PSW NYC LLC v Bank of Am., N.A.
2016 NY Slip Op 32219(U)
October 31, 2016
Supreme Court, New York County
Docket Number: 650390/2016
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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PSW NYC LLC,

Index No.: 650390/2016

Plaintiff,

DECISION & ORDER

-against-

BANK OF AMERICA, N.A., as Trustee for the Registered Holders of Wachovia Bank Commercial Mortgage Trust 2007-C30, acting by and through its Special Servicer, CWCapital Asset Management LLC, BANK OF AMERICA, N.A., as Trustee for the Registered Holders of COBALT CMBS Commercial Trust 2007-C2, acting by and through CWCapital Asset Management LLC pursuant to the authority granted under that certain Amended and Restated Co-Lender agreement dated March 12, 2007, U.S. BANK NATIONAL ASSOCIATION, as Trustee for the Registered Holders of Wachovia Bank Commercial Mortgage Trust 2007-C31, ML-CFC Commercial Mortgage Trust 2007-5, ML-CFC Commercial Mortgage Trust 2007-6, acting by and through its Special Servicer, CWCapital Asset Management LLC, pursuant to the authority granted under that certain Amended and Restated Co-Lender agreement dated March 12, 2007, PCV-M HOLDINGS LLC, and CWCAPITAL ASSET MANAGEMENT LLC, in its individual capacity,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 003 and 004 are consolidated for disposition.

Defendants CWCapital Asset Management LLC (CWC), PCV-M Holdings LLC (PCV), Bank of America, N.A. (BOA), and U.S. Bank, National Association (U.S. Bank) move: (1) pursuant to CPLR 3211, to dismiss the complaint (Seq. 003); and (2) pursuant to 22 NYCRR § 130-1.1, for sanctions against plaintiff PSW NYC LLC (PSW) and its attorneys, Stephen B. Meister and Meister Seelig & Fein LLP, on the ground that this action is frivolous (Seq. 004). PSW and its counsel oppose both motions and cross-move for partial summary judgment on

liability.[1] For the reasons that follow, defendants' motion to dismiss is granted, their motion for sanctions is denied, and PSW's cross-motion for summary judgment is denied.

I. Factual Background & Procedural History

As this is a motion to dismiss, the facts recited are taken from the complaint and the documentary evidence submitted by the parties.

This case concerns the sale by PSW to PCV of some of the mezzanine debt secured by apartment complexes in Manhattan known as Peter Cooper Village and Stuyvesant Town (the Property). The court will not discuss the extensive and complex background of the underlying sale of the Property to non-party Blackstone Group (for more than $5 billion in December 2015) because it is not germane to this case. The instant motions turn on the application of the parties' unambiguous sale contract that, as discussed below, refutes PSW's claims.

The loans at issue in this case are referred to by PSW as "Mezzanine Loans 1-3", which had a face value of $300 million and were part of an 11 mezzanine loan structure with a total face value of $1.4 billion. These mezzanine loans were subordinated to a $3 billion senior loan (the Senior Loan) that was owned by the commercial mortgage backed securities trusts listed in the caption, which were controlled by BOA and U.S. Bank (collectively, the Trustees).[2] On February 16, 2010, the Trustees and CWC, the special servicer for the Senior Loan, commenced an action in federal court to foreclose on the Senior Loan. *See Bank of Am., N.A. v PCV ST*

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[1] In its opposition brief, PSW also seeks sanctions against defendants, but did not file a cross-motion seeking such relief. *See* Dkt. 58 at 13. Regardless, as the complaint is being dismissed, there clearly is no basis to sanction defendants. References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF).

[2] BOA and U.S. Bank are sued only in their capacity as trustees. PSW "does not assert any wrongdoing on their part." *See* Complaint ¶ 2.

OWNER LP, No. 10-cv-1178 (SDNY). A foreclosure judgment was entered by the federal court (Hellerstein, J.) on June 21, 2010. *See* Dkt. 39.

In July 2010, CWC sought to acquire Mezzanine Loans 1-3. The owners of Mezzanine Loans 1-3 rejected CWC's offer and, instead, sold them to PSW on August 6, 2010 for $45 million. PSW, a Delaware LLC, is a special purpose entity that was created on July 30, 2010 by non-parties Pershing Square Capital Management, L.P. and Winthrop Realty Trust (which, respectively, are controlled by William Ackman and Michael Ashner) to hold Mezzanine Loans 1-3. On August 7, 2010, PSW notified the Trustees that it intended to foreclose on the collateral securing Mezzanine Loans 1-3 by conducting a UCC non-judicial foreclosure sale on August 25, 2010. CWC objected on the ground that such a foreclosure would violate a February 16, 2007 Intercreditor Agreement (the ICA), which, according to CWC, prohibited foreclosure on the mezzanine collateral without first curing the outstanding defaults on the Senior Loan. In other words, according to CWC, PSW could not foreclose on the mezzanine collateral without first paying off the Senior Loan.

On August 18, 2010, the Trustees commenced an action in this court seeking an injunction prohibiting the mezzanine collateral foreclosure. *See Bank of Am., N.A. v PSW NYC LLC*, Index No. 651293/2010 (Sup Ct, NY County) (the 2010 Action). By order dated September 16, 2010, the court (Lowe, J.) granted the Trustees' motion and issued a preliminary injunction prohibiting PSW's proposed mezzanine collateral foreclosure while the Senior Loan remained in default. *See Bank of Am., N.A. v PSW NYC LLC*, 29 Misc3d 1216(A) (Sup Ct, NY

County 2010) (the Injunction Decision).[3] PSW appealed the Injunction Decision and sought a stay from the Appellate Division pending appeal. The Appellate Division denied the stay.

On October 26, 2010, shortly before the senior lenders were scheduled to conduct their foreclosure sale, PSW and defendants entered into an Assignment, Assumption and Settlement Agreement (the Agreement), pursuant to which the 2010 Action was discontinued and PSW sold all of its rights under Mezzanine Loans 1-3 to defendants for $45 million (i.e., the amount PSW paid to purchase Mezzanine Loans 1-3 less than three months beforehand). *See* Dkt. 19.[4] Section 3 of the Agreement provides:

> Effective as of the Closing Date (as defined below), **Assignor [i.e., PSW] hereby irrevocably assigns, sells, transfers and delivers to Assignee [i.e., PCV] all of Assignor's right, title and interest in and to the Senior Mezzanine Loan Documents and [the ICA]** (collectively, the "Transferred Documents") and to the extent related thereto, **any and all related rights, claims, suits and causes of action of Assignor** (collectively, the "Transferred Rights"), in each case free and clear of any lien, security interest, participation interest, option or other charge or encumbrance of any nature whatsoever, **without recourse, and without any representations or warranties, in each case except as expressly set forth in this Agreement**. Effective as of the Closing Date, Assignee hereby accepts such assignment of the Transferred Rights from Assignor and assumes all of the obligations of Assignor under the Transferred Documents accruing from and after the Closing Date, except for any obligations resulting from any breach by Assignor (or any predecessor thereof) of any of the Transferred Documents occurring prior to the Closing Date, and agrees to be bound by the Transferred Documents. Upon the delivery of the Assignor Closing Documents (as defined below) and the Assignee Closing Documents (as defined below) by each party pursuant to Section 6 hereof and the payment of the Payment (as defined below) pursuant to Section 5 hereof: (i) Assignee shall, as of the Closing Date, succeed to

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[3] Justice Lowe reasoned that the ICA is unambiguous because "[i]ts plain language obligates PSW to cure all Senior Loan defaults if PSW acquires the Equity Collateral, which includes the $3.6 billion Indebtedness resulting from the Default." *See* Injunction Decision, 29 Misc3d 1216(A), at *6.

[4] Section 2 of the Agreement provides that the 2010 Action would be discontinued and section 5 sets forth the $45 million purchase price. *See* Dkt. 19 at 3. Section 6 lists the documents (e.g., the promissory notes and release) that were to be delivered at closing. *See id.* at 4-5. It should be noted that the Agreement is governed by New York law, contains a merger clause, prohibits oral modifications, and provides for jurisdiction in this court. *See id.* at 11-12.

> the rights and obligations of Assignor under the Transferred Documents in Assignor's capacity as holder of the Senior Mezzanine Loans and (ii) Assignor shall be released from its obligations under the Transferred Documents arising on and after the Closing Date.

See Dkt. 19 at 3 (emphasis added).

Section 5 states that after the amounts due under the Agreements are paid, "[a]ll amounts due to the holders of [Mezzanine Loans 1-3] on and after the Closing Date shall be paid to Assignee, and **Assignor shall not have any right or interest therein**." *See id.* (emphasis added). Likewise, in section 7 (which contains representations and warranties made by PSW to PCV), section 7(j) provides that "Assignor understands and agrees that, effective as of the Closing Date, **Assignor shall have no further rights of any nature whatsoever with respect to the Senior Mezzanine Loans or the Property**." *See id.* at 7 (emphasis added).

Section 8 contains representations and warranties made by PCV to PSW, which include:

> (a) Assignee is fully aware of the terms and conditions contained in the Transferred Documents, including those in [the ICA] related to Transfers **and the transaction contemplated by this Agreement is in accordance with all such terms and conditions**.
>
> ...
>
> (f) None of the execution, delivery and performance of this Agreement, or any other agreement, instrument or document executed, or to be executed, in connection with this Agreement and to which it is a party, by Assignee or the consummation of the transactions contemplated by this Agreement or any such other agreement, instrument or document by Assignee will: ... (iv) **violate[] any judgment, order, injunction, decree or award of any court, arbitrator, administrative agency or governmental or regulatory body against, or binding upon, Assignee or upon any of the securities, properties, assets, or business of Assignee**; ...

See Dkt. 19 at 7, 9 (emphasis added). Section 8 also provides that:

> Assignee shall indemnify and hold Assignor harmless, against any and all liability, loss, cost and expense (including reasonable attorney's fees and disbursements) resulting from any breach of any representation and warranty by Assignee in this Section 8.

See id. at 9.[5]

In conjunction with the Agreement, the parties executed a Mutual Release Agreement dated October 26, 2010 (the Release). *See* Dkt. 20. Section 2(b)(i) of the Release provides:

> In consideration of the [Agreement], ... [PSW] hereby absolutely, unconditionally and irrevocably releases, remises and forever discharges [the defendants in this action] **of and from all Claims of every name and nature, known or unknown**, suspected or unsuspected, ... have or claim to have against [the defendants in this action] ... **which arises at any time on or prior to the day and date of this Agreement relating to the [ICA], the Senior Borrowers, the Junior Borrowers, the Property, or the [2010] Action**. Notwithstanding the foregoing sentence, **PSW is not releasing hereby and shall not be deemed to have released hereby any Claims against Plaintiff Releasees arising under this Agreement or the Assignment Agreement, and no Member is releasing hereby or shall be deemed to have released hereby any Claims against Plaintiff Releasees arising under this Agreement or the Assignment Agreement**.

See Dkt. 20 at 3 (emphasis added). In other words, in addition to PSW disclaiming all of its rights to Mezzanine Loans 1-3 in the Agreement, PSW expressly released any claims concerning Mezzanine Loans 1-3 that existed prior to the Agreement. Pursuant to the Agreement, the 2010 Action was discontinued, the appeal of the Injunction Decision was withdrawn, and the injunction was dissolved.

PSW alleges that shortly after the Agreement was executed, PCV "conduct[ed] a strict foreclosure of the [mezzanine collateral] by registering in its own name certificates evidencing the sole membership interest in the general partners of the senior borrowers (PCV ST Owner GP LLC and ST Owner GP LLC)." *See* Complaint ¶ 17. PSW claims that, despite Justice Lowe's ruling in the Injunction Decision, "[d]efendants thereby acquired the very same ownership

[5] Neither this section, nor the corresponding provision in section 7, justify an award of defendants' attorneys' fees in this action because defendants have not asserted a claim that PSW breached a warranty in the Agreement. The attorneys' fees sought by defendants are based on their claim that this action is frivolous.

interests in the Senior Borrowers that had been pledged to [PSW] without paying off the more than $3.6 billion Senior Loan." *See id.*[6] PSW further alleges that PCV intended to do this prior to entering into the Agreement and, therefore, PSW was fraudulently induced to enter into the Agreement. PSW, however, admits that if it did not enter into the Agreement, it would have lost its entire $45 million investment in Mezzanine Loans 1-3 by virtue of the impending foreclosure in the federal action, instead of receiving that $45 million from PCV under the Agreement. *See* Complaint ¶ 10 ("Faced with the **certain annihilation** of its investment in advance of being able to procure appellate review of the [Injunction Decision], ... PSW sold and assigned Mezzanine Loans 1-3 to [PCV] on the specific terms and conditions expressed in the Agreement.") (emphasis added).

On January 24, 2016, PSW commenced this action by filing a complaint with four causes of action: (1) breach of the Agreement; (2) fraudulent inducement; (3) a declaratory judgment regarding the proper interest rate in the federal foreclosure action; and (4) indemnification and legal fees under section 8 of the Agreement. On February 26, 2016, defendants filed the instant motion to dismiss. On April 11, 2016, PSW opposed the motion and cross-moved for partial summary judgment on liability on its first cause of action. On May 5, 2016, defendants filed their reply and opposition to PSW's cross-motion, and separately moved for sanctions on the ground that the claims asserted by PSW in this action are frivolous. PSW and its counsel opposed the sanctions motions. The court reserved on the motions after oral argument. *See* Dkt. 63 (8/22/16 Tr.).

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[6] PCV disputes PSW's allegation that its actions contravened the ICA as interpreted by Justice Lowe. However, for the purpose of this decision, the court assumes that PSW is correct that the manner in which PCV took control of the mezzanine collateral is incompatible with the Injunction Decision. Nonetheless, for the reasons set forth below, PSW does not have the right to sue for this alleged breach.

II. Legal Standard

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 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1st Dept 1992); *see also Cron v Hargro Fabrics, Inc.*, 91 NY2d 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 and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 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 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

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 *prima facie* showing requires a denial of the 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, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 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 a summary judgment motion. *Zuckerman,* 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).

III. Discussion

PSW concedes that, in the Agreement and Release, it gave up all rights it had in Mezzanine Loans 1-3, including the right to sue for breaches of the ICA.[7] And, even if PSW did not transfer those rights to PCV under the Agreement, in section 2(b)(i) of the Release, PSW

[7] Despite PSW taking this position in its brief [*see* Dkt. 36 at 17-18], at oral argument, PSW suggested that the Agreement's "Whereas" clauses and certain language in section 3 demonstrate that PSW did, in fact, retain some rights in Mezzanine Loans 1-3. PSW relied on the uncontroversial proposition that courts must not interpret contractual provisions in isolation. *See Kolbe v Tibbetts*, 22 NY3d 344, 353 (2013) ("It is well established that when reviewing a contract, [p]articular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties manifested thereby") (citation and quotation marks omitted). This rule, however, does not support PSW's contention that the Agreement can be reasonably interpreted to mean that PSW has rights in Mezzanine Loans 1-3 and can sue for breach of the ICA. When considering the entirety of the Agreement, there can be no doubt that this argument has no merit. As set forth herein, the Agreement and Release clearly and unambiguously state that PSW retained no rights in Mezzanine Loans 1-3 and the ICA, and released defendants from liability for any claims arising thereunder.

expressly released defendants from any claim "relating to [the ICA]." *See* Dkt. 20 at 3. It is well settled under New York law that such a clear, unambiguous release is enforceable. *See Centro Empresarial Cempresa S.A. v Am. Movil, S.A.B. de C.V.*, 17 NY3d 269, 276 (2011).

Nonetheless, as PSW correctly maintains, it may still sue defendants for breach of the Agreement. However, the only provisions in the Agreement that could possibly have been breached by defendants are the warranties in sections 8(a) and 8(f)(iv). Section 8(a) states that PCV "is fully aware of the terms and conditions [of the ICA] related to Transfers and **the transaction contemplated by this Agreement** is in accordance with all such terms and conditions." *See* Dkt. 19 at 7 (emphasis added). Section 8(f)(iv) provides:

> None of the execution, delivery and performance of this Agreement, or any other agreement, instrument or document executed, or to be executed, in connection with this Agreement and to which it is a party, by Assignee or the consummation of the transactions contemplated by this Agreement or any such other agreement, instrument or document by Assignee will ... **violate[] any judgment, order, injunction, decree or award of any court,** arbitrator, administrative agency or governmental or regulatory body against, or binding upon, Assignee or upon any of the securities, properties, assets, or business of Assignee.

See id. at 9 (emphasis added).[8] PSW contends that these warranties amount to a "promise that Defendants will abide by the ICA from and after the Closing Date." *See* Dkt. 36 at 18 (quotation marks omitted). PSW also avers that "Defendants agreed in the [Agreement] to abide by the terms of the ICA, *as construed by Justice Lowe*." *See id.* (emphasis in original).

To the contrary, section 8(f)(iv) does not warrant that the Agreement and the related transactions entered into by defendants will not breach the ICA (as construed by either PSW or Justice Lowe). Rather, section 8(f)(iv) merely warrants that the Agreement and any related

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[8] Arguably, the scope of the transactions subject to the warranty in section 8(f)(iv) is broader than in section 8(a) because section 8(a) concerns "the **transaction** contemplated by this Agreement" while section 8(f)(iv) refers to "**transactions** contemplated by this Agreement". This does not matter. As discussed below, section 8(f)(iv) could not have been breached because no court order or injunction was violated.

agreement would not violate any "judgment, order, injunction, decree or award of any court," such as a violation of the Injunction Decision. Defendants never violated the Injunction Decision. As previously noted, the parties agreed to settle the 2010 Action and to vacate the injunction issued by Justice Lowe. The stipulation discontinuing the 2010 Action states:

> that, as a result of the parties' stipulation to a voluntary discontinuance, **a continuation of the preliminary injunction against [PSW] is no longer necessary**. Accordingly, the Parties agree that the $4.5 Million undertaking that was ordered by the Court in connection with the preliminary injunction shall be terminated.

See Index No. 651293/2010, Dkt. 59 at 2 (emphasis added). Moreover, by its terms, the injunction issued by Justice Lowe applied "during the pendency of [the 2010 Action]." *See* Index No. 651293/2010, Dkt. 47 at 26. Hence, when the parties discontinued the 2010 Action, the injunction was dissolved. Therefore, the injunction would not survive after the parties' settlement – that is, there would be no "judgment, order, injunction, decree or award of any court" in effect after settlement. *See Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569-70 (2002) ("if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity."). Consequently, even if defendants' subsequent assumption of control over the mezzanine collateral would have violated the injunction had it not been dissolved (an issue this court need not and will not reach), such assumption could not have violated Justice Lowe's preliminary injunction. Ergo, defendants did not breach section 8(f)(iv).

Nor did defendants breach section 8(a), regardless of whether their actions ran afoul of the ICA as interpreted by Justice Lowe. Contrary to the arguments made by PSW, defendants never actually promised to abide by the ICA. While in section 8(a), defendants warranted that the ICA was not being violated, that warranty applied to "the transaction contemplated by [the]

Agreement."[9] That "transaction" was the transfer of PSW's rights in Mezzanine Loans 1-3 to PCV in exchange for $45 million, the discontinuance of the 2010 Action and exchange of releases. The Agreement did not address the transactions that PSW claims are violative of the ICA (PCV's takeover of the mezzanine collateral). Indeed, given the then-present conflict between the parties over the ability to take over the mezzanine collateral without contravening the ICA – the very subject of the 2010 Action – these sophisticated, counseled parties could have included a warranty regarding PCV's intentions with respect to the mezzanine collateral. They did not.

For these reasons, the court finds that defendants did not breach the Agreement.[10]

It, necessarily, follows that PSW's claim that it was fraudulently induced to enter into the Agreement and the Release fails. "The elements of a cause of action for fraud [are] a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009); *see Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 (1st Dept 2014). The only misrepresentations alleged by PSW are those set forth in the warranties the court has found not to have been breached. *See* Complaint ¶ 82 (noting

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[9] It should be noted that, in Exhibit D to the Agreement, PCV agreed to be bound by the ICA. *See* Dkt. 19 at 35. However, both Exhibit D and section 6(b)(ii) provide that this was done for the benefit for the other Junior and Senior Lenders (listed on Schedule A), not PSW (who, as discussed, retained no rights under the ICA). *See id.* at 21. This was not a warranty made to PSW (no such warranty is contained in section 8), but a going-forward agreement with the other debt holders, who, unlike PSW, are the only parties with standing to assert a claim for breach of the ICA.

[10] It is not clear what damages would be available on a claim for breach of sections 8(a) and 8(f)(iv), but the court need not reach this issue since PSW has not actually alleged a breach.

fraud claim is based on "Defendants' representations in the Agreement").[11] To be sure, the First Department has held that a false representation of present fact made in a warranty, if made with the requisite scienter, can support an independent claim for fraud that is not duplicative of a claim for breach of contract. *See Wyle Inc. v ITT Corp.*, 130 AD3d 438 (1st Dept 2015). However, where, as here, there is no *false* representation, PSW has not stated a claim for fraud. Moreover, a separate basis for dismissal would be failure to plead loss causation [see *Mosaic Caribe, Ltd. v AllSettled Group, Inc.*, 117 AD3d 421, 422 (1st Dept 2014)], since, as PSW admits in paragraph 10 of its complaint, had it not entered into the Agreement, it would have lost its entire investment in Mezzanine Loans 1-3.

Next, since PSW has no rights to or claim arising from Mezzanine Loans 1-3 or the ICA, PSW has no standing to assert a claim for alleged improper calculation of interest in the federal foreclosure action (the third cause of action). Likewise, since PSW has failed to allege a breach of a warranty in section 8 of the Agreement, it has no basis to assert a claim for indemnification under section 8 (the fourth cause of action).

Finally, the court declines to sanction PSW and its counsel due to the complaint's alleged frivolity. Accordingly, it is

ORDERED that the motion by defendants CWCapital Asset Management LLC, PCV-M Holdings LLC, Bank of America, N.A., and U.S. Bank, National Association to dismiss the

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[11] The complaint also suggests that defendants had a duty to disclose their intentions with respect to the mezzanine collateral, that is, defendants committed the tort of fraudulent omission. However, where, as here, the parties are arms' length contractual counterparties without fiduciary duties to each other, a claim for fraudulent omission does not lie. *See Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 179 (2011), citing *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 (1st Dept 2003) ("A cause of action for fraudulent concealment requires, in addition to the four foregoing elements (of fraudulent misrepresentation), an allegation that the defendant had a duty to disclose material information and that it failed to do so").

complaint is granted, the cross-motion by plaintiff PSW NYC LLC for partial summary judgment is denied, defendants' sanctions motion is denied, and the Clerk is directed to enter judgment dismissing the complaint with prejudice.

Dated: October 31, 2016

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C