PMC Fin. Servs. Group, LLC v Nations Equip. Fin., LLC
2022 NY Slip Op 32097(U)
July 4, 2022
Supreme Court, New York County
Docket Number: Index No. 657631/2019
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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PMC FINANCIAL SERVICES GROUP, LLC and UTICA LEASECO, LLC,

Plaintiffs,

- v -

NATIONS EQUIPMENT FINANCE, LLC, NEFPASS, LLC, PHILIP CARLSON, and SOLAR CAPITAL LTD.,

Defendants.

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INDEX NO. 657631/2019

MOTION DATE _____

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48

were read on this motion to/for DISMISS.

In motion sequence number 002, defendants Nations Equipment Finance, LLC (NEF), NEFPASS, LLC (NEFPASS), Philip Carson,[1] and Solar Capital LTD. (Solar)[2] move, pursuant to CPLR 3211(a)(1) and (7), to dismiss plaintiffs PMC Financial Services Group, LLC (PMC) and Utica Leaseco, LLC's (Utica) amended complaint.

Background

This action arises out of PMC, Utica, NEF, and NEFPASS's agreements to finance and lease a portfolio of equipment to nonparty Falcon Transport Co. (Falcon). Falcon,[3] along with nonparties B M C Enterprises, Inc., G.D. Leasing of Indiana Inc.,

[1] Carson is the President and CEO of NEF. (NYSCEF Doc. No. [NYSCEF] 20, Amended Complaint [AC] ¶ 5.)

[2] Solar is the "corporate parent of both NEF and NEFPASS." (NYSCEF 20, AC ¶ 6.)

[3] Plaintiffs allege that Falcon, prior to "shutting their doors and ceasing operations, was a 116-year-old leading trucking company that employed over 500 people with a large

and M E C Enterprises, Inc. engaged NEF and NEFPASS to acquire a portfolio of equipment, comprised mainly of trucks, trailers and flatbeds (Equipment), that was then owned by nonparty Encina Equipment Finance SPV, LLC (Encina) and being leased to Falcon. (*See* NYSCEF 20, AC ¶ 10, 14.)

On October 24, 2018, NEFPASS entered into a Master Lease Agreement (Lease) with Falcon and Encina, pursuant to which NEFPASS agreed to acquire the Equipment from Encina for the sum of $17,497,954.57, and then, in turn, lease the Equipment to Falcon. (*Id.* ¶ 14.) Under the Lease, Falcon agreed to pay NEFPASS sixty-six monthly rental installments of $345,745.33. (*Id.* ¶ 15.) NEF and NEFPASS, in an alleged attempt to mitigate the risk of the equipment acquisition, solicited PMC and Utica to enter into the transaction as partners. (*Id.* ¶ 11.) NEF and NEFPASS sent PMC and Utica a confidential Credit Approval Report (Credit Report), an Equipment Schedule FAL-0001 (Equipment Schedule), and an appraisal of the Equipment conducted by nonparty Taylor & Martin (Appraisal). (*See* NYSCEF 37, Credit Report; NYSCEF 39, Lease at 25 [Equipment Schedule];[4] NYSCEF 38, Appraisal.) After reviewing the documentation, PMC and Utica believed there was "a substantial profitable opportunity," and agreed to participate in the transaction. (NYSCEF 20, AC ¶ 13.)

On October 24, 2018, PMC and Utica entered into respective assignment agreements (Assignments) with NEFPASS, "pursuant to which NEFPASS sold to Utica

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dedicated fleet of trucks, trailers, and flatbeds serving major industry and individuals alike." (NYSCEF 20, AC ¶ 10, n 1.)

[4] Pages cited refer to NYSCEF generated pagination.

a 8.5724% undivided ownership interest in the Lease for the sum of $1,500,000.00 and sold to PMC a 20.0023% undivided ownership interest in the Lease for the sum of $3,500,000.00." (*Id.* ¶ 16; *see also* NYSCEF 36, Utica and PMC Assignment Agreements.) NEFPASS held the remaining 71.4245% interest. (*Id.*) On the same day, NEF, NEFPASS, Utica, and PMC entered into an Assignment and Intercreditor Agreement (Intercreditor Agreement). (*Id.* ¶ 17; NYSCEF 35, Intercreditor Agreement.) Under the Intercreditor Agreement, NEF was "to act as servicer and administrative agent, in which capacity it was to administer, service and collect the Payments, disburse same to NEFPASS, Utica, and PMC in accordance with their respective percentage ownerships in and to the Lease, and maintain adequate books and records regarding the Lease." (NYSCEF 20, AC ¶ 17.) Utica and PMC assert that NEFPASS, under the Intercreditor Agreement, "was to act as the collateral agent, in which capacity it had the specific, sole, and exclusive right and authority to, *inter alia*, (a) 'manage, supervise, and otherwise deal with the [Equipment],' and (b) to act as collateral agent and take all steps necessary for 'purposes of the perfection of all [l]iens' and all other purposes stated therein." (*Id.* ¶ 18.) After the closing of the Lease, NEF and NEFPASS rejected "Utica's offer to take steps to ensure that liens properly appeared on the titles to the Equipment," asserting "their sole and exclusive authority to act as administrative and collateral agents under the Intercreditor Agreement." (*Id.* ¶ 20.)

In March 2019, after only making three rent payments, Falcon defaulted, which entitled "NEFPASS, Utica, and PMC to exercise their remedies" which included "taking immediate possession of, disabling in place, and/or otherwise obtaining, recovering, holding, selling, re-leasing, and/or disposing of the Equipment." (*Id.* ¶ 21.) Among

other alleged misrepresentations, Utica and PMC alleges that NEF and NEFPASS misrepresented the description of the Equipment, such that it was worth significantly less than represented, and that NEF and NEFPASS allegedly inflated the information contained within the Credit Report relied on by plaintiffs. (*Id.* ¶ 24; *see also id.* ¶¶ 35-38.) After failed attempts to resolve the situation, Utica and PMC filed this action. (*Id.* ¶¶ 26-27.)

Utica and PMC assert the following causes of actions: (i) breach of the Collateral Obligations under the Intercreditor Agreement (against NEF and NEFPASS); (ii) fraudulent inducement to enter into the operative agreements (against NEF and NEFPASS); and (iii) conspiracy to commit fraud (against Solar and Carlson).

Discussion

At the outset, the Intercreditor Agreement uses the terms "Agent/Agents," "Administrative Agent," "Collateral Agent," and "Lessors" throughout the Agreement. The Intercreditor Agreement defines "Administrative Agent" as NEF and "Collateral Agent" as NEFPASS. (NYSCEF 35, Intercreditor Agreement at 2.) Together, the "Administrative Agent" and the "Collateral Agent" is defined as the "Agents" and individually, the "Agent." (*Id.*) "Lessors" is defined in the Agreement as Utica, PMC, NEFPASS, and "any other party to this Agreement from time to time owning all or a portion of the Lease." (*Id.*)

Defendants move, pursuant to CPLR 3211(a)(1), to dismiss all of plaintiffs' causes of action on the basis that plaintiffs covenanted not to sue for such claims under Section 9(b)(i)—(iv) of the Intercreditor Agreement. (NYSCEF 35, Intercreditor Agreement at 8-9.) Plaintiffs oppose, first, on the basis that the covenant not to sue

pertains only to the Lease and not the Intercreditor Agreement. Second, plaintiffs alternatively oppose defendants' argument on the basis that, if the covenant applies to the Intercreditor Agreement, it does not preclude plaintiffs from basing their claims upon defendants' gross negligence and/or willful misconduct.

Section 9(b) of the Intercreditor Agreement states that

> "No Agent or its Affiliates shall be liable for any action taken or omitted to be taken by any of them under or in connection with any Lease Document, and each Lessor hereby waives and shall not assert any right, claim or cause of action based thereon, except to the extent of Liabilities resulting primarily from the gross negligence or willful misconduct of such Agent or, as the case may be, such Affiliate (each as determined in a final, non-appealable judgment by a court of competent jurisdiction) in connection with the duties expressly set forth herein. Without limiting the foregoing, no Agent:
>
> i shall be responsible or otherwise incur liability for any action or omission taken in reliance upon the instructions of the Required Lessors or for the actions or omissions of any of its Affiliates;
>
> ii. shall be responsible to any Lessor or other Person for the due execution, legality, validity, enforceability, effectiveness, genuineness, sufficiency or value of, or the attachment, perfection or priority of any Lien created or purported to be created under or in connection with, any Lease Document;
>
> iii. makes any warranty or representation, and shall not be responsible, to any Lessor or other Person for any statement, document, information, representation or warranty made or furnished by or on behalf of Lessee or any Affiliate of Lessee in connection with any Lease Document or any transaction contemplated therein or any other document or information with respect to Lessee, whether or not transmitted or omitted to be transmitted by such Agent, including as to completeness, accuracy, scope or adequacy thereof, or for the scope, nature or results of any due diligence performed by such Agent in connection with the Lease Documents; and
>
> iv. shall have any duty to ascertain or to inquire as to the performance or observance of any provision of any Lease Document, whether any condition set forth in any Lease Document is satisfied or waived, as to the financial condition of Lessee or as to the existence or continuation or possible occurrence or continuation of any Event of Default and shall not

> be deemed to have notice or knowledge of such occurrence or continuation unless it has received a notice from Lessee or any Lessor describing such Event of Default clearly labeled "notice of default" (in which case such Agent shall promptly give notice of such receipt to all Lessors);
>
> and, for each of the items set forth in clauses i through iv above, each Lessor hereby waives and agrees not to assert any right, claim or cause of action it might have against any such Agent based thereon."

(NYSCEF 35, Intercreditor Agreement at 8-9 [emphasis in original].)

As an initial matter, plaintiffs' argument that Section 9(b) and its sub-provisions do not apply to the Intercreditor Agreement, and apply only to the Lease, based on the language "[n]o Agent . . . shall be liable for any action taken or omitted to be taken by any of them under or in connection with any *Lease Document*," is rejected. (NYSCEF 35, Intercreditor Agreement at 8 [emphasis added].) Plaintiffs assert that, although the Intercreditor Agreement defines "Lease Documents," the definition of "Lease Documents" does not expressly include the Intercreditor Agreement, and thus, claims arising out the Intercreditor Agreement are not waived.[5]

As defined in the Intercreditor Agreement, Lease Documents "mean, as used in this Agreement, the Lease Documents as related to the Equipment Schedule,[6] but excluding any rights thereunder related to any other Schedule under the Lease

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[5] Although the Intercreditor Agreement defines "Lease Documents" and not "Lease Document," the inclusion of the word "any" before Lease Document implies the existence of more than one Lease Document. Whatever the substantive differences are between Lease Document and Lease Documents, if any, will nevertheless not be considered by the court as neither party raise this issue.

[6] NEFPASS, Falcon, B M C Enterprises, Inc., G.D. Leasing of Indiana Inc., and M E C Enterprises entered into the Equipment Schedule as a "separate instrument of the Lease." (NYSCEF 39, Equipment Schedule at 25.) The Equipment Schedule sets forth the Lease term and the rent and schedule of payments due. (*Id.*)

Agreement." (*Id.* at 2.) To create a carve out to exclude the Intercreditor Agreement from the ambit of the covenant not to sue contained in that Agreement does not make sense. Why would the covenant not to sue only apply to other agreements that plaintiffs were not parties to but not to the Intercreditor Agreement in which the covenant is found? The fact that the Intercreditor Agreement is not specifically mentioned in Section 9(b) and the definition of Lease Documents definition does not equate to its exclusion. Section 9(b) employs very broad language that provides that NEF and NEFPASS will not be liable for acts or omissions in connection with any Lease Documents. Any alleged breach of the Intercreditor Agreement by NEF and NEFPASS certainly is in connection with their alleged acts or omissions involving the Lease and Equipment Schedule as NEF and NEFPASS's duties under the Intercreditor Agreement developed out of the Lease and Equipment Schedule.

A motion to dismiss pursuant to CPLR 3211(a)(1) may be granted only where 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].) Where the documentary evidence, such as a contract, does not clearly refute the allegations in the complaint, the action will not be dismissed. (*See 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 154 [2002].) The contract must not be ambiguous, otherwise a defense is not conclusively established as a matter of law. (*Weston v Cornell Univ.*, 56 AD3d 1074, 1074 [3d Dept 2008].) A contract is ambiguous if its provisions "lack a definite and precise meaning and provide a reasonable basis for a difference of opinion." (*Id.* [citations omitted].)

Here, the Intercreditor Agreement does not conclusively show that plaintiffs' claims based on allegations of willful misconduct and/or gross negligence are foreclosed. The plain terms of Section 9(b) expressly carve out an exception to an "Agent or its Affiliates['s]" potential liability taken "under or in connection with any Lease Document" for "Liabilities resulting primarily from the gross negligence or willful misconduct of such Agent or . . . Affiliate in connection with the duties expressly set forth herein." (NYSCEF 35, Intercreditor Agreement at 7 [emphasis added].)

"Liabilities" is defined in the Intercreditor Agreement as "all claims, actions, suits, judgments, damages, losses, liability, obligations, responsibilities, fines, penalties, sanctions, costs, fees, taxes, commissions, charges, disbursements and expenses, in each case of any kind or nature . . . whether joint or several, whether or not indirect, contingent, consequential, actual, punitive, treble or otherwise." (*Id.* at 3.) This broad definition of "Liabilities" not only includes "damages" and "losses" but also excepts any of the enumerated liabilities from the covenant of Section 9(b). Therefore, the covenant language plainly excludes, for example, losses, "resulting primarily from the gross negligence or willful misconduct of such Agent." (*Id*. at 7.) Whether defendants acted with gross negligence or willful misconduct cannot be determined on this motion.

Further, defendants' contention that the exception does not apply to the specific disclaimers contained within 9(b)(i)—(iv), based on the last sentence of Section 9(b), is equally contradicted by the first sentence, which premises the sub-provisions with "Without limiting the foregoing." That foregoing language reasonably refers to the foregoing text of 9(b) that includes the "willful misconduct and/or gross negligence" clause. To that end, the Intercreditor Agreement is not clear on its face as to whether

the willful misconduct/gross negligence exclusion applies to plaintiffs' breach of contract, fraudulent inducement, and conspiracy to commit fraud claims, claims all based on the allegations that NEF and NEFPASS breached their purported obligations and acted with willful misconduct and/or with gross negligence. Thus, the court turns to defendants' remaining arguments in support of dismissal.

Breach of Contract Claims

Plaintiffs allege that NEF and NEFPASS breached the Intercreditor Agreement by (1) "failing to properly inventory the Equipment and confirm that the final equipment schedule was consistent with the equipment listed in the appraisal," (2) "failing to ensure that they could monitor the Equipment, including through confirming the installation/operation of GPS units, precluding the immediate discovery and recovery of the Equipment, leading to numerous pieces of Equipment being unable to be located after being abandoned, and leading to numerous pieces of Equipment being turned over to improper locations and cannibalized before they were found," (3) "failing to properly secure the Equipment, including through failing to perfect, or ensure and maintain the perfection and priority of, liens on the Equipment (including through failing to promptly file UCC-1 Financing Statements and/or ensure the Equipment was re-titled after closing to reflect proper lienholder information) and obtain, or ensure that there were in place, proper landlord consents/waivers/agreements/estoppels prior to (or after) closing, which resulted in the holding hostage of pieces of the Equipment by the owners of the facilities at which same were located," (4) "failing to ensure or confirm that Falcon maintained current insurance on the Equipment and/or ensure that the Equipment was

otherwise protected and subject only to a priority interest of NEFPASS, Utica, and PMC," and (5) "failing to confirm the existence of pieces of the Equipment at their stated locations or match the equipment in the appraisal with the actual Equipment, which became apparent when Utica and PMC learned that, at several of the locations at which NEF and NEFPASS represented that certain pieces of the Equipment were located, same had not been located there for a substantial period of time prior to entry into the Lease." (NYSCEF 20, AC ¶ 31.)

Defendants move, pursuant to CPLR 3211(a)(7), to dismiss plaintiffs' breach of contract cause of action due to plaintiffs' failure to identify any contractual provisions that NEF and NEFPASS breached. However, contrary to defendants' assertion, plaintiff do identify provisions allegedly breached. In the amended complaint, plaintiffs point to breached of "Collateral Obligations," which are set forth in Section 4(d) of the Intercreditor Agreement to support their breach of contract claim. (NYSCEF 20, AC ¶¶ 31-32 [defining "Collateral Obligations" in accordance with the duties listed in Section 4(d) of the Intercreditor Agreement].) Plaintiffs specifically point to Section 4(d)(iii)-(v), which reads in pertinent part:

> "Agents shall have the sole and exclusive right and authority (to the exclusion of the Lessors), and are hereby authorized to . . .
>
> (iii) with respect to Collateral Agent, to act as collateral agent for each Lessor for purposes of the perfection of all Liens created by such agreements and all other purposes stated therein, (iv) with respect to Collateral Agent, to manage, supervise and otherwise deal with the Collateral, (v) with respect to Collateral Agent, to take such other action as is necessary or desirable to maintain the perfection and priority of the Liens created or purported to be created by the Lease Document."
>
> (NYSCEF 35, Intercreditor Agreement at 6.)

However, these limited provisions only address the obligations of the Collateral Agent, NEFPASS, and plaintiffs have

failed to identify provisions of the Intercreditor Agreement breached by NEF.[7] (*Kraus v Visa Intern. Service Assn.*, 304 AD2d 408, 408 [1st Dept 2003] [dismissing for failure to state a claim for breach of contract since plaintiff failed to allege the breach of any particular contractual provision].) Thus, this claim is dismissed against NEF.

To state a claim for breach of contract, the plaintiff must show the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of the contract, and damages. (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010].)

Defendants contend that Section 4(d) does not obligate NEFPASS to take such actions, but merely confers a non-mandatory "right and authority" to do so. They further argue that NEF and NEFPASS did not undertake any of the duties or obligations that plaintiffs allege were breached. Defendants rely primarily on the disclaimer language in Section 5 of the Intercreditor Agreement, which reads:

> "Under the Lease Documents, the Agents (i) are acting solely on behalf of the Lessors with duties that are entirely administrative in nature, notwithstanding the use of the defined term 'Agent', 'Administrative Agent', 'Collateral Agent', the terms 'agent', 'administrative agent', and 'collateral agent' and similar terms in any Lease Document to refer to the Agents, which terms are used for title purposes only, (ii) are not assuming any obligation under any Lease Document other than as expressly set forth herein or therein or any role as agent, fiduciary or trustee of or for any Lessor or any other Person and (iii) shall have no implied functions, responsibilities, duties, obligations or other Liabilities under any Lease Document, and each Lessor, by accepting the benefits of the Lease Documents, hereby waives and agrees not to assert any claim against any Agent based on the roles, duties and legal relationships expressly disclaimed in clauses (i) through (iii) above."

(NYSCEF 35, Intercreditor Agreement at 7.)

[7] While Section 4(d) outlines obligations of the Administrative Agent, NEF, those obligations do not align with any of the alleged obligations breached.

Although Section 5 acts to bar claims arising out of "the roles, duties and legal relationships expressly disclaimed in [Section 5] (i) through (iii)," defendants fail to explain how it applies to the broad and "expressly set forth" provisions of Section 4(d)(iii), (iv), and (v). (NYSCEF 35, Intercreditor Agreement at 6.)

Moreover, defendants' argument that the rights set out in Section 4(d) do not impose affirmative obligations is without merit. The opening phrase of Section 4(d), "Agents shall have the sole and exclusive right and authority (to the exclusion of the Lessors), and are hereby authorized to", imposes the enumerated obligations upon NEFPASS as it excludes the "Lessors", i.e., plaintiffs, from taking on these actions.[8]

Further, the court must also "construe the agreements so as to give full meaning and effect to the material provisions. A reading of the contract should not render any portion meaningless." (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324-325 [2007] [internal quotation marks and citations omitted].) The specific actions listed in Section 4(d) would be rendered useless if in fact no one would actually be responsible for such actions. Moreover, defendants' assertion that these obligations, such as the obligation to perfect liens on the collateral equipment, are actually Falcon's obligations under the Lease, is beyond the scope of this motion.

Accordingly, this cause of action is dismissed only against defendant NEF.

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[8] As defined in the Intercreditor Agreement, the terms "Agents" and "Lessors" include NEFPASS. It is therefore difficult to reason that the term "Lessors" in Section 4(d) includes NEFPASS given the context of that Section, a provision that purports to set out the "sole and exclusive" rights of the Agents and not to the Lessors. (*See* NYSCEF 35, Intercreditor Agreement at 6.)

Fraudulent Inducement

Plaintiffs' fraudulent inducement claim is based upon allegations that NEF and NEFPASS provided materially inaccurate information and intentionally concealed the information so that plaintiffs would rely upon and go forward with the transaction. To state a claim of fraudulent inducement, plaintiffs must show that "there was a false representation, made for the purpose of induce another to act on it, and that the party to whom the representation was made justifiably relied on it and was damaged." (*Perrotti v. Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 496 [1st Dept 2011] [citation omitted].) Defendants seek dismissal of plaintiffs' fraudulent inducement claim on four distinct grounds: (i) that the fraudulent inducement claim is barred by Section 3(a) of the Assignments and Sections 9(b)(iii), 9(c)(i)-(iv), 9(d), and 11 of the Intercreditor Agreement; (ii) the facts allegedly misrepresented and upon which plaintiff relied on were not within the peculiar knowledge of NEF and NEFPASS; (iii) the claim is not pled with particularity in accordance with CPLR 3016; and (iv) the allegations in the amended complaint with regard to the appraisal and credit documents are contradicted by what is actually stated in those documents.

At the outset, plaintiffs' reliance on the special facts doctrine is unavailing. Plaintiffs argue and allege that they were given false statements and information, for example, an inaccurate Credit Report, inaccurate valuations of the equipment, a materially inaccurate Equipment Schedule, and information regarding the financial well-being of Falcon. They further argue that NEF, NEFPASS, Carson, and Solar were fully aware of the material inaccuracies contained within those documents to induce plaintiffs to enter into this transaction. According to plaintiffs, they did not have any means

available to them to learn these facts but nevertheless defendants had a duty to, and should have, disclosed the underlying facts to plaintiffs.

> "Three specific elements must be shown to invoke the special facts doctrine: (1) one party must have superior knowledge, (2) that knowledge must not be readily available to the other party, and (3) the party with the knowledge must know that the other party is acting on the basis of mistaken knowledge."

(*Congress Financial Corp. v John Morrell & Co,*, 790 F Supp 459, 473 [SD NY 1992], citing *Aaron Ferer & Sons v Chase Manhattan Bank, N.A.,* 731 F2d 112, 123 [2d Cir 1984] [apply New York state law].)

Here, "plaintiffs have not alleged any facts from which it could logically be inferred that defendants' access to the relevant information was superior to the access afforded to plaintiffs." (*UST Private Equity Investors Fund, Inc. v Salomon Smith Barney*, 288 AD2d 87, 89 [1st Dept 2001], citing *Congress*, 490 F Supp at 470-172].) For example, plaintiffs do not allege that they even attempted to pursue information that plaintiffs claim were not discoverable to them. (*Congress*, 790 F Supp at 473, citing *Aaron Ferer*, 731 F2d at 123.) Additionally, there are no allegations that defendants interfered or prevented in any way plaintiffs' ability to seek verification of the information. There is no indication that plaintiffs did not have any way of doing their own research or verifying the information presented to them.

Defendants also assert that plaintiffs specifically disclaimed reliance. Both parties rely on *Danann Realty Corp. v Harris* for the proposition that "a specific disclaimer destroys the allegations in plaintiff's amended complaint that the agreement was executed in reliance upon these contrary oral representations." (5 NY2d 317, 320-321 [1959].) The Court of Appeals distinguished cases "generally concerned with

factual situations wherein the facts represented were matters peculiarly within the defendant's knowledge" from *Danann*. (*Id.* at 322.) Plaintiffs use *Danann* for that proposition—that their case is closer to cases dealing with facts within the defendants' knowledge. However, as explained above, the special facts doctrine does not apply, and nevertheless, the court finds the disclaimers concerning reliance upon diligence documents specific enough to satisfy the requirements set forth in *Danann*. (*See Magi Communications, Inc. v Jac-Lu Associates*, 65 AD2d 727, 728 [1st Dept 1978] [citations omitted] [where there is a specific disclaimer disclaiming reliance upon representations on the very facts for which fraud claims are based upon precludes the admission of parol evidence to vitiate the agreement].)

Even if the court concluded to the contrary, the court nevertheless finds that plaintiffs fail to sufficiently allege the necessary element that their reliance was reasonably justified. The common thread underlying defendants' remaining arguments in support of dismissal, is that plaintiffs did not adequately plead their fraudulent inducement claim. In a cause of action based upon fraud, "the circumstances constituting the wrong shall be stated in detail." (CPLR 3016 [b].) "As a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of verification that were available to it." (*UST*, 288 AD2d at 88.) The amended complaint alleges that "[b]ased on industry custom and practice, as well as their own prior direct dealings with NEF and NEFPASS, [plaintiffs] reasonably and justifiably relied upon the express representations, certifications, agreements, and warranties made by NEF and NEFPASS with respect to the condition and valuation of the Equipment in agreeing to

participate in the Lease." (NYSCEF 20, AC ¶¶ 35, 39.) And, although plaintiffs allege that defendants "intentionally concealed this information so that [plaintiffs] would rely upon an inaccurate list of equipment and valuation," the amended complaint is devoid of any allegations explaining plaintiffs' attempts in seeking to verify such information, making such an allegation conclusory. Based on plaintiffs' allegation that "[b]ased on industry custom and practice, as well as their own prior direct dealings with [defendants]," it can be reasonably inferred that plaintiffs did not attempt to seek to verify the information they were given by any means. Without allegations that plaintiffs, being sophisticated parties, attempted to verify the information that it was given, plaintiffs' fraudulent inducement claims are doomed. (*See Valassis Communications, Inc. v Weimer*, 304 AD2d 448, 448-449 [1st Dept 2003] ["Plaintiffs' inability to establish the element of reasonable reliance, essential to a claim for fraud, is additionally evident from the circumstance that plaintiffs . . . were provided financial information relevant to the . . . transaction . . . but failed to verify the accuracy of that information, as they could have."].)

Thus, for the foregoing reasons, the allegations of plaintiffs' fraudulent inducement claim are insufficient, and the plaintiffs' fraudulent inducement claim is dismissed.

Civil Conspiracy to Commit Fraud

To state a cause of action of civil conspiracy, plaintiff must "allege a cognizable tort, coupled with an agreement between the conspirators regarding the tort, and an overt action in furtherance of the agreement." (*1766-68 Assoc., LP v City of New York*, 94 AD3d 519, 520 [1st Dept 2012].) However, "it is well settled that New York does not

recognize an independent civil tort of conspiracy." (*Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 85 AD3d 457, 458 [1st Dept 2011].) Therefore, "[a]llegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort." (*Alexander & Alexander of New York, Inc. v Fritzen*, 68 NY2d 968, 969 [1986].) As plaintiffs have failed to state a claim of fraudulent inducement, plaintiffs have failed to allege the first element of the claim for civil conspiracy. Accordingly, as a cause of action for conspiracy to commit fraud cannot stand alone and "is never of itself a cause of action," (*MBF Clearing Corp. v Shine*, 212 AD2d 478, 479 [1st Dept 1995] [citations omitted]), plaintiffs' third cause of action, conspiracy to commit fraud, is likewise dismissed.

Accordingly, it is

ORDERED that defendants' motion to dismiss is granted to the extent that the breach of contract claim is dismissed against defendant Nations Equipment Finance, LLC and the claims of fraudulent inducement (second cause of action) and conspiracy to commit fraud (third cause of action) are dismissed in their entirety, and thus, the complaint is dismissed in its entirety as against defendants Nations Equipment Finance, LLC, Philip Carson, and Solar Capital LTD with costs and disbursements to the defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of those defendants; and it is further;

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

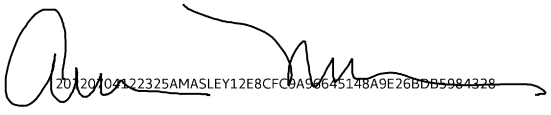
ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), 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 Clerk of the Court and the 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 (access*ible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)]; and it is further

ORDERED that defendant NEFPASS shall file an answer within 20 days; and it is further

ORDERED that the parties shall submit a proposed joint preliminary conference orders within 30 days of this decision or competing proposed preliminary conference orders if they cannot come to an agreement.



7/4/2022
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE