SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH **PART** 54
Justice

Index Number : 653193/2011
AVIATION CAPITAL PARTNERS, LLC
vs.
GAZ REALTY INC.
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 8/10/12
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** 19-20

Answering Affidavits — Exhibits _____ **No(s).** 28-32

Replying Affidavits _____ **No(s).** 34

Upon the foregoing papers, it is ordered that this ~~motion is~~

and cross-motion are

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: 4/18/13

SHIRLEY WERNER KORNREICH, J.S.C.

1. **CHECK ONE:** ..... ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☒ **GRANTED** ☒ **DENIED** cross-motion ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

AVIATION CAPITAL PARTNERS, LLC and AVCAP CVG, LLC,

Index No. 653193/2011

Plaintiffs,

DECISION & ORDER

-against-

GAZ REALTY INC. and AIRPORT PLAZA HOLDINGS, LLC

Defendants.

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GAZ REALTY INC. and AIRPORT PLAZA HOLDINGS, LLC

Counterclaim Plaintiffs,

-against-

AVIATION CAPITAL PARTNERS, LLC, AVCAP CVG, LLC, DAMG, LLC and JOSEPH PISCITELL,

Counterclaim Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Motions number 2 and 3 are consolidated for disposition.

This action arises out of a failed real estate project to develop gas stations in or around a number of airports. The financier, acting through plaintiffs Aviation Capital Partners, LLC and AvCap CVG, LLC, alleges that the developer, acting through defendants GAZ Realty, Inc. and Airport Plaza Holdings, LLC (collectively, GAZ), owes money under a number of agreements. Defendants have counterclaimed, adding Joseph Piscitell and DAMG, LLC (DAMG, collectively

with Aviation Capital Partners, LLC, AvCap CVG LLC and Piscitell, Aviation Capital) as defendants to the counterclaim alleging, among other things, fraud, and seeking the rescission of certain agreements. In motion number 2, plaintiffs move for partial summary judgment on liability for all causes of action and for the dismissal of defendants' counterclaims and affirmative defenses. Defendants oppose, and seek leave to amend their answer. In motion number 3, plaintiffs seek to supplement their summary judgment motion's evidentiary record. For the reasons that follow, plaintiffs' motion for partial summary judgment is granted, defendants' cross-motion to amend is denied, and plaintiffs' motion to supplement the record is denied as moot.

I. Background

A. Piscitell Affidavit

In support of their motion for summary judgment, plaintiffs have submitted the affidavit of Piscitell, which the following account summarizes in relevant part. Piscitell avers that he is the chief executive officer of DAMG. DAMG wholly owns plaintiff Aviation Capital Partners, LLC, which it formed in 2009 to provide financial advisory services for infrastructure projects (affidavit of Joseph A. Piscitell, sworn to March 5, 2012, ¶¶ 1 & 5). In January 2010, Piscitell was introduced to George Abi Zeid, the principal of GAZ, who told him that he had potential deals to develop a type of gas station around several airports, but needed help obtaining financing (*id.* at ¶¶ 10–11). Piscitell told him that Aviation Capital could provide up to 90% of the project's cost through the issuance of tax-exempt municipal bonds (*id.* at ¶ 12). Piscitell explained that this financing method would require that a subsidiary of Aviation Capital lease the necessary property from the relevant airport authority, and then sublease the land to GAZ (*id.* at ¶

14). Abi Zeid said that he understood and agreed to this structure (*id.* at ¶ 15).

On February 12, 2010, Aviation Capital and GAZ entered into a letter of intent memorializing their agreement (*id.* at ¶16; exhibit 8 [Letter of Intent]). The Letter of Intent contemplated the execution of a net lease between a subsidiary of Aviation Capital as landlord, and a subsidiary of GAZ, as tenant (Letter of Intent 4). GAZ agreed to pay Aviation Capital's preliminary due diligence costs, and Aviation Capital thereafter began its due diligence (*id.* at 10, 14–15; Piscitell affidavit ¶¶ 21–22).

In late 2010, Aviation Capital and GAZ entered into three separate commitment letters to finance GAZ's projects around Cincinnati/Northern Kentucky International Airport (the CVG Project; Piscitell affidavit, exhibit 9 [the CVG Commitment Letter]), Tulsa International Airport (the TUL Project; Piscitell affidavit, exhibit 10 [the TUL Commitment Letter]) and John F. Kennedy International Airport (the JFK Project; Piscitell affidavit, exhibit 11 [the JFK Commitment Letter, collectively, the Commitment Letters]), respectively. In each agreement, Aviation Capital committed to provide financing up to a certain maximum amount ($7 million for the CVG Project, $6.5 million for the TUL Project, and $12 million for the JFK Project), subject to fulfillment of certain conditions precedent (*see, e.g.*, CVG Commitment Letter §§ 1[a] & 2). Among other things, for each project GAZ promised to pay, or to cause the contemplated sublessee to pay, all of Aviation Capital's reasonable expenses, "whether or not any one or all of the Transactions was consummated and whether or not any or all of the conditions [precedent] are, or can be, satisfied, unless the Leasehold Financing does not close solely due to [Aviation Capital]'s default" (Commitment Letters § 5). A condition precedent for financing was that GAZ would unconditionally and irrevocably guarantee the payment of these expenses (CVG

Commitment Letter, § 2[l][w]).

The JFK Project was deferred because of certain demands of the Port Authority (Piscitell affidavit, ¶ 32). The TUL Project was abandoned when the Tulsa Airport Authority refused to act as a bond issuer, after GAZ's failure to provide it with "satisfactory pre-leasing information" (*id.*). However, the CVG Project went forward and closed on December 30, 2010. At closing, a subsidiary of GAZ, Cincinnati Airport Plaza, LLC, entered into a ground lease with the Kenton County Airport Board (*id.* at ¶ 37, exhibit 13). The lessee assigned the ground lease to plaintiff AvCap CVG, LLC (Sublessor), a wholly owned subsidiary of Aviation Capital (*id.* at ¶ 37, exhibit 16). Sublessor then entered into a sublease with Airport Plaza CVG, LLC (Sublessee), a wholly owned subsidiary of GAZ (*id.* at ¶ 37, exhibit 18 [Sublease]). The Sublease required Sublessee to reimburse Sublessor for certain types of insurance and to acquire other types of insurance on its own (Sublease § 7). It also provided that in the event the ground lease was terminated either through condemnation or by the airport authority, then Sublessee would pay to Sublessor a certain amount, specified on a schedule attached to the sublease, minus any amount otherwise paid to Sublessor in connection with such termination (*id.* at § 10.4). The Sublease further required Sublessor to pay all the costs and expenses detailed in Section 5 of the CVG Commitment Letter (*id.* at § 19.1).

In addition, at closing defendants entered into two payment guaranties. Under the first, GAZ guaranteed the payment to Sublessor of the expenses detailed in Section 5 of the CVG Commitment Letter, as well as the amounts described under Section 10.4 of the Sublease (Piscitell affidavit, exhibit 22 [Limited Guaranty], § 1.2). In the second agreement, GAZ promised to pay Sublessor all costs arising out of a number of events, including any "failure

to . . . obtain and maintain the fully paid for insurance policies in accordance with the Sublease" (Piscitell affidavit, exhibit 23 [Recourse Guaranty] [collectively, with the Limited Guaranty, the Guaranties, § 1.2[g]). Each guaranty stated that the guarantors' obligations thereunder were "absolute and unconditional" and would not be subject to any counterclaim or defense other than a claim of full and indefeasible payment (Guaranties § 2). Twenty-four types of defenses are specifically enumerated as excluded or waived, including the exclusion of "any other occurrence or circumstance whatsoever . . . that might otherwise constitute a legal or equitable defense" (Guaranties §§ 2–3).

The bonds were issued, and the proceeds from their sale were deposited into Sublessor's account at Deutsche Bank (Piscitell affidavit, ¶ 47; exhibit 25). However, Sublessee did not obtain the required insurance policies or reimburse Sublessor, nor did it pay the required security deposit (*id.* at ¶ 49). After a demand for payment and notice of default when unheeded, Sublessor terminated the Sublease effective February 1, 2011 (Piscitell affidavit, ¶¶ 50–52, exhibit 28). After failing to find another party willing to take over the project, Sublessor called the bonds, and terminated the ground lease with the consent of the airport authority (*id.* at ¶¶ 53–55). To date, GAZ has not paid any of its obligations under the Guaranties, the Commitment Letters, or the Letter of Intent (*id.* at ¶ 56).

B. Abi Zeid Affidavit and Verified Answer

Defendants have laid out their opposition, defenses and counterclaims in an answer, verified by Stefano Pascucci, an officer of GAZ, and an affidavit, sworn to by Abi Zeid on May 3, 2012, which the following account summarizes in relevant part. Abi Zeid avers that Piscitell represented to him that Aviation Capital had extensive experience in the field of airport

infrastructure financing (affidavit of George Abi Zeid, sworn to May 3, 2010, ¶¶ 8–9). Piscitell told him that Aviation Capital would obtain financing for 90% of the cost of each of Abi Zeid's various projects, using the "sandwich lease" structure explained above to raise the money through the sale of tax-free municipal bonds (*id.* at ¶¶ 11–14). Piscitell stated that the bonds would be paid off through the rental payments under the sublease, and that if no financing was provided, no rent would be due (*id.* at ¶ 14).

As the deadline to close on the CVG Project approached, Aviation Capital's estimation of the costs of the project, the amounts that would be covered by the financing, and the contribution that defendants would be required to make began to shift to defendants' detriment. Whereas previously Abi Zeid had been told that GAZ would only need to make an equity contribution equal to 10% of the debt, plaintiffs demanded that GAZ put $875,000 into the CVG Project (*id.* at ¶¶ 71 & 79). The estimated cost of construction was revised upward from $4.9 million to $5.3 million (*id.* at ¶ 47, exhibits D & E). Other alleged surprise expenses included the bond broker's fee and more than $98,000 in insurance costs (*id.* at ¶¶ 78 & 80). These and other changes had the effect of requiring more money from defendants

Defendants and plaintiffs did not agree to these sudden new terms, and though a closing was planned for December 28, it did not take place that day (*id.* at ¶ 81, exhibit M). While Abi Zeid signed all the necessary closing documents on behalf of defendants, the agreements were to be held in escrow, not to be released until an agreement was reached (*id.*).

On December 30, there was an exchange of emails in an attempt to reach a resolution. At 10:04 AM, defendants' attorney sent an email to plaintiffs' attorney, stating that Piscitell had agreed to most of Abi Zeid's demands as articulated in his email sent at 8:32 that morning. She

asked that Piscitell "sign this email" (*id.*, exhibit N). The record contains no response to that email from plaintiffs' side. Defendants' attorney then requested that defendants be given thirty days to obtain cheaper insurance for a coverage amount no greater than that required by the ground lease, with the authority to negotiate a lower coverage amount with the airport authority (*id.*, exhibit N, email at 1:05 PM). Plaintiffs' counsel agreed, on condition that any insurance obtained by defendants would come from a company with as good a rating as the one whose policy was then in place (*id.*, email at 1:16 PM). Defendants' counsel accepted the qualification and authorized the release of the closing documents "so long as [plaintiffs] agree to the terms regarding the insurance" (*id.*, emails at 1:17 PM and 1:32 PM). She later sent a draft letter agreement memorializing the foregoing understanding (*id.*, email at 4:01 PM). The documents were then released from escrow (Abi Zeid affidavit, ¶ 89). Abi Zeid avers that the release from escrow was subject to the resolution of not only the insurance issue, but also the "documentation of the remaining items" from his 8:32 AM email, which he believed to have been resolved (*id.* at ¶¶ 89, 92).

However, the draft agreement was not executed (*id.*, exhibit P, email dated January 3, 2011 at 2:19 PM). After the weekend, defendants' counsel proposed to revise the Sublease itself to reflect the changed insurance provisions, according to new terms (*id.*). Plaintiffs' counsel objected to a revision of the Sublease as being too complicated and noted that defendants' new terms appeared to differ from last week's terms in a number of material respects, such as omitting the requirement that any new insurance have the same rating as the existing policy and requiring plaintiffs to pay for certain fuel equipment (*id.*, emails dated January 3, 2011 at 4:09 PM and January 5, 2011 at 11:18 AM). From that point, the emails attached to Abi Zeid's

affidavit descend into mutual acrimony which is unnecessary to rehash here, though it does not appear that any final agreement regarding the insurance was ever signed. In any case, Abi Zeid obtained an insurance quote for the relevant coverage for $21,000, which was rejected by plaintiffs (*id.* at ¶¶ 110–11). On January 17, 2011, Sublessee sent a notice of default to plaintiffs (*id.*, exhibit S). The letter accuses plaintiffs of reneging on various promises allegedly made by plaintiffs regarding the use of the loan proceeds and the payment arrangements for the services of Bovis Lend Lease, Inc. (Bovis) (*id.*). It also faults plaintiffs for rejecting the insurance quote obtained by Abi Zeid (*id.*).

Abi Zeid contends that "it does not even appear that [Aviation Capital] ever obtained the $7,000,000 in long term tax-free municipal bonds for the CVG Project" (Abi Zeid affidavit, ¶ 104). He also avers that he was repeatedly told that the "liquidated damages" provision of Section 10.4 of the Sublease was only in place to pay off the bonds in the event of a default by Sublessee (*id.* at ¶ 59). Finally, Abi Zeid lays the blame for the failure of the TUL Project at the feet of plaintiffs, claiming that the Tulsa Airport Authority rejected the project because it discovered that Aviation Capital had made certain misrepresentations about the potential purchasers of the contemplated bond issue (*id.* at ¶¶ 118–21).

C. Procedural History

Plaintiffs filed a summons and complaint on November 17, 2011, seeking to collect certain amounts allegedly due under the Letter of Intent, each Commitment Letter, and each guaranty. Defendants answered, asserting counterclaims seeking rescission of those agreements and alleging breach of contract, tortious interference, negligent misrepresentation and fraud. On March 6, 2012, plaintiff Aviation Capital Partners, LLC, commenced a related action against Abi

Zeid personally (*Aviation Capital Partners, LLC v Abi Zeid*, New York County, Index No. 650669/2012). Two days later, plaintiffs made the instant motion for summary judgment. The parties later stipulated that the two actions be joined, but that such joinder would not affect the consideration of the present motion.

II. Standard

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 [1979]). A failure to make such a showing requires a denial of the summary judgment motion, regardless of the sufficiency of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]). If a *prima facie* showing has been made, however, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez, supra*, 68 NY2d at 324; *Zuckerman, supra*, 49 NY2d at 562). The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept. 1997]). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat summary judgment (*Zuckerman, supra*, 49 NY2d, at 562). Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts (*Amaro v. Gani Realty Corp.*, 60 NY3d 491 [2009]; *Skillgames, L.L.C. v. Brody,* 1 AD3d 247, 250 [1st Dept 2003] [citing *McGill v. Parker,* 179 A.D.2d 98, 105 (1992)]; *see also Cron v. Harago Fabrics,* 91 N.Y.2d 362, 366 [1998]). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action (*Skillgames, id.* [citing *Guggenheimer v. Ginzburg,* 43 N.Y.2d 268, 275 (1977)]). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff (*Amaro,* 60 NY3d at 491). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration" (*Skillgames,* 1 AD3d at 250 [citing *Caniglia v. Chicago Tribune–New York News Syndicate,* 204 A.D.2d 233 (1st Dept 1994)]).

III. Discussion

A. Enforceability of Documents

Plaintiffs have made a *prima facie* showing that defendants agreed to pay certain expenses under the Letter of Intent, the three Commitment Letters and the Limited Guaranty. They have also shown that under the Limited Guaranty, defendants are obligated to pay the sums dictated by Section 10.4 of the Sublease and that the Recourse Guaranty makes them liable for any costs incurred by plaintiffs through defendants' failure to procure insurance. They have submitted evidence showing that the CVG Airport Authority terminated the ground lease (albeit with plaintiffs' consent), thereby triggering the obligations under Section 10.4 of the Sublease,

and that defendants have not paid them for their expenses and insurance costs, as obligated.

In response, defendants have argued that the Guaranties and the other closing documents are without force and effect, as Aviation Capital and GAZ never actually reached a true meeting of the minds as to the terms of the deal. GAZ maintains that it only authorized the documents' execution because it incorrectly believed that Aviation Capital had finally agreed to certain other terms and modifications it had proposed. Claiming that the written documents do not reflect the terms of the deal it believed it was entering into, it seeks the rescission of all of the closing documents, including the Guaranties, based on the doctrine of mistake.

GAZ is essentially claiming that when it authorized the release of the closing documents it mistakenly believed that Aviation Capital had assented to certain side agreements. However, a unilateral mistake does not normally support a claim for rescission (*Angel v Bank of Tokyo–Mitsubishi, Ltd*, 39 AD3d 368, 369–70 [1st Dept 2007]). While a court of equity may rescind a contract on the basis of a unilateral mistake where failure to do so would result in the unjust enrichment of one party at the expense of another, that is only the case where the windfall to be prevented by rescission would be the result of the mistake (*Gessin Elec. Contrs., Inc. v 95 Wall Assoc.*, 74 AD3d 516, 520 [1st Dept 2010] [mistake as to how much contractor had already been paid allowed rescission of agreement to make further payments]; *Cox v Lehman Bros. Inc.*, 15 AD3d 239 [1st Dept 2005] [promise to remit 112,400 shares rescinded upon discovery that account possessed only 81,700]).

The Guaranties here require GAZ to reimburse certain expenses and to assume liability for certain liquidated damages under the Sublease. GAZ is merely claiming that it would not have assumed these obligations if it had understood that Aviation Capital had not agreed to

certain other, essentially unrelated terms and conditions.[1] This is not a sustainable claim of mistake. Defendants' alternative claim, that the provision of a shopping period for insurance was an external condition precedent to executing the Sublease, is not viable in real estate transactions (*Torres v D'Alesso*, 80 AD3d 46 [1st Dept 2010]) or where, as here, the purported condition contradict the terms of the written agreement (*Hicks v Bush*, 10 NY2d 488, 491 [1962]; *see* Sublease § 7.1 [giving Sublessor right to obtain certain initial insurance at Sublessee's expense, and only giving Sublessee the right to propose replacement policies]).

In sum, the Guaranties were properly executed and are binding on defendants. As noted above, the Guaranties provide that they are absolute, unconditional and not to be subject to any counterclaim or defense. This language is sufficient to bar defendants' counterclaims and defenses, including fraudulent inducement, insofar as they might impede a judgment on the Guaranties (*Citibank v Plapinger*, 66 NY2d 90 [1985]; *Sterling Nat. Bank v Biaggi*, 47 AD3d 436 [1st Dept 2008]; *Raven Elevator Corp. v Finkelstein*, 223 AD2d 378 [1st Dept 1996]; *see also Generale Bank, New York Branch v Wassel*, 779 FSupp 310, 317–19 [SDNY 1991]). Defendants' protestations that these waivers are merely general boilerplate are belied by each guaranty's enumeration of more than twenty possible defenses or claims which the defendants specifically foreswear. The fact that not every possible counterclaim was specified is as inevitable as it is irrelevant. In any case, to the extent defendants' claims against the Guaranties are premised on the unenforceability or invalidity of the underlying documents, due to lack of

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[1] GAZ's belief that it had been granted a window within which to purchase cheaper insurance does not render its obligation to reimburse Aviation Capital for its insurance costs unjust enrichment. Aviation Capital merely seeks reimbursement, not unearned profit.

consideration or otherwise, that defense *was* specifically waived (Guaranties § 3.9).[2] Similarly, defendants cannot assert counterclaims based on any purported modification of the Sublease, whether related to the purchase of insurance or otherwise (Guaranties § 2.1). Claims for rescission based on fraudulent inducement are further barred by the integration clauses contained in the Guaranties and the Sublease which state that the writings constitute the entire agreement between the parties (Guaranties § 6.6; Sublease § 19.11; *General Bank v Mark II Imports, Inc.*, 293 AD2d 328, 328–29 [1st Dept 2002] *citing Marine Midland Bank, N.A. v CES/COMPU–Tech, Inc.*, 147 AD2d 396 [1st Dept 1989]). Accordingly, defendants' counterclaims and defenses on the Guaranties are dismissed.

B. Counterclaims for Fraud and Negligent Misrepresentation

However, plaintiffs also seek partial summary judgment on their claims arising from the Letter of Intent and the Commitment Letters. As these agreements do not contain the waivers found in the Guaranties, the court must consider defendants' counterclaims on the merits.

To state a claim for fraud, the pleadings must allege a representation of material fact, falsity, scienter, reliance and injury (*Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 [1999]). Defendants base their counterclaims for fraud and negligent misrepresentation on a number of statements allegedly made by Aviation Capital (*see* defendants' opposition to summary judgment, 14–15). Defendants first contend, essentially, that Aviation Capital never intended to go through with the deal from the very beginning. For this claim to be sustainable, defendants

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[2] Defendants' point that a party cannot "guaranty" its own obligation or that the Recourse Guaranty is actually an indemnity agreement, to the extent it is correct, merely renders the subject documents mislabeled, not ineffective, and certainly has no effect on the waivers contained therein.

must do more than infer such intent from the fact that all of the contemplated deals collapsed. If that were the case, every aborted transaction would have the potential to end up in court, regardless of any precautions taken in drafting the initial documents. To state a claim for fraud in this regard, defendants must identify facts indicating such fraudulent intent (*Stuart Lipsky, P.C. v Nouveau Entertainment, Ltd*, 215 AD2d 102, 103 [1st Dept 1995]). They have not done so.

Similarly, though defendants point an accusing finger at Aviation Capital's representations about its past experience, they have not identified what, if anything, was untrue about those statements. Also, there are no allegations of falsity or detrimental reliance concerning the financing of defendants' contemplated project at Newark airport, for which a commitment letter was never even signed. As for the TUL Project, the parties agreed that Aviation Capital's obligations would depend on it being able to procure bond financing "upon terms satisfactory to [itself] in its sole and absolute discretion" (TUL Commitment Letter § 2[a]). That the Tulsa Airport Authority would refuse to issue the bonds, for whatever reason, is a risk that was clearly accepted by defendants and cannot serve as the basis for a cause of action against Aviation Capital. Furthermore, GAZ cannot sue for fraud based on representations made to a third party (*Pensee Assocs. Ltd. v Quon Indus. Ltd.*, 241 AD2d 354, 360 [1st Dept 1997]). Consquently, defendants' counterclaims based on fraud and misrepresentation are dismissed.

C. Breach of Contract

In like manner, defendants' claims for breach of the Letter of Intent of the CVG Commitment Letter are without merit. The court takes judicial notice of the fact that the Boone County Fiscal Court unanimously authorized the issuance of Industrial Building Revenue Bonds (AvCap CVG, LLC Project) Series 2010 on December 7, 2010 (Minutes of the Boone County

Fiscal Court, Dec. 7, 2010, item vii, http://www.boonecountyky.org/Minutes/2010/1207.pdf). The Electronic Municipal Market Access (EMMA) system of the Municipal Securities Rulemaking Board indicates that the bonds, which carry a CUSIP number of 098786FA9, were issued for a principal amount of $7,350,000 on December 30, 2010, with a stated maturity date of December 1, 2040. Defendants have submitted bank statements showing that they held at least $7,350,000 in their account for this project as of January 31, 2011, with ten percent thereof designated for debt service (Piscitell affidavit, exhibit 25). SEC filings reveal that as of March 31, 2011, the bonds were held by a money market fund advised by Charles Schwab Investment Manager, Inc., and audited by PricewaterhouseCoopers LLP (Charles Schwab Family of Funds, Monthly Schedule of Portfolio Holdings [Form N-MFP, acc. no. 0001145549-11-004479] [Apr. 7, 2011]). In the face of this evidence, which defendants do not address, their conclusory insistence that the bonds were never issued need not be credited. The fact that the loan proceeds may never have been released to the developer does not mean that they would not have been available for disbursement, pursuant to whatever terms Aviation Capital and GAZ had agreed upon, had the deal not died. Furthermore, GAZ has not alleged that it signed acceptable sub-subleases with prospective tenants of the contemplated facility, a condition precedent to obtaining *any* of the bond proceeds (Sublease § 9.9 [a]).

The remaining grounds for breach of contract also fail. No agreement between Aviation Capital and GAZ required Aviation Capital to pay Bovis for preconstruction services. Thus, Aviation Capital's refusal to pay for such services cannot be a breach. Indeed, the contract for these services was between GAZ and Bovis (Abi Zeid affidavit, ¶¶ 34 & 36). The fact that AvCap *also* promised to pay Bovis for this work in a separate agreement between the two gave

Bovis additional rights, not GAZ (*see Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d 38, 43–46 [1985]; *Aymes v Gateway Demolition Inc.*, 30 AD3d 196 [1st Dept 2006]). The other allegations cited by defendants as grounds for breach of contract, such as being charged with excessive costs, not being provided with satisfactory documentation therefor, or failure to provide adequate capitalized interest, fail as defendants have not explained how these acts or omissions breached the Letter of Intent or the CVG Commitment Letter.

Finally, the fact that Aviation Capital convinced GAZ to assign its own ground lease to Aviation Capital does not constitute tortious interference with the relationship between GAZ and the CVG Airport Authority. It should go without saying that "conduct constituting tortious interference with business relations is, by definition, conduct directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship" (*Carvel Corp. v Noonan*, 3 NY3d 182, 192 [2004]). Here, GAZ is claiming that AvCap used improper means to convince GAZ itself to assign its lease. This counterclaim is dismissed.

Defendants' remaining arguments do not raise any issue of either fact or law. Since plaintiffs are seeking partial summary judgment on liability only, evidence of the amount of actual damages is not necessary at this stage. The fact that no bond proceeds were ever advanced to GAZ is immaterial, as Aviation Capital is seeking to collect the reimbursement of its expenses and the liquidated damages set forth in the Sublease. Then too, defendants' attempts to cast the Letter of Intent and the Commitment Letters as non-binding fail. The agreements, while acknowledging that they are not final, expressly stipulate that certain terms, including GAZ's obligation to pay Aviation Capital's expenses, are binding and survive the agreement's expiration

(Letter of Intent 15; Commitment Letters § 11).

In conclusion, plaintiffs' motion for partial summary judgment should be granted and defendants' counterclaims and defenses dismissed. The court notes that defendants' opposition has largely consisted of arguments that fly in the face of either black-letter law or the facts. Integration clauses and waivers of defenses are intended to have the salutary effect of giving banks and other financing entities the assurances they need to be comfortable lending millions of dollars to relative strangers. As a corollary, the law provides businessmen the right to not sign a document to which they do not wish to be bound. Defendants' proposed amended answer does not remedy any of the defects identified above. Therefore, leave to amend is denied. Additionally, since their motion for partial summary judgment is granted, plaintiffs motion to supplement the record is moot. Accordingly it is

ORDERED that the motion of plaintiffs and counterclaim defendants Aviation Capital Partners, LLC, AvCap CVG, LLC, DAMG, LLC and Joseph Piscitell to dismiss the affirmative defenses and counterclaims of defendants GAZ Realty Inc. and Airport Plaza Holdings, LLC is granted and the counterclaims and defenses are dismissed in their entirety; and it is further

ORDERED that the motion of plaintiffs for partial summary judgment on liability under the Letter of Intent, the Commitment Letters and the Guaranties against defendants GAZ Realty Inc. and Airport Plaza Holdings, LLC, is granted; and it is further

ORDERED that the cross-motion of defendants GAZ Realty Inc. and Airport Plaza Holdings, LLC to amend the answer is denied; and it is further

ORDERED that the motion of plaintiffs and counterclaim defendants Aviation Capital

Partners, LLC, AvCap CVG, LLC, DAMG, LLC and Joseph Piscitell to supplement the record is denied as moot.

Dated: April 18, 2013

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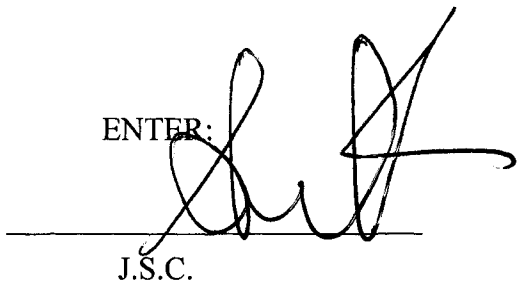

J.S.C.