N450JE LLC v Priority 1 Aviation, Inc.
2015 NY Slip Op 32119(U)
April 17, 2015
Supreme Court, New York County
Docket Number: 603490/08
Judge: Debra A. James
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

EA 4/22/15

PRESENT: DEBRA A. JAMES PART 59

Justice

Index Number : 603490/2008
N450JE LLC
vs.
PRIORITY 1 AVIATION
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

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).** _____

Answering Affidavits — Exhibits _____ | **No(s).** _____

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

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

resolved in accordance with the attached Memorandum Decision and Order.

FILED
APR 22 2015
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL
APR 22 2015

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

Dated: APR 17 2015

_____, J.S.C.
DEBRA A. JAMES

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**

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 59

----------x

N450JE LLC, JGINDI N450JE LLC, and EGINDI N450JE LLC,

Plaintiffs,

-against-

Index No. 603490/08

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

Defendants.

----------x

Debra A. James, J.:

The plaintiffs' motion for summary judgment shall be granted on the first and second causes of action for breach of contract against defendant Priority 1 Aviation, Inc (Priority) and Insured Aircraft Title Service, Inc (Insured), respectively, and dismissing the first through fifth counterclaims of Priority. The defendants' cross motions for renewal and summary judgment shall be denied, except for that portion of defendant Priority's cross motion to dismiss the cross claims of Insured, which shall be granted.

Plaintiffs move for an order, pursuant to CPLR 3212, granting them summary judgment on their complaint. Defendants cross-move for leave to renew their motions for summary judgment dismissing the complaint.

In this breach of contract action, plaintiffs seek recovery for defendant Priority 1 Aviation, Inc.'s (Priority) breach of an agreement to purchase a Gulfstream IV-SP airplane (the Aircraft), and for defendant Insured Aircraft Title Service, Inc.'s (Insured) breach of the escrow agreement, pursuant to which it was holding the deposit for the Aircraft purchase.

Plaintiffs assert that Priority breached by failing to accept delivery of the Aircraft after plaintiffs remediated all airworthiness discrepancies disclosed in the pre-closing inspection and tendered it to Priority, and that Insured should have then remitted the deposit to plaintiffs, not Priority. Priority contends that plaintiffs failed to provide the inspection report or notice of the correction of the discrepancies, and that absent satisfaction of that condition precedent, it was not obligated to close. Insured contends that, because the condition precedent was never met, the deposit was refundable, and it cannot be held liable for transferring the deposit back to the purchaser.

THE TRANSACTION

Plaintiffs are limited liability companies that, from September 2008 to the present, jointly were and are the owners of the Aircraft.

On September 17, 2008, plaintiffs and Priority entered into an Aircraft Purchase Agreement (the Agreement), pursuant to which plaintiffs were obligated to sell and Priority was obligated to purchase the Aircraft for $22.9 million. The sale was actually a two-step transaction, with Priority acting as a middleman or broker- Priority had arranged to "flip" the Aircraft after taking title to it, by immediately selling it to the ultimate buyer, a Mexican company known as Taxi Aero BAE S.A. de C.V. (Taxi), for $23 million. For this brokerage service, Priority was to receive $100,000, the difference between the purchase prices, as its fee.

The Agreement states that a deposit in the amount of $750,000 would be held by defendant Insured, as escrow agent, with the balance of the purchase price to be paid at closing, which was to occur no later than November 21, 2008. Such deposit was paid by Taxi, and was being held by Insured.

The Agreement provides that the Aircraft's manufacturer, Gulfstream Aerospace Corp. of Savannah, Georgia (Gulfstream), would conduct a standard pre-purchase inspection of the Aircraft. As was consistent with industry practice, Agreement section 3.1 (a) states that Priority, as the buyer, would prepay all costs and expenses of the inspection, and the

plaintiffs, as seller, would pay Gulfstream for the correction of any airworthiness discrepancies discovered during the inspection, all prior to the closing.

With regard to the inspection, Agreement section 3.1 (b) provides that "[i]n the event [Gulfstream] estimates the cost to correct the Discrepancies will exceed USD $250,000 (... the 'Aircraft Correction Threshold'), [plaintiffs] shall deliver written notice to [Priority] within two (2) business days of receiving [Gulfstream's] final list of Discrepancies" either electing to correct all discrepancies, or electing to correct them up to the Aircraft Correction Threshold, and then reducing the purchase price in the amount of the additional repairs exceeding such correction threshold. If plaintiffs did not timely deliver a notice of such election, they would be deemed to have elected to reduce the purchase price as set forth therein. Priority then was to send an Aircraft Inspection Response, pursuant to which it accepted the Aircraft subject to plaintiffs' remediation.

With respect to the cost to correct the discrepancies greater than $250,000, Agreement section 3.1 (c) further provides that the deposit was nonrefundable when plaintiffs received the response from Priority accepting the Aircraft, or,

if Priority failed to deliver a response within three business days of Priority's receipt of Gulfstream's issuance of the final list of discrepancies and the estimated cost of repair, then Priority would be deemed to have accepted the Aircraft.

Agreement Section 3.1 (d) states that "[e]ach party shall provide the other party copies of all written reports of [Gulfstream] produced during or in connection with the Inspection".

Section 11.4 of the Agreement set forth the parties' agreed-upon remedies upon default. Specifically, in section 11.4 (a), the Agreement provided, in relevant part, that:

> (a) Upon failure by [Priority] to accept delivery of the Aircraft or remit the Purchase Price in accordance with the terms and conditions of this Agreement, or upon any other material default by [Priority], but prior to Closing, [plaintiffs] may (i) terminate this Agreement, (ii) proceed otherwise to sell or dispose of the Aircraft and (iii) retain the Deposit. The parties expressly agree that such amount is not intended as a penalty but is a reasonable estimate of the damages that would be incurred by the Seller in the event of such breach, and retention of such amount shall be the sole and exclusive remedy of Seller for breach by Buyer under this Agreement.

In Agreement section 10, the parties explicitly agreed that, concurrently with this transaction, Priority shall enter

into an agreement to sell the Aircraft to Taxi immediately upon closing, and that the Taxi agreement shall contain substantially similar terms, conditions, and default provisions as the Agreement.

Although the Agreement provided that the "Buyer," which was Priority thereunder, was responsible for the inspection of the Aircraft, since, as the parties agreed, Taxi was the ultimate purchaser, Taxi was responsible for handling and paying for the inspection. On September 12, 2008, Taxi accepted and paid Gulfstream $60,618 for the inspection. Taxi was present at Gulfstream's premises during the inspection, was aware of the discrepancies uncovered by the inspection, and signed off on them so that Gulfstream could go forward and correct them. By October 16, 2008, Gulfstream corrected all discrepancies and completed its Final Condition Survey Review Report (Gulfstream Report) for Taxi. Gulfstream would not give plaintiffs the Gulfstream Report, informing them that if they wanted a copy they would have to get the buyer's permission. Plaintiffs were separately invoiced $25,990.81 for correction of the discrepancies uncovered by the inspection, and all of the discrepancies were remediated at plaintiffs' expense.

Plaintiffs claim that at the time of such invoice, they

were informed that Priority was not going to complete the purchase and take delivery of the Aircraft. By email, dated October 27, 2008, from plaintiffs' attorney to the attorney for Priority and to the principal of Insured, Kirk Woford, plaintiffs demanded remittance of the deposit. This demand noted that plaintiffs had tendered the Aircraft to Priority, after correcting all discrepancies, which were significantly under the $250,000 Aircraft Correction Threshold, and that because Priority failed to accept the Aircraft, take delivery thereon, and remit the purchase price, plaintiffs were entitled to the deposit of $750,000 being held by Insured. By email dated October 29, 2008, Woford responded that he concurred with plaintiffs' account of Insured's representations, and asked that they communicate directly with Insured's attorney to perfect the payment.

Notwithstanding such e-mail from Woford, on November 13, 2008, Insured released the deposit to Taxi.

On November 14, 2008, plaintiffs sent a second demand to Priority and Insured for remittance of the deposit.

On November 18, 2008, Insured's counsel responded to plaintiffs, asserting that Insured was not holding a deposit, that is, that no deposit was received by it on the contract where plaintiffs were the sellers.

On November 20, 2008, Priority sent a letter to plaintiffs asserting that it was terminating the Agreement, based on the force majeure clause in the contract because there was "a global economic downturn" which created a force majeure, and prevented Priority from meeting its obligations under the Agreement.

Procedural History

On November 26, 2008, plaintiffs commenced this action against Priority and Insured, seeking the amount of the deposit. The first two claims are for breach of contract against Priority and Insured, respectively. The third claim, also for breach of contract, and the fourth claim, for fraud and breach of duty against Insured, were previously dismissed. In their answers, defendants abandoned the defenses of a force majeure clause event, and that Insured never held a deposit under the Agreement. Instead, Priority denied the material allegations of the complaint, and asserted five counterclaims: two for breach of contract, and the remaining claims for tortious interference with contract, a declaratory judgment, and for indemnification. Insured denied the complaint allegations, and asserted eleven affirmative defenses, many of which, the court now notes, are irrelevant and inapplicable to the claims.

In 2010, after document discovery, but before depositions were complete, defendants cross-moved for summary judgment dismissing the complaint. They argued that as a condition precedent to Priority accepting the Aircraft and the deposit becoming nonrefundable under Agreement section 3.1 (b) and (c), plaintiffs were required to, and did not, provide a list of discrepancies prior to closing. By order entered on June 1, 2011, this court initially granted defendants summary judgment. Plaintiffs then moved for reargument, and, by order filed on July 18, 2012, this court granted reargument to plaintiffs, holding that it had overlooked material issues of fact raised by plaintiffs with regard to whether Gulfstream sent the list of discrepancies and cost estimate directly to Priority, and whether the intent of the parties under the Agreement was that the inspection reports would be provided directly to the buyer of the aircraft, which bore all costs thereof in accordance with the practice in the industry. This court also found that section 3.1 (b) of the Agreement provided that only if the cost of the discrepancies exceeded $250,000, were the plaintiffs required to provide notice to the buyer of their election to either correct all deficiencies or to correct the deficiencies up to the Aircraft Correction Threshold of $250,000, and credit the

balance of the cost as a reduction in the purchase price. It further found that because plaintiffs' evidence showed that the cost to correct the deficiencies was only $25,990.81, and section 3.1 (b) of the Agreement did not provide for notice to Priority in such circumstances, there was an issue of fact as to whether the Priority must be deemed to have accepted the Aircraft under section 3.1 (c) of the Agreement.

On appeal, by decision and order dated January 21, 2013, the Appellate Division, First Department unanimously affirmed this court's decision. N450JE LLC v Priority 1 Aviation, Inc., (102 AD3d 631 [1st Dept 2013]). The First Department held that reargument was properly granted to plaintiffs as to the court's misapprehension of section 3.1 (b). It explicitly rejected defendants' contention that plaintiffs' failure to comply with section 3.1 (d), requiring them to send Gulfstream's reports to Priority, excused Priority's performance, since it could not "say, as a matter of law, that plaintiffs' breach was material". In considering sections 3.1 (b) and (c), the Appellate Division found that "Priority's acceptance of the aircraft was a condition precedent to closing and it never formally accepted the aircraft," but that the "'deemed acceptance' provision of section 3.1 (c) does not apply because

the cost to correct the discrepancies was less than $250,000" (102 AD3d at 632). Nevertheless, the First Department concluded that, even if the deposit was not nonrefundable under section 3.1 (c), section 11.4 (a) provided another basis under which plaintiffs could recover. Under that provision, plaintiffs were permitted to "terminate the agreement and retain the deposit upon Priority's failure to accept delivery or remit the purchase price, '*or upon any other material default by [Priority]*'" ([emphasis in original]).

Depositions completed, plaintiffs now move for summary judgment on their first and second causes of action for breach of contract against both defendants, seeking the deposit of $750,000. They argue that, even if Priority did not receive a list of discrepancies for the $25,990.81 in repairs made by Gulfstream, that was not a material breach by plaintiffs, or a condition precedent to Priority's obligation to close and take delivery of the Aircraft. They contend that the earlier decisions by this court and the Appellate Division are law of the case that plaintiffs' notices to Priority, which were a condition precedent to Priority's obligation to accept or be deemed to have accepted the Aircraft, were not required where the discrepancies were less than $250,000. They argue also that the earlier

holdings bar defendants' challenge that plaintiffs materially breached the Agreement, excusing Priority's performance. Plaintiffs further argue that there is no dispute that all discrepancies were remediated by Gulfstream in October 2008, and plaintiffs paid for them, all prior to the closing date of November 21, 2008. They also maintain that it is undisputed that Priority had no dealings with Gulfstream, since it had essentially delegated its responsibilities to Taxi, the ultimate buyer of the Aircraft. They submit proof that Taxi engaged Gulfstream to perform the inspection, for which it paid $60,618; was present at the inspection; and was aware of the results of it and the efforts undertaken to remediate the detected discrepancies; but left the facility, telling Gulfstream that it was no longer interested in the airplane; Gulfstream has no record of ever having sent the report to Taxi. Plaintiffs point to Gulfstream's Final Condition Survey Review Report, completed on October 16, 2008, which shows that it was specifically prepared for Taxi, as well as to the email from Gulfstream transmitted on October 17, 2008 in which it informed plaintiffs that it "will be" mailing the report to the buyer and that, in order for plaintiffs to get a copy of the report, they had to get the buyer's permission. All of this evidence, plaintiffs argue,

belies any defense by Priority that because it was entitled to a list of discrepancies, which it did not receive from plaintiffs, it had no further obligations to perform under the Agreement, and that it could walk away from the transaction.

Plaintiffs also seek dismissal of Priority's five counterclaims, Insured's affirmative defenses, and an award of attorneys' fees, pursuant to section 11.13 of the Agreement, which provides for reasonable attorneys' fees to the prevailing party.

Defendants cross-move for leave to renew their prior summary judgment motions. Priority contends that both the Appellate Division decision, which is law of the case, and the deposition testimony from Gulfstream that the Gulfstream Report was never delivered to Taxi as Taxi told Gulfstream that it was no longer interested in the sale, are bases to warrant renewal, and complete exoneration of Priority from any alleged breach. Priority once again argues that it could not breach for failure to close, because it was never obligated to do so since the condition precedent to closing was never satisfied. It claims that the First Department already decided that it did not accept and could not be deemed to have accepted the aircraft under sections 3.1 (b) and (c). Priority concludes that, therefore,

it "had no obligation whatsoever to proceed to closing". Priority argues that plaintiffs' reference to the cost of repairs is irrelevant, and that section 3.1 (b) of the Agreement is the only section under which the cost to repair would impact the parties' obligations. Priority claims that section 3.1(b) only provides for plaintiffs to give Priority an election of remedies if the repair was greater than $250,000 and, because the repair here was less than $250,000, this section and the remedy election notice requirement is not probative. Priority argues that it was still entitled to receive a final list of discrepancies, and that such receipt was an unconditional prerequisite to its acceptance of the Aircraft, which was a condition precedent to its obligation to close. Priority also urges that plaintiffs have not alleged any other material defaults by on its part. Finally, it argues that plaintiffs are not entitled to summary judgment because there is still an issue of fact as to whether plaintiffs breached the Agreement by failing to comply with section 3.1 (d), which required them to send Gulfstream's reports to Priority.

On its counterclaims, Priority asserts that the first counterclaim for plaintiffs' breach of their obligation of confidentiality, pursuant to section 11.17 of the Agreement, is proven by emails from plaintiff to Taxi regarding the inspection

in which provisions of the Agreement were quoted, and which disclosed details of the inspection. The second counterclaim for tortious interference is based on the communications between plaintiffs and Taxi, which allegedly excluded Priority, and led to the failed sale. The third counterclaim, alleging breach of section 3.1 (d) of the Agreement, according to Priority has been adjudicated in its favor by the Appellate Division. The fourth counterclaim seeks a declaratory judgment that Priority did not breach the Agreement, and, as determined by the Appellate Division, Priority could not have breached since it did not accept the Aircraft. Finally, Priority argues that because the court found that plaintiffs breached section 3.1 (d) of the Agreement, plaintiffs are contractually obligated to indemnify Priority for damages alleged by Insured on account of plaintiffs' breach.

Defendant Insured argues that it is not liable to plaintiffs because the deposit never became nonrefundable under the Agreement, as determined by the First Department on the prior appeal. Insured contends that since Priority never received the inspection documents, Priority could never accept the Aircraft, and the deposit never became nonrefundable. According to Insured, the deposit was fully refundable, and, therefore,

Insured cannot be liable for any damages resulting from not transferring the deposit to plaintiffs. It also contends that plaintiffs are asserting for the first time a claim against it sounding in the fiduciary obligations of escrow agents, and that this claim was not in the complaint or bill of particulars, and, therefore, may not be pursued now.

DISCUSSION

With respect to plaintiffs' motion for summary judgment, the court first addresses their first cause of action against Priority for breach of contract damages related to the Deposit. This court finds that plaintiffs have demonstrated as a matter of law that any breach by the plaintiffs of section 3.1(d) of the Agreement was not material, and therefore Priority's performance is not excused.

In order for plaintiffs to recover for breach of contract, plaintiffs must demonstrate that they performed their obligations under the contract, but that Priority failed to perform (see Harris v Seward Park Hous. Corp., 79 AD3d 425, 426 [1st Dept 2010] [the required elements for breach of contract are existence of a contract, plaintiff's performance, defendant's breach, and resulting damages]). As the Appellate Division held, with regard to the earlier summary judgment motion by defendants,

the plaintiffs' failure to send Gulfstream reports was a breach of plaintiffs' obligation to "provide the other party copies of all written reports of [Gulfstream] produced during or in connection with the Inspection" (102 AD3d at 632). The First Department then held that it could not be said that plaintiffs' breach was material as a matter of law (102 Ad3d, ibid). Contrary to plaintiffs' arguments, however, this was not a holding that the breach was immaterial as a matter of law. Instead, it was a holding determining that the issue was disputed, and could not be determined on the proof submitted.

Now on this motion, plaintiffs present uncontested proof that Taxi was present at the inspection and signed off on the repairs needed with regard to the discrepancies; that neither plaintiffs nor Priority were able to obtain a copy of the Gulfstream Report from Gulfstream without Taxi's approval; and that Taxi communicated to Gulfstream that it was no longer interested in purchasing the Aircraft. Defendants present proof that plaintiffs failed to send to Priority the proof of completion and payment for the repairs, both of which plaintiffs received from Gulfstream.

The court notes that Priority was not present at the inspection; that Taxi was the party dealing directly with the

inspection; that Taxi had access to all the relevant information that was in the Gulfstream Report and was entitled to such report for which it paid; but that Taxi chose not to obtain the report.

As stated in Long Island Savings Bank, FSB v Geloda/Briarwood Corp, (190 AD2d 64, 67 [1st Dept 1993]):

> 'One who unjustly prevents the performance of the happening of a condition of his own promissory duty thereby eliminates it as a condition. He will not be permitted to take advantage of his own wrong, and to escape from liability for not rendering his promised performance by preventing the happening of the condition on which it was promised.
>
> (Corbin, Contracts § 767, cited in Ellenberg Morgan Corp v Hard Rock Café Assocs, 116 AD2d 266, 271)'.

Here, having been informed that Gulfstream would not provide the report to third parties absent approval of the buyer Taxi, which paid for the inspection and report, Priority, which had its own agreement with Taxi that contained substantially similar terms, conditions, and default provisions as the Agreement, and therefore had every right to obtain Taxi's approval, never sought such approval. Instead, less than a month after the issuance of the Gulfstream Report, Priority sent its November 20, 2008 termination letter, asserting that it was terminating the Agreement under section 11.1 of the Agreement, the "force majeure" clause based upon "a global economic

downturn" which prevented Priority from meeting its obligations under the Agreement. The letter makes no mention of either the Gulfstream Report, proof of payment and completion of repairs, or section 3.1 (d) of the Agreement. Thus, Priority cannot escape its promise, having prevented the happening of such condition under the Agreement.

On the second cause of action against Insured, plaintiffs are likewise entitled to summary judgment on their claim that Insured breached its escrow agreement by returning the deposit to Taxi after it was aware of plaintiffs' claims to the deposit. "An escrow agent not only has a contractual duty to follow the escrow agreement, but additionally becomes a trustee of anyone with a beneficial interest in the trust" (Takayama v Schaefer, 240 AD2d 21, 25 [2d Dept 1998] [citations omitted]; see also Baquerizo v Monasterio, 90 AD3d 587, 587 [2d Dept 2011]). Therefore, an escrow agent may be held liable for breach of contract and breach of fiduciary duty as escrowee (Takayama v Schaefer, 240 AD2d at 25; *see* Greenapple v Capital One, *N.A.*, 92 AD3d 548, 549 [1st Dept 2012]). An escrow agent has a duty not to deliver the deposit held in escrow to anyone except in "strict compliance with the conditions imposed" in the escrow agreement (Takayama v Schaefer, 240 AD2d at 25 [internal quotation marks

omitted]; see Farago v Burke, 262 NY 229, 233 [1933]). "It is well-settled that, in the event of a dispute, the escrow funds may not be released until the conditions of the escrow agreement are fully performed and it is 'clear that no factual issues or viable claims exist under the closely scrutinized terms of the escrow agreement'" (Takayama v Schaefer, 240 AD2d at 25, citing and quoting E.S.P. Adj. Servs. v Asta Group, 125 AD2d 849, 849-850 [3d Dept 1986]). An escrow agent may continue to hold the funds in escrow, or commence an interpleader action, to avoid liability while the dispute is resolved (id. at 25-26).

Here, the escrow agreement with Insured was contained in the Agreement, which was signed by Insured. Section two of the Agreement, describing the purchase price, provided that the deposit was being held by Insured, "and applied towards the Purchase Price, and which shall be refundable to Buyer, except as otherwise expressly provided in the Agreement". In section 3.2 (b) (ii) of the Agreement, the parties agreed that Insured "shall not release the Deposit to Buyer until Seller has confirmed that Buyer's financial obligations listed above have been satisfied". The financial obligations involved the inspection facility and test flight expenses. The Agreement also provided, in section 10, that Priority was entering into a related transaction with

Taxi, and that "Escrow Agent agrees to pay Taxi's deposit directly to [plaintiffs] in the event of Taxi's default under the Taxi Agreement, and further agrees to provide [plaintiffs] notice and the opportunity to object to any release of Taxi's deposit before releasing such funds". Notwithstanding these provisions requiring notice to plaintiffs and confirmations from them regarding the satisfaction of the Buyer's financial obligations before return of the deposit, plaintiffs present proof that Insured did not notify plaintiffs at all that the deposit was being returned to Taxi after Taxi decided to walk away from the transaction, and never sought confirmations about the buyer's satisfaction of the listed financial obligations. In fact, plaintiffs present proof that Insured received plaintiffs' October 27, 2008 email demanding payment of the deposit based on Priority's default, and Insured responded by email on October 29, 2008, in which Woford of Insured agreed with plaintiffs' account of Insured representations, and stated that there were certain items Insured would need in order to perfect payment of the deposit to plaintiffs). Nevertheless, around two weeks later, Insured released the deposit funds on instructions from both Priority and Taxi to an account defendants directed. Woford admitted at his deposition that he knew at the time he was

releasing the deposit funds, that both plaintiffs and Taxi were making demands for the deposit, but failed to notify plaintiffs of the release.

Insured claims that, according to the First Department's decision, Priority's acceptance of the Aircraft was a condition precedent to closing, it never formally accepted it, the deposit, thus, was not nonrefundable, and, therefore, Insured cannot be liable as a matter of law. The fallacy of this argument is that it not only ignores sections 3.2 (b) (ii) and 10, but also section 11.4 (a), and the Appellate Division decision pointing out that plaintiffs could seek, and actually are seeking in this motion, to retain the deposit under that default remedies provision. The fact that the deposit may not have been nonrefundable under section 3.1 (b) and (c) because the cost of repairs was significantly less than the $250,000 correction threshold, as the Appellate Division found, does not absolve Insured of its obligations to not deliver the escrowed funds without strictly complying with the Agreement. Nowhere in the Agreement is Insured, as the escrow agent, given the authority to take instructions only from Priority or even Taxi, and release the funds without any notification to plaintiffs as the sellers, and without confirming that there are no factual

issues or viable claims as to the deposit (see Takayama v Schaefer, 240 AD2d at 25). Insured's affirmative defenses fail to raise any triable issues. Therefore, the court finds that Insured has failed to raise a triable issue as to its breach of the escrow agreement, and summary judgment is granted to plaintiffs on the second cause of action.

With respect to Priority's counterclaims, plaintiffs are granted summary judgment dismissal of the first counterclaim for breach of the confidentiality provision of the Agreement. Section 11.17 of the Agreement, in which the parties agreed to keep the contents of the agreement and the parties' identities confidential, provided an exception in subsection (g) "for performance of the obligations under this Agreement". Clearly, plaintiffs' communications with Taxi were in connection with the inspection that was required in order to effect the sale, and fall within that exception. Similarly, Priority's second counterclaim for tortious interference with Priority's contract with Taxi due to plaintiffs' disclosing the contents of the Agreement and the discrepancies and costs of repair to the Aircraft, fails as a matter of law. Again, section 11.17 (g) allows plaintiffs to disclose the contents of the Agreement to effect the sale, the parties' agreed the transactions were

related, and the discrepancies and costs of repair were disclosed to Taxi because it was present at the inspection, and signed off on the repairs. The remaining three counterclaims for breach of the Agreement for plaintiffs' failure to deliver the inspection reports and discrepancies list, for a declaratory judgment regarding that same breach claim, and for contractual indemnification (under Agreement § 5.3 for seller's indemnity), are summarily dismissed in light of the issue of fact that any breaches by plaintiffs of section 3.1 (d) were not material. In addition Priority's "declaratory judgment cause of action is unnecessary and inappropriate where it has an adequate, alternative remedy in another form of action, such as breach of contract" (Apple Records v Capitol Records, 137 AD2d 50, 54 [1st Dept 1988]). Plaintiffs' request for summary judgment of liability as to attorneys' fees, pursuant to section 11.13 of the Agreement, as the prevailing party is granted.

In light of the above determination with regard to plaintiffs' second cause of action against Insured for breach of contract, Insured's cross motion for summary judgment dismissing that same claim is denied.

As reasoned above, Priority has failed to demonstrate a material breach by plaintiffs or prejudice since it prevented the

performance of the condition. (Unigard Sec. Ins. Co. v North Riv. Ins. Co., 79 NY2d 576, 581 [1992]).

Moreover, while defendants are correct that the Appellate Division already determined that Priority's acceptance of the Aircraft was a condition precedent to closing, its receipt of the list of discrepancies or the Gulfstream Report are not conditions precedent to closing under the Agreement. Sections 3.1 (b) and (c) do not provide support for defendants' argument, because both of those provisions address requirements for plaintiffs to provide written notice to Priority, and Priority to provide a response, "[i]n the event [Gulfstream] estimates the cost to correct the Discrepancies will exceed USD $250,000". It is undisputed that the costs here were approximately $25,000, well under the $250,000 threshold. Nowhere in the Agreement is there a provision that states that a list of discrepancies under $250,000 was a condition precedent to Priority's obligation to accept the Aircraft and proceed to closing. A contractual duty "will not be construed as a condition precedent absent clear language showing that the parties intended to make it a condition" (Unigard Sec. Ins. Co. v North River Ins. Co., 79 NY2d at 581; see also Torres v D'Alesso, 80 AD3d 46, 57-58 [1st Dept 2010]; Ashkenazi v Kent S. Assoc., LLC, 51 AD3d 611, 611-612 [2d

Dept 2008]). "If the language is in any way ambiguous, the law does not favor a construction which creates a condition precedent" (Kass v Kass, 235 AD2d 150, 159 [2d Dept 1997], affd 91 NY2d 554 [1998] [citations omitted]). When it does not "'clearly appear from the agreement itself that the parties intended a provision to operate as a condition precedent,'" the court will not construe a contractual duty as a condition precedent (Ashkenazi v Kent S. Assoc., LLC, 51 AD3d at 611, quoting Kass v Kass, 235 AD2d at 159).

As plaintiffs aptly point out, the Appellate Division rejected this same contention by defendants, citing the Unigard Sec. Ins. Co. v North Riv. Ins. Co. (79 NY2d 576) case.

Defendants also argue once again that the deposit never became nonrefundable under section 3.1 (b) and (c) so that plaintiff cannot recover and retain the deposit for breach of this Agreement. This court disagrees. Section 3.1 (b) and (c) were not the only provisions under which Priority could accept the Aircraft, and were not the only provisions under which plaintiffs could seek recovery for Priority's failure to go forward with closing. By their October 27, 2008 demand letter, plaintiffs explicitly informed Priority that the inspection was concluded, and that the discrepancies were corrected and were

significantly less than $250,000. As already noted by the First Department, here, where plaintiffs performed their obligations of remediating discrepancies of the Aircraft discovered in the inspection, and Priority refused to accept the Aircraft, plaintiffs could terminate the Agreement and retain the deposit under section 11.4 (a), which they attempted to do. Defendants fail to present any support in the language of the Agreement that Priority had the right for any reason or for no reason to simply refuse to accept the Aircraft. The court reiterates that Priority's repudiation in its November 20, 2008 letter nowhere asserts that it was refusing to accept the Aircraft because of plaintiffs' failure to provide a list of the discrepancies, proof of repair, or any other purported failure of an alleged condition precedent. Rather, it made a meritless claim that the Wall Street collapse and global economic crisis fell within the Agreement's force majeure clause.

Finally, the indemnification provisions of the Agreement do not cover contractual obligations thereunder. Thus, Insured's cross claims against Priority lack merit.

Accordingly, it is

ORDERED that the motion of plaintiffs for summary judgment is granted on the first cause of action against

defendant Priority I Aviation, Inc. and on the second causes of action against defendant Insured Aircraft Title Service, Inc., and is granted to the extent of dismissing the first through fifth counterclaims of defendant Priority 1 Aviation, Inc and the Clerk is directed to enter judgment in favor of plaintiffs and against defendants in the sum of $750,000, with interest at the statutory rate from the date of the decision, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the cross motions of defendants for summary judgment are granted only to the extent of dismissing Insured's cross claims, and are otherwise denied; and it is further

ORDERED that that portion of plaintiffs' action that seeks recovery of attorney's fees is severed and the issues of reasonable attorneys fees plaintiffs may recover against the defendants is referred to a Special Referee to hear and report pursuant to CPLR 4320 and that within 30 days from the date of service of this order with notice entry, either party shall cause a copy of this order with notice of entry, including proof of service thereof, to be filed with the Special Referee clerk (Room 119M, 646-386-3028 or spref@courts.state.ny.us) to arrange a date

for a reference to hear and report pursuant to CPLR 4320 and for placement at the earliest convenient date upon the calendar of the Special Referees Part; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.

Dated: April 17, 2015 ENTER:

J.S.C.

DEBRA A. JAMES