Burlington Loan Mgt. Ltd. v SMBC Nikko Capital Mkts. Ltd.
2015 NY Slip Op 30952(U)
June 3, 2015
Supreme Court, New York County
Docket Number: 651917/2014
Judge: Eileen Bransten

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

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BURLINGTON LOAN MANAGEMENT LIMITED,

Index No.: 651917/2014
Motion Seq. No.: 001
Motion Date: 4/7/2015

Plaintiff,

-against-

SMBC NIKKO CAPITAL MARKETS LIMITED,
f/k/a SMBC CAPITAL MARKETS LIMITED,

Defendant.

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BRANSTEN, J.

Before the Court is Defendant SMBC Nikko Capital Markets Limited, f/k/a SMBC Capital Markets Limited's motion to dismiss pursuant to CPLR 3211(a)(1) and (a)(7). Plaintiff Burlington Loan Management Limited opposes the relief sought in that motion. For the reasons that follow, Defendant's motion to dismiss is denied.

BACKGROUND[1]

This action arises out of the alleged breach of an agreement for the transfer of a creditor's claims in two bankruptcy proceedings. Plaintiff is "an Irish registered and

[1] The facts set forth herein are taken from the complaint except where otherwise indicated.

incorporated special purpose securitization vehicle with affiliate offices in New York [City]." (Compl. ¶ 6.) Defendant is "a London-based global derivatives dealer with affiliate offices in New York [City]." (Compl. ¶ 7.)

On May 12, 2000, Defendant and Lehman Brothers International (Europe) ("LBIE") entered into an ISDA Master Agreement, pursuant to which they executed several swap transactions. (*See* Def.'s Mem. at 2.) Under the terms of that agreement, another Lehman entity—Lehman Brothers Holdings, Inc. ("LBHI")—served as a "credit support provider for LBIE," making LBHI, in essence, a guarantor of LBIE's obligations under the swap transactions. (*See* Def.'s Mem. at 2.)

On September 15, 2008, LBIE entered "bankruptcy administration" in the United Kingdom. (Compl. ¶ 11.) On September 22, 2008, Defendant declared that LBIE's entry into bankruptcy administration constituted an event of default under the terms of the ISDA Master Agreement, and thereafter terminated that agreement and the related swap transactions.

Under the terms of the ISDA Master Agreement, Defendant was permitted to select one of two methods in order to determine the amount owed to it by LBIE. Defendant selected the "Market Quotation" method of valuation instead of the "Loss" method. Under the Market Quotation method, Defendant received price quotes from several different brokers, which were then used to calculate the value of the terminated

swaps and accordingly the amount owed by LBIE. By contrast, the Loss method looks at the cost of replacing the terminated swap transactions. (*See* Pl.'s Opp. Mem. at 13.)

However, on or about the same day as it received the quotations needed for a valuation under the Market Quotation method, Defendant also entered into replacement transactions and terminated certain hedge transactions, which "accurately reflected the price at which a party would in-fact transact." (Compl. ¶ 14.) Plaintiff now alleges that because these replacement transactions constituted a valuation under the Loss method, the simultaneous valuation under the Market Quotation method was improper. Based on the allegedly improper Market Quotation valuation, Defendant asserted claims in the LBIE's bankruptcy administration and in LBHI's chapter 11 bankruptcy proceeding, which was commenced shortly after LBIE's bankruptcy. In each of the bankruptcies, the amount claimed by Defendant was approximately $22.6 million.

A Transfer of Claim Agreement was executed on January 14, 2011 (the "Transfer Agreement), pursuant to which Defendant assigned its rights under the ISDA Master Agreement and with respect to the terminated swaps to a third party. That agreement was subsequently assigned to Plaintiff, which enabled Plaintiff to step into the shoes of Defendant as a creditor in each of the bankruptcy cases.

Following the assignment to Plaintiff, the administrators in LBIE's bankruptcy informed Plaintiff that its claims would be disputed. Specifically, the administrators referenced the fact that, unbeknownst to Plaintiff, Defendant had entered into

replacement transactions and terminated hedges at prices more favorable than the valuation under the Market Quotation method.

Stating that the Loss method was, in fact, the proper method of valuation, Plaintiff's claims should actually be valued using the more favorable replacement prices. Plaintiff eventually settled its dispute with the administrators in LBIE's bankruptcy and was paid $17.35 million, but which is approximately $5.25 million less than the initial amount of the claims.

Plaintiff commenced this action against Defendant on June 23, 2014, seeking to recover the approximately $5.25 million in lost profits. Plaintiff alleges that Defendant failed to comply with Section 6(d) the ISDA Master Agreement by using the Market Quotation method rather than the Loss method of valuation, as recognized by the administrators in the LBIE bankruptcy and which caused them to dispute the assigned claims. Plaintiff now claims that Defendant's improper valuation and its failure to inform Plaintiff of the replacement transactions constitute breaches of Sections 3(j) and 3(p) of the Transfer Agreement respectively.

ANALYSIS

I. The Standard Applicable to a Motion to Dismiss

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord

plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). In addition, "[a] plaintiff may provide, and the court can consider, sworn affidavits to remedy any defects in the complaint and preserve a possibly inartful pleading that may contain a potentially meritorious claim." *Ray v. Ray*, 108 A.D.3d 449, 452 (1st Dep't 2013).

A motion to dismiss under CPLR 3211(a)(7), for failure to state a cause of action, must be denied if the factual allegations contained within "the pleadings' four corners . . . manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 151-52 (2002). While factual allegations contained in a complaint should be accorded a favorable inference, bare legal conclusions and inherently incredible facts are not entitled to preferential consideration. *Sud v. Sud*, 211 A.D.2d 423, 424 (1st Dep't 1995).

Where the motion to dismiss is based on documentary evidence under CPLR 3211(a)(1), the claim will be dismissed "if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon*, 84 N.Y.2d at 88; *see 150 Broadway NY Assocs., L.P. v. Bodner*, 14 A.D.3d 1, 5 (1st Dep't 2004).

II. The Alleged Breach of Section 3(j)

Plaintiff alleges that Defendant breached section 3(j) of the Transfer Agreement by "failing to employ the correct methodology for determining the Settlement Amount for the Claims." (Compl. ¶ 29.) That is, Defendant "improperly used the Market Quotation method in determining the value of the Claims, rather than the Loss method, in violation of the ISDA Master Agreement, because [Defendant] entered into replacement transactions or terminated hedges at prices more favorable than Market Quotation on or about the same day that it received the quotations that provided the basis for its Market Quotation." (Compl. ¶ 28.)

According to Section 3(j) of the Transfer Agreement, the "SELLER" (i.e., Defendant) represents that it "has exercised all of its rights and prerogatives . . . and made all calculations and determinations under the ISDA Master Agreement . . . consistent with and in conformity with the requirements of the Claim Documents." (Transfer Agreement at 5.) That section includes Defendant's further representation that "the effectiveness of any action taken by SELLER in respect of the Claims, the determination of the amount of the Claims, and the conformity of SELLER's actions in respect of the Claims and the perfection and assertion thereof under the ISDA Master Agreement and applicable law are not subject to challenge or dispute by the Debtors or any other person, and there are no grounds for any such challenge or dispute." (Transfer Agreement at 5.)

Defendant suggests that Plaintiff's claim for breach of Section 3(j) is barred by Section 3(y), arguing that the latter section precludes the assertion of a claim based upon a "Valuation Dispute." (Def.'s Memo at 8-9.) Defendant also submits that the claim for breach of Section 3(j) is likewise barred by Section 4(m).

A. Whether Section 3(y) Bars Plaintiff's Claim for Breach of Section 3(j)

Section 3(y) of the Transfer Agreement provides as follows:

> SELLER calculated the Claim Amount and the Guaranty Claim Amount based upon the Claim Documents. Notwithstanding anything to the contrary herein, it is agreed that any *objection* based on SELLER's Claim Amount or the Guaranty Claim Amount valuation or any determination in the Case(s) that the valuation of the Claim Amount or Guaranty Claim Amount should be reduced, does not constitute a breach of a representation, warranty or covenant herein.
>
> For purposes of clarity, *an objection to valuation* shall include, among other things, *any challenge or any dispute* to the *Claims* which results from or is in connection with any challenge or dispute as to the Net Amount to be Paid to SMBC-CM by LBIE as set forth in the Notice of Calculation Result as included in the Claim Documents. Without limiting the generality of the foregoing, such challenge or dispute shall include any challenge to SELLER's valuation of terminated transactions, its selection of Reference Market Makers (as such term is defined in the Claim Documents), its dealings or arrangements with the Reference Market Makers, the prices at which it executed any replacement transactions, the valuation of any collateral, the computation of any interest amount or amounts due, or any challenge whatsoever based upon the argument that the SELLER should have calculated the Claim Amount or the Guaranty Claim Amount differently or that the

> Claim Amount or Guaranty Claim Amount as calculated is not legally supportable or that all or any portion of (i) "Legal Fees" as indicated on the LBIE Claim Proof of Debt or (ii) the unspecified amount of costs and expenses (including attorneys' fees and disbursements) incurred by Seller as described in the LBHI Claim Proof of Claim is not legally or factually supported. Such challenge or dispute shall be deemed a "*Valuation Dispute*".

(Transfer Agreement at 7 (emphasis added).) While Defendant suggests that Plaintiff's claim for breach of Section 3(j) falls "clear[ly]" within the definition of a Valuation Dispute and must therefore be dismissed, (Def.'s Reply Mem. at 2), the language of Section 3(y) does not so easily lend itself to that interpretation.

1. The Transfer Agreement's Use of the Term "Objection"

The Transfer Agreement, which was entered into to transfer Defendant's right to assert certain claims in the LBIE and LBHI bankruptcy proceedings, uses the term "objection" (and the verb form "to object") in several instances throughout the agreement. The term "objection" is not a capitalized defined term in the Transfer Agreement. Section 3(y), which Defendant cites in support of its arguments for dismissal, provides in part that certain "objection[s]" do not constitute a breach of representation, warranty or covenant. (Transfer Agreement at 7.) Section 3(y) further provides that the broader category of "objection[s]" "shall include" the more specific terms, "challenge or dispute" (which are collectively defined as a "Valuation Dispute"). (Transfer Agreement at 7.) In

other words, either a "challenge or dispute" may constitute an "objection".[2] (Transfer Agreement at 7.) Thus, Section 3(y) provides that certain objections, which can include, among other things, particular challenges or disputes, do not constitute a breach of a representation, warranty or covenant by Defendant.

The term "objection" is also used elsewhere in the Transfer Agreement, and first appears in Section 1(a) in the phrase "objections to the Claims based on Section 502(d) of the Bankruptcy Code." (Transfer Agreement at 2.)

In Section 3(h), the verb form "to object" is used in Defendant's representation that it "has not received any written notice or written information from any Debtor or any official creditors' committee of any dispute over, or intent to object to or seek avoidance of, any Claim or to seek any avoidance recovery from SELLER, and, each Claim is a valid, allowable, enforceable, non-contingent, liquidated, unsubordinated, non-disputed and unsecured prepetition claim against the relevant Debtor." (Transfer Agreement at 5.)

Apart from Section 3(y), the final use is in Section 7, which provides in part that Plaintiff "shall have the sole responsibility to prosecute the Assigned Rights and/or to defend the Assigned Rights against any objection, dispute or litigation that may be filed or commenced in respect thereof." (Transfer Agreement at 10.)

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[2] Section 3(y) uses the term "objection" interchangeably with the phrase "objection to valuation."

"[I]t is well established that when reviewing a contract, '[p]articular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties manifested thereby.'" *Kolbe v. Tibbetts*, 22 N.Y.3d 344, 353 (2013) (quoting *Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P.*, 13 N.Y.3d 398, 404 (2009)).

As the Court of Appeals has explained, "[w]ords considered in isolation may have many and diverse meanings. In a written document the word obtains its meaning from the sentence, the sentence from the paragraph, and the latter from the whole document, all based upon the situation and circumstances existing at its creation." *Eighth Ave. Coach Corp. v. New York*, 286 N.Y. 84, 89 (1941).

Contextually, Sections 1(a) and 3(h) suggest that references in the Transfer Agreement to an "objection" (or the verb "to object") refer to one made in the context of a bankruptcy proceeding. Section 1(a)'s reference to an objection is qualified as one having been made pursuant to Bankruptcy Code Section 502(d). Likewise, Section 3(h) references a notice of "intent to object" from a Debtor or an official creditors' committee, both of which are entities that exist in the context of a bankruptcy proceeding.

While Section 7 contains no bankruptcy-specific language, the usage in that section does refer to an objection having been made by someone other than Plaintiff, based on the fact that Plaintiff bears the "sole responsibility . . . to defend the Assigned Rights against any objection." (Transfer Agreement at 10.) "[T]he situation and

circumstances," *Eighth Ave. Coach*, 286 N.Y. at 89, surrounding the Transfer Agreement make the usage in Section 7 consistent with that in Sections 1(a) and 3(h). That is, Defendant sold Plaintiff certain claims that it possessed in two different bankruptcy proceedings, and it follows that by stepping into Defendant's shoes in those proceedings, Plaintiff would take on the responsibility of defending its claims against the bankrupt entities from objections by debtors or other creditors.

Considering the term "objection" in Section 3(y) in the context of its usage throughout the Transfer Agreement, it is reasonable to conclude, particularly at the motion to dismiss stage, that the term is limited in scope to objections made by individuals or entities other than Plaintiff in the context of a bankruptcy proceeding.

Accordingly, Section 3(y) does not provide a basis at this juncture for dismissal of Plaintiff's claim for breach of Section 3(j), which, as alleged, is neither an objection asserted in a bankruptcy proceeding, nor is it an objection by someone other than Plaintiff.

2. The Transfer Agreement's Use of the Term "Claims"

Further support for the interpretation above is found in the second paragraph of Section 3(y), which provides in part that an "objection to valuation shall include, among other things, any challenge or dispute *to the Claims*." (Transfer Agreement at 7

(emphasis added).) The term "Claims" is defined in Section 1(a) to include "'claims' as defined in Section 101(5) of [the Bankruptcy Code]." (Transfer Agreement at 2.)

According to Section 1(a), Claims fall into one of two categories—that is, a claim asserted against either LBIE or LBHI—and are followed by the qualifying language, "in each case in the applicable Case." (Transfer Agreement at 2.) The defined term "Case" includes a bankruptcy proceeding in the Southern District of New York in the case of LBHI, and a bankruptcy administration proceeding in the United Kingdom in the case of LBIE. *See* Transfer Agreement at 2; Compl. ¶¶ 11-12.

Because "Claims," as the term is used in the Transfer Agreement, exist only in one of two different bankruptcy proceedings (i.e., the "Cases"), the phrase, "challenge or dispute to the Claims," may reasonably be read as referring to a challenge or dispute undertaken in one of those two proceedings.

As Plaintiff's cause of action for breach of Section 3(j) is being asserted in this Court and not in either of those bankruptcy proceedings, accepting Plaintiff's allegations as true and affording it the benefit of every reasonable inference, the cause of action as pleaded would not be a "challenge or dispute to the Claims" that would be dismissable under Section 3(y).

3. Whether Plaintiff's Cause of Action Is a "Determination"

The first paragraph of Section 3(y) provides that "any objection based on SELLER's Claim Amount or the Guaranty Claim Amount valuation *or any determination in the Case(s) that the valuation of the Claim Amount or Guaranty Claim Amount should be reduced*, does not constitute a breach of a representation, warranty or covenant herein." (Transfer Agreement at 7 (emphasis added).)

As explained above, the defined terms "Case" or "Cases" refer to one of two different bankruptcy proceedings. Because the assertion of Plaintiff's cause of action in this proceeding cannot reasonably be considered a "determination" in either of those two proceedings, it follows that, as presently alleged, the instant breach of contract claim is not dismissable as a "determination" pursuant to Section 3(y).

B. Whether Section 4(m) Provides a Basis for Dismissal

Defendant also argues that Section 4(m) bars Plaintiff from asserting its claim for breach of Section 3(j). That section provides the following:

> BUYER acknowledges that the Claims, the Claim Amount and the Guaranty Claim Amount may be subject to dispute by Debtors. Where that dispute is a Valuation Dispute, Buyer acknowledge [sic] that it shall have no recourse to or against SELLER, or any of SELLERS [sic] officers, directors, members, managers, employees, agents or controlling persons for any loss, costs or damages relating to such Valuation Dispute. Buyer further acknowledges that this lack of recourse shall extend to any obligation that SELLER may

> have to indemnify BUYER, or BUYER'S directors, members, managers, employees, agents or controlling persons.

(Transfer Agreement at 9.) Based on the discussion above, Plaintiff's allegations, when accepted as true and afforded the benefit of every favorable inference, do not constitute an "objection" and likewise cannot constitute a "Valuation Dispute," the latter of which, according to the language of Section 3(y), is particular type of "challenge or dispute," making it a subset of the term "objection." *See* Transfer Agreement at 7. As such, Section 4(m) does not provide a basis for the dismissal of Plaintiff's claim for breach of Section 3(j).

C. Whether Defendant's Interpretation of Sections 3(y) and 4(m) Would Render Section 3(j) Meaningless

In Section 3(j), Defendant represented, among other things, that it "made all calculations and determinations under the ISDA Master Agreement at times and in a manner consistent with and in conformity with the requirements of the Claim Documents, and . . . the determination of the amount of the Claims . . . are not subject to challenge or dispute by the Debtors or any other person, and there are no grounds for any such challenge or dispute." (Transfer Agreement at 5.)

Plaintiff's claim with respect to Section 3(j) is that Defendant improperly used the Market Quotation method of valuing its claims. Instead, according to the ISDA Master Agreement, the Loss method of valuation should have been used, because Defendant

"entered into replacement transactions or terminated hedges at prices more favorable than Market Quotation on or about the same day that it received the quotations that provided the basis for its Market Quotation." (Compl. ¶ 28.)

If, pursuant to Sections 3(y) and 4(m), Defendant were permitted to bar Plaintiff's claim for breach of Section 3(j), it would render the representation above meaningless. In other words, there would be no reason for Defendant to have made the representation above, if Plaintiff were unable to bring a claim for breach of that representation.

According to the First Department, "[i]t is a cardinal rule of construction that courts should 'adopt an interpretation that renders no portion of the contract meaningless.'" *Matter of Gittens v. State Univ. of N.Y.*, 125 A.D.3d 473, 474 (1st Dep't 2015) (quoting *Matter of Wallace v. 600 Partners Co.*, 205 A.D.2d 202, 206 (1st Dep't 1994), *aff'd*, 86 N.Y.2d 543 (1995)).

Defendant's reliance upon the phrase in Section 3(y), "[n]otwithstanding anything to the contrary herein," does not alter this conclusion. (Def.'s Reply Mem. at 4.) The language of Section 3(y) may properly be read, as explained above, as precluding the assertion of a claim against Defendant solely on the basis that an objection to one of the purchased claims has been asserted. The force of the carve-out is bolstered by the addition of the "notwithstanding" language.

However, Plaintiff's claim is not based upon the fact that an objection was to one or more of the purchased claims was made. Rather, Plaintiff alleges that a contractually

improper method of valuation was used, in contravention of the representation made in Section 3(j). Permitting such a claim is consistent with the contextual analysis of the contractual terms set forth above, and moreover does not require that the representation in Section 3(j) be rendered meaningless, which is consistent with the applicable rule of construction.

For all of these reasons, Defendant's motion to dismiss is denied with respect to Plaintiff's claim for breach of Section 3(j).

III. The Alleged Breach of Section 3(p)

Section 3(p) is in essence a representation by Defendant that it has provided to Plaintiff certain information about the claims. That section provides as follows:

> True and complete copies of all Claim Documents are attached as Exhibit A hereto, and, other than the Claim Documents, there are no other contracts, documents, stipulations or orders that describe, define, create, perfect or enhance the Assigned Rights, the absence of which could adversely affect the Assigned Rights or BUYER'S rights hereunder, including, without limitation, any and all documents, correspondence, records, information, and the like (including "Market Quotation" and "Loss" details, price information and third party quotations) that relate to, evidence, define, or are in support of, the Assigned Rights and/or the amount and/or derivation of the Claims (including all waivers, supplements, forbearances, and amendments thereto) and all schedules and exhibits thereto (but not electronic messages or tape recordings).

(Transfer Agreement at 6.) Plaintiff claims that Defendant breached Section 3(p) by "fail[ing] to disclose . . . that it entered into replacement transactions and terminated hedges on or around the same date that it requested the Market Quotations, and fail[ing] to disclose information and documentation related to those replacement transactions and terminated hedges." (Compl. ¶ 31.)

Defendant makes two arguments in favor of dismissing this claim. First, Defendant argues that it was under no obligation to disclose any information about the "replacement transactions and terminated hedges" because it had previously elected to use the Market Quotation method of valuation. Accordingly, the information about those other transactions, which would be applicable only under the Loss method of valuation, is not implicated by Section 3(p). Second, Defendant argues that this claim is also a Valuation Dispute and is accordingly barred by Sections 3(y) and 4(m).

As to Defendant's first argument, the language of Section 3(p) is broad enough so as not to preclude Plaintiff's claim. For example, Defendant represents in that section that "there are no other . . . documents . . . that describe . . . or enhance the Assigned Rights, the absence of which could adversely affect the Assigned Rights or BUYER's rights hereunder, including . . . any and all documents . . . (including . . . price information and third party quotations) that relate to . . . the Assigned Rights and/or the amount and/or derivation of the Claims." (Transfer Agreement at 6.)

Documents related to the alleged replacement transactions memorializing the higher value which Defendant was able to obtain would arguably have enhanced the Assigned Rights by demonstrating a potentially greater value than Plaintiff had initially believed. Likewise the absence of such documents could have adversely affected Plaintiff's rights, such as by not seeking or recovering a higher amount in the bankruptcy proceedings.

In a motion, such as this one, under CPLR 3211, not only are the pleadings afforded liberal construction and accepted as true, but this Court must give Plaintiff "the benefit of every possible favorable inference" with respect to the sufficiency of its pleading. *TIAA Global Invs., LLC v. One Astoria Sq. LLC*, 127 A.D.3d 75, 85 (1st Dep't 2015). Moreover, where dismissal is sought under CPLR 3211(a)(1), the documentary evidence must "'utterly refute[] plaintiff's factual allegations.'" *Mill Fin., LLC v. Gillett*, 122 A.D.3d 98, 103 (1st Dep't 2014). Based on the foregoing, drawing such inferences in Plaintiff's favor, the documents at issue here simply do not rise to the level of refutation needed to dismiss this claim.

Along the same lines, Defendant's argument that this claim also amounts to a Valuation Dispute is unpersuasive. As explained at length above, the terms "objection," "challenge or dispute," or "Valuation Dispute" may reasonably be read as denoting actions taken in one of the two bankruptcy proceedings by individuals or entities other than Plaintiff. The act alleged here—the failure to provide certain

documentation—would not have satisfied that definition and cannot otherwise be transformed into a Valuation Dispute simply because the documents at issue involve the calculation of value. Simply put, Defendant's alleged failure to provide certain documents which concern valuation and which might have had an affect on valuation are *not* the same as the act of disputing a valuation.

For all of these reasons, Defendant's request to dismiss the claim for breach of Section 3(p) is denied.

IV. Whether Plaintiff Is Barred From Recovering Damages

Defendant's remaining argument that Plaintiff may not recover damages for its claims also must be rejected for many of the reasons discussed above. Defendant's assertion that the Transfer Agreement bars any recovery stemming from Valuation Disputes does not mandate dismissal, as the Plaintiff has asserted claims which, as alleged, do not fall within the definition of a Valuation Dispute.

Defendant's argument that Plaintiff profited from the transaction and cannot therefore recover any damages is likewise unpersuasive. The case law cited by Defendant defining the term "warranty" as a "promise to indemnify the promisee for any *loss* if the fact warranted proves untrue." *Ainger v. Mich. Gen. Corp.*, 476 F. Supp. 1209, 1220 (S.D.N.Y. 1979), *aff'd*, 632 F.2d 1025 (2d Cir. 1980) (emphasis added), appears inapposite. Even if this standard were controlling (and, as a federal decision, it is, at

most, persuasive), Section 3 of the Transfer Agreement contains not only Defendant's warranties, but also its representations and covenants. Given the deferential review that must be afforded Plaintiff to test the sufficiency of its pleadings, the mere fact that a warranty requires a showing of loss would not mandate dismissal. In addition, the requirement of a "loss" espoused in that definition is by no means dispositive when one considers that Plaintiff seeks to recover *lost* profits.

Based on the foregoing, the request for dismissal on the basis that Plaintiff is barred from recovering damages is denied.

(Order follows on next page.)

CONCLUSION

Accordingly it is

ORDERED that Defendant's motion to dismiss is denied; and it is further

ORDERED that Defendant shall serve an answer within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on Tuesday, July 14, 2015, at 10:00 A.M.

This constitutes the decision and order of the Court.

Dated: New York, New York
June 3, 2015

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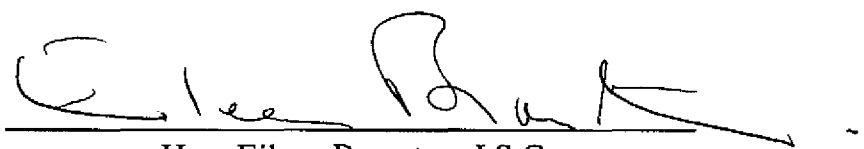

Hon. Eileen Bransten, J.S.C.