

<b>Itria Ventures LLC v Provident Bank</b>
2020 NY Slip Op 30494(U)
February 19, 2020
Supreme Court, New York County
Docket Number: 653667/2018
Judge: Andrew Borrok
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. ANDREW BORROK

PART IAS MOTION 53EFM

*Justice*

-----X

INDEX NO. 653667/2018

ITRIA VENTURES LLC,  
  
Plaintiff,

MOTION DATE 02/13/2020

MOTION SEQ. NO. 007 008

- v -

PROVIDENT BANK,  
  
Defendant.

**DECISION + ORDER ON  
MOTION**

-----X

PROVIDENT BANK  
  
Plaintiff,

Third-Party  
Index No. 595127/2019

-against-

BIZ2CREDIT INC., RAMIT AURORA, HIGHCREST CAPITAL,  
LLC, JIFFER SMALL BUSINESS LENDING FUND, LP,  
MARKETPLACE SPV, LLC, PRIME MERIDIAN CAPITAL  
MANAGEMENT, LLC, RANGER DIRECT LENDING FUND  
TRUST

Defendant.

-----X

ITRIA VENTURES LLC, BIZ2CREDIT INC., RAMIT AURORA  
  
Plaintiff,

Second Third-Party  
Index No. 595072/2020

-against-

PROVIDENT FINANCIAL SERVICES, INC., CHRISTOPHER  
MARTIN, DONALD BLUM, SHARON BENDER, ARTHUR  
MCCRAY, PKF O CONNOR DAVIES LLP, COST REDUCTION  
SOLUTIONS, MICHAEL ALBANESE, DENISE ALBANESE,  
TIGER CAPITAL LLC, MANDELBAUM SALBURG PC

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 149, 150, 151, 152,  
153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 166, 167, 168, 169, 176, 177, 178, 179

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 180, 181, 182, 183, 184, 185, 186, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242

were read on this motion to/for

DISMISS

Motion sequence numbers 007 and 008 are consolidated for disposition. Itria Ventures LLC (**Itria**), Biz2Credit Inc. (**Biz2Credit**), and Ramit Arora's (**Arora**, together with Itria and Biz2Credit, collectively, the **Itria Parties**) motion (Mtn. Seq. No. 007) pursuant to CPLR §§ 3211 (a) (1) and (7) to dismiss the third (fraud and civil conspiracy), fourth (negligent misrepresentation), and sixth (fraudulent misrepresentation) causes of action asserted in Provident Bank's (**Provident**) Amended Answer, Defenses, Counterclaim, and Third Party Complaint (the **Third-Party Complaint**) is granted solely to the extent that the third cause of action is dismissed as set forth herein, the fourth cause of action is dismissed without prejudice and the sixth cause of action is sustained as a fraud claim, but is otherwise denied. And, Jiffer Small Business Lending Fund, LP (**Jiffer**), Marketplace SPV, LLC (**Marketplace**), Prime Meridian Capital Management, LLC (**Prime Meridian**), and Ranger Direct Lending Fund Trust's (**Ranger**, together with Jiffer, Marketplace, and Prime Meridian, collectively, the **Investors**) motion (Mtn. Seq. No. 008) pursuant to CPLR § 3211 (a) (7) to dismiss the fifth cause of action (conversion) is granted and the fifth cause of action is dismissed without prejudice.

## THE RELEVANT FACTS AND CIRCUMSTANCES

Itria is a financial services company engaged in the business of providing financing to its clients by making loans and purchasing accounts receivable (Third-Party Compl., ¶ 1). Biz2Credit, an affiliate of Itria, is a broker that assists businesses in applying for and obtaining financing (*id.*, ¶

2). Mr. Arora is an officer of Itria and Biz2Credit and holds ownership interests in both companies (*id.*, ¶ 3). From 2014 through 2017, Itria entered into a series of Future Receivables Sale Agreements (the **Pre-Closing FRSAs**) with Lotus Exim International, Inc. (**Lotus Exim**) (*id.*, ¶ 10; Third-Party Compl., Ex. A). Pursuant the Pre-Closing FRSAs, Itria extended financing to Lotus Exim by factoring Lotus Exim's accounts receivable (*id.*). According to the terms of the Pre-Closing FRSAs, Lotus Exim granted Itria a first priority, continuing security interest in 100% of Lotus Exim's future receivables, inventory, and other assets, and Lotus Exim was prohibited from selling, assigning, pledging, or transferring any of its receivables to any other party until Itria was paid in full for all funding provided to Lotus Exim (*id.*, ¶¶ 13, 14). Itria recorded a UCC-1 Financing Statement to perfect its security interest (*id.*, ¶ 18). The Pre-Closing FRSAs were negotiated by Mr. Arora and executed by Mr. Arora on behalf of Itria (*id.*, ¶¶ 11, 12).

The Pre-Closing FRSAs authorized Itria to withdraw payments from Lotus Exim directly from a designated bank account (*id.*, ¶ 16). Itria provided more than \$5,600,000 in funding to Lotus Exim between May 2014 and December 2016 pursuant to the Pre-Closing FRSAs (*id.*, ¶ 20). The funds were deposited into a TD Bank account in the name of Lotus Exim, with an account number ending in -1975 (the **1975 Account**) (*id.*, ¶ 19). Repayment was made through debits from the 1975 account directly to Itria or, in some instances, to the Investors (*id.*, ¶ 22). By January 2017, the total amount owed to Itria pursuant to the Pre-Closing FRSAs exceeded \$2,000,000 (*id.*, ¶ 23).

Itria's liens pursuant to the Pre-Closing FRSAAs were junior to those of existing creditors of Lotus Exim (the **Pre-2017 Senior Lenders**) (*id.*, ¶ 24). Biz2Credit had served as the loan broker with respect to the loans from the Pre-2017 Senior Lenders to Lotus Exim and knew that they maturity dates of certain loans were approaching (*id.*, ¶ 26). Mr. Arora directed Biz2Credit to connect Lotus Exim with Provident to secure financing to Lotus Exim to satisfy the Pre-2017 Senior Lenders and ensure that Itria would be paid on its Pre-Closing FRSAAs (*id.*, ¶ 27). Mr. Arora and Corey Falkin, an employee of Itria, acting as representatives of Biz2Credit, introduced Lotus Exim to Provident (*id.*, ¶ 28).

Provident requested certain financial and business information from Lotus Exim as part of its underwriting process to determine whether to grant the line of credit (*id.*, ¶ 31). Biz2Credit facilitated the production of documents and information from Lotus Exim to Provident and in some cases provided the requested information directly to Provident (*id.*, ¶ 31). Biz2Credit provided Provident with (i) inventory and accounts receivable listings, (ii) information about Lotus Exim's existing bank accounts, (iii) audited financial statements for Lotus Exim, (iv) information regarding existing Itria UCC filings against Lotus Exim, and (v) the status of previous financing between Itria and Lotus Exim (collectively, the **Due Diligence Materials**) (*id.*). Biz2Credit did not, however, disclose that Itria owned 100% of Lotus Exim's accounts receivable pursuant to the Pre-Closing FRSAAs (*id.*, ¶ 30).

Biz2Credit's Due Diligence Materials reflected approximately \$14,000,000 in accounts receivable owned by Lotus Exim (*id.*, ¶ 32). But, as alleged in the Third-Party Complaint, the Itria Parties knew that the information that Biz2Credit was providing to Provident was false (*id.*,

33). Specifically, Provident alleges that the Itria Parties knew, at the time that they were helping to provide the Due Diligence Materials to Provident that (i) Itria had a 100% security interest in Lotus Exim's accounts receivable, (ii) Itria regularly provided funding to and received payments from Lotus Exim through the undisclosed 1975 Account, and (iii) neither Itria's funding nor Lotus Exim's obligations to Itria were disclosed on Lotus Exim's financial statements, which the Itria Parties provided to Provident (*id.*).

Provident completed its due diligence and agreed to extend a \$17,000,000 line of credit to Lotus Exim secured in part by a first priority lien Lotus Exim's accounts receivable (*id.*, ¶ 34).

Provident recorded UCC-1 Financing Statements naming Lotus Exim as the debtor (*id.*, ¶ 55).

At closing, Lotus Exim drew down on the line of credit and used the proceeds to pay off its obligations to the Pre-2017 Senior Lenders and to Itria pursuant to the Pre-Closing FRSA's (*id.*, ¶ 60).

On January 3, 2017, a few days prior to closing on the line of credit, Steven Forleiter, Provident's Vice President of Asset Based Lending, sent an email to representatives of Lotus Exim, following up on a prior email sent on December 30, 2016 asking for clarification regarding, among other things, the relationship between Lotus Exim and Itria (Third-Party Compl., Ex. D). A representative of Lotus Exim, Anshul Maheshwari, replied to Mr. Forleiter and cc'd representatives of Biz2Credit, and Itria on January 3, 2017, stating:

Itria Ventures took a guarantee from lotus exim to support Mr RK son's company called Doorsa Foods, so there was a cross collateralize for that which got released this week and ***there is no obligation pending now*** (*id.* [emphasis added]).

Significantly, Biz2Credit and Itria did not take any steps to correct the misstatement by indicating that there was in fact a continuing financial relationship between Itria and Lotus Exim pursuant to which Itria had provided more than \$5 million in funding to Lotus Exim through the purchase of its accounts receivable. And, in fact, Provident alleges that the Itria Parties materially misled Provident by indicating that the obligations to Itria had been paid in full.

To wit, on January 4, 2017, after Biz2Credit provided Provident with a UCC-3 termination statement from Itria, Provident requested a payoff letter from Itria indicating that all amounts owed by Lotus Exim to Itria have been paid in full, all obligations owed by Lotus Exim to Itria are deemed cancelled, all of Itria's security interest in the assets of Lotus Exim have terminated, and Lotus Exim and its agents are authorized to prepare and record all applicable UCC-3 terminations (Third-Party Compl., Ex. E). In response, Jonathan Gitlin, Itria's Senior Vice President and General Counsel to both Itria and Biz2Credit, sent an email to representatives of Provident, cc'ing Mr. Arora and Mr. Falkin, stating:

As per your request, attached in a copy of the UCC-3 Termination Statement that was filed last Wednesday with the State of New Jersey by Corporation Service Company on behalf of Itria Ventures LLC terminating Itria Venture's lien on [Lotus Exim's] assets.

***This email will confirm that the attached UCC lien termination filing was authorized by Itria Ventures in connection with prior financings that have been repaid in full.***

(Third-Party Compl., Ex. F [emphasis added]).

However, a TD Bank statement for the 1975 Account from January 2017 illustrates that Lotus Exim continued to make regular payments of tens of thousands of dollars to Itria and the Investors (Third-Party Compl., Ex. G).

As further evidence of Biz2Credit's and Itria's intent and participation in defrauding Provident in to making a loan (*i.e.*, hiding the obligations owed to them), Provident offers the post Provident loan closing email of Mr. Maheshwari of Lotus Exim to Mr. Arora and Mr. Falkin of Biz2Credit, dated May 23, 2017, in which Mr. Maheshwari asked for direction as to how to reflect the building loan on its financial papers and, significantly, acknowledging that Itria and Biz2Credit knew, and potentially prior to the closing of the Provident loan, that the Itria/Biz2Credit financing had not been disclosed on Lotus Exim's financials:

*As you know we had not shown your funding in our financials* but this mortgage for 766k against new building needs to be booked accordingly so that it can be reflected in our books as well. For that we need the clarification that amount of 185k currently paid by you is part of 766k or will this be a completely separate amount[?]

If this 185k is part of 766k then ach payments against this loan going out from lotus needs to be shifted to a different bank account then the usual account we use, so that we can show that properly in our books. I called you to explain this and provide the new bank details to make ach of this loan.

(Third-Party Compl., Ex. C at 2 [emphasis added]).

And, subsequently, in an email, dated December 28, 2017 (*i.e.*, 11 months after the closing of the Provident loan), from Binal Rana, Assistant Accountant at Lotus Exim to Mr. Arora and Mr. Falkin of Biz2Credit, Mr. Rana stated:

All the loans & debits are routing from account ending in **1975 as this account is not disclosed in the bank** (Third-Party Compl., Ex. B at 2 [emphasis added]).

From March 2017 to February 2018, Itria and Lotus Exim entered into a series of 22 new Future Receivables Sale Agreements (the **Post-Closing FRSAs**). Pursuant to the Post-Closing FRSAs, Lotus Exim sold all of its accounts receivable to Itria at a discount (Third-Party Compl., Ex. H). Like the Pre-Closing FRSAs, the Post-Closing FRSAs were executed by Mr. Arora on behalf of Itria and Mr. Arora negotiated their terms (*id.*, ¶ 70). Itria and Mr. Arora directed Lotus Exim to deposit payments into the 1975 Account, the existence of which was not disclosed to Provident (*id.*, ¶ 73). Itria recorded UCC-1 Financing Statements (the **Itria UCCs**) in connection with its security interest in Lotus Exim's accounts receivable (*id.*, ¶ 77). The Post-Closing FRSAs and the pledge of Lotus Exim's collateral were not disclosed to Provident and were done without Provident's consent in violation of its loan agreement, which Mr. Arora negotiated on behalf of Biz2Credit (*id.*, ¶¶ 78-80). Between January 2017 and March 2018, Lotus Exim sent payments in excess of \$2,600,000 to Itria and an additional \$1,720,989.38 to the Investors through the 1975 Account (*id.*, ¶¶ 85, 87).

Provident discovered that some of Lotus Exim's Accounts receivable were being paid into the 1975 Account and instructed Lotus Exim to make all deposits into Provident's designated account (*id.*, ¶¶ 89, 90). After a brief period of making payments directly into Provident's account, Lotus Exim resumed making payments to Itria through the 1975 Account (*id.*, ¶ 91). Provident contacted Biz2Credit and requested its assistance (*id.*, ¶ 92). Mr. Arora indicated that he would discuss this issue with Lotus Exim and would ensure that the 1975 Account was closed, ***but he did not disclose that Itria was receiving funds from Lotus Exim through the 1975 Account*** (*id.*, ¶¶ 93, 94). The 1975 Account was never closed (*id.*, ¶ 95).

Provident ordered UCC searches in December 2017, which revealed the Itria liens under the Itria UCCs (*id.*, ¶ 98). By then, Lotus Exim had fully drawn down the line of credit, which had an outstanding principal balance of approximately \$17,000,000 (*id.*, ¶ 99). In February 2018, Lotus Exim was in default under the line of credit for failure to make payments (*id.*, ¶ 100). Provident and Lotus Exim entered into negotiations to address the payment defaults, and the parties agreed to add Lotus Natural Stone LLC (**Lotus NS**), Lotus Exim's affiliated holding company, as a guarantor of the line of credit (*id.*, ¶ 102). To secure its guaranty, Lotus NS delivered mortgages to Provident on four properties located in New Jersey (*id.*, ¶¶ 103-104). Lotus Exim also agreed to obtain terminations of the Itria UCCs, but this never happened (*id.*, ¶¶ 105, 106). By March 2018, Itria and the Investors had collected over \$4,300,000 of Lotus Exim's account receivables (*id.*, ¶ 107), which account receivables were pledged to Provident as security for its loan.

In July 2017, Itria extended financing to Lotus NS for the purchase of a building in Wayne, New Jersey through two loans totaling \$3,750,000 (the **Wayne Loans**) (*id.*, ¶ 111). Lotus Exim guaranteed the Wayne Loans and pledged its accounts receivable as collateral (*id.*, ¶ 112). Again, Provident was not aware of and did not consent to the guaranty or Lotus Exim's pledge of its accounts receivable as collateral (*id.*, ¶¶ 114, 115). By February 2018, Lotus NS was in default under the Wayne Loans (*id.*, ¶ 116). Lotus NS gave Itria a Deed in Lieu of Foreclosure for the Wayne Property, which it recorded on March 26, 2018 (*id.*). The following day, Lotus Exim, Lotus NS, and affiliated entities filed Chapter 7 bankruptcy petitions in the United States Bankruptcy Court in the District of New Jersey (*id.*, ¶ 117).

Itria sued Provident for (i) promissory estoppel (ii) negligent misrepresentation, (iii) unjust enrichment. Provident moved to dismiss, and pursuant to a decision and order, dated January 23, 2019, the court dismissed the second cause of action for negligent misrepresentation and otherwise denied the motion. Provident then filed an answer with counterclaims on February 14, 2019. The Itria Parties moved to dismiss and pursuant to a decision and order dated March 25, 2019, the court dismissed Provident's first cause of action for conversion against Mr. Arora and Biz2Credit and dismissed the third cause of action for fraud and civil conspiracy, fourth cause of action for negligent misrepresentation, and fifth cause of action asserting claims against Joe Doe Corporations without prejudice. Provident then filed its amended Third-Party Complaint seeking to recover damages in excess of \$17,000,000 from the Itria Parties and \$1,720,989.38 from the Investors and the Itria Parties and the Investors moved to dismiss.

### DISCUSSION

A party may move for judgment dismissing one or more causes of action on the ground that the pleadings fail to state a cause of action for which relief may be granted (CPLR § 3211 [a] [7]). On a motion to dismiss pursuant to CPLR § 3211 (a) (7), the court must afford the pleadings a liberal construction and accept the facts alleged in the complaint as true, according the plaintiff the benefit of every favorable inference (*Morone v Morone*, 50 NY2d 481, 484 [1980]). The court's inquiry on a motion to dismiss is whether the facts alleged fit within any cognizable legal theory (*id.*). Bare legal conclusions are not accorded favorable inferences, however, and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999]). A party may also move to dismiss based on documentary evidence pursuant to CPLR § 3211 (a) (1). A motion to dismiss pursuant to CPLR § 3211 (a) (1) will be granted only where

the documentary evidence conclusively establishes a defense to the plaintiff's claims as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]).

### **I. Motion Sequence 7: The Itria Parties' Motion to Dismiss is Granted in Part and the Negligent Misrepresentation Claim is Dismissed Without Prejudice**

#### **Fraud and Civil Conspiracy**

The Itria Parties argue that the fraud claim and civil conspiracy to commit a fraud must be dismissed because (i) the allegations against the Itria Parties amount to omissions (*i.e.*, passing along information from the borrower – Lotus Exim – which may have been false), and omissions cannot give rise to a claim for fraud absent a special relationship and there was no such special relationship between the Itria Parties and Provident, (ii) as a sophisticated party, Provident cannot establish justifiable reliance, and (iii) civil conspiracy is not recognized as a separate cause of action in New York. The central argument here fails because, among other things, Provident's Third Party Complaint alleges more than omissions, but active fraudulent statements from Itria/Biz2Credit. As discussed below, this cause of action is dismissed only inasmuch as it is duplicative of the other fraud claim asserted (sixth cause of action) and because "civil conspiracy to commit fraud" is not a separate cognizable cause of action, but a theory on which a party may proceed in asserting its claim for fraud.

To establish a cause of action for fraud, a plaintiff must allege that (i) the defendant made a material misrepresentation of fact, (ii) with knowledge of its falsity, (iii) an intent to induce reliance, (iv) justifiable reliance by the plaintiff, and (v) damages (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Where a complaint alleges fraud, "the circumstances constituting the wrong shall be stated in detail" (CPLR § 3016 [b]).

The Itria Parties argue that Provident merely alleges that the Itria Parties failed to disclose certain documents and information, which amounts, at most, to acts of omission rather than affirmative misrepresentations, and that the fraud claim must therefore be dismissed because there is no special relationship between Itria Parties and Provident. The argument, however, fails.

Although a plaintiff asserting a cause of action for fraud based on the defendant's alleged omissions must establish a fiduciary relationship between the parties (*EBC I, Inc. v Goldman Sachs & Co.*, 91 AD3d 211, 219 [1st Dept 2011]). Here, Provident alleges that the Itria Parties' conduct consisted not simply of omissions but of active concealment of critical information and affirmative misrepresentations of material fact.

As alleged in the Third-Party Complaint, the Itria Parties knowingly and intentionally provided Due Diligence Materials to Provident that were materially false and misleading. In addition, Provident alleges that the Itria Parties misrepresented or concealed the relationship between Itria and Lotus Exim and falsely stated that Lotus Exim's obligations to Itria had been "repaid in full" (Third-Party Compl., Ex. F), and "there is no obligation pending now" (Third-Party Compl., Ex. D). In addition, Provident alleges that the Itria Parties actively and intentionally concealed the existence of the 1975 Account, so that Itria could continue receiving payments from Lotus Exim without alerting Provident to the ongoing relationship between Itria and Lotus Exim. In Mr. Maheshwari's May 23, 2017 email to representatives of Itria and Biz2Credit, he acknowledges that the existence of the 1975 Account had not been disclosed to Provident (Third-Party Compl., Ex. C at 2).

Moreover, Provident alleges that Itria continued extending financing to Lotus Exim pursuant to the Pre-Closing FRSA's and subsequently entered into 22 additional Post-Closing FRSA's with Lotus Exim pursuant to which Itria acquired all of the Lotus Exim's accounts receivable at a discount, and that it did so knowing that Provident had a first priority security interest in 100% of Lotus Exim's accounts receivable. And, Provident further alleges that the Itria Parties knowingly provided false information to Provident reflecting that Lotus Exim owned \$6,000,000 of inventory between its three locations knowing that Provident would rely on this information in making its underwriting determination, with the intention of later claiming that the inventory was actually owned by three separate and distinct entities and did not belong to Lotus Exim.

With respect to Mr. Arora in his individual capacity, he is alleged to have personally pressured Provident, orally and in writing, to extend funding to Lotus Exim, claiming that Provident would lose Lotus Exim's business if it did not oblige, and to have furthered the scheme by pretending to assist Provident as an intermediary between Provident and Lotus Exim while secretly engaging in self-dealing to the detriment of Provident (Third-Party Compl., ¶¶ 149, 157). Significantly, Provident alleges that Mr. Arora personally assured Provident that he would assist Provident by talking to Lotus Exim about its funneling of accounts receivables through unauthorized, non-Provident accounts, but concealed the fact that Lotus Exim was acting at his direction (*id.*, ¶ 93). To wit, Provident alleges that Mr. Arora and his companies, Itria and Biz2Credit, were directing Lotus Exim not to deposit the funds into the Provident account but to deposit them into the 1975 Account so that Itria could receive the proceeds (*id.*). Provident also alleges that Mr. Arora represented that he would personally go to TD Bank to close the non-Provident accounts, but he never did, and continued funneling payments through these accounts (*id.*, ¶¶ 94-95).

Taken as true, the allegations in the Third-Party Complaint are sufficient to satisfy the requirement to plead that the Itria Parties made affirmative, material misrepresentations of fact, and not just omissions.

Next, the Itria Parties argue that Provident cannot, as a matter of law, establish justifiable reliance because it is a sophisticated party and it had the means to conduct its own independent due diligence. The court, however, disagrees.

The First Department has held that “a sophisticated plaintiff cannot establish that it entered into an arm’s length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it” (*HSH Nordbank AG v UBS AG*, 95 AD3d 185, 194-195 [2012], quoting *Ventur Group, LLC v Finnerty*, 68 AD3d 638, 639 [1st Dept 2009] [citation omitted]). But in this case, Provident alleges that it *did* make use of the means of verification that were available to it. For example, Provident alleges that it used its in-house field examiners and an outside auditing firm to conduct due diligence. In addition, Provident alleges its efforts to verify the Due Diligence Materials and information provided by the Itria Parties were stymied by the Itria Parties’ active concealment of critical information and by their misrepresentations of material fact. Thus, Provident reasonably relied on the Itria Parties’ misrepresentations in making the loan to Lotus Exim and in continuing to extend additional financing, and that it would not have done so but for the Itria Parties’ fraudulent conduct and would have frozen all advances and pursued its available remedies if it was not defrauded (*id.*, ¶¶ 152, 153, 158, 159).

Here, unlike in *HSH Nordbank AG*, the pleadings establish that “the true nature of the risk being assumed” by Provident could not have been “ascertained from reviewing market data or other publicly available information,” as information critical to assessing the risk was peculiarly within the Itria Parties’ knowledge (*HSH Nordbank AG*, 95 AD3d at 195). In any event, as the Court of Appeals has observed, “the question of what constitutes reasonable reliance is not generally a question to be resolved as a matter of law on a motion to dismiss” (*ACA Fin. Guar. Corp. v. Goldman, Sachs & Co.*, 25 NY3d 1043 [2015]).

To the extent that the Itria Parties argue that Provident’s allegations in a related proceeding brought in New Jersey Superior Court which alleges that Provident relied on independent auditors and field examiners in connection with its due diligence review for the Lotus Exim line of credit preclude Provident from alleging in this case that it reasonably relied on the Itria Parties, this argument likewise fails. Although Provident may assert in the New Jersey action that it reasonably relied on the independent auditors and field examiners, there is no basis on which to preclude them from arguing here that they *also* relied on the documents and information provided to Provident by the Itria Parties – particularly when the allegations include knowingly false statements from Itria’s general counsel that no further payoff was required because all obligations were satisfied in order to induce Provident to make the loan.

Inasmuch as the Itria Parties argue that the third cause of action impermissibly seeks to assert a claim for civil conspiracy as a separate cause of action, the argument misconstrues the pleadings. In its third cause of action, Provident alleges that the Itria Parties conspired to induce Provident

to extend the line of credit to Lotus Exim and to continue advancing funds to Lotus Exim by, among other things, providing materially false due diligence materials to Provident (Third-Party Compl., §§ 143, 144). Although civil conspiracy to commit fraud is not recognized as a separate cause of action in New York, a plaintiff asserting a fraud cause of action may allege that parties conspired together to commit the fraud (*Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 85 AD3d 457, 458 [1st Dept 2011], citing *MBF Clearing Corp. v Shine*, 212 AD2d 478, 479 [1995]). Provident asserts a fraud cause of action (the sixth cause of action), which is well-accepted under New York law, and simply alleges that the Itria Parties conspired together to commit the fraud, which is entirely permissible. To the extent that this claim is one for conspiracy to commit fraud the claim is dismissed as a separate cause of action. However, Provident may continue to allege that the parties conspired to commit fraud as a theory of liability. And, inasmuch as there is a cause of action for fraud (i.e., the sixth cause of action) the third cause of action is dismissed as duplicative of the sixth cause of action (fraudulent misrepresentation), however, the facts underlying the third cause of action may continue to be the basis for the remaining fraud claim asserted.

### **Negligent Misrepresentation**

To properly state a cause of action for negligent misrepresentation, a plaintiff must plead “(1) that the existence of a special or privity-like relationship imposed a duty on the defendant to impart correct information to the plaintiff; (2) that the imparted information was actually incorrect; and (3) that the plaintiff reasonably relied on the information” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011]). To establish a special or privity-like relationship, a

plaintiff “must show either privity of contract between the plaintiff and the defendant or a relationship ‘so close as to approach that of privity’” (*Sykes v RFD Third Ave. 1 Assocs., LLC*, 15 NY3d 370, 372 [2010], quoting *Ultramares Corp. v Touche*, 255 NY 170, 182-183 [1931] [Cardozo, J.]). Here, Provident fails to allege a special or privity-like relationship that would impose a duty on the Itria Parties to impart correct information to Provident. Provident’s negligent misrepresentation cause of action is therefore dismissed.

### **Fraudulent Misrepresentation**

To state cause of action for fraudulent misrepresentation, “a plaintiff must allege ‘a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury’” (*Mandarin Trading Ltd.*, 16 NY3d at 178, quoting *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). Where a complaint alleges fraud, “the circumstances constituting the wrong shall be stated in detail” (CPLR § 3016 [b]).

Here, Provident alleges that Biz2Credit, at the direction of Itria and Mr. Arora, represented to Provident that Lotus Exim conducted business at three locations and owned all of the inventory at each location, together with the accounts receivable therefrom, with a total value of \$6,000,000, and that it provided such materials and information to Provident to induce it to issue the line of credit to Lotus Exim (Third-Party Compl., ¶¶ 184-186). Provident further alleges that Itria, at the direction of Mr. Arora, subsequently began listing one or more of Lotus Exim’s d/b/a companies as additional “sellers” on its Post-Closing FRsAs (*id.*, ¶ 188). Following the

commencement of the bankruptcy proceedings of Lotus Exim and its affiliates, however, Itria took the position that each of Lotus Exim's locations was in fact a separate entity with its own separate accounts receivable and that Lotus Exim did not actually own any inventory or accounts receivable (*id.*, ¶¶ 190-191). According to the Third-Party Complaint, Provident reasonably relied on the Due Diligence Materials and representations provided by the Itria Parties through Biz2Credit, at Mr. Arora's direction, and as a result, Provident has incurred monetary damages including substantial legal fees in connection with the bankruptcy proceedings.

Taken as true for the purposes of this motion to dismiss, the allegations in the Third-Party Complaint are sufficient to sustain Provident's sixth cause of action, which the court construes as a fraud claim. Accordingly, the motion to dismiss the sixth cause of action is denied.

## **II. Motion Sequence 8: The Investors' Motion to Dismiss the Conversion Claim is Granted Without Prejudice**

The tort of conversion occurs "when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 50-51 [2006]). To properly assert a cause of action for conversion, a plaintiff must allege (i) that the plaintiff has a possessory right or interest in the subject property, and (ii) the defendant has exercised dominion and control over the property or otherwise interfered with it, in violation of the plaintiff's right of possession (*id.*, at 50). In addition, the money that is the subject of a conversion claim "must be specifically identifiable and be subject to an obligation to be returned

or to be otherwise treated in a particular manner” (*Republic of Haiti v. Duvalier*, 211 AD2d 379, 384 [1st Dept 1995]).

In this case, Provident alleges Provident had a security interest in Lotus Exim’s accounts receivable, and that Lotus Exim transferred the proceeds of the accounts receivable to the 1975 Account, and the Investors interfered with Provident’s right of possession of the proceeds by receiving and retaining payments from Itria through the 1975 Account (Third-Party Compl., ¶¶ 173-182). However, once Lotus Exim transferred the funds to the 1975 Account, they were under Itria’s control and therefore Provident no longer had a possessory interest when the funds were subsequently transferred to the Investors (*McBride v KPMG*, 105 AD3d 576, 580 [1st Dept 2016]). And, significantly, there are no allegations that the funds were segregated or otherwise specifically identifiable (*id.*).

In addition, Provident alleges that the Investors received funds to which Provident had a first priority security interest. Section 9-332 of the New York Uniform Commercial Code (the **NY UCC**) provides: “[a] transferee of money takes the money free of a security interest unless the transferee acts in collusion with the debtor in violating the rights of the secured party” (NY UCC § 9-332 [a]). Here, critically, the Third-Party Complaint fails to allege that the Investors colluded with Lotus Exim or the Itria Parties. Therefore, the Investors’ motion to dismiss the conversion claim is granted.

Accordingly, it is

ORDERED that Itria Ventures LLC, Biz2Credit Inc., and Ramit Arora's motion to dismiss the third (fraud and civil conspiracy), fourth (negligent misrepresentation), and sixth (fraudulent misrepresentation) causes of action asserted in Provident Bank's Amended Answer, Defenses, Counterclaim, and Third Party Complaint is granted solely to the extent the fourth cause of action is dismissed without prejudice and is otherwise denied; and it is further

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

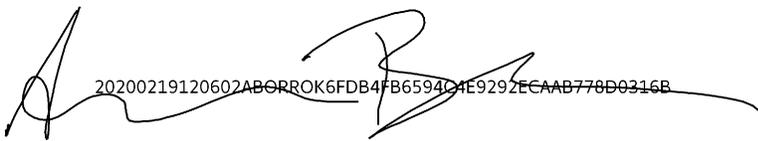
ORDERED that Jiffer Small Business Lending Fund, LP, Marketplace SPV, LLC, Prime Meridian Capital Management, LLC and Ranger Direct Lending Fund Trust's motion to dismiss the fifth cause of action (conversion) asserted in Provident Bank's Amended Answer, Defenses, Counterclaim, and Third-Party Complaint is granted and the fifth cause of action is dismissed without prejudice, and the Clerk is directed to enter judgment accordingly in favor of said third-party defendants; and it is further

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

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

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

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

  
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2/19/2020  
DATE

ANDREW BORROK, J.S.C.

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