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

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MADCAP ACQUISITIONS LLC,

Plaintiff,

-against-

Index No. 654339/2012
Motion Date: 3/2/2016
Motion Seq. No. 002

AMERICAN TOWERS LLC AND AMERICAN TOWER CORPORATION,

Defendants.

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BRANSTEN, J.

Plaintiff MadCap Acquisitions LLC ("MadCap") brings this action against Defendants American Towers LLC ("ALC") and American Tower Corporation ("ATC") (collectively, "American Tower") for breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment. Specifically, MadCap alleges that American Tower breached a confidentiality and non-circumvention agreement the parties executed in connection with certain property located within the John Hancock Center in Chicago, Illinois. American Tower now moves for summary judgment, seeking dismissal of each cause of action. In turn, MadCap cross-moves for summary judgment.

For the reasons that follow, American Tower's motion for summary judgment is granted, MadCap's cross-motion is denied, and the complaint is dismissed in its entirety.

I. Background

In late 2011, an entity known as W2007 Golub JHC Realty, LLC ("Golub") held title to the John Hancock Center in Chicago, Illinois (the "Property"). (Compl. ¶ 9).

With Golub facing default on approximately $400 million in loans set to mature in February 2012, MadCap positioned itself to acquire the controlling tranches of the debt stack, and presented the opportunity to Deutsche Bank AG ("Deutsche Bank") to be MadCap's capital partner. *Id.* at ¶¶ 10-11. MadCap also approached American Tower, a leading independent owner and operator of wireless and broadcast communication sites, with an opportunity to jointly acquire the Property's telecommunication lease, which included the broadcast antennas on the roof of the Property (the "Telecom Rights" or the "Broadcast Rooftop"). *Id.* at ¶ 12.

A. Confidentiality and Non-Circumvention Agreement

In December 2011, MadCap and American Tower executed a confidentiality and non-circumvention agreement (the "Agreement"), which provides, in relevant part, for the disclosure of confidential information by MadCap to American Tower in connection with the proposed Telecom Rights transaction. (Compl. Ex. A at 1). The Agreement further provides,

> [i]n consideration of the Disclosing Party's furnishing the Company with the Confidential Information and as a condition precedent thereto, the Company hereby agrees as follows:
>
> 1. In connection with the Proposed Transaction, it is understood that the Disclosing Party and its Representatives...are prepared to furnish the Company and its Representatives with certain oral and written information concerning the Property that is or may be nonpublic, confidential and/or proprietary in nature...All such information...shall, except as otherwise permitted hereunder, be

> kept strictly confidential by the Company and its Representatives…
>
> …
>
> The Confidential Information shall be used by the Company solely for the purposes of the Proposed Transaction.

Id. at ¶ 1. The confidentiality provision excludes information that "becomes available to the Company and its Representatives from a source other than the Disclosing Party…provided that such source is not bound by a confidentiality agreement with the Disclosing Party…or otherwise bound to keep such information confidential…" *Id.*

In addition, the Agreement prohibits American Tower from discussing the Property with, among others, the current owner of the Property, any tenant of the Property, or any party in discussion with either the owner or MadCap regarding becoming a tenant. *Id.* at ¶ 5. The Agreement also contains a non-circumvention clause (the "Non-Circumvention Clause"), which provides, in relevant part,

> For a period of one year from the date of this letter agreement, the Company and its Representatives shall not…directly or indirectly, solicit, initiate, or encourage any inquiries, offers or proposals from, or participate in any negotiations or discussions concerning, or enter into any letter of intent, memorandum of understanding, agreement in principle, commitment or contract with, or provide any information…to, any person entity or group (*other than the then owner of the Property or its agents, brokers or affiliates*) relating to the acquisition, disposition or encumbrance of any portion of the Property, or relating to the proposed transaction. (emphasis added).

Id. at ¶ 6.

B. Golub's Default and MadCap's Continued Interest in the Telecom Rights

After Golub defaulted in March 2012, Deutsche Bank partnered with NorthStar Realty Finance Corporation to form the German American Capital Corporation ("GAC"), and took control of the Property as its lender, but never recorded the deed. (Compl. ¶¶ 21, 47-49). As GAC started selling off portions of the Property, MadCap, still pursuing a partnership with American Tower, created an online "war room" through which American Tower could access confidential and due diligence materials regarding the Telecom Rights. *Id.* at ¶¶ 22-23. Thereafter, American Tower accessed and downloaded information from the war room. *Id.* at ¶ 25.

C. ATC's Purchase of the Telecom Rights

In October 2012, after allegedly discussing the Property with various third-parties, ATC executed a Purchase and Sale Agreement ("PSA") with Golub to acquire the Telecom Rights, on its own and without MadCap, for approximately $70 million. *Id.* at ¶¶ 26-27. However, according to MadCap, ATC actually transacted with Deutsche Bank, and not Golub, since at the time of the purchase Deutsche Bank was controlling Golub and its transactions. *Id.* at ¶ 28. MadCap further alleges that the proceeds from the sale went to Deutsche Bank, through GAC, which shows that American Tower made an end-run around MadCap to acquire the Telecom Rights with a third-party. *Id.* at ¶ 31.

In December 2012, MadCap filed the complaint, asserting claims against American Tower for: (1) breach of contract; (2) breach of the implied covenant of good

faith and fair dealing; and (3) unjust enrichment. On February 10, 2016, this Court denied the parties' respective motions to preclude expert testimony.

II. Discussion

Defendants filed this motion for summary judgment, seeking dismissal of the complaint in its entirety. Plaintiff filed a cross-motion, seeking summary judgment in its favor on each of the three claims.

A. Summary Judgment Standard

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

When deciding a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-movant. *Branham v. Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931, 932 (2007). However, mere conclusions, unsubstantiated allegations or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 N.Y.2d at 562; *see also Ellen v. Lauer*, 210 A.D.2d 87, 90 (1st Dep't

1994) ("[it] is not enough that the party opposing summary judgment insinuate that there might be some question with respect to a material fact in the case. Rather, it is imperative that the party demonstrate, by evidence in admissible form, that an issue of fact exists ...") (citations omitted).

B. MadCap's Claim for Breach of Contract

First, American Tower seeks summary judgment on MadCap's breach of contract claim, arguing that the claim should be dismissed because MadCap failed to prove the existence of legally cognizable damages, a required element. *See Harris v. Seward Park Housing Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010) (citing *Morris v. 702 E. Fifth St. HDFC*, 46 A.D.3d 478 (2007)) (explaining elements for breach of contract claim).

i. Standard for the Recovery for Lost Profits

American Tower asserts that MadCap's claim for loss of future profits, *i.e.*, the anticipated profits from the hypothetical joint venture with American Tower to acquire the Telecom Rights, is foreclosed by the Court of Appeals' decision in *Kenford Company v. County of Erie,* 67 N.Y.2d 257, 261 (1986). In *Kenford*, the Court explained that, to recover for lost profits,

> First, it must be demonstrated with certainty that such damages have been caused by the breach and, second, the alleged loss must be capable of proof with reasonable certainty. In other words, the damages may not be merely speculative, possibly or imaginary, but must be reasonably certain and directly traceable to the breach, not remote or the result of other intervening causes. In addition, there must be a showing that the particular damages

> were fairly within the contemplation of the parties to the contract at the time it was made. (internal citation omitted).

Id. at 261. The Court noted that "[i]f it is a new business seeking to recover for loss of future profits, a stricter standard is imposed for the obvious reason that there does not exist a reasonable basis of experience upon which to estimate lost profits with the requisite degree of reasonable certainty." *Id.*

In *Ashland Management v. Janien*, the Court applied the above standard, and clarified the requirement that damages be proved with "reasonable certainty." 82 N.Y.2d 395, 403 (1993). There, the Court first found lost profit damages were within the contemplation of the parties since lost profits were specifically included in the language of the agreement. *Id.* at 405. In examining the second requirement of "reasonable certainty," the Court explained that "the law does not require that [damages] be determined with mathematical precision. It requires only that damages be capable of measurement based upon known reliable factors without undue speculation." *Id.* at 403. The Court found that since the agreement included specific calculations for future profits, for example, 15% of gross revenues from "any and all existing or future accounts," lost profits could be calculated with reasonable certainty. *Id.* at 405-06.

ii. MadCap's Evidence of Lost Profits

Here, Plaintiff alleges that "[a]s a result of AT's multiple breaches of the NCA, MadCap was prevented from participating in the acquisition of the Broadcast Rooftop,

and, thereby, was prevented by AT from obtaining the compensation it would have received if the parties had partnered to acquire the Broadcast Rooftop, as contemplated." (Pl. Mem. of Law in Opp. at 6). In support of the claim, MadCap relies on the report and testimony of its damages expert, Jahn Brodwin. (*See* Affirmation of Y. David Scharf ("Scharf Affirm.") Ex. 30 ("Brodwin Report"); Ex. 31 (Brodwin December 18, 2014 Deposition Transcript ("Brodwin Tr.")).

According to Brodwin,

> MadCap's role as [general partner] in originating and transacting the acquisition of the Broadcast Parcel and subsequent management of the asset as part of a [joint venture] with [American Tower] would have resulted in market rate formula for the distribution of profits between the partners that is typically utilized by real estate and private equity investors.

Scharf Affirm. Ex. 30 at 1. In accordance with the aforementioned formula, and due to American Tower's independent acquisition of the Broadcast Rooftop, Brodwin opined that "MadCap suffered economic damages in an amount equal to $19,302,000 as of [January 1, 2013], plus pre-judgment and post-judgment interest." *Id.* at 6-7. The figure accounts for the following: (1) a promoter's fee, calculated as a percentage of the profits generated by the Broadcast Rooftop; (2) a 10% equity interest in the Broadcast Rooftop; and (3) an "acquisition fee" that represented 1% of the roof's purchase price. *Id.*

During his deposition, Brodwin further explained that if the parties had gone forward with the joint venture, "based on the assumptions that were provided to me in the

[valuation report], plus my own knowledge about how deals like this typically get structured, this is the hypothetical profit that MadCap would have earned." Scharf Affirm. Ex. 31 at 63. When asked whether the damages stemmed from MadCap's not having the opportunity to partner with American Tower, Scharf testified that the damages were an "estimation of the profits MadCap could have earned, whether it was with American Tower or anybody else..." *Id.* at 64-65.

iii. Analysis of MadCap's Claim for Lost Profits

Applying the *Kenford* standard to the facts in this case, it is clear that MadCap has failed to meet its burden. First, MadCap has not shown that the damages were "reasonably certain and directly traceable to the breach." *Kenford Company v. County of Erie,* 67 N.Y.2d 257, 262 (1986). Although MadCap's damages estimate was calculated using a "market rate formula for the distribution of profits between the partners that is typically utilized by real estate and private equity investors," MadCap's model relies on several, significant assumptions, undermining any certainty that the damages projection may have had.

Indeed, the projection is based on the assumption that MadCap decided to partner with American Tower, despite receiving numerous bids, and that American Tower, under no contractual obligation to partner with MadCap, agreed. MadCap also assumes that the parties were able to agree on the terms of the partnership, including the investment model

for the purchase of the Telecom Rights, and the various fees that MadCap now seeks.[1] Finally, MadCap assumes that a contract memorializing those terms was executed by the parties, and the Telecom Rights were successfully purchased pursuant to those terms. Accordingly, MadCap's claim for damages, dependent on each of the above assumptions—with little basis in fact—is nothing more than a speculative projection of lost profits. Although the law does not require "mathematical precision," MadCap has failed to show that the damages were "reasonably certain." *Kenford Company v. County of Erie,* 67 N.Y.2d 257, 261 (1986); *see also Ashland Management v. Janien*, 82 N.Y.2d 395, 403 (1993) (explaining that damages must be ascertainable based on reliable factors and without "undue speculation").

In addition, MadCap has failed to show that the damages were in the contemplation of the parties at the time the Agreement was executed. *See Kenford,* 67 N.Y.2d at 261. As the above makes clear, the Agreement does not memorialize a partnership between MadCap and American Tower, nor does it memorialize the purchase of the Telecom Rights. Rather, the Agreement outlines obligations with respect to non-

[1] It should be noted that although Brodwin's investment model was "typical for real estate and private equity investors," American Tower is not a private equity firm, but an owner and operator of broadcast towers. *See* Scharf Affirm. Ex. 31 at 30. Although MadCap argues that the fees are "typical," in that MadCap has obtained the fees in similar transactions, the proofs submitted show that MadCap has obtained those fees when transacting with private equity investors, and, further, American Tower opposed those fees. *See* Scharf Affirm. Ex. 30 at 12.

circumvention, non-disclosure and confidentiality. Notably, the Agreement refers to the acquisition of the Telecom Rights as the "Proposed Transaction," indicating it was still a hypothetical joint venture. (Compl. Ex. A at 1). Scharf also testified that the damages were an "estimation of the profits MadCap could have earned, whether it was with American Tower or anybody else..." Scharf Affirm. Ex. 31 at 64-65.

Further still, Paragraph 11 of the Agreement provides,

> [American Tower] acknowledges that [MadCap] reserves the right, in its sole discretion, to reject any and all proposals made by or through [American Tower]. Each party further reserves the right to terminate discussions and negotiations at any time and for any reason, and unless and until a written definitive agreement concerning the Proposed Transaction has been executed, neither party hereto...will have any legal obligation of any kind whatsoever with respect to the Transaction. [American Towers] further acknowledges that [MadCap] has not committed to consummate any transaction.

(Compl. Ex. A). Similarly, Paragraph 6, the non-circumvention provision, includes a carve-out that allowed American Tower to negotiate for the Telecom Rights directly with the owner of the property, which, again, demonstrates the parties contemplated alternative outcomes with respect to the Broadcast Rooftop. *Id.* These facts, considered together, indicate that the damages MadCap now seeks were not in the contemplation of the parties at the time the Agreement was executed. *See Kenford Company v. County of Erie,* 67 N.Y.2d 257, 261 (1986).

Nonetheless, MadCap argues that Brodwin's report and testimony sufficiently establishes damages, citing *Care Travel Company v. Pan American World Airways*, 944

F.2d 983 (2d Cir. 1991). There, the parties contracted for a joint venture, whereby the plaintiff would take over as the defendant's general sales agents for flights to India and Pakistan. *Care Travel,* 944 F.2d at 993. Though the defendant, Pan American, argued that the arrangement constituted a "new venture," warranting the stricter standard for lost profits established in *Kenford*, the Second Circuit disagreed, noting that the plaintiff, Care Travel, was specifically sought out because of its preexisting business affiliations with India and Pakistan. *Care Travel,* 944 F.2d at 993. In addition, the court found that the damages sought were not "purely speculative," but supported by expert reports, which relied on Care Travel's prior sales figures in those regions. *Care Travel,* 944 F.2d at 994.

Distinguishing *Care Travel* from the facts at hand is a quick task because the agreement in that case explicitly outlined the terms of the joint venture between the parties. *Care Travel,* 944 F.2d at 986-87. Here, on the other hand, the Agreement does not memorialize the terms of any partnership, indeed, such partnership is referred to as the "Proposed Transaction." Further, the Agreement specifically permitted the parties to transact with others for the acquisition of the Telecom Rights, and pursuant to Paragraph 11, "unless and until a written definitive agreement concerning the Proposed Transaction has been executed, neither party hereto...will have any legal obligation of any kind whatsoever with respect to the Transaction." (Compl. Ex. A).

In light of these observations, the facts here are more akin to those in *Goodstein Construction Corporation v. City of New York*, 80 N.Y.2d 366 (1992), where the plaintiff

sought to recover $800 million from the defendant for breaching two letter agreements in connection with the development of two properties in Manhattan. Pursuant to the agreements, the plaintiff was "to exclusively negotiate the terms and conditions of a land disposition agreement ('LDA')" with the City. *Goodstein,* 80 N.Y.2d at 369. Before an LDA was completed, the City terminated the plaintiff as exclusive negotiator, and Goodstein brought an action asserting breach of contract, breach of the implied covenant of good faith and fair dealing, and tortious interference. *Goodstein,* 80 N.Y.2d at 369-70.

Thereafter, the First Department reversed the trial court's dismissal of the claims for loss of future profits in connection with consummated LDA's. *See Goodstein Construction Corp. v. City of New York*, 169 A.D.2d 229 (1st Dep't 1991). In finding the lost profits were in the contemplation of the parties, the court explained that "the [letter] agreements implicitly indicate that the plaintiff reasonably anticipated and the City must have believed, that the agreements were entered into by the plaintiff for profit-making purposes." *Goodstein,* 169 A.D.2d at 237.

The Court of Appeals, however, disagreed, explaining that the City's obligations did not arise from the LDA, but the "preliminary agreement to negotiate an LDA." *Goodstein,* 80 N.Y.2d at 372. The Court concluded that

> [t]o allow the profits that the plaintiff might have made under the prospective LDA as the damages for breach of the exclusive negotiating agreements would be basing damages not on the exclusive negotiating agreements but on the prospective terms of a nonexistent contract which the City was fully at liberty to reject.

Goodstein, 80 N.Y.2d at 373. According to the Court of Appeals, awarding the plaintiff lost profits based on these projections was "illogical and without any basis." *Goodstein,* 80 N.Y.2d at 373. (internal citations omitted).

Here, holding American Tower to the "prospective terms of a nonexistent contract" would be similarly "illogical," where the Agreement expressly allowed MadCap to contract with other parties. *Goodstein,* 80 N.Y.2d at 373. Further, as in *Goodstein*, should this court permit MadCap to continue on its breach of contract claim, it is not only possible, but likely, that Plaintiff would end up in a better position than if it had never contracted. *See Goodstein,* 80 N.Y.2d at 373 (explaining that "contract damages are ordinarily intended to give the injured party the benefit of the bargain by awarding a sum of money that will, to the extent possible, put that party in as good a position as it would have been had the contract been performed") (internal citation omitted).

As previously explained, the Court would have to presume the existence of a partnership agreement, and the terms therein, including the various fees MadCap now seeks as lost profits. Such a conclusion is foreclosed by *Kenford Company v. County of Eerie*, *Goodstein Construction Company v. City of New York*, and although MadCap argues otherwise, the Court's decision in *Ashland Management v. Janien,* 82 N.Y.2d 395 (1993), does not dictate a different result.

Finally, this Court finds that Plaintiff's reliance on *Borne Chemical Co. v. Dictrow*, 85 A.D.2d 646 (2d Dep't 1981), and *Pencom Sys. v. Shapiro*, 193 A.D.2d 561 (1st Dep't 1993), is misplaced. In *Borne*, the Second Department found that the plaintiff established a loss of business as a result of the defendants' violation of a non-compete provision in the employment agreement. *Borne*, 85 A.D.2d at 650. Similarly, in *Pencom*, the First Department explained that the proper measure of damages for a breach of an employment agreement's non-compete provision was lost profit. *Pencom*, 193 A.D.2d at 561. Despite Plaintiff's argument that the non-compete provisions in those cases—between employer and employee—are analogous to the non-circumvent provision in the Agreement, that proposition is belied by the facts, which demonstrate that a partnership between MadCap and American Tower was never created. Thus, the holdings in *Borne* and *Pencom* are inapposite.

Since Plaintiff has failed to prove the existence of non-speculative damages—and, at most, premises its damages claim on the prospective terms of a nonexistent contract—American Tower's motion for summary judgment on MadCap's claim for breach of contract must be granted, and Plaintiff's cross-motion must be denied.

C. MadCap's Claim for Breach of the Covenant of Good Faith and Fair Dealing

Next, American Tower moves for summary judgment on MadCap's second cause of action for breach of the implied covenant of good faith and fair dealing.

"Implicit in every contract is a covenant that in the course of performing the contract, 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." *MP Cool Investments Ltd. v. Forkosh*, 2016 WL 3042983, at *5 (1st Dep't 2016). However, the duty "is not without limits, and no obligation can be implied that would be inconsistent with other terms of the contractual relationship." *Staffenberg v. Fairfield Pagma Associates, L.P.*, 95 A.D.3d 873, 875 (2d Dep't 2012) (internal citation omitted). "Moreover, a claim for breach of the implied covenant of good faith and fair dealing 'may not be used as a substitute for a nonviable claim of breach of contract.'" *StarVest Partners II, L.P., v. Emportal, Inc.*, 101 A.D.3d 610, 613 (1st Dep't 2012) (citing *Sheth v. New York Life. Ins. Co.*, 273 A.D.2d 72, 73 (1st Dep't 2000)).

Here, MadCap claims that American Tower breached the implied covenant of good faith and fair dealing by using its confidential information to make an "end-run" around MadCap to acquire the Telecom Rights. (Compl. ¶¶ 80, 87-92). Although MadCap asserts that American Tower did so in bad faith, a bald allegation of bad faith, lacking evidentiary support, is insufficient to distinguish the claim from MadCap's "nonviable" breach of contract claim, seeking identical damages, so therefore must also be dismissed. *See StarVest Partners II, L.P.*, 101 A.D.3d at 613 (dismissing claim for breach of the implied covenant of good faith and fair dealing); *see also Credit Suisse First Boston v. Utrecht-America Finance Co.*, 80 A.D.3d 485, 488 (1st Dep't 2011)

(affirming the trial court's dismissal where the claim "merely duplicates the cause of action for breach of contract" and was therefore "redundant"); *see also Hawthorne Group v. RRE Ventures*, 7 A.D.3d 320, 323 (1st Dep't 2004) (same) (internal quotations omitted).

MadCap further attempts to distinguish this claim from the breach of contract claim by advancing an alternate theory of damages, albeit belatedly.[2] MadCap asserts that the lost profits could be measured as the difference between the contract price paid by American Tower and the fair market value of the Telecom Rights, which, according to MadCap, amounts to $5.25 million. (*See* Pl. Mem. in Opp. at 22-23). First, this theory of damages relies on the same series of assumptions this Court has previously found speculative, and rejected. Further, even if this Court were to accept the assumptions as facts, MadCap has not provided any evidentiary support for the figure, thus failing to raise a triable issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

In light of these findings, American Tower's motion for summary judgment on the second cause of action is granted, and MadCap's cross-motion is denied.

[2] MadCap concedes that theory was not presented until well after the close of discovery. (*See* Pl. Reply Mem. at 11).

D. MadCap's Claim for Unjust Enrichment

Finally, American Tower moves for summary judgment on MadCap's claim for unjust enrichment. A plaintiff seeking to recover on a claim for unjust enrichment must demonstrate that the plaintiff bestowed a benefit upon the defendant, that the benefit remains with the defendant, and that the defendant has not adequately compensated the plaintiff for that benefit. *See Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114, 120-21 (1st Dep't 1998). "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 388 (1987); *Rashid v. B. Taxi Mgt. Inc.*, 107 A.D.3d 555, 556 (1st Dep't 2013).

Here, MadCap's claim is barred by the existence of a written contract governing the parties' rights and obligations. Thus, even if proven, MadCap's claim it is owed the 1% acquisition fee of $725,000 for introducing American Tower to the Broadcast Rooftop does not provide a basis for recovery on the claim for unjust enrichment. (*See* Pl. Mem. in Opp. at 24). Accordingly, American Tower's motion for summary judgment is granted on the remaining cause of action for unjust enrichment, MadCap's cross-motion is denied.

(Order on the following page)

III. Conclusion

For the foregoing reasons, it is

ORDERED that Defendants' motion for summary judgment is granted and the complaint is dismissed in its entirety with costs and disbursements to Defendants as taxed by the Clerk of the Court, upon submission of an appropriate bill of costs; and it is further

ORDERED that Plaintiff's cross-motion for summary judgment is denied on the merits; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: New York, New York
July 19, 2016

ENTER

Hon. Eileen Bransten, J.S.C.