STATE OF OHIO	)	IN THE COURT OF COMMON PLEAS
	) SS:	
CUYAHOGA COUNTY	)	CASE NO. CV-546514

MILES CARTER, et al.	)	
	)	
Plaintiffs	)	
	)	
vs	)	**FINDINGS OF FACT AND**
	)	**CONCLUSIONS OF LAW**
NEXTHOME, INC.	)	
	)	
Defendant	)	

MICHAEL J. RUSSO, JUDGE:

Trial of this matter was heard by the Court without a jury beginning on July 7, 2006 and concluding on July 12, 2006. The parties filed proposed Findings of Fact and Conclusions of Law on September 22, 2006. The Court, having considered the pleadings, pre- and post-trial briefs, and the admissible evidence introduced at trial, makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Plaintiffs are Miles G. Carter and Catherine Carter, d.b.a. Carter Properties (a general partnership) (collectively, "Plaintiffs"). Plaintiffs are the owners of a single-story commercial office building of approximately 30,000 square feet located at 28605 Ranney Parkway in Westlake, Ohio (the "Building"). When the Building was purchased out of foreclosure by Plaintiffs around 1993, EDS, Inc. was leasing the entire space.

2. In Spring 2004, approximately 17,000 square feet of vacant space in the Building was available for lease. The only tenant in the Building at that time was EDS, Inc., which was downsizing its operation.

3. The Defendant, NextHome, Inc. ("NextHome"), is a real estate brokerage firm which assists sellers and buyers of residential real estate in purchase and sale transactions.

4. In late 2003, NextHome began looking for office space to relocate and expand its operations and the operations of its two affiliates. At that time, NextHome and its affiliates were occupying space in two different locations (on Crocker-Bassett Road and on Center Ridge Road in Westlake) under leases held by NextHome. Those leases were expiring at the end of 2004, and NextHome sought to consolidate its operations because multiple locations and lack of space caused inefficiencies for NextHome.

5. NextHome used a real estate broker, Donald Rudy, to assist in locating new space. NextHome was interested in finding ground-floor office space in the Westlake area because its business involves agents coming to and from its offices carrying signs and other items.

6. During its search for new office space, NextHome looked at numerous potential office buildings. The rental rates of the buildings it was looking at were in the neighborhood of $14.00 to $18.50 per square foot.

7. Around April 2004, representatives of NextHome were shown the Building. NextHome was interested in the Building due to its location in Westlake, and the fact that there was first-floor office space available. After viewing the property, NextHome asked Joseph Stout to prepare a preliminary concept floor plan to determine whether and how NextHome and its affiliates could fit into the available space in the Building. Mr. Stout is the husband of one of the

owners of NextHome, Winona Stout. He is a retired professional architect, but was not paid for his services by NextHome. The concept drawing was prepared using a drawing of the layout of the entire floor which had previously been prepared by Plaintiffs' architect, ADA Architects.

8. The initial concept drawing was dated May 16, 2004. After meeting with representatives of NextHome, Mr. Stout revised the initial concept drawing and created a preliminary floor plan dated June 1, 2004 ("the June 1 Floor Plan"). The June 1 Floor Plan was then presented to Plaintiffs. It was used by the parties in discussions concerning what space NextHome would need.

9. Unbeknownst to NextHome, Miles Carter provided the June 1 Floor Plan to a contractor named JJO Construction and requested a construction estimate. Although the preliminary floor plan lacked sufficient information (*i.e.*, information regarding electrical, HVAC, door schedules, floor finishes, lighting, wall coverings, etc.) from which a firm cost estimate could be prepared, JJO Construction provided Mr. Carter with a "proposal" to perform the work called for in the June 1 Floor Plan in the approximate amount of $160,000. This amount did not including the cost of a back-up generator, which Plaintiffs planned to provide as part of any build-out of the office space. Mr. Carter relied on the JJO Construction proposal in negotiating the terms of a letter of intent and the final lease with NextHome. The "proposal" was never shared with NextHome during the negotiation of its lease with Plaintiffs.

10. The JJO Construction proposal was not an accurate estimate of the cost to build out the office space. In late 2004, Fiorelli Construction reviewed the same June 1 Floor Plan and provided a conditional estimate of the cost to build out that space of more than $344,000.

11. Negotiations continued and, on July 9, 2004, Plaintiffs and NextHome signed a Letter of Intent. The Letter of Intent stated, *inter alia*, that Plaintiffs would build out the office space, at

their sole cost and expense, in accordance with the June 1 Floor Plan, "with minor revisions and Tenant shall sign off on final floor plan." It was understood by the parties that the June 1 Floor Plan was only intended to demonstrate whether or not NextHome could fit its operations into the available space, and it was contemplated that NextHome would be revising the floor plan during the period the parties were negotiating a final lease agreement. The term "minor revisions" was never defined.

12. After the Letter of Intent was executed, the parties began negotiations of a formal lease agreement. Plaintiffs, as the landlord, were represented in these negotiations by Norman Gutmacher, a partner with the law firm of Benesch, Friedlander. NextHome, as the tenant, was represented by Edward Hurtuk, a partner with the law firm Hurtuk & Daroff.

13. Plaintiffs and NextHome executed a written lease dated September 15, 2004 (the "Lease").

14. In the Lease, and in all preliminary drafts, the Landlord agreed in Section 3.1, entitled "Landlord's Work," to perform, at its own expense, the tenant improvement work "described in the specifications set forth on Exhibit C attached hereto, substantially in accordance with Tenant's floor plan, a copy of which is attached hereto as Exhibit D. ('Landlord's Work')." Exhibit D to the Lease, as described above, was to be the final floor plan agreed to and "signed off on" by NextHome.

15. On or about August 30, 2004, while the parties' attorneys continued to negotiate the terms of the Lease, the final floor plan was completed by Mr. Stout on behalf of NextHome ("the Final Floor Plan"). The Final Floor Plan consists of the June 1 Floor Plan with revisions dated August 30, 2004.

16. A meeting took place at the Building on September 1, 2004, the purpose of which was for NextHome to present the Final Floor Plan to Plaintiffs and their architect, ADA Architects.

Attending the meeting on behalf of Plaintiffs were Miles Carter, John Carter (Miles Carter's son, who worked for Carter Properties), and Jim Kassay from ADA Architects; attending on behalf of NextHome was Philip Vitanza (its president), Winona Stout (its vice-president) and Joseph Stout. At this meeting, the parties reviewed a large scale version of the Final Floor Plan and discussed the drawing at length.

17. The size of the space to be leased by NextHome was increased in the Final Floor Plan from approximately 11,000 square feet to just over 12,000 square feet. In addition, several offices were added and a conference room deleted.

18. At the September 1, 2004 meeting, Miles Carter instructed ADA Architects to proceed to prepare preliminary construction drawings based on the Final Floor Plan, since this is the floor plan which had been approved by the parties. Plaintiffs did not object to the Final Floor Plan, nor did they communicate in any way that the changes made to the original June 1 Floor Plan were not the type of "minor revisions" the parties had in mind when the Letter of Intent was negotiated. Further, there is no evidence that there was any material difference in the cost of construction between the June 1 Floor Plan and the Final Floor Plan -- the average cost to build out commercial office space remained at $20 - $30 per square foot.

19. Through negotiation, the size of NextHome's proposed space was increased in the Final Floor Plan. As a result, Plaintiffs requested on September 1, 2004 that all of the provisions of the Lease (which was in the process of being drafted) that were dependent on the amount of square footage being leased (i. e., provisions relating to rental payments, security deposit, CAM charges) be revised to reflect the increased size of the space shown in the Final Floor Plan. These requested changes were accepted by NextHome and incorporated into the Lease.

20. On September 13, 2004, two days before the Lease was executed, Mr. Hurtuk, counsel for NextHome, requested that Mr. Gutmacher, counsel for plaintiffs, send him the Final Floor Plan so that it could be attached as Exhibit D to the Lease. Mr. Gutmacher, in turn, e-mailed Miles Carter and asked him to send to both counsel the Final Floor Plan so it could be attached as Exhibit D. On Plaintiffs' behalf, John Carter faxed the Final Floor Plan to Mr. Gutmacher and Mr. Hurtuk for use as Exhibit D. Mr. Gutmacher then sent another e-mail to Mr. Hurtuk telling him that the Final Floor Plan was to be attached to the Lease as Exhibit D.

21. ADA Architects submitted copies of the preliminary construction drawings to both parties for their review on September 13, 2004. This was two days before the parties executed the Lease. Miles Carter reviewed the preliminary construction drawings, and he was aware that the preliminary construction drawings were based on the Final Floor Plan.

22. Plaintiffs did not obtain any other cost estimate or proposal before signing the Lease, and they did not send out the Final Floor Plan for a proposal or estimate. They also did not send out the preliminary construction drawings for a cost estimate or proposal before the Lease was executed, even though these drawings contained more detailed information regarding the construction.

23. When the Lease was executed on September 15, 2004, the Final Floor Plan, was attached thereto as Exhibit D. Before signing the Lease, Miles Carter reviewed the entire Lease and stated that he read all the exhibits.

24. After the Lease was executed, there were changes (unrelated to the issues in this case) which needed to be made to Exhibit C to the Lease. Exhibit C to the Lease set forth general specification for the Landlord's Work. Item 4 of Exhibit C originally stated: "[r]ebuild walls, electrical, etc. per floor plan dated June 1, 2004, including minor revisions *and Tenant shall sign off*

on final floor plan." When changes were made to other sections of Exhibit C after the Lease was signed, Mr. Gutmacher, as counsel for Carter Properties, suggested that this language be changed to read: "[r]ebuild walls, electric, etc. per floor plan dated June 1, 2004, including minor revisions and per Section 3.1 of the Lease." Mr. Gutmacher made this suggested change to Exhibit C to reflect that revisions had been made to the preliminary June 1 Floor Plan, and that there would no longer be any need to have the tenant sign off on a final floor plan. NextHome agreed with this change and Exhibit C was modified accordingly.

25. Section 3.1 of the Lease provided a schedule for NextHome to make comments to the preliminary construction drawings and for Plaintiffs to accept or object to such comments. The comments made by NextHome during this period were very minor and did not materially change the cost of construction. Miles Carter was not concerned with the changes because they were so minor. Plaintiffs did not object to any of the comments made by NextHome to the preliminary constructions drawings.

26. NextHome's comments were then incorporated by ADA Architects into a set of final construction drawings, which were to be sent out for bid. Under the schedule set forth in Section 3.1 of the Lease, the 110-day construction period was scheduled to commence upon approval of the final construction drawings.

27. The final construction drawings were approved by Plaintiffs and NextHome on September 28, 2004. Carter Properties then requested its architect to send out the final approved construction drawings for bid. The final set of construction drawings were based on the Final Floor Plan, as agreed. Miles Carter reviewed the construction drawings before they were sent out for bid, and he personally observed that the drawings were based on the Final Floor Plan.

28. Plaintiffs received bids from two contractors for the Landlord's Work: a bid from JJO Construction for $479,191.61 and a bid from Fiorelli Construction was for $441,101.00. At that time, Plaintiffs disclosed to NextHome that it had previously--in June, 2004, when the parties first began Lease discussions and before the Final Floor Plan was agreed to—obtained a lower "bid" which had been based on the preliminary June 1 Floor Plan.

29. By letter dated October 13, 2004, Miles Carter notified NextHome that Plaintiffs would not perform Landlord's Work called for by Section 3.1 of the Lease unless one of three things happened: (1) NextHome agreed to an increase in its rent by $3.08 per square foot; (2) NextHome paid the difference in price between the bids received on the final construction drawings and the "bid" Plaintiffs claimed to have received back in June 2004; or (3) NextHome agreed to let Carter Properties perform the work called for in the original preliminary June 1 Floor Plan, rather than the Final Floor Plan. NextHome refused and insisted that Carter Properties comply with its obligations under the Lease. Plaintiffs refused.

30. In anticipation of moving into the Building, NextHome had done the following: (1) paid Plaintiffs its security deposit in the amount of $7,875.33; (2) paid a sign company $4,408.00 to begin designing an exterior sign for the Building; (3) hired a company to inspect the roof of the Building; (4) hired a contractor to inspect the HVAC of the Building; (5) notified its existing landlords that it would be vacating its space at year-end; and (6) paid a contractor $2,250.00 to disassemble and move the workstations at the premises into a vacant portion of the Building so that demolition and construction could proceed.

31. NextHome was at all times ready, willing and able to perform under the Lease. If Plaintiffs had not refused to proceed with the demolition and build-out of the office space, NextHome would have moved into the Building under the terms of the Lease.

32. The final rental rates that were negotiated in the Lease were:

MONTHS 1 THRU 6:	NO FIXED MINIMUM RENT	
Months 7 thru 30:	$8.00 PSF per annum	$7,875.33 PER MONTH
Months 31 thru 54:	$9.00 PSF per annum	$8, 859.75 PER MONTH
Months 55 thru 78:	$10.00 PSF per annum	$9,844.17 PER MONTH
Months79 thru 102:	$11.00 PSF per annum	$10,828.59 PERMONTH
Months 103 thru 126:	$12.00 PSF per annum	$11,813.00 PER MONTH

These rental rates were less than fair market rent for comparable office space, built out as reflected in the final construction drawings. The existing tenant at the Building, EDS, Inc., was paying $13.75 per square foot to rent under a triple net lease. According to Miles Carter, he had the Building advertised for lease at $12.95 per square foot after the deal with NextHome terminated. James Caldwell testified that the market rate for rental of the Building at the time of the Lease was between $13.00 to $15.00 per square foot. The NextHome Lease, like the EDS, Inc. lease, was a triple net lease. According to Carter, with the build-out described in the construction drawings, his opinion (based upon his years of experience in the real estate industry and his efforts to market the Building for sale) was that the fair market rent for the NextHome space was what EDS, Inc. was paying for rent--$13.75 per square foot.

33. After Plaintiffs refused to proceed with the demolition and build-out, NextHome began looking for comparable office space to lease in the same area where it had been looking previously. It again hired Donald Rudy to assist in this process. NextHome was able to secure extensions of the leases it had in its existing locations, but it was not practical for NextHome to permanently remain in

these spaces due to space limitations and the inefficiencies associated with having to operate out two different locations. In addition, NextHome was paying approximately $14.50 per square foot to lease these spaces.

34. NextHome looked at approximately a dozen other potential office spaces to rent, but was unable to find anything comparable to the Building at similar rents. (i.e., at below fair market rent).

35. Ultimately, because the cost of renting was going to be much higher than NextHome had anticipated paying under the Lease for the Building, NextHome chose to build its own office building of approximately 15,000 square feet in Westlake. NextHome moved into this space in March 2006.

CONCLUSIONS OF LAW

36. Count One of Plaintiffs' Complaint seeks "reformation" of the Lease pursuant to the doctrine of mutual mistake. Plaintiffs allege in Count One that attaching the Final Floor Plan as Exhibit "D" to the Lease "constitutes a mutual mistake going to a basic assumption upon which the Lease was made." (Complaint ¶16.) Plaintiffs sought a declaratory judgment reforming the Lease to substitute the June 1st Floor Plan for the Final Floor Plan as the correct exhibit attached as Exhibit "D" to the Lease, as was intended by the parties. (Complaint, ¶25.)

37. Plaintiffs are not entitled to any reformation of the Lease because they did not prove that a "mutual mistake" occurred as a matter of law.

38. "Mutual mistake is a mistake of all parties to the contract. Reformation is [only] available where it is shown that the written instrument does not express the true agreement entered into between contracting parties by reason of mistake common to them." *Weiner v. Kopp* (June 25,

1997), Hamilton Cty. App. No. C-960611, 1997 Ohio App. LEXIS 2717, quoting *Wagner v. Nat'l Fire Ins. Co.* (1937), 132 Ohio St. 405, 412. A mistake is material when it goes to a basic assumption on which the contract was made, such that the intention of the parties must have been frustrated by the mistake. See *Reilly v. Richards* (1994), 69 Ohio St.3d 352, 353.

39. Proof of mutual mistake must be by *clear and convincing* evidence by the party seeking reformation. *Weiner, supra;* see also *Frate v. Rimenik* (1926), 115 Ohio St. 11. "No reformation of an instrument can be made that does not conform to the intention of both parties; the court cannot, by reformation, make a new contract." See *L.B. Trucking Co., Inc. v. C.J. Mahan Construction Co.,* 10th Dist. No. 01AP-1240, 2002-Ohio-4394. Plaintiffs have failed to establish by clear and convincing evidence that a mutual mistake occurred here.

40. Specifically, the Court finds that Plaintiffs and NextHome did not make a mutual mistake in attaching the Final Floor Plan to the Lease as Exhibit D, instead of the preliminary June 1 Floor Plan. To the contrary, the Court finds that the June 1 Floor Plan was only a preliminary plan intended to show at the outset of the parties' discussions how much space NextHome was interested in leasing. It was the parties' understanding from the outset that the June 1 Floor Plan would be revised during the course of the Lease negotiations, and it was. The Letter of Intent entered into by the parties explicitly contemplated that there would be revisions to the June 1 Floor Plan and that NextHome had the right to sign off on the final floor plan.

41. Further, when Plaintiffs received the Final Floor Plan at the end of August 2004, while the Lease documents were *still being negotiated,* Plaintiffs specifically requested changes to the draft Lease to take into account that NextHome would be taking more space under the Final Floor Plan than it was proposing to take in the preliminary June 1 Floor Plan. Plaintiffs' attorney

revised Exhibit C to the Lease to reflect that the preliminary June 1 Floor Plan had been revised, and that there would no longer be a need for the tenant to "sign off" on the final floor plan.

42. When Plaintiffs were asked by their attorney to provide both attorneys involved in the transaction with the correct floor plan to attach as Exhibit D to the Lease, Plaintiffs faxed the Final Floor Plan, and specifically directed that this floor plan was to be used as Exhibit D. Miles Carter admitted that he read the entire Lease, along with the exhibits, and he did not indicate the wrong floor plan was attached to the Lease. Even when the preliminary construction drawings were sent to the parties for their review and approval on September 13, 2004 —two days *before* the Lease was executed—Mr. Carter saw that the construction drawings were based on the Final Floor Plan, rather than the preliminary June 1 Floor Plan. Thus, there is no credible evidence that a mutual mistake was made when the Final Floor Plan was utilized for execution of the Lease on September 15, 2004.

43. In June 2004, Plaintiffs had unilaterally solicited a "proposal" from a contractor as to what it would cost to build out the premises using a floor plan which was preliminary at best. The "proposal" was for approximately $160,000, and Plaintiffs erroneously assumed that this is what it would cost to perform Landlord's Work. In reality, the "proposal" was no more than a budget and Plaintiffs were too experienced to have relied upon it. Further, such "proposal" was not a term negotiated by the parties and Plaintiffs' reliance upon same violated the integration clause of Section 8.12 of the Lease.

44. Plaintiffs had the opportunity to negotiate and cap the cost of the Landlord's Work under the Lease, but failed to do so. Any detriment to Plaintiffs based upon the erroneous "proposal" does not constitute a "mutual mistake" warranting reformation of the contract. Any mistake concerning the terms of this Lease was unilateral, if at all. *General Tire, Inc. v. Mehlfeldt* (1997), 118

Ohio App.3d 109, 115; *Marshall v. Beach* (2001), 143 Ohio App.3d 432, 437.

45. The opinion of the court in *Kane v. Hopkins* (1949), 309 Ky. 488, 218 S.W.2d 37, is directly on point when it comes to a party claiming "mutual mistake" after it made erroneous assumptions regarding the cost of construction before entering into a contract:

> Finally it is argued that the parties were mistaken in estimating the amount required to be expended to finish the houses, and by of such mutual mistake appellant in the settlement was not allowed a fair sum for this work. The contention can be answered briefly. If every contract could be rescinded on the ground that the parties underestimated or overestimated the cost of construction or manufacture of the subject of the contract, one venturing into business would risk little and have an opportunity to gain much. Aside from that, appellant was a contractor and must be deemed to have had more knowledge of costs of construction than appellees. He now cannot complain on the ground that they struck a bad bargain.
> *Id.* At 494.

46. The law in Ohio is the same. Even where there is a mistake, there can be no reformation of the contract (to, in effect, create a new contract) where one party to the contract bears the risk of that mistake. *Shank v. Porter* (March 14, 2002), Franklin App. No. 01AP-838, 2002 Ohio App. LEXIS 1073. In this case, Plaintiffs bore the risk of any mistake or erroneous assumptions made in determining how much it would cost to complete Landlord's Work under Section 3.1 of the Lease. "Reforming" the contract as requested by Plaintiffs would simply re-assign that risk to NextHome, a result not permitted by Ohio law.

47. Finally, even assuming for purposes of argument that Plaintiffs could prove that a "mutual mistake" was made in attaching the Final Floor Plan to the Lease, it is well settled that reformation is not available when the complaining party is negligent in failing to discover the alleged mistake. See *Hadden Co., L.P.A. v. Del Spina,* 10th Dist. No. 03AP-37, 2003-Ohio-4507; *Reilley v.*

Richards (1994), 69 Ohio St.3d 352. A party has a duty to read the contract and point out any alleged errors or omissions prior to signing it. See *Hadden Co., L.P.A., supra.* Where that duty is breached, a party cannot then claim "mutual mistake."

48. In this case, it was Carter Properties (and its attorney) who directed that the Final Floor Plan be attached as Exhibit D to the Lease. Miles Carter also admitted that he read the entire Lease and all of the exhibits prior to signing the Lease. Carter Properties cannot claim under these circumstances that the Lease should be "reformed" pursuant to the doctrine of mutual mistake.

49. In similar fashion, assuming *arguendo* that Plaintiffs were unilaterally mistaken as to the Lease terms involving the Final Floor Plan and construction costs, the Lease agreement cannot be avoided because Plaintiffs bore the risk of the mistake. *Weber v. Budzar Industries, Inc.*, 11th Dist. No. 2004-L-098, 2005-Ohio-5278, citing *Aviation Sales, Inc. v. Select Mobile Homes* (1988), 48 Ohio App.3d 90, 94. Since Plaintiffs negotiated the Lease, provided the Final Floor Plan to counsel for inclusion in the Lease, and read the Lease before signing, it is reasonable in these circumstances to allocate the risk of mistake to the Plaintiffs. Further, enforcement of the Lease as signed would not have been unconscionable, although unfavorable to Plaintiffs, because EDS, Inc. had vacated much of its original space and Plaintiffs had been unsuccessful in renting it to any other tenant. Plaintiffs were facing a difficult rental market and NextHome, even at a below market rate and with substantial costs for Landlord Work, would provide a 10 year stream of income to Plaintiffs and the value of the improvements to NextHome's space would inure to Plaintiffs' benefit. As a result, judgment is granted in favor of Defendant upon Count One of the Complaint and same is dismissed.

50. Count Two of Plaintiffs' Complaint seeks "specific performance of the Lease with the June 1 Floor Plan attached as Exhibit "D" and requiring Defendant to accept the Premises as set forth in the June 1 Floor Plan." (Complaint, ¶30). For all of the reasons described above, NextHome is entitled to judgment on Count Two as well. NextHome was not required to "accept the Premises" as set forth in the preliminary June 1 Floor Plan when the evidence established conclusively that the Final Floor Plan was specifically agreed to by the parties and was accordingly attached as Exhibit D to the Lease.

51. The Court therefore determines and declares that NextHome is entitled to judgment on all counts of Plaintiffs' Amended Complaint.

52. The Court next finds that NextHome is entitled to judgment on its claim for anticipatory breach of contract. (NextHome's claim for specific performance was dismissed by stipulation of the parties during the course of the trial). It is well settled that "an anticipatory breach of contract is one committed before the time has come when there is a present duty of performance, and is the outcome of words or acts evincing an intention to refuse performance in the future." *Ernies's Pizza, Inc. v. Myeroff* (April 25, 1985), Cuyahoga App. No. 49017, 1985 Ohio App. LEXIS 6552, citing *New York Life Insurance Co. v. Viglas* (1936), 297 U.S. 672, 681. "A renunciation to be treated as a breach by the opposite party must be clear and unequivocal so that the party will be informed that he need not expect anything further upon the contract from the other side." *Id.*, citing *Gilmore v. American Gas Machine Co* (1952), 70 Ohio Law Abs. 569, 570; *McDonald v. Bedford Datsun* (1989), 59 Ohio App.3d 38.

53. In Ohio, a "defendant's repudiation of the contract, and rendering itself unable to perform, constitute a sufficient breach" to maintain an action for damages. *Smith v. The Sloss*

Marblehead Lime Co. (1898), 57 Ohio St. 518, 522; *McDonald v. Bedford Datsun* (1989), 59 Ohio App.3d 38. But, "as with any breach of contract, the non-breaching party has a duty to mitigate his or her damages." *W. O. M. Ltd. v. Willys-Overland Motors, Inc.*, 6th Dist. No. L-05-1201, 2006-Ohio- 6997.

54. Damage awards for breach of contract must consider "the natural or probable consequences of the breach of contract or damages resulting from the breach that were within the contemplation of the parties" at the time the contract was made. *The Toledo Group, Inc. v. Benton Industries, Inc.* (1993), 87 Ohio App. 3d 798, 806. Further, damages for breach of contract must be proven with reasonable certainty. *Textron Financial Corp. v. Nationwide Mutual Ins.* (1996), 115 Ohio App.3d 137, 144.

55. Here, Carter Properties unequivocally declared that it would not proceed with the performance of Landlord's Work unless NextHome agreed to an increase in the rental price, or to pay a substantial portion of the cost of Landlord's Work. NextHome was not required under the contract to do either. By refusing to perform Landlord's Work and to deliver the improved Premises to NextHome, unless NextHome agreed to conditions that were completely contrary to the clear and unambiguous language of the Lease, Plaintiffs anticipatorily breached the obligations under the Lease.

56. In order to prevail on its claim for anticipatory breach, NextHome must demonstrate a readiness, ability and willingness to perform the contract. See *George Wiedemann Brewing Co. v. Maxwell* (1908), 78 Ohio St. 54, syllabus 2; *Halliday v. Diehm* (1919), 11 Ohio App. 395. In this instance, NextHome was ready, willing and able to perform the Lease as of the time it was informed that Plaintiffs would not perform Landlord's Work. Mr. Vitanza, NextHome's president and CEO,

testified as to all of the steps NextHome had taken to prepare to move into the Premises. In essence, all that was left at the time of the anticipatory breach was for NextHome to move in upon the completion of Landlord's Work within 110 days after September 28, 2004, the date upon which NextHome faxed its acceptance of the Tenant's floor plans referenced in Exhibit C.

57. NextHome is entitled to damages for Plaintiffs' anticipatory breach of contract. It is a well established law in Ohio that the general rule of damages to be applied when there is an anticipatory breach of a contract to make a lease "is the difference between the fair market rental of the property proposed to be leased and the agreed rental to be paid in the proposed lease, such sum discounted to present value, together with any special damages arising from the breach. Such rule is one of almost universal application, is consistent with general contract law, and represents the weight of authority." See *F. Enterprises, Inc. v. Kentucky Fried Chicken Corp.* (1976), 47 Ohio St.2d 154, 158.

58. As to the issue of "special damages," expenses incurred by the lessee in preparing to move to and occupy the premises are recoverable. See *Reichman v. Drake* (1951), 89 Ohio App. 222, 230. "As a general rule the reasonable and necessary expenses incurred in good faith, anticipation of performance, or in part performance, of a contract, may be recovered as part of the damages for its breach, especially where the breach consists in prevention of performance." *Id.*

59. NextHome suffered damages for the period commencing January 2005, the anticipated date for NextHome to move into the Building, through the end of March 2006, when NextHome had built and moved into a building it now owns. NextHome's ownership and tenancy of its own building in the Westlake area fulfilled its duty to mitigate damages, and its actions

constituted a reasonable effort to ameliorate the ill effects of Plaintiffs breach of the lease. See *Frenchtown Square Partnership v. Lemstone Inc.*, 99 Ohio St.3d 254, 2003-Ohio-3648.

60. The testimony of Miles Carter and James Caldwell established that a market rental rate of $13.00 per square foot was reasonable for class B office space like the Building, given that the rental market was soft during that period of time and ample comparable space existed in the Westlake area. The testimony and damage calculations of Allen Taub represented competent, credible evidence concerning the value of NextHome's loss due to Plaintiffs' breach of the Lease. Utilizing and accepting Taub's opinions as testified to and set forth in Table 1 of his report, the present value of NextHome's loss for 2005 and January through March 2006 totaled $120,988.05 (e.g. $106,317.06 plus $14,670.99).

61. In addition, the Court finds that NextHome suffered the following special damages as a result of Plaintiffs' anticipatory breach:

(a)	Amounts paid to Brilliant Sign:	$4,408.00
(b)	Security deposit:	$7,875.33
(c)	Cost to relocate workstations	$2,250.00
	TOTAL	$14,533.33

62. The Court therefore finds that NextHome's special damages are $14,533.00, which are to be added to NextHome's damages for breach of the Lease of $120,988.05.

63. Based on the foregoing, NextHome is entitled to judgment against Carter Properties, Miles Carter and Catherine Carter, jointly and severally, on NextHome's clam for anticipatory breach of contract. Pursuant to Section 8.10 of the Lease, however, NextHome is limited to recovery for satisfaction of damages solely from Plaintiffs' interest in the Building and neither NextHome nor

anyone claiming through it may recover from Plaintiffs' by way of personal liability. Accordingly, the Court awards NextHome the sum of $135,521.38 in damages, plus costs, and statutory interest from January 1, 2005.

IT IS SO ORDERED.

August 10, 2007

MICHAEL J. RUSSO, JUDGE