SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 651434/2011
VFS FINANCING, INC.
vs.
INSURANCE SERVICES CORPORATION
SEQUENCE NUMBER : 007
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for Dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

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

Replying Affidavits _____ | No(s). _____

Cross-Motion Yes

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

D

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

Dated: 10/5/12

SHIRLEY WERNER KORNREICH J.S.C.

J.S.C.

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

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VFS FINANCING, INC.,

Plaintiff/Counterclaim Defendant,

Index No. 651434/2011

-against-

DECISION & ORDER

INSURANCE SERVICES CORPORATION,
JAMES R. LOOMIS and THE LOOMIS COMPANY,

Defendants/Counterclaim Plaintiffs.

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INSURANCE SERVICES CORPORATION and
JAMES R. LOOMIS,

Third-Party Plaintiffs,

-against-

GE CAPITAL CORPORATION,

Third-Party Defendant.

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SHIRLEY WERNER KORNREICH, J.:

Motion Sequence Numbers 003 and 007 are consolidated for disposition.

In this action to recover amounts due under a loan and security agreement for a private aircraft, plaintiff /counterclaim defendant, VFS Financing, Inc.(VFS), seeks contract damages against defendants/counterclaim plaintiffs, Insurance Services Corporation (ISC), James R. Loomis (Loomis) and The Loomis Corporation (Loomis Corp.). [1] ISC, Loomis and Loomis Corp. assert: affirmative defenses against VFS based on failure to state a claim, waiver, estoppel, laches, unclean hands, failure to mitigate, failure to comply with contract terms, lack of promise or guaranty by Loomis Corp., and lack of authority to prosecute claim; and counterclaims and a third-party complaint against VFS and third-party defendant GE Capital Corporation (GE) for fraud in the inducement, breach of contract, tortious interference with contract, reformation of contract due to mistake, and breach of duty of good faith and fair dealing. VFS and GE move to

[1]As the court explains below, the First and Second Causes of Action for Injunctive Relief and Specific Performance, respectively, are moot.

dismiss the counterclaims and third-party complaint pursuant to CPLR 3211(a)(1) (documentary evidence) and (a)(7) (failure to state a claim), and to strike the affirmative defenses pursuant to CPLR 3211(b). ISC, Loomis and Loomis Corp. oppose and cross-move to dismiss the fifth cause of action for breach of contract based on their guarantees to GE. VFS and GE oppose the cross-motion.[2]

I. Background

VFS' motion to dismiss was first argued in September 2011 and taken under submission by the court. Mot. Seq. No. 003. The Third-Party Complaint named GE as a Third-Party Defendant, but at the time of the argument, GE had not yet been served. Thereafter, VFS filed an Amended Complaint (AC), adding Loomis Corp. as a defendant and served GE. Defendants responded to the AC with a new Verified Answer and Affirmative Defenses, Counterclaims and a Third-Party Complaint, with the only significant change being a new ninth affirmative defense disputing any agreement between Loomis Corp. and VFS. Transcript, 4/17/12 Argument, pgs. 1-6. The second motion then was argued.

The AC and Amended Counterclaims and Third-Party Complaint (CC/TPC) allege the following. Loomis is the president of ISC. In 2006, he contacted GE about obtaining financing to purchase an aircraft on ISC's behalf as part of an IRS section 1031 exchange. The exchange involved an aircraft he had purchased in 2002 with financing from GE. The Note Loomis had signed for the 2002 financing included a prepayment fee of 2% only for the first year and did not include a "Make Whole Amount." AC, ¶¶7-10, Exh.2.

On April 12, 2006, GE prepared and delivered a Loan Proposal to ISC. CC/TPC, Exh.1 (Loan Proposal). The Loan Proposal provided that: Loomis and Loomis Corp. would be guarantors; the loan amount would be $7,290,000; ISC would be the borrower; GE or its assigns would be the lender; ISC would pay $72,900 to lock in the interest rate of 6.41% "for funding

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[2]Loomis and Loomis Corp. were located in Pennsylvania, ISC was located in Delaware, and GE was located in Connecticut. AC, ¶¶1-4.

that occur[s] on or before May 15, 2006"; the proposal would be valid until April 14, 2006; and there would be a prepayment premium for the first two years and none thereafter. Exh. 1. Loomis had negotiated the two-year "Prepayment Premium" with Frank Cleary of GE "in exchange for obtaining an interest rate of 6.41%." CC/TPC, ¶6. ISC paid the $72,900 on or about April 13, 2006. *Id.* at ¶7, Ex h. 2 (4/13/06 letter and check).

GE delivered a May 8, 2006 Letter of Commitment to Loomis that included financial terms similar to those in the loan proposal, except there was no reference to a Prepayment Premium. The lender was referred to as "GE Capital or one of its wholly-owned subsidiaries." CC/TPC, Exh. 3. It did not include any reference to a "Make Whole Amount." CC/TPC, ¶¶8-10, Exh. 3. Clove Acquisitions, LLC (Clove) was formed to facilitate the IRS section 1031 exchange. On or about May 10, 2006, GE made a loan in the original amount of $7,290,000 to Clove and they entered into a security agreement and a promissory note, both of which GE had prepared. CC/TPC, ¶¶11-15, AmComp, ¶18, Exhs. 6, 7.

The Clove Promissory Note (Clove Note) contained a Prepayment Premium defined as a "Make Whole Amount" to be calculated according to an included formula and, during the first two years, an additional sum equal to a percentage of the remaining principal balance. The Clove Note was signed by Jeffrey S. Towers as Vice President of TVPX Acquisitions, Inc., Clove's managing member. Exh..7. Five days earlier, on or about May 5, 2006, Loomis Corp., ISC and Loomis had executed Guarantees for Clove's obligations. Exhs. 8-10. On or about June 1, 2006, GE refunded the balance of Loomis' good faith deposit of $72,900, paid to lock in the 6.41% rate, deducting closing costs. AC, ¶15, Exh.5 (check). On or about June 16, 2006, Clove and ISC entered into a Transfer and Assumption Agreement (T&A Agreement) through which Clove assigned its interest in the aircraft and Security Agreement to ISC, and ISC assumed Clove's obligations under the agreements with GE. Exh. 11. Loomis and Loomis Corp. each executed a Guarantor Consent and Confirmation to GE. Exh. 12.

Thereafter, the loan was moved from GE to VFS, its wholly owned subsidiary located in

Connecticut. VFS engaged GE to service the account of defendants. VFS alleges, "on information and belief", that in December 2006, Loomis approached GE and requested that it re-document the terms of the loan to make ISC the debtor instead of Clove. AC, ¶25.[3] Defendants allege that GE approached Loomis and ISC about moving the loan from GE to VFS. CC/TPC, ¶18. At the first argument on September 8, 2011, VFS' counsel represented that individuals from GE had been involved in negotiating the VFS loan. Sept. Trans., p. 4.

On or about December 29, 2006, Loomis signed a new promissory note between himself and VFS and a new security agreement between ISC and VFS. The loan amount was the "unpaid principal balance" of $7,217,019.02. VFS did not disburse any new funds. The new Note included a Prepayment Premium with the same definition as that in the May Note, including a "Make Whole Amount" and an additional amount if prepayment occurred during the first two years. The new agreements contained integration clauses that referred to the Note and the other "Debt Documents", defined as including the Note and "any other document or agreement related [to the security] and this Note." AC, ¶¶25-29, Exhs. 13, 14. It is not alleged that new guarantees were issued. Because the May and December loan documents were essentially the same and referred to the same funds and transaction, GE waived the Prepayment Premium and "Make Whole Amount" referenced in the May Note between Clove and GE that ISC had assumed. ¶32, Exh. 15.

Defendants allege and Loomis attests in an Affidavit that: Loomis first became aware that the VFS loan documents contained a "Make Whole Amount" and Prepayment Fee in or about May 2008; Loomis had never agreed to their inclusion; and Loomis requested that VFS remove the provisions. CC/TPC, ¶¶21-23; Loomis Affid., ¶¶15,16, Exh. 4 (5/13/08 letter to GE). ISC made all payments due on the loan for approximately three and one-half years, then missed a

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[3]During the second argument, in response to the court's query about an "email or document in the exhibit" concerning VFS' allegation "on information and belief" that Loomis approached GE to request redocumentation of the loan, counsel for defendants said, "[t]here's e-mail - - there's no affidavit submitted." Transcript, pg. 18. The court has been unable to locate any email concerning the topic that was submitted for review in conjunction with the motion.

payment due on June 1, 2010.[4] CC/TPC, ¶24. Loomis attests that he missed the payment due to financial difficulties. Loomis Affid., ¶18. Loomis and GE discussed a sale of the aircraft as a possible resolution of the default. In July 2010, Loomis negotiated a sale for $4,700,000. Because the sale was for less than the remaining balance on the Note, GE's approval was required. GE refused to approve the sale unless Loomis provided collateral to secure a deficiency amount that included the Prepayment Premium and the "Make Whole Amount". Loomis refused, the sale did not take place, and no payments were made during June, July and August, 2010. CC/TCP, ¶¶26-40; Loomis Affid., ¶¶23-30.

In an August 19, 2010 email, GE Capital Vice President Beth Bonell advised Loomis that he could cure the default by taking the following steps: (1) Making a payment of $190,926 by 12:00 P.M., August 20, 2010; (2) Providing a current personal financial statement for Mr. & Mrs. Loomis by August 23; (3) Providing projections for 2010 and 2011 for the Loomis Company by August 23; (4) Providing full disclosure on all current debt obligations; (5) Committing that the September 1[t] payment of $63,642.05 would be timely; and (6) Paying GE's legal expenses. GE agreed to place the account on the Electronic Payment System (EPS) and waive late fees and default interest. ISC timely made the first payment of $190, 926.15 and all subsequent monthly payments of $63,642.05, through April 1, 2011. Loomis Affid., ¶¶34-37, Exhs. 9, 10.

GE, Loomis and their counsel continued discussions about renegotiating the loan. On May 3, 2011, Loomis wrote to GE offering to renegotiate the loan and sent a check for $45,027.77, which GE cashed. Since the first June 21, 2010 letter of default from Bonell at GE, ISC made payments totaling $754,090.32. Loomis Affid., ¶¶38-40, 43. VFS commenced this action on May 25, 2011.

II. Discussion

On a motion to dismiss a complaint for failure to state a claim, the court must accept the facts alleged as true, accord the plaintiff the benefit of every possible favorable inference and

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[4]The VFS Note was between VFS and Loomis individually, not ISC.

determine whether the facts as alleged fit within any cognizable legal theory. *Morone v Morone,* 50 NY2d 481, 484 (1980); *Rovello v Orofino Realty Co.,* 40 NY2d 633, 634 (1976); *Skillgames, L.L.C. v Brody*, 1 AD3d 247, 250 (1st Dept 2003). Similarly, on a motion to strike an affirmative defense for failure to state a claim, the court must accept the facts as alleged, liberally construe the pleadings in favor of the party asserting the defense and give the party the benefit of every favorable inference. *Mazzei v. Kyriacou,* 2012 NY Slip Op 6285 (2d Dept Sept. 26, 2012). "However, factual allegations that do not state a viable cause of action [or defense], that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames,* 1 AD3d 250. A court may freely consider affidavits submitted by the opposing party to remedy any defects in the complaint. *Rovello* at 635-636.

Dismissal under CPLR 3211(a)(1) (documentary evidence) is warranted only if the documentary evidence conclusively establishes a defense to the asserted claims as a matter of law. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10; *Leon v Martinez,* 84 NY2d 83, 88 (1994); *Bishop v Maurer,* 33 AD3d 497, 498 (1st Dept 2006); *see Sokol v Leader*, 74 AD3d 1180, 1182 (2d Dept 2010) (when court considers evidentiary material on 3211 motion, criteria is whether plaintiff has cause of action, not whether he has stated one).

Finally, the pleadings should give adequate notice to the court and the adverse party of the transactions or occurrences intended to be proved. *Two Clinton Sq. Corp. v Friedler*, 91 AD2d 1193, 1194 (4th Dept 1983); *see Ackerman v 305 E. 40th Owners Corp.*, 189 AD2d 665, 666 (1st Dept 1993). Dismissal of a defense under CPLR 3211(b) is warranted where "a defense is not stated or has no merit."

A. Counterclaims/Third-Party Complaint

1. Fraud in the Inducement

The First Counterclaim against VFS, and Third-Party Cause of Action against GE assert that "GE, both individually and as VFS' agent and/or representative, intentionally misrepresented

and failed to disclose to Loomis the fact that it had modified significant financial terms of the Loan Proposal in the VFS Loan Documents." CC/TPC, ¶54. The pleading claims that the prior "loan" was modified to include a Prepayment Fee and Make Whole Amount provision. VFS and GE argue that the allegations fail to meet the specificity requirement of CPLR 3016(b) and the operative documents conclusively contradict allegations of misrepresentation and justifiable reliance. The court agrees.

A claim for fraudulent inducement of contract requires proof of a material misrepresentation, known to be false, made to induce reliance, actual reliance, and resulting damage. *Crystal & Co., Inc. v Dillmann*, 84 AD3d 704 (1st Dept 2011). The fraud claim alleged by Loomis and ICS against VFS and GE asserts: GE intentionally misrepresented that it would provide financing based on the terms in the Loan Proposal and would include those terms in the VFS loan documents; GE failed to disclose that the VFS documents would not include the same terms and would in fact be less favorable; GE's misrepresentations were made to induce Loomis and ISC to enter into the VFS agreement; Loomis and ISC relied on the misrepresentations and were damaged by entering into the VFS agreement and paying $72,900 to secure the terms in the VFS Loan Documents. CC/TPC, ¶¶43-61.

Loomis and ISC further allege that: VFS/GE surreptitiously inserted Prepayment Fee and Make Whole Amount provisions in the VFS loan documents; the provisions had not been negotiated or disclosed; and Loomis would not have executed the documents if he had known they contained the provisions. There are no specific allegations of oral or written representations that the VFS loan documents would *not* contain the provisions or that the Loan Proposal and Commitment Letter constituted a final agreement. Rather, the proposal states explicitly that GE's funding was subject to certain conditions and the execution of additional documents. The pleading does not establish that ISC's and Loomis' alleged understanding to the contrary was based on a representation by either GE or VFS.

Additionally, the documentation supporting the pleadings and the motion to dismiss flatly

contradicts the allegations that Loomis was misled. Before the VFS "re-documentation", GE issued the funds and the parties executed a Promissory Note, other documents integral to the IRS exchange, and the loan and funding of the purchase. Included in the Note were Prepayment Fee and Make Whole Amount provisions, a fact ignored in defendants' pleading and Loomis' Affidavit. This was the loan being re-documented.

In May 2006, Clove Acquisitions LLC was formed to facilitate the purchase of the aircraft for the IRS exchange. Jeffrey S. Towers, VP of Clove's managing member TVPX Acquisitions, executed a Promissory Note payable to GE that contained a Make Whole Amount provision like the one included in the VFS Note. AmComp, Exh.7.[5] Loomis signed guarantees for the Clove Note on behalf of himself, ISC and Loomis Corp. and signed an agreement transferring Clove's rights and obligations under the Clove Note to ISC. AmComp, Exhs. 8-11. The Transfer and Assumption Agreement contained ISC's (Loomis') acknowledgment that it had "received and reviewed a true and correct copy of the Contract prior to execution and delivery of this Agreement." Exh. 11, ¶4. "Contract", as defined, included the May [Clove] Note and Security Agreement. Exh. 11, pg.2.

The Clove documentation plainly contradicts the claim of misrepresentation, as well as the element of reliance. Parties to a contract, particularly sophisticated parties, have an obligation to exercise ordinary diligence in ascertaining the terms of the contracts they sign. *Sander v J.P. Morgan Chase Home Mortg.,* 56 AD3d 301, 302 (1st Dept 2008). Loomis is a sophisticated businessman. Ordinary diligence would have included reading the agreement he was assuming and guaranteeing on behalf of himself and his corporations. It is not reasonable to infer that Loomis did not read these documents before signing them or, at the very leasd, that a failure to read them would have been justifiable. Indeed, even if the pleading sufficiently alleged a prior misrepresentation, the general merger clause in the Note would exclude parol evidence of it, and

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[5] VFS alleges (AmComp, ¶15) that Loomis and ISC "arranged for the formation" of Clove. Defendants do not admit or deny forming Clove.

the contradictory provisions in the Note would negate justifiable reliance. *See Marine Midland Bank N.A. v Walsh*, 260 AD2d 990 (3d Dept 1999); *AFG Industries, Inc. v Empire Glass Co.*, 226 AD2d 487 (2d Dept 1996); *Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498-99 (1st Dept 2011).[6]

The allegations of fact pled by defendants to support their claim of fraudulent inducement are insufficient; the claim is contradicted by the operative documents. *See Bishop v Maurer,* 33 AD3d 497, 498 (1st Dept 2006). For the reasons discussed above, the Fourth Counterclaim and Third-Party Cause of Action for Mutual Mistake and Reformation is insufficient as a matter of law. The allegations do not support any inference that VFS/GE made a mistake in preparing the VFS loan documents or that Loomis was mistaken in signing them.

2. Breach of Contract

In support of their Second Counterclaim and Third-Party Cause of Action, Loomis and ISC allege that a contract or contracts were created by: GE's delivery of the Loan Proposal to ISC; inclusion in the proposalof a limited, two-year Prepayment Premium, and interest rate of 6.41%; ISC's payment to GE of $72,900 to lock in the "terms" of the proposal; GE's delivery to ISC of the Commitment Letter containing "the same financial terms as the Loan Proposal"; and Loomis' signature on the letter indicating his agreement and acceptance. CC/TPC, ¶¶5-10, 20, 32, 63-68. GE allegedly breached by including terms in the Loan Documents that had not been negotiated and were not included in the proposal or letter. ¶¶21-23, 31-32, 38, 70. Alleged damages include GE's and VFS' refusal to approve the sale of the aircraft without payment by defendants of amounts not covered by the Loan Proposal. GE argues that the Loan Proposal was an unenforceable agreement to agree and, as a result, there was no breach because the deal between VFS and defendants "was a distinct agreement which contained a valid merger clause, making prior negotiations irrelevant." Memo of Law, pgs. 10-11.

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[6]In light of the court's findings, defendants' allegation that GE approached Loomis to request the change to VFS does not compel denial of the motion.

In order to state a claim for breach of contract in New York, a plaintiff must establish: (1) The existence of an agreement; (2) Adequate performance of the agreement by the plaintiff; (3) Breach of the contract by the defendants; and (4) damages. *Flomenbaum v New York Univ.*, 71 AD3d 80, 91 (1st Dept), *affd* 14 NY3d 901 (2010). "Generally, where the parties anticipate that a signed writing is required, there is no contract until one is delivered." *Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423 (1st Dept), *lv denied* 15 NY3d 704 (2010) (citation omitted).

By its terms, the Loan Proposal prepared by GE anticipated further review and negotiation, and a subsequent signed agreement. Defendants' construction that acceptance of the proposal locked in all the "terms" for the subsequent transaction, is refuted by the operative documents. The proposal provided that payment of the $72,900 locks the "rate" of 6.41% for "funding that occur[s] on or before May 15, 2006." Paragraph 6 of the proposal page titled, "Terms and Conditions", states: "This is only a proposal and is not a firm commitment by GE Capital to enter into a transaction or purchase the aircraft described herein [and] may be withdrawn by GE Capital at any time prior to a definitive written commitment to enter into the transaction." AC, Exh.3. The proposal also was subject to, *inter alia*, GE's credit approval process and execution of documentation defined as GE's "current standard Aircraft loan documentation." *Id.* On April 13, 2006, the day before the proposal was due to expire, ISC accepted it by signing and sending a check for $72,900 with the words "Refundable Interest Lock" noted on the bottom. *Id.* Defendants' view of GE's subsequent May 8, 2006 commitment letter is equally contrary to its terms. Contrary to Loomis' assertion, the letter does not include "the same fundamental financial terms" as the proposal. Some of the same terms are included, but not all, either by exclusion or a change in terms, e.g., the Prepayment Premium language is not included and the "lender", identified in the proposal as "GE . . . and or its assigns," is identified in the letter as "GE Capital or one of its wholly-owned subsidiaries." AC, Exh. 4.

In addition, by its terms the letter was subject to certain conditions. For instance, it

required execution of "all documentation required by GE Capital and in form and substance satisfactory to GE Capital in its sole discretion." Id. The subsequent loan documentation prepared by GE and signed by the parties contained a Make Whole Amount provision. The merger clauses in the subsequent May and December 2008 agreements exclude parol evidence of prior writings and oral understandings or agreements to determine the terms of the parties' controlling agreement.

3. Tortious Interference With Contract

ISC and Loomis title their Third Counterclaim and Third-Party Cause of Action as Tortious Interference With Contract and allege that GE and VFS "acted in a willful, intentional and tortious manner to interfere with the prospective economic advantage of Loomis and ISC." CC/TPC, ¶76. The claim is insufficient as a matter of law.

The contract at issue was the Aircraft Purchase Agreement between ISC and Baldor Electric Company to sell the aircraft for $4.7 Million. A copy is attached as Exh.6 to the Loomis Affidavit opposing the motion to dismiss. Loomis alleges and avers that GE withheld its consent to the sale after he refused to provide collateral for the deficiency amount it claimed would be due, because GE had calculated the amount using the Prepayment Fee and Make Whole Amount. GE/VFS argue that the contract was not valid and was void without their consent and GE was within its contractual rights to withhold consent.

The security agreement with ISC made the sale of the aircraft subject to VFS' consent. Loomis was negotiating with GE, which was servicing the account on behalf of VFS, its subsidiary. There are no allegations of domination and control, and the allegations fail to distinguish between the two entities, instead using their names interchangeably. Although this failure could serve as a threshold basis for seeking dismissal on behalf of one or both entities, GE and VFS have not addressed it in their motion.

The court can and will address the insufficiency of allegations to establish elements of the claim. The elements of a claim for tortious interference with an existing contract are: 1) the

existence of a valid contract with a third party, 2) defendant's knowledge of that contract, 3) defendant's intentional and improper procuring of a breach, and 4) damages. *New Stadium LLC v Greenpoint-Goldman Corp.*, 2010 N.Y. Misc. LEXIS 1724 (NY Sup Ct, Apr.12, 2010), citing *White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 (2007). A defendant may raise as a defense that it acted to protect its own legal or financial stake in the breaching party's business. *Id.* GE was acting to protect VFS' security interest in the aircraft and arguably GE's rights under the guarantees.

GE used proper means to protect these interests. Where the defendant has an economic interest to protect, the plaintiff must show malice, fraud, illegal or otherwise improper conduct. *Id.*; *see Foster v Churchill*, 87 NY2d 744 (1996) (even where defendants acted in bad faith, actions taken for economic health of company were defense to tortious interference with contract absent malice or illegal conduct). A creditor protecting its secured interest is justified absent malicious conduct. *See Ultramar Energy Ltd. v Chase Manhattan Bank*, 179 AD2d 592, 593 (1st Dept 1992) (alleged attempt by Chase to protect its secured interest not construed as malicious or carried out with intent to harm). VFS was entitled to withhold its consent to a sale of the aircraft, and there are no allegations that GE undertook any illegal or otherwise improper conduct.

In like manner. the lack of illegal or improper conduct dooms a claim for tortious interference with economic advantage. *See Carvel Corp. v Noonan*, 3 NY3d 182, 190 (2004) (plaintiff must plead defendant employed wrongful means or acted with "sole purpose of inflicting intentional harm"). The request for leave to further amend the claim to one of "tortious interference with prospective business advantage" is denied. Memo, pg. 10.

4. Breach of Duty of Good Faith and Fair Dealing

Loomis and ISC incorporate the other four claims to plead a violation of the implied covenant of good faith and fair dealing as the Fifth Counterclaim and Third-Party Cause of Action. "It is axiomatic that all contracts imply a covenant of good faith and fair dealing in the course of performance. This covenant 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." *Forman v Guardian Life Ins. Co. of America*, 76 AD3d 886 (1st Dept 2010) (citations and internal quotations omitted). Loomis and ISC do not claim that they were deprived of the benefits of an agreement in the course of VFS/GE's performance.

Rather, Loomis and ISC claim damages resulting from alleged misrepresentations that induced them to enter into the agreement in the first place, and from acts allegedly undertaken by VFS/GE that were independent of their contract performance. The operative documents establish an enforceable agreement. Defendants can not use the doctrine of an implied duty of good faith and fair dealing "to circumvent the parties' express agreement or to create a free-floating duty unattached to the underlying legal document." *Cohen PDC, LLC v Cheslock-Bakker Opportunity Fund, LP*, 94 AD3d 539 (1st Dept 2012).

B. Affirmative Defenses

Under CPLR 3211(b), "A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." The First Affirmative Defense based on failure to state a claim is permissible. *See Riland v Frederick S. Todman & Co.*, 56 AD2d 350 (1st Dept 1977) (noting that defense can be asserted at any time even if not pled [CPLR 3211(e)]). Defendants' Second, Fourth, Sixth and Seventh Affirmative Defenses are stricken as conclusions of law without supporting facts. *See Bruino v Sant'elia,* 52 AD3d 556, 557 (2d Dept 2008); *see also Kronish Lieb Weiner & Hellman LLP v Tahari, Ltd.*, 35 AD3d 317 (1st Dept 2006).

The court construes defendants' Third, Fifth and Eighth Affirmative Defenses collectively as challenging the *amount* of damages VFS seeks in the Amended Complaint, as opposed to liability. In fact, defendants' counsel conceded at argument on the motion that money is due on the loan. The parties dispute the basis for liability and the amount due. The third defense refers to the allegations in the counterclaims and in the third-party complaint as the grounds for challenging the disputed amounts. The fifth defense cites VFS' failure to mitigate damages. The allegations, taken as true, establish that VFS/GE withheld consent to a sale of the aircraft for $4.7

Million and, because of the resulting delay, the aircraft ultimately sold for substantially less. Defendants have included sufficient facts to support the defense. *See Wilmot v State*, 32 NY2d 164, 168 (1973) (discussing rule of mitigating damages); *see also Brushton-Moira Cent. Sch. Dist. v Fred H. Thomas Assocs.*, P.C., 91 NY2d 256 (1998).

As for the Ninth Affirmative Defense denying that Loomis Corp. made a guaranty or promise to VFS, it raises the same ground as the cross-motion to dismiss the Fifth Cause of Action for Breach of Contract as against Loomis Corp. The court will discuss the defense and the cross-motion together below. The Tenth Affirmative Defense is not a defense but a non-prejudicial reservation of the right to assert additional defenses post-discovery, which is surplusage.

The request for leave to file a second amended pleading is denied. No proposed amendment has been submitted, and there has been no discussion of the bases for one. The only ground raised is that dismissal is premature pre-discovery. This is not sufficient.

C. Cross-Motion to Dismiss the Fifth Cause of Action

Defendants' argue that VFS' Fifth Cause of Action for Breach of Contract should be dismissed because VFS was not a party to the Guarantees allegedly breached and that the Guarantees were intended to guaranty the obligations under the May documents. VFS argues that the cross-motion should be denied because it is made on documentary evidence pursuant to CPLR 3211(a)(1) and should have been brought within the time to file a responsive pleading. The court agrees. Defendants chose to answer the complaint and pled a Ninth Affirmative Defense, as to Loomis Corp., based on the same ground. As to the motion to dismiss the Ninth Affirmative Defense, VFS correctly argues that pursuant to the Transfer and Assumption Agreement and the Guarantor Consent and Confirmation documents, Loomis, Loomis Corp. and ISC affirmed that their Guarantees would remain in full force and effect after the Note was transferred to VFS. In addition, the Guarantees: obligated the Guarantors to pay GE "and all its subsidiaries" all money owed by Clove; permitted GE to assign the Guarantees and the Account Documents; and

obligated the Guarantors to pay the assigns. Exhs. 9-13. Accordingly, it is hereby

ORDERED that the motion of plaintiff VFS and third-party defendant GE to dismiss the affirmative defenses, counterclaims and third-party complaint is granted as to all counterclaims, the third-party complaint, and the second, fourth, sixth, seventh and ninth affirmative defenses, which are dismissed, and the motion is denied as tothe first, third and eigth affirmative defenses; and it is further

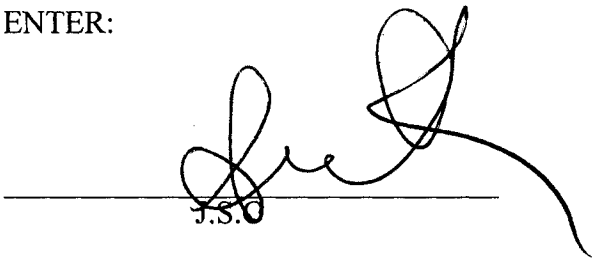
ORDERED that the cross-motion to dismiss the fifth cause of action is denied; and it is further

ORDERED that within two weeks of the date of entry of this decision and order, defendants shall file an amended pleading deleting the dismissed claims and affirmative defenses and allegations of fraud, and with a corrected caption; and it is further

ORDERED that on November 8, 2012, at 11:30 A.M., counsel for the parties shall appear in Part 54, Room 228, of the New York Supreme Court, located at 60 Centre Street, New York, New York, for a pretrial conference.

Dated: October 5, 2012

ENTER:



J.S.C.