Transit Funding Assoc. LLC v Capital One Equip. Fin. Corp.
2016 NY Slip Op 32688(U)
July 15, 2016
Supreme Court, New York County
Docket Number: 652346/2015
Judge: Saliann Scarpulla

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA Justice PART 39

Index Number : 652346/2015
TRANSIT FUNDING ASSOCIATES LLC
vs.
CAPITAL ONE EQUIPMENT
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. 652346/2015
MOTION DATE 9/3/2016
MOTION SEQ. NO. 001

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 7/15/16 which disposes of motion sequence(s) no. 1

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

Dated: 7/15/16

SA
_____, 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 39

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TRANSIT FUNDING ASSOCIATES LLC, TAXI AFFILIATION SERVICES LLC, TAXI MEDALLION MANAGEMENT LLC, YELLOW MEDALLION HOLDINGS LLC, CL MEDALLION HOLDINGS, LLC, YELLOW GROUP LLC, YC1 LLC, YC2 LLC, YC17 LLC, YC18 LLC, YC19 LLC, YC20 LLC, YC21 LLC, YC22 LLC, PATTON R. CORRIGAN, and MICHAEL LEVINE,

Index No.

652346/2015

Plaintiffs,

-against-

CAPITAL ONE EQUIPMENT FINANCE CORP. f/k/a ALL POINTS CAPITAL CORP. d/b/a CAPITAL ONE TAXI MEDALLION FINANCE and CAPITAL ONE, N.A.,

Defendants.

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HON. SALIANN SCARPULLA, J.:

In this action, defendants Capital One Equipment Finance Corp. f/k/a All Points Capital Corp. d/b/a Capital One Taxi Medallion Finance and Capital One, N.A. (collectively, "Capital One" or "Defendants") move, pursuant to CPLR 3211 (a) (7) and 3016 (b), to dismiss the complaint. Plaintiff Transit Funding Associates, LLC ("TFA") was a borrower pursuant to a commercial loan agreement, which provided for a revolving advised line of credit. TFA, together with some of its affiliates (collectively, "Plaintiffs") bring this lawsuit asserting causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, fraud, unfair competition, negligent impairment of collateral, and for declaratory relief.

Unless otherwise noted, the following allegations are taken from the complaint. "Since 2006, TFA has been in the business of lending money to Chicago taxi owners and drivers who need to finance their purchase of a taxi medallion." Plaintiffs further allege that "[i]n 2009, Capital One induced TFA to switch its existing banking relationship and work with Capital One as its partner instead." TFA contends that Capital One was part of a joint venture with TFA, and "initially invested $35 million into the joint venture by providing a revolving credit facility to finance the loans that TFA made." That amount increased until April 2012, when the credit facility was established at $80 million, pursuant to a "Loan and Security Agreement" ("Loan Agreement"). Under the agreement, which was renewed in August 2013 for a one-year term, "TFA could draw down funds up to the maximum credit limit by requesting 'advances' from Capital One," and "Capital One could exercise its discretion in determining whether or not to approve a particular advance." At the beginning of 2014, Capital One refused to approve any further drawdowns of the loan, even though the loan was in good standing and well below the lending limit. "When TFA sought an explanation, Capital One responded categorically that it would no longer lend in the Chicago medallion market."

According to Plaintiffs, "Capital One made a strategic decision to repudiate its commitments to TFA and abandon the parties' longstanding taxi medallion financing joint venture in favor of what Capital One perceived to be a more desirable business deal — a partnership with the ride-sharing service Uber." Plaintiffs further maintain that Capital One fraudulently concealed its plans from TFA, and that Defendants' actions destroyed TFA's business and the Chicago taxi medallion market as a whole.

Capital One and TFA entered into a letter agreement, dated September 16, 2014 ("Letter Agreement"). The Letter Agreement set forth an outline for the possibility of TFA and Capital One continuing their financial relationship. TFA alleges that "Defendants breached their obligations under the Letter Agreement."

Plaintiffs assert causes of action for breach of contract, based on Capital One's alleged breach of the Loan Agreement; breach of the implied covenant of good faith and fair dealing; breach of fiduciary duty; fraud; unfair competition; negligent impairment of collateral; breach of contract, based on Capital One's alleged breach of the Letter Agreement; declaratory judgment with respect to the Loan Agreement; and declaratory judgment with respect to guarantees.

Capital One now moves to dismiss the complaint, arguing that the relationship between the parties was based on the arm's length Loan Agreement, note, and guarantees. TFA has defaulted, and Plaintiffs now seek to avoid payment. Capital One disputes TFA's characterization of the parties' relationship as that of participants in a joint venture, and rejects any inference that Capital One was required to continue to finance the taxi medallion loans, or that it had any long-term commitment to TFA to provide ongoing financing. Capital One further maintains that the Letter Agreement was not a binding obligation.

Breach of Contract

Capital One contends that the breach of contract cause of action has no merit because there was only one advance that Defendants were denied, in February 2014, of $1.3 million, and that was to a TFA affiliate who is not a party to the Loan Agreement,

and another advance that was requested only two weeks before the expiration of the loan facility. Capital One maintains that those two loans cannot have led to TFA's default in repaying the $57 million that it owed on the loan. Capital One concludes that, therefore, Plaintiffs cannot show that they sustained any damages. Further, Capital One asserts that because the Loan Agreement explicitly stated that Capital One was not required to renew the loan facility after one year, Plaintiffs cannot demonstrate that Capital One was responsible for the collapse of the medallion market.

Capital One misconstrues Plaintiffs' argument. It is not Capital One's failure to renew the loan facility that is at the base of the breach of contract cause of action. Rather, TFA maintains that when Capital One refused to approve the advance in February 2014, TFA contacted Capital One to find out why the advance was rejected. At that time, Capital One informed TFA that it had unilaterally determined not to approve any further advances, even though the facility was scheduled to continue for several months. It was not the denial of just one request that constituted the alleged breach of contract, but Capital One's alleged refusal to advance any funds under the loan facility pursuant to the Loan Agreement.

Capital One's argument—that it does not make sense that the denial of loans would have such far reaching effects—does not suffice to require dismissal of the cause of action. At this stage of the litigation, Plaintiffs are not required to prove their damages, and, in any event, this issue would present a question of fact. *See Lappin v Greenberg*, 34 AD3d 277, 279 (1st Dept 2006) ("To survive a CPLR 3211 (a) (7) pre-

answer dismissal motion, a pleading need only state allegations from which damages attributable to the defendant's conduct may reasonably be inferred.").

Additionally, Plaintiffs seek lost profits. "A party may not recover damages for lost profits unless they were within the contemplation of the parties at the time the contract was entered into and are capable of measurement with reasonable certainty." *Ashland Management Inc. v Janien*, 82 NY2d 395, 403 (1993). Plaintiffs have at least raised a question of fact "[i]nsofar as the first element is concerned, i.e. that the lost profits are a natural consequence of the wrongful act." *Levine v. American Federal Group, Ltd.*, 180 AD2d 575, 577 (1st Dept 1992). "The second requirement, that damages be reasonably certain, does not require absolute certainty," *Ashland Management*, 82 NY2d at 403, and the fact that TFA began financing medallions in 2006 militates against dismissal at this time on account of damages being uncertain. *See Levine*, 180 AD2d at 577 ("Since the plaintiffs had an existing relationship with the garage corporations, of seven years' duration, this latter element of demonstrating damages with sufficient certainty does not preclude plaintiffs' recovery of some damages, as a matter of law, at this time.").

In sum, Capital One has failed to demonstrate that Plaintiffs' allegations utterly fail to state a claim. Therefore, I deny Capital One's motion to dismiss the breach of contract cause of action.

Implied Covenant of Good Faith and Fair Dealing

Capital One maintains that the cause of action for breach of the implied covenant of good faith and fair dealing is duplicative of the breach of contract claim. Plaintiffs

counter that this cause of action focuses on a different portion of the contract than the first cause of action. The breach of the implied covenant of good faith and fair dealing cause of action cites section 2.1 (g) of the contract, which gave Capital One discretion over approving a given advance. Plaintiffs maintain that, under the implied covenant of good faith and fair dealing, Capital One was required to exercise its discretion in good faith. Thus, this cause of action does not focus on Capital One's failure to meet its obligation for the entire term of the agreement, but on its failure to exercise appropriate discretion in determining whether to approve particular requests.

The complaint makes two separate claims. One is that Capital One breached the agreement by discontinuing funding the loan facility despite its obligation to fund such loans for the entire term. The other claim is that Capital One failed to act in good faith in reviewing a particular request. These two claims are distinct, and, at this juncture, both should be permitted to go forward. *See Hong Leong Fin. Ltd. (Singapore) v Morgan Stanley*, 131 AD3d 418, 419 (1st Dept 2015).

Breach of Fiduciary Duty

Capital One contends that there was no fiduciary duty because the Loan Agreement specifically provided that there was no joint venture or fiduciary duty between the parties. Plaintiffs maintain that this action is governed by Illinois law, and under Illinois law, the terms of a written agreement are not dispositive of the existence of a joint venture. Plaintiffs contend that there was a joint venture, and that the parties to a joint venture have a fiduciary relationship with each other. Plaintiffs further maintain that they have sufficiently alleged a joint venture under Illinois law, and that, therefore,

Capital One had a fiduciary duty to TFA. Plaintiffs conceded, at oral argument, that if there is no joint venture, the cause of action for breach of fiduciary duty falls. Tr at 34.

Even assuming Illinois law applies to this claim, under Illinois law, if an agreement specifies that there is no joint venture, the parties would be bound by that agreement. *See Public Elec. Constr. Co. v Hi-Way Elec. Co.*, 62 Ill App 3d 528, 531-532, 378 NE2d 1147, 1150 (Ill App Ct 1978).

Here, the Loan Agreement explicitly states:

> Section 10.4. **LIMITED ROLE OF LENDER.** The relationship between the Borrower and the Lender shall be solely that of Borrower and Lender, respectively. Borrower hereby acknowledges that (a) it has been advised by counsel in the negotiation, execution and delivery of this Agreement and the other Loan Documents; (b) neither Lender nor anyone associated with Lender has any fiduciary relationship with or fiduciary duty to Borrower arising out of or in connection with this Agreement or any of the other Loan Documents, and the relationship between Lender, and Borrower, in connection herewith or therewith is solely that of debtor and creditor; and (c) no joint venture or partnership is created hereby or by the other Loan Documents or otherwise exists by virtue of the transaction contemplated hereby among the parties. The Borrower and the Lender hereby severally acknowledge that there are no representations, warranties, covenants, undertakings or agreements by the parties hereto as to the Loan Documents, except as specifically provided herein and therein.

In view of the clauses specifically and explicitly stating that there is no fiduciary relationship between the parties, and that there is no joint venture, Plaintiffs cannot now assert that such relationships were created. Nor have Plaintiffs alleged the essential elements of a joint venture, *e.g.* "'a provision for the sharing of profits and losses.'" *Tilden of N.J. v Regency Leasing Sys.*, 230 AD2d 784, 785-786 (2d Dept 1996) (citation

omitted); *see Hallmark Ins. Administrators, Inc. v. Colonial Penn Life Ins. Co.*, 697 F. Supp. 319, 325 (ND Ill 1988) (citing Illinois law). Consequently, the cause of action for breach of fiduciary duty must be dismissed.

Fraud

Capital One maintains that the fraud claim is duplicative of the breach of contract claim. Further, Capital One argues that, in the absence of a joint venture, there was no duty to disclose, and, therefore, the fraud claim must be dismissed. Capital One also contends that the Loan Documents, including disclaimers in certain of those documents, prohibit the fraud claim.

As with the breach of fiduciary duty claim, Plaintiffs contend that Illinois law applies to this cause of action and that the claim is proper. Further, Plaintiffs claim that not only did Capital One never intend to perform the contract, but it also falsely stated to Plaintiffs that it would continue in the business of medallion funding, when it actually had undisclosed plans to exit the business and partner with Uber. Thus, even under New York law, Plaintiffs maintain that Capital One engaged in fraud by making "'a promise . . . with a preconceived and undisclosed intention of not performing it.'" Plaintiffs' br. at 20 (quoting *Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986]) (internal quotation marks omitted). Plaintiffs argue that even without a fiduciary duty, the fraud cause of action stands because Capital One made explicit misrepresentations, *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376-378 (1st Dept 2003), and because Capital One had knowledge about its

business plans that Plaintiffs lacked. Finally, Plaintiffs contend that Capital One's arguments about the disclaimers are inapplicable.

In New York, "[g]eneral allegations that defendant entered into a contract while lacking the intent to perform it are insufficient" to support a fraud claim. *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 (1995). Similarly, "[a]s a general rule in Illinois, a promise to perform a future act, even though made without a present intention to perform, is insufficient to constitute fraud." *International Meat Co., Inc. v Bockos*, 157 Ill App 3d 810, 815 (Ill App Ct 1987). However, in Illinois, "[t]he exception to this general rule occurs 'where the false promise or representation of intention or of future conduct is the scheme or device to accomplish the fraud.'" *Id.* (citations omitted). Nonetheless, "a false promise made with the intent of not to keep it is not enough to trigger the exception. The totality of the circumstances must show a scheme or device to defraud, and the fraud must be pled with specificity." *Id.* (citing *Zaborowski v Hoffman Rosner Corp.*, 42 Ill App 3d 21, 25 [Ill App Ct 1976]).

Here, Plaintiffs' maintain that they alleged "a years-long scheme to lull plaintiffs into believing that the bank was committed to the medallion finance business." Plaintiffs' br. at 20. However, in support of that assertion, Plaintiffs merely highlight a portion of the complaint that discusses an increase in TFA's line of credit over time. Therefore, even if Illinois law applies, Plaintiffs' have failed to specifically allege "a scheme or device to defraud" to show that the exception to the rule quoted above applies. *International Meat Co.*, 157 Ill App 3d at 815 (citing *Zaborowski*, 42 Ill App 3d at 25); *see Zaborowski*, 42 Ill App 3d at 25 ("Fraud must be pleaded with specificity; and while

a motion to dismiss admits allegations of fraud properly pleaded it does not admit conclusions of law or conclusions of fact unsupported by specific facts.").

Additionally, Plaintiffs argue that "[t]he existence of Capital One's secret plans to get out of the taxi medallion financing business altogether and back competing ride-sharing services like Uber was a 'fact' that Capital One concealed from plaintiffs, wholly apart from whether the bank intended to honor its specific contractual obligations." Plaintiffs' br. at 20 (citing New York state and federal cases). "It is well established that, absent a fiduciary relationship between the parties, a duty to disclose arises only under the special facts doctrine where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair." *Jana L. v West 129th Street Realty Corp.*, 22 AD3d 274, 277 (1st Dept 2005) (citations and internal quotation marks omitted). "[T]he doctrine requires satisfaction of a two-prong test: that the material fact was information peculiarly within the knowledge of [a party], and that the information was not such that could have been discovered by [another party] through the exercise of ordinary intelligence." *Id.* at 278 (citations and internal quotation marks omitted). As discussed above, there was no fiduciary duty among the parties, so the viability of a fraud claim based on Capital One's undisclosed business plans depends on the application of "the special facts doctrine." *Id.* at 277.

Here, Plaintiffs assert that "Capital One had special knowledge about its internal business plans that was peculiarly within its own knowledge and not reasonably discoverable by plaintiffs," citing its allegations, *inter alia*, that employees at Capital One were discussing leaving the medallion funding business as early as April 2013 and further

citing a Facebook post that it believes supports its position. Plaintiffs' br. at 21. However, Plaintiffs' contention that Capital One had plans in April 2013 to leave the medallion funding business, supported by nothing other than a single Facebook post is insufficient to show "[a] material fact . . . peculiarly within the knowledge of [Capital One]." *Id.* at 278 (citations and internal quotation marks omitted); *see Jones v Bank of America Nat. Ass'n*, 2013 WL 4017344, at *7 n.3 (Sup Ct, Kings County2013) ("As to liability based on omissions, plaintiffs do not plead the existence of any fiduciary duty between them and the sellers. Nor do they allege facts, other than in conclusory fashion, that would support the invocation of the 'special facts' doctrine.").

Finally, Plaintiffs base their claim on Capital One's alleged affirmative misrepresentations. Specifically, Plaintiffs allege that, before renewing the Loan Agreement, TFA saw a Facebook post, stating, "[h]ad to celebrate the demise of specialty funding," that raised concerns about whether Capital One intended to stay in the medallion funding business. After raising this issue with Capital One, Capital One assured TFA that it was intending to continue funding such loans, and TFA maintains that it would not have renewed the Loan Agreement without such assurances. According to Plaintiffs, the fact that Capital One, less than a year later, refused to fund any more loans even though it was obligated to do so under the Loan Agreement demonstrates that Capital One explicitly misrepresented its intentions, damaging Plaintiffs.

Plaintiffs have not alleged sufficient facts to support their assertion that, in April 2013, Capital One had determined that it would stop funding medallion loans, other than the posting that Plaintiffs claim had that meaning. This one Facebook post does not

sufficiently raise a particularized allegation to support a cause of action for fraud. CPLR 3016.

Unfair Competition

Defendants argue that Plaintiffs have failed to adequately plead their unfair competition claim. Plaintiffs allege, "[o]ver the course of several years, Plaintiffs invested substantial time, labor, money, and effort into developing the infrastructure for a successful medallion lending business." They further allege that "Defendants expropriated the fruits of Plaintiffs' investments." Specifically, Plaintiffs allege that because of Plaintiffs, Defendants gained a dominant market position and derived profits, which it then used to partner with Uber, in direct competition with medallion owners.

"Under New York law, '[a]n unfair competition claim involving misappropriation usually concerns the taking and use of the plaintiff's property to compete against the plaintiff's own use of the same property.'" *ITC Ltd. v Punchgini Inc.*, 9 NY3d 467, 478 (2007) (citation omitted). Plaintiffs do not allege that Capital One took or used any property belonging to them. To the extent that Plaintiffs argue that "Capital One expropriated the fruits of [Plaintiffs'] investments by exploiting plaintiffs' knowledge and experience to gain a dominant market position and extract substantial profits," their argument is still unconvincing. Plaintiffs' br. at 24. Capital One provided funding for TFA to loan money to those who wished to finance their purchases of taxi medallions. Plaintiffs' claims are not that Capital One is now funding a TFA competitor in providing loans to purchasers of taxi medallions. Rather, it is objecting to Capital One's partnership with Uber. Uber does not finance medallions; it is a competitor of taxis with

medallions. While Uber may be a threat to Plaintiffs' business, it is not a competitor of that business, but with the underlying business upon which Plaintiffs' business depends. Plaintiffs' cause of action for unfair competition does not comply with the requirements for such a cause of action, and it is, therefore, dismissed. *See Ahead Realty LLC v India House, Inc.*, 92 AD3d 424, 425 (1st Dept 2012).

Negligent Impairment of Collateral

Capital One argues that the negligent impairment of collateral claim (sixth cause of action) should be dismissed because it was not required to permit Plaintiffs to sell the medallions. Plaintiffs argue that "[Capital One] destroyed the value of the medallions and medallion loans by abruptly withdrawing from the market," and, additionally, that "it arbitrarily refused to release its liens, preventing plaintiffs from selling medallions when they had the chance." Plaintiffs' br. at 24.

While acknowledging that a secured party does not have an obligation to sell collateral, Plaintiffs maintain that Capital One negligently or recklessly refused the sale, in violation of UCC § 9-207. Plaintiffs allege that in March 2014, TFA sought a release of the liens on 48 of the collateral medallions to permit their sale. According to Plaintiffs, at that time the medallions had an approximate worth of $17 million. Plaintiffs further allege that, by withdrawing from the market, without permitting Plaintiffs to sell the medallions at a time when the market was its strongest, TFA negligently impaired the value of the medallions.

As Plaintiffs acknowledge, a secured lender is not under any obligation to release a lien to enable the sale of collateral. *American Bank & Trust Co. v Lichtenstein*, 48

AD2d 790, 791 (1st Dept 1975), *affd* 39 NY2d 857 (1976); *see* UCC § 9-207. However, "where...a demand is made of the creditor to liquidate the collateral and subsequent to the refusal to liquidate the collateral substantially declines in value, the failure to liquidate, if negligent, is a breach of the secured party's duty to use reasonable care in the custody and preservation of collateral." *FDIC v. Marino Corp.*, 74 AD2d 620, 621 (2d Dept 1980); *see* Uniform Commercial Code, § 9-207, subd [1]. Moreover, a secured party's duty to act with due diligence, reasonableness and care may not be disclaimed by agreement. *Id.* On this pre-answer motion, Plaintiffs have adequately pled a claim for negligent impairment of collateral, thus Capital One's motion to dismiss this claim is denied. *See IBJ Schroder Bank & Trust Co. v. Kerney*, 200 A.D.2d 519 (1st Dep't 1994).

Breach of the Letter Agreement

Defendants argue that dismissal of the cause of action based on an alleged breach of the Letter Agreement is barred by the terms of the Letter Agreement. Plaintiffs allege a breach of the Letter Agreement because, *inter alia*, Capital One did not negotiate in good faith. Plaintiffs argue that the Letter Agreement imposes such a duty because, among other things, it states that "Capital One . . . would consider modifying and extending the existing and outstanding credit facility."

In New York, "a binding preliminary contract [may] giv[e] rise to a duty to negotiate in good faith." *SNC, Ltd. v Kamine Eng'g & Mech. Contr. Co.*, 238 AD2d 146, 146 (1st Dept 1997); *IDT Corp. v Tyco Group, S.A.R.L.*, 13 NY3d 209, 213-214 (2009).

The Letter Agreement, dated September 16, 2014, states, in part:

> Please note that this term sheet contains an outline of suggested terms only and does not represent a commitment of any kind by Capital One or create any obligations whatsoever on the part of either party hereto with the exception of the Audit Fee and Confidentiality provisions herein. This Proposal is for discussion purposes only and the terms outlined herein remain subject to approval by the appropriate lending authorities within Capital One.

This portion, together with the caveat that "[t]his letter is not to be construed as a formal commitment on the Lender's part but merely a proposal," is dispositive in determining whether a document imposes any binding obligations.[1] While it is true that many terms are specified in the Letter Agreement, the specific language of the Letter Agreement, stating that it "does not represent a commitment of any kind by Capital One or create any obligations whatsoever on the part of either party," cannot be construed as a commitment to negotiate in good faith. The parties clearly did not intend to be bound, and any finding to the contrary would be in direct opposition to the plain language of the Letter Agreement. Therefore, the claim for breach of the Letter Agreement must be dismissed.

Declaratory Judgment with Respect to Loan Agreement

Capital One maintains that there is no need for the declaratory judgment cause of action, because if Plaintiffs establish their breach of contract claim, there is no need for declaratory relief. On the other hand, if they cannot establish their claim, they would not

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[1] *See Arcadian Phosphates, Inc. v Arcadian Corp.*, 884 F2d 69, 72 (2d Cir 1989) (internal citation omitted) (in analyzing whether a preliminary agreement is binding, a court should "consider [] whether the intent to be bound was revealed by (1) the language of the agreement; (2) the context of the negotiations; (3) the existence of open terms; (4) partial performance; and (5) the necessity of putting the agreement in final form, as indicated by the customary form of such transactions. The first factor, the language of agreement, is the most important.").

be entitled to declaratory relief. Plaintiffs contend that they are properly seeking a declaratory judgment with respect to the Loan Agreement to determine that TFA is not liable under that agreement so that the guarantors' liability will be affected.

The guaranty states,

> Guarantor's liability hereunder shall in no way be limited or impaired by . . . the invalidity, irregularity or unenforceability, in whole or in part, of any of the Loan Documents, this Guaranty or any other instrument or agreement executed or delivered to Lender in connection with the Loan, except to the extent that there is a final adjudication by a court of competent jurisdiction of a valid defense to Borrower's obligations under the Loan Documents to payment of its liabilities.

In this action, Plaintiffs are asserting, among other things, that Capital One breached the Loan Agreement. If they can prove that, then they may demonstrate a valid defense to their obligations. Under the express terms of the guaranty, that would be a basis to limit the guarantor's liability. However, a valid defense to Plaintiffs' obligations is not the same as success on the breach of contract claim. In the breach of contract cause of action, Plaintiffs seek monetary damages. If they cannot prove those damages, they will not prevail. That would not preclude a finding that Capital One breached the contract in such a way as to support a valid defense against Plaintiffs' obligations under the Loan. Under such circumstances, it would be premature to dismiss the declaratory judgment action at this time.

Declaratory Judgment with Respect to Guarantees

Capital One highlights the fact that the guarantees are "absolute, irrevocable and unconditional" and, therefore, all defenses to payment are waived. In opposition,

Plaintiffs point to the language in the guaranty that states that liability is limited "to the extent that there is a final adjudication by a court of competent jurisdiction of a valid defense to Borrower's obligations under the Loan Documents to payment of its liabilities." This express exception to the absolute nature of the guaranty cannot be dismissed. Therefore, it would be premature to dismiss this cause of action before Plaintiffs have the opportunity to litigate the question of whether there is a valid defense to the obligations under the Loan Agreement.

In its opposition to Defendants' motion to dismiss, Plaintiffs request leave to replead if the motion is partially granted. Although this request is not specifically addressed by Defendants, the request is denied without prejudice to making a motion to amend, to which a proposed amended complaint may be provided. CPLR 3025 (b).

In accordance with the foregoing, it is hereby

ORDERED that the motion of Capital One Equipment Finance Corp. f/k/a All Points Capital Corp. d/b/a Capital One Taxi Medallion Finance and Capital One, N.A. to dismiss the complaint is granted only to the extent that the third, fourth, fifth, and seventh causes of action of the complaint are dismissed and the motion is otherwise denied; and it is further

ORDERED that Defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 208, 60 Centre Street, on September 7, 2016, at 2:15 p.m.

Dated: July 15. 2016

ENTER:

J.S.C.

HON. SALIANN SCARPULLA