

Standard Power, LLC v Alliance Energy, N.Y., LLC
2015 NY Slip Op 31151(U)
June 29, 2015
Supreme Court, New York County
Docket Number: 402640/2011
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

-----X
STANDARD POWER, LLC,

Plaintiff,

-against-

Index No. 402640/2011
Motion Date: 2/11/2015
Motion Seq. No.: 005

ALLIANCE ENERGY, NEW YORK, LLC,

Defendants.

-----X

Bransten, J.:

In this action, plaintiff Standard Power, LLC (“Standard”) asserts a range of contract and tort claims against defendant Alliance Energy, New York, LLC (“Alliance”), stemming from Alliance’s refusal to close on a transaction, through which Alliance would have purchased membership interests in an electric generating facility from plaintiff.

Alliance now brings the instant motion, seeking summary judgment dismissing the complaint, as well as judgment on Alliance’s third counterclaim requiring plaintiff Standard Power, LLC (“Standard”) to return the \$100,000 deposit that Alliance paid under the parties’ purchase agreement. In the alternative, Alliance requests partial summary judgment on both parties’ damages claims, dismissing Standard’s claim for attorneys’ fees, and limiting Standard’s damages. For the reasons that follow, Alliance’s motion is granted to the extent of (i) dismissing the fourth and sixth causes of action; (ii) dismissing Standard’s request for attorneys’ fees; and, (iii) limiting Standard’s damages to \$175,000. The motion is otherwise denied.

I. Background

The instant action arises from Alliance's failed purchase from Standard of a membership interest in Standard Binghamton LLC ("Standard Binghamton"), which owned and operated a natural gas-fired power plant in Binghamton, New York (the "Facility"). (Def.'s Rule 19-a St. of Material Facts ("Def.'s St.") ¶¶ 1-2.)

A. Membership Interest Purchase Agreement

On March 15, 2011, Standard and Alliance entered into a Membership Interest Purchase Agreement (the "Agreement"), in which Standard agreed to sell its ownership interest in, and all the assets of, Standard Binghamton to Alliance for \$2.5 million. The Agreement provided that Alliance would submit a down payment of \$100,000.00 and pay the balance of the purchase price at closing. *Id.* ¶ 2; Affirmation of Michael D. Schimek ("Schimek Affirm.") Ex. A §§ 1.1-1.3 (Agreement). The closing was to occur "five (5) Business Days after the date on which all of the conditions set forth in Article 6 and Article 7 [of the Agreement] shall have been satisfied or waived, other than those conditions to be satisfied at the Closing (but subject to the satisfaction of those conditions)." (Agreement § 2.1.)

B. *Post-Agreement Events*

The Facility sold electricity to New York residents, and the electricity was generated by a natural gas-fired General Electric LM 5000 gas turbine (the “Gas Turbine”). (Def.’s St. ¶ 4.) The Gas Turbine was first installed at the Facility in 1999, and when installed, was not new. *Id.*; Pl.’s Rule 19-a Counterstatement of Material Facts (“Pl.’s St.”) ¶ 4.

According to Alliance, on July 21, 2011, the Gas Turbine had a “flame out” and a safety shutdown. (Def.’s St. ¶ 5.) Plaintiff maintains that there was no “flame out,” merely a “brief shutdown on the turbine” caused by a “low voltage signal on the NYSEG [state energy utility] transmission system.” (Pl.’s St. ¶ 5.)

Alliance submits the inspection report of William Heider, a General Electric Field Service Representative, who inspected the Facility on August 25, 2011, spoke to site personnel, and reviewed the site operator's log, and the plant control system, and alarm summary historical data. *See* Schimek Affirm. Ex. M at 2; *see also* Affirmation of Daniel S. Cahill (“Cahill Affirm.”) Ex. 5 at 2. Based on the site log, Heider stated that the unit initially was started at 10:30 A.M.; the voltage regulator for the Gas Turbine turned on at approximately 10:58 A.M.; an adjustment to the governor was made by Standard’s employees to increase the Gas Turbine’s engine speed; and as a “flame out” and a governor fault shutdown occurred prior to syncing to the electricity grid. *Id.* At 11:03

A.M., the control system went into a mandatory four-hour safety lockout. *Id.* Standard's site personnel manually overrode the lockout protection and restarted the Gas Turbine approximately 12 minutes after the "flame out," which was outside the required five minute shutdown for a "hot restart." *Id.*

Heider stated that the four-hour lockout was a safety mechanism installed by the turbine's manufacturer, General Electric, to provide time for the engine to cool completely before it is restarted. If the engine is not restarted within five minutes of shutdown, the engine will cool faster than the rotating components within the engine, which then could be damaged by rubbing against the case walls as the case contracts. *Id.* at 3. Heider stated that "[t]here is no way to verify the internal condition of the unit unless a borescope inspection of the engine is performed," and he could not determine the cause of the "flame out" due to the lack of information from Standard's site and records. *Id.* He determined that Standard did not have Netcon historical data, alarm summary historical data, or Zycom computer data for July 21, 2011. *Id.* at 2-3.

Standard offers a different version of events, through the report of Wilfrid N. Derby, a professional engineer with experience in the power generation business, who was hired by Standard to investigate the July 21, 2011 event. *See* Affidavit of David E. Glazek Ex. C (annexing report of Wilfrid N. Derby as Ex. A thereto) (Derby Report). Derby stated that the July 21, 2011 start up was a routine one, dictated by increased

system load due to hot weather and heavy electric demand on the electricity grid. *See* Derby Report at 1. Derby also reported that “[a]t approximately 11:50 A.M., shortly before scheduled interconnection to the grid by closing the main circuit breaker, the plant’s control system reported an anomaly condition, triggered the alarm, and immediately initiated its safety shut-down procedure.” *Id.* He stated that following the alarm, Standard personnel checked all logs and equipment, and the plant’s control system indicated that all was functioning properly, and “it was determined that the cause of shut down by the fail-safe equipment was due to low voltage condition reported on the energized side of the circuit breaker, e.g. low voltage indication on NYSEG [the electric utility] side of the main breaker.” *Id.* at 1-2. The alarms were cleared, no problems were noted by personnel, and a restart of the equipment was initiated. *Id.* at 2. When NYSEG confirmed that there were safe conditions for interconnection to the grid, Standard proceeded with a “hot restart” and interconnection to the grid. *Id.* at 2. Derby concluded that the safety shut down was the result of a “momentary low voltage condition on the NYSEG side of the main circuit breaker,” that the plant operator and power plant’s computer control system followed safety protocols, “the equipment proceeded through an uneventful and routine ‘hot restart,’” the 10 to 15 minute delay in connecting to the grid had “no adverse effect,” and that “there is no defect in plant equipment or controls.” *Id.* at 5-6.

C. *The Instant Action*

On July 29, 2011, just eight days after the flame out and shut down, Standard commenced this action, asserting claims for: wrongful termination of the Agreement (first claim), breach of contract (second claim), specific performance (third claim), breach of the duty of good faith (fourth claim), indemnity (fifth claim), and fraudulent misrepresentation (sixth claim). Alliance answered the complaint and interposed five counterclaims for breach of the duty of good faith, fraud, breach of contract, abuse of process, and indemnification.

D. *Standard's Sale of the Facility to Wellhead Equipment Leasing, LLC*

On January 30, 2012, Standard signed a membership purchase agreement with Wellhead Equipment Leasing, LLC, pursuant to which it was to sell its interests in the Facility to Wellhead for \$2,225,000. *See* Affidavit of David E. Glazek Ex. D (annexing a November 21, 2011 Affidavit Of David E. Glazek as Ex. F thereto) (Wellhead Equipment Leasing Membership Agreement). That transaction closed, and Standard no longer owns any interest in the Facility. *See* Def.'s St. ¶¶ 18-19; Pl.'s St. ¶¶ 18-19; Schimek Affirm. Ex. O at 33 (Tr. of Deposition of David E. Glazek). Since Standard no longer owns the facility, plaintiff's third cause of action for specific performance has been mooted.

II. Discussion

It is well-understood that summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established the absence of any material issues of fact, requiring judgment as a matter of law. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 (2012) (citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986)). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). When deciding a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-movant. *Branham v. Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931, 932 (2007).

A. *Wrongful Termination, Breach of Contract, and Contractual Indemnification Claims and Counterclaim (First, Second, and Fifth Claims and Third Counterclaim)*

Through its wrongful termination, breach of contract, and contractual indemnification claims, plaintiff seeks damages stemming from Alliance's allegedly improper termination of the Agreement prior to closing. Standard claims that it received a September 20, 2011 Notice Letter from Alliance, stating that a "material adverse effect may have occurred." (Am. Compl. ¶ 94; Harvey Affirm. Ex. E.) While Standard

responded that the shutdown was inconsequential and occurs from time to time without causing damage to the equipment, Alliance purportedly sent a September 30th letter terminating the Agreement, notwithstanding Standard's offer for additional access to the Facility and more due diligence. (Harvey Affirm. Ex. F & G.)

In support of its summary judgment motion, Alliance first contends that plaintiff's wrongful termination, breach of contract, and contractual indemnification claims merit dismissal because Standard failed to satisfy the required conditions precedent to closing under the Agreement. Specifically, Alliance focuses on Standard's obligation under Section 6.1 of the Agreement to establish prior to closing that no Material Adverse Effect or material damage to the assets occurred after the Membership Agreement was signed on March 15, 2011. Following the July "flame out" and shutdown, Alliance asserts that Standard was obligated to demonstrate that no significant damage to the Gas Turbine had occurred in order for the closing to go forward. Since Standard purportedly failed to do so, Alliance maintains that it was not required to proceed to closing. In addition, Alliance contends that Standard's decision making during the "flame-out" and shortly thereafter demonstrates that plaintiff did not maintain the Facility in manner "consistent with Good Operating Practices," in breach of the warranty in Section 3.8 and 3.26. In section 3.8, Standard represented that it had valid title to the assets, and that it "maintained the Facility consistent with Good Operating Practices." (Agreement § 3.8.) In section 3.26,

Standard represented, among other things, that “the Facility has been operated consistent with Good Operating Practices” and with Standard’s and the Facility’s past practices, that “there has not been any Material Adverse Effect,” and “there has not been any material damage or destruction to the Assets or any portion thereof.” *Id.* § 3.26.

1. Wrongful Termination and Breach of Contract

Alliance’s motion for summary judgment is denied as to the wrongful termination and breach of contract claims, given the existence of triable issues of fact as to a key element of both claims – whether all of the conditions precedent to Defendant’s performance under the Agreement have been met. Specifically, the parties’ briefing highlights material issues of fact regarding whether a “flame out” occurred, the cause of the incident and shutdown, whether it caused material damage to the assets being purchased, and, thus, whether Standard satisfied the condition precedent to closing set forth in Article 6 of the Agreement.

a. **Whether a “Flame Out” Occurred**

Alliance has presented the opinion of its experts that on July 21, 2011, the Gas Turbine unexpectedly had a flame out – after being started but before being connected or synced to the grid.

Standard maintains that there was no “flame out,” contrary to Alliance’s assertions. Instead, Standard contends that it was an external low voltage signal on the state electrical utility transmission system that had “nothing to do with any defect in plant equipment or controls.” *See* Pl.’s St. ¶ 5 (citing Glazek Aff. Ex. C ¶ 4.)

b. The Cause of the Incident

Alliance asserts that a flame out “occurred either because a programmed safety feature within the Facility was activated and shutdown the [G]as [T]urbine or [the] turbine experienced a failure that caused it to cease operating.” (Sharland Aff. ¶8.) Alliance maintains that it requested additional operating information from Standard to more clearly understand and identify the cause but that Standard never provided the information. *See* Sharland Aff. ¶¶ 5, 11. In addition, Alliance represents that the alarm summary historical data, along with other historical data, for that date was “not available,” although historical data was available for dates both before and after. Thus, the parties dispute whether a “flame out” occurred and whether the incident was caused by Standard’s failure to adhere to “Good Operating Practices” as represented or whether it was the result of a low voltage signal on the state utility transmission grid, having nothing to do with plaintiff’s practices. This raises a material issue of fact for trial.

c. Whether the Incident Caused Damage Constituting a Material Adverse Event

The parties next dispute whether the incident itself and/or plaintiff's actions following the alleged "flame out" and shutdown resulted in damage to the internal mechanisms of the [G]as [T]urbine, constituting a Material Adverse Effect under the Agreement.

In section 6.1, the parties agreed that the "representations and warranties of [Standard] contained in this Agreement shall have been true and correct in all material respects ... as of the Closing date," and that "[n]o Material Adverse Effect shall have occurred since the Effective Date." (Agreement § 6.1.) "Material Adverse Effect" is defined to include any "change, event, occurrence, circumstance, state of facts, development, or effect" that is materially adverse to the assets, the company or the Facility, except if those changes or developments arise out of changes in national economic conditions in general or in the industry, changes in the retail market for electricity, in the general regulatory conditions, in the national electric transmission or distribution systems, or in this Agreement. *Id.* at 5.

Alliance maintains that the manufacturer's (General Electric's) safety mechanism automatically shut the Gas Turbine down and required a four-hour cooling period before the Gas Turbine could be restarted – unless it was restarted within five minutes. *See*

Cahill Affirm. Ex. 5 at 1-3. The purpose of the cooling down period was to prevent internal damage to the turbine. *Id.* at 3. Standard's employees manually overrode the safety shutdown, and restarted the turbine, not within the allowable five minute period, but instead, after 12 minutes. *Id.* at 2-3; Sharland Aff. ¶¶ 8-10; Def.'s St. ¶¶ 8-9.

According to Standard, upon noticing the service disruption and quickly determining that it was caused by an external voltage anomaly "that was sensed by the plant controls," the operating personnel at the facility "initiated a quick restart of the equipment which was successful." (Pl.'s St. ¶¶ 8, 9.)

Alliance maintains that Standard would not confirm for it whether this shutdown and restarting procedure resulted in internal damage to the turbine. *See* Sharland Aff. ¶ 12. According to an inspector retained by Alliance, "there is no way to verify the internal condition of the unit unless a borescope inspection of the engine is performed." *See* Def.'s St. ¶ 14. No such borescope inspection has been performed.

The parties dispute whether a borescope inspection was even necessary to determine if there was internal damage to the Gas Turbine. Alliance's expert, Mr. Heider, a General Electric Field representative, concluded that there was "no way to determine the internal condition of the unit unless a borescope inspection of the engine is performed." (Heider Report at 3). Greg Sharland, Alliance's vice president of Operations, who has maintained and managed power plants for over 20 years, attested

that performing a borescope is a routine maintenance event that is often used to inspect the internal components of a turbine, requires no major disassembly to perform, and is not considered an invasive inspection. (Sharland Aff. ¶ 12.)

Mr. Derby, Standard's professional engineer, however, concluded that the plant operator handled the situation properly, and that "[p]ost-event review of controls and situation reconfirmed that there is no defect in plant equipment or controls." (Derby Report at 6.) Mr. Delamer, Standard's expert in the operation of gas turbines, concluded that the request for a borescope "to ascertain evidence of a Material Adverse Event is not warranted." (Delamer Aff. ¶ 10.). Standard also contends that it offered Alliance further "reasonable inspections" in late September 2011 but that Alliance failed to conduct such inspections, and, instead, sought to terminate the Agreement. *See* Harvey Affirm. ¶¶ 9-10 & Exs. F & G.

Based on these competing and contrasting factual showings, Alliance has not demonstrated for the purpose of summary judgment that the turbine was damaged internally. Accordingly, the Court cannot conclude as a matter of law on this motion that such damage has occurred, constituting a Material Adverse Effect under the Agreement. This remains an issue for trial.

d. Whether Conditions Precedent to Closing Were Satisfied

Finally, there are material issues of fact regarding whether Standard satisfied the requisite conditions precedent to closing set forth in Article 6 of the Agreement. Under section 6.1, the parties agreed that the “representations and warranties of [Standard] contained in this Agreement shall have been true and correct in all material respects ... as of the Closing date,” and that “[n]o Material Adverse Effect shall have occurred since the Effective Date.” *Id.* § 6.1. As discussed above, there are outstanding material issues of fact regarding whether the “Good Operating Practices” was correct and true, as it pertained to the operation of the Gas Turbine during the incident, shutdown, and “hot restart.” In addition, there are issues of fact regarding whether the shutdown and restart caused internal damage to the turbine, constituting a “Material Adverse Effect.” These are matters to be determined at trial.

2. Indemnification (Fifth Claim) and Damages on Contract Claims

Alliance next seeks summary judgment on plaintiff’s fifth claim for contractual indemnity, as well as on plaintiff’s contractual damage claims. This motion is granted insofar as Standard is limited to seeking direct damages from Alliance in the amount of the price differential between Standard’s Agreement with Alliance and its subsequent contract with Wellhead Equipment Leasing, LLC (\$2,500,000 - \$2,225,000 = \$275,000),

see Wellhead Equipment Leasing Membership Agreement at 5, less the \$100,000 deposit Alliance paid under the Agreement, for a total potential damages amount of \$175,000. In addition, as explained below, the Court concludes that Standard may not recover special, punitive, incidental, consequential, or indirect damages, or lost profits.

In the fifth claim, Standard alleges that section 8.3(a) of the Agreement requires Alliance to indemnify Standard from and against certain costs and liabilities arising from its breach of a material covenant of the Agreement. As a result, Standard now seeks recovery for all its losses, damages, costs or expenses, including, without limitation, court costs and reasonable attorneys' fees. Alliance contends that this provision is for indemnification for third-party claims and that Standard's damages are limited by section 8.9 of the Agreement.

a. Attorneys' Fees

First, as Alliance correctly contends, Standard may not recover attorneys' fees absent evidence of the parties' clear intent in their agreement that such fees be recoverable in a dispute between them. "Inasmuch as a promise by one party to a contract to indemnify the other for attorney's fees incurred in litigation between them is contrary to the well-understood rule that parties are responsible for their own attorney's fees, the court should not infer a party's intention to waive the benefit of the rule *unless the*

intention to do so is unmistakably clear from the language of the promise.” Hooper Assoc. v. AGS Computers, 74 N.Y.2d 487, 492 (1989) (emphasis added).

There is no such “unmistakenly clear” language in the Agreement. Section 8.3 of the Agreement requires Alliance to “indemnify, protect, defend and hold harmless” Standard “with respect to all Indemnifiable Damages of Seller,” arising out of (1) any breach or default in the performance of any material covenant in the agreement made by Alliance in the Agreement or (2) any breach of any warranty made by Alliance. (Agreement § 8.3(a).) Section 8.3(b) goes on to provide that, in the event that such damages are incurred or a third-party claim is commenced against Standard, Standard will give prompt written notice, providing details and documentation of the circumstances giving rise to the claim. *Id.*

Section 8.4 then provides the time period for the notice for any third-party claim for which indemnification is sought, and section 8.5 provides that the indemnitor may assume the defense of the claim. *Id.* The subjects for which Alliance is obligated to indemnify Standard include third-party claims for failures in the operation of the Facility and “[n]one are exclusively or unequivocally referable to claims between the parties themselves or support an inference that defendant promised to indemnify plaintiff for counsel fees in an action on the contract.” *Hooper Assoc.*, 74 N.Y.2d at 492.

Moreover, if section 8.3 were to apply to a suit between the parties, then the provisions in section 8.3(b) for prompt notification and documentation, and the provision in section 8.5 regarding assumption of the defense, would be rendered meaningless. *Id.*; *see also Gotham Partners, L.P. v. High River Ltd. P'ship*, 76 A.D.3d 203, 207 (1st Dep't 2010).

Standard's reliance on *Crossroads ABL LLC v. Canara Capital Mgmt., LLC*, 105 A.D.3d 645, 645-646 (1st Dep't 2013), is misplaced as that case is factually distinguishable. In *Crossroads*, the indemnification language in the contract was "extremely broad," and the parties chose to use highly-inclusive language. Further, in that case, it does not appear that there were any other provisions that would have been rendered meaningless by applying it to intra-party claims, or by which that indemnification obligation was limited. Conversely, in this case, the language is not so extremely broad. Thus, because there is no language in the Agreement expressing the parties' unmistakably clear intent to cover an attorneys' fee award resulting from a claim between the parties for breach of contract, that portion of the damages sought by Standard in its claim for indemnification for attorneys' fees and costs of litigation between the parties is dismissed.

b. Special, Punitive, Incidental, Consequential, or Indirect Damages

In addition, in section 8.9, the parties specifically provided a limitation of liability between them to not exceed the amount of the purchase price, and clearly stated that neither party “shall be liable to the other Party for special, punitive, exemplary, incidental, consequential, or indirect damages, or lost profits, whether based on contract, tort, strict liability, or otherwise.” (Agreement § 8.9.) Such provisions represent the parties’ agreement allocating the risk of economic loss between them in the event the transaction does not close, and are honored and enforced by courts. *Metro. Life Ins. Co. v. Noble Lowndes Int’l*, 84 N.Y.2d 430, 436 (1994); *Renaissance Equity Holdings, LLC v. Al-An El. Maint. Corp.*, 121 A.D.3d 661, 663-664 (2d Dep’t 2014) (enforcing limitation on liability provision to bar consequential damages).

Section 8.9 limits Standard’s recovery of damages to the amount of the purchase price and bars Standard’s claims for operational expenses and legal expenses associated with the subsequent sale of the Facility. Operational expenses, that is, damages incurred as a result of the delay in the closing or for managing the Facility while marketing it to another buyer, are incidental expenses barred by this limitation provision. *See* NY UCC § 2-710 (“[i]ncidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer’s breach, in connection with return or resale of

the goods or otherwise resulting from the breach”]; *see also Daily New, L.P. v Rockwell Int'l Corp.*, 256 A.D.2d 13 (1st Dep't 1998); *Mom's Bagels of N. Y. v. Sid Greenebaum Inc.*, 164 A.D.2d 820, 822 (1st Dep't 1990).

Standard does not delineate clearly the expenses included in its request for “mitigation fees.” It may only recover damages that are direct or expectation damages. *See J.R. Loftus, Inc. v. White*, 85 N.Y.2d 874, 877 (1995); *Latham Land I, LLC v. TGI Friday's, Inc.*, 96 A.D.3d 1327, 1330-1331 (3d Dep't 2012). Consequential damages “are extraordinary in that they do not directly flow from the breach [and] are recoverable only upon a showing that they were foreseeable and within the contemplation of the parties at the time the contract was made.” *Latham Land I, LLC*, 96 A.D.3d at 1331; *see also Biotronik A.G. v. Conor Medsys. Ireland, Ltd.*, 22 N.Y.3d 799 (2014) (stating that consequential damages for breach of contract are damages that do not directly flow from the breach).

In addition, section 8.9 of the Agreement expressly prohibits the recovery of any “special, punitive, exemplary, incidental, consequential, or indirect damages, or lost profits.” (Agreement § 8.9.) Thus, to the extent that the “mitigation expenses” are consequential or incidental damages, and not direct damages, they also are barred by section 8.9.

The attorneys' fees sought by Standard stemming from its resale of the Facility would not be recoverable, in any event, as they are incidental expenses barred by this limitation provision. *See Neri v. Retail Marine Corp.*, 30 N.Y.2d 393, 400 (1972) (deeming that in sale of goods, attorneys' fees not recoverable as they are not in the nature of the type of protective expenses contemplated by the UCC); *Brownie's Army & Navy Store v. E.J. Burke, Jr., Inc.*, 72 A.D.2d 171, 175 (4th Dep't 1980) (concluding that incidental damages in UCC § 2-710 do not include attorneys' fees).

Accordingly, the damages recoverable by Standard from Alliance are limited, pursuant to section 8.9, to the purchase price (\$2,500,000) minus the price the Facility was sold for to Wellhead Equipment Leasing, LLC (\$2,225,000) and minus Alliance's down payment (\$100,000), which Standard still holds, for a total potential damage amount for breach of the Agreement in the amount of \$175,000.

B. *Breach of Duty of Good Faith (Fourth Claim)*

Alliance's motion for summary judgment dismissing Standard's claim for breach of the duty of good faith and fair dealing is granted. In this claim, Standard alleges that by materially breaching the Agreement, Alliance breached its duty of good faith and fair dealing.

Notably, this claim is based on the identical facts and allegations as the breach of contract claim, and seeks identical damages. Thus, it is dismissed as duplicative. *See Netologic, Inc. v. Goldman Sachs Group, Inc.*, 110 A.D.3d 433, 433-434 (1st Dep't 2013) (dismissing breach of the duty of good faith claim as duplicative where breach of contract and breach of duty of good faith claims both "arise from the same facts and seek identical damages for each alleged breach"); *Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce*, 70 A.D.3d 423, 426 (1st Dep't 2010) (same).

C. *Fraudulent Misrepresentation Claim (Sixth Claim)*

Alliance's motion for summary judgment dismissing the sixth claim for fraud likewise is granted. This claim is based on the identical allegations as the breach of contract claim and simply alleges that Alliance did not intend to perform its obligations under the Agreement. These allegations fail to provide a basis for an independent tort, and are dismissed as duplicative of the breach of contract claim. *Laurel Hill Advisory Grp., LLC v. Am. Stock Transfer & Trust Co., LLC*, 112 A.D.3d 486, 487 (1st Dep't 2013) (dismissing fraud claim where based on same facts as contract claim and seeking same damages already recoverable under contract theory); *Richbell Info. Servs. v. Jupiter Partners*, 309 A.D.2d 288, 305 (1st Dep't 2003) (dismissing fraud claim as duplicative where based on same facts underlying the contract claim); *J.E. Morgan Knitting Mills v.*

Reeves Bros., 243 A.D.2d 422, 423 (1st Dep't 1997) (affirming dismissal of fraud claim as duplicative of contract claim, where fraud claim was "based on the same facts as underlie the contract claim" and was not merely "collateral to the contract").

III. Conclusion

Accordingly, it is


ORDERED that defendant's motion for summary judgment is granted to the extent that the fourth and sixth claims are dismissed, plaintiff's potential damages are limited to the total amount of \$175,000, and plaintiff's request for attorneys' fees and operational expenses are dismissed, and the motion is otherwise denied; and it is further

ORDERED that counsel are directed to appear for a pretrial conference in Room 442, 60 Centre Street, on September 1, 2015 at 10 a.m.

Dated: New York, New York

June 29, 2015

ENTER



Hon. Eileen Bransten, J.S.C.