

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED
Justice

PART 60

E-FILE

JET ACCEPTANCE CORP.,
Plaintiff,

INDEX NO. 602789-2008

-against-

MOTION DATE _____

QUEST MEXICANA, S.A. de C.V. and LOMAS GROUP, S.A. de C.V.,

MOTION SEQ. NO. #001

Defendants.

MOTION CAL. **RECEIVED**

The following papers, numbered 1 to _____ were read on this motion to/for

JUN 28 2010

**MOTION SUPPORT OFFICED
NYS SUPREME COURT - CIVIL**

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

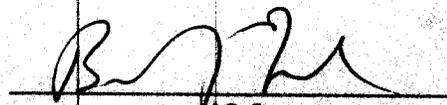
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION

Dated: 6/23/2010



HON. BERNARD J. FRIED

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60

-----X
JET ACCEPTANCE CORP.,

Plaintiff,

Index No. 602789/08

-against-

QUEST MEXICANA, S.A. de C.V. and LOMAS
GROUP, S.A. de C.V.,

Defendants.
-----X

APPEARANCES:

Attorneys for Plaintiff:

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Ann M. Cook, Esq.
Rebecca Key Johnson, Esq.

FRIED, J.:

In this action involving four commercial aircraft lease agreements, plaintiff-lessor Jet Acceptance Corp. (JAC) moves, pursuant to CPLR 3212, for an order granting partial summary judgment on the issue of liability as against defendant-lessee Quest Mexicana, S.A. de C.V. (Quest), and as against defendant-guarantor Lomas Group S.A. de C.V. (Lomas).

JAC, a Delaware corporation, and Quest, a Mexican limited liability company entered into four commercial aircraft lease agreements, each entitled "Aircraft Operating Lease Agreement," concerning four BAE 146-200 aircraft with serial numbers E2133,

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John M. Nonna, Esq.
Eridania Perez, Esq.

E2130, E2139 and E2140 (the Lease Agreements). The Lease Agreements, identical in all relevant aspects, were executed on or about August 16, 2007, and amended on or about October 16, 2007. On or about October 16, 2007, Lomas executed a guaranty, agreeing to unconditionally guaranty all of Quest's obligations under each of the Lease Agreements (the Guaranty).

Each Lease Agreement separately required that Quest "shall follow the Delivery Procedures" for the particular aircraft to which that Lease Agreement applied (Lease Agreement, ¶ 4.1). JAC's obligation to "tender [each] Aircraft for Delivery" arose only "after satisfactory completion of the Delivery Procedure" (Lease Agreement, ¶ 4.2).

Section 7 of each Lease Agreement is commonly referred to as a "hell or high water clause." It provides as follows:

7. Obligations Unconditional

The Lessee's obligation to pay Rent and to perform all of its other obligations under this Agreement on time is absolute and unconditional in all respects, regardless of the occurrence of any supervening events or circumstances (whether or not foreseen and whether or not fundamental in the context of the arrangements contemplated by this Agreement). The Lessee must continue to perform all of its obligations under this Agreement in any event and notwithstanding any defense, set-off, counterclaim, recoupment or other right of any kind or any other circumstance except as otherwise expressly set forth in this Agreement.

According to JAC, following execution of the Lease Agreements and the guaranty, in accordance with the specifications provided by Quest, JAC invested nearly eight million dollars readying the four aircraft for delivery to Quest.

JAC alleges that, on or about November 22, 2007, after conducting a full inspection and test flight of the first aircraft, Quest's representatives accepted delivery of the

first aircraft and executed and delivered to JAC, a signed Acceptance Certificate, in accordance with the terms of the Lease Agreement.¹ The Acceptance Certificate was signed by Quest's representative and is unconditional on its face. It states that Quest's "technical experts inspected the Aircraft and Aircraft Documents and found that they conformed fully with the Agreement . . . [and] confirm that the Aircraft meets all of the requirements necessary for [Quest] to accept Delivery, and that [JAC] has carried out all of its obligations under the Agreement concerning Delivery." Quest also "acknowledge[d] that the Aircraft has been delivered to us 'as is-where is'" and "confirm[ed] that the Aircraft is accepted for all purposes under the Agreement."

¹ The Acceptance Certificate states, in relevant part:

1. The Aircraft has been delivered to us today together with its Aircraft Documents. Delivery took place at Calgary Airport at [1700] hours . . .

2. Immediately before Delivery, our technical experts inspected the Aircraft and Aircraft Documents and found that they conformed fully with the Agreement, except as noted in the Delivery Reservations Agreement attached to this certificate (if any). We confirm that the Aircraft meets all of the requirements necessary for us to accept Delivery, and that Lessor has carried out all of its obligations under the Agreement concerning Delivery. We acknowledge that the Aircraft has been delivered to us "as is-where is."

3. We confirm to the Lessor that as of the time indicated above, being the Delivery Date

* * *

(c) the Aircraft is accepted for all purposes of the Agreement

* * *

6. We agree to your proposed remedial programme relating to the "Reservations Requiring Action" (if any) which have been recorded in the Delivery Reservations Agreement.

Notwithstanding the above, Quest did not thereafter remove the first aircraft from its location in Calgary, and made only two payments of \$60,000.00 each, representing rent for the months of November and December 2007.

JAC claims that Quest failed to complete the necessary Conditions Precedent set forth in the Lease Agreement to physically move the first aircraft from Calgary to Mexico.

JAC claims that, on or about December 13, 2007, it tendered the second aircraft to Quest for inspection in accordance with the provisions of the Lease Agreement. According to JAC, Quest's representative made a partial inspection of this aircraft but did not complete the inspection. JAC further alleges that, on January 2, 2008, it tendered the second aircraft to Quest for acceptance in accordance with the provisions of the Lease Agreement.

In January 2008, JAC notified Quest that the third aircraft was would be tendered for inspection on or about January 7, 2008, pursuant to the Lease Agreement. JAC then notified Quest, on January 18, 2008, that the aircraft would be ready for acceptance and delivery on or about February 1, 2008.

JAC contends that it repeatedly urged Quest to complete the delivery process for the second and third aircraft, but that Quest failed to do so.

JAC sent invoices for the monthly rent for the first aircraft specified in the Lease Agreement to Quest on November 9, 2007, December 3, 2007, January 7, 2008 and February 20, 2008. Quest paid rent on the first aircraft for the months of November and December 2007, but failed to pay the monthly rent for any subsequent period.

JAC also sent monthly invoices to Quest for the rent due under the respective Lease Agreements for the second and third aircraft, but Quest made no monthly rent payments at all for the second and third aircraft.

On February 20, 2008, JAC sent a notice of default to Quest with respect to the first, second and third aircraft. Also on February 20, 2008, JAC sent to Lomas, as guarantor, a copy of this notice of default, together with a notice that Lomas's obligations were due under the guaranty.

On March 14, 2008, relying on the cross-default provision set forth in article 17 of the Lease Agreement, JAC sent Quest a notice of default with respect to the fourth aircraft. JAC also sent a copy of that notice to Lomas, together with a notice stating that Lomas's obligations were due under the guaranty.

JAC commenced this action in September 2008.

JAC maintains that it has established the alleged defaults by Quest and Lomas of the Lease Agreements and the Guaranty, and that each such default constitutes a material breach of the Lease Agreements and the Guaranty, entitling JAC to summary judgment as against both Quest and Lomas.

JAC argues that Quest, pursuant to the terms of the Lease Agreement and the Acceptance Certificate, expressly and unconditionally accepted the first aircraft, but failed to complete the necessary conditions precedent documentation to remove the aircraft from Calgary, Canada, as required by the Lease Agreement. Quest also failed to pay any rent to JAC beyond the first two months of the lease term of the first aircraft. JAC submits that each of these failures by Quest constituted a material breach of the Lease Agreement with respect

to the first aircraft.

Regarding the second and third aircraft, JAC argues that Quest failed to accept delivery of these aircraft, when they were tendered to Quest, and that Quest also failed to pay rent as required by the Lease Agreements after it was deemed to have accepted delivery of these aircraft. JAC asserts that, each of these failures constituted a material breach of the Lease Agreements.

JAC further points out that Quest's breach of any one of the four Lease Agreements constituted a default and repudiation as to each other Lease Agreement under the cross-default provisions in the Lease Agreements. JAC contends that Quest is in material breach of the Lease Agreement for the fourth aircraft based on the cross-default provision, and the notice given of such default to Quest.

JAC asserts that the relevant terms of the Lease Agreements are clear and unambiguous - - they are mandatory and impose an affirmative obligation on Quest to take delivery of the aircraft and to comply with the delivery procedure set forth in the agreements. The provisions also provide that, where the lessee fails to comply with the specified delivery procedure and does not affirmatively accept delivery of the aircraft, the aircraft is deemed delivered and the lessee forfeits its right to inspect and object to the delivery of the aircraft. JAC further submits that the Lease Agreements do not permit the lessee to delay or unilaterally change the delivery procedure, avoid its obligation to accept the aircraft, or timely make specific objections to its delivery condition, and then later, in hindsight, argue that, if it had complied with the contract terms, it would have objected and refused acceptance and delivery. As such, JAC contends that Quest failed to observe the acceptance

and delivery provisions of the Lease Agreements, and thus lost any rights it possessed to object to purported breaches thereof.

In opposition, Quest maintains that material issues of fact exist which preclude summary judgment. Among other things, Quest argues that: (1) the aircraft were not in "delivery condition"; (2) the Lease Agreements are unconscionable; (3) JAC breached the Lease Agreement for the first aircraft by failing to obtain an export certificate so Quest could move that aircraft from Calgary, Canada to Mexico; and (4) the aircraft were not "airworthy." Quest further argues that the motion is premature because Quest is entitled to discovery.

Quest contends that the execution of the Acceptance Certificate was conditional and subject to JAC deregistering the first aircraft and securing an Export Certificate of Airworthiness. Quest submits that JAC did not complete the necessary prior work for this purpose, and that JAC did not satisfy its prior obligations, thus precluding Quest from taking possession of the aircraft. Quest further submits that it materially performed its obligations and conditions precedent, including its obligation to procure the insurance for the first aircraft, but that JAC wrongly claimed that the insurance Quest procured was insufficient. Quest also claims that the "hell or high water" clause only would become operative after a party's contractual obligations are triggered. In this regard, Quest submits that its contractual obligations were not triggered because they were contingent upon JAC completing the work necessary to deregister the aircraft, and securing the Export Certificate of Airworthiness, prerequisites which Quest submits JAC never completed.

Regarding the second aircraft, Quest contends that it inspected, but did not sign an Acceptance Certificate for this aircraft because the aircraft was not in satisfactory condition. It submits that, when JAC attempted to tender the aircraft for delivery, Quest rejected same because JAC had not put the aircraft in delivery condition and, further, because the aircraft was not airworthy. As to the third aircraft, Quest submits that the aircraft was never put in airworthy or delivery condition, and consequently, that JAC had no basis, under the Lease Agreement, to tender the aircraft for delivery. Quest thus maintains that it had no obligation to accept delivery of either the second or the third aircraft or to pay rent for either aircraft under the Lease Agreements.

Quest further contends that, since it was not in default of any of the Lease Agreements, there was no basis for JAC to invoke the cross-default provisions. Quest likewise argues that, since it was not in default of any of the Lease Agreements, there is no basis to invoke the Guaranty, and therefore, Lomas has no liability herein.

New York law enforces contractual terms as written. That is particularly true when the contracts are commercial agreements entered into at arms' length by corporations. Hell or high water clauses, such as the clause contained in each Lease Agreement, are common in equipment lease agreements, and are respected and enforced (*Wells Fargo Bank, N.A. v BrooksAmerica Mtg. Corp.*, 419 F3d 107 [2d Cir 2005]; *see also Wells Fargo Bank Minnesota, N.A. v CD Video, Inc.*, 6 Misc 3d 1003[A], 2004 Slip Op 51707[U] *8 [Sup Ct, NY County 2004, Edmead, J.], *aff'd* 22 AD3d 351 [1st Dept 2005]). In a case involving a commercial aircraft lease, where, as here, the lease contained "hell or high water" clauses and representations that the aircraft would be delivered "as is-where is," the Southern District

granted partial summary judgment to an aircraft lessor (*Wells Fargo Bank Northwest, N.A. v Taca Intl. Airlines, S.A.* (247 F Supp 2d 352 [SD NY 2002]))

Quest's argument that none of the aircraft were in "delivery condition" is unavailing. Quest is precluded from making this argument with respect to the first aircraft - based on the clear language in the Acceptance Certificate and the Delivery Reservations Agreement incorporated therein, Quest unconditionally accepted that aircraft. The "delivery condition" argument, advanced by Quest, with respect to the second and third aircraft is also rejected as inapplicable because: (a) Quest's breach is based on the Delivery Procedures provisions in the Lease Agreement; (b) Quest's failure to pay rent; and (c) JAC's invocation of the cross-default provisions. This argument is likewise inapplicable with respect to the fourth aircraft, insofar as Quest's breach thereof was based on the cross-default provisions.

Quest's argument that summary judgment is not warranted based on the doctrine of unconscionability, is rejected. In a commercial transaction among sophisticated business entities, there is a presumption that unconscionability is legally inapplicable (*Scotts Co., LLC v Ace Indem. Ins. Co.*, 51 AD3d 445 [1st Dept 2008]).

In *Sablosky v Edward S. Gordon Co., Inc.* (73 NY2d 133, 138-139 [1989]), speaking on the doctrine of unconscionability, the Court of Appeals explained:

The doctrine of unconscionability contains both substantive and procedural aspects, and whether a contract or clause is unconscionable is to be decided by the court against the background of the contract's commercial setting, purpose and effect (*see, Wilson Trading Corp. v David Ferguson, Ltd.*, 23 NY2d 398, 403 [1968]). Substantively, courts consider whether one or more key terms are unreasonably favorable to one party (*People v Two Wheel Corp.*, 71 NY2d 693, 699 [1988]). There is no general test for measuring the reasonableness of a transaction but we have recently provided this guidance: "[a]n unconscionable contract [is] one which 'is so grossly unreasonable or

unconscionable in the light of the mores and business practices of the time and place as to be unenforceable according to its literal terms.' " (*Gillman v Chase Manhattan Bank*, 73 NY2d 1, 10 [1988], quoting *Mandel v Liebman*, 303 NY 88, 94 [1951]). . . . [Claims of] procedural unconscionability in the contract formation process . . . are judged by whether the party seeking to enforce the contract has used high pressure tactics or deceptive language in the contract and whether there is inequality of bargaining power between the parties (*Gillman v Chase Manhattan Bank*, 73 NY2d 1, *supra*; *Matter of State of New York v Avco Fin. Serv.*, 50 NY2d 383, 390 [1980]; *State of New York v Wolowitz*, 96 AD2d 47, 67 [2d Dept 1983]).

Here, Quest was represented by sophisticated counsel in entering into the Lease Agreements - - the negotiations lasted over a year, involving numerous drafts and the execution of numerous documents, including two sets of memoranda of understanding, four Lease Agreements, four amendments, and a guaranty. Quest has simply come forward with no substantiation for its claim of unconscionability, such as an proof that the Lease Agreements were one-sided, or that they were entered into under circumstances depriving Quest of meaningful choice, let alone proof that the Lease Agreements were "so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforceable according to its literal terms . . . [including] some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party [internal quotation marks and citations omitted]" (*Gillman v Chase Manhattan Bank*, 73 NY2d at 10).

Quest's claim that JAC failed to provide an Export Certificate for the first aircraft is also unavailing. In the Delivery Reservations Agreement signed by Quest's officer as part of the Acceptance Certificate, Quest accepted the first aircraft "as being eligible or Export Certificate of Airworthiness," and agreed the Certificate would be furnished after

Quest satisfied its Conditions Precedent. Quest argues that it satisfied the insurance requirements in the Lease Agreement by furnishing insurance certificates that did not include insurance for "spares." It devotes its efforts to discussing the difference between spare and other insurance, concluding that it was not obligated to procure spares insurance. This argument misses the mark. First, it appears that the provisions of the Lease Agreement, in fact, call for spares insurance. Second, even if there was a question as to whether the Lease Agreement required Quest to procure spares insurance, schedule 6 of the Lease Agreement entitled JAC to require Quest to arrange different insurance in order to protect the owner and financiers of the aircraft. Without question, JAC did communicate to Quest that it required proof that the insurance included coverage for spares. Having failed to first satisfy its obligation to procure satisfactory insurance for the aircraft, Quest cannot be heard to argue that JAC breached the Lease Agreement by failing to de-register the first aircraft and provide an Export Certificate.

Quest also argues that summary judgment must be denied because the aircraft were not "airworthy." This argument is foreclosed as to the first aircraft by Quest's representations in the Acceptance Certificate. Furthermore, the Lease Agreement required Quest "to accept Delivery of the Aircraft and to start paying Rent" even if the aircraft "does not have a Certificate of Airworthiness directly or indirectly as a result of the action or inaction of [Quest]." As to the fourth aircraft, JAC never contended that the aircraft was ready for delivery - - rather JAC's claim rests upon the cross-default provision in each of the Lease Agreements. As to the second and third aircraft, Quest's liability results from Quest's breach of its contractual obligation to adhere to the Delivery Procedures. This is the basis

for which JAC declared Quest in default of its obligations under the Lease Agreements, an obligation which does not require a showing of airworthiness.

JAC has made a prima facie showing of its entitlement to summary judgment as against Quest on the issue of liability. Quest has failed to refute this showing. In this regard, I have examined each of the arguments raised by Quest in opposition to the motion and find that they fail to demonstrate a triable issue of material fact and are inadequate to defeat JAC's entitlement to the relief requested. Additionally, Quest has failed to identify any possible discovery that is potentially needed to address a particular issue material to this motion. As such, the argument that this motion is premature does not bar a grant of summary judgment.

Regarding the Guaranty, to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty (*see Reliance Constr. Ltd. v Kennelly*, 70 AD3d 418, 419 [1st Dept 2010]; *North Fork Bank Corp. v Graphic Forms Assoc., Inc.*, 36 AD3d 676 [2d Dept 2007]; *Kensington House Co. v Oram*, 293 AD2d 304 [1st Dept 2002]; *City of New York v Clarose Cinema Corp.*, 256 AD2d 69 [1st Dept 1998]). JAC has made a prima facie showing of its entitlement to summary judgment as against Lomas, because it has submitted proof of the underlying agreement, the Guaranty, Quest's failure to make payments under the underlying agreement, and Lomas's failure to perform under the Guaranty. Lomas has failed to refute this showing.

Accordingly, plaintiff Jet Acceptance Corp. is entitled to judgment on liability as against defendants Quest Mexicana, S.A. de C.V. and Lomas Group S.A. de C.V. and the only triable issues of fact arising on plaintiff's motion for summary judgment relate to the amount of damages. Therefore, it is

ORDERED that the motion is granted with regard to liability; and it is further

ORDERED that the issue of how much defendants owe to plaintiff under the Lease Agreements and Guaranty is hereby to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by C.P.L.R. § 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Special Referee Clerk (Room 119) to arrange a date for the reference to a Special Referee.

Dated: June 23, 2010

ENTER:



J.S.C.

HON. BERNARD J. FRIED