IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

ARSENAL, INC.	:	OCTOBER TERM, 2007
	:	
Plaintiff,	:	NO. 03294
	:	
v.	:	COMMERCE PROGRAM
	:	
AIG BAKER DEVELOPMENT, L.L.C.	:	Control Nos.: 08106720, 08111966,
	:	08116344, 09012415
Defendant.	:	

ORDER

AND NOW, this 20th day of March, 2009, upon consideration of AIG Baker Development, L.L.C.'s ("AIG") Motion for Judgment on the Pleadings, the parties' cross-Motions for Summary Judgment, AIG's Motion for Reconsideration, the responses thereto, and all other matters of record, and in accord with the Opinion issued simultaneously, it is **ORDERED** as follows:

1) AIG's Motion for Judgment on the Pleadings is **DENIED**;

2) AIG's Motion for Reconsideration is **DENIED**;

3) AIG's Motion for Summary Judgment and Arsenal, Inc.'s ("Arsenal") Motion for Summary Judgment are **GRANTED in part** and **DENIED in part** as follows:

   a) AIG's Counterclaims are **DISMISSED**;

   b) **JUDGMENT** is entered against AIG and in favor of Arsenal on Arsenal's claim for breach of contract in the amount of $1,201,200.00 with interest at the rate of six percent (6%) from September 21, 2005; and

c) AIG must assign and deliver to Arsenal those Plan Turnover documents[1] in AIG's possession as of October 17, 2005.

BY THE COURT,

ARNOLD L. NEW, J.

[1] The "Plan Turnover" documents are defined in the parties' Agreement of Sale, Addendum, ¶ II(b).

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Defendant.	:	

OPINION

This dispute involves a failed real estate transaction in which plaintiff Arsenal, Inc. ("Arsenal") was going to sell a portion of the former Frankford Arsenal (the "Property") to defendant AIG Baker Development, LLC ("AIG"). AIG intended to build a large retail "box" store on the Property.

The Property is environmentally contaminated after years of use by the federal government as a munitions manufacturing and testing facility. Any development of the Property necessarily will involve environmental cleanup, or at least containment, of the multiple contaminants in the soil and ground water. The cleanup/containment must be approved by the Department of Environmental Protection of the Commonwealth of Pennsylvania ("PADEP") before development may begin. Arsenal has been in communication with the PADEP for many years regarding the Property.[1]

In early 2005, Arsenal and AIG negotiated the sale of the Property to AIG. AIG claims Arsenal represented it would take only 6 months and cost $150,000 in legal and engineering fees

[1] *See* June 21, 2002 Letter from PADEP to Arsenal attached to AIG's Motion for Summary Judgment as Ex. 7.

to obtain PADEP's approval of a plan to cleanup the Property. An approved plan is commonly referred to as a "Buyer/Seller Agreement" (hereinafter "B/SA").

On May 11, 2005, Arsenal and AIG entered into a written Agreement of Sale for the Property (the "Agreement"). In the Agreement, the parties agreed to the following timeline and terms:

May 11, 2005	AIG was required to make an "Initial Deposit" of $500,000, and the120 day "Due Diligence Period" began. During this period, AIG was "to do feasibility studies, including . . . (i) to enter upon the Property to perform such tests, surveys, inspections and examinations of the Property as [AIG] deems advisable, including soil and environmental tests (including core drilling and related inspections); (ii) to make investigations with regard to title to the Property, matters of survey, flood plain of the Property, wetlands on the Property, utilities availability, zoning and building code and other applicable governmental requirements with regard to the Property and the use thereof; (iii) to conduct market feasibility studies and any and all other studies as [AIG] may deem necessary or appropriate in order to determine the feasibility of the Property for [AIG's] intended use; and (iv) to meet with all governmental agencies regarding entitlements, site planning and building permit approvals for the Property (the 'Due Diligence Inspections')."[2]
June 11, 2005	AIG was required to "identify and retain an engineering firm and legal counsel, pursuant to contracts approved in advance by [Arsenal], to prepare the documentation required for submission of the [B/SA]. . . . Immediately following [Arsenal's] approval of the engineer and counsel, [AIG] shall place in escrow . . . an amount equal to the estimated cost for the engineer and counsel to prepare the [B/SA] (the 'Engineering Deposit'). . . . In the event [AIG] terminates [the] Agreement for any reason other than the default of [Arsenal], the Engineering Deposit will be released to [Arsenal]."[3]
Sept. 8, 2005	End of 120 day Due Diligence Period. "If [AIG is] dissatisfied for any reason whatsoever with the result of the Due Diligence Inspections, then [AIG has] the option to terminate [the] Agreement by notice to [Arsenal] at any time on or before expiration of the Due Diligence Period (the 'Due Diligence Deadline Date'), in which event, except for matters that expressly survive termination of the Agreement, the Agreement shall be

[2] Agreement, Addendum, ¶ II(a), attached to Complaint as Ex. A.

[3] *Id.*, Addendum, ¶ III(b).

	null and void and the Escrowee shall pay the Initial Deposit to [AIG] and neither Party shall have any further liabilities or obligations hereunder, except as otherwise set forth herein."[4] * * * "If [AIG] fails to terminate [the] Agreement prior to the Due Diligence Deadline Date . . . [AIG] shall deposit the additional sum of [$500,000] (the 'Second Deposit')."[5]
Oct. 17, 2005	Intended "Settlement Date." "[AIG], at [AIG's] expense, shall diligently pursue obtaining the [B/SA] so as to permit Settlement to occur on [the Settlement Date]." If the B/SA is not procured from PADEP by that date, the Settlement Date may be extended by AIG for up to six months and subsequently for up to six months by Arsenal.[6] * * * "In the event Settlement shall not occur . . for any reason other than default of [Arsenal], [AIG] shall promptly assign and deliver to [Arsenal] (i) all Approvals, (ii) all leases, letters of intent and other agreements relating in any way to leasing the Property; and (iii) all other documents (including, but not limited to, applications, permits and approvals) and all other plans, specifications, surveys, maps, drawings, engineering, environmental and feasibility studies and reports, leasing data and contact list, and all other similar documents pertaining to the Property which [AIG] may then have, or ever had, in its possession . . . together with all other documentation in the possession of, or formerly in the possession of, or owned by or ordered by [AIG], or prepared at [AIG's] request, which would or could reasonably be used by [Arsenal] in connection with the development and/or operation of the Property for lease or sale . . . (the "Plan Turnover"). . . . The Plan Turnover shall survive any termination of the Agreement, except Settlement or termination due to [Arsenal's] default.[7]

There is no dispute AIG timely put the Initial Deposit of $500,000 in escrow. AIG also timely retained the engineering firm, Langan Engineering ("Langan"), and legal counsel, Manko Gold Katcher Fox, LLP ("MGKF"). Both Langan and MGKF had previously worked for, and were approved by, Arsenal. On June 23, 2005, AIG timely deposited $201, 020 in escrow as an

[4] Agreement, Addendum, ¶ III(a).

[5] *Id.*, ¶ 2(b).

[6] *Id.*, Addendum, ¶ III(b).

[7] *Id.*, Addendum, ¶ II(b).

Engineering Deposit.[8] The $201,200 was based upon estimates provided to AIG by Langan and MGKF.[9]

On June 16, 2005, AIG had its first meeting with PADEP.[10] AIG continued to meet with PADEP and to conduct other Due Diligence Inspections throughout the Due Diligence Period. What it discovered caused it some concern, so on September 6, 2005, two days before the Due Diligence Deadline Date, AIG emailed Arsenal the following:

> Mark, at this point in time, I can not recommend to my partners here and AIG that we proceed further at the risk of $1m. Our September 8th date was actually based on where everyone thought we would be with PADEP and an accurate cost to the environmental clean-up and today we are just not there. We have been told to perform extensive additional tests and site characteristics beyond what was initially discussed and agreed upon back in June. PADEP has gone further and requested additional activities for the compound perchlorate which was never mentioned. PADEP also requested further testings on some radon type gas that, as we are told, could require venting slabs in certain areas and we have no way of knowing the retailer tolerance if this were to occur. The storm water testing is just another.
>
> The sanitary sewer running N/S was also a surprise and we have to determine how to avoid. . . .
>
> We have buried debris over a large area that will likely have to be excavated, disposed off-site and replaced with imported structural fill. . . .
>
> We are now of the opinion the original number of $6m for demo does not include some significant costs that are being evaluated. . . .
>
> With all this being said, we remain very very positive and interested in staying the course but until we get factual data/costs and final positions from PADEP we just can not place our deposit at risk. We will continue to fund our side in an effort to reach closure on the remediation required by PADEP . . . Our professionals see mid November as the timeframe for the first round of comments from PADEP

[8] First Amended Counterclaims, Ex. 1.

[9] *See* Estimate provided by Langan attached to First Amended Counterclaims as Ex. 2; Estimate provided by MGKF attached to AIG's Motion for Summary Judgment as Ex. 32.

[10] *See* Affidavit of Darryl D. Borrelli, ¶ 26, attached to AIG's Motion for Summary Judgment as Ex. 81.

> and sometime in January as final. At whatever time that occurs, we are ready to go hard.[11]

After AIG expressed its concerns, the parties entered into four separate "Amendments to Agreement of Sale." The First Amendment was signed September 8, 2005 and extended the Due Diligence Deadline Date until September 11, 2005. The Fourth Amendment was signed September 16, 2005 and extended the Due Diligence Deadline Date until September 21, 2005. Each of those Amendments provided as follows: "Reaffirmation. As amended hereby, the Agreement of Sale remains in full force and effect."[12]

There is no dispute AIG did not make the Second Deposit, the B/SA was never obtained from the PADEP, and Settlement did not occur. The parties attempted for the next year and a half to determine the extent of the contamination and cleanup costs and to negotiate further amendments to the Agreement, but they never reached agreement on new terms. In April, 2007, AIG informed Arsenal it had "made the decision to withdraw efforts to develop the property."[13] In response, Arsenal alerted AIG to numerous breaches of the Agreement that had occurred, including AIG's failure to pay the Second Deposit and its failure to go to Settlement on the Property.[14]

Arsenal filed this breach of contract action against AIG in October, 2007. AIG filed counterclaims for fraudulent and innocent representation and omission. Both parties have moved for summary judgment on all claims, which motions are presently before the court.

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[11] September 6, 2005 email from Bubba Smith of AIG to Mark Hankin of Arsenal attached to AIG's Motion for Summary Judgment as Ex. 50.

[12] Amendments to Agreement attached to Complaint as Exs. B, C, D, and E.

[13] April 26, 2007 Email from Bubba Smith to Mark Hankin attached to First Amended Counterclaims as Ex. 5.

[14] April 27, 2007 Email from Mark Hankin to Bubba Smith attached to AIG's Motion for Summary Judgment as Ex. 53.

I. AIG's Claims For Misrepresentation/Omission Must Be Dismissed.

AIG claims the Agreement of Sale was fraudulently induced and therefore is void. AIG also claims to have suffered damages due to Arsenal's fraud. AIG bases its fraud claims on the following facts:

1. Arsenal did not disclose to AIG an October 2003 Letter from PADEP indicating extensive testing and remediation might be required on the Property.
2. Arsenal did not disclose to AIG a March 2000 estimate from Langan indicating the cost of obtaining a B/SA for the Property would be $395,140.
3. Arsenal did not disclose to AIG a February 2003 estimate from Langan indicating the cost of obtaining a B/SA for the Property would be $345,805.
4. Arsenal told AIG in February 2005 it would take only six months and cost $150,000 in legal and engineering fees to obtain the B/SA.

The first three items are all omissions. There are disputed issues of fact regarding the relevance of the contents of each of these omitted documents.[15] For the purposes of deciding the present Motions only, the court assumes the PADEP Letter and the two Langan Estimates contain information relevant to obtaining a B/SA for the Property in 2005.

The fourth item is an affirmative misrepresentation. There is a disputed issue of fact regarding whether such representation was made. For purposes of deciding the present Motions only, the court assumes the statement was made.

> The elements of intentional misrepresentation are as follows: (1) A representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and,(6) the resulting injury was proximately caused by the

[15] Arsenal claims the PADEP letter was unauthorized and was withdrawn by PADEP. Arsenal also claims many of the costs included in the Langan Estimates were for services unrelated to obtaining a B/SA.

> reliance. The tort of intentional non-disclosure has the same elements as intentional misrepresentation except in the case of intentional non-disclosure, the party intentionally conceals a material fact rather than making an affirmative misrepresentation.[16]

In this case, AIG has failed to satisfy elements 5 and 6, at least, of its claims for misrepresentation/omission.

All of the alleged omissions/misrepresentations constitute statements of opinion regarding the cost, timing, and requirements for obtaining a B/SA.

> The recipient of a fraudulent misrepresentation solely of the maker's opinion is not justified in relying upon it in a transaction with the maker, unless the fact to which the opinion relates is material, and the maker
> (a) purports to have special knowledge of the matter that the recipient does not have, or
> (b) stands in a fiduciary or other similar relation of trust and confidence to the recipient, or
> (c) has successfully endeavored to secure the confidence of the recipient, or
> (d) has some other special reason to expect that the recipient will rely on his opinion.[17]

> If the subject matter of the transaction is one upon which both parties have an approximately equal competence to form a reliable opinion, each must trust to his own judgment and neither is justified in relying upon the opinion of the other. The law assumes that the ordinary man has a reasonable competence to form his own opinion as to the advisability of entering into those transactions that form part of the ordinary routine of life. The fact that one of the two parties to a bargain is less astute than the other does not justify him in relying upon the judgment of the other. This is true even though the transaction in question is one in which the one party knows that the other is somewhat more conversant with the value and quality of the things about which they are bargaining. Thus the purchaser of an ordinary commodity is not justified in relying upon the vendor's opinion of its quality or worth. For example, one who is purchasing a horse from a dealer is not justified in relying upon the dealer's opinion, although the latter has a greater experience in judging the effect of the factors which determine its value.[18]

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[16] Bortz v. Noon, 556 Pa. 489, 499, 729 A.2d 555, 560 (1999).

[17] Restatement (Second) Torts, § 542 (1977).

[18] *Id.*, Comment d.

Under the facts of this case, AIG was not justified in relying upon Arsenal's misrepresentations and omissions regarding the ease of obtaining a B/SA for the Property.

First, the Agreement of Sale contains an express disclaimer of all representations not set forth in the Agreement.[19] Such a disclaimer is intended to, and should, put a reasonable person on notice that all prior oral representations, such as those allegedly made by Arsenal to AIG, cannot be relied upon unless they are expressly set forth in the Agreement.[20]

Second, the Agreement gave AIG a Due Diligence Period during which it was permitted to meet with the third parties, *i.e.*, Langan and the PADEP, who provided the information Arsenal allegedly omitted to give to AIG. During the Due Diligence Period, AIG met with the PADEP and Langan, so it had the opportunity to learn "straight from the horse's mouth" what was needed to get the B/SA. During this period, AIG also received opinions from MGKF and Langan as to their estimated costs. Despite the larger estimates they previously gave to Arsenal, they estimated the costs of obtaining a B/SA to be $201,200 in June, 2005.

The facts AIG could have learned, and did learn, during the Due Diligence period from sources other than Arsenal put AIG on equal footing with Arsenal. AIG could form its own opinion as to what time, money, and effort was needed to obtain a B/SA and to remediate the environmental conditions at the Property. If AIG formed a negative opinion based on the information it received from these knowledgeable third parties, it had the right to terminate the

[19] "Entire Agreement. This Agreement, including Addendum 1, embodies the entire agreement between [Arsenal] and [AIG] and there are no other terms, obligations, covenants, representations, statements, or conditions, oral or otherwise, of any kind whatsoever concerning this transaction." Agreement, ¶ 18.

[20] *See* Yocca v. Pittsburgh Steelers Sports, Inc., 578 Pa. 479, 501-502, 854 A.2d 425, 439 (2004) ("given this Commonwealth's adoption of the parol evidence rule, [plaintiff] simply cannot be said to have justifiably relied on any representations made by the [defendant] before the parties entered into the Agreement. Indeed, by signing the Agreement, which contained an integration clause stating that the terms of the Agreement superseded all of the parties' previous representations and agreements, [plaintiff] explicitly disclaimed reliance on any such representations.")

Agreement before the end of the Due Diligence Period. If it failed to terminate the Agreement in the face of negative information, it can blame only itself, not Arsenal.

II. AIG Breached The Contract By Failing To Pay The Second Deposit At The Close Of The Due Diligence Period.

Arsenal argues AIG breached the Agreement in many ways, so Arsenal is entitled to damages for the breach. AIG claims it is not in breach because: 1) it properly terminated the Agreement; 2) a condition precedent to its performance did not occur; 3) the Agreement was modified and AIG's performance was waived by Arsenal. The facts do not support AIG's version of events.

Under the Agreement, if AIG failed to terminate the Agreement on or before the Due Diligence Deadline Date, AIG was required to pay a Second Deposit of $500,000 by that date. The original Due Diligence Deadline Date was September 8, 2005. On September 6th, AIG sent an email it claims terminated the Agreement. The email does not clearly terminate the Agreement because, in it, AIG contemplates continuing to fund its side of the transaction set forth in the Agreement.

Even if the email did contain language clearly terminating the Agreement, AIG revoked any such termination by subsequently entering into four separate Amendments to the Agreement of Sale. In each of the four Amendments, AIG reaffirmed that "the Agreement of Sale remains in full force and effect," and AIG agreed to extend the Due Diligence Deadline Date. The final extended Due Diligence Deadline Date was September 21, 2005. Under the Agreement, as amended by the Amendments, AIG had to terminate the Agreement or pay the Second Deposit on that date. AIG has produced no evidence it terminated the Agreement after the Amendments were executed. It never made the Second Deposit. Therefore, it breached the Agreement.

AIG claims it did not breach the Agreement because obtaining a B/SA was a condition precedent to its performance under the Agreement.[21] Obtaining a B/SA was a (waivable) condition precedent to Settlement on the Property.[22] It was not a condition precedent to payment of the Second Deposit.[23] Instead, the Agreement anticipates the B/SA will be obtained, if at all, after the Second Deposit is made.[24]

AIG claims Arsenal waived AIG's breach or otherwise agreed to modify or rescind the Agreement by negotiating with AIG for a year and a half to try to complete the transactions contemplated in the Agreement. AIG does not point to any express, written waiver, modification or rescission document. Nor does AIG point to any course of conduct by Arsenal that would estop Arsenal from subsequently asserting its rights under the Agreement, including its right to declare AIG in breach for failing to pay the Second Deposit.

III. Arsenal Is Entitled To Liquidated Damages From AIG For Breach Of The Agreement.

In the event of a breach of the Agreement by AIG, Arsenal is entitled to receive the Initial Deposit, the Second Deposit, and the Engineering Deposit as liquidated damages.[25] There is no dispute AIG made the Initial Deposit of $500,000, nor is there any dispute AIG did not make the Second Deposit of $500,000. There is also no dispute AIG deposited $201,200 in escrow as the Engineering Deposit. There is, however, a dispute whether this is the only amount due from AIG as the Engineering Deposit.

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[21] AIG's Motion for Summary Judgment, ¶¶ 94-95

[22] Agreement, Addendum, ¶ III(b).

[23] *Id.*, ¶ 2(b).

[24] *Id.*, Addendum, ¶ III(b).

[25] *Id.*, Addendum, ¶ V(a).

Arsenal argues the Engineering Deposit should be $1,362,964.64. Arsenal bases this claim on what was eventually spent by AIG and on later estimates given by Langan regarding the ultimate cost of obtaining a B/SA. AIG argues it was required to deposit only $201,200 based on Langan's and MGKF's initial estimates of the cost for obtaining the B/SA.

The Agreement provides:

> Within thirty (30) days after the Effective Date [May 11, 2005], [AIG] shall identify and retain an engineering firm and legal counsel, pursuant to contracts approved in advance by [Arsenal], to prepare the documentation required for submission of the Buyer-Seller Agreement (the "Required Submission"). . . Immediately following [Arsenal's] approval of the engineer and counsel, [AIG] shall place in escrow with the Escrow Agent an amount equal to the estimated cost for the engineer and counsel to prepare the Required Submission (the "Engineering Deposit").

AIG complied with this provision. Upon signing the Agreement, AIG retained, with Arsenal's approval, Langan as its engineering firm and MGKF as its legal counsel. On June 2, 2005, Langan estimated the cost of its services towards the B/SA would be $176,200.[26] On June 6, 2005, MGKF estimated its services would be $25,000.[27] On June 23, 2005, AIG deposited the total of those two estimates in escrow as required.[28]

The Agreement requires AIG to make only one deposit, in June 2005. AIG made that deposit based on the estimates given to it at the time. Arsenal knew the amount of the deposit when it was made and did not object to it.[29] Although Arsenal is entitled to recover the Engineering Deposit as part of its liquidated damages, Arsenal is not entitled to more than the amount AIG deposited.

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[26] AIG's Motion for Summary Judgment, Ex. 34.

[27] *Id.*, Ex. 35.

[28] *Id.*, Ex. 36.

[29] *Id.*

IV. Arsenal Is Entitled To Limited Plan Turnover Documents.

In addition to paying damages for breach of the Agreement, AIG must also turn over to Arsenal certain documents and information it acquired while attempting to obtain a B/SA for the Property. The Agreement provides:

> In the event Settlement shall not occur hereunder for any reason other than default of [Arsenal], [AIG] shall promptly assign and deliver to [Arsenal] (i) all Approvals, (ii) all leases, letters of intent and other agreements relating in any way to leasing the Property; and (iii) all other documents (including, but not limited to, applications, permits and approvals) and all other plans, specifications, surveys, maps, drawings, engineering, environmental and feasibility studies and reports, leasing data and contact list, and all other similar documents pertaining to the Property which [AIG] may then have, or ever had, in its possession . . . together with all other documentation in the possession of, or formerly in the possession of, or owned by or ordered by [AIG], or prepared at [AIG's] request, which would or could reasonably be used by [Arsenal] in connection with the development and/or operation of the Property for lease or sale . . . (the "Plan Turnover"). . . . The Plan Turnover shall survive any termination of the Agreement, except Settlement or termination due to [Arsenal's] default.[30]

Under the Agreement, Settlement was to occur on October 17, 2005.[31] It did not occur then or ever. Since AIG had already breached the Agreement at that time, AIG was required to turn over all Plan Turnover documents in its possession "promptly" after October, 17, 2005. However, AIG has no obligation to turn over documents and information it obtained after that date.

V. Arsenal Is Not Entitled To Collect Consequential Damages From AIG.

In addition to collecting the liquidated damages provided in the Agreement, Arsenal claims it is entitled to $1,585,120 in consequential damages due to AIG's failure to turn over the Plan Turnover documents as required under the Agreement. The Agreement provides:

> In the event [AIG] violates or fails to fulfill or perform any of the other terms and conditions of this Agreement required to be performed by [AIG], . . . [Arsenal]

[30] Agreement, Addendum, ¶ II(b).

[31] *Id.*, Addendum, ¶ III(b).

> shall have to option to terminate this Agreement by notice to [AIG], in which event, except for matters that expressly survive termination of the Agreement, the Agreement shall be terminated and be null and void, the Parties shall have no further rights or obligations hereunder (except as otherwise provided in this Agreement), and the Escrowee shall pay the Deposit and the Engineering Deposit to [Arsenal], as liquidated damages and not as a penalty. [ARSENAL] AND [AIG] AGREE THAT IN THE EVENT OF A DEFAULT BY BUYER HEREUNDER, THE DAMAGES RESULTING TO [ARSENAL] BY REASON OF SUCH DEFAULT ARE NOW AND THEN WOULD BE IMPRACTICAL TO DETERMINE AND THAT THE BEST ESTIMATE, BASED ON ALL THE CIRCUMSTANCES EXISTING ON THE DATE OF THIS AGREEMENT, OF THE TOTAL DAMAGES THAT [ARSENAL] WOULD SUFFER IS AND SHALL BE AN AMOUNT EQUAL TO THE DEPOSIT AND THE ENGINEERING DEPOSIT.[32]

The language of this Liquidated Damages provision is clear. It applies to all breaches and is the exclusive damages remedy available to Arsenal. The Engineering Deposit and the Deposit, which includes the Initial and Second Deposits, are the only damages Arsenal may recover for AIG's breach, even with respect to those "matters that expressly survive termination of the Agreement," such as the Plan Turnover requirements.

The court's prior Order overruling AIG's Preliminary Objections on this issue does not have preclusive effect since it was issued without Opinion. It is likely, in this fact intensive case, the court erred on the side of caution in letting Arsenal's consequential damages claim survive Preliminary Objection in case the Agreement or some provision of it was later found to be void. The court is not precluded at this stage from dismissing the consequential damages claim based on the language of the Agreement. Even if the court had previously ruled Arsenal is entitled to consequential damages, that ruling would not be binding law of the case because it is clearly erroneous.[33]

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[32] Agreement, Addendum ¶ V(a).

[33] Zane v. Friends Hosp., 575 Pa. 236, 243-244, 836 A.2d 25, 29-30 (2003) ("One of the distinct rules that are encompassed within the 'law of the case' doctrine is the coordinate jurisdiction rule. Generally, the coordinate jurisdiction rule commands that upon transfer of a matter between trial judges of coordinate jurisdiction, a transferee

VI. Arsenal Is Entitled To Interest From AIG.

AIG had a duty to pay the Second Deposit on or before September 21, 2005. Since it failed to do so, it breached the parties' Agreement on that date. Upon the occurrence of AIG's breach, the Initial Deposit, the Second Deposit, and the Engineering Deposit became immediately due and payable to Arsenal. Since AIG did not make these required payments to Arsenal, it owes Arsenal interest[34] on them from that date at the rate of six percent.[35]

VII. Arsenal Is Not Entitled to Collect Its Attorneys Fees From AIG.

Arsenal claims it is entitled to its attorneys fees incurred in this action. The Agreement provides for the payment of attorneys fees in limited circumstances:

> The [Liquidated Damages Provision] shall not limit [Arsenal's] right, if [AIG] fails to terminate this Agreement prior to 5:00 p.m. EST on the Due Diligence Expiration Date, to take all legal action necessary or appropriate to require [AIG] to make the Second Deposit (plus legal fees for collection) and have it released to [Arsenal] as part of [Arsenal's] liquidated damages . . .[36]

The present action is not simply an action filed to collect the Second Deposit. Instead, Arsenal is attempting in this action to obtain much more from AIG than the Second Deposit. Arsenal's legal fees incurred in prosecuting its many claims and in defending against AIG's counterclaims in this action do not constitute "legal fees for collection" of the Second Deposit recoverable from AIG.

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trial judge may not alter resolution of a legal question previously decided by a transferor trial judge. . . . [A]n exception is permitted where the prior holding was clearly erroneous and would create a manifest injustice if followed.").

[34] Fernandez v. Levin, 519 Pa. 375, 379, 548 A.2d 1191, 1193 (1988)("For over a century it has been the law of this Commonwealth that the right to interest upon money owing upon contract is a legal right. That right to interest begins at the time payment is withheld after it has been the duty of the debtor to make such payment.". Restatement (Second) Contracts, § 354 (1981) ("If the breach consists of a failure to pay a definite sum in money or to render a performance with fixed or ascertainable monetary value, interest is recoverable from the time for performance on the amount due less all deductions to which the party in breach is entitled.")

[35] 41 P.S. § 202.

[36] Agreement, Addendum ¶ V(a).

VIII. AIG's Motion For Reconsideration Must Be Denied.

In ruling on Arsenal's Preliminary Objections to AIG's Counterclaims, the court dismissed AIG's claim for breach of contract because it was redundant of its misrepresentation/omission claims. Arsenal's alleged failure to provide material information to AIG before the Agreement was signed is not a breach of contract. It is, at best, a basis for a claim for fraud in the inducement. Likewise, Arsenal's failure to inform AIG of an environmental claim asserted against the Property after AIG breached the Agreement, is not a breach of contract by Arsenal.

CONCLUSION

For all the foregoing reasons, AIG's Motion for Judgment on the Pleadings and Motion for Reconsideration are denied, and the parties' Cross-Motions for Summary Judgment are granted in part and denied in part.

BY THE COURT,

_____

ARNOLD L. NEW, J.