SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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LEFKARA GROUP, LLC,

Plaintiff,

-against- Index No. 651678/2013

FIRST AMERICAN INTERNATIONAL BANK,

Defendant.

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LAWRENCE K. MARKS, J.

This case involves a construction project. The developer, plaintiff Lefkara Group LLC (hereinafter "Lefkara"), entered into agreements and borrowed funds from defendant First American International Bank (hereinafter "First American").

In its complaint, Lefkara asserts that, based upon First American's breach of contract, Lefkara was damaged in an amount to be determined at trial, but in no event less that $7,900,00. First American moves for summary judgment. It argues that the discovery process has confirmed that Lefkara's claims are without merit, and that there is no genuine issue of material fact.

BACKGROUND

Lefkara was the owner and developer of property located at 42-05 Parsons Boulevard, Flushing, New York (hereinafter "the premises' or "the project"). Compl, ¶ 5.

Lefkara was constructing and developing a mixed commercial and residential building. *Id.*, ¶ 6.

The parties entered into a Building Loan Contract, dated August 23, 2006. Defendant's 19-a statement (hereinafter "Mov 19-a"), Exh A. The parties also entered into a mortgage note for $7,000,000 (hereinafter the "First Note"), dated August 23, 2006. Mov 19-a, Exh B. The parties later entered into another note for $300,000 (hereinafter the "Second Note"), dated April 10, 2009. *Id.*, Exh K.[1] The Building Loan Contract and the Second Note were both guaranteed by Michael Paras, Compl, ¶¶ 6, 8; Mov 19-a, Exhs D, M, the managing member of Lefkara.[2]

Lefkara asserted in its pleadings and in discovery that by early 2009, the project "was ninety nine (99%) percent complete." Compl, ¶ 7. *See also* Mov 19-a, Exh MM, p 205, lines 8-11.

In April 2009, Lefkara requested a disbursement of $314,631.00. Mov 19-a, Exh

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[1] The purpose of the second construction loan was to continue work on the ongoing project. Mov Br at 23, citing Mov 19-a, Exh MM, p 205 (Paras depo).

[2] Paras Aff, ¶ 1. First American raises an issue with regard to the admissibility of the Paras affidavit. First American contends that "Paras's entire out of state affidavit should be disregarded as . . . it lacks a certificate of conformity . . . required by CPLR 2309(c), and therefore is not properly before the Court." Reply Br at 7 n 2, citing *Green v. Fairway Operating Corp.*, 72 A.D.3d 613 (1st Dep't 2010) (finding plaintiff failed to satisfy her burden by submitting an affidavit sworn in the Dominican Republic, without the required certificate of conformity). Here, Paras's affidavit was purportedly sworn in New Jersey. However, the Court will accept the Paras affidavit and its exhibits, but all counsel are reminded to comply with CPLR requirements in the future. *See generally Hall v. Elrac, Inc.*, 79 A.D.3d 427, 428 (1st Dep't 2010).

O.[3] The April 2009 funding request was disbursed on May 18, 2009. Opp Br at 8; Reply Br at 6. *See also* Young Aff ¶ 37; Mov 19-a, Exh V. It is this unit of time, and whether it was permissible or constituted a breach by First American, that is the basis for this action.

On July 17, 2009, Lefkara and the contractor, Orion Development, Inc. (hereinafter "Orion"), entered into their own agreement, which followed the existing agreement between them. Mov 19-a, Exh X. Under this new agreement, Orion was to finish the work on the project, and advance the costs and expenses for doing so. Young Aff ¶ 39; Mov 19-a, Exh X.

A prior related action was filed by First American against Lefkara and Mr. Paras, among others, in Queens County. Paras Aff, ¶ 21. There was also a related bankruptcy proceeding.

On March 11, 2011, First American assigned its interests, rights and title regarding its loans with Lefkara to another company, 42-05 Parsons LLC, through mortgage assignments. Mov 19-a, Exh GG. In the related bankruptcy proceeding, Lefkara and 42-05 Parsons reached a settlement, wherein Lefkara was paid $137,500 and the premises were transferred to 42-05 Parsons. Mov Br at 14; Mov 19-a, Exh HH, II.

The Summons and Complaint in this action were filed on May 9, 2013. Lefkara asserts that this is a classic lender liability lawsuit, stemming from First American's

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[3] In the complaint, Lefkara asserts that it requested the funds on April 20, 2009. Compl, ¶ 10. However the document titled "Request for payment" is dated April 13, 2009 and signed by Mr. Paras on April 14, 2009. Mov 19-a, Exh O.

breach by refusing to disburse funds necessary to complete the project. Compl, ¶ 1. It avers that through this refusal, First American "breached the express terms of the [Second Note] as well as its obligations of good faith and fair dealing." *Id.*, ¶ 11.

DISCUSSION

A party seeking summary judgment must make a prima facie showing of entitlement to summary judgment, as a matter of law, and demonstrate the absence of any material questions of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). To defeat such a motion, the opposing party must demonstrate the existence of a genuine triable issue of fact; mere conclusions, expressions of hope or assertions are insufficient. *Id.* The burden is shifted to the opposing party to produce evidence sufficient to demonstrate the existence of a material issue of fact which requires a trial. *Madeline D'Anthony Enterprises, Inc. v. Sokolowsky*, 101 A.D.3d 606, 607 (1st Dep't 2012). The assertions of the non-moving party are given every favorable inference in opposition to a motion for summary judgment. *Myers v. Fir Cab Corp.*, 64 N.Y.2d 806, 808 (1985); *Martin v. Briggs*, 235 A.D.2d 192, 196 (1st Dep't 1997).

Breach of Contract

To establish a breach of contract, a party must prove the elements of the claim, which "include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." *Harris v. Seward Park Hous. Corp.*,

79 A.D.3d 425, 426 (1st Dep't 2010).

First American asserts that it is entitled to dismissal of the breach of contract claims for multiple reasons. First American does not dispute the existence of a contract between it and Lefkara and, in fact, relies upon several contracts it claims are interconnected. It does contend, however, that it is entitled to summary judgment in its favor because of Lefkara's own earlier breach of the agreements, because it did not itself breach, and it is not liable for any damages sustained by Lefkara.

The Issue of Plaintiff's Breach

First American contends that it did not breach any agreement with Lefkara through its own handling of the April 2009 disbursement request. However, First American argues that even if it had, it cannot be held in breach, because of Lefkara's own prior breach of the agreements.

There is no doubt that the Building Loan Contract and the Second Note explicitly provided First American with the right, in certain circumstances, to withhold advances and/or determine that Lefkara was in default. The Building Loan Contract is explicit that, although the there must be a failure to proceed sufficiently with the construction or a failure of the borrower to keep any of its covenants, the right to make that determination is left to First American.[4] The Second Note is also clear that there are multiple scenarios

[4] The Building Loan Contract provides that any further advance can be, inter alia, terminated upon certain conditions, including:

(j) *If for any cause* whatever the construction of said improvement is

that would constitute a default by Lefkara, including false or misleading statements, insufficient collateral, or default on any terms in any of the loan documents.[5] Further, the language is clear that it is up to First American to determine if, in its opinion or discretion, there was a default. Additionally, the agreements provide that a default under one, constitutes a default under the others.[6]

> at any time discontinued or not carried with reasonable dispatch *in the judgment of the lender*. . . .
>
> (o) If the borrower fails to keep, observe or perform *any of the conditions*, stipulations, agreements or covenants contained *in this agreement* or in the said bond or note and mortgage *or in any other loan document*.

Mov 19-a, Exh A, ¶ 23 (emphasis added).

[5] The Second Note provides that Lefkara would be in default by

> *making any misrepresentations to Bank*; or if any representation or warranty made by any Obligor in the Note or contained in any document, loan document or financial *or other statement furnished at any time under or in connection with this loan shall prove to have been incorrect, incomplete, or misleading* in any material respect on or as of the date made or deemed made; or, *in Bank's opinion*, impairment of financial responsibility of any Obligor, or *in Bank's opinion*, impairment of the collateral *or, if at any time Bank shall, in its discretion consider the collateral/security or any part thereof unsatisfactory or insufficient*, or if the Obligors shall not if demanded furnish other or additional collateral or make payment on account satisfactory to Bank; *or default in any of the terms and provision of any of the loans documents* . . . .

Mov 19-a, Exh K at 2 (emphasis added).

[6] The Building Loan Contract provides:

> *In the event that more than one mortgage is executed* pursuant to this agreement *and there should be any default by the borrower* in the performance of any of the conditions, stipulations, agreements and

The question then is whether First American is correct that Lefkara was itself in breach prior to the April 2009 drawdown request.

Insufficient Funds

First American contends that Lefkara was in breach simply for not having enough funds to complete the project, and by making misleading or incorrect statements about

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> covenants contained in this agreement or in any of the bonds or notes and mortgages given in connection therewith, *then, at the option of the lender*, the principal *indebtedness secured by all or any* of such bonds or notes and mortgages *shall immediately become due* and payable . . . .

Mov 19-a, Exh A, ¶ 24 (emphasis added).

The Second Note provides:

> It is hereby expressly agreed, that the principal sum and *all other sums* secured by this Note *shall become due at the option of the Holder* thereof on the happening of any default or event by which, *under the terms of any loan documents relating to any collateral* or securing this Note, including but not limited to the Mortgage, General Security Agreement and Guaranty(s), said principal sum may or shall become due and payable; *also that all* of the covenants, conditions and *agreements contained in the loan documents are hereby made part of this instrument.*

Mov 19-a, Exh K at 1 (emphasis added). The Second Note further provides that "Events of Default" include

> *default in payment of the Note*, any loan document *or any other obligation of any nature* or description to Bank, the Note, *any loan documents and such other obligations of Obligors*, hereinafter referred to as the "Obligations"; *default in payment of any other note or any other obligation of any nature or description to any other creditor* . . .

Id., Exh K at 2 (emphasis added).

that.

First American is certainly correct that Lefkara was required to have sufficient funding to finish the project.[7] In Lefkara's April 2009 written request for funds, it stated that the "unadvanced portion of construction loan is sufficient to complete the entire project." Mov Br at 24; Mov 19-a, Exh O. First American avers that this was false when that representation was made.

First American points to an email, dated April 30, 2009 but reflecting at least one earlier communication, that the total funds available, between both loans, was only $524,594.19, and that at least another $600,000 was needed to complete the project, even without the cost "to remedy the sewer connection problem." Young Aff ¶ 33; Mov 19-a, Exh U. Lefkara itself noted that it received a bid for $185,000 on August 7, 2009 to address the sewer issue. Paras Aff, Exh I.[8] Lefkara notes that this bid, for $185,000, was received in August 2009, but that in June and July of 2009 the bids for the sewer work "ranged from $298,000 to $433,000." *Id.* Orion's own estimate, on July 21, 2009, stated

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[7] The Building Loan Contract provides:

> The borrower certifies that for the duration of the construction loan, *the unadvanced portion of the loan is always sufficient* to complete the described property improvements.

Mov 19-a, Exh A, ¶ 6 (emphasis added).

[8] This exhibit is another Paras affidavit, dated August 10, 2011, submitted in the related Queens action, in which Lefkara was defendant. Lefkara is citing to ¶ 18 and Exh D of that affidavit.

that the budget needed "to complete the work" was $1,352.031.12. Mov 19-a, Exh Y. Further, although additional funding for the project was ultimately obtained through Orion, a document in late 2009 between Lefkara and First American evidences at least the consideration of First American extending Lefkara another $950,000. Young Aff ¶ 52; Mov 19-a, Exh DD.[9]

In opposition, Lefkara puts forth both general statements and its own figures. Lefkara asserts that the "bank's internal accounting records are wrong and are disputed" and that it "had at least $717,381.44." Paras Aff, ¶¶ 2, 17. However, neither Lefkara's general statements nor the numbers are established or supported in the opposition papers put before the Court. *Id.* The Court is therefore left with mere conclusory allegations that do not satisfy Lefkara's burden and fail to raise a triable issue of fact. *Worldcom, Inc. v. Dialing Loving Care*, 269 A.D.2d 159 (1st Dep't 2000) (conclusory statements and unsubstantiated allegations were patently insufficient to raise any issue of fact).

Although the Court need not determine what the remaining and total costs of the project were, there is no doubt from the record that the parties have put before the Court that the funds available to Lefkara in April 2009 were not sufficient to complete the project. Even though final figures are not readily apparent to the Court from the motion papers, both parties put forth documents that include estimates for the remaining work to

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[9] This document is dated November 5, 2009 at the top of the document and December 22, 2009 at the signatures by Lefkara. Mov 19-a, Exh DD. Lefkara asserts it did not take the additional funding from First American because the deal was "unacceptable for several reasons" and that it did not need it since the funding had been agreed to with Orion. Paras Aff, ¶ 39.

be done to complete the project. Those documents establish that the further funds needed are greater than the remaining funds available to Lefkara from First American in April 2009.

Insufficient Time

First American also claims Lefkara was incorrect with regard to the time needed to complete the project, and that it was material.[10] On November 6, 2008, in the context of seeking additional funding, Lefkara stated that "as we near completion . . . all the major hurdles of this project are behind us . . ." Mov 19-a, Exh J. On April 21, 2009, Lefkara's counsel sent an email to First American, estimating that the building would be completed within 90 days. Mot Br at 24; Mov 19-a, Exh S.

However, Lefkara did not even obtain plan approval from the New York City Department of Environmental Protection to fix the sewer connection problem until January 21, 2010, 275 days later. Mov Br at 24; Mov 19-a, Exh CC. Further, this approval was without a permit, which was to be obtained separately, and therefore must have been obtained even later in time. *Id.* First American asserts this difference in the time needed was so material that it functionally renders the original estimate to have been a breach of the Second Note. Mov Br at 25.

The Court finds that although a final date for completion of all work on the project

[10] The sewers were among the items that were known to require work, at least potentially, from the beginning. The Building Loan Contract provides, "In case city sewers are not installed . . . the borrower shall install and properly connect sewers of city specifications as to size and quality . . ." Mov 19-a, Exh A, ¶ 22.

is not readily apparent from the motion papers, the dates that are before the Court are sufficient to establish that there is no factual question necessitating a trial. The above statements in 2008 and 2009 by Lefkara regarding the remaining time still needed for completion of the project clearly were off by more than enough to be either misleading or inaccurate when made.

Insufficient Approval/Permits

First American further contends that Lefkara was in breach by failing to obtain certain required approvals. Mov Br at 26. The Building Loan Contract does require that Lefkara obtain all required permits to complete the project, and to do so before being advanced funds.[11] First American claims Lefkara failed to do this.

It is certainly the case that as of April 2009, the sewers were a known issue, the approvals were not obtained and that the approvals and permit required (as addressed above) were not even obtained by the end of that calendar year. As such, it is clear that Lefkara did not meet its obligations with regard to obtaining approvals and permits.

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[11] The Building Loan Contract provides that

> *before the making of the first advance* hereunder, the *borrower agrees* to file with all governmental authorities having jurisdiction and *to obtain all necessary approvals of said plans and specifications and all necessary building permits* from said authorities. The said plans and specifications shall first be submitted to and approved by the lender in writing; and *no changes or amendments thereto shall be made without first obtaining the written approval of the lender.*

Mov 19-a, Exh A, ¶ 1 (emphasis added).

The Issue of First American's Breach

The instant breach of contract claim is based on Lefkara's attempt in April 2009, to draw down the second construction loan. Compl, ¶ 10. First American contends that the only time period in which First American withheld or delayed any funding was between learning of the sewer connection problem and fully funding the April 2009 payment request on May 18, 2009. Mov Br at 22. First American, however, argues that it did not breach any contractual obligation by doing so.

Discretion

Among its arguments that it was not in breach,[12] First American contends that, even if certain funds were withheld, the loan documents gave it sole discretion with regard to disbursements. Mov Br at 22; Reply Br at 11. First American claims that there are multiple provisions wherein it reserved the right to disburse funds in its sole discretion. Mov Br at 23.

In this, First American is correct. Both documents[13] clearly and explicitly included

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[12] First American also argues, for example, that there is no proof that the verbal request, in April 2009, ever took place. First American asserts that there was testimony by Lefkara that Lefkara requested the funds verbally on April 14, 2009, but that there is no documentary evidence provided by Lefkara that such a call took place on that date either. Mov Br at 21. First American avers that if such a request had been made, First American would have informed Lefkara that funding requests must be made in writing. Mov Br at 21, citing Chen Aff, ¶¶ 3-6 and Young Aff, ¶¶ 21-22.

[13] The Building Loan Contract provides:

> *The said loan is to be advanced at such times and in such amounts as the lender shall determine*, but tentatively in installments in accordance with the following schedule:

contractual language that places the determination for the advancement of funds with First American. This includes, but is not limited to, termination and having all funds become due.

Lefkara counters that First American had no discretion. Opp Br at 3. *See also*

SCHEDULE OF PAYMENTS – Schedule "A"

> . . . Lender may make construction loan advances as it deems advisable in its *sole judgment* which may include the Construction Cost Breakdown annexed as Schedule A to the extent of the loan, with 10% construction retainage holdback(s) during construction until receipt of the permanent Certificate of Occupancy for the improvement.

Mov 19-a, Exh A, ¶ 6 (emphasis added). The Building Loan Contract further provides:

> The borrower covenants and agrees not to do any act or thing prohibited by the terms of this agreement, and it is expressly agreed that *in any of the following events all obligation on the part of the lender to make said loan or to make any further advance shall, if the lender so elects, cease and terminate, and the said bond or note and mortgage shall, at the option of the lender, become immediately due and payable*, but the lender may make any advances or parts of advances after the happening of any of the following events without thereby waiving the right to demand payment of the mortgage debt and without becoming liable to make any other or further advances.

Mov 19-a, Exh A, ¶ 23 (emphasis added).

The Second Note provides:

> In the event that the value of the collateral securing this loan is reduced, or deemed insufficient, *at the sole option of the Bank*, then the maximum amount available to be advanced pursuant to this Note may be reduced accordingly.

Mov 19-a, Exh K at 1 (emphasis added).

Paras Aff ¶ 5. Lefkara does not, however, address the general and broad language of the Building Loan Contract. Instead, it tries to distinguish "credit line documentation" from "construction loan documents." Opp Br at 3. Lefkara does not, however, cite to any contractual language in support of its view or any case law on this issue generally.

What the Court is left with is clear language, cited by First American and not meaningfully opposed by Lefkara. This is insufficient in opposition to a motion for summary judgment.

The Issue of Damages

Lefkara contends that it was damaged by First American's refusal to fund the drawdown request, and that this led to Lefkara being unable to complete the project and begin selling the commercial and residential condominium units. Compl, ¶ 12. Lefkara asserts that, therefore, when the first and second notes matured, on August 31, 2009 and April 1, 2010, respectively, it defaulted. *Id.* Lefkara avers that, because of First American's breach of contract, Lefkara has been damaged in the amount of lost profits to be determined at trial, but in no event less than $7,900,000. *Id.*, ¶ 13.

Causation

First American argues that even if it committed a breach, that breach was not the cause of Lefkara's damages.[14] It avers that its own decisions regarding the April 2009

[14] First American contends that its causation argument is relevant only to the extent that the Court determines that either First American was in breach, by failing to fund the April 2009 payment request, or if there is a question of fact on that issue. Reply Br at 5. Although the Court has not found that Lefkara has established either the existence of a breach by First American or a

request were not the proximate cause of Lefkara's damages. First American contends, inter alia, that there were not enough funds available to Lefkara to complete the project

First American asserts that even if it had disbursed the balance of the funds in April 2009, Lefkara did not receive approval for the sewer connection work until a letter dated January 21, 2010, and that it was still required to obtain a construction permit. Mot Br at 18; Mov 19-a, Exh CC (as addressed above). First American, therefore, argues that the construction work itself would have started even later. It avers that, by then, there would not have been enough money left, even taking both loans together, to meet the monthly interest payments on the loans. Mot Br at 19. First American contends that Lefkara would have been in default by May 2009, and thus in breach of the loans prior to completing the project, irrespective of First American's actions. *Id.* at 19-20.

Without making any determinations of fact regarding final dates or final figures of funds needed for completion of the project, it is clear (for the reasons addressed above) that First American, not having disbursed the April 2009 funds until May 2009, was not the proximate cause of the project not being completed or of any damages to Lefkara.

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question of fact regarding that issue, the Court is still addressing certain damages issues raised in the motion.

Interest

On the issue of damages, or breach for that matter, the parties have vastly different views on the question of the interest on the loans. Lefkara claims that there is no provision that permits First Amendment to segregate estimated interest on the $7,000,000 loan, and withhold it from Lefkara. Paras Aff ¶ 6. First American asserts that interest payments were permitted, under the operative documents.

Upon viewing the terms of the agreements, it is clear that First American is correct.[15] As such, any review of funds available to complete the project must recognize

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[15] The Building Loan Contract provides:

> *The Lender may deduct from any payment to be made under this agreement any amount necessary for the payment of any fees and expenses relating to . . . building loan service fees*, and any expenses incurred in the procuring or the making of the said loan, and in the payment of any . . . mortgages . . . and apply such amount in making said payments, and all sums so applied shall be deemed advanced under this agreement and secured by said bond or note and mortgage.

Mov 19-a, Exh A, ¶ 17 (emphasis added).

The First Note states:

> The Bank shall have a continuing lien and/or right of set-off on deposits (general and special) and credits with the Bank of every maker and endorser, and may apply all or part of same to Obligations (whether contingent or unmatured), at any time or times, without notice. . . . The Bank reserves the right to offset any and all accounts that the Borrower maintains at the Bank and to accelerate the loan upon default such that the full unpaid principal amount of the loan is due and payable immediately.

Mov 19-a, Exh B, at 2.

The Second Note provides:

the interest, and adjust for these payments. This, therefore, lowers the amount of funds available to Lefkara from First American, in April 2009. Further, correspondence well after the execution of the contracts, as the April 2009 funding request was being addressed, further confirms this practice.[16]

Lefkara contends that there are disputed material facts regarding causation.[17] Opp Br at 3. However, it does not address the numbers and dates presented by First American. Instead, Lefkara continues to assert that there are questions of fact. *Id.* at 8. This is insufficient. Given the amount of money that was still needed to complete the project (as addressed above), even giving Lefkara every favorable inference, it has raised no questions of fact that require a trial. First American is correct that where a plaintiff fails "to come forward with evidence sufficient to demonstrate damages flowing from the

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> Bank shall have a continuing lien and/or right of set-off on deposits (general and special) and credits with Bank of every Maker, Guarantor and Endorser, and may apply all or part of same to Obligations (whether contingent or unmatured), at any time or times, without notice or demand . . . for any purpose. The Bank reserves the right to offset any and all accounts that Borrower/any Guarantor maintains at the Bank . . . .

Mov 19-a, Exh K, at 2.

[16] First American explicitly addressed, in the context of the April 2009 funding request, that the amount that still remained as needed to complete the project "includes the 4 months interest reserve." Mov 19-a, Exh U.

[17] Lefkara also seems to assert that there was a different breach, stemming from a refusal to pay a request submitted on September 11, 2009. Lefkara claims that if that September 2009 requisition had been paid, it "would have resulted in a completed project." Opp Br at 7. However, Lefkara does not provide any documents in support of this position. More significantly, this request, and any alleged breach regarding it, is not addressed in the complaint.

breach alleged and relies, instead, on wholly speculative theories of damages, dismissal of the breach of contract claim is in order." *Lexington 360 Assoc. v. First Union Nat'l Bank of North Carolina*, 234 A.D.2d 187, 190 (1st Dep't 1996) (reversing denial of summary judgment).

Type of Damages

First American further argues that any damages stemming from lost profits cannot be recovered by Lefkara in this action. Lefkara counters that it has demonstrated the existence of special circumstances, which support consequential damages. Opp Br at 9. First American responds that the complaint does not assert any special circumstances. Reply Br at 12. In this, First American is correct.

The complaint includes Lefkara's allegation that it was "damaged in the amount of lost profits to be determined at trial but in no event less than $7,900,000." Compl, ¶ 13. However, Lefkara does not provide support for that figure in the complaint. That was not necessarily a requirement for Lefkara at the pleading stage, and no pre-answer motion to dismiss was filed. However, at this post-discovery and post-Note of Issue stage, no proof of lost profits, and support for their applicability, is explicitly included in the opposition to this motion. The First Department has held that where a plaintiff seeks to recover lost profits in a breach of contract claim, "a plaintiff must establish that such damages were actually caused by the breach, that the particular damages were fairly within the contemplation of the parties to the contract at the time it was made and that the alleged

loss is capable of proof with reasonable certainty." *Awards.com v Kinko's, Inc.*, 42 A.D.3d 178, 183 (1st Dep't 2007) (internal quotation marks and citation omitted), *aff'd* 14 N.Y.3d 791 (2010).

Lefkara does use the phrases "consequential damages" and "special circumstances supporting consequential damages" (Opp Br at 9), but even giving it the benefit of every favorable inference, as the Court must on a motion for summary judgment, this is insufficient. Evidence must be proffered, not mere conclusions or assertions. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). With regard to damages:

> Even if plaintiff could demonstrate it had a viable claim for breach of contract, it could not demonstrate it suffered any damages as a result of the breach. This is because it could not clear the initial hurdle of demonstrating that the particular damages were fairly within the contemplation of the parties to the contract at the time it was made.

Digital Broadcast Corp. v. Ladenburg, Thalmann & Co., Inc., 63 A.D.3d 647, 647 (1st Dep't 2009) (internal citations omitted).[18]

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[18] The Court notes Lefkara does not allege a theory of damages, other than lost profits, in the complaint. First American argues that any damages available to Lefkara would be limited to the costs of obtaining replacement financing. First American further asserts that, in the case at hand, that cost was actually zero. Mov Br at 28. First American contends that Orion agreed to advance costs and expenses. Mov 19-a, Exh X, at ¶ 3B. Also, First American offered further financing. Mov 19-a, Exh DD. Thus, according to First American, the documentary evidence shows that Lefkara was able to obtain financial assistance from Orion, and even turned down additional financing from First American. First American, therefore, claims that Lefkara cannot establish that it suffered and is entitled to any damages. Mov Br at 29. The Court need not address this issue further, as the only form of damages sought in the complaint is lost profits.

Breach of Good Faith and Fair Dealing

First American argues that Lefkara's claim for breach of good faith and fair dealing should be dismissed as duplicative of its claim for breach of contract. It contends that the only damages asserted by Lefkara are based upon an alleged breach of contract. The damages are not claimed to be arising out of any breach separate and distinct to the covenant of good faith and fair dealing. Rather, any such damages are intrinsically tied to those allegedly resulting from a breach of contract claim and are, therefore, redundant. *Canstar v. J.A. Jones Constr. Co.*, 212 A.D.2d 452, 453 (1st Dep't 1995). Further, there are no facts and circumstances alleged as supporting a claim for breach of covenant of good faith and fair dealing that are distinct from those that give rise to Lefkara's breach of contract claim. Where damages stem from the same underlying facts, a claim of the breach of the duty of good faith and fair dealing that accompanies a claim for breach of contract is duplicative and must be dismissed. *Whitecap (US) Fund I, L.P. v. Siemans First Capital Commercial Fin. LLC*, 121 A.D.3d 584, 593 (1st Dep't 2014).

The Court has considered the parties' other arguments, and finds them unavailing.

For the reasons addressed above, defendant First American International Bank's motion for summary judgment is granted.

Accordingly, it is

ORDERED that the motion for summary judgment by defendant First American International Bank (sequence 002) is granted in full and the claims against it by plaintiff Lefkara Group, LLC are dismissed.

This constitutes the Decision and Order of the Court.

Dated: April 26, 2016

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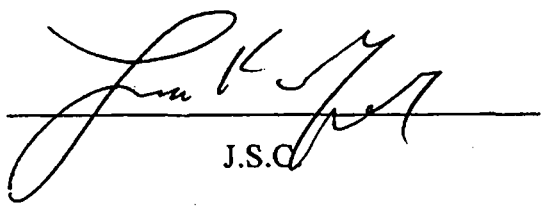

J.S.C.

HON. LAWRENCE K. MARKS