Looks Great Servs., Inc. v National Grid El. Servs., LLC
2015 NY Slip Op 32651(U)
April 22, 2015
Supreme Court, Nassau County
Docket Number: 601012/2014
Judge: Timothy S. Driscoll

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x	**TRIAL/IAS PART: 14**
LOOKS GREAT SERVICES, INC.,	**NASSAU COUNTY**
Plaintiff,	**Index No: 601012-14**
	Mot. Seq. No. 3
-against-	**Submission Date: 3/27/15**
NATIONAL GRID ELECTRIC SERVICES, LLC and LONG ISLAND POWER AUTHORITY,	
Defendants.	
----------x	

Papers Read on this Motion:

Notice of Motion, Affirmation in Support and Exhibits.....x
Memorandum of Law in Support.....x
Plaintiff's Opposition.....x
Correspondence dated January 14, 2015.....x
Memorandum of Law in Further Support.....x

This matter is before the court on the motion filed by Defendant Long Island Power Authority ("LIPA") on November 25, 2014 and submitted on March 27, 2015. For the reasons set forth below, the Court 1) grants the motion to the extent that the Court a) dismisses the fourth cause of action in the Amended Complaint alleging bad faith breach of contract; and b) dismisses Plaintiff's claims for consequential damages, punitive damages and attorney's fees; and 2) denies LIPA's motion to dismiss the first cause of action in the Amended Complaint alleging account stated.

BACKGROUND

A. Relief Sought

LIPA moves, pursuant to CPLR § 3211(a)(7), for an Order dismissing, with prejudice, the first and fourth causes of action and demand for consequential damages, punitive damages and

attorney's fees contained in the Amended Complaint of Plaintiff Looks Great Services, Inc. ("Plaintiff").

Plaintiff opposes the motion.

B. The Parties' History

The parties' history is set forth in detail in a prior Order ("Prior Order") of the Court dated February 24, 2015 in which the Court directed that the motion would be the subject of oral argument and/or a conference in aid of disposition. The Court conducted that conference on March 27, 2015 and the motion was submitted on that date.

As noted in the Prior Order, the Amended Complaint (Ex. B to Versichelli Aff. in Supp.) alleges as follows:

Plaintiff provides a variety of services, including disaster relief cleanup services, such as debris removal and disposal. In this action, Plaintiff seeks payment from Defendants National Grid Electric Services, LLC ("National Grid") and LIPA for emergency debris removal services completed in the aftermath of Superstorm Sandy.

Plaintiff alleges that in 2011, at a time when no emergency was present, Nassau County, with the assistance of Plaintiff, developed an emergency management plan. As part of its emergency preparedness, Nassau County requested competitive proposals for emergency management, debris removal and debris disposal services. As a result of this competition, Nassau County awarded Looks Great a pre-event Professional Services Agreement ("Agreement") (Ex. 1 to Am. Compl.) which was executed by the Nassau County Department of Public Works ("DPW") on August 26, 2011.

Pursuant to the Agreement, in return for performing debris removal services, Looks Great was to receive payment within ten (10) days of submitting an invoice for completed services at contract rates listed in Exhibit A to the Agreement ("Exhibit A"). For services within Plaintiff's scope of work, but not covered by the fee schedule in Exhibit A, Looks Great would perform the work according to Supplemental Agreements or on a negotiated lump sump or not-to-exceed amount. Invoices submitted by Looks Great to Defendants for services rendered also stated that payment was to be made "net 10" (Amended Complaint at ¶ 14), meaning ten (10) days from the date of the invoice.

As a result of damage caused by Superstorm Sandy ("Storm") in late October 2012, the DPW activated the Agreement and began directing Looks Great to begin disaster relief services. The Long Island Railroad, Town of Huntington, City of Long Beach, Town of Hempstead, Freeport Electric and Garden City also requested services under the Agreement and paid Plaintiff at the rates provided in the Agreement for all services provided. None of these entities ever disputed Looks Great's rates. In a press release dated May 7, 2013, the Nassau County Comptroller's Office "touted" (Am. Compl. at ¶ 17) the cost savings realized from services provided under the Agreement, including the fact that Nassau County had paid up to 32% less than New York City for the Storm debris removal.

Plaintiff alleges that Defendants, however, did not have emergency debris removal contracts in place and, therefore, any trucks available to Defendants were idle because Defendants had failed to obtain a temporary debris disposal site. Defendants contacted Plaintiff on November 17, 2012 seeking emergency debris removal services. That same day, representatives of Plaintiff met with representatives of Defendants' management teams and advised Defendants that Plaintiff was prepared to perform the work needed at the same rates ("Standard Rates") that it charged other customers in Nassau and Suffolk Counties pursuant to the Agreement. At Defendants' request, Looks Great provided Defendants with a copy of the Agreement and the Standard Rates. Upon information and belief, Defendants confirmed with representatives of the Federal Emergency Management Agency ("FEMA") that FEMA had previously approved and reimbursed applicants at the Standard Rates in response to Hurricane Irene the prior year. Plaintiff alleges that during the November 17, 2012 meeting, Defendants clearly agreed to the terms of the Agreement and to pay for the emergency services provided by Looks Great at its Standard Rates.

Plaintiff alleges that it documented the services that it performed at Defendants' direction in daily work tickets, all of which were signed and approved by field representatives of National Grid at or near the time that the services were rendered, and provides a sample of these daily work tickets (Ex. 3 to Am. Compl.). Plaintiff also periodically submitted detailed invoices ("Invoices") to National Grid that were prepared using and identifying each daily work ticket, and the services were billed at Standard Rates, which Defendants accepted without complaint.

The Invoices provided by Looks Great from November 17, 2012 through December 8, 2012 were submitted to National Grid on December 12, 2012 (Ex. 4 to Am. Compl.) and National Grid did not object to the Invoices or Standard Rates. Accordingly, Looks Great continued its work, in reasonable reliance on Defendants' failure to object to the Invoices and Defendants' prior commitment to pay for the services provided at the Standard Rates, and continued to periodically submit Invoices requesting payment for services performed.

Plaintiff alleges that it successfully completed all services requested by Defendants on or about March 21, 2013, and all of the Invoices that had been periodically submitted while the work was being performed were submitted as a group to National Grid again on April 1, 2013 (*see, e.g.*, Ex. 4 to Am. Compl. at p. 2). Defendants accepted and held all of the Invoices without reservation, and never notified Plaintiff of any deficiencies in its work. Plaintiff did not receive payment and, accordingly, sent a letter to National Grid dated May 22, 2013 demanding payment (Ex. 5 to Am. Compl.). National Grid responded by letter dated June 17, 2013 (Ex. 6 to Am. Compl.) in which it acknowledged receipt of some of the Invoices in February 2013, and acknowledged that there was a balance due to Plaintiff. National Grid also, for the first time, 1) disputed the Standard Rates and advised Plaintiff of "a lengthy and cumbersome procedure that Looks Great putatively was to follow to obtain the late payments" (Am. Compl. at ¶ 35); and 2) advised Plaintiff that it would have to enter into an emergency restoration services agreement with National Grid, although National Grid never provided Plaintiff with any such agreement.

Plaintiff met with National Grid in an effort to resolve their disputes, at which time National Grid made partial payments. After Defendants made their final partial payment on September 25, 2013, a balance remained in the total principal amount of $844,740.75. By letter dated October 18, 2013 (Ex. 7 to Am. Compl.), Plaintiff demanded payment of the balance. Plaintiff also provided additional information substantiating the reasonableness of the Standard Rates and invited Defendants to contact Nassau County to confirm that it paid the Standard Rates. Plaintiff also alleges that the governmental entities to which Plaintiff provided services were reimbursed by FEMA at the Standard Rates and submits that is evidence of their reasonableness.

Defendants have advised Plaintiff that the emergency services rates billed by Looks Great for three specific pieces of equipment were too high. Plaintiff alleges that the principal amount

withheld by Defendants is not directly and solely related to the rates charged for the services provided by this equipment, and that one or more of the unpaid Invoices do not contain charges for any of this equipment. Looks Great has asked Defendants to provide support for their position as to the rates that should have been charged, which Defendants have failed to do. Looks Great sent additional demand letters in November and December of 2013 (Exs. 8-11 to Am. Compl.). Plaintiff alleges that, as a result of Defendants' improper withholding of payment, Plaintiff suffered incidental and consequential damages including, but not limited to, foregone interest and the need to finance ongoing services provided by Plaintiff from its own working capital line of credit, which damages were allegedly objectively foreseeable.

The instant motion is addressed to the first and fourth causes of action in the Amended Complaint, and to Plaintiff's demand for consequential damages, punitive damages and attorney's fees. Plaintiff seeks attorney's fees pursuant to N.Y. Ct. R. § 130-1.1 (Am. Compl. at ¶ 49). The first cause of action alleges an account stated and the fourth cause of action alleges that Nassau County engaged in bad faith breach of contract for which an award of punitive damages is appropriate.

C. The Parties' Positions

LIPA submits that the Court should dismiss the first cause of action, for account stated, because the parties never mutually agreed on the amount due for Plaintiff's services, and Defendants have always disputed the amount owed to Plaintiff, and continue to dispute that amount. LIPA contends that Plaintiff's demand for $844,740.75 is not based on an express agreement with Defendants but, rather, is based on rates of compensation that Plaintiff received for similar jobs that Plaintiff performed for local governments on Long Island. LIPA notes that, in Plaintiff's demand letter dated November 4, 2013 (Ex. 8 to Am. Compl.), Plaintiff's counsel stated that the amounts due were "based upon rates approved by FEMA and utilized by other local governments on Long Island to include Nassau County." LIPA contends that the submissions on which Plaintiff relies, including the numerous letters annexed to the Amended Complaint, are evidence of the "lack of mutual assent between Defendants and Plaintiff regarding the terms and rate of compensation" (LIPA Memo. of Law in Supp. at p. 9). LIPA also disputes Plaintiff's contention that Defendants' lack of response within the ten-day deadline for payment set forth in the Invoices should be deemed a lack of objection to the Invoices sufficient

to establish an account stated. LIPA submits that, in light of the emergency situation presented by the Storm, it would not have been reasonable to require LIPA to object to and/or pay the Invoices within ten days. LIPA also submits that Plaintiff's failure to allege that Defendants ever paid within the ten-day deadline without objection is fatal to the account stated claim.

LIPA also submits that the Court should dismiss the fourth cause of action, alleging bad faith breach of contract, because there is no independent cause of action for a bad faith breach of contract and this cause of action is duplicative of Plaintiff's breach of contract cause of action. LIPA submits that Plaintiff has failed to set forth allegations that would provide a basis for converting its claim for breach of contract into a tort and, therefore, Plaintiff's cause of action for bad faith breach of contract is legally insufficient.

LIPA also argues that Plaintiff has failed to set forth allegations that would support Plaintiff's request for consequential damages in connection with its third, fifth and sixth causes of action, which consequential damages allegedly include, but are not limited to, forgone interest and the lost opportunity cost of Plaintiff's inability to perform other profitable work while it was performing work for Defendants. LIPA submits that Plaintiff does not, and cannot, allege that the parties contemplated consequential damages at the time of, or prior to, contracting as evidenced by the fact that 1) there was no written contract between Plaintiff and either Defendant; and 2) Defendants are not signatories to the Agreement.

LIPA also contends that Plaintiff's demand for punitive damages fails as a matter of law because punitive damages are not recoverable for an ordinary breach of contract, and Plaintiff has failed to allege that Defendants committed any tortious conduct, independent of the alleged breach of contract, that would warrant the additional imposition of exemplary damages. Moreover, the imposition of punitive damages would not be appropriate because Plaintiff is seeking to redress a private wrong, specifically Defendants' alleged failure to pay the amount due and owing for services provided by Plaintiff pursuant to the parties' putative agreement, and Plaintiff has not alleged that Defendants' conduct was part of a pattern directed at the public generally.

Finally, LIPA submits that Plaintiff is not entitled to attorney's fees which may only be awarded where authorized by the parties' agreement, statutory provision or court rule. LIPA contends that Plaintiff's reliance on N.Y. Ct. R. § 130-1.1 is misplaced because that section

authorizes an award of attorney's fees resulting from frivolous conduct and Plaintiff has not, and cannot, allege that Defendants and or their counsel have engaged in frivolous conduct. Thus, Plaintiff has failed to identify any basis that would entitle it to attorney's fees, and the Court should dismiss Plaintiff's claim for attorney's fees.

In opposition, Plaintiff submits that it has pleaded facts establishing the elements of an account stated by alleging that Plaintiff submitted the Invoices to Defendants shortly after the services were performed and that Defendants accepted the Invoices without objection at the time they were received or within a reasonable time thereafter. Plaintiff disputes LIPA's contention that LIPA "always" (P's Opp. at p. 4, citing LIPA Memo. of Law in Supp. at pp. 8-9) disputed the amount owed to Plaintiff and notes that the correspondence on which LIPA relies was exchanged between counsel for the parties "long after" (P's Opp. at p. 4) Plaintiff had provided the services and LIPA had received the Invoices without complaint. Thus, Plaintiff submits, the correspondence on which LIPA relies does not establish that LIPA disputed any Invoice at the time it was initially submitted, or was subsequently resubmitted, or within a reasonable time thereafter. Moreover, Plaintiff submits, LIPA is incorrect in asserting that Plaintiff may not assert a claim for account stated because there is no underlying written agreement, as an account stated is an agreement independent of the underlying agreement. Plaintiff also disputes LIPA's contention that Plaintiff's failure to establish that Defendants ever paid within the 10-day deadline without objection is fatal to its account stated claim. Plaintiff submits that it need only allege facts which, when taken as true, establish that the party receiving invoices kept them and made no objection within a reasonable time, which Plaintiff has done.

Plaintiff also disputes LIPA's contention that there is no independent cause of action for bad faith breach of contract. Plaintiff submits that the Second Department has recognized a cause of action for bad faith breach of contract, and the appropriateness of punitive damages, where a defendant's actions are sufficiently egregious. Plaintiff submits that it has alleged facts which, if taken as true, establish that LIPA breached the contract in good faith, including but not limited to their allegations that Defendants "repeatedly and disingenuously reaffirmed Defendants' obligation to pay in full for the services performed by Looks Great by signing and approving daily work tickets" (Am. Compl. at ¶ 84) and "disingenuously attempted to force Looks Great to accept less than what it is owed under the Agreement through the use of improper

tactics" (*id.* at ¶ 89), including threatening litigation.

Plaintiff contends, further, that it may recover consequential damages because it has pled facts showing that such damages were foreseeable because they were 1) a natural and probable consequence of Defendant's breach; or 2) contemplated by the parties at the time of contracting. Plaintiff notes that it has alleged that it sustained consequential damages, including but not limited to lost profits, lost opportunities and interest costs, and has further alleged that these damages were reasonably and objectively foreseeable to Defendant as the natural consequence of its failure to pay for the services that it received. Alternatively, Plaintiff has alleged facts reflecting that Defendant had reason to know that a breach of the contract would result in the consequential damages claimed. Plaintiff submits that these facts, if taken as true, establish Plaintiff's ability to recover consequential damages that LIPA knew, or should have foreseen, would result from its breach of the parties' agreement.

Finally, Plaintiff submits that it has identified a court rule, specifically N.Y. Ct. R. § 130-1.1, which would authorize the Court to award attorney's fees for meritless/frivolous litigation. In light of this authority, Plaintiff contends, the Court should not dismiss Plaintiff's claim for attorney's fees at this stage of the litigation.

In reply, LIPA submits that 1) Plaintiff has failed to identify case law supporting its contention that there is an independent cause of action for a bad faith breach of contract; 2) the conduct complained of is not sufficiently egregious to warrant an award of punitive damages; 3) Plaintiff's account stated claim is insufficient because there was no agreed on account between the parties and there is evidence that LIPA objected to the amount purportedly due and owing; 4) Plaintiff does not, and cannot, dispute that the Amended Complaint does not contain any allegation that the parties contemplated consequential damages at the time of contracting and, accordingly, the Court should dismiss Plaintiff's claim for consequential damages; and 5) Plaintiff has failed to set forth a valid basis for the recovery of attorney's fees, and cannot rely on N.Y. Ct. R. § 130-1.1 because Plaintiff has not alleged that LIPA or its counsel engaged in frivolous conduct.

RULING OF THE COURT

A. Dismissal Standards

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court must 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. *Bivona v. Danna & Associates, P.C.*, 123 A.D.3d 956, 957 (2d Dept. 2014), quoting *Alva v. Gaines, Gruner, Ponzini & Novick, LLP*, 121 A.D.3d 724 (2d Dept. 2014) (internal quotation marks omitted) and citing *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

B. Attorney's Fees

In New York, an attorney's fee is merely an incident of litigation and is not recoverable absent a specific contractual provision or statutory authority. *IG Second Generation Partners, LP v. Kaygreen Realty Co.*, 114 A.D.3d 641, 643 (2d Dept. 2014), citing *214 Wall St. Assoc., LLC v. Medical Arts-Huntington Realty*, 99 A.D.3d 988, 990 (2d Dept. 2012), quoting *Levine v. Infidelity, Inc.*, 2 A.D.3d 691, 692 (2d Dept. 2003), *lv. app. dism.*, 3 N.Y.3d 656 (2004).

C. Punitive Damages

An award of punitive damages is warranted where a plaintiff establishes that the defendant's conduct evinced a high degree of moral turpitude and demonstrated behavior that equated to criminal indifference to civil obligations. *Stormes v. United Water New York, Inc.*, 84 A.D.3d 1351 (2d Dept. 2011), citing *Huang v. Sy*, 62 A.D.3d 660 (2d Dept. 2009). The misconduct must be exceptional, as when the wrongdoer has acted maliciously, wantonly, or with a recklessness that betokens an improper motive or vindictiveness, or has engaged in outrageous or oppressive intentional misconduct or with reckless or wanton disregard of safety rights. *Stormes v. United Water New York, Inc.*, 84 A.D.3d at 1351, quoting *Ross v. Louise Wise Servs., Inc.*, 8 N.Y.3d 478, 489 (2007) (internal quotation marks omitted).

Even when a defendants' conduct was unintentional, punitive damages may be awarded when the defendant's conduct is grossly negligent, wanton or so reckless as to amount to a conscious disregard of the rights of others. *Home Ins. Co. v. American Home Prods. Corp.*, 75 N.Y.2d 196, 201 (1990). The purpose of punitive damages is both to punish the perpetrator for his morally culpable conduct; and to deter repetition of such acts. *Id.* at 203; *State Farm Mut.*

Auto Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003). Ordinarily, punitive damages are not recoverable for breach of contract, and are only recoverable where the breach of contract also involves a fraud evincing a high degree of moral turpitude, and demonstrating such wanton dishonesty as to imply a criminal indifference to civil obligations, and where the conduct was aimed at the public generally. *Tartoro v. Allstate*, 56 A.D.3d 758 (2d Dept. 2008).

Damages arising from the breach of a contract will ordinarily be limited to the contract damages necessary to redress the private wrong, but punitive damages may be recoverable if necessary to vindicate a public right. *Sikarevich Family L.P. v. Nationwide Mutual Ins. Co.*, 30 F. Supp. 3d 166, 173 (E.D.N.Y. 2014), quoting *New York Univ. v. Cont'l Ins. Co.*, 87 N.Y.2d 308, 315 (1995); *Rocanova v. Equitable Life Assur. Soc'y*, 83 N.Y.2d 603, 613 (1994). To state a claim for punitive damages where the claim arises from a breach of contract, a plaintiff must plead that: 1) defendant's conduct is actionable as an independent tort; 2) the tortious conduct is of an egregious nature; 3) the egregious conduct is directed to plaintiff; and 4) it is part of a pattern directed at the public generally. *Sikarevich Family L.P. v. Nationwide Mutual Ins. Co.*, 30 F. Supp. 3d at 173-174, quoting *New York Univ. v. Cont'l Ins. Co.*, 87 N.Y.2d at 316. To the extent that some courts have found meeting the "public harm" requirement unnecessary, the Second Circuit has concluded that they are against the weight of authority on the issue. *Sikarevich Family L.P. v. Nationwide Mutual Ins. Co.*, 30 F. Supp. 3d at 174, quoting *Mayline Enters., Inc. v. Milea Truck Sales Corp.*, 641 F. Supp. 2d 304, 311 (S.D.N.Y. 2009), citing *TVT Records v. Island Def Jam Music Grp.*, 412 F.3d 82, 94 & n. 12 (2d Cir. 2005).

D. Account Stated

A party establishes a *prima facie* case for an account stated by proving that the defendants received and retained bills for services rendered to the defendants without objection. *Nebraskaland, Inc. v. Best Selections, Inc.*, 303 A.D.2d 662 (2d Dept. 2003); *Herrick Feinstein LLP v. Stamm*, 297 A.D.2d 477 (1st Dept. 2002). An account stated is an agreement, independent of the underlying agreement, regarding the amount due on past transactions. *G. W. White & Son, Inc.*, 219 A.D.2d 866, 867 (4th Dept. 1995), citing *Rodkinson v. Haecker*, 248 N.Y. 480 (1928) and *Fink, Weinberger, Fredman, Berman & Lowell v. Petrides*, 80 A.D.2d 781 (1st Dept. 1981), *app. dism.*, 53 N.Y.2d 1028 (1981). There can be no account stated where no account was presented or where any dispute about the account is shown to have existed. *Abbott,*

Duncan & Wiener v. Ragusa, 214 A.D.2d 412 (1st Dept. 1995), citing *Waldman v. Englishtown Sportswear*, 92 A.D.2d 833, 836 (1st Dept. 1983). Whether a bill has been held without objection for a period of time sufficient to give rise to an inference of assent, in light of all the circumstances presented, is ordinarily a question of fact, and becomes a question of law only in those cases where only one inference is rationally possible. *Yannelli, Zevin & Civardi v. Sakol,* 298 A.D.2d 579, 580 (2d Dept. 2002), citing *Legum v. Ruthen*, 211 A.D.2d 701, 703 (2d Dept. 1995), quoting *Bowne of City of N.Y. v. International 800 Telecom Corp.*, 178 A.D.2d 138 (1st Dept. 1991).

E. Damages in Breach of Contract Actions

It is well established that in actions for breach of contract, the nonbreaching party may recover general damages which are the natural and probable consequence of the breach. *Kenford Company, Inc. v. County of Erie*, 73 N.Y.2d 312, 319 (1989). It has long been recognized that the theory underlying damages for breach of contract is to make good or replace the loss caused by the breach. *Seidman v. Industrial Recycling Properties, Inc.*, 106 A.D.3d 983, 985 (2d Dept. 2013) citing, *inter alia*, *Brushton-Moira Cent. School Dist. v. Thomas Assocs.*, 91 N.Y.2d 256, 261 (1998). Damages are intended to return the parties to the point at which the breach arose and to place the nonbreaching party in as good a position as it would have been had the contract been performed. *Seidman v. Industrial Recycling Properties, Inc.*, 106 A.D.3d at 985 citing, *inter alia*, *Bi-Economy Mkt., Inc. v. Harleysville Ins. Co. of N.Y.*, 10 N.Y.3d 187, 195 (2008). To impose on the defaulting party a further liability than for damages which naturally and directly flow from the breach, *i.e.*, in the ordinary course of things, arising from a breach of contract, such unusual or extraordinary damages must have been brought within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting. *Kenford Company, Inc. v. County of Erie*, 73 N.Y.2d at 319 , quoting *Chapman v. Fargo*, 223 N.Y. 32, 36 (1918).

F. Application of these Principles to the Instant Action

The Court denies LIPA's motion to dismiss the first cause of action, alleging account stated, in light of the Court's conclusion that Plaintiff has asserted a legally sufficient cause of action for account stated by alleging that Plaintiff submitted the Invoices to Defendants shortly after the services were performed and that Defendants accepted the Invoices without objection.

The Court dismisses the fourth cause of action, alleging a bad faith breach of contract, in light of the Court's conclusion that there exists no independent cause of action for bad faith breach of contract and this cause of action is duplicative of the cause of action alleging breach of contract. The Court dismisses Plaintiff's claim for punitive damages based on the Court's conclusion that the conduct alleged is not sufficiently egregious to warrant an award of punitive damages. The Court dismisses Plaintiff's claim for consequential damages because Plaintiff does not allege facts that would support the conclusion that the parties contemplated consequential damages at the time of, or prior to, contracting. Finally, the Court dismisses Plaintiff's claim for attorney's fees in light of the absence of statutory or contractual authority for such an award, and because Plaintiff may not rely on N.Y. Ct. R. § 130-1.1 because there is no allegation that Defendants or their counsel engaged in frivolous conduct.

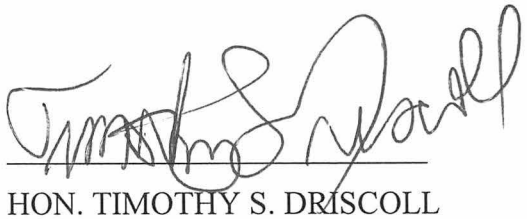
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

Counsel for the parties are reminded of their required appearance before the Court for a Preliminary Conference on June 9, 2015 at 9:30 a.m.

ENTER

DATED: Mineola, NY
April 22, 2015



HON. TIMOTHY S. DRISCOLL
J.S.C.