

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

PRESENT: MELVIN L. SCHWEITZER
J.S.C. Justice

PART 45

Fortis Bank (Nederland) N.V.,
Plaintiff,

INDEX NO. 601948109

MOTION DATE _____

- v -
Abu Dhabi Islamic Bank,
Defendant.

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

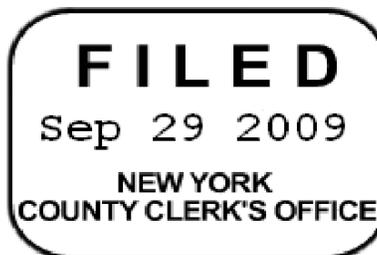
Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*for a prejudgment order
of attachment is granted per
the attached decision.*



Dated: September 25, 2009

Melvin L. Schweitzer
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

-----X		
FORTIS BANK (NEDERLAND) N.V.,	:	
	:	
Plaintiff,	:	Index No. 601948/09
	:	
- against -	:	DECISION
	:	
ABU DHABI ISLAMIC BANK,	:	Motion Sequence: 001
	:	
	:	
Defendant.	:	
-----X		

MELVIN L. SCHWEITZER, J.:

In this breach of contract action by plaintiff Fortis Bank (Nederland) N.V. (Fortis) against defendant Abu Dhabi Islamic Bank (ADIB), a bank of the United Arab Emirates, to recover damages in the amount of \$40 million by reason of ADIB’s alleged failure to honor its written obligation to reimburse Fortis on a letter of credit, Fortis brings this application for a prejudgment order of attachment pursuant to CPLR 6201(1) and 6210 to establish quasi in rem jurisdiction over ADIB and to secure a judgment against it.¹

From the allegations of both sides, this factual background emerges. Bank Awal, a Bahraini bank (Awal), issued a letter of credit on June 16, 2008 in favor the beneficiary, Bunge S.A., for the purchase of Brazilian soybeans and maize. The transaction is alleged to have been entered into by Awal at the request of the financial arm of its parent holding company, Al

¹ Fortis brought on its application for an attachment by Order the Show Cause and Temporary Restraining Order directed to ADBI’s correspondent banks in New York, which the court issued on June 24, 2009. On the return date, ADBI agreed to deposit the sum of \$41 million in a segregated escrow account with one of its correspondent banks, Citibank, pending final adjudication of the attachment proceeding and in consideration of Fortis’ consent to the court’s vacatur of the Temporary Restraining Order.

Gosaibi Trading and Services Co. (“ATS”). By the terms of the letter of credit, Fortis was entitled to reimbursement from Awal 360 days after it negotiated drafts drawn on the letter of credit. On June 18, 2008 ADIB added its own confirmation to the letter of credit and thus also contracted to reimburse Fortis upon its receipt from Fortis of confirmation that documents had been presented “in conformity with the L/C terms at their [Fortis’] counter and have been forwarded to the issuing bank [Awal]....” ADIB received a fee of \$499,999.96 for adding its confirmation, which ADIB directed to be paid to a bank account it maintained with one of its correspondent banks in New York, JPMorgan Chase. Thereafter, on June 23, 2008, Fortis negotiated drafts drawn under the letter of credit and then sent a SWIFT message to ADIB informing it that it had negotiated “credit complying” documents and that, in accordance with the terms of the letter of credit, it would be sending these documents directly to Awal, the issuing bank. It asked ADIB to confirm that it would reimburse Fortis 360 days later, June 15, 2009. The next day, by SWIFT message dated June 24, 2008, ADIB replied by acknowledging its obligation under the letter of credit and confirming it would reimburse Fortis on June 15, 2009. ADIB asked Fortis to claim its reimbursement at least five business days prior to June 15, 2009. Awal subsequently sent a SWIFT message to ADIB on July 1, 2008, confirming that it had accepted the documents sent to it by Fortis and that it had instructed its bank in New York, HSBC, to honor Fortis’ claim.

On June 4, 2009, Fortis did demand reimbursement from ADIB but ADIB did not reimburse Fortis. Instead, on June 14, 2009, one day before the June 15 maturity date for such reimbursement, ADIB went to court in the Kingdom of Bahrain and obtained an *ex parte* injunction against its paying Fortis on the confirmation. According to ADIB, it did so because on

May 31, 2009, its CEO had been informed by others that agents of Awal's Saudi holding company, the Saad Group, were involved in fraud involving forged signatures on financial facilities to enable Saad to raise capital. In the days that followed leading up to ADIB's *ex parte* action, reports appeared in the press that the Saad Group was in financial difficulty, had defaulted on its obligations and its accounts had been frozen. The reports also referenced irregularities in trade finance transactions within ATS. Since those reports (and the *ex parte* injunction), there have been other reports along these lines, but those presented to this court appear to reference the Group's financial problems and "apparent irregularities" within Awal and ATS. (Declaration of Nuhad Saliba, ¶ 17, Ex. 9). No reports or specific allegations have been presented regarding fraud in the letter of credit transaction at issue here, nor have any specific allegations of fact been made that Fortis engaged in any fraud.² What ADIB appears to rely on *viz.* Fortis is that Fortis has refused to show ADIB copies of what was the "credit complying" documentation it had negotiated and then sent on directly to Awal. From this, ADIB questions Fortis' bona fides with regard to the transaction at issue. Fortis' response is that nothing in the contemplated confirmation transaction (which ADIB had negotiated for itself) entitled ADIB to such documents as a condition to its obligation to reimburse Fortis. At this pre-discovery stage of the litigation here, argues Fortis, when what is at issue is whether an attachment should be granted to establish quasi in rem jurisdiction, for Fortis to honor ADIB's pre-discovery request without

² ADIB, in opposition to Fortis' application here, presents an affidavit by Qays H. Zubi, its lawyer in Bahrain. Mr. Zu'bi alleges "I am informed by ADIB that ADIB believes that it was deceived into giving the reimbursement undertaking by Awal as a security for the purchase of commodities, namely soybeans to be shipped to a Brazilian port, whereas it appears from the factual position that no such commodity transaction took place and the whole transaction was a means of raising finance by ATS, and that Awal, ATS and Fortis were aware of the actual nature of the transaction from the very beginning." (Zu'bi Amended Declaration, ¶ 12). This statement, laden with hearsay and generality, hardly suffices to present the court with evidence of fraud in this transaction.

there being any evidence of fraud in this transaction, let alone any semblance of wrongdoing by Fortis, is both unwarranted and premature.³

Fortis' attachment application alleges that ADIB is a non-domiciliary residing without the State or a foreign corporation not qualified to do business in New York. ADIB does not maintain a branch or office in New York, but does maintain correspondent banking relationships with JPMorgan Chase, Citibank and Bank of America. With regard to the transaction at issue, ADIB's \$500,000 fee for its participation as confirming bank on the letter of credit was paid by the beneficiary with a deposit in ADIB's New York correspondent account at JPMorgan Chase. ADIB, in its own demand to HSBC, Awal's bank in New York, for contemplated reimbursement by Awal, had directed that such a payment be made by HSBC to ADIB's JPMorgan Chase account here on the same day ADIB was required to pay Fortis.⁴

In order to obtain an order of attachment under CPLR 6201 (a), movant must show (1) it has a cause of action; (2) defendant is a non-domiciliary residing without the State or is a foreign corporation not qualified to do business in the State; (3) it is probable that it will succeed on the merits; and (4) its claim exceeds all known counter-claims. CPLR 6212 (a). ADIB does not contest the second and fourth elements.

³ ADIB's suit in Bahrain was commenced on June 28, 2009 following its procurement of the *ex parte* injunction. It names Awal, Al-Gosaibi and Fortis. It alleges that the sale of goods addressed by the letter of credit at issue here never took place and was, in fact, a fraudulent scheme to raise financing by Al-Gosaibi. No substantiating fact allegations are presented pertaining to this transaction. Fortis has not appeared in that action although it has been served. ADIB's counsel here informs the court that the next scheduled hearing in Bahrain is October 27, 2009. Fortis' counsel here, which does not represent Fortis in Bahrain, says that Fortis does not yet have counsel in Bahrain, but once counsel is retained, the bank may challenge the Bahrain court's jurisdiction over it.

⁴ Fortis asks the court to infer from this that had things gone as planned, ADIB would have paid Fortis in New York. ADIB's account at JP Morgan Chase would have increased by \$40 million on the same day it was required to pay Fortis. Fortis had requested payment in New York and this was a U.S.-dollar transaction. The stated purpose of ADIB's New York correspondent accounts was to handle dollar-denominated transactions.

As to the requirements that a cause of action for a money judgment exists and that movant is likely to succeed on the merits, “the court must give the plaintiff the benefit of all the legitimate inferences that can be drawn from the facts.” *National Audubon Soc. v Sonpia Corp.*, No. 09 Civ. 975 (PGG) 2009 WL 636952, at *3 (SDNY Mar. 6, 2009) (citing *Bank Leumi Trust Co. v Istim, Inc.*, 892 F Supp 478, 482 (SDNY 1995)). *Accord, DLJ Mortg. Capital, Inc. v Kontogiannis*, 594 F Supp 2d 308, 319 (EDNY 2009).

With regard to probability of success on the merits, plaintiff simply must “demonstrate that it is more likely than not that it will succeed on its claims.” *National Audubon Soc., supra*, 2009 WL 636952, at *3. *Accord, Thornapple Assocs. v Sahagen*, No. 06 Civ. 6412 (JFK), 2007 WL 747861, at *4 (SDNY Mar. 12, 2007).

Here, ADIB does not deny that the letter of credit was issued; ADIB added its confirmation to the letter of credit; Fortis negotiated drafts under the letter of credit; ADIB confirmed its obligation to reimburse Fortis; Fortis sent the underlying documents to Awal, the issuing bank; Fortis made a timely demand for reimbursement; and ADIB has failed to reimburse Fortis.

The obligations of a bank with respect to a letter of credit are wholly independent of the underlying commercial contract to which the credit relates as well as any dispute between the parties to that contract:

“[A] fundamental principle governing these transactions [the three separate contractual relationships and undertakings in a letter of credit transaction, including the reimbursement obligation] is the doctrine of independent contracts,” which “provides that the issuing bank’s obligation to honor drafts drawn on a letter of credit by the beneficiary is separate and independent from any obligation of its customer to the beneficiary under the contract and separate as well from any obligation of the issuer to its customer under their agreement.” Stated another

way, this principle stands for ‘the fundamental proposition that all parties [to a letter of credit transaction] *deal in documents rather than with the facts the documents purport to reflect.*’”

Mennen v J.P. Morgan & Co., 91 NY2d 13 (1997) (citations omitted).

In order for a ‘fraud in the transaction’ defense to create an issue of fact that would lead the court to question plaintiff’s likelihood of success on the merits, the pleader must state in detail “the circumstances constituting the wrong.” CPLR 3016 (b). “Conclusory allegations or mere suspicion of fraud are wholly insufficient.” *Bank Leumi Trust Co. v D’Evori Intern., Inc.*, 163 AD2d 26, 31-32 (1st Dept 1990) (citing *Glassman v Catli*, 111 AD2d 774 (2d Dept 1985)). To date, all that has been presented to this court are unsubstantiated allegations that the entire underlying commercial transaction to which the letter of credit relates was fraudulent, but nothing which specifies what allegedly happened, and nothing that ties Fortis to any wrongdoing. ADIB’s posture of questioning Fortis bona fides in the transaction because of the latter’s objection to producing the documentation it received when it paid the letter of credit and then transmitted the documents to Awal does not come close to suggesting a valid fraud defense. As Fortis correctly points out, the letter of credit confirmation terms were negotiated by ADIB and they did not provide for copies of the documents to go to ADIB as a condition of its payment obligation. The discovery stage of this litigation has not yet commenced, as ADIB opposes quasi in rem jurisdiction. ADIB’s action in Bahrain against Awal has been pending since June. Awal has the documents that Fortis transmitted to it as called for by the letter of credit. ADIB has had substantial time to do its own investigation since then of whether fraud permeates this transaction, including pressing for discovery of the documents there. To date, however, ADIB has not presented this court with anything concrete to substantiate its assertion of fraud in this

transaction. Fortis, as plaintiff, thus remains entitled to receive the benefit of all legitimate inferences that can be drawn on its application here.

ADIB also argues that the Bahrain court's issuance of the *ex parte* order excuses its payment to Fortis. The court disagrees. In *Banco Nacional de México, S.A. v Societe Generale*, 34 AD3d 124 (1st Dept 2006), the confirming bank, Banco Nacional, paid the beneficiary of a letter of credit and sought reimbursement from the issuing bank, Societe Generale. Societe Generale tried to avoid reimbursement, claiming that court orders issued in Mexico, at the request of the letter of credit's applicants, excused its payment. The First Department rejected this effort, explaining it would be contrary to New York's policy to give effect to such *ex parte* orders:

[E]ven under the traditional comity analysis, there is no basis for the motion court to recognize the Mexican injunctions because they are non-final, *ex parte* orders of Mexican courts. CPLR 5302 permits recognition of foreign judgments under certain circumstances if they are final, conclusive and enforceable where rendered. This Court has consistently held that although the decision whether to extend comity is a matter of discretion, it is normally not extended by New York courts to non-final, non-merit orders.

Id. at 131 (citing *Matter of Johnson*, 142 Misc 2d 388, 391-92 (Sur Ct NY County), *aff'd* 145 AD2d 388 (1st Dept 1988); *LBS Bank-N.Y. v Yutex, Inc.*, 283 AD2d 281 (1st Dept 2001)). This is especially the case here, where the fraud allegations ADIB has lodged in Bahrain are wholly conclusory.

ADIB argues, finally, that this court should not exercise quasi in rem jurisdiction over it because ADIB does not maintain sufficient minimum contacts with the State and the property plaintiff seeks to attach, *i.e.* ADIB's bank accounts maintained at its correspondent banks in

New York, bears no relationship to the cause of action here (*Shaffer v Heitner*, 433 U.S. 186 [1977]). The Court of Appeals case that controls this issue in New York dictates the contrary.

In *Banco Ambrosiano, S.p.A. v Artoc Bank & Trust*, 62 NY2d 65 (1984), the plaintiff, an Italian Bank, placed a U.S. dollar deposit with the defendant, Artoc, a bank in the Bahamas. Because the deposit was denominated in U.S. dollars, the transaction flowed through Artoc's correspondent bank account with Brown Brothers in New York. When the deposit matured, Artoc did not repay the money. Banco Ambrosiano commenced an action in New York and attempted to establish quasi in rem jurisdiction by attaching Artoc's correspondent bank account at Brown Brothers. In resisting the attachment, Artoc argued, "that the sole reason New York banks were utilized is that the transaction was to be in United States dollars and therefore had to be handled through such clearing accounts." Neither Banco Ambrosiano nor Artoc was authorized to do business in New York; all of the negotiations regarding the transaction took place outside of New York; and "Artoc's sole contact with this State was its maintenance of the correspondent account with Brown Brothers." The account in question was not used solely for the transaction at issue, but was used regularly by Artoc to effect its international banking business.

Artoc argued, as does ADIB here, that simply maintaining a correspondent account in New York was insufficient to establish personal jurisdiction. Citing *Shaffer v Heitner, supra*, Artoc asserted that constitutional due process demanded more for the minimum contacts test to be satisfied, and thus the court could not exercise jurisdiction over it. The Court of Appeals nonetheless held that quasi in rem jurisdiction could be exercised over Artoc. "These factors – the relationship between the cause of action and the property the activities to be performed in

New York under the parties' agreement, and Artoc's other ties with New York – combine to render the exercise of quasi-in-rem jurisdiction appropriate in this case.” 62 NY2d at 73. The same result follows here. ADIB's undisputed contacts consist of (1) at least three New York bank accounts, Citibank,⁵ JPMorgan Chase, and Bank of America; (2) ADIB's receipt of its \$500,000 fee for the transaction at issue here into one of these New York bank accounts (JPMorgan Chase); and (3) ADIB's own demand to be paid \$40 million on this letter of credit from Awal's bank in New York (HSBC) to ADIB's JPMorgan Chase account in New York. The court also agrees with Fortis that it is reasonable to infer that ADIB contemplated paying Fortis in U.S. dollars from one of these New York correspondent accounts.

The court thus concludes there is a sufficient relationship between ADIB's correspondent bank accounts in New York and its reimbursement obligation to Fortis on this specific transaction. As such, Fortis' application for an order of attachment for purposes of quasi in rem jurisdiction is granted.

Accordingly, it is

ORDERED that plaintiff's motion for a prejudgment attachment is granted; and it is further

⁵ Fortis asserts it has learned that in the first six months of 2009, ADIB effected over 6,600 transactions in its Citibank account here, with a combined value (debits plus credits) of over \$1.3 billion. As the Court of Appeals observed in *Banco Ambrosiano*, “Nor is this transaction an isolated one, for it appears that Artoc utilizes this account regularly to accomplish its international banking business, communicating with Brown Brothers for disbursements of funds on its behalf and directing others to deposit funds there.” *Id.* at 73.

ORDERED that plaintiff is to submit a proposed order to the court within 15 days of the entry of this Decision.

Dated: *September 25*, 2009

ENTER:

Michael R. Adams

J. S. C.

