SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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NORTH AMERICAN AIRLINES, INC.,

Plaintiff,

-against-

WILMINGTON TRUST COMPANY, as Owner Trustee, pursuant to the Trust Agreement Trustee, [North American Airlines Inc. Trust No. 28039] dated as of December 1, 2006; ALE-ONE, LIMITED, LOCAT S.P.A., SAN PAOLO LEASINT S.P.A. and INTESA LEASING S.P.A.,

Defendants

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DECISION AND ORDER

Index No. 602985/2009
Mot. Seq. Nos. 007 and 008

O. PETER SHERWOOD, J.:

Motion sequence numbers 007 and 008[1] are consolidated for disposition.

This action arises under various agreements relating to the lease of a Boeing 767 aircraft. Plaintiff North American Airlines, Inc. ("NAA") now moves for summary judgment (CPLR 3212) on various claims seeking reimbursement of approximately $2.6 million for engine repairs from defendant Wilmington Trust Co. ("WTC") and three guarantors, defendants Locat S.p.A. ("Locat"), San Paolo S.p.A. ("San Paolo"), and INTESA Leasing S.p.A. ("INTESA", together with Locat and San Paolo, the "Guarantors"). Additionally, NAA seeks recovery of $930,000 that it contends WTC wrongfully drew down under a letter of credit. NAA also moves to dismiss WTC's counterclaims, which allege that NAA failed to timely redeliver the aircraft. WTC moves

1 The motions are misnumbered as 008 and 009 in the parties' submissions.

for summary judgment dismissing all claims of the First Amended Complaint (the "Amended Complaint") except for the first cause of action for breach of the Lease agreement.

I. BACKGROUND

The facts discussed here are drawn from the parties' respective Rule 19-a statements and affidavits, and the documents and testimony referenced therein, and are undisputed unless otherwise noted. NAA is a United States air carrier previously headquartered at John F. Kennedy International Airport in Jamaica, New York (Plaintiff's Rule 19-a Statement of Undisputed Material Facts ["PSOF"], Dkt. 194, ¶1).[2] It was a wholly-owned subsidiary of World Air Holdings, Inc., later known as Global Aviation Holdings ("Global") (Defendants' Rule 19-a Statement of Undisputed Material Facts ["DSOF"], Bridgeman affirmation 7/9/2013 ["Bridgeman Aff. 1"], exhibit A, Dkt. 197). In 2005, NAA began negotiations with defendant ALE-One, Limited ("ALE"), an Irish entity, to lease ALE's Boeing model 767-304ER aircraft (the "Aircraft") equipped with two engines bearing manufacturer's serial numbers 704351 (the "351 Engine") and 704352 (the "352 Engine") (PSOF ¶ 3). ALE was a special purpose company created by Itochu Air Lease B.V. ("Itochu"), a Netherlands company, and the Aircraft was ALE's sole asset (Aaronson affirmation 6/13/2013 ["Aaronson Aff."], exhibit 16, Dkt. 144 [Ohki Dep., Part 1, 73:35-74:6]); Bridgeman affirmation 6/13/2013 ["Bridgeman Aff. 2"], exhibit F, Dkt. 205). Greg Mitchell ("Mitchell") acted as lead negotiator for NAA (Bridgeman Aff. 1, exhibit A) and Saturo

2 References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

Ohki ("Ohki"), an employee and/or consultant for Itochu, represented ALE (Ohki Dep., Part 1, 66:7-67:14).

A. The Parties' Agreements

ALE and NAA agreed upon terms for a lease of the Aircraft in December 2006 (PSOF ¶ 4). To effect the transaction, the parties executed several contemporaneous agreements dated December 1, 2006 (PSOF ¶ 20). They included a Trust Agreement (the "Trust Agreement") (Aaronson Aff., exhibit 27, Dkt. 155), an Aircraft Lease Agreement (the "Lease") (*id.*, exhibit 25, Dkt. 153), and a Participation Agreement (the "Participation Agreement") (*id.*, exhibit 28, Dkt. 156) (collectively, the "Operative Documents").

1. The Trust Agreement

To comply with federal law requiring NAA to operate aircraft registered in the United States and owned by a "United States Citizen," defendant WTC, a Delaware Corporation, agreed to act as Owner Trustee of the aircraft under a Trust Agreement. ALE, as Trustor, then conveyed the aircraft to a trust (PSOF ¶¶ 5-7; Aaronson Aff., exhibit 27, Dkt. 155.) Itochu director Taro Kumashiro ("Kurashiro") executed the Trust on behalf of ALE and WTC Assistant Vice President Robert P. Hines, Jr. ("Hines") did so on behalf of WTC (Trust Agreement, pp. 21-22).

The Trust Agreement defined the "Trust Estate" to include the right to "payments of any kind for or with respect to the Aircraft" (Trust Agreement § 1.2). Section 8.1 of the Trust Agreement required that any transfer or assignment of WTC's of rights or interest in the Trust or the Trust Estate to be memorialized in a written agreement "which shall provide that such transferee thereby becomes a party to, and beneficiary of, this Trust Agreement and a Trustor for

all purposes hereof and that such transferee assumes all of the obligations of its transferor under this Trust Agreement." Pursuant to sections 5.2 and 5.3, ALE was required to indemnify WTC for any acts undertaken with respect to the Lease by WTC pursuant to ALE's instructions.

2. The Aircraft Lease

Under the Lease, ALE leased the aircraft to NAA for a term three-year running from December 1, 2006 to November 30, 2009 (PSOF ¶ 10; Lease § 3.5 and Lease exhibit C-2). However, due to delays in redelivery of the Aircraft from the prior operator, WTC did not deliver the Aircraft until February 19, 2007. The Lease was amended by "Amendment No. 1," dated February 19, 2007, to reflect changes in the actual date of delivery and related adjustments (Aaronson Aff., exhibit 26, Dkt. 154).

In addition to the rent, the Lease required NAA to make a variety of payments to WTC, including monthly payments to help fund specified types of future maintenance of the Aircraft ("Maintenance Reserve Payments"). The amount of each such payment was determined under a formula which accounted for the utilization of the Aircraft in the prior month (Lease exhibit C-1 § 3). WTC was required to credit the Maintenance Reserve Payments in separate notional Maintenance Reserve sub-accounts ("M/R Sub-Accounts") (*see* PSOF ¶ 13; Defendants' Response to Plaintiff's Statement of Facts ["DRSOF"] Dkt. 244, ¶ 13).

Notwithstanding the existence of the reserves funded by NAA, the Lease provided that in some instances WTC would be required to expend additional funds of its own to reimburse NAA

for maintenance. Among the reimbursable tasks defined by the Lease were "Items of Heavy Maintenance." As relevant here, section 4.3 (b) (ii) (A) provided:

> In the case of the first performance after the Delivery Date of each Item of Heavy Maintenance, the following provisions shall apply: Provided that no potential Default or Event of Default has occurred and is continuing and provided further that Lessee shall provide Lessor prior to the Heavy Maintenance of each Item of Heavy Maintenance with the scope of work of such intended Heavy Maintenance, Lessor shall pay to Lessee within thirty (30) days of the Lessee's written request to Lessor (together with supporting documentation evidencing the scope of work of maintenance performed and the amount of the costs and expenses involved all in form satisfactory to Lessor acting reasonably), such amounts as are equal to
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> * * *
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> (2) The actual costs incurred and paid by Lessee in respect of any off-wing maintenance (as hereinafter defined) which consists of a shop visit for full performance restoration to restore the Engine performance (i.e., EGT margin) of any engine in the accordance with the Engine Manufacturer's Engine Shop Manual for engines like the Engine multiplied by a fraction, the numerator of which is flight hours elapsed since last Engine Shop Visit of such engine prior to the Delivery Date and up to the Delivery Date and the denominator of which is the numerator plus flight hours elapsed since the Delivery Date and up to the date such Engine Shop Visit is performed.
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> For the avoidance of doubt, the amount payable by Lessor under clauses (1) through (5) above shall be paid by the Lessor without any deduction form the M/R Sub-Accounts.
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> Provided that no Potential Default or Event of Default has occurred and is continuing and subject to paragraph (iv) below, with respect to each Item of Heavy Maintenance Lessor shall also pay to Lessee (at the same time that Lessor is to make the payment pursuant to the preceding paragraph) an additional amount equal to the difference between (x) the actual cost of the first performance after the Delivery Date of such Item of Heavy Maintenance and (y) the amount paid by Lessor to Lessee with respect to such Item of Heavy Maintenance pursuant to the preceding paragraph (which amount

> shall be deducted from the amount previously credited to the relevant M/R Sub-Account).

The EGT (exhaust gas temperature) margin referred to in 4.3 (b) (ii) (A) (2) is an engine performance rating that measures how much use an engine has left on it (defs' mem in opposition at 4 n 2). With respect to that measurement, the Lease provided that:

> The condition of the Aircraft and installed systems upon return to the Lessor shall be as follows:
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> * * *
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> (iii) as long as each Engine shall have an EGT margin no less than 25 degrees Celsius on the Delivery Date, each Engine shall have an EGT margin no less than 25 degrees Celsius, if the Lease is not extended pursuant to Section 3.5. If the Lease is extended pursuant to Section 3.5, each Engine shall have an EGT margin as mutually determined by Lessor and Lessee in connection with the extension of the Lease. If the Lease is not extended pursuant to Section 3.5 and if the EGT margin of any Engine is less than 25 degrees Celsius, then before Lessor requiring Lessee to return such Engine with a minimum EGT margin of 25 degrees Celsius, Lessee and Beneficiary shall, for a period of time not to exceed three Business Days, discuss in good faith to see if they can reach a financial settlement to compensate Lessor in lieu of Lessee having to return such Engine with a minimum EGT margin of 25 degrees Celsius . . . .

(Lease, exhibit E, section 2 [b] [iii]).

As pertinent here, section 4.3 (b) (iv) of the Lease provided for certain additional exceptions to NAA's right to reimbursement:

> (A) No payment shall be made in respect of . . . (cc) repairs, overhaul, maintenance or replacement of Parts . . . or any repair, overhaul, maintenance or replacements caused by ingestion, foreign object damage, (FOD), faulty maintenance or installation, repairs . . . improper operations, misuse, neglect, accidental cause, unless Lessee undertakes a full performance restoration to restore the Engine's

> performance upon the occurrence of such event in which case such costs as are directly attributable to damage sustained as a result of such ingestion or FOD or the correction of any defect resulting from improper operations or accidental cause shall be excluded from any amount recoverable from Lessor . . .
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> (B) Lessor shall not be obligated to make any payment hereunder in respect of any amount claimed by Lessee hereunder for as long as Lessor or Beneficiary is contesting in good faith such amount;
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> (C) Except for Lessor's maintenance cost compensation set forth in the second paragraph of Section 4.3(b)(ii)(A), the total amounts available for payment pursuant to paragraph (ii) above in respect of . . . each Engine . . . individually shall not in any event exceed the balance of any funds paid by Lessee to Lessor pursuant to paragraph (i) above in respect of the specific amounts held respectively for each . . . Engine.

The Lease also required NAA to establish a security deposit in the amount of $930,000 (Lease § 4.3 [a] at 15-16, and exhibit C-1, section 2 at 79), which was deemed to be "the sole property of the Lessor" (Lease § 4.3 [a] [ii] at 79). However, the Lease permitted NAA to replace the security deposit with a Security Letter of Credit upon 14 days' notice (Lease § 4.3 [a] [vi] at 15). The Security Letter of Credit was defined as "an irrevocable letter of credit issued by an internationally recognized bank reasonably acceptable to Lessor and in a form reasonably acceptable to Lessor, in the same amount as the Security Deposit" (Lease § 1.1 [Definitions] at 8). The Lessor was authorized to draw upon the letter of credit "at any time if it is not renewed on or before fifteen (15) days prior to its expiration," and the Lease further provided that:

> Lessor may draw upon the Security Letter of Credit in any manner Lessor deems fit including in or towards the satisfaction of any sums due to Lessor by Lessee or to compensate Lessor for any

> sums which it may in its discretion advance or expend as a result of the failure of Lessee to comply with any of its obligations under this Agreement or any of the other Operative Documents.

(Lease § 4.3 [a] [viii] at 16). The Lease further required WTC to return the Letter of Credit five days after the return of the Aircraft, "[p]rovided that no Potential Default exists and no Event of Default has occurred and is continuing and Lessee has performed all its responsibilities and obligations under the Operative Documents" (Lease § 4.3 [a] [x] at 16).

3. The Participation Agreement

In the Participation Agreement, ALE and its prospective assignees guaranteed, *inter alia*, WTC's performance of its obligations regarding the repayment of NAA's security deposit and Maintenance Reserves in accordance with the term of the Lease. The Participation Agreement also provided that if ALE assigned its interests in the Operative Documents, then its assignees would assume ALE's obligations under the Operative Documents, including the guaranty in the Participation Agreement (Aaronson Aff., exhibit 28 § 3) (PSOF ¶¶ 22-23).

B. The Transfer of Interests

By email dated March 14, 2007, Kumashiro of Itochu informed Greg Mitchell that an Italian airline called Air Italy S.p.A. ("Air Italy") had obtained financing to purchase ALE-ONE and asked for NAA's cooperation in arranging for an inspection of the aircraft and securing additional insurance (*see* Bridgeman Aff. 1, exhibit E). In a March 21, 2007 letter, Kumashiro indicated that Air Italy had purchased ALE's shares, and that Itochu would be assuming certain obligations of ALE and WTC (Bridgeman Aff. 1, exhibit F, Dkt. 205). NAA, however, contends

that there is no evidence that the sale of shares to Air Italy actually closed (Plaintiff's Response to Defendants' Statement of Facts ["PRSOF"], Dkt. 340, ¶ 4).

On April 9, 2007, ALE assigned its interest in the Trust Agreement to the Guarantors, each of whom assumed one-third of ALE's obligations, including the guarantee (Bridgeman Aff. 1, exhibit J, Dkt. 209 [Assignment of Trust Interest]). The Assignment of Trust Interest provided each Guarantor became "a party to, and a beneficiary of, the Trust Agreement and a 'Trustor' for all purposes of the Trust Agreement" (*id.*). Each Guarantor also received "the right to receive all future sums that but for this assignment would be due Assignor under the Trust Agreement" (*id.*). On April 11, 2007, the Guarantors and Air Italy executed leasing contracts, subject to NAA's use of the Aircraft pursuant to the Lease ("Follow-On Lease") (Bridgeman Aff. 1, exhibits L and M, Dkts. 211 and 212 [translated from the Italian]). The Guarantors and Air Italy also entered into a Deed of Assignment (the "Deed") (Bridgeman Aff. 1, exhibit K, Dkt. 210) that day which provided, as relevant here, that "[n]otwithstanding what stated [sic] in the premises with regard to the current detention of the Aircraft by N.A.A. under the Lease Agreement, title to the Rights is hereby transferred to the [Guarantors] and by them, pursuant to the Leasing Contract, to [Air Italy] as of today for all purposes" (Deed, Article 5 [translated from Italian]).

C. The Letter of Credit

On March 27, 2007, NAA notified WTC of its intention to replace the Security Deposit with a letter of credit in fourteen days (Aaronson Aff., exhibit 51, Dkt. 179). NAA attached its application for the letter of credit to the notice, which proposed an expiration date of November 30, 2009 (*id.*). The application also provided that it would be available for payment upon

submission of a statement signed by a WTC officer that "an Event of Default under the Lease had occurred and is continuing" (*id.*). In a March 28, 2007 letter, NAA explained that its decision to replace the Security Deposit with a letter of credit was related to its concerns regarding Air Italy's inferior creditworthiness and its potential misuse of the security deposit and maintenance reserves (Bridgeman Aff. 1, exhibit H, Dkt. 207).

On April 9, 2007, ALE responded to that notice by requesting, among other things, that the expiration date of the letter of credit be extended from November 30, 2009 to January 15, 2010 to provide the lessor with a reasonable time to declare a default and draw upon the letter should NAA fail to timely return the aircraft (Bridgeman Aff. 1, exhibit I, Dkt. 208). On May 4, 2007, NAA replaced the Security Deposit with a letter of credit (the "Letter of Credit") (Aaronson Aff., exhibit 50, Dkt. 178). The Letter of Credit retained the November 30, 2009 expiration date and the requirement that WTC certify an Event of Default to draw upon it.

D. The Engine Repair

On November 8, 2008, NAA discovered excessive core vibrations in the 351 Engine (PSOF ¶ 28). A borescope (fiber optic camera inspection) of the 351 Engine revealed that the high pressure turbine was damaged beyond maintenance manual limits (PSOF ¶ 29). The HPT Stage 1 blade had failed, causing downstream damage (PSOF ¶ 30). On November 10, 2008, Marlon Fabiani ("Fabiani") a senior manager for maintenance analysis in NAA's Maintenance and Engineering Division, emailed Ohki to notify Itochu of the problem (Bridgeman Aff. 1, exhibit O, Dkt. 214).

By email dated November 25, 2008, an engine consultant for NAA, Alan Webber of Royal Aero, advised GE Caledonian, Limited ("GECAL"), a repair facility in Scotland, that "to meet return conditions, we need to carry out a 'full performance restoration'" (DSOF ¶ 12; Bridgeman Aff. 1, exhibit P, Dkt. 215). In a November 27, 2008 response, one of the GECAL engineers, Calum Hume, asked Webber to clarify the term "full performance restoration" and asked whether he or Webber would be preparing the workscope (*id.*). NAA thereafter removed the 351 Engine from the Aircraft and shipped it to GECAL for further inspection and repair (PSOF ¶ 31). GECAL is an affiliate of General Electric, the manufacturer of the 351 Engine, and had previously serviced the 351 Engine on several occasions (*id.* ¶ 32).

On November 28, 2008, GECAL prepared a preliminary workscope for the 351 Engine (*id.* ¶ 33). The initial workscope identified an HPT Stage 1 blade failure as the reason for removal of the 351 Engine, and called for a "performance restoration" and an investigation into the blade failure and the downstream damage (*id.* ¶ 34).

In December 2008, pursuant to Section 4.3 (b) (ii) (A) of the Lease, NAA provided WTC the scope of work to be performed (Aaronson Aff., exhibit 41). GECAL's initial inspection of the 351 Engine found that the engine's low pressure turbine airfoils had sustained damage due to a Stage 1 HPT blade failure (*id.*, exhibit 42 [Preliminary Shop Visit Report]). Disassembly of the 351 Engine confirmed this blade failure and revealed that 90% of the airfoil was missing (*id.*). Disassembly of the engine into the submodular level also exposed other areas of the 351 Engine, allowing GECAL to inspect additional areas, and on December 17, 2008, GECAL and NAA revised the workscope to reflect the new information (*id.*, exhibit 39).

GECAL then completed a performance restoration on the 351 Engine and confirmed that the work was performed in accordance with the Planning Guide (*id.*). GECAL issued an FAA Form 8130-3 Airworthiness Approval Tag certifying that the 351 Engine was sufficiently repaired to be returned to service (*id.*, exhibit 44). GECAL also issued a final report (*id.*, exhibit 45). GECAL confirmed that even if the workscope had initially been limited to a repair level workscope, the condition of the 351 Engine would have resulted in a performance level workscope (PSOF ¶ 58) (Aaronson Aff., exhibit 49 at 2; *see also id.*, exhibit 20 [Coull Dep.] at 50:21-51:13).

GECAL returned the 351 Engine to NAA on or about February 6, 2009 (PSOF ¶ 46). In February 2009, at the request of Fabiani, a preliminary shop visit report was revised to replace the term "performance restoration" with "full performance restoration", in order to have "all wording coincide" (Aaronson Aff., exhibit 40). GECAL issued NAA an invoice in the amount of $2,647,501.72 for the work performed which NAA paid in full in March 2009 (PSOF ¶ 48) (Sheetz Aff. 6/1/2013, exhibits 1 and 2).

On March 5, 2009, NAA emailed WTC's representatives a maintenance reserve claim for $1,559,606.33 (Bridgeman Aff. 2, exhibit Q). On May 21, 2009, Air Italy disputed that the work carried out met the criteria for maintenance reserve reimbursement and rejected NAA's demand (DSOF ¶ 14). Specifically, Air Italy contended that "only the costs of a 'full performance restoration to restore the Engine performance (i.e. EGT margins) of any Engine in accordance with the Engine Manufacture's Engine Shop Manual . . .' qualifies for payment" and noted that "[a]lthough the Lessor had requested Information concerning the EGT margins and trend monitoring data for this Engine from NAA, the information was not furnished. We have

ascertained the information independently, and based on that information, it is clear that NAA did not accomplish a 'full performance restoration'" (Bridgeman Aff. 2, exhibit R, Dkt. 226).

Thereafter, GECAL customer program manager Steven Coull and NAA engine consultant Alan Webber discussed ways to characterize the work. In an email dated May 28, 2009 to Coull, copied to Fabiani, Webber wrote:

> Here is a thought. What we could say is that the HPC had a performance restoration carried out, the module was disassembled to inspect for damage caused as a result of the failure.
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> If you include the other modules in the statement and say how they were stripped as a result of the failure and a performance restoration was carried out then everything is covered. We have not said that a performance restoration was carried out on the HPC due to the failure, merely that it was disassembled to inspect for damage and a performance restoration was carried out as well. This will leave the lease company to ask the next question which is what amount of the disassembly was due to the failure and the WSPG requirements, and what amount was elective, if they do we can tell them at that stage.

(Bridgeman Aff. 1, exhibit N). Fabiani expressed his approval of the idea in an email, and participated in a call about the matter with Coull and Webber the same day (*id.*). The next day, Coull sent an undated, unsigned letter to Fabiani, stating that due to the failure and exposed conditions within the engine, the repair of various components necessitated "performance restoration level workscope" (Bridgeman Aff. 1, exhibit O). In July 2009, Air Italy made several requests for engine trend monitoring data to help it determine EGT margin deterioration, but NAA asserted that it did not maintain such information (Bridgeman Aff. 1, exhibit Q, Dkt. 225).

On September 3, 2009, NAA issued a revised written request (the "Request") for reimbursement from WTC in the amount of $2,647,501.72 (Aaronson Aff., exhibit 47). NAA

submitted certain supporting documentation pursuant to Section 4.3 (b) (ii) (A) of the Lease (*id.*, exhibit 47). At the time of repair, $1,232,996.51 was in the 351 Engine's M/R Sub-Account (*id.*, exhibit 46). WTC refused to pay, as did the Guarantors (PSOF ¶ 56-57).

E. The Redelivery of the Aircraft

From mid-September until the end of the month, the parties discussed the possibility of extending the Lease. WTC's agent requested, *inter alia*, the withdrawal of the reimbursement claim as part of any agreement. Ultimately, the parties could not agree, and WTC demanded return of the Aircraft pursuant to the Lease (Bridgeman Aff. 1, exhibit T, Dkt. 228 [email correspondence between Ohki and Mitchell]).

NAA initiated the return process in October 2009 and ferried the Aircraft to Miami to conduct an orderly redelivery to WTC (PSOF ¶ 77). The Lease has a section setting forth the required return condition for the Aircraft ("Return Conditions") (*id.* ¶ 78; Lease exhibit E). Aircraft returns involve both lessor and lessee inspecting the aircraft to ensure it meets the required return condition detailed in the applicable lease (PSOF ¶ 79). Aircraft returns are typically an iterative process during which the lessor reviews the aircraft's maintenance records and makes physical inspections of the aircraft, and the lessee addresses any legitimate concerns the lessor raises, and the parties work together to negotiate disputes as to questionable discrepancies (*id.* ¶ 80). Given the extensive and detailed return condition requirements, returned aircraft rarely comply with 100% of the return condition requirements. Instead, cash settlements are negotiated in lieu thereof. (*id.* ¶ 81).

Air Italy as WTC's designated agent for return purposes, issued lists identifying hundreds of defects (*id.* ¶ 83). In an e-mail dated November 13, 2009, an Air Italy employee was instructed to find as many defects as possible to charge to NAA so as to give it "a basis for further discussions with NAA" (Aaronson Aff., exhibit 59, Dkt. 187). In addition to rectifying certain return condition defects, NAA worked with Air Italy to negotiate monetary compensation for certain noncompliant items (PSOF ¶ 84).

NAA and Air Italy ultimately disagreed on various open items where Air Italy claimed the item was not compliant with the Return Conditions (*id.* ¶ 85). Many of these disputes centered on items that NAA felt were within the generally accepted industry parameters of ordinary wear and tear, and therefore met the applicable Return Conditions (*id.* ¶ 86). NAA contends that it worked diligently towards redelivering the Aircraft by November 30, 2009, but that the process was delayed by Air Italy's failure to devote sufficient personnel to the effort (*id.* ¶ 87). NAA further asserts that by December 3, 2009, the repair work was completed, but the return negotiations came to a standstill when Air Italy's personnel claimed their management in Italy was unavailable (*id.* ¶ 88).

Defendants counter that during the redelivery process, Air Italy had a team of four engineers and technicians at and off the inspection site, and that although there was only one representative on site on November 30, 2009, there were six other staff members monitoring the situation and available by email (DRSOF ¶ 87). Defendants also assert that on December 4, 2009, Air Italy offered a Redelivery Acknowledgement to NAA and later that day NAA responded with a counteroffer (*id.* ¶ 88). They contend that the parties conducted further negotiations on

December 5, 2009, but that NAA shut down the discussions despite the availability of Air Italy's technical and legal staff (*id.*). Defendants additionally claim that earlier in the process, NAA engaged in delaying tactics by falsely claiming that Air Italy had blocked its access to data required to facilitate redelivery (*id.* ¶ 87).

On December 5, 2009, NAA ferried the Aircraft to NAA's main maintenance base at JFK International Airport, to better facilitate rectifying any agreed redelivery discrepancies and economically store the Aircraft (PSOF ¶ 89). NAA returned the Aircraft to WTC on December 10, 2009 (*id.* ¶ 90). WTC did not sustain any damage, lose any business, or incur any expenses as a result of the redelivery after November 30, 2009 (*id.* ¶¶ 92, 93, 95, 97, 99-104). Defendants contend, however, that Air Italy suffered damages of approximately $9 million, including over $7 million in lost charter contracts (DRSOF ¶ 94; Bridgeman Aff. 2, exhibit DD [First Amended Affidavit of Daniel L. Bernstein] [defendants' expert witness]).

F. The Draw on the Letter of Credit

On November 30, 2009, minutes before the Letter of Credit was to expire, Hines of WTC submitted a draw certification (the "Draw Certification") to Wachovia demanding the full $930,000.00 available thereunder (PSOF ¶¶ 64, 66). The Draw Certification certified "that an Event of Default (as defined in that certain Aircraft Lease Agreement dated as of December 1, 2006 between the undersigned and North American Airlines, Inc.) has occurred and is continuing. We therefore demand payment in the amount of $930,000.00, as same is due and owing" (*id.* ¶ 69). Wachovia paid out $931,525.00, including a transaction fee, which WTC wired to Air Italy

(*id.* ¶¶ 73, 74, 76). Hines made a round trip flight between Delaware and North Carolina, using a private jet and private car paid for by Air Italy (*id.* ¶¶ 65, 67, 68).

NAA contends that WTC gave it no notice of an Event of Default, and that no such event had occurred at the time of the draw (*id.* ¶¶ 70, 71). Hines testified that when he submitted the draw certification, he did so on the instructions of counsel without knowing or asking whether a default had actually occurred (*id.* ¶¶ 72; Aaronson Aff., exhibit 14 [Hines deposition] at 105-06). Defendants contend, however, that NAA had indicated to Air Italy, then acting as WTC's agent, that it could not meet the Return Conditions as to certain open items (DRSOF ¶¶ 70-71).

II. PROCEDURAL HISTORY

NAA commenced this action against WTC, ALE and the Guarantors on September 29, 2009, seeking recovery of the $2.6 million it paid for the engine repair (Dkt. 1 [Complaint]). On December 8, 2009, plaintiff moved for an attachment of the Aircraft to secure payment of that alleged debt, in anticipation of WTC's transfer of the Aircraft to Air Italy (Affidavit of Stephen F. Harmon in Support of an Order of Attachment ¶ 1, Dkt. 13). The motion for an attachment was withdrawn and resolved by a Stipulation and Order dated December 18, 2009 (the "Stipulation") (Bridgeman Aff. 1, exhibit P-4, Dkt. 219). The Stipulation provided as follows:

> 1. The indemnification obligations of [the Guarantors] as set forth in Section 5.3 of the Trust Agreement and in the Direction Letter dated December 18, 2009 from Trustors to the [WTC] apply to any final judgment that has not been stayed or discharged that may be entered in favor of NAA against the [WTC] in this action on claims arising out of the facts alleged as of the date hereof in the First Amended Complaint dated December 14, 2009.
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> 2. Should a Final Judgment that has not been stayed or discharged be entered against [WTC] in this action on claims arising out of the

> facts alleged . . . in the First Amended Complaint . . . [WTC] agrees to promptly exercise and pursue its indemnification rights pursuant to Section 5.3 of the Trust Agreement and the Direction Letter. If [WTC] fails to take steps reasonably necessary to exercise or pursue such indemnification of rights in good faith, then, upon ten (10) business days (in Italy) written notice to [WTC], NAA shall have the right, in its own name and in the name of [WTC] to exercise and pursue such indemnification rights.

Plaintiff filed the Amended Complaint on December 14, 2009 setting forth eight causes of action (Aaronson Aff., exhibit 4, Dkt. 132 [Amended Complaint]). The first seven seek reimbursement of the $2,647,501.72 that NAA paid for the engine repairs under a variety of theories as follows: (1) breach of the Lease by WTC; (2) breach of the covenant of good faith and fair dealing by WTC; (3) unjust enrichment against WTC; (4) breach of guarantee against the Guarantors; (5) unjust enrichment against the Guarantors; (6) breach of guarantee against ALE; and (7) unjust enrichment against ALE. The eighth cause of action, for conversion, seeks $930,000 against WTC for drawing on the Letter of Credit. In its Answer and Counterclaims (Dkt. 42), WTC asserts three counterclaims: (1) breach of the Lease for failing to timely return the Aircraft; (2) breach of the Lease for failing to meet the Return Conditions; and (3) conversion for failing to return the Aircraft upon demand. The Guarantors' Answers and Counterclaims (Dkts. 64 and 65) asserts those same three causes of action.

Several motions to dismiss and/or stay this action were subsequently filed. By order dated February 8, 2010 (Dkt. 35), this court (Yates, J.) denied WTC's motion to dismiss and/or stay, holding that the pendency of an earlier-filed lawsuit brought by Air Italy in Italy was not grounds for such relief because an action in a foreign court did not qualify as a prior action pending within the meaning of CPLR 3211 (a) (4), and because the two actions involved different parties and

different claims. In a May 21, 2010 order (Dkt. 59), the court (Yates, J.) denied a similar motion by the Guarantors for the same reasons, and, relying on a forum selection clause in the Trust Agreement, rejected the guarantors' additional argument alleging a lack of personal jurisdiction. In a second order dated May 21, 2010 (Dkt. 60), the court denied NAA's motion to dismiss WTC's counterclaim for conversion, holding that NAA's conduct in bringing the Aircraft from Miami to New York to secure an order of attachment, allegedly in violation of FAA regulations, stated a tort claim distinct from the breach of Lease claim. However, by stipulations dated May 25, 2011 (Dkts. 104 and 105), the Guarantors discontinued, with prejudice, their counterclaims against NAA. Extensive discovery followed, and the instant motions for summary judgment followed.[3]

III. DISCUSSION

A. Standard for Summary Judgment

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez*, 68 NY2d at 329; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

3 NAA filed a Chapter 11 petition for bankruptcy on November 12, 2013 (Dkt. 379). By orders dated November 20, 2013 (Dkts. 380 and 381), this court held the motions in abeyance. Those orders were vacated by orders dated November 30, 2015 (Dkts. 395 and 396), subject to an additional 60 day stay to permit defendants to retain new counsel.

Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver*, 90 NY2d 204, 208 [1997]). The court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, Inc v Ceppos*, 46 NY2d 223, 231 [1978]). Nonetheless, bald, conclusory assertions or speculation and "a shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J Capalin Assoc v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *see Zuckerman, supra*; *Ehrlich v American Moninga Greenhouse Manufacturing Corp.*, 26 NY2d 255, 259 [1970]).

Lastly, " '[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility' " (*Ruiz v Griffin*, 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]).

B. Plaintiff's Claims for Reimbursement for Engine Repairs

NAA seeks summary judgment on the first through fifth causes of action relating to reimbursement of the $2,647,501.72 it paid for the performance restoration. WTC seeks summary judgment dismissing the second through seventh causes of action relating to that

reimbursement.[4] For the following reasons, NAA's motion is granted, and WTC's motion to dismiss is granted as to the second, third, fourth and fifth causes of action to the extent discussed below.

1. First Cause of Action (Breach of the Lease)

a. Arguments

In its motion for summary judgment for breach of the Lease, NAA argues that all prerequisites of section 4.3 (b) (ii) (A) of the Lease were met. Specifically, NAA contends that it is undisputed that the Lease was in effect, that NAA provided WTC with the scope of work, that GECAL undertook a Full Performance Restoration, and there was no Event of Default at the time the repairs were made (pl's mem in support [Dkt. 195] at 17). NAA also contends that the Lease requires reimbursement regardless of whether the repairs were actually necessary, or whether WTC consented to them (*id.* at 18-19).

WTC argues that under section 4.3 (b) (ii) (A), the cost of a Full Performance Restoration is reimbursable only where it is undertaken expressly for the purpose of restoring a deteriorated EGT margin, and not, as here, where the repairs were necessitated by a blade failure (defs' mem in opposition [Dkt. 199] at 4-5). WTC also relies upon section 4.3 (b) (iv) (A) (cc) for this conclusion, urging that the blade failure constituted an "accidental cause" for which reimbursement is unavailable (*id.* at 6). WTC argues that if the Lease is ambiguous, the parties' negotiation history supports its narrower interpretation of the reimbursement provisions (*id.* at 5- 6). WTC further contends that even if the Lease requires payment for any Full Performance Restoration

4 Insomuch as the sixth and seventh causes of action are asserted against ALE and NAA concedes that that party was never served and never appeared (pl's mem in opposition at 24), those claims are dismissed.

regardless of its cause, NAA's total reimbursement would be limited to $1,437,830.61. That figure represents $204,834.10, the amount that both parties agree would be owed under section 4.3 (b) (ii) (A) (2) as lessor's contribution for wear and tear incurred prior to delivery of the equipment to lessee (the so called "top up"[5] payments) plus $1,232,996.51, the funds remaining in the engine maintenance reserve account and available pursuant to section 4.3 (b) (iv) (C) (*id.* at 6-7).

NAA counters that the express purpose of a Full Performance Restoration is to restore EGT margin, and that the Engine's EGT margin was in fact restored (pl's reply mem [Dkt. 373] at 1-2). NAA further argues a blade failure does not fall under the "accidental cause" exception, which only applies when reimbursement is sought for damage to "Parts," rather than to entire engines (*id.* at 3). NAA also notes that 4.3 (b) (ii) (A) (cc) allows for reimbursement for a full performance restoration which is occasioned by an accidental cause, so long as the costs attributable to the accidental damage are excluded (*id.* at 3-4). NAA opposes WTC's introduction parol evidence as inadmissible in the absence of contractual ambiguity. Such evidence is also barred by the Lease's merger clause, albeit reserving its right to supplement the record on that issue should the Lease be found ambiguous (*id.* at 2-3, 3 n 4). Finally, NAA asserts that section 4.3 (b) (iv) (C) does not limit reimbursement to the funds remaining in the maintenance reserve account, but requires full payment while requiring deduction from the accounts to the extent possible (*id.* at 4-6). In that connection, NAA also asserts that the amount of available maintenance reserves was the

5 Upon a first performance repair following delivery of the equipment to the lessee, the lessor is required to make a "top-up" payment to NAA for that portion of the cost of repairs due to wear and tear attributable to pre-lease use of the equipment. Such payment, is referred to as the "top-up" payment and is to be made without any deduction from the maintenance reserve account held by WTC (*see* PSOF, ¶ 18, NYSCEF Doc. No. 194).

$1,750,620.36 paid in over the course of the full Lease term, not $1,232,996.51 on deposit at the time of the repairs (*id.* at 6 n 8).

b. Analysis

Despite their multilayered and technical phrasing, the relevant Lease clauses are clear and unambiguous, thereby allowing the court to determine what repairs the parties intended to be reimbursable. Accordingly, plaintiff's motion for summary judgment on its claim for breach of the Lease is granted.

Under New York law, "written agreements are construed in accordance with the parties' intent and the best evidence of what parties to a written agreement intend is what they say in their writing" (*Schron v Troutman Sanders LLP*, 20 NY3d 430, 436 [2013]. Thus, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]). Extrinsic evidence may be used to interpret a contract only where is it ambiguous, and the determination as to ambiguity is a question of law to be answered by the court (*id.* at 570.)
A contract is ambiguous if "[it] is reasonably susceptible of more than one interpretation" (*Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]), but is not made so "just because one of the parties attaches a different, subjective meaning to one of its terms" (*Moore v Kopel*, 237 AD2d 124 [1st Dept 1997]). Furthermore, "[t]he existence of ambiguity is determined by examining the entire contract and consider[ing] the relation of the parties and the circumstances under which it was executed, with the wording viewed in the light of the obligation as a whole and the intention of the parties as manifested thereby" (*Banco Espirito Santo, S.A. v Concessionaria Do Rodoanel Oeste*

S.A., 100 AD3d 100, 106 [1st Dept 2012] [internal quotations and citations omitted]). An expert's opinion may be considered regarding industry custom to resolve a contractual ambiguity (*see, e.g.*, *Excess Ins. Co. v Factory Mut. Ins. Co.*, 2 AD3d 150, 151 [1st Dept 2003], *aff'd sub nom. Excess Ins. Co. v Factory Mut. Ins.*, 3 NY3d 577 [2004]) and may also be consulted regarding the use of specialized "words and phrases . . . which may be understood by those engaged in [a particular] business or art . . . but which convey no meaning to those who are not initiated into the mysteries of the craft" (*Fox Film Corp. v Springer*, 273 NY 434, 436 [1937]; *see Harber Philadelphia Ctr. City Office Ltd. v Tokai Bank*, 281 AD2d 179, 180 [1st Dept 2001]).

As discussed below, WTC was required to pay for performance restoration which restored the EGT margin. There is no dispute that such repairs were performed. The Lease is also unambiguous in allowing a reduction of WTC's liability by the amount of costs "incurred" as a direct result of such . . . accidental cause" Lease section 4.3 (b) (iv) (A) (cc).

(i). Full Performance Restoration

Lease section 4.3 (b) (ii) (A) (2) specifies that a Full Performance Restoration is to be undertaken in accordance with the Engine Manufacturer's Engine Shop Manual. In this case, the manual consulted for the repairs was the GE Workscope Planning Guide ("Planning Guide") (Aaronson Aff., Ex. 38). The Planning Guide identifies four levels of work as follows:

- ☐ Assembled Engine Workscope.
- ☐ Applies to engines incoming to the shop prior to disassembly and after final assembly.
- ☐ Shop Visit Minimum Workscope.

- ☐ Applies to all engine shop visits with modules having no apparent hardware failure or performance problems, if the module is removed or accessible. Engines/modules worked to this level should have demonstrated adequate performance margin incoming to the shop.
- ☐ Performance or full overhaul thresholds not exceeded.
- ☐ Engine Manual Condition Maintenance Chapters (72-00-XX) apply.
- ☐ Performance Workscope.
- ☐ Intended to restore EGT/SFC margin.
- ☐ Low in-service performance prior to removal.
- ☐ Performance threshold exceeded (full overhaul threshold not exceeded) L-J.
- ☐ Shop visit minimum workscope recommendations apply at this level. Performance restoration for the booster and LPT modules is accomplished at the full overhaul level.
- ☐ Full Overhaul Workscope.
- ☐ Full overhaul threshold exceeded.
- ☐ Entails thorough piece-part inspection and refurbishment (including all life-limited rotating part NDT inspections) per Engine Manual Overhaul Chapters (72-00-XX) apply.
- ☐ Extension of performance workscope. All elements of shop visit minimum and performance workscopes apply at full overhaul.

NAA has proffered an expert affidavit to establish that that the term "Performance Workscope" used in the Planning Guide is commonly used in the commercial aviation industry as equivalent to the term "Full Performance Restoration" that is employed by the Lease (PSOF ¶ 35; Aaronson Aff., exhibit 21, p. 4 n 6 [Expert Report of Mark R. Benson]). WTC has not countered this conclusion, other than to point to deposition testimony from various witnesses expressing confusion over the meaning of the term (*see* testimony cited at DRSOF ¶ 36). Furthermore, the Performance Workscope is the only level of work of the four enumerated in the Planning Guide specifically intended to "restore the EGT/SFC margin." WTC also concedes that the change made in the shop visit report to specify a "full performance restoration" rather than a "performance

restoration" had no impact on the work performed by GECAL (DRSOF ¶ 38). Accordingly, there is no dispute that a Full Performance Restoration within the meaning of 4.3 (b) (ii) (A) (2) was performed.

(ii). EGT Margin

Section 4.3 (b) (ii) (A) (2) of the Lease requires fractional reimbursement of "any off-wing maintenance . . . which consists of a shop visit for full performance restoration to restore the Engine performance (i.e., EGT margin)."[6] On a first performance, the cost of repairs due to wear and tear are apportioned between the lessor and the lessee with the pre-lease portion allocated to the lessor. The court concurs with NAA's interpretation that any Full Performance Restoration that results in a restored EGT margin qualifies under this provision. WTC's contention that the Lease requires that the restoration of the EGT margin be the *sole* reason for the shop visit is inconsistent with the clause in § 4.3 (b) (iv) (A) (cc) that provides for reimbursement where "lessee undertakes a full performance restoration to restore the Engine performance upon occurrence of [an accidental cause]". The word "to" in the relevant clause is merely "a word expressing purpose [or] consequence" (*Merrill Lynch, Pierce, Fenner & Smith Inc. v Manning,* 136 S Ct 1562, 1568 (2016), *quoting* The Concise Oxford Dictionary 1288 [1931]). Here, there is no dispute that

6 "EGT" means exhaust gas temperature. Expressed in Celsius, EGT "is the temperature at the engine exhaust and a measure of an engine's efficiency in producing its design level of thrust; the higher the EGT, the more wear and deterioration affect an engine. High EGT can be an indication of degraded engine performance . . . EGT reaches its maximum during take-off or just after lift-off. The difference between the maximum permissible EGT [a fixed temperature referred and to as 'EGT Redline'] and the peak EGT during take-off is called the EGT Margin. EGT Margin is expressed mathematically as follows: EGT Margin=EGT Redline-EGT Gauge Reading.
In general, EGT margins are at their highest [hence the EGT Gauge Reading shows a low temperature] when, the engine is new or just following refurbishment." (Shannon Ackert, *Engine Maintenance Concepts for Financiers, Elements of Turbofan Shop Maintenance Cost* inAircraft Monitor [2d ed Sept 2011] at p. 7), available at http://www.dl.icdst.org/pdfs/files1/cb84b7e01aa2465b1914b8f7f9ce1e00.pdf

restoration of the EGT margin was both a consequence and a purpose of the shop visit (*see* pl's reply mem at 2, n. 3 and exhibits referenced therein) (EGT margin was 32 degrees upon the Aircraft's delivery in 2007, and 37 degrees after the performance restoration).

(iii). Accidental Cause

The court rejects WTC's argument that the blade failure falls within the "accidental cause" exception and thus excuses WTC from liability for the work. As noted above, section 4.3 (b) (iv) (A) (cc) of the Lease provides that where the "Lessee undertakes a full performance restoration to restore the Engine upon the occurrence of [an accidental cause, the] costs as are directly attributable to damage sustained as a result of such. . . accidental cause shall be excluded from any amount recoverable from Lessor". Accordingly, the section does not excuse reimbursement for all repairs necessitated by an accidental cause, but merely states that where a full performance restoration is performed on the occasion of such an event, no reimbursement is required for the costs of repairs relating to such accidental cause. As provided for in section 4.3 (b) (ii) (A) (2) of the Lease, NAA is entitled to reimbursement of the "actual costs incurred . . . of any off wing maintenance . . . which consists of a ship visit for full performance restoration to restore . . . EGT margin". NAA is not entitled to recover for repairs relating solely to damage caused by the blade failure.

(iv). Calculation of Additional Reimbursement

Finally, there is no ambiguity regarding the method of calculating the amount owed to NAA under 4.3 (b) (ii) (A) of the Lease, although it is unclear what deduction must be made here for "costs as are directly attributable to damage sustained as a result of such. . . accidental cause".

The Lease states that WTC "shall pay . . . an additional amount" to NAA sufficient to make up actual cost of the first performance restoration. Although the Lease provides that the amount of the reimbursement "shall be deducted" from the appropriate maintenance reserve account, it does not say that the amount owed is limited to the balance remaining in the account. This is made clear by the language of section 4.3 (b) (iv) (C), which caps reimbursement for later maintenance work to the amount contributed to the reserve account, while expressly exempting the payment for the first performance restoration from that limitation. A hearing shall be required to permit defendants an opportunity to establish the costs that should be excluded from the amount of reimbursement owed NAA.

2. Second Cause of Action (Good Faith and Fair Dealing)

NAA alleges that WTC breached the covenant of good faith and fair dealing by refusing to reimburse the $2.6 million allegedly owed under section 4.3 (b) (ii) (A) of the Lease (amended complaint ¶ 54). NAA amplifies this allegation by contending that WTC sought to avoid payment (1) by making bad faith demands for technical data regarding the Engine that predated the damage and was not required to be produced under the terms of the Lease, and (2) erroneously insisting that the engine could have been repaired without a Full Performance Restoration (pl's mem in opposition, Dkt. 341, at 23-24).

A claim for breach of the implied covenant of good faith and fair dealing arises "when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement" (*Jaffe v Paramount Communications, Inc.*, 222 AD2d 17, 22–23 [1st Dept 1996]; *Peter R.*

Friedman, Ltd. v Tishman Speyer Hudson Ltd. Partnership, 107 AD3d 569 [1st Dept 2013]; *Skillgames, LLC v Brody*, 1 AD3d 247, 252 [1st Dept 2003]). Where a contract authorizes the exercise of discretion, the covenant "includes a promise not to act arbitrarily or irrationally" in doing so (*Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 [1995]); *see also Peacock v Herald Sq. Loft Corp.*, 67 AD3d 442, 443 [1st Dept 2009]). However, a good faith claim is deficient where it is "premised on the same conduct that underlies the breach of contract cause of action" and is "intrinsically tied to the damages allegedly resulting from a breach of the contract" *MBIA Ins. Corp. v Merrill Lynch*, 81 AD3d 419, 419–420 [1st Dept 2011]) (internal quotation marks and citation omitted). The second cause of action must thus be dismissed as duplicative of the breach of Lease claim. NAA merely restates its arguments that WTC violated or misinterpreted various Lease provisions, and seeks the same reimbursement sought under the first cause of action.

3. Third and Fifth Causes of Action (Unjust Enrichment)

In the event its breach of Lease claim is dismissed, NAA seeks recovery of from WTC and the Guarantors of the $2.6 million it paid GECAL for the repairs under a theory of unjust enrichment. NAA pleads that paying that sum bestowed a benefit upon defendants, in the form of the enhancement of the Engine's value, of which they were aware and which they accepted (amended complaint ¶ 57-59; pl's mem in support at 19-20).

These claims too must be dismissed. An unjust enrichment claim fails where there is an express contract covering the subject matter of the dispute (*Am. Media, Inc. v Bainbridge & Knight Labs.*, LLC, 135 AD3d 477, 477 [1st Dept 2016]; *Allenby, LLC v Credit Suisse, AG*, 134 AD3d 577, 579 [1st Dept 2015]). The Lease clearly governs all aspects of the parties' rights and plaintiff

raises no meaningful opposing argument. NAA's attempt to plead the cause of action in the alternative must be rejected, as that procedure is available only where "there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue" (*Joseph Sternberg, Inc. v Walber 36th St. Assocs.*, 187 AD2d 225, 228 [1st Dept 1993]). NAA makes no such allegations here.

4. Fourth Cause of Action (Breach of Guarantee)

In the fourth cause of action, NAA seeks payment from the Guarantors pursuant to their agreement to guarantee payment of the maintenance reserves pursuant to the Trust Agreement and the Participation Agreement. NAA effectively concedes that by virtue of the Stipulation, its claim to enforce the guarantee is premature because NAA has not obtained a judgment against WTC, WTC has attempted and failed to assert its indemnification rights against the Guarantors under paragraph 2 of the Stipulation, and NAA has not given ten days' written notice of its intention to pursue the Guarantors under its own name. Accordingly, this claim must be dismissed as premature to the extent it is based upon the terms of the Trust.

NAA nevertheless asserts that it may enforce the guarantee against the Guarantors pursuant to the Participation Agreement without first taking action against WTC. This theory is also flawed. The guarantors were not parties to the Participation Agreement, and were thus not automatically subject to its guarantee provision. Rather, the Participation Agreement merely authorized ALE to transfer its obligations under the Trust Agreement, with ALE remaining liable "to the extent" the obligations were assumed by the assignees. In the Assignment of Trust Interest, the Guarantors each only assumed one-third of the obligations of ALE under the Trust

Agreement. The assignment did not mention the Participation Agreement, or provide that the Guarantors assumed the obligations thereunder. Accordingly, the Guarantors indemnification obligations as Trustors are governed solely by the Trustee Agreement and the terms of the Stipulation.

C. Plaintiff's Claim for Conversion

The eighth cause of action seeks recovery of the $930,000 WTC drew under the Letter of Credit. In seeking summary judgment on the claim, the parties raise a multitude of arguments concerning whether the instrument's terms complied with the Lease; whether WTC waived its objections to those terms; whether WTC complied with those terms; whether NAA was in default; and whether each party acted with unclean hands. However, the ultimate inquiry is whether WTC had any right to retain the funds after they were drawn, regardless of whether it acted properly in obtain the proceeds in the first instance.

"It is a fundamental principle that the letter of credit is completely independent of the contract between the customer and the beneficiary" (*Chiat/Day Inc. v Kalimian*, 105 AD2d 94, 96 [1st Dept 1984]). Accordingly, a bank may honor a letter of credit without proof of performance of the underlying contract, and regardless of whether there is an existing dispute between the parties (*UBAF Arab Am. Bank v New World Research Corp.*, 174 AD2d 392, 394 [1st Dept 1991]). The parties' rights as between themselves will thus not turn upon the terms of the letter of credit but upon their underlying agreement (*see, e.g.*. Official Comment No. 1 to NYUCC § 5-103) ("That the beneficiary may have breached the underlying contract and thus have given a good defense on that contract to the applicant against the beneficiary is no defense for the issuer's refusal to honor").

In view of this court's further holding (in connection with NAA's motion to dismiss WTC's counterclaims) that WTC incurred no damages as a consequence of NAA's alleged failure to timely redeliver the Aircraft or satisfy the Return conditions, NAA is entitled to judgment for the conversion of the funds. To establish a claim for conversion, "it need only be shown that a plaintiff had legal title or an immediate superior right of possession to the identifiable fund and the exercise by defendants of unauthorized dominion over the money in question to the exclusion of plaintiff's rights" (*Bankers Trust Co. v Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 AD2d 384, 385 [1st Dept 1992]). The use of a corporation's funds without any proof that they were used for corporate purposes may constitute conversion (*Paradiso & DiMenna, Inc. v DiMenna,* 232 AD2d 257, 257 [1st Dept 1996]). Even assuming that WTC had a right to draw upon the Letter of Credit in anticipation of a default under the Lease by NAA, as discussed below in connection with the dismissal of the counterclaims, WTC has not demonstrated that it incurred or suffered any damages from the alleged default.

Although the Lease permitted WTC to draw upon the Letter of Credit "in any manner [it saw] fit," that discretion was plainly limited to recovery of sums owed by NAA to WTC, or incurred by WTC as a consequence of NAA's breach of the Lease (*see* Lease § 4.3 [a] [viii] at 16). WTC has not established that it suffered any such damages. Hines testified that Air Italy did not demand reimbursement from WTC, and as discussed below, Air Italy was not made a beneficiary of the Trust. Accordingly, WTC's wiring of the funds to Air Italy constituted a conversion of NAA's funds. WTC's contention that the Letter of Credit was its "sole property" pursuant section § 4.3 [a] [ii] is without merit, as that section applies only to the separately defined "Security

Deposit." Furthermore, the use of the funds from both the Security Deposit and the Letter of Credit was limited to purposes related to curing defaults under the Lease, and subject to return to the extent they were not so used.

D. Defendant WTC's Counterclaim

NAA moves to dismiss WTC's three counterclaims, which allege that NAA breached the Lease by failing to timely redeliver the Aircraft and failing to meet the Return Conditions, and also committed conversion in connection with its failure to make a timely redelivery. WTC concedes that it neither paid nor incurred any damages due to NAA's conduct, but contends that it is suing for damages its capacity as trustee on behalf of Air Italy as a beneficiary of the Trust (defs' mem in opposition at 13-14). The claims are dismissed.

WTC does not quote, cite or analyze the contractual language which it contends confers beneficiary status upon Air Italy. Instead, it relies on the testimony of a Delaware attorney who testified that Air Italy became a Trust beneficiary by virtue of a series of conveyances between WTC, ALE, the Guarantors and Air Italy (Bridgeman Aff. 2, Durante Deposition Testimony). From his deposition testimony, it appears that the sole basis for his conclusion is Article 5 of the Deed, which provided that title to certain rights were transferred to Air Italy (Durante deposition at 94). However, that language plainly does not comply with the mandate of section 8.1 of the Trust, which states that specific language must appear in the transfer agreement declaring the transferee to be a party and a beneficiary of the Trust, and that the transferee assume all of the obligations the Trust. Although the Guarantors executed such a document with WTC conferring upon them beneficiary and obligor status, Air Italy did not.

IV. CONCLUSION

The motion summary judgment of plaintiff, NAA, for (a) breach of section 4.3 (b) (ii) (A) of the Lease shall be granted as to liability with a trial to be held as to damages and (b) conversion relating to the Letter of Credit (motion sequence number 007). That branch of the same motion seeking dismissal of WTC's three counterclaims for (a) failure to timely return the aircraft, (b) failure to satisfy the Return Conditions and (c) conversion in connection with untimely re-delivery shall be granted.

The motion summary judgment of defendant, WTC, which seeks dismissal of plaintiff's second through seventh causes of action (motion sequence number 008) shall be granted. The court notes that the Stipulation and Order dated December 18, 2009 (NYSCEF Doc. No. 23) remains in effect as to the fourth cause of action against the alleged guarantors. Accordingly, those claims will be dismissed without prejudice.

Accordingly, it is hereby

ORDERED, that the motion of plaintiff North American Airlines, Inc. (motion sequence number 007) for summary judgment is granted to as to the first cause of action for breach of the Lease, and the eighth cause of action for conversion, and is denied as to the remaining causes of action, and it is further

ORDERED, that the branch of the same motion of plaintiff North American Airlines, Inc.(motion sequence number 007) for summary judgment seeking dismissal of the counterclaims of defendant Wilmington Trust Company, as Owner Trustee, pursuant to the Trust Agreement

Trustee, [North American Airlines Inc. Trust No. 28039] dated as of December 1, 2006, is granted, and those claims are severed and dismissed with prejudice, with costs and disbursements to plaintiff as taxed by the Clerk of the Court; and it is further

ORDERED, that the motion of defendant Wilmington Trust Company, as Owner Trustee, pursuant to the Trust Agreement Trustee, [North American Airlines Inc. Trust No. 28039] dated as of December 1, 2006, (motion sequence number 008), for summary judgment dismissing the claims of plaintiff North American Airlines, Inc. is granted as to the second, third, fifth, sixth and seventh causes of action with prejudice, and as to the fourth cause of action without prejudice to the extent it is based upon the Trust Agreement, and is otherwise denied, and it is further

ORDERED that the claims referenced in the decretal paragraph immediately above are severed and dismissed, with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that pursuant to CPLR 3212 (c), a trial shall be held to determine the amount of damages owed NAA by reason of its claim for reimbursement under the top-up clause and section 4.3 (b) (iv) (cc) of the Lease and in connection therewith, the parties shall appear at a pre-trial conference at Part 49, 60 Centre Street, Room 252, New York, New York 10007 on September 6, 2017 at 10:00 am.

This constitutes the decision and order of the court.

DATED: July 6, 2017

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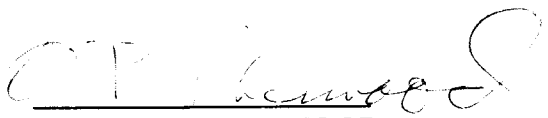

O. PETER SHERWOOD
J.S.C.