

**MEG Holdings, LLC v Sapphire Power Fin. LLC**

2014 NY Slip Op 32165(U)

July 25, 2014

Supreme Court, New York County

Docket Number: 653906/12

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: Saliann Scarpulla  
Justice

PART 39

MEG Holdings LLC  
-v-  
Sapphire Power Finance LLC,

INDEX NO. 653906/12  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 003

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

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

decided per the memorandum decision dated \_\_\_\_\_  
which disposes of motion sequence(s) no. 003 + 004.

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

Dated: 7/24/14

  
\_\_\_\_\_, J.S.C.  
**HON. SALIANN SCARPULLA**

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  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: IAS PART 19

-----X  
MEG HOLDINGS, LLC,

Plaintiff,

Index No.: 653906/2012

-against-

SAPPHIRE POWER FINANCE LLC,  
Defendant,

**DECISION AND ORDER**

-and-

U.S. BANK NATIONAL ASSOCIATION,  
Nominal Defendant.

-----X  
SALIANN SCARPULLA, J.:

In this action, *inter alia*, seeking a judgment declaring the invalidity of certain indemnity claims asserted against plaintiff MEG Holdings, LLC, (“MEG”), MEG moves for (1) partial summary judgment against defendant Sapphire Power Finance LLC (“Sapphire”) on its first cause of action seeking a declaratory judgment rendering the indemnity claims invalid, and its second cause of action seeking to release the money being held in escrow as a result of the indemnity claims made; and (2) for an order pursuant to CPLR §3214(b) staying discovery pending the determination of this motion and motion sequence 004 (motion seq. no. 003). MEG also moves to dismiss Sapphire’s three counterclaims (motion seq. no. 004). Motion sequence numbers 003 and 004 are hereby consolidated for disposition.

MEG owned Morris Energy Group, LLC and Morris Energy Management Company (collectively referred to as “Morris”). The assets owned and managed by Morris included seven power plants located in New Jersey, Pennsylvania and Massachusetts (“the plants”). On July 15, 2011, Sapphire, as assignee of Sapphire Power Acquisition LLC, entered into a Purchase and Sale Agreement (“PSA”) to purchase 100% of the membership interest in Morris for \$255,600,000. The closing date for the transaction was October 6, 2011.

Also on October 6, 2011, pursuant to the PSA, MEG entered into an escrow agreement (“Escrow Agreement”) with Sapphire and nominal defendant U.S. Bank National Association. Pursuant to the Escrow Agreement, MEG was obligated to place approximately \$25,560,000 with the escrow agent, in the event that Sapphire asserted indemnification claims against MEG. In the absence of any properly asserted claims within one year from the closing date, the escrow funds were scheduled to be released in two allotments: approximately \$20,560,000 was scheduled to be released on October 6, 2012, with the remainder to be released on April 6, 2013.

Section 3(a) of the Escrow Agreement stated that if, at any time prior to April 6, 2013, Sapphire made a claim for indemnification under section 10.1(a) of the PSA, Sapphire should deliver a written certificate stating that it is “entitled to such indemnification under the [PSA] describing the reason for indemnification and the amount of such Claim . . . .”

The Escrow Agreement also stated that “from and after the initial disbursement date, except with respect to any claims pending as of the initial disbursement date and subject to the provisions of Section 3(a) and Section 3 (b) of this Agreement,” Sapphire was only entitled to make claims and receive payments from the Stub Escrow Property that were a result of claims of MEG’s breaches of “representations and warranties made in Section 4.14” of the PSA, or breaches of MEG’s “covenants and agreements,” made in section 6.18 of the PSA.<sup>1</sup>

Pursuant to a letter dated October 4, 2012, two days prior to the first scheduled release date of the escrow funds, Sapphire asserted 14 claims for indemnification under the PSA. Sapphire alleged that, pursuant to sections 10.1 and 10.2 of the PSA and section 3 of the Escrow Agreement, it was entitled to indemnification in the amount of approximately \$18 million. In the letter, Sapphire demanded that MEG “indemnify and hold Buyer harmless from and against all Losses Buyer has incurred or suffered resulting from Seller’s breach of representations and warranties set forth in Sections 4.7 and 4.25 of the PSA.” The letter continued as follows, in pertinent part:<sup>2</sup>

“Buyer requests that Escrow Agent promptly remit to Buyer \$17,521,258.13 from the Escrow Property. This amount constitutes the total losses of \$18,521,258.13 set forth below and detailed in Appendix A, less the Deductible Amount of \$1,000,000 . . . .

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<sup>1</sup> Stub Escrow Property includes the second disbursement amount of \$5,000,000, plus any investment income.

<sup>2</sup> For the purposes of this decision, only some of the claims are listed as examples.

Basis of Claim:	Claim Amount:
Lack of Detailed HRSG Inspections (All Projects)	\$185,451.20
Camden: Incorrect Transition Pieces	\$298,720.00
Newark Bay: Combustion and Hot Gas Path Component Reuse	\$11,416,695.45
Bayonne: Discrimination Suit	\$5,940.77
York: Lack of HRSG Maintenance	\$2,315,218.40"

As a result of Sapphire's claims, the escrow agent released only \$3,051,560.32 to MEG on the first release date, and held back \$17,521,258.13 in escrow. MEG objected to Sapphire's indemnity claims, pursuant to an appropriate objection notice, as set forth in the Escrow Agreement.

MEG then commenced this action, seeking to have the amount of \$17,521,258.13 released from escrow. The first cause of action sought a declaration as to the invalidity of the Sapphire's indemnity claims. The second cause of action sought the release of the \$17,521,258.13 in escrow funds, plus interest, as a result of the legally and/or factually insufficient indemnity claims. In the third cause of action, MEG alleged that Sapphire breached the PSA, by, among other things, asserting indemnity claims that were improper.

MEG now moves for partial summary judgment on its first cause of action seeking a declaratory judgment rendering the indemnity claims invalid, and its second cause of action seeking to release the money being held in escrow as a result of the indemnity claims made. According to MEG, the indemnity claims, with the exception of

the Bayonne Discrimination suit, are “interparty” claims which were not true indemnification claims under Article 10 of the PSA.<sup>3</sup> As such, MEG asserts that these indemnification claims are improper and cannot be asserted by Sapphire as a way to block the release of the funds held in escrow.

Article 10 is entitled “Indemnification, Limitations of Liability and Waivers.”

Some of the sections in Article 10 which will be discussed below, are referenced here:

Section 10.1, Indemnification, states the following, in pertinent part:

“(a) Subject to Section 10.2, from and after Closing, Seller shall indemnify, defend and hold Buyer, its affiliates and each of their respective officers, directors, stockholders, members, managers, employees, successors and assigns . . . harmless from and against all Losses incurred or suffered by Buyer Indemnatee resulting from:

(i) any breach of any representation or warranty of Seller contained in this Agreement; and

(ii) any breach of any covenant or agreement of Seller contained in this Agreement.

(b) Subject to Section 10.2, from and after Closing, Buyer shall indemnify, defend and hold Seller, its affiliates and each of their respective officers, directors, stockholders, members, managers, employees, successors and assigns . . . harmless from and against all Losses incurred or suffered by Seller Indemnatee resulting from:

(i) any breach of any representation or warranty of Buyer contained in this Agreement; and

(ii) any breach of any covenant or agreement of Buyer contained in this Agreement.”

Section 10.2, Limitations of liability, states the following, in pertinent part:

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<sup>3</sup> Evidently, MEG issued a check to Sapphire at the close of the first oral argument and it appears that the parties have settled the outstanding \$6,000 discrimination claim. As a result, the court is not considering the indemnification claim that stemmed from the discrimination suit, and will only discuss the alleged indemnification claims that make up the outstanding \$17 million in dispute.

“(a) . . . any Claim for liability under or pursuant to Section 10.1 (a) (1) or Section 10 (b) (i) must be made in writing no later than twelve (12) months following the Closing Date except with respect to (i) a breach of Section 4.14 (Environmental Matters) which must be made in writing no later than twenty-four (24) months following the Closing Date . . .

(f) the Parties mutually agree to treat Losses recovered hereunder as an adjustment to the Purchase Price and the Parties will report such payments consistent with such intent.”

Section 10.3, Duty to Mitigate, provides:

“Each Party shall have a duty to mitigate any Loss in connection with this Agreement, including using all commercially reasonable efforts to make and prosecute such claims under insurance policies which insure such Party or any of its affiliates against such Loss. Each Loss shall be reduced by the amount of any and all proceeds received by the Party asserting such Loss or any of its affiliates under insurance policies that insure such Party or any of its affiliates against such Loss.”

Section 10.4, which is written all in caps and entitled “Waiver of Other Representations,” states:

“(a) Notwithstanding anything in this agreement to the contrary, it is the explicit intent of each party, and the parties hereby agree, that none of seller or any of its affiliates or representatives has made or is making any representation or warranty whatsoever, express or implied, written or oral, including any implied representation or warranty as to the condition, merchantability, usage, suitability or fitness for any particular purpose with respect to the purchased interests, the MEG companies or any of the purchased assets, or any part thereof, except those representations and warranties expressly set forth in articles III and IV. Seller makes no representation or warranty to buyer with respect to any documents, materials, information or other data provided or made available to the buyer or its affiliates or representatives, including financial projections or forecasts relating to the MEG companies, the projects or the purchased assets.

b)except as otherwise expressly provided herein, seller’s interests in the MEG companies are being transferred through the sale of the purchased interests ‘as is, where is, with all faults,’ and seller expressly disclaims any

representations or warranties of any kind or nature, express or implied, as to the condition, value or quality of the MEG companies and their assets or the prospects (financial or otherwise), risks and other incidents of the MEG companies and their assets.”

Section 10.5 is the Waiver of Remedies provision. Section 10.5(a) states:

“Buyer and Seller acknowledge and agree that the foregoing indemnification provisions in this Article X shall be the exclusive remedy of Buyer and Seller with respect to the matters set forth in Article X, except for fraud or intentional misrepresentation; *provided however*, that the foregoing shall not limit or restrict the availability of specific performance or other injunctive or equitable relief to the extent that specific performance or such other relief would otherwise be available to the Parties hereunder.”

Section 10.5(b), written all in caps, states:

“Notwithstanding anything in this agreement to the contrary, neither party shall be liable for special, punitive, exemplary, incidental, consequential or indirect damages, whether based on contract, tort, strict liability, other law or otherwise and whether or not arising from the other party’s sole, joint or concurrent negligence, strict liability or other fault (‘non-reimbursable damages’).”

Section 10.7, Procedure with Respect to Third-Party Claims, states:

“[i]f any Party (or as to Buyer after Closing, the Project Company) becomes subject to a pending or threatened Claim of a third party and such Party (the ‘Claiming Party’) believes it has a claim against the other Party (the ‘Responding Party’) as a result, then the Claiming Party shall notify the Responding Party in writing of the basis for such Claim setting forth the nature of the Claim in reasonable detail.”

Section 10.8, Access to Information, explains that seller and buyer shall grant each other access to all information about the companies reasonably necessary to investigate or

“defend any claims between the Parties arising under, this Agreement other than (w) information relating to post-closing periods that is commercially sensitive, trade secret or otherwise confidential or (x) in the case of claims between the Parties, any information that is subject to any attorney client, work product or other privilege or that otherwise would not be required to be provided pursuant to a subpoena or other civil discovery procedure.”

In the PSA, “Loss” is defined as follows:

“any and all judgments, losses, liabilities, amounts paid in settlement, damages, fines, penalties, deficiencies, losses and expenses (including interest, court costs, reasonable fees of attorneys, accountants and other experts or other reasonable expenses of litigation or other proceedings or of any claim, default or assessment). For all purposes in this Agreement the term ‘Losses’ does not include any Non-reimbursable damages.”

MEG argues that, pursuant to the language in the indemnification provision and the definition of losses, claims between the parties are not subject to the indemnification provision in the PSA. According to MEG, section 10.1, which is the indemnification provision, and the provision mentioned in the Escrow Agreement, apply to potential third-party claims for failures in the operation of the plants. Sapphire’s claims were claims based mostly on MEG’s failure to maintain the plants. These claims are between Sapphire and MEG.

MEG further maintains that, even if Sapphire’s claims are proper indemnification claims, they are barred by the waiver provisions of the PSA, in which Sapphire acknowledges that it is acquiring MEG’s assets “as is, where is, with all faults.” As such,

even if the “interparty” indemnity claims were proper, “Sapphire may not complain about defects in the plant, equipment or systems . . . .”

MEG further argues that even if the claims stemming from section 4.25 of the PSA were permissible under Article 10, Sapphire’s loss would allegedly be classified as “non-reimbursable damages,” which are barred, as set forth in section 10.5(b). Finally, even if Sapphire’s indemnity claims arising from section 4.25 of the PSA were proper, MEG argues that it was in full compliance with the Prudent Industry Practice Standard.

Pointing to section 10.8 of the PSA, MEG also notes that, had the parties meant for the indemnification provision to cover interparty claims, the parties would have provided such language in the contract. In section 10.8, claims between the parties are referenced. As such, had the parties wanted section 10.1’s indemnification provision to apply to claims between the parties, the language would have so indicated. MEG provides that the interparty claims referenced in section 10.8 are the permissible claims that have “survived the exclusive remedy provision of 10.5(a), i.e., injunctive relief; monetary relief based on interparty claims for fraud or intentional misrepresentation; and monetary relief based on third-party claims.”

Sapphire asserts that it incurred losses as a result of MEG’s breach of sections 4.7 and 4.25 of the PSA. Briefly, section 4.25 provides that the equipment and property at each site has been maintained in accordance with Prudent Industry Practices.<sup>4</sup> Section

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<sup>4</sup> Section 4.7 states that, to MEG’s knowledge, there is no claim pending against any MEG company. This is no longer relevant to this claim.

4.25 is contained in Article 4, which is entitled “Representations and Warranties

Regarding the MEG Companies,” and states the following:

“Operation of Projects. Except as set forth on Schedule 4.25, the equipment, machinery, interconnections, systems, Property and Intellectual Property included in each Project have been operated and maintained in accordance with Prudent Industry Practices since the Acquisition Date of the respective Project Company.”

Sapphire also argues that, looking at the PSA as a whole, the parties intended to include interparty claims in the indemnification provision. Section 10.1 provides that MEG was to indemnify Sapphire for all losses incurred by Sapphire as a result of any breaches of any representation or warranties or any breach of any covenant or agreement. Section 10.2(f) of the PSA states that “the Parties mutually agreed to treat Losses recovered” under the indemnification provisions of the PSA as an “adjustment of the Purchase Price.” According to Sapphire, it understood that, “based on this language, the purpose of the indemnification provision was to provide a discount to the purchase price and reimburse Sapphire for any breaches and/or misrepresentations of the PSA by MEG.”

Contrary to MEG’s argument, Sapphire maintains that section 10.2(a) and section 10.7 are two notice provisions in the PSA, and support the conclusion that section 10.1 was intended to cover interparty claims. Section 10.1 makes no reference to section 10.7. Section 10.2(a) provides that Sapphire had twelve months from the closing date to assert any claims for liability under sections 10.1(a)(i) or (b)(i). Sapphire believes this section applies to all claims. On the other hand, the notice provision in section 10.7 refers to

third-party claims, imposing additional obligations on the parties with respect to third-party claims. As such, Article 10 “contemplated” that the parties would indemnify each other for both interparty and third-party claims, and that the parties were instructed to follow additional procedures with respect to third-party claims.

According to Sapphire, MEG’s interpretation of section 10.5, which is the exclusive remedy provision in the PSA, would lead to the “absurd result” that the parties could not be held liable for breach of contract. Sapphire claims that, according to MEG, MEG can breach every representation made, as long as there is no fraud, intentional misrepresentation or third party claim.

In Article 4 of the PSA, MEG made 32 sets of representations and warranties relating to MEG. According to Sapphire, some of the representations, such as the accuracy of their financial statements, could only give rise to interparty claims, and not third-party ones. Sapphire would never negotiate a contract where it would not have any remedies to enforce breaches of warranties.

With respect to the “as is” provision, Sapphire argues that the preamble includes the language of, “except as otherwise expressly provided herein.” As such, the “as is” language would not apply to representations as to the operation and maintenance of the plants, as set forth in MEG’s list. If it did apply, MEG would be able to escape liability from any false representations. In addition, Sapphire notes that it would be a question of fact as to what sort of damages Sapphire incurred as a result of its claims.

According to Sapphire, section 10.3, which creates a duty to mitigate, could apply to both interparty and third-party claims. In addition, insurance losses could also apply to interparty claims.

In its answer, Sapphire asserted three counterclaims. The first counterclaim was for breach of contract and refusal to indemnify. Sapphire argued that MEG breached the PSA and the Escrow Agreement by refusing to indemnify and defend Sapphire from costs arising from MEG's failure to operate the plants in accordance with Prudent Industry Practices, and for its failure to disclose a pending litigation against the companies. Sapphire explained that, during its first year owning the power plants, some problems were discovered as a result of forced outages. Allegedly, none of these deficiencies was disclosed by MEG on schedule 4.25 of the PSA. These deficiencies demonstrated that the power plants had not always been operated in accordance with Prudent Industry Practices.

Sapphire's second counterclaim was for breach of contract and breach of express warranty. Sapphire maintained that MEG breached the express warranty provisions set forth in sections 4.7 and 4.25 of the PSA by not operating the plants in accordance with Prudent Industry Practices and by not disclosing pending litigation. Sapphire stated that "MEG's representations and warranties set forth in Sections 4.7 and 4.25 of the PSA were material to Sapphire, and Sapphire would not have entered into the transaction under the terms of the PSA had MEG disclosed the lawsuit and MEG's deviations from Prudent

Industry Practice identified in Sapphire's claim for identification." As a result, Sapphire suffered damages, and sought to be compensated for no less than \$17,521,258.13.

In its third counterclaim, Sapphire alleged that MEG breached the confidentiality provisions of the PSA by failing to keep all information relating to Sapphire, the power plants and the PSA, confidential in accordance with the PSA. Sapphire maintains that MEG filed a complete and unredacted copy of the PSA along with its complaint. Section 11.3 of the PSA sets forth that, for two years after the closing date, MEG shall keep all information confidential. The PSA further provides that, if MEG is to disclose information in a legal proceeding, MEG is to give Sapphire notice, disclose only the information that is reasonably required, and make an effort to keep the information confidential. According to Sapphire, MEG did not inform Sapphire it was disclosing confidential information, and disclosed more confidential information than MEG was reasonably required to disclose.

MEG moves to dismiss Sapphire's counterclaims. According to MEG, Sapphire's first counterclaim, which seeks indemnity based on an interparty claims, must be dismissed for the reasons set forth above, namely that Article 10 covers only third-party claims.

MEG argues that Sapphire's second counterclaim should be dismissed because, pursuant to section 10.5, post-acquisition claims against MEG are limited to claims for

intentional misrepresentation and fraud and third-party claims. Sapphire's claims are interparty warranty claims based on MEG's violation of section 4.25 of the PSA.

In addition, by implementing an "as is" clause, MEG disclaimed any warranty for the condition of the plants, and Sapphire acknowledged this disclaimer. Taking the property "as is," prevents Sapphire from attempting to later claim a breach of warranty. According to MEG, "Sapphire received the benefit of its bargain (i.e., a lower purchase price); it cannot now assert claims it waived by its own hand." Moreover, Sapphire conducted due diligence and was aware of what it was purchasing.

MEG argues that, even if Sapphire could allege a breach of warranty under section 4.25, any warranty of the existing conditions of the plants have been waived. According to MEG, section 4.25 represents a warranty of representation of the prior condition of the plants. As such, damages, such as repairs, which stem from the existing condition of the plants, are deficient. MEG points out that consequential or indirect damages are beyond the scope of the PSA. Sapphire's claims for repairs are damages which flow directly from the current condition of the plants. These would be consequential or indirect damages, which MEG is not liable for under section 10.5(b) of the PSA.

Sapphire argues that it has sufficiently pleaded a cause of action for breach of contract based on MEG's failure to indemnify. As explained above, Sapphire argues that, looking at the PSA as a whole, the indemnification provision was meant to include interparty as well as third-party claims.

With respect to its second counterclaim, Sapphire maintains that, in the event the court concludes that Article 10 of the PSA does not provide a right to indemnification for third-party claims, Sapphire has still set forth a valid counterclaim for breach of express warranty. According to Sapphire, the exclusive remedy provision of section 10.5 does not bar a claim for breach of express warranty. If section 10.1 provides indemnification only for third-party claims, then section 10.5 would only serve to limit third-party claims. Section 10.5 would not limit the parties' remedies for matters that extend beyond Article 10, such as interparty claims.

In addition, Sapphire argues that the "as is" clause does not apply to the representations that MEG made concerning the operations of the plants in accordance with Prudent Industry Practices. Sapphire maintains that its damages are direct in that Sapphire's cost to replace pieces of equipment are a direct result of MEG's improper maintenance.

Sapphire next argues that it has sufficiently pleaded a cause of action for breach of the PSA's confidentiality provisions, which comprises its third counterclaim. It alleges that MEG could have merely quoted from relevant portions of the PSA and the escrow agreement, rather than attaching the entire agreements when filing the complaint. In Sapphire's opinion, MEG did not notify Sapphire of its disclosure of confidential information nor did not take reasonable steps to limit the disclosure. In addition, Sapphire argues that it has and will continue to suffer damages as a result of MEG's

improper disclosure of the confidential information. For instance, the purchase price, along with the break-up fee, deductible amounts, environmental information and back account numbers, were disclosed in these agreements. Disclosure of the purchase price, for example, along with other sensitive business information, will allegedly affect Sapphire's ability to sell the plants in the future.

## **Discussion**

### **Summary Judgment**

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 306 (1<sup>st</sup> Dept 2007), citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v. Grasso*, 50 A.D.3d 535, 545 (1<sup>st</sup> Dept 2008), quoting *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). In considering a summary judgment motion, evidence should be "viewed in the light most favorable to the opponent of the motion." *People v. Grasso* 50 A.D.3d at 544, citing *Marine Midland Bank v. Dino & Artie's Automatic Transmission Co.*, 168 A.D.2d 610 (2d Dept 1990). The function of the court is one of issue finding, not issue determination. *Ferrante v. American Lung Assn.*, 90 N.Y.2d 623, 630 (1997).

The Escrow Agreement indicates that the funds in escrow would not be released to MEG if Sapphire “makes a claim for indemnification under Section 10.1(a) of the PSA.” Section 10.1(a) of the PSA, labeled “Indemnification,” states that MEG is to indemnify, defend and hold Sapphire harmless from and against all Losses. Losses is then defined as any and all judgments, liabilities, fines, and amounts paid in settlements, among others.

It is a well-settled contract principle that “when parties set down their agreement in a clear complete document, their writing should . . . be enforced according to its terms [internal quotation marks and citations omitted].” *TAG 380, LLC v. ComMet 380, Inc.*, 10 N.Y.3d 507, 512-513 (2008). Additionally, “[e]vidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing [internal quotation marks and citation omitted].” *Golden Gate Yacht Club v. Société Nautique de Genève*, 12 N.Y.3d 248, 256 (2009).

Sapphire argues that if Article 10 is taken as a whole, it is evident that the parties contemplated indemnifying each other for both third-party and interparty claims. On the other hand, MEG argues that remaining provisions of the Article 10 complement section 10.1. Applying the above law to the facts at hand, it is evident that the section 10.1, labeled indemnification, is “clear and complete.” The court does not need to look beyond

10.1(a), as this provision is not ambiguous and refers only to third-party claims, and not claims between the parties.

Moreover, with respect to indemnity, the Court of Appeals has held that “[w]hen a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed.” *Hooper Assoc. v. AGS Computers*, 74 N.Y.2d 487, 491 (1989). For an indemnification clause, such as the one here, to cover “claims between contracting parties rather than third-party claims, its language must unequivocally reflect that intent.” *Gotham Partners, L.P. v. High Riv. Ltd. Partnership*, 76 A.D.3d 203, 206 (1<sup>st</sup> Dept 2010).

Section 10.1 of the PSA “falls short of the satisfying the exacting standard of *Hooper* . . . .” *Id.* As explained in *Hooper*, the language in section 10.1 is “typical of those which contemplate reimbursement when the indemnitee is required to pay damages on a third-party claim.” 74 N.Y.2d at 492. MEG is obligated to indemnify, defend and hold Sapphire harmless from and against all losses resulting from any breach of any representation, warranty, covenant or agreement by MEG in the PSA. These proposed failures by MEG can understandably lead to third-party claims. There is no language “exclusively or unequivocally referable to claims between the parties themselves . . . .” *Id.*

Although *Hooper* and *Gotham Partners, L.P.* both involved a claim for attorneys’ fees under the indemnification provision, courts have applied *Hooper* to interpret

indemnification provisions where attorneys' fees were not the subject of the dispute. *See e.g. Tonking v. Port Auth. of N.Y. & N.J.*, 3 N.Y.3d 486, 490 (2004) (“In the case before us, as in *Hooper*, the language of the parties is not clear enough to enforce an obligation to indemnify, and we are unwilling to rewrite the contract and supply a specific obligation the parties themselves did not spell out. If the parties intended to cover Bovis as a potential indemnitee, they had only to say so unambiguously”).

In the alternative, Sapphire argues that section 10.2 is a notice provision which applies generally to all claims, and section 10.7 is a notice provision which applies as an additional obligation for third-party claims only. As such, this express third-party notice provision would be a surplusage if the indemnification provision were not meant to refer to interparty claims as well. Sapphire argues, “where one [notice] provision applies generally and the other applies only to third-party claims, [it] evinces the parties’ clear and unmistakable intent to provide an indemnification for interparty claims.” *See e.g. Sagittarius Broadcasting Corp. v. Evergreen Media Corp.*, 243 A.D.2d 325, 326 (1<sup>st</sup> Dept 1997) (holding that the first sentence of the indemnification clause “cannot reasonably be interpreted as limited to third-party claims, particularly in view of the second portion of that clause, which clearly pertains to third-party actions, thereby rendering the first part mere surplusage were it only applicable . . . to third-party actions”).

However, again, looking at the language of the contract, as MEG argues, the two provisions are not both notice provisions and, in actuality, complement each other.

Section 10.2 refers to the time frame required to assert an indemnification, or third-party claim, and section 10.7 sets forth the procedure for implementing third-party claims. The two provisions are not in conflict with one another and can both be read to apply to third-party claims. *See e.g. BNP Paribas Mtge. Corp. v. Bank of Am., N.A.*, 778 F.Supp.2d 375, 418 (SDNY 2011) (“Thus, the fact that the single notice provision in each Agreement references claims by a ‘third party’ actually strengthens the point that the indemnification provisions in the Agreements cover only third-party claims”).

Had the sophisticated drafters of the PSA and the Escrow Agreement wanted the indemnification provision 10.1(a), clearly labeled “Indemnification,” to include claims between the parties rather than only third-party claims, they would have stated such. “Mere conclusory assertions, devoid of evidentiary facts, are insufficient [to defeat a well-supported summary judgment motion], as is reliance upon surmise, conjecture or speculation [internal quotation marks and citations omitted].” *Grullon v. City of New York*, 297 A.D.2d 261, 263-264 (1<sup>st</sup> Dept 2002). As such, Sapphire cannot set forth any triable issues of fact showing that it is entitled to indemnification for interparty claims. Accordingly, MEG is granted summary judgment on its second cause of action seeking to release the funds held in escrow due to Sapphire’s filing of indemnification claims.

During oral argument, the court granted MEG’s motion to stay discovery, pending the disposition of these motions. However, this request to stay discovery is moot now that, as a result of this decision, the court has determined the outcome of the motions.

In addition, the first cause of action for a declaratory judgment invalidating Sapphire's indemnification claims is unnecessary and inappropriate, because the second cause of action releasing the funds from escrow affords MEG an adequate remedy. *See Apple Records v. Capitol Records*, 137 A.D.2d 50, 54 (1<sup>st</sup> Dept 1988).

MEG's Motion to Dismiss Sapphire's Counterclaims:

On a motion to dismiss, pursuant to CPLR 3211, the facts as alleged in the complaint are accepted as true, the plaintiff is given the benefit of every possible favorable inference, and the court must determine simply whether the facts alleged fit within any cognizable legal theory. *Mendelovitz v. Cohen*, 37 A.D.3d 670, 671 (2d Dept 2007); *see also P.T. Bank Cent. Asia, N.Y. Branch v. ABN AMRO Bank N.V.*, 301 A.D.2d 373, 375 (1<sup>st</sup> Dept 2003). Under CPLR 3211(a)(1), a dismissal is appropriate only "if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994). Under CPLR 3211 (a) (7), however, "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one [internal quotation marks and citations omitted]." *Id.*

In its first counterclaim, Sapphire alleges that MEG breached the PSA and the Escrow Agreement by refusing to indemnify Sapphire for costs arising out of MEG's alleged failure to operate the plants in accordance with Prudent Industry Practices, and

from MEG'S failure to disclose pending litigation prior to the closing date. Sapphire filed "indemnification" claims, consisting of costs for repairing equipment, among other issues. These costs totaled approximately what was supposed to be disbursed to MEG on the first anniversary date of the closing, barring any indemnification claims.

As discussed above, the court has concluded that the PSA indemnification provision linked to the Escrow Agreement, which is the documentary evidence submitted, does not cover interparty claims. As such, MEG had no obligation to indemnify Sapphire for Sapphire's claims, which consist of its own claims as against MEG. Accordingly, Sapphire's first counterclaim is dismissed.

Sapphire's second counterclaim alleges that, by failing to operate the plants in accordance with Prudent Industry Practices, MEG has materially breached the express warranty, which was set forth in section 4.25 of the PSA. In addition, MEG allegedly breached the express warranty as set forth in section 4.7, by not disclosing any lawsuits pending against MEG. Sapphire is claiming the same amount of damages as it claims in its first counterclaim, namely the amount of its indemnification claims. Finally, Sapphire maintains that its entitlement to conduct due diligence is irrelevant since it was relying on MEG's warranty in section 4.25 of the PSA.

Sapphire argues that, pursuant to the language in the waiver provisions in Article 10, even if the PSA does not provide a right to interparty indemnification claims, Sapphire is still able to assert an alternative claim for breach of express warranty.

Sapphire maintains that, in this circumstance, the waiver of remedies in section 10.5 would not apply to a claim for breach of contract, because it is not an indemnification claim, and would be outside the confines of Article 10. Sapphire also argues that the “as is” clause does not apply to the representations made in Article 4, because there was an express carve out for those representations. “Except as otherwise expressly provided herein,” the preamble to the “as is” clause, creates an exception for the representations made in Article 4. In addition, the language of “except those representations and warranties expressly set forth in Articles III and IV” would also create an exception to the “as is” clause for the warranties set forth in Article 4.25.<sup>5</sup>

The PSA contained a waiver provision, in bold caps, stating that MEG was not making an express warranty with respect to any of the purchased assets. All of Sapphire’s claims, except the one seeking payment for the discrimination claim, are claims based on the condition of the plants. Sapphire agreed that it was purchasing the plants as is, where is, and with all faults. “The court’s role is limited to interpretation and enforcement of the terms agreed to by the parties, and the court may not rewrite the contract or impose additional terms which the parties failed to insert.” *131 Heartland*

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<sup>5</sup> To reiterate, section 10.4 (a) states that MEG is not making any express warranties, except for those representations and warranties expressly set forth in articles three and four. Section 10.4 (b) continues to state that, except as otherwise expressly provided herein, MEG’s interests are being transferred “as is, where is, with all faults,” and Sapphire disclaims any express or implied representations and warranties. MEG’s representations and warranties are set forth in articles three and four. Section 4.25, the provision relied upon by Sapphire for its claims, indicates that, except for what was listed on a separate schedule, the equipment and property has been operated and maintained in accordance with Prudent Industry Practices since the acquisition date of the respective project company.

*Blvd. Corp. v. C.J. Jon Corp.*, 82 A.D.3d 1188, 1189 (2d Dept 2011). Where, as here, “the contract specifically disclaims the existence of warranties or representations, a cause of action alleging breach of contract based on such a warranty or representation cannot be maintained.” *Simone v. Homecheck Real Estate Servs., Inc.*, 42 A.D.3d 518, 521 (2d Dept 2007).

Sapphire purchased the property "as is" without warranty as to its condition. It also conducted due diligence and stated in the PSA that it had conducted an investigation of the current condition of the plants prior to purchase. An “as is” clause “generally extinguishes any claim for after-discovered defects or breakdowns [internal quotation marks and citation omitted].” *Caldwell v. 302 Convent Ave. Hous. Dev. Fund Corp.*, 272 A.D.2d 112, 114 (1<sup>st</sup> Dept 2000); *see also Board of Mgrs. of the Chelsea 19 Condominium v. Chelsea 19 Assoc.*, 73 A.D.3d 581, 581 (1<sup>st</sup> Dept 2010). In addition, although Sapphire argues that its due diligence is irrelevant, it is “foreclosed from establishing reliance by the specific disclaimers and by [its] undertaking to conduct [its] own investigation [internal citation omitted].” *Board of Mgrs. of the Chelsea 19 Condominium v. Chelsea 19 Assoc.*, 73 A.D.3d at 581. As such, Sapphire is now prevented from making claims relating to equipment breaking down.

Even in the event that Sapphire could conclude, pursuant to section 10.4(a), that it was entitled to make a breach of warranty claim based on MEG’s failure to operate the plants in accordance with Prudent Industry Practices, the remainder of the contract

precludes claims grounded in breach of warranty. And, contrary to Sapphire's contentions, there is no language in section 10.5 that limits the remedies to the application of indemnification claims only. Section 10.5 is very clear. Indemnification claims are to be the exclusive remedy for the parties, except that Sapphire is also permitted to make claims for fraud, or intentional misrepresentation, and is not restricted in the availability of specific performance or equitable relief.

In other words, section 10.5 limits Sapphire's remedies to indemnification claims and claims for fraud or intentional misrepresentation. The court has concluded that the only indemnification claims covered are ones for third-party claims. The indemnity claims made by Sapphire are not third-party claims, nor are they ones for fraud or misrepresentation. As such, even if Sapphire could maintain that MEG breached an express warranty by not operating the equipment in a certain way, the Sapphire waived its rights to assert claims on that basis.<sup>6</sup>

Citing to *E\*Trade Fin. Corp. v. Deutsche Bank* (631 F.Supp.2d 313, 392 [SDNY 2009], *aff'd* 374 Fed Appx 119 [2d Cir 2010]), Sapphire argues that, if the indemnification provision applies only to third-party claims, Sapphire is left without remedy for obligations between the parties. Sapphire then concludes that MEG's interpretation of the indemnification provision leads "to the absurd conclusion that, although Sapphire

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<sup>6</sup> Because Sapphire is precluded from making claims grounded in breach of an express warranty, the arguments presented by the parties on whether the damages stem from the existing or prior conditions of the plant, or what type of damages these entail, are irrelevant.

negotiated for and received numerous express representations from MEG in the PSA, Sapphire never intended to have any remedies to enforce the same.”

However, as argued by MEG, in the present situation, the indemnification provision is not the only remedy available to Sapphire. Sapphire is also entitled to, and also contracted for, the ability to make claims for fraud, intentional misrepresentation and equitable remedies. “Deliberate choices by ‘sophisticated, counseled parties dealing at arm’s length’ in a ‘multimillion dollar transaction’ must be given effect.” *BNP Paribas Mortg. Corp. v. Bank of Am., N.A.*, 778 F.Supp.2d at 410, quoting *Chimart Assoc. v. Paul*, 66 N.Y.2d 570, 574-575 (1986); see also *101123 LLC v. Solis Realty LLC*, 23 A.D.3d 107, 112 (1<sup>st</sup> Dept 2005) (Court discussed the restricted applicable remedies provision as read in a contract for sale of real property and concluded that “the standard rules of contract construction and enforcement require that we limit the buyer to the remedies that were specifically delineated in the sale contract”).

Even if the “as is” provision did not apply to the representations made in articles three and four, the waiver of remedies provision precludes Sapphire from asserting claims based on a breach of warranty. Sapphire’s second counterclaim is therefore dismissed.

In its third counterclaim, Sapphire alleges that MEG breached the PSA by failing to adhere to the confidentiality provision in the PSA. Sapphire maintains that, as a result of this litigation, the disclosure of confidential information, such as the purchase price of

the plants, has been released. Due to the disclosure of this and other information, Sapphire has allegedly incurred damages in an “amount to be determined at trial.”

The elements of a breach of contract claim are: (1) the existence of a valid contract; (2) performance of the contract by the injured party; (3) breach by the other party; and (4) resulting damages. *Morris v. 702 E. Fifth St. HDFC*, 46 A.D.3d 478, 479 (1<sup>st</sup> Dept 2007). Sapphire speculates that the disclosure of the price it paid for the plants will affect Sapphire’s ability to sell the plants in the future. Sapphire is alleging some future hypothetical sale as a basis for his loss, which is not recoverable. *See also Fruition, Inc. v. Rhoda Lee, Inc.*, 1 A.D.3d 124, 125 (1<sup>st</sup> Dept 2003) (“The damages for which a party may recover for a breach of contract are such as ordinarily and naturally flow from the non-performance. They must be proximate and certain, or capable of certain ascertainment, and not remote, speculative or contingent [internal quotation marks and citation omitted]”). Accordingly MEG’s motion for dismissal is granted with respect to Sapphire’s third counterclaim for breach of the confidentiality provision.<sup>7</sup>

The court has considered Sapphire’s remaining contentions and finds them without merit.<sup>8</sup>

In accordance with the foregoing, it is hereby

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<sup>7</sup> As a result of motion sequence 001, the complaint was removed and replaced with a redacted version. The redaction did not limit Sapphire’s rights with respect to the third counterclaim. As a result of motion sequence 002, a stipulation was entered into for the production and exchange of confidential information.

<sup>8</sup> For instance, Sapphire’s argument that many of the representations and warranties listed in articles three and four would not lend themselves to potential third-party claims, is without merit.

ORDERED and ADJUDGED that so much of MEG Holdings, LLC's motion (motion sequence number 003) seeking partial summary judgment ordering the escrow agent to disburse the money remaining in escrow is granted, and the remainder of the motion is otherwise denied as academic; and it is further

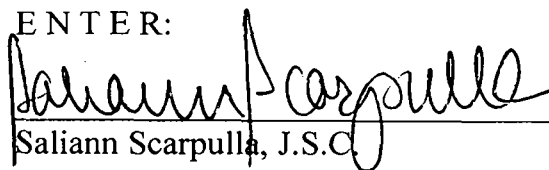
ORDERED and ADJUDGED that the escrow agent, U.S. Bank National Association, shall, upon service of a certified copy of this order with notice of entry, absent a timely appeal and/or stay, immediately disburse the remaining funds held in escrow, together with any accrued investment income less any fees and expenses due the escrow agent pursuant to Section 6 of the Escrow Agreement; and it is further

ORDERED and ADJUDGED that MEG Holdings, LLC's motion (motion sequence 004) to dismiss Sapphire Power Finance LLC's counterclaims is granted and the counterclaims are dismissed.

This constitutes the decision, judgment and order of the court.

Dated: New York, NY  
July 25, 2014

ENTER:

  
Saliann Scarpulla, J.S.C.