

**Al Hejaz Al Mamour Co. v Corporate Funding
Partners**

2006 NY Slip Op 30241(U)

June 21, 2006

Supreme Court, New York County

Docket Number:

Judge: Bernard J. Fried

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: BERNARD J. FRIED
Justice

PART 60

AL HEJAZ AL MAMOUR
PLAINTIFF

FBEM

INDEX NO. #801247-2005

MOTION DATE _____

- v -

CORPORATE FUNDING PARTNERS
DEFENDANT

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

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

NYS SUPREME COURT
REVIEWED
PAPERS NUMBERED
JUN 23 2006
E-FILE DEPT.

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

This motion is decided in accordance with the attached memorandum decision.

SO ORDERED

FILED
JUN 21 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/21/06

Bernard J. Fried
J.S.C. **BERNARD J. FRIED**
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60

FBEM

-----X
AL HEJAZ AL MAMOUR CO.,

Plaintiff,

Index No. 601247/2005

-against-

CORPORATE FUNDING PARTNERS,
LC.COM, LTD. and MARSHALL
JABLON,

Defendants.

-----X
APPEARANCES:

For Plaintiff:

For Defendant:

The Catafago Law Firm, P.C.
350 Fifth Avenue, Suite 4810
New York, New York 10118
(Steven Kaiser)

Noel F. Caraccio, PLLC
211 Mamaroneck Avenue
Mamaroneck, New York 10543
(Noel F. Caraccio)

FRIED, J.:

Defendants, Corporate Funding Partners, LC.Com, Ltd. and Marshall Jablon, move for dismissal of the complaint on the grounds of a defense founded upon documentary evidence, lack of capacity to sue and failure to state a cause of action.

The following allegations are taken from the complaint. LC.Com, Ltd. (LC.Com) is a corporation that is in the business of providing letters of credit to clients (Complaint, ¶ 8). Corporate Funding Partners is a corporate affiliate of LC.Com and Marshall J. Jablon is the president of LC.Com (*id.*, ¶ 7). Defendants worked closely with First American Bank (First American), an entity that advertises its ability to issue “confirmed” letters of credit whereby the credit risk of a foreign bank is replaced and borne by First American’s own

creditworthiness (*id.*, ¶ 9).

Plaintiff Al Hejaz Al Mamour Co. sought defendants' expertise in its efforts to secure letters of credit to facilitate the purchase of 200 buses (*id.*, ¶ 12). On June 28, July 28, August 23, September 14 and October 4, 2004, plaintiff asked defendants for confirmed letters of credit (*id.*, ¶ 14). On June 16, 2004 and July 14, 2004, plaintiff applied for confirmed letters of credit from First American Bank, which works closely with defendants (*id.*, ¶ 13). At all relevant times, plaintiff reasonably relied, to its detriment, on defendants' false representations regarding the sufficiency of the letters of credit and accordingly executed an "Indemnity Agreement," dated June 28, 2004 in favor of LC.Com., approved the three letters of credit, paid the fees associated with the transaction, and entered into a "Master Trade Agreement" with LC.Com (*id.*, ¶ 16). As part of their scheme to defraud, defendants sent invoices to plaintiff detailing the fees, on June 16, June 20, August 26 and October 4, 2004, and collected payments thereon on July 1, July 21 and August 27, 2004 (*id.* ¶ 18).

On September 14, 2004, defendants claimed for the first time that it was not their policy to engage in the process for confirmation of letters of credit (*id.*, ¶ 17). As the inadequate letters of credit were to expire, and it became clear that they could not satisfy what was required, in December 2004, defendants demanded they be paid another \$448,800 or \$323,857.50 in order to extend the letters of credit (*id.*, ¶ 19). By communication dated December 1, 2004, defendants refused to amend or extend the letters of credit without receiving more money (*id.*). Plaintiff demanded a refund of the fees that it had paid to LC.Com for correct letters of credit, totaling \$794,935, but received nothing (*id.*, ¶ 21). On

December 1, 2004, defendants proposed in writing, through a “Deal Reconstruction Term Sheet,” that plaintiff pay another \$3-3.75 million to defendant LC.Com, so that a proper letter of credit could be arranged (*id.*, ¶ 22). On advice of counsel, plaintiff refused to remit any additional sums (*id.*). As a result, plaintiff commenced this action asserting claims for breach of contract, fraud, and unjust enrichment. Plaintiff seeks recovery of \$3,174,571 in lost revenue in connection with the failed bus transaction, \$794,935 in improperly charged fees, and \$2,620 in additional lost profits, totaling \$6,589,507 (*id.*, ¶ 26). Plaintiff is also seeking accrued interest from June 29, 2004 (*id.*).

Defendants contend that they are entitled to dismissal of this action because: (1) plaintiff was not authorized to do business in this state, and thus lacks capacity to sue, (2) the complaint fails to state a cause of action, and (3) the terms of the Indemnity Agreement and the letters of credit refute plaintiff’s allegations and conclusively establish a defense as a matter of law.

Under the Business Corporation Law, a foreign corporation doing business in this state without authority cannot maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state and it has paid to the state all fees and taxes imposed (Business Corporation Law § 1312 [a]). Of course, a foreign corporation’s failure to qualify under section 1312 (a) of the Business Corporation Law does not create a jurisdictional defect (*Maro Leather Co. v Aerolineas Argentinas*, 161 Misc 2d 920, 924 [App Term, 1st Dept 1994], *appeal dismissed* 85 NY2d 837, *cert denied* 514 US 1108 [1995]; *see Tri-Term. Corp. v CITC Indus., Inc.*, 78 AD2d 609 [1st Dept 1980]). A more appropriate remedy under such circumstances would not be an outright

dismissal of the complaint, but a conditional dismissal, or a stay affording plaintiff an opportunity to cure its nonjurisdictional defect (*id.*).

Defendants contend that the pleadings fail to assert that plaintiff is a foreign corporation duly authorized to do business in the state of New York. However, there is no showing that plaintiff is in fact doing business in New York. Therefore, plaintiff may maintain this action against defendants; section 3212 is not a bar (*see, e.g., Uribe v. Merchants Bank of New York*, 266 AD2d 21 [1st Dept., 1999]) to its doing so.

Defendants also argue that plaintiff lacks capacity to sue due to its failure in the complaint to denote the country or government under whose laws it was created. CPLR 3015 (b) provides:

“Where any party is a corporation, the complaint shall so state and, where known, it shall specify the state, country, or government by or under whose laws the party was created.”

The pleadings properly designate plaintiff as a corporation and identify that it was duly organized under the laws of Saudi Arabia with its principal place of business in Jeddah (Exhibit A, ¶ 1 to Aff. of Noel F. Caraccio, dated August 8, 2005) (Caraccio Aff.). Thus, the allegations in the complaint as to plaintiff's status are sufficient for pleading purposes (*Community Serv. Soc. v Cuomo*, 167 AD2d 168, 170 [1st Dept 1990]).

Defendants' further claim that they are entitled to dismissal pursuant to CPLR 3211 (a) (7) because the complaint fails to state a cause of action for fraud, breach of contract, and unjust enrichment:

Fraud: To plead a cause of action for fraud, plaintiff must allege: (1) a

representation of material fact; (2) the falsity of that representation; (3) knowledge by the party that made the representation that it was false when made; (4) justifiable reliance; and (5) injury (*Bank Leumi Trust Co. of New York v D'Evori Intl., Inc.*, 163 AD2d 26, 31 [1st Dept 1990]).

One who fraudulently makes a misrepresentation of intention for the purpose of inducing another to act or refrain from action in reliance thereon in a business transaction is liable for the harm caused by the other's justifiable reliance upon the misrepresentation (*Alanthus Corp. v Travelers Ins. Co.*, 92 AD2d 830, 831 [1st Dept 1983]). Here, the fraud claim is based on defendants' alleged misrepresentations concerning the nature of the letters of credit. The complaint alleges that: (1) plaintiff solicited and paid defendants for confirmed letters of credit, (2) defendants understood the purpose for which the requested letters of credit were sought, and (3) defendants materially, but falsely, warranted to plaintiff's detriment, that the letters would be confirmed abroad (Ex. A, ¶¶ 14-17 to Caraccio Aff.)

The Indemnity Agreement provides:

“We also agree that neither we nor the beneficiary nor any of our representatives, agents or attorneys shall contact you or your bank or make any claim against the documentary letter of credit or dispute any of the conditions of the documentary letter of credit application duly approved by us”. (Ex. F to Carracio Aff.)

The Agreement further provides:

“We further irrevocably waive any refund from the documentary letter of credit opening, any bank charges and commissions paid to you for this transaction once the documentary letter of credit has been opened. We waive any claim for any lawsuit or claim in arbitration with regard to this documentary letter of credit”. (Ex. F to Carracio Aff.)

Plaintiff’s reliance upon defendants’ alleged misrepresentations was unjustified because the parties’ fully-executed agreement stated that plaintiff waived any claims arising from transactions involving the letters of credit (*see Pine Equity NY, Inc. v Manhattan Real Estate Group LLC.*, 2 AD3d 248, 249 [1st Dept 2003]). Thus, plaintiff waived its right to assert a claim or obtain a refund of any fees associated with any transaction involving the issuance of the letters of credit (*id.*).

Breach of Contract: In order to sustain a claim for breach of contract, the pleading must clearly specify the existence of a contract, plaintiff’s performance under the contract, and the basis of the alleged breach of the agreement (*Noise in Attic Productions v. London Records*, 10 AD3d 303, 306-7 [1st Dept 2004]). The complaint alleges that: (1) plaintiff and LC.Com entered into the Master Trade Agreement and that said document superseded all other documents executed between the two parties, (2) Section 1.01 of the Master Trade Agreement prescribed that any issued letters of credit between the two parties would be acceptable to plaintiff’s customers, (3) despite plaintiff’s payment of more than \$794,935 in transaction fees, no acceptable letter of credit was ever issued or drawn upon, and (4) despite due demand, defendants have refused to refund any of the costs or fees associated with the

transaction as required under Section 1.03 of the Master Trade Agreement (Exhibit A, ¶¶ 21-25 to Carracio Aff.). Therefore, taking the allegations of the complaint as true, and giving plaintiff every reasonable inference to be drawn therefrom, plaintiff has sufficiently plead a claim for breach of contract. Nevertheless, the validly stated breach of contract cause of action must be dismissed because documentary evidence (i.e., the letters of credit and the Indemnity Agreement) “*utterly*” refutes plaintiff’s factual allegations, and conclusively establishes a defense as a matter of law (*see, Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002][emphasis added]).

Plaintiff contends that it is entitled to a refund of the fees that it incurred in its transactions with defendants because it did not receive the type of letters of credit for which it bargained.

Letters of credit, which are separate arrangements from the underlying transaction to which they are related, are analyzed under the same general principles that govern any other contract; they are to be strictly construed and performed in compliance with their stated terms (*Venizelos, S.A. v Chase Manhattan Bank*, 425 F2d 461, 465-66 [2d Cir 1970]; *Creaciones Con Idea, S.A. de C.V. v MashreqBank PSC.*, 51 F Supp 2d 423, 427 [SD NY 1999]; *affd* 232 F3d 79 [2d Cir 2000]). Here, the provisions of the letters of credit, along with the Indemnity Agreement were clear and unambiguous on their face, and performed in accordance to the plain meaning of their terms. The parties executed three documentary letters of credit on June 28, 2004 that excluded any special condition for confirmation (Exhibit D, ¶ 49 to Carracio Aff.). Plaintiff was given a draft of each letter of credit to review and approve prior to execution (Exhibit A, ¶¶ 15-16 to Carracio Aff.). Plaintiff also

had notice that the final draft of the letters of credit excluded a special condition for confirmation (Exhibit A, ¶¶ 15-16 to Carracio Aff.). Despite plaintiff's knowledge of that fact, it moved forward with the transaction and failed to incorporate a special condition for confirmation within the letters of credit (Exhibit A, ¶¶ 15-16 to Carracio Aff.).

Plaintiff further contends that the Master Trade Agreement required that the issued letters of credit be acceptable to plaintiff's customers, and only upon the issuance of such letters would any fees which had been paid become non-refundable.

It is uncontroverted that the parties executed an Indemnity Agreement. Under that agreement, plaintiff "waived its right to make any claim against the documentary letters of credit or to dispute any of the conditions of the letters of credit application duly approved by defendants" (Exhibit F to Carracio Aff.). Moreover, plaintiff waived "all claims to any refund concerning the opening of the letters of credit and any lawsuit with regard to those same letters" (*id.*). Thus, the Indemnity Agreement and the letters of credit, themselves, establish defendant's right to dismissal of the contract claim.

Unjust Enrichment: The theory of unjust enrichment is a quasi contract claim. It is an obligation that the law creates in the absence of any agreement (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]). Here, the unjust enrichment claim is not viable because the matter is controlled by contract. Given that the disputed terms and conditions fall entirely within the parties' Indemnity Agreement, there is no valid claim for unjust enrichment.

Accordingly, it is

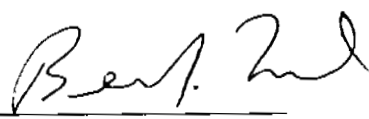
ORDERED that the motion to dismiss is granted, and the complaint is dismissed with

costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the clerk is directed to enter judgment accordingly.

Dated: 6/21/06

ENTER:



J.S.C. **BERNARD J. FRIED**
J.S.C.

FILED
JUN 21 2006
COUNTY CLERK'S OFFICE
NEW YORK