

**N450JE LLC v Priority 1 Aviation, Inc.**

2011 NY Slip Op 31432(U)

May 25, 2011

Sup Ct, NY County

Docket Number: 603490/08

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

N450JE LLC, JGINDI1 N450JE LLC, and EGINDI  
N450JE, LLC,  
Plaintiffs,

Index No.: 603490/08

Motion Date: 09/02/10

Motion Seq. No.: 02

Motion Cal. No.: \_\_\_\_\_

- v -

PRIORITY 1 AVIATION, INC. and INSURED  
AIRCRAFT TITLE SERVICE, INC.,  
Defendants.

The following papers, numbered 1 to 12 were read on this motion to compel.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits \_\_\_\_\_  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits - Exhibits \_\_\_\_\_

PAPERS NUMBERED	
1 - 3	
4, 5	
6 - 12	

**FILED**

Cross-Motion:  Yes  No

JUN 01 2011

Upon the foregoing papers,

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The court shall deny plaintiffs' motion to compel defendants to accept plaintiffs' Reply to Counterclaims and Responses to Request to Admit and shall grant the defendants' respective cross-motions for summary judgment.

With respect to the cross-motions, defendants separately seek summary judgment dismissing the complaint on the ground that they did not breach the contract because plaintiff failed to comply with a condition precedent to their performance. The

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

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

court agrees with defendants that the contract terms are clear that the prerequisites to acceptance of the aircraft by the buyer did not occur and therefore plaintiffs' claims must be dismissed. ABS Partnership v AirTran Airways, Inc., 1 AD3d 24, 29 (1<sup>st</sup> Dept 2003) ("When the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the document, and the court must enforce it without recourse to parol evidence").

Section 3.1 of the Aircraft Purchase Agreement provides in relevant part that:

(a) Buyer's inspection of the Aircraft shall consist of a visual inspection (the "Visual Inspection") and a pre-purchase inspection (the "Inspection"). . . Seller shall pay the Inspection Facility for the correction of any airworthiness discrepancies discovered during the Inspection ("Discrepancies") prior to Closing (defined below); . . .

(b) In the event the Inspection Facility estimates the cost to correct the Discrepancies will exceed USD \$250,000 . . . (hereinafter the "Aircraft Correction Threshold"), Seller shall deliver written notice to Buyer within two (2) business days of receiving the Inspection Facility's final list of Discrepancies discovered during the Inspection and the cost estimate to repair such Discrepancies, either (i) electing to correct all Discrepancies or (ii) electing to correct such Discrepancies up to the Aircraft Correction Threshold, in which case the Purchase Price shall be reduced by the amount that the actual cost of correcting the Discrepancies exceeds the Aircraft Correction Threshold. If no such notice is timely delivered by Seller to Buyer, Seller shall be deemed to have elected to reduce the Purchase Price as set forth above in this section. Within three (3) business days of Buyer's receipt of the final list of Discrepancies discovered during the Inspection and the cost estimate to repair such Discrepancies, Buyer shall deliver to the Seller and Aircraft Inspection Response in the form and substance as

set forth in Exhibit B hereto (the "Aircraft Inspection Response") pursuant to which it accepts the Aircraft subject to Seller's remediation of the Discrepancies attached to the Aircraft Inspection Response.

(c) Upon receipt by Seller of the Aircraft Inspection Response accepting the Aircraft or other deemed acceptance of the Aircraft, the Deposit shall be nonrefundable, except as provided in Section 3.5 and Section 11.4(b), provided that Seller tenders the Aircraft to Buyer in accordance with this Agreement. Upon Seller's receipt of the Aircraft Inspection Response accepting the Aircraft, Seller shall correct all Discrepancies discovered during the Inspection at its cost and expense (or upon Buyer's approval, enter into an agreement to remedy same after Closing) up to the Aircraft Correction Threshold and either correct any additional Discrepancies or reduce the Purchase Price according to its election as set forth above in Section 3.1(b). Buyer's failure to deliver an Aircraft Inspection Response to Seller within three (3) business days of Buyer's receipt of the Inspection Facility's issuance of the final list of Discrepancies discovered during the Inspection and the cost estimate to repair such Discrepancies will be deemed and acceptance under Section 3.1(b).

(d) Each party shall provide the other party copies of all written reports of the Inspection Facility produced during or in connection with the Inspection.

### 3.2 The Closing . . .

(b) Closing shall occur . . . no later than the third (3<sup>rd</sup>) business day after both of the following have occurred: (i) Buyer's acceptance of the Aircraft, and (ii) Seller's remediation of the reported Discrepancies in accordance with Section 3.1; such date being the "Closing Date". The Closing Date shall in no event take place after December 17, 2008. In the event that Closing does not occur on or prior to this date through no fault of Buyer or Seller, Seller or Buyer shall be entitled to terminate this Agreement and Escrow Agent shall return the Deposit to Buyer upon Seller's confirmation that Buyer's expenses payable to the Inspection Facility for the Inspection and to Seller for costs and expenses of Seller associated with the Test Flight have been paid. Escrow Agent shall not release the Deposit to Buyer until

Seller has confirmed that Buyer's financial obligations have been satisfied.

Section 3.2(b) of the Agreement makes clear that two steps must occur before the transaction closes. First the Buyer must accept the aircraft and second any "Discrepancies" must be resolved pursuant to Section 3.1 of the Agreement. Section 3.1(c) of the Agreement further states that the deposit only becomes nonrefundable after acceptance of the Aircraft.

As argued by the defendants, the Agreement in Section 3.1(b) only provides two methods by which the Buyer can accept the Aircraft. First, "[u]pon receipt by Seller of the Aircraft Inspection Response" from the Buyer. Or alternatively, Buyer's acceptance will be deemed to have occurred upon "Buyer's failure to deliver an Aircraft Inspection Response to Seller within three (3) business days of Buyer's receipt of the Inspection Facility's issuance of the final list of Discrepancies."

Contrary to plaintiffs' argument, the requirements of Section 3.1(b) by its express terms are not limited to a situation where the estimate to correct the Discrepancies was over \$250,000. The Agreement merely gave the Seller the option to either perform repairs or have the price reduced upon the surmounting of that threshold. By its very terms the Agreement requires an acceptance of the Aircraft by the Buyer in order to trigger the purchase obligation and acceptance is expressly

conditioned upon the receipt by the Buyer from the Seller of a report on the Discrepancies resulting from the inspection as defined in the Agreement. Plaintiff fails on this dispositive cross-motion to establish that any inspection reports were ever delivered to buyer. Contrast Embraer Finance Ltd. v Servicios Aereos Profesionales, S.A., 55 AD3d 427 (1<sup>st</sup> Dept 2008) (acceptance pursuant to the contract conclusive).

Here plaintiffs' failure to send the required inspection reports to the Buyer constitutes a failure of a condition precedent to Buyer's obligation to accept the Aircraft and close the transaction. Therefore, the plaintiffs' cannot hold the defendants liable for the alleged breach of their obligations under the contract. See MHR Capital Partners LP v Presstek, Inc., 12 NY3d 640, 643 (2009) ("defendant's obligation to perform under . . . agreement did not arise because an express condition precedent was not fulfilled").

Accordingly, it is

ORDERED that plaintiffs' motion is DENIED as moot; and it is further

ORDERED that the cross-motions of the defendants for summary judgment dismissing the complaint is GRANTED; and it is further

ORDERED that the complaint is DISMISSED as against all defendants and the Clerk is directed to enter judgment accordingly.

This is the decision and order of the court.

Dated: May 25, 2011

ENTER:

~~Debra A. James~~  
**DEBRA A. JAMES** J.S.C.

**FILED**

JUN 01 2011

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