

**Paulicopter - CIA. Paulista De Helicoptero Ltda. -  
Taxi Aereo, v Bank of Am., N.A.**

2019 NY Slip Op 30771(U)

March 27, 2019

Supreme Court, New York County

Docket Number: 150161/2017

Judge: Andrea Masley

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: ANDREA MASLEY**

**PART IAS MOTION 48EFM**

*Justice*

INDEX NO. 150161/2017

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 005

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PAULICOPTER - CIA. PAULISTA DE HELICOPTERO LTDA. -  
TAXI AEREO, ANTONIO ABDALLA FILHO, FAJA  
DESENVOLVIMENTO URBANO, LTDA., COMPANHIA  
AGRICOLA E PASTORIL FAZENDA RIO PARDO, ELLIRA  
CORPORATION

Plaintiff,

- v -

BANK OF AMERICA, N.A., BANK OF AMERICA MERRILL LYNCH  
BANCO MULTIPLO S.A., RENATO PINHEIRO, GLAUCIA  
NOGUEIRA,

Defendant.

**DECISION AND ORDER**

-----X  
**MASLEY, J.:**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 190, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 249, 250, 251, 277, 278, 279, 280, 281, 286, 287, 288, 289, 290, 304, 305, 306, 307

were read on this motion to/for DISMISS

Upon the foregoing documents, it is ordered that defendants' motion to dismiss is granted.

In motion sequence number 005, defendant Bank of America, N.A. (BOA) moves pursuant to CPLR 3211(a)(1), (3), and (7) to dismiss the amended complaint (the Complaint) of plaintiffs Paulicopter – CIA. Paulista De Helicoperto Ltda. – Taxi Aereo (Paulicopter), Antonio Joao Abdalla Filho (Abdalla), Faja Desenvolvimento Urbano, Ltda. (Faja), Companhia Agricola E. Pastoril Fazenda Rio Pardo Companhia), and Ellira Corporation (Ellira) (collectively, Paulicopter).

## Background

This action arises out of an alleged breach of a structured aircraft lease transaction offered by BOA to certain parties in Brazil including Paulicopter (the Transaction). On December 27, 2011, BOA, as lessor, executed an aircraft lease (the Aircraft Lease) with non-party Wells Fargo Bank Northwest, NA (WF), as owner-trustee and lessee, by which BOA leased a pre-owned Bombardier Global Express aircraft (the Aircraft) to WF (NYSCEF Doc. No. 121). Simultaneously, BOA, WF, and Paulicopter entered into a Consent to Aircraft Operating Sublease and Assignment, permitting WF to sublease the Aircraft to Paulicopter (Consent to Sublease) (NYSCEF Doc. No. 145). WF, as sublessor, then executed an aircraft sublease (the Aircraft Sublease) with Paulicopter, as sublessee (NYSCEF Doc. No. 122). The Transaction allegedly enabled Paulicopter to acquire the Aircraft without a direct purchase, which would typically be subject to expensive import taxes (NYSCEF Doc. No. 120, ¶ 4). Paulicopter's obligations under the Aircraft Sublease were guaranteed by Abdalla, Faja, and Companhia (the Guarantors) (*id.* at ¶ 41).<sup>1</sup>

In mid-2012, Paulicopter alleges that 15 airplanes acquired using similarly structured leases, though not necessarily involving BOA, were seized by the Brazilian government (*id.* at ¶ 45). Paulicopter alleges that BOA was aware of the seizures but failed to either notify Paulicopter of the potential investigation or modify the Transaction to comply with the Brazilian regulations (*id.*).

On March 9, 2016, BOA received a summons from the Brazilian tax authorities of an investigation into 24 aircraft acquisitions structured using BOA's Transaction.

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<sup>1</sup> As alleged in the Complaint, Abdalla is a citizen of Brazil and the principal of the Brazilian corporate plaintiffs, Paulicopter, Faja, Ellira, and Companhia (NYSCEF Doc. No. 120, ¶ 19).

Paulicopter alleges that BOA was aware prior to receiving the summons that it was the subject of the investigation yet did nothing to warn its clients or take steps to minimize their exposure (*id.* at ¶ 46). Consequently, BOA allegedly began devising a scheme to recover the Aircraft before it could be seized by the Brazilian authorities (*id.* at ¶ 48).

Beginning in December 2015, BOA allegedly made informal claims that (1) Abdalla was not in compliance with one of the financial covenants in his guarantee because he had fallen below the guarantee's \$15 million cash collateral requirement (Liquidity Covenant); (2) Paulicopter failed to make a payment of an administrative charge applicable to the December 2015 lease payment; and (3) Paulicopter failed to schedule routine maintenance on the Aircraft in violation of the Aircraft Sublease (Maintenance Obligations) (*id.* at ¶¶ 50, 52, 53).

On April 14, 2016, BOA noticed a default of the Aircraft Sublease for (1) breach of the Liquidity Covenant, (2) failure to pay the December 2015 administrative charge for failing to timely pay basic rent for December 2015, and (3) failure to pay basic rent for March 2016 (Notice of Default) (*id.* at ¶ 66 and exhibit 6). The Notice of Default also stated that other defaults may have occurred (*id.*, exhibit 6). BOA sent two additional notifications of the defaults on April 29, 2016 and June 7, 2016 (*id.* at ¶ 67; *see also* NYSCEF Doc. No. 147). The parties communicated back and forth, but no resolution was reached (*id.* at ¶ 66).

On August 23, 2016, without prior notice to Paulicopter, BOA seized the Aircraft while it was in Florida awaiting scheduled maintenance and moved it to a hanger controlled by BOA (*id.* at ¶ 68). BOA allegedly refused access to the Aircraft and refused to permit Paulicopter to arrange and pay for the necessary maintenance to cure

the alleged default (*id.*). By letter dated August 25, 2016, BOA notified Paulicopter of the tax investigation by the Brazilian Tax Authorities (*id.* at ¶ 79 and exhibit 8). By letter dated September 14, 2016, BOA declared an event of default under the Aircraft Sublease for Paulicopter's breach of the Maintenance Obligation as the basis for repossessing the Aircraft (*id.* at ¶ 70). On April 7, 2017, the Aircraft was sold at a public auction for \$7.4 million and BOA retained Ellira's security deposit of \$4 million (*id.* at ¶ 90, 91).

Thereafter, WF assigned its claims as lessee under the Aircraft Lease to Paulicopter, who then commenced this action asserting claims for breach of contract, tortious interference with contract, breach of the implied covenant of good faith and fair dealing, declaratory judgment, conversion, and conspiracy (*id.* at ¶ 2).

## Discussion

### I. Standing

As a threshold matter, BOA contends that Paulicopter lacks standing to assert WF's claims because the Consent to Sublease prohibits the assignment of WF's claims to Paulicopter. This court disagrees.

The anti-assignment provision contained within the Consent to Sublease provides that WF and Paulicopter:

"will not assign, delegate, pledge or otherwise encumber any of its rights or obligations under the [Aircraft Sublease and the related Transaction documents] (or otherwise with respect to the Aircraft) other than as provided herein (with respect to right granted in favor of [BOA]) absent the express prior written consent of the [BOA], which consent [BOA] may withhold or delay in its sole discretion"

(NYSCEF Doc. No. 145, § 9 [a]). This provision clearly does not provide that any assignment made in violation of the provision will be invalid (*see Almeida Oil Co. v*

*Singer Holding Corp.*, 51 AD3d 604, 606 [2d Dept 2008] [finding that where an agreement only contained a covenant not to assign, and did not provide that any assignment would be void or invalid, the assignment was not void and that a violation of the provision only gives rise to a claim for damages for violation of the covenant not to assign”). Like in *Almeida Oil Co.*, the anti-assignment provision in the Consent to Sublease is a personal covenant against assignments, and only gives rise for a claim of damages against WF for violating the covenant. It does not otherwise render WF’s assignment to Paulicopter void or invalid.

## II. Motion to Dismiss

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87–88, [1994] [citations omitted]). However, bare legal conclusions and “factual claims which are either inherently incredible or flatly contradicted by documentary evidence” are not “accorded their most favorable intendment” (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995]).

### A. *Breach of Contract*

To assert a cause of action for breach of contract, Paulicopter must allege the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Paulicopter alleges in its first cause of action that BOA breached the Aircraft Lease by seizing the Aircraft based on contrived and knowingly false allegations

of events of default, including, but not limited to, the breach of the Maintenance Obligations, the Liquidity Covenant and the failure to pay rent. As a result, Paulicopter asserts that WF and itself were denied use of the Aircraft resulting in damages to Paulicopter's Aircraft transportation business and a fine from the Brazilian Revenue Authority in the amount of approximately \$2.3 million for failing to apply for the permanent export of the Aircraft.

BOA contends that Paulicopter fails to state a cause of action because the seizure of the Aircraft was justified as a matter of law because Paulicopter breached the Maintenance Obligations, breached the Liquidity Covenant, and failed to pay rent in a timely manner, each a default under the Aircraft Sublease § 13 (a) (i), (ii), and (xxv). In the event of default, BOA was permitted to terminate the Aircraft Sublease and take immediate possession of the Aircraft by self-help (NYSCEF Doc. No. 122, § 13 [b] [ii], [iii]).

As a matter of law, Paulicopter fails to state a claim for breach of contract because BOA had the authority to seize the Aircraft when Paulicopter breached the Aircraft Sublease by failing to pay rent in a timely manner and violating the Liquidity Covenant. Even accepting Paulicopter's allegations of BOA's improper ulterior motives in seizing the Aircraft as true, it is irrelevant, where, as discussed below, Paulicopter was in default of the Aircraft Sublease.

1. Payment of Rent Charges

It is undisputed that Paulicopter did not make its rental payments due on March 30, 2016 in a timely manner and that BOA ultimately received the payment on May 4, 2016. Paulicopter contends that the acceptance of the payment operated as a waiver of

any default based on the late payment of the rent. In addition, Paulicopter contends that it was justified in paying the rent late because BOA failed to appoint a Brazilian resident as an agent in that country to manage the aircrafts it leased to Brazilian lessees in violation of Brazilian law.

However, Section 7 of the Aircraft Sublease, which contains a “hell or high water” clause, renders Paulicopter’s lease payment obligations irrevocable and unconditional, providing that:

“This Sublease is a net lease, and Sublessee acknowledges and agrees that (a) Sublessee's obligation to pay, and Sublessor's right to receive, all Rent In accordance with this Sublease shall be absolute, Irrevocable, Independent and unconditional and shall not be subject to (and Sublessee hereby waives and agrees not to assert) any abatement, reduction, setoff, defense, counterclaim or recoupment (collectively, "Abatements) for any reason or under any circumstance whatsoever as to any such Rent, and without limiting the foregoing, Sublessee also hereby waives any and all existing and future claims to any Abatement against or with respect to such Rent, (b) It will pay all such Rent regardless of any Abatement, and (c) this Sublease, and Sublessee's payment and other obligations hereunder, are non-cancelable and non-terminable by Sublessee except as expressly provided In this Sublease and any Addendum”

Under this provision, Paulicopter was obligated to pay the rental payments on time, in accordance with the Aircraft Sublease, and waived its right to contest its payment obligations “for any reason or circumstance whatsoever” (*id.* at [a]).

“Hell or high water clauses...are common in equipment lease agreements, and are respected and enforced” (*Jet Acceptance Corp. v Quest Mexicana, S.A. de C.V.*, 28 Misc 3d 1204 [A], 2010 NY Slip Op 51150 [u], \*5 [Sup. Ct. NY County 2010], *aff'd*, 87 AD3d 850 [1<sup>st</sup> Dept 2011]). In *Jet Acceptance*, the court enforced a provision in an aircraft lease that rendered the lessee’s obligations unconditional. The court held that

“[t]he Lessee's obligation to pay Rent and to perform all of its other obligations under this Agreement on time is absolute and unconditional in all respects, regardless of the occurrence of any supervening events or circumstances

(whether or not foreseen and whether or not fundamental in the context of the arrangements contemplated by this Agreement). The Lessee must continue to perform all of its obligations under this Agreement in any event and notwithstanding any defense, set-off, counterclaim, recoupment or other right of any kind or any other circumstance except as otherwise expressly set forth in this Agreement”

(*id.* at \*2). Here, the terms of Section 7 are clear; Paulicopter’s obligation to pay its rent on time is absolute, irrevocable, independent and unconditional.

Paulicopter’s defense that it was justified in paying the rent late because BOA failed to appoint a Brazilian resident as an agent in that country to manage the aircrafts is unavailing in light of the “hell or high water clause.” “As a general rule, leases containing hell or high water clauses are enforceable even in the face of defaults by the party seeking to enforce them” (*Wells Fargo Bank Northwest N.A. v Taca Intl. Airlines*, 247 F Supp 2d 352, 361 [SDNY 2002] [citations omitted]).

## 2. Breach of Liquidity Covenant

In addition to the event of default for failure to pay rent, BOA also informed Paulicopter that there was a breach of the Liquidity Covenant based on Abdalla’s financial statements. Paulicopter sought to remedy the undisputed breach by using a *precatario*, an alleged form of government bond. BOA ultimately rejected the *precatario* and declared a default of the Aircraft Sublease based on the breach of the Liquidity Covenant contained in the Guaranty. Paulicopter does not dispute BOA’s assertion that the Guarantors never sought to remedy this breach after the *precatario* was rejected.

Under the Liquidity Covenant, the Guarantors agreed that they would maintain at least \$15,000,000 in “unencumbered liquidity,” defined as

“[f]or any Person, all cash (including Brazilian cash), cash equivalents (including Brazilian bank issued certificates of deposit), United States Treasury obligations, mutual fund holdings, Brazilian government bonds, and/or Net Ready Marketable

Securities owned solely and directly (without giving effect to any such assets held by a trust or company in which such Person has an interest) by such Person; provided, however, that if any such instrument becomes subject to or relating at any time to any margin account, agreement, request, obligation or liability of any kind whatsoever, or subject to any liens, security interests, claims, pledges, or encumbrances of any kind whatsoever, that the amount of the liens, security interests, claims, pledges, or encumbrances of any kind shall reduce the value of said instrument.”

(NYSCEF Doc. No. 148, Guaranty, Annex I, § [a]; [c] [1]).

In addition, under the Guaranty, BOA had the right to determine if the Guarantors were in compliance with the Liquidity Covenant at any time (*id.* at § [a]).

Paulicopter alleges that a *precatario* is a form of government bond issued when a party obtains a final judgment against the Brazilian government. Furthermore, Paulicopter asserts that BOA only declared the *precatario* in furtherance of its scheme to create a false pretext to seize the Aircraft.

BOA contends that the documents it received from Paulicopter relating to the *precatario* indicate that Abdalla was not the sole and direct owner of the *precatario* and that it was not unencumbered or liquid. Specifically, BOA references a Certificate of Case No. 449/88 (the “Certificate”) related to the *precatario* at issue, which provides that Abdalla is entitled to 30% of the payment arising from *precatario* and that the payment would be paid through “48 monthly and successive installments” (NYSCEF Doc. No. 279, PC0009063). Furthermore, the Certificate provides that the proceeds are “awaiting the outcome of the suit brought by the State Treasury against the amount deposited” (*id.* at PC0009064). BOA further argues its supplemental submission<sup>2</sup> of

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<sup>2</sup> BOA submitted supplemental authorities in the form of Brazilian court records relating to the *precatario* at issue in this motion (NYSCEF Doc. Nos. 287-289; 304-306). On September 28, 2018 Paulicopter objected to the submission by letter on grounds that, pursuant to the Commercial Division Rule 18, a party is only to submit supplemental authorities informing the court of citations of any relevant post-submission court cases and that this court warned the

Brazilian court records confirms that the additional collateral posted by Abdalla was the subject of litigation in Sao Paulo, rendering the value of the *precatario* uncertain, and thus, insufficient to satisfy the Liquidity Covenant.

Paulicopter ignores the issues raised by the Certificate and instead reiterates that the *precatario* is sufficient in conclusory fashion and contends that BOA acted arbitrarily and irrationally even in light of BOA's contractual right to determine if the Guarantors were in compliance with the Liquidity Covenant. The affidavit of Guilherme Abdalla, a Brazilian attorney, submitted by Paulicopter, also fails to address any of the discrepancies raised by BOA and merely states again in conclusory fashion that the *precatario* is compliant with the Liquidity Covenant (NYSCEF Doc. No. 228, ¶ 8).

Even if a *precatario* is, in fact, a form of Brazilian bond that would typically fall within the definition of "unencumbered liquidity" under the Guaranty, BOA's unrebutted documentary evidence establishes that there were legitimate concerns surrounding the liquidity of the *precatario* and its ability to function as collateral for the Transaction. Based on BOA's unrebutted documentary evidence, BOA properly exercised its contractual right in determining that Paulicopter was in violation of the Liquidity Covenant and declaring a default of the Liquidity Covenant under the Aircraft Sublease. BOA's documentary evidence refutes Paulicopter's conclusory allegations that BOA rejected the *precatario* solely in furtherance of a scheme to seize the plane.

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parties in January 2018 about submitting supplemental briefs (NYSCEF Doc. No. 307). While Paulicopter does not object to the documents' admissibility or authenticity, the court notes that judicial records, such as judgments and orders, qualify as documentary evidence (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432 [1<sup>st</sup> Dept 2014]). Despite the objection based on Rule 18, the court will consider these documents as supplemental authorities in support of BOA's motion.

Consequently, Paulicopter's first cause of action is dismissed on the basis that the documentary evidence has established that BOA's seizure of the Aircraft was proper based on Paulicopter's breaches of the Aircraft Sublease.

B. Tortious Interference with Contract

The "elements of a tortious interference with contract claim are...the existence of a valid contract, the tortfeasor's knowledge of the contract and intentional interference with it, the resulting breach, and damages" (*Hoag v Chancellor, Inc.*, 246 AD2d 224, 228 [1998]). Paulicopter alleges that (1) there was a valid sublease agreement between Paulicopter and WF; (2) BOA was aware of the Aircraft Sublease; (3) that BOA interfered with the Aircraft Sublease by maliciously depriving WF of the ability to continue providing Paulicopter with access to the Aircraft, a breach of the Sublease; (4) that BOA maliciously caused WF to fail to comply with its obligation to cooperate with plaintiffs as a potential indemnitor of WF by failing to allow WF and plaintiffs to participate in the Brazilian tax inquiry; and (5) plaintiff suffered damages, including fines by the Brazilian government.

Paulicopter's allegation of malice is pleaded in conclusory fashion. "Although on a motion to dismiss plaintiffs' allegations are presumed to be true and accorded every favorable inference, conclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss" (*Barnes v Hodge*, 118 AD3d 633, 633 [1<sup>st</sup> Dept 2014]).

Furthermore, BOA contends that it was acting to protect its economic interest in the Aircraft. A party may assert the defense of economic interest to defeat a cause of action for tortious interference with contract unless there is malice or illegality (*Foster v*

*Churchill*, 87 NY2d 744, 750 [1996]). It is well established that “bare allegations of malice do not suffice to bring the claim under an exception to the economic interest rule” (*Rather v CBS Corp.*, 68 AD3d 49, 60 [1<sup>st</sup> Dept 2009]).

Paulicopter breached the Aircraft Sublease, and BOA, as owner and lessor of the Aircraft, had an economic interest in protecting the Aircraft from Paulicopter, as the sublessee of the Aircraft. In fact, Paulicopter even alleges that BOA’s conduct was motivated by a desire to “protect its own interests” (Complaint, ¶ 12). Consequently, the second cause of action for tortious interference with contract is dismissed.

C. Breach of the Implied Covenant of Good Faith and Fair Dealing

“Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance” (*Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995]). “Encompassed within the implied obligation of each promisor to exercise good faith are ‘any promises which a reasonable person in the position of the promisee would be justified in understanding were included’” (*id.* [citation omitted]). “This embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract” (*id.* [internal quotation marks and citations omitted]).

Paulicopter asserts that BOA breached the duty of good faith and fair dealing by manufacturing breaches under the Aircraft Sublease, denying Paulicopter access to the Aircraft after it was seized, refusing to arrange for permanent export, and refusing to respond to the Brazilian investigation. These allegations for the third cause of action for breach of the implied covenant of good faith and fair dealing reference breaches of the same obligations under the Aircraft Lease and Aircraft Sublease that are the subject of

Paulicopter's first cause of action for breach of contract. Therefore, the third cause of action for breach of the implied covenant of good faith and fair dealing is dismissed as duplicative because "both claims arise from the same facts and seek the identical damages for each alleged breach" (*Netologic, Inc. v Goldman Sachs Group, Inc.*, 110 AD3d 433, 434 [1<sup>st</sup> Dept 2013] [internal quotation marks and citations omitted]).

#### D. Declaratory Judgment

The fourth cause of action for declaratory judgment seeking a declaration that the Aircraft Lease and Aircraft Sublease are invalid is dismissed because Paulicopter fails to articulate a justiciable controversy that would warrant a declaratory judgment (*Ahead Realty LLC v India House, Inc.*, 92 AD3d 424 [1<sup>st</sup> Dept 2012]).

"The general purpose of a declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations" (*Touro Coll. v Novus Univ. Corp.*, 146 AD3d 679, 679 [1<sup>st</sup> Dept 2017] [internal quotation marks and citations omitted]). "Thus, a declaratory judgment requires a 'justiciable controversy', in which not only does the plaintiff have an interest sufficient to constitute standing to maintain the action but also that the controversy involve present, rather than hypothetical, contingent or remote, prejudice to plaintiffs" (*id.* [internal quotation marks and citations omitted]).

"While fact issues certainly may be addressed and resolved in the context of a declaratory judgment action, the point and the purpose of the relief is to declare the respective legal rights of the parties based on a given set of facts, not to declare findings of fact" (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 99–100 [1<sup>st</sup> Dept 2009]). A "[d]eclaratory judgment is generally appropriate only where a

conventional form of remedy is not available and a declaratory judgment will serve some practical and useful purpose” (*Automated Ticket Sys., Ltd. v Quinn*, 90 AD2d 738, 739 [1982]), *aff’d*, 58 NY2d 949 [1983] [internal quotation marks and citations omitted]).

“It is usually unnecessary where a full and adequate remedy is already provided by another well-known form of action” and should not be employed where there is not necessary (*James v Alderton Dock Yards*, 256 NY 298, 305 [1931]).

Here, the court finds no basis to declare that the Aircraft Lease and Aircraft Sublease invalid in light of Paulicopter’s breaches.

#### E. Conversion

“Conversion is the “unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner’s rights” (*State of New York v Seventh Regiment Fund*, 98 NY2d 249 [2002] [internal quotation marks and citations omitted]). Paulicopter alleges that a conversion of the Aircraft occurred when BOA allegedly fabricated defaults to seize the Aircraft, subsequently seized the Aircraft, and denied Paulicopter access to the Aircraft after the seizure, interfering with its and WF’s rights under the Aircraft Lease and Sublease, respectively (*compare* Complaint, ¶¶ 95-6 and 120-126). Since BOA had the authority to seize the Aircraft under the terms of the Aircraft Sublease, the court cannot find that its taking of the Aircraft was unauthorized.

Alternatively, the fifth cause of action for conversion, predicated on the same facts as Paulicopter’s dismissed cause of action for breach of contract, is dismissed (*Sebastian Holdings, Inc. v Deutsche Bank, AG.*, 108 AD3d 433, 433 [1<sup>st</sup> Dept 2013]).

#### F. Conspiracy

"There is no tort of civil conspiracy in and of itself. There must first be pleaded specific wrongful acts which might constitute an independent tort" (*Satin v Satin*, 69 AD2d 761, 762 [1<sup>st</sup> Dept 1979]). "The pleading of a conspiracy may be made only to connect the actions of the individual defendants with an actionable injury and to establish that these acts flow from a common scheme or plan" (*Smukler v 12 Lofts Realty*, 156 AD2d 161, 163–64 [1<sup>st</sup> Dept 1989]).

Paulicopter's sixth cause of action for conspiracy is dismissed because the underlying torts of tortious interference with contract and conversion potentially supporting this claim have been dismissed. It is well established that "New York does not recognize a substantive tort of conspiracy" (*MBF Clearing Corp. v Shine*, 212 AD2d 478, 479 [1<sup>st</sup> Dept 1995]). "While a plaintiff may allege, in a claim of fraud or other tort, that parties conspired, the conspiracy to commit a fraud or tort is not, of itself, a cause of action" (*Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 85 AD3d 457, 458 [1<sup>st</sup> 2011]).

The court has considered all remaining arguments and finds them without merit.

Accordingly it is,

ORDERED that the motion of defendant Bank of America, N.A. to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against the defendant, with costs and disbursements to the defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of the defendant; and it is further


ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the County Clerk and Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-filing" page on the court's website - [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

3/27/19  
DATE

  
HON. ANDREA MASLEY  
ANDREA MASLEY, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED			<input type="checkbox"/>	GRANTED IN PART		
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE