SHIRLEY WERNER KORNREICH
J.S.C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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DOLP 1133 PROPERTIES II LLC,

Index No.: 653789/2014

Plaintiff,

DECISION & ORDER

-against-

AMAZON CORPORATE, LLC,

Defendant.

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SHIRLEY WERNER KORNREICH, J.:

Defendant Amazon Corporate, LLC (Amazon) moves, pursuant to CPLR 3211, to dismiss the complaint. For the reasons that follow, the motion is granted in part and denied in part.

I. Procedural History & Factual Background

As this is a motion to dismiss, the facts recited are taken from the complaint, the documentary evidence submitted by the parties, and the affidavit of Thomas Bow (a Senior Vice President at Durst), submitted by plaintiff and dated February 26, 2015 (Dkt. 19).[1]

Plaintiff DOLP 1133 Properties II LLC (Durst) is an affiliate of Royal Realty Corp d/b/a The Durst Organization, which owns and manages commercial and residential real estate in the New York City area. Complaint ¶ 10. Durst owns the commercial building located at 1133 Avenue of the Americas in Manhattan (the Building). ¶ 9. "Amazon.com, Inc. is the sole shareholder of Amazon Global Resources, Inc., which is the sole member of [defendant] Amazon Corporate." *See* Dkt. 7 at 2 n.3.

[1] Bow's affidavit adds further factual allegations to the complaint, addressing Amazon's contention that the fraud claim lacks the specificity required by CPLR 3016(b). "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 AD3d 449, 452 (1st Dept 2013); *see Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 (1976).

On January 8, 2013, the parties, through correspondence, commenced negotiating Amazon's lease of office space in one of Durst's Manhattan buildings. ¶ 14. In November 2013, the parties discussed possibly leasing commercial space in the subject Building. ¶¶ 16-18. Amazon's broker, non-party Cresa New York LLC (Cresa), negotiated on Amazon's behalf. ¶¶ 17-18. An Amazon representative toured the building on December 10, 2013. ¶ 21.

On April 7, 2014, the parties met with "design and technical teams at the Building to examine and discuss the available space inside the Building" and "discussed the construction and necessary renovations inside the Building to accommodate Amazon's needs." ¶¶ 23-24. The parties had extensive discussions about the substantial work required to prepare the Building for Amazon's tenancy. ¶¶ 26-29. For instance, Amazon wanted "a private entrance at the Building on West 44th Street to access its office space" and the "installation of a new private escalator leading from the ground level to the second floor of the Building." ¶¶ 26-27. Further, to accommodate the renovation, Durst claims it permitted the current tenant to vacate the Building prior to the expiration of that tenant's lease, which was to expire on September 21, 2014. ¶ 28.

On April 28, 2014, the parties executed a Nondisclosure Agreement (the NDA). *See* Dkt. 9. The NDA prohibits the parties from disseminating each other's Confidential Information, which is defined in paragraph 1 of the NDA. *See id.* at 2. Paragraph 11 provides that the NDA is governed by the laws of the State of Washington and requires litigation "arising out of or relating to [the NDA]" to be conducted in King County, Washington. *See id.*

On July 2, 2014, the parties executed a Letter of Intent (the LOI). *See* Dkt. 3.[2] Section 29 of the LOI provides:

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[2] Durst filed the LOI along with the complaint. *See* Dkt. 3. Amazon's motion papers included a heavily redacted version. *See* Dkt. 10. As discussed at oral argument, absent a sealing order, which may only be issued upon a finding of good cause, litigants may not file partial or redacted

> Except for the provisions of Sections 27 (Confidentiality) and 28 (Exclusivity) above, **this letter of intent is nonbinding**. This letter of intent does not contain all of the material terms that would be included in the Lease if the parties elect to negotiate the Lease. **Each party agrees that it is proceeding with the proposed Lease at its sole cost and expense**. Neither party will be bound **unless and until a Lease has been fully executed** by both parties and **neither [Durst] nor [Amazon] will be required to negotiate or enter into a Lease**. The submission of this letter of intent does not constitute an offer to lease. A Lease will not be binding and in effect unless and until it has been executed by both parties. Any lease and quantity contemplated by this letter of intent will be subject to [Amazon's] internal approval process with respect to such documents (and this process is not reflected in the schedule attached as Exhibit H). In connection with the foregoing, [Amazon] agrees to use its commercially reasonable efforts to keep the internal approval process as short as reasonably possible and to keep [Durst] informed regarding such process.

See Dkt. 3 at 15 (emphasis added).

> Section 27 provides:
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> This letter of intent and all discussions related thereto shall be held in confidence by [the parties] and will not be discussed with third parties except on an "as-needed" basis. All information disclosed by [Amazon], including the terms of this letter of intent, is subject to the [the NDA]. Prior to execution of the Lease, [the parties] will not make any press release or public announcement with respect to this letter of intent or the transactions completed hereby without the prior written consent of the other party.

See id. at 14. Aside from memorializing the parties' confidentially obligations and making clear that the LOI itself is confidential, the LOI does not otherwise reference the NDA.

> Section 28 provides:
>
> [The Parties] agree to promptly and in good faith negotiate the Lease. In consideration of the effort and expense that will be required to negotiate and finalize the Lease and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree that **prior to the date that is [60] days following the date of this letter of intent [i.e., August 31, 2014] (and for so long as [the parties] are negotiating the Lease in**

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versions of contracts. The court requires a complete copy of every contract because a contract may not be meaningfully analyzed without reading it in its entirety. Nor did Durst breach the NDA by filing the LOI. If the parties did not want their disputes to be a matter of public record, they could have agreed to mandatory arbitration. *See* Dkt. 29 (6/25/15 Tr. at 8) (a counterclaim that filing the LOI breached the NDA would be frivolous).

> **good faith), (a) [Durst] shall not negotiate a lease with, or lease the Premises to, any other third party and (b) [Amazon] shall not negotiate the leasing of any space with any other landlord, owner or other third party with respect to its space requirements contemplated for this particular transaction in the New York City metropolitan area ("the Exclusivity Period").** For the purposes hereof, the term "negotiate" shall mean (i) the delivery of a written term sheet or RFP to a third party or the delivery of a written counterproposal to a term sheet or RFP from a third party or (ii) a verbal communication to a third party by [Durst], in the case of [Durst], or a verbal communication to a third party by [Amazon], in the case of [Amazon]. The parties at their expense shall cause their employees, agents and counsel to use their best efforts to negotiate and finalize the Lease within the above time period.
>
> Notwithstanding the foregoing, either party at any time following the first [10] days of the [60] day period set forth herein [i.e., July 13, 2014] may (if it believes that the other party is not negotiating the Lease in good faith) terminate negotiations with respect to the Lease by the delivery of (3) business days' notice to the other party. In such event, the terms of this Section 28 shall be null and void and of no further force or effect.

See id. The LOI does not have a forum selection clause.

Between July 7, 2014 and September 3, 2014, the parties exchanged and edited drafts of the proposed lease. Complaint ¶¶ 49-55. On September 10, 2014, "Amazon advised Durst that Amazon would not be available to further discuss the Lease until on or about September 30, 2014 … as a result of the travel schedules of certain of Amazon's employees." ¶ 56. On September 11, 2014, Durst met with Cresa "concerning the brokerage and commission agreement with Cresa." ¶ 58. "On September 12, 2014, Durst delivered to Amazon a list of 'open issues' remaining to be resolved under the Lease." ¶ 58.

In Bow's affidavit, he alleges that "[i]n or around the second week of September 2014, a rumor resurfaced in the marketplace that Amazon was negotiating for commercial space in the building located at 7 West 34th Street [the 34th Street Building]". *See* Dkt. 19 at 5. Bow further claims that he "spoke with Justin Halpern of [Cresa] and Clay Nielson of Washington Partners, Inc. ("WPI") [Amazon's co-broker] by phone" and that "Nielson, with full authority to speak on

Amazon's behalf, assured me that Amazon would continue to proceed to finalize the Lease." *See id.* "Nielson further assured me that any negotiations in connection with [the 34th Street Building] involved a lease of 'warehouse space' that would not affect the Lease." *Id.* Dow claims that "[f]rom that point onward, Amazon and its brokers continued to urge that Durst continue to prepare the [Building] for Amazon and continue to finalize the Lease." *Id.*

On September 24, 2014, Durst, Amazon, and the brokers participated in a conference call to discuss the remaining issues and scheduled an "all hands" conference call for September 30, 2014. Complaint ¶ 62. In preparation for that call, on September 28 and 29, 2014, Durst had conference calls with Cresa and WPI. ¶ 63. However, on the afternoon of September 29, 2014, Nielson informed Durst that all Lease negotiations with Amazon in connection with the Building were "on hold" as a result of Amazon's potential lease of alternate commercial space. ¶ 64. "During a phone call on September 30, 2014, Durst was informed "that the Lease negotiations were not merely 'on hold', but rather that Amazon was 'pulling away from the transaction' entirely as a result of Amazon's lease of alternate commercial space in New York City." ¶ 65.

In the end, Amazon leased office space in the 34th Street Building. Durst claims that Amazon's negotiations to enter into that lease violated the LOI and that the assurances provided to Durst that Amazon was only interested in the 34th Street Building for warehouse space were false and fraudulently induced Durst to continue negotiating and spending money renovating the Building for Amazon. In all, Durst claims to have spent over $1.3 million in construction costs and over $300,000 in legal fees.[3]

On December 11, 2014, Durst commenced this action by filing a Summons with Notice. Durst filed the Complaint on January 9, 2015. *See* Dkt. 2. The Complaint asserts four causes of

[3] The exact dates of construction, and, specifically, the amounts spent before and after the alleged fraudulent inducement, are not clear on this record.

action: (1) breach of the LOI; (2) breach of the implied covenant of good faith and fair dealing; (3) fraud; and (4) specific performance (i.e., to compel Amazon to enter into a lease in the Building). Amazon now moves to dismiss. Amazon claims that this action arises out of and relates to the NDA and, therefore, it must be dismissed as barred by the NDA's forum selection clause. Amazon also seeks dismissal of the second, third, and fourth causes of action for failure to state a claim, and dismissal of Durst's claims for lost profits, punitive damages, and attorneys' fees. Oral argument was held on June 25, 2015. *See* Dkt. 29 (6/25/15 Tr.).

II. Legal Standard

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames, id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed only if "the documentary evidence utterly refutes plaintiff's factual

allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

III. Discussion

A. The NDA's Forum Selection Clause

At the outset, the court rejects Amazon's argument that this lawsuit is subject to the NDA's forum selection clause. Durst is not suing for breach of the NDA. Rather, Durst is claiming that Amazon breached the LOI's exclusivity clause by negotiating with another landlord and that Amazon fraudulently induced Durst to continue negotiating and spending money renovating the Building in reliance on Amazon's mid-September 2014 representation that Amazon's interest in the 34th Street Building was only for warehouse space. Nonetheless, Amazon argues that by virtue of Section 27 of the LOI providing that "[a]ll information disclosed by [Amazon], including the terms of this letter of intent, is subject to the [the NDA]," the entirety of the LOI is "subject" to the NDA. Amazon is wrong.

"Words in a contract are to be construed to achieve the apparent purpose of the parties. Although the words might 'seem to admit of a larger sense, yet they should be restrained to the particular occasion and to the particular object which the parties had in view.'" *Hooper Assocs., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 (1989), quoting *Robertson v Ongley Elec. Co.*, 146 NY 20, 23 (1895). Thus, "a reference by the contracting parties to an extraneous writing for a particular purpose makes it part of their agreement **only for the purpose specified**." *VRG Linhas Aereas S/A v MatlinPatterson Global Opportunities Partners II L.P.*, 605 FedAppx 59, 61 (2d Cir 2015) (emphasis added), quoting *Lodges 743 & 1746, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v United Aircraft Corp.*, 534 F2d 422, 441 (2d Cir 1975), quoting

Guerini Stone Co. v P.J. Carlin Const. Co., 240 US 264, 277 (1916); *see also Intesa Sanpaolo, S.p.A. v Credit Agricole Corporate & Inv. Bank*, 2013 WL 4856199, at *4 (SDNY 2013) (same); *In re Enron Creditors Recovery Corp.*, 2011 WL 1345254, at *5 (SDNY 2011) (same); *see also Torres v Major Auto. Group*, 2014 WL 4802985, at *8 (EDNY 2014) ("The mere fact that a contract refers to another contract does not mean that it has 'incorporated' the other contract"), quoting *MBIA Ins. Corp. v Patriarch Partners VIII, LLC*, 842 FSupp2d 682, 706 (SDNY 2012).

Section 27 does not purport to incorporate the entirety of the LOI into the NDA. Rather, Section 27 merely designates the confidential information produced during the lease negations, including the terms of the LOI itself, as confidential information subject to the protections of the NDA. Had Amazon wrongfully disclosed this information, redress for that confidentially breach would be subject the NDA and, therefore, would need to be litigated in King County, Washington. But that is not what Durst is suing for. To be sure, Amazon may have disclosed the LOI to its new landlord in contravention of the NDA, a fact that Durst is not in a position, prior to discovery, to ascertain. However, the gravamen of Durst's complaint is not so much the confidentiality breach; it is the alleged violation of the exclusivity clause. Durst claims to have continued to spend considerable sums on lease negotiations and renovations all the while Amazon was, in alleged contravention of Section 28 of the LOI, negotiating with another landlord. Moreover, when Durst sought assurances from Amazon upon hearing a rumor that this was the case, Amazon allegedly lied to it. But for that lie, Durst alleges it would have ceased negotiating and renovating, a cessation that would have saved Durst money and allowed it to begin the process of procuring another tenant. These claims do not arise from or relate to the NDA. *See CooperVision, Inc. v Intek Integration Tech., Inc.*, 7 Misc3d 592, 595-602 (Sup Ct, Monroe County 2005) (Fisher, J.) (forum selection clause in software license did not apply to

implementation agreement even though implementation agreement incorporated software license by reference).

The New York state case law cited by Amazon is not to the contrary. The contracts in such cases either had a clear forum selection clause contained therein [*see, e.g., Boss v Am. Express Fin. Advisors, Inc.*, 6 NY3d 242, 245-46 (2006)] or contained language expressly incorporating the subject contract into another contract with a forum selection clause. *See, e.g., State Bank of India v Taj Lanka Hotels*, 259 AD2d 291 (1st Dept 1999) (defendant "consented to the jurisdiction of New York's courts since the guarantees executed by [defendant] ... clearly incorporate the terms of the underlying note which, in turn and with equal clarity, incorporates **all of the terms** of the Loan Agreement, including its consent to New York jurisdiction clause") (emphasis added). Here, in contrast, the NDA is only mentioned once in the LOI, and only for the purpose of making clear that the confidentially of the LOI itself is governed by the NDA. That single reference to the NDA is insufficient to render the entire LOI "subject" to the NDA. Had these sophisticated parties wished to make a breach of Section 28 subject to the NDA, they would have expressly stated so in the LOI. *See N.Y. Tel. Co. v Alvord & Swift*, 49 AD2d 726 (1st Dept 1975) (company not obligated to arbitrate since contract did not specifically incorporate by reference arbitration clause of main contract). Certainly, they could have included a forum selection clause in the LOI. They did not. The NDA's forum selection clause, therefore, does not apply.

B. Failure to State a Claim

Turning now to the merits, it must first be noted that Amazon does not move to dismiss Durst's cause of action for breach of Amazon's exclusivity obligations under Section 28. Rather,

Amazon seeks dismissal of the good faith, fraud, and specific performance causes of action, as well as Durst's claims for lost profits, punitive damages, and attorneys' fees.

1. Good Faith and Fair Dealing

The covenant of good faith and fair dealing is implied in every contract. *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 (2002). "This covenant embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" *Id.*, quoting *Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 (1995). "While the duties of good faith and fair dealing do not imply obligations 'inconsistent with other terms of the contractual relationship,' they do encompass 'any promises which a reasonable person in the position of the promisee would be justified in understanding were included.'" *Id.*, quoting *Murphy v Am. Home Prods. Corp.*, 58 NY2d 293, 304 (1983) and *Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 69 (1978).

Amazon argues that Durst's good faith claim should be dismissed as duplicative of its claim for breach of Section 28. Amazon relies on the rule that "[a] cause of action for breach of the implied duty of good faith and fair dealing cannot be maintained where the alleged breach is 'intrinsically tied to the damages allegedly resulting from a breach of the contract.'" *The Hawthorne Group, LLC v RRE Ventures*, 7 AD3d 320, 323 (1st Dept 2004), quoting *Canstar v J.A. Jones Const. Co.*, 212 AD2d 452, 453 (1st Dept 1995); *see Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 (1st Dept 2009) (good faith claim "duplicative of the breach of contract claim because both claims arise from the same facts"). Amazon is correct. Though Durst does allege that Amazon acted in bad faith, Section 28 expressly obligates the parties to negotiate in good faith. *See* Dkt. 3 at 14 ("The Parties] agree to promptly and in **good faith** negotiate the Lease") (emphasis added). Hence, if Amazon failed to do so, it expressly

breached the LOI. A separate claim for breach of the implied covenant of good faith and fair dealing is duplicative.

2. Fraud

"The elements of a cause of action for fraud [are] a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009). Pursuant to CPLR 3016(b), "the circumstances constituting the wrong shall be stated in detail." *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 (2008). Durst alleges that Amazon's misrepresentation denying negotiating for office space in the 34th Street Building induced Durst to continue expending money renovating and negotiating. This is a validly pleaded fraud claim. Amazon, however, argues that such claim should be dismissed as duplicative.

"A fraud-based cause of action is duplicative of a breach of contract claim when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract." *Manas v VMS Assocs., LLC*, 53 AD3d 451, 453 (citations and quotation marks omitted), accord *N.Y. Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 (1995); *see Beta Holdings, Inc. v Goldsmith*, 120 AD3d 1022, 1023 (1st Dept 2014). Moreover, a fraud claim is impermissibly duplicative when it "seeks the same damages as the breach of contract claim." *Mosaic Caribe, Ltd. v AllSettled Group, Inc.*, 117 AD3d 421, 423 (1st Dept 2014). "A fraud-based cause of action may lie, however, where the plaintiff pleads a breach of a duty separate from a breach of the contract." *Manas*, 53 AD3d at 453. Likewise, a fraud claim is not duplicative if the damages recoverable by the alleged fraud are different than those recoverable under the contract. *See id.* at 454 ("Causes of action for breach of contract and fraud … are designed to provide remedies for different species of damages: the damages recoverable for a

breach of contract are meant to place the nonbreaching party in as good a position as it would have been had the contract been performed; the damages recoverable for being fraudulently induced to enter a contract are meant to indemnify for the loss suffered through that inducement, e.g., damages for foregone opportunities.") (citations and quotation marks omitted).

Durst's fraud claim is not duplicative. While Amazon's negotiations with another landlord are alleged to be violative of its exclusivity and good faith obligations under the LOI, even absent contractual good faith obligations, a contractual party cannot lie, as Amazon allegedly did, about its interest in another property to induce a landlord to continue spending money making custom renovations. While it may well be the case that Amazon's alleged fraud constitutes a violation of Section 28, the question of whether Section 28's obligations were still in place in mid-September is a disputed issue that neither party seeks resolution of on this motion. If, at the time of the alleged fraudulent misrepresentations, Amazon was no longer bound by Section 28, it may still have committed fraud by lying to Durst about its intentions with respect to the 34th Street Building. Consequently, it is premature at this juncture to determine whether the claims are duplicative. Additionally, it is unclear what damages are recoverable for breach of the LOI – another issue beyond the scope of this motion (except to the extent set forth below) – and, hence, it is possible that Amazon may be liable for fraud damages that are not recoverable for its alleged breach of the LOI. The fraud claim, therefore, is not dismissed.

3. Specific Performance & Lost Profits

As noted earlier, Section 29 of the LOI expressly provides that, aside from Sections 27 and 28, it is nonbinding. Durst's claim for specific performance to compel Amazon to enter into a lease in the Building is utterly incompatible with Section 29, which states:

> This letter of intent **does not contain all of the material terms that would be included in the Lease** if the parties elect to negotiate the Lease. Each party

> agrees that it is proceeding with the proposed Lease at its sole cost and expense. Neither party will be bound unless and until a Lease has been fully executed by both parties and **neither [Durst] nor [Amazon] will be required to negotiate or enter into a Lease.** The submission of this letter of intent **does not constitute an offer to lease. A Lease will not be binding and in effect unless and until it has been executed by both parties.**

See Dkt. 3 at 15 (emphasis added). The LOI was an agreement to agree. *See Joseph Martin, Jr., Delicatessen, Inc. v Schumacher*, 52 NY2d 105, 109 (1981) ("a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable.") *see generally Cobble Hill Nursing Home, Inc. v Henry & Warren Corp.*, 74 NY2d 475, 482 (1989). It does not bind Amazon to lease the subject space. Nonetheless, a breach of the binding provisions of the LOI may still give rise to damages.

There are, however, limits on the damages recoverable for breach of agreement to negotiate in good faith. Where, as here, a letter of intent requires "the parties to negotiate in good faith and only with each other toward a final lease, and to do so on an exclusive basis … as 'long as the parties are negotiating in good faith to consummate the transaction'", "**plaintiff's measure of damages is out-of-pocket loss.**" *180 Water St. Assocs., L.P. v Lehman Bros. Holdings, Inc.*, 7 AD3d 316, 317 (1st Dept 2004) (emphasis added), citing *Goodstein Const. Corp. v City of New York*, 80 NY2d 366 (1992); *see MG West 100 LLC v St. Michael's Protestant Episcopal Church*, 127 AD3d 624, 626 (1st Dept 2015) ("Any profits that plaintiffs may have made under the prospective contracts contemplated by the MOU cannot properly be awarded as damages … since the MOU was merely a preliminary agreement by which the parties planned to proceed with their initial efforts on the construction project") (citation omitted), *accord Kenford Co. v County of Erie*, 73 NY2d 312, 319 (1989) (losses not

contemplated by parties are not recoverable). Accordingly, Durst's claims for specific performance and lost profits are dismissed.[4]

4. Punitive Damages & Attorneys' Fees

"[I]n order for punitive damages to be awarded, the plaintiff must demonstrate that the defendant's conduct is intentional and deliberate, has fraudulent or evil motive, and has the character of outrage frequently associated with crime." *Morsette v "The Final Call"*, 309 AD2d 249, 254 (1st Dept 2003), citing *Prozeralik v Capital Cities Communications, Inc.*, 82 NY2d 466, 479 (1993). Most instances of fraud, let alone a breach of an LOI, do not meet this standard. *See Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 85 AD3d 457, 458 (1st Dept 2011) ("Mere commission of a tort, even an intentional tort requiring proof of common law malice, is insufficient; there must be circumstances of aggravation or outrage, or a fraudulent or evil motive on the part of the defendant."), citing *Walker v Sheldon*, 10 NY2d 401, 405 (1961) (punitive damages are not available "in the ordinary fraud and deceit case"). Consequently, the punitive damages demand is stricken.

Nor may Durst recover its attorneys' fees from Amazon. "In this State, and indeed, in the rest of the country, the longstanding 'American rule' precludes the prevailing party from recouping legal fees from the losing party "except where authorized by statute, agreement or court rule." *Gotham Partners, L.P. v High River Ltd. Partnership*, 76 AD3d 203, 206 (1st Dept

[4] While Durst cannot compel Amazon to enter into a lease or recover whatever profits Durst may have realized had such a lease been entered into, at this juncture, the court is not deciding which of Durst's costs are recoverable. While the LOI contemplated renovations, such costs were supposed to be paid for by Durst and cannot be recovered merely because Durst was hoping a final lease would be agreed to. These costs were a risk Durst assumed in the event the parties did not agree upon a final lease agreement. That being said, Durst may have stopped spending money once it became aware that Amazon was, as is alleged, not negotiating in good faith. The moment in time, if ever, that Amazon committed a good faith breach is a question of fact to be probed in discovery. Such a finding will impact which of Durst's costs, if any, are recoverable.

2010), quoting *U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 597 (2004); *see also Hooper*, 74 NY2d at 492. No such applicable statute or contractual provision exists here. Accordingly, it is

ORDERED that the motion to dismiss by defendant Amazon Corporate, LLC is granted to the extent that (1) the second (breach of the implied covenant of good faith and fair dealing) and fourth (specific performance) causes of action are dismissed; (2) the claims for lost profits, punitive damages, and attorneys' fees are stricken from the complaint; and (3) the motion is otherwise denied; and it is further

ORDERED that within defendant shall file an answer to the complaint within 21 days of the entry of this order on the NYSCEF system; and it is further

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre Street, Room 228, New York, NY, for a preliminary conference on August 27, 2015 at 10:30 in the forenoon; and it further

ORDERED that before the preliminary conference, the parties must read and comply with the court's rules, and the joint status letter discussed therein must be e-filed and faxed to Chambers (212-952-2777) no later than August 25, 2015 at 4:00 pm.

Dated: August 17, 2015

ENTER:

SHIRLEY WERNER KORNREICH
J.S.C