

Kookmin Bank v Sexton Dia-Tools Inc.

2006 NY Slip Op 30465(U)

March 7, 2006

Supreme Court, New York County

Docket Number: 600967/2002

Judge: Richard B. Lowe

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

PRESENT:

PART 56

Index Number : 600967/2002

KOOKMIN BANK

vs

SEXTON DIA-TOOLS

Sequence Number : 002

PARTIAL SUMMARY JUDGMENT

FILED

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS GRANTED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 3/7/2006

RICHARD B. LOWELL

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: JAS PART 56

-----X
KOOKMIN BANK, in its own Right and as Assignee
of Sun Jin Dia-tools & Equipment Industrial Company
Limited,

Plaintiff,

Index No.: 600967/2002

-against-

**DECISION
& ORDER**

SEXTON DIA-TOOLS INC., and WOORI AMERICA
BANK f/k/a Hanvit American Bank,
Defendants.

-----X
RICHARD B. LOWE, III, J.:

Plaintiff Kookmin Bank (Kookmin), in its own right and as assignee of Sun Jin Dia-tools & Equipment Industrial Company Limited (Sun Jin) moves for partial summary judgment pursuant to CPLR 3212 (e) as to its fourth cause of action against defendant Sexton Dia-Tools Inc. (Sexton) for failure to pay duly accepted bills of exchange and to its fifth cause of action against defendant Woori America Bank f/k/a Hanvit America Bank (Woori), for breach of obligation to obtain proper acceptances from Sexton, based on twelve negotiable bills of exchange the plaintiff claims the defendants failed to pay.

ED

BACKGROUND

Because the defendants failed to deny any matters of fact set forth in the plaintiff's request for admissions, the court deems certain matters of which an admission was requested as admitted for purposes of this litigation (CPLR 3123 [a], [b]).

OFFICE

Kookmin, a Korean banking corporation, provided credit to Korean exporter Sun Jin and was named as the payee of the negotiable bills of exchange which Sun Jin drafted in connection with its sales of various industrial tools to Sexton, a New York corporation. Between 2000 and 2001, twelve bills of exchange totaling \$381,754,13 were accepted by Sexton as the drawee of

the bills. One of the bills of exchange, having a face value of \$115,421.00, was presented to Sexton by Chase Manhattan Bank (Chase), and was accepted by Sexton on the face of the bill. The other eleven bills of exchange, representing \$ 266,333.13, that were presented to Sexton were presented by Woori, then known as Hanvit America Bank (Hanvit). Those eleven bills of exchange were not accepted by endorsements placed on the bills themselves, but were instead accepted by virtue of Sexton's signatures on separate acknowledgment forms supplied by Hanvit. All of the bills of exchange became due by September 15, 2001. It is alleged that Sexton failed to pay the bill of exchange as presented by Chase Manhattan Bank as well as the remaining eleven bills of exchange as presented by Woori.

The plaintiff alleges five causes of action against the defendants. As against defendant Sexton, the plaintiff alleges breach of contract (first cause of action), unjust enrichment (second cause of action), account stated (third cause of action), and failure to pay duly accepted bills of exchange (fourth cause of action). As against defendant Woori, the plaintiff alleges breach of obligation to obtain proper acceptances from Sexton (fifth cause of action).

DISCUSSION

The plaintiff moves for partial summary judgment as to its fourth cause of action against Sexton for failure to pay duly accepted bills of exchange and its fifth cause of action against Woori for failure to obtain proper acceptances from defendant Sexton on the bills of exchange presented by Woori.

To obtain summary judgment, the movant must establish its cause of action "sufficiently to warrant the court as a matter of law in directing judgment" in its favor (CPLR 3212[b]), and it must "set forth evidence that there is no factual issue" requiring an adjudication on the facts

(*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]). On the other hand, to defeat a motion for summary judgment the opposing party must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]). One opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the movant rests its claim; “mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to raise a question of material fact (*A.I.A. Gen. Constr. v New York City Hous. Auth.*, 92 NY2d 20, 33 [1998], quoting *Zuckerman v New York*, 49 NY2d 557, 562 [1980]).

I. Sexton

As to defendant Sexton, Kookmin moves for summary judgment as to all twelve bills of exchange. Kookmin argues that Sexton admitted to accepting the twelve bills of exchange and Sexton failed to pay any of the bills. As to bills of exchange presented by Chase, Sexton does not argue that Kookmin is not a holder in due course. However, as to the bills of exchange presented by Woori, Sexton avers that Kookmin was not a holder in due course because those bills of exchanges were not properly indorsed pursuant to the Uniform Commercial Code (UCC), Article 22 of the Uniform Rules for Collections, and under Article 41 of the United Nations Convention on International Bills of Exchange. Further, Sexton argues that because it has claims of defective shipments against Sun Jin, such amounts under the bills of exchanges are subject to dispute. Finally, Sexton argues that it had paid some of the moneys alleged to be owed.

As to the bill of exchange as presented by Chase Manhattan Bank, there is no dispute that Sexton owes \$115,421.00 to the plaintiff as Sexton duly signed the bill of exchange. Pursuant to the UCC, unless Sexton has a defense for non-payment of an obligation, Sexton is liable for

\$115,421.00 to the plaintiff. As to the other eleven bills, however, the court finds that Sexton is not liable pursuant to the provisions of the UCC.

The plaintiff argues, and there is no dispute, that Sexton signed separate acknowledgment forms from Woori. However, acceptance by collateral acknowledgment forms is contrary to the expressed provisions of the UCC, where acceptance of a bill of exchange “*must be written on the draft*” (UCC § 3-410 [emphasis added]). Furthermore, the UCC provides that “*[n]o person is liable on an instrument unless his signature appears thereon*” (§ 3-401 [emphasis added]). Indeed, there is no dispute that the eleven bills of exchange the plaintiff seeks damages on were not indorsed *on the face* of the instruments, but, instead, on separate forms. As such, as Sexton did not sign on the instrument itself, it cannot be held liable as there is no promise to pay. Accordingly, Sexton has no obligation to pay \$ 266,333.13 pursuant to the remaining eleven bills of exchange.

Sexton makes arguments that it has claims of defective shipments against Sun Jin, which would lower the amounts due and owing under the bills of exchange. However, a holder in due course is not subject to the personal defenses which the drawee could raise against the drawer with regard to the underlying transactions (*see First International Bank, Ltd. v L. Blankstein & Son, Inc.*, 59 NY2d 436, 444 [1983]; *see also DII Cattle Holdings Co. v Smith*, 195 AD2d 202 [1st Dept 1994]). For one, the defendant failed to oppose this fact when the plaintiff provided a request for admissions, and, accordingly, the defendant has deemed this admitted pursuant to CPLR 3213 (a). More importantly, the defendant has failed to produce any evidence that would otherwise provide a viable defense as to the bills of exchange. Indeed, Sexton only makes mere conclusory statements of defective shipments, which are not enough to defeat a motion for summary judgment (*A.H.A. Gen. Constr.*, 92 NY2d at 33).

Finally, Sexton argues that it had made payments pursuant to the bills of exchange. However, as rebutted by evidence presented by Kookmin, amounts were paid to banks other than Kookmin or were used for transactions unrelated to the current bills of exchange (*see* Sanders Reply Aff, Ex. A & C). Because these payments do not relate to the bills of exchange allegedly unpaid in this action, Sexton's arguments to the contrary are irrelevant.

For the reasons above, the court partially grants summary judgment as to the first bill of exchange, totaling \$115,421.00, to the plaintiff Kookmin, and partially grants summary judgment as to the remaining eleven bills of exchange, totaling \$233,333.13, to defendant Sexton.

II. Woori

Kookmin seeks summary judgment as to its fifth cause of action, averring that Woori should be liable under the bills of exchange because Woori failed to obtain proper acceptances from Sexton in violation of the UCC and under Article 22 of the URC. Woori argues that because the UCC and URC do not provide specific methods in which a bank may accept a draft, Woori is allowed to utilize separate acknowledge forms in securing the drawer's or the holder's legal right to payment.

The UCC explicitly provides that acceptance of a bill of exchange "*must be written on the draft*" (UCC § 3-410 [emphasis added]). Further, the acceptance of a draft by a bank is the equivalent to a direction by the drawee to the bank to pay it for its account (*see A. Sidney Davison Coal Co. v National Park Bank of New York*, 201 AD 309 [1st Dept 1922]). Here, there is no dispute that Woori accepted the drafts, even where the bills of exchange it presented never contained a signature by Sexton authorizing payment. While there is no particular method in which Woori may accept a draft, nonetheless it is because Woori accepted the bills of exchange

[* 7]

in this manner that has given Sexton a reason not to pay on those bills. In turn, these bills of exchange are defective precisely because Woori mishandled its obligations as the presenting bank.

Accordingly, Woori is liable for any damages Kookmin is unable to recollect from Sexton. The court grants the plaintiff's motion for partial summary judgment as to the fifth cause of action in favor of the plaintiff.

CONCLUSION

For the reasons stated, it is hereby

ORDERED that the plaintiff Kookmin Bank's motion for partial summary judgment is granted as follows:

ORDERED that the fourth cause of action is granted partially in favor of plaintiff Kookmin Bank against defendant Sexton Dia-Tools Inc. as to the first bill of exchange in the amount of \$115,421.00, together with interest as prayed for allowable by law until the entry of judgment, as calculated by the clerk of the court, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the clerk upon submission of an appropriate bill of costs, and in favor of defendant Sexton Dia-Tools Inc. as to the remaining eleven bills of exchange; it is further

ORDERED that the fifth cause of action is granted in favor of plaintiff Kookmin Bank and against Woori America Bank in the amount of \$266,333.13, together with interest as prayed for allowable by law until the entry of judgment, as calculated by the clerk of the court, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the clerk upon submission of an appropriate bill of costs; it is further


ORDERED that the fourth and fifth causes of action are severed, and the clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action shall continue as to the first through third causes of action.

THIS SHALL CONSTITUTE THE DECISION AND ORDER OF THE COURT.

Dated: March 7, 2006

ENTER:



RICHARD B. LOWE, III, J.S.C.

FILED
MAR 7 2006
CLERK