

At an IAS Term, Part Comm-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 29<sup>th</sup> day of May, 2007.

P R E S E N T:

HON. CAROLYN E. DEMAREST,

Justice.

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NEW YORK TRANS HARBOR LLC, D/B/A

NEW YORK WATER TAXI,

Plaintiff,

Index No. 23423/06

- against -

DEREKTOR SHIPYARDS CONN., LLC , et ano.,

Defendants.

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The following papers numbered 1 to 3 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1 - 2
Opposing Affidavits (Affirmations) _____	3
Reply Affidavits (Affirmations) _____	_____
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers in this action by plaintiff New York Trans Harbor LLC, d/b/a New York Water Taxi (NYWT) alleging, inter alia, breach of a January 31, 2002 contract (the Agreement) to design and construct six aluminum water taxis (the vessels), defendants Derektor Shipyards Conn., LLC (Derektor CT) and Robert E. Derektor, Inc. (Derektor NY) (collectively, defendants) move for an order dismissing: (1)

NYWT's complaint as against NY Derektor based upon an Assignment and Assumption Agreement dated January 1, 2003, (2) NYWT's first cause of action for breach of contract design due to NYWT's alleged acceptance of the design in accordance with the terms of the Agreement, (3) NYWT's first and second causes of action for breach of contract-design and breach of contract- workmanship, respectively, based upon the ground that any remedies under the Agreement are limited to a claim under the Agreement's warranty provision, (4) NYWT's third cause of action for breach of contract-warranty based upon the ground that the warranty period has expired, or, in the alternative, because the Agreement limits the remedies under the warranty to repair or replacement of any defects, (5) all of NYWT's claims for consequential damages on the basis that the Agreement specifically excludes any liability for consequential damages, (6) all of NYWT's claims for incidental damages based on the ground that none of the factual allegations in NYWT's complaint serve as a legal basis for incidental damages, (7) all of NYWT's claims for attorney's fees and costs on the basis that NYWT's complaint fails to state a legally cognizable basis for such claims, and (8) NYWT's fourth cause of action for rescission/revocation of acceptance due to NYWT's alleged failure to declare or seek a rescission or revocation within a reasonable time.

NYWT operates a commercial ferry service that transports commuters, tourists, and other passengers around the New York City Harbor area and between New York and New Jersey. On January 31, 2002, NYWT, as buyer, and Derektor NY, as builder,

entered into the Agreement under which Derecktor NY agreed to design, engineer, construct, test, and deliver the vessels for passenger transport in accordance with the contract documents as modified by change orders, if any, for the purchase price of \$4,800,000. Derecktor NY completed and delivered the first three vessels on August 7, August 23, and September 21, 2002. NYWT asserts that at the time of delivery and after placing these vessels in operation, certain structural and mechanical problems became apparent. NYWT claims that it immediately complained to Derecktor NY about these problems, and that Derecktor NY assured it that these problems would be rectified. At the same time, Derecktor NY complained that it had underbid the job and refused to construct the remaining three vessels unless NYWT agreed to a price increase. NYWT acquiesced to these demands and executed an amendment to the agreement dated December 30, 2002, establishing a purchase price of \$1,144,845 for each of the remaining three vessels.

During the negotiation of the December 30, 2002 amendment, Derecktor NY asked if NYWT would consent to an assignment of the Agreement for the remaining three vessels. On January 1, 2003, Derecktor NY and Derecktor CT executed an Assignment and Assumption Agreement, which provided for the assignment of “all of [Derecktor NY’s] right, title, interests, obligations and liabilities in, to and under the . . . Agreement.” Thereafter, Tom Fox, who is NYWT’s president and CEO, on behalf of NYWT, executed a letter dated January 13, 2003 from E. Paul Derecktor, who is the president of Derecktor

NY, acknowledging and consenting to an assignment of the Agreement by Derecktor NY to Derecktor CT, effective January 1, 2003, in accordance with section 13 (b) of the Agreement. On July 1, August 8, and September 15, 2003, Derecktor CT completed and delivered the last three vessels to NYWT. NYWT claims that these vessels suffered from structural and mechanical problems, many of which were similar or identical to the problems the first three vessels had. NYWT asserts that it, once again, complained of these problems, and that defendants assured it that the problems would be rectified. As a result of these problems, all six vessels allegedly suffered numerous and chronic breakdowns, had to be taken out of service multiple times for extended periods of time, and even were ordered out of service by the United States Coast Guard.

On December 7, 2004, NYWT allegedly met with defendants and Detroit Diesel, the manufacturer of the vessels' engines, in an attempt to persuade defendants to rectify the problems with the vessels. NYWT claims that at this meeting, defendants admitted that the vessels were improperly designed, and agreed to the appointment of three marine consultants to examine the vessels and propose a possible solution. In January 2005, these marine consultants concluded that defendants had improperly designed and constructed the vessels, and proposed radical modifications to the vessels' design to mitigate or ameliorate the problems.

Over the course of the remainder of 2005 through the summer of 2006, defendants performed the modifications recommended by the consultants. These modifications,

performed at the Connecticut and New York shipyards, required each vessel to be removed from service for a substantial period of time. However, NYWT asserts that defendants continued to provide poor quality workmanship and materials that resulted in further breakdowns, delays, and disruptions of its ferry service. NYWT avers that defendants failed to eradicate the problems plaguing the vessels, and that defendants created further problems, which remain uncorrected and which the vessels continue to experience. NYWT claims that as a result of the problems in the vessels' design and construction, and in the repairs, none of them have been able to meet the operational requirements for which they were to be designed, rendering them unreliable and unfit for its commercial ferry service operation for which they were intended.

Consequently, on August 4, 2006, NYWT brought this action as against Derecktor CT and Derecktor NY. NYWT's complaint purports to allege four causes of action, consisting of claims for breach of contract-design, breach of contract-workmanship, breach of contract-warranty, and rescission/revocation of acceptance. It seeks the recovery of direct damages as well as consequential damages and incidental damages, and an award of costs and reasonable attorney's fees.

In support of their motion insofar as it seeks an order dismissing NYWT's complaint as against Derecktor NY, defendants rely upon section 13 (b) of the Agreement, which provides:

“Neither party may assign or transfer any of its  
respective rights or obligations hereunder without the prior

written consent of the other party, which consent shall not be unreasonably withheld.”

Defendants argue that the prior written consent of NYWT was obtained by NYWT’s execution of the January 13, 2003 letter, which consented to an “assignment of the . . . Agreement” to Derecktor CT, effective January 1, 2003, “in accordance with section 13 (b) of the Agreement.” They assert that since the January 1, 2003 Assignment and Assumption Agreement provided for an assignment of “all of [Derecktor NY’s] right, title, interests, obligations and liabilities in, to and under the . . . Agreement,” NYWT’s written consent to this assignment was effective to assign its obligations and liabilities under the Agreement to Derecktor CT and to absolve Derecktor NY of all liability thereunder.

It is well established that a party to a contract is not released from liability under the contract simply by the assignment of the contract (*see Worldcom, Inc. v Prepay USA Telecom, Corp.*, 294 AD2d 157, 158 [2002]; *Mandel v Fisher*, 205 AD2d 375, 376 [1994]; *Matter of Auerbach v State Tax Commn.*, 142 AD2d 390, 394 [1988]; *John W. Cowper Co. v CDC -Troy, Inc.*, 50 AD2d 1076, 1076 [1975]; *Iorio v Superior Sound*, 49 AD2d 1008, 1008 [1975]; *S & L Paving Corp. v MacMurray Tractor*, 61 Misc 2d 90, 93 [1969]). “[I]n order to relieve the original . . . assignor from its continuing liability after assignment, it must be expressly shown that the [other contracting party] not only consented to the assignment, but accepted the assignee in place of the [assignor]” (185

*Madison Assocs. v Rejan*, 174 AD2d 461, 461 [1991]). Such release of the assignor must either be expressly stated by an agreement between the contracting party and the assignor “specifically provid[ing] for a release of liability upon assignment” (*Matter of Auerbach*, 142 AD2d at 394; *Mandel*, 205 AD2d at 376), or “implied from facts other than the [other contracting party’s] mere consent to the assignment and its acceptance of [performance] from the assignee” (*185 Madison Assocs.*, 174 AD2d at 461; *see also Mandel*, 205 AD2d at 376).

Here, the January 13, 2003 letter only refers to an “assignment of the . . . Agreement . . . in accordance with section 13 (b) of the Agreement.” While section 13 (b) of the Agreement permits an assignment, upon NYWT’s written consent, of Derecktor NY’s obligations under the Agreement, it does not specifically provide that such assignment releases Derecktor NY of all liability under the Agreement, and the January 13, 2003 letter does not specifically provide for a release of Derecktor NY’s liability upon assignment.

Although the Assignment and Assumption Agreement did expressly provide for Derecktor CT’s assumption of Derecktor NY’s obligations and liabilities in, to, and under the Agreement, it is undisputed that a copy of this Assignment and Assumption Agreement was not shown to NYWT prior to its written consent to the assignment. Thus, its terms, while effective vis a vis Derecktor NY and Derecktor CT, do not establish that NYWT consented to such blanket assignment of all of Derecktor NY’s liability set forth

in that Assignment and Assumption Agreement or that NYWT intended to fully release it from liability and accept Derecktor CT in its place and stead.

Indeed, by e-mail, dated January 13, 2003, captioned "Subject: Taxis 4-6" Joe Dayton, the project manager for the design and construction of vessels four, five, and six at Derecktor CT, informed Tom Fox (who, as noted above, is NYWT's president and CEO) that NYWT would be sent "a letter and some paperwork regarding [his] consent for [them] to assign the contract of the NY Water Taxis to Derecktor CT *for [their] accounting purposes*" (emphasis supplied). Tom Fox attests, in his sworn affidavit, that he never knew the Assignment and Assumption Agreement existed and was not aware of its terms. He further attests that he understood that the January 13, 2003 consent would be the operational document, and that the assignment was purely for accounting purposes and for the completion of construction of the remaining three vessels by Derecktor CT. Tom Fox states that since the first three vessels had already been constructed in Derecktor CT's shipyard, an assignment for accounting purposes for the remaining vessels seemed routine to him, and that he did not consent to any assignment of liability for improper design, construction, and repair of the vessels already completed or to be completed. Tom Fox also points out that all six vessels continued to have repair work performed at Derecktor NY's shipyard in Mamaroneck, New York, long after he signed the January 13, 2003 letter, consenting to the assignment.

Thus, inasmuch as defendants have not demonstrated an express agreement to

release Derecktor NY from liability upon assignment or one that can be implied from facts other than NYWT's mere consent to the assignment, dismissal of NYWT's complaint as against Derecktor NY must be denied (*see Mandel*, 205 AD2d at 376; 185 *Madison Assocs.*, 174 AD2d at 461).

Defendants, in their motion, also request dismissal of NYWT's first cause of action for "breach of contract-design." This cause of action alleges that the design of the vessels was defective, and that such defective design was in breach of defendants' obligations under the Agreement that it would design the vessels in a manner consistent with the standard of a first-class shipyard, capable of reliably performing in the ferry service and fit to withstand the ordinary rigors of such service. Defendants seek dismissal of this cause of action based upon section 16(a) of the Agreement, which provides:

"Upon the completion of the detail design drawings for the first vessel, Builder shall provide Buyer with a complete set of such detail design drawings and, upon receipt of the same, Buyer shall have fourteen (14) calendar days to review such designs. Unless Builder receives written objection from Buyer by the end of such 14-day period, the detail design drawings as submitted to Buyer shall be deemed approved by Buyer . . ."

Defendants assert that the services of an architect, Nigel Gee & Associates, were utilized by Derecktor NY to design the vessels, which it paid to prepare plans and specifications, and that Derecktor NY provided all detail design drawings to NYWT in

accordance with section 16 (a) of the Agreement. They contend that since NYWT did not provide a written objection to these detail design drawings within the 14-day period allowed under section 16 (a) of the Agreement, these drawings were deemed approved by NYWT, and that, therefore, dismissal of NYWT's first cause of action for breach of contract based on an allegedly defective or negligent design must be dismissed.

Defendants' contention is without merit. Section 16 (a) of the Agreement further provides that:

“Following written objection by Buyer, the parties shall negotiate adjustments which may result in changes to the detail design drawings requested by Buyer, and the final resolution of such adjustments shall be approved in writing by Buyer and Builder.”

Thus, as is apparent from this portion of section 16 (a), the purpose of such written objections pertained only to the negotiations of adjustments to the drawings which would result from requested changes to the drawings by NYWT rather than to a preclusion of future claims.

Nothing in section 16 (a) of the Agreement precludes NYWT from bringing a breach of contract action based on improper design if NYWT were to later discover that defendants improperly designed the vessels. Section 16 (a) is silent with respect to the issue of waiver, prohibition, preclusion, or any loss of rights, and defendants have provided no evidence whatsoever to support that such preclusion was the parties' intent.

“Limitations on a party’s liability will not be implied and to be enforceable must be clearly, explicitly and unambiguously expressed in a contract” (*Terminal Cent. v Henry Modell & Co.*, 212 AD2d 213, 218 [1995]). Section 16 (a) of the Agreement does not provide that the lack of such objection within the 14-day period would forever preclude NYWT from a future claim based upon a later arising problem with the vessels’ design.

Furthermore, the Agreement specifically states that Derecktor NY would design the vessels “in a manner consistent with the standards, practices and workmanship of a first class shipyard,” and, as noted above, Derecktor NY admits that it provided an architect to design, as its agent, as part of the Agreement. Based thereon, NYWT asserts that it relied upon Derecktor NY’s architect for competent design, and NYWT did not contemplate that it would be required to incur the additional expense and effort of engaging another naval architect to review the drawings to determine whether the designs were improper or defective at the risk of being forever barred from bringing a claim for breach of contract with respect to the design of the vessels.

Thus, the court finds that the fact that NYWT did not object to the design drawings did not excuse defendants from the exercise of ordinary and reasonable skill with respect to the design of the vessels. Consequently, since the failure to object to the detail design drawings by the end of a 14-day period did not result in a permanent waiver of a future claim by NYWT based on a problem with the vessels’ design, dismissal of NYWT’s first cause of action based upon section 16 (a) must be denied.

Defendants additionally seek dismissal of NYWT's first cause of action for breach of contract-design and dismissal of NYWT's second cause of action for breach of contract-workmanship on the ground that they purport to set forth an improper negligence claim and are merely duplicative of NYWT's third cause of action for breach of contract-warranty. NYWT's second cause of action alleges that defendants failed to perform the vessels' construction in a workmanlike manner, used sub-standard materials or materials not in accordance with the contract specifications, and otherwise exercised poor workmanship. NYWT's third cause of action alleges that defendants expressly warranted that the vessels would be free of all defects in workmanship and/or materials, and that the vessels were constructed with numerous defects in workmanship and/or materials that were directly caused by poor workmanship or negligent installation of the materials by defendants in breach of the Agreement's express warranties.

As noted by defendants and conceded by NYWT, NYWT's first and second causes of action are solely based on breach of contract (as opposed to tort) claims as there is no duty owed by defendants under a negligence theory (*see Orlando v Novurania of Am.*, 162 F Supp 2d 220, 225 [SD NY 2001]; *Megarix Furs v Gimbel Bros.*, 172 AD2d 209, 211 [1991]; *Work Mgt. Corp. v AT & T Info. Sys.*, 135 AD2d 317, 321 [1988]). Thus, since the allegations of NYWT's third cause of action for breach of warranty consist essentially of a breach of contract claim based on a breach of the express warranties in the Agreement as to the quality of the workmanship and materials, NYWT's second cause of

action which alleges this same breach of contract is subsumed in, and duplicative of this claim. Consequently, dismissal of NYWT's second cause of action, on the basis that it is duplicative of its third cause of action, is required (*see Orlando*, 162 F Supp 2d at 225).

NYWT's first cause of action (as discussed above), on the other hand, relates to breach of the Agreement with respect to the vessels' design, which is not subsumed by NYWT's third cause of action, which relates to the workmanship and materials used in the construction of the vessels. Defendants contend, though, that the warranties made by them are solely set forth in section 7 of the Agreement, which, in subsection (e), specifically disclaims "any [other] representation or warranty, express or implied, including but not limited to warranties of merchantability and fitness for a particular purpose."

This limitation of warranties in section 7 (e) of the Agreement, however, is not fatal to NYWT's first cause of action for breach of contract. The specification of certain remedies in the Uniform Commercial Code available to the buyer does not exclude the more general remedy of breach of contract (*see* UCC 1-103). Thus, a buyer may recover "not only [for] breaches of warranties, but also [for] any failure of the seller to perform according to [its] obligations under the contract" (UCC 2-714, Comment 2). Therefore, dismissal of NYWT's first cause of action is not warranted (*see generally Tiffany at Westbury Condominium v Marelli Dev. Corp.*, 34 AD3d 787, 789 [2006]).

Defendants also seek dismissal of NYWT's third cause of action for breach of

contract-warranty. Section 7 (a), upon which NYWT's breach of warranty claim rests, provides, as follows:

“Section 7. Warranty

(a) Builder, for the duration of the Warranty Period, warrants that all labor furnished by Builder hereunder shall have been performed in a good and workmanlike manner and in conformity with the Contract Documents and that all materials furnished by Builder hereunder and made a part of the Vessels are new and free of defects discoverable on reasonable inspection and testing, and Builder further guarantees the Vessels against all defects in workmanship and/or materials during the Warranty Period which are (i) directly caused by poor workmanship or negligent installation of materials by [defendants] or its subcontractors during the Construction of the Vessels, and (ii) which [NYWT] gives notice to [defendants] in writing within fourteen (14) days of discovery thereof by [NYWT] or an agent, employee, or representative of [NYWT] (the ‘Defects’) . . .”

Defendants rely upon section 1 of the Agreement entitled “Definitions,” which defines the “Warranty Period” referred to in section 7 as follows:

“‘Warranty Period’ with respect to a Vessel shall mean the period commencing on the Delivery Date of such Vessel and ending on the date, which falls twelve (12) months after such Delivery Date.”

Defendants assert that since the six vessels were delivered to NYWT on August 7, August 23, and September 21, 2002, and on July 1, August 8, and September 15, 2003, the remedies allowed to NYWT under the Agreement's section 7 warranty provision, pursuant to the section 1 definition of “warranty period,” expired 12 months from each of

these delivery dates, the last of which was over three years ago. They argue that, therefore, NYWT's third cause of action for breach of warranty should be dismissed as time-barred.

Defendants' argument must be rejected. The Agreement contains no language which specifically reduces the statutory four-year Statute of Limitations period for breach of warranty claims provided by UCC 2-725 (1). Rather, the one-year warranty set forth in section 1 and referred to in section 7 of the Agreement is not a one-year Statute of Limitations, but, instead, is "a period during which a cause of action might accrue for failure to repair or replace a defect in material or workmanship" (*Dennin v General Motors Corp.*, 78 Misc 2d 451, 452 [1974]). By this warranty, if a covered defect was brought to the attention of defendants during this period and they failed to repair it, a cause of action in favor of NYWT arose upon which NYWT could sue for a period of four years thereafter (*see id.*).

NYWT alleges that it timely notified defendants about the problems with the vessels within the one-year warranty period for each of the vessels and was assured by defendants that they would be timely rectified. Thus, having provided notice to defendants, NYWT had four years to commence an action in the event that defendants did not remedy these problems and/or defects. Therefore, since NYWT brought this action within this four-year period, it has been timely commenced.

Defendants, alternatively, contend that NYWT's third cause of action for contract-

breach of warranty must be dismissed based upon section 7 (c) of the Agreement, which provides:

“ . . . Buyer’s sole and exclusive remedy against Builder under this warranty shall be for the repair or replacement of the Defects.”

Defendants argue that due to section 7 (c), NYWT’s remedies are limited to the repair or replacement of any defect, and that it may not seek any damages in this action.

Defendants’ argument is unavailing. While UCC 2-719 (1) (a) permits an agreement to limit a buyer’s remedies “to repair and replacement of non-conforming goods or parts,” UCC 2-719 (2) provides that “[w]here circumstances cause [such] an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this chapter” (which includes the remedies of cover, rejection, revocation, and the recovery of compensatory, consequential, and incidental damages, pursuant to UCC §§ 2-711, 2-714, and 2-715).

It is well settled that “whether circumstances have caused a ‘limited remedy to fail of its essential purpose’ . . . is a question of fact for the jury and one necessarily to be resolved upon proof of the circumstances occurring after the contract is formed” (*Cayuga Harvester v Allis-Chalmers Corp.*, 95 AD2d 5, 10-11 [1983]; *see also Laidlaw Transp. v Helena Chem. Co.*, 255 AD2d 869, 869, 870 [1998]; *Scott v Palermo*, 233 AD2d 869, 869-870 [1996]; *Belfont Sales Corp. v Gruen Indus.*, 112 AD2d 96, 98-99 [1985]). The

plaintiff need not make a showing of dilatory or negligent conduct (*see Caruya Harvester*, 95 AD2d at 11). “Rather, [UCC 2-719 (2)] is to apply whenever an exclusive remedy, which may have appeared fair and reasonable at the inception of the contract, as a result of later circumstances, operates to deprive a party of a substantial benefit of the bargain” (*id.*; *see also Roneker v Kenworth Truck Co.*, 944 F Supp 179, 184 [WD NY 1996]).

Here, NYWT’s complaint contains allegations of numerous problems and defects which afflicted the vessels from the time of their delivery and continuing thereafter. These problems and defects allegedly caused numerous and chronic breakdowns, rendering the vessels inoperable, and requiring that they be taken out of service multiple times for extended periods for repairs and attempts to modify the structural and mechanical problems. NYWT alleges that most of defendants’ attempts to repair the vessels were unsuccessful or did more damage to the vessels, and that other repairs modified the vessels’ design and negatively affected their performance, aesthetics, and market value. NYWT claims that due to these chronic problems, it has been unable to provide swift, efficient, and reliable service to its daily commuters, has been unable to develop, plan, and grow its business, and has sustained significant financial losses. Thus, NYWT’s complaint sufficiently alleges that the limited remedy of section 7 (c) has failed of its essential purpose so as to withstand defendants’ motion to dismiss (*see Consolidated Data Terminals v Applied Digital Data Systems*, 708 F2d 385, 392 [9<sup>th</sup> Cir

1983]; *Cayuga Harvester*, 95 AD2d at 11-12).

Defendants also argue that all of NYWT's claims for consequential damages must be dismissed based upon section 7 (c) of the Agreement, which further provides that:

“[I]n no event shall Builder be liable for any consequential loss, damages or expenses arising from any such Defects, including, but not limited to, claims for . . . maintenance and care, wages, property damage, delays, demurrage, loss of profit, lost revenues or any other consequential damages arising out of any breach of this Agreement or the performance thereof.”

UCC 2-719 (3) provides that “[c]onsequential damages may be limited or excluded unless the limitation or exclusion is unconscionable.” The failure of a limited remedy, without more, does not invalidate an agreement excluding consequential damages where such exclusion is not unconscionable (*see Cayuga Harvest*, 95 AD2d at 16). Here, inasmuch as this case involves a commercial transaction, the provision precluding NYWT from recovering consequential damages is not unconscionable and may be enforced (*see Laidlaw*, 255 AD2d at 870; *Suffolk Laundry Services v Redux Corp.*, 238 AD2d 577, 579 [1997]; *Cayuga Harvester*, 95 AD2d at 20).

In opposition to this branch of defendants' motion, however, NYWT argues that this exclusion of consequential damages pertains only to “the Defects” “under th[e] warranty” provided by section 7. It contends that section 7 (c) should not be construed as excluding consequential damages arising with respect to any other breach of the Agreement. Such narrow construction of section 7 (c), however, must be rejected as it ignores the express language in this section (quoted above), which excludes not only “any

consequential . . . damages arising from any such Defects,” but also “any other consequential damages *arising out of any breach of this Agreement or the performance thereof*” (emphasis supplied). Thus, NYWT’s claims for consequential damages are precluded by the Agreement.

Defendants further contend that since NYWT’s complaint does not contain any allegations that it rejected the vessels or that it effected cover (by procuring substitute goods for those due from the seller), it cannot recover incidental damages. Such contention is without merit. UCC 2-714 (1) permits recovery of damages resulting from the seller’s breach for any non-conformity of tender even after the non-conforming goods have been accepted by the buyer. Under UCC 2-714 (3), incidental damages may be recovered, pursuant to UCC 2-715. UCC 2-715 (1) defines incidental damages resulting from the seller’s breach as including any “reasonable expense incident to the [sellers’] delay or other breach.” Therefore, since defendants have not shown that NYWT has not incurred incidental damages, as alleged by it in the complaint, dismissal of NYWT’s claim for the is relief cannot be granted.

Defendants additionally argue that NYWT’s request for attorney’s fees in its complaint should be dismissed. Attorney’s fees are not recoverable in an action in the absence of a statute or contract which provides for such recovery (*see Fernandez v Koretz*, 267 AD2d 1025, 1025 [1999]; *Wu v Kao*, 194 AD2d 666, 666 [1993]). Thus, since the Agreement does not provide for the recovery of attorney’s fees under the

circumstances alleged in NYWT's complaint and there is no statute providing for such a claim, NYWT may not recover attorney's fees herein.

Defendants' motion also seeks dismissal of NYWT's fourth cause of action for rescission/revocation of acceptance. Pursuant to UCC 2-606 (1) (b), acceptance of goods occurs when the buyer fails to make an effective rejection under UCC 2-602 (1). NYWT does not deny that it accepted the vessels, but seeks to rescind or revoke its acceptance under UCC 2-608 (1) (a), which provides that "[t]he buyer may revoke [its] acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to [it] if [it] has accepted it . . . on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured."

NYWT asserts that the vessels' non-conformity due to defendants' breach have substantially impaired the vessels' value to it, and that it had accepted the vessels on the reasonable assumption that these non-conformities would be cured. NYWT alleges that defendants' efforts to repair and rectify the problems and defects in the vessels have been largely unsuccessful, and it has now become apparent that defendants are unable to repair or rectify these problems and defects, and that the value of the vessels to it remain substantially impaired due to defendants' breach. NYWT argues that it is, therefore, entitled to revoke acceptance of the vessels, treat the contract as rescinded, and return the vessels to defendants, and that defendants must reimburse it for the full purchase price of the vessels, with change orders, in the amount of \$6,237,118.

UCC 2-608 (2), however, provides:

“(2) Revocations of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.”

While NYWT alleges that there has been no substantial change in condition of the goods which is not caused by their own defects, such allegation, as noted by defendants, is inconsistent with the undisputed fact that these vessels must have sustained a diminution in value due to their continued use over the course of three or four years (*see Kollé v Mainship Corp.*, 2006 WL 1085067, \*7 [ED NY 2006]). NYWT’s retention of possession of the vessels and its use of them for over three years without notifying defendants that it was revoking acceptance until the institution of this lawsuit is completely at odds with a revocation of acceptance (*see Sobiech v International Staple & Mach. Co.*, 867 F2d 778, 780-781 [2d Cir 1989]; *Computerized Radiological Servs. v Syntex Corp.*, 786 F2d 72, 75-76 [2d Cir 1986]).

NYWT, in opposing dismissal of its revocation of acceptance claim, relies upon Comment 4 to UCC 2-608, which notes that since remedy of revocation of acceptance “will be generally resorted to only after attempts at adjustment have failed, the reasonable time period should extend in most cases beyond the time for discovery of non-conformity after acceptance and beyond the time for rejection after tender.”

NYWT alleges that it was not until December 2004 that defendants finally admitted that the vessels were improperly designed, and that in January 2005, the marine consultants who examined the vessels concluded that design flaws were responsible for the chronic problems. It claims that prior to that time, it had no way of knowing that these latent design problems existed and were the cause of the continuous and debilitating breakdowns. NYWT further alleges that throughout 2005 and well into 2006, defendants performed modifications recommended by the consultants to attempt to correct the problems, and that these modifications largely failed, and caused additional problems. It claims that it only became clear to it at that time that the attempts at adjustment had truly failed. It argues that, therefore, its attempt to revoke acceptance by its commencement of this action on August 4, 2006 occurred within a reasonable time.

NYWT's argument must be rejected. The policy of UCC 2-608 (2) is to seek "substantial justice in regard to the condition of the goods restored to the seller" (UCC 2-608, Comment 6), and revocation of acceptance cannot be said to have occurred within a reasonable time with no substantial change in the condition of the goods when a period of years has passed, during which the goods are retained and continued use of the goods has occurred. Thus, while the time to invoke the remedy of revocation of acceptance under UCC 2-608 is extended beyond the time for rejection after tender where attempts at adjustment have failed, to permit such an extension over the lengthy period of a course of years during which the goods are retained and extensively used without notification to the

seller of the buyer's intention to rescind the contract and demand the return of its purchase price, would be inconsistent with the policy and intent of UCC 2-608 (2).

Consequently, assuming that NYWT's acceptance of the vessels was induced by defendants' assurances that the non-conformity would be cured, its revocation of acceptance still had to have occurred within a reasonable time (*see* UCC 2-608 [2]; *Sears, Roebuck & Co. v Galloway*, 195 AD2d 825, 827 [1993]). Thus, since NYWT continued to retain and use the vessels for three to four years without any unequivocal effective timely notification of its revocation of its acceptance to defendants, it cannot allege that it revoked acceptance within the "reasonable time" required by UCC 2-608 (2) (*see Computerized Radiological Servs.*, 786 F2d at 76; *Kolle*, 2006 WL 1085067 at \*7; *Cliffstar Corp. v Elmar Indus.*, 254 AD2d 723, 724 [1998]; *V. Zappala & Co. v Pyramid Co. of Glens Fall*, 81 AD2d 983, 984 [1981]). Dismissal of NYWT's fourth cause of action is, therefore, mandated (*see* CPLR 3211 [a] [7]).

The court notes, in passing, that while such dismissal is required, NYWT's failure to effectively revoke acceptance of the vessels does not impair any other remedy provided by UCC article 2 for non-conformity (*see* UCC 2-607 [2]; *Flick Lbr. Co. v Breton Indus.*, 223 AD2d 779, 780 [1996]; *Sears, Roebuck & Co.*, 195 AD2d at 827; *Gem Jewelers v Dykman*, 160 AD2d 1069, 1070 [1990]). NYWT's repeated complaints and requests for repairs were sufficient to preserve its right to sue for damages, and NYWT may seek damages for its losses which, it claims, resulted from defendants' breach of the

Agreement, as alleged by it in its remaining causes of action (*see* UCC 2-714 [1]; *Cliffstar Corp.*, 254 AD2d at 724).

Accordingly, defendants' motion is granted insofar as it seeks dismissal of NYWT's second and fourth causes of action, and NYWT's claims for recovery of consequential damages and attorney's fees. Defendants' motion is denied insofar as it seeks dismissal of NYWT's complaint as against Derecktor NY, NYWT's first and third causes of action, and NYWT's claim for recovery of incidental damages.

Counsel are directed to appear for Preliminary Conference on July 18, 2007 at 9:45 a.m. in Commercial Division I, Room 756 at 360 Adams Street, Brooklyn, New York.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.