), 8 (b), and 16 of the Agreement.

Accordingly, for all the reasons stated herein, defendant is entitled to summary judgment dismissing plaintiff's only remaining cause of action for breach of contract, and granting it summary judgment on liability as to its counterclaim.

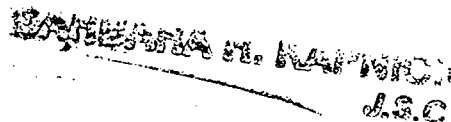
Counsel shall appear for a conference in IA Part 39, 60 Centre Street - Room 208 on February 11, 2014 at 10:00 a.m. to schedule a trial on damages on defendant's counterclaim for breach of contract.

This constitutes the decision and order of this Court.

Dated: January 4, 2014



 BARBARA R. KAPNICK
 J.S.C.


 BARBARA R. KAPNICK
 J.S.C.