

<b>Germex GmbH v J &amp; A Intl. Resources, Inc.</b>
2007 NY Slip Op 33812(U)
November 20, 2007
Supreme Court, Nassau County
Docket Number: 1512-07/
Judge: Ute W. Lally
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SCAW

SHORT FORM ORDER

mg.md

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 8  
NASSAU COUNTY

GERMEX GMBH,

Plaintiff(s),

MOTION DATE: 9/5/07  
INDEX NO.: 11512/07  
SEQ. NO. 1,2  
CAL. NO.

-against-

J & A INTERNATIONAL RESOURCES, INC.,

Defendant(s)

The following papers read on this motion :

Notice of Motion/ Order to Show Cause.....	1-5
Notice of Cross Motion.....	6-9
Answering Affidavits.....	10-13
Replying Affidavits.....	14,15
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Upon the foregoing papers, it is ordered that this motion by plaintiff for an order pursuant to CPLR 6211(b) confirming the order of attachment entered on July 11, 2007 is granted; cross motion by defendant for an order pursuant to CPLR 3211 dismissing plaintiff's verified complaint and pursuant to CPLR 6212(b) directing plaintiff to pay all costs and damages, including reasonable attorney's fees is denied.

This is an action to recover money damages arising from an alleged breach of contract. In late Fall 2006, plaintiff, a German corporation, negotiated and entered into an agreement to purchase from defendant a domestic corporation, a certain amount of newsprint, and to deliver same to plaintiff's customer in Istanbul, Turkey.

On November 11, 2006, plaintiff delivered its purchase order

for newsprint to defendant. The purchase price for the entire amount of newsprint was \$300,000.00. Payment was made by plaintiff via an irrevocable Letter of Credit issued by Dresdner Bank on behalf of plaintiff for the benefit of defendant. The initial three deliveries arrived in Istanbul on February 22, March 4, and March 13, 2007. On March 13, 2007, plaintiff's customer advised plaintiff that the goods delivered did not conform to either the purchase order or the Bills of Lading. On the same day, plaintiff notified defendant that it was rejecting the non-conforming goods. By that time however [prior to it learning of the non-conforming goods], defendant had been paid by drawing against the Letter of Credit in the amount of \$141,120.00 for the cost of the alleged non-conforming goods.

Plaintiff then had an international commodity inspector company, VITSAN Gozetim Mumessillik ve Tic. A.S. International Commodity Inspection ("VITSAN") inspect the delivered goods. VITSAN's inspection confirmed that the goods delivered did not conform to the terms and specifications on the Bills of Lading and commercial invoices. VITSAN concluded that the goods delivered could not be used as newsprint paper. Plaintiff then forwarded a copy of the VITSAN report to defendant and attempted to resolve the situation with defendant. On April 12, 2007, plaintiff again notified defendant that it was rejecting the non-conforming goods.

The defendant does not dispute that it delivered non-conforming goods; defendant concedes that the goods it delivered were not of newsprint quality. However, it maintains that pursuant to the "proforma" invoice, dated November 9, 2006, it forwarded "conforming" goods to plaintiff's customer. the defendant maintains that the goods in fact conformed to the terms and conditions of the subject contract and/or "proforma" invoice and therefore defendant has not breached the subject contract herein.

On July 3, 2007, plaintiff sought and obtained an ex parte Order of Attachment. The Order was entered on July 11, 2007 wherein attachment of the defendant's bank account numbered 791-6305068 at Commerce Bank, 5555 Merrick Road, Massapequa, New York was authorized.

The Nassau County Sheriff served the Order of Attachment on

Kristi Saroglou at the Commerce Bank branch located at 855 Franklin Avenue, Mineola, New York on Friday, July 13, 2007. Plaintiff had five days after service of the Order to commence the instant motion to confirm the Order. As a result of the short service period permitted under CPLR 6211(b), the instant motion was personally served by counsel for plaintiff on the president of J&A International Resources, Inc., Avis Afshar, on Monday, July 16, 2007. On Tuesday, July 17, 2007, Afshar went to defendant's Commerce Bank branch at 5555 Merrick Road in Massapequa, New York and withdrew \$156,000.00 from defendant's account(s). Upon learning this information, counsel for plaintiff immediately telephoned Commerce Bank and spoke to Commerce's Levy Department. The representative from Commerce confirmed that such a sum was in fact removed on July 17, 2007 and that such a withdrawal was permitted in contravention of the Order of Attachment because the Levy Department did not receive the Order from its branch personnel until July 18, 2007.

Upon a motion to confirm an order of attachment, plaintiff has the burden of establishing, 1) a ground for the attachment, 2) the existence of a cause of action, 3) the probability that plaintiff will succeed on the merits, 4) the need for continuing the levy, and 5) that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff (CPLR 6211 [b], 6212[a], 6223[b]). Plaintiff must establish each element as to each defendant (**AMF, Inc. v. Algo Distr. Inc.**, 48 AD2d 352). Plaintiff may do so by any combination of documents, affidavits reciting personal knowledge, and affidavits reciting information and belief provided the basis of the information and belief is stated (**AMF, Inc. v. Algo Distr. Inc.**, supra; **Richman v. Richman**, 41 AD2d 993,; **Swiss Bank Corp. v. Eatessami**, 26 AD2d 287, 289-90).

In support of the attachment, the German equivalent of president of the plaintiff corporation, namely; Joachim Seidel, claims in his affidavit that the defendant's action in this matter of shipping and delivering non-conforming goods is not an isolated incident. In 2004, the defendant engaged in a similar delivery of non-conforming goods to another company. Plaintiff alleges that defendant's modus operandi is to deliver non-conforming and inferior goods, draw against the seller's Letter of Credit before it is discovered that the goods shipped are non-conforming and then

dispute the inspection of the goods by a neutral international commodity inspection company. plaintiff's president alleges that the defendant will remove all of its assets from its accounts at Commerce Bank and relocate them, thereby prevent the plaintiff from being able to collect a judgment for breach of contract and/or fraud.

In opposing plaintiff's motion, and in support of its own cross motion to dismiss the complaint, defendant submits that plaintiff has not shown that defendant "disposed of or secreted property or removed same from the State of New York and/or threatened to do the same." the defendant submits the affidavit from Avis Afshar wherein he states, inter alia, "[t]hat on or about July 17, 2007, I removed approximately \$125,000.00 from my bank account at Commerce Bank. That I removed the money to mitigate my damages that I would suffer because of the Plaintiff's wrongful conduct. That I have no intentions to dispose of or secret this property or remove the same from the State of New York." The defendant additionally and conclusively claims, without any authority to support its assertion, that only its actions prior to the issuance of the Order of Attachment may be considered by this court in determining whether the Order should be confirmed. This court disagrees.

CPLR 6201(3) authorizes attachment if it can be shown that the defendant is finagling with his property with intent to defraud creditors (**Computer Strategies, Inc. v. Commodore Business Machines, Inc.**, 105 AD2d 167). It is true that allegations raising a mere "suspicion" of fraudulent intent have been held insufficient. However, an affidavit which sets forth evidentiary facts and circumstances and affirmatively and necessarily tends to establish a probability that such intent exists, suffices to establish and prove that fraudulent intent or an intent to frustrate the enforcement of a judgment exists (**Rallings v. McDonald**, 76 AD2d 112; **Johnson v. Antonopoulos**, 204 AD2d 843; **O'Rourke v. Rankin**, 193 AD2d 494).

In this case, plaintiff's president, Joachim Seidel, states in his affidavit, that in 2004:

"[d]efendant shipped defective/damaged/non-conforming

newsprint to a business known as 'DAR EL FIKR S.A.L.' in Beirut, Lebanon. Even though an order of a Lebanese court was obtained stopping payment on the [Letter of Credit] involved in that matter, the United States bank involved refused to honor the Lebanese order because it had not been reduced to a judgment in the United States. Thus, defendant in 2004 engaged in the same type of conduct that it has engaged in the instant action."

Under the circumstances of this case, this court finds that the Seidel affidavit, together with plaintiff's supporting exhibits sufficiently establish that defendant intended to dispose of its property with the intent to defraud the plaintiff (**Meinhart v. Contresta**, 194 NYS 593 [Sup. Ct. Monroe 1922]; **Albany Sav. Bank F.S.B. v. All Advantages Limousine Service, Inc.**, 154 AD2d 759).

Grounds for attachment against defendant have been demonstrated. The next issue is whether there exists a cause of action and the probability that plaintiff will succeed on the merits.

To assert a cause of action for breach of contract, plaintiff must establish (1) the terms of the agreement, (2) the consideration, (3) the performance by the plaintiff, (4) the basis of the alleged breach of contract (**Furia v. Furia**, 116 AD2d 694) and (5) the damages precipitated thereby (**Ely Cruikshank Co. Inc., v. Bank of Montreal**, 185 AD2d 182, order revd on other grounds 81 NY2d 399). Plaintiff has submitted ample evidence in this case that defendant breached the terms of the purchase order dated November 11, 2006 when it, concedely, shipped goods that were not of newsprint quality and did not conform to the terms and specifications of the purchase order.

In opposition however, defendant submits a copy of a "proforma" invoice which it claims sets forth the terms of the agreement between the parties herein and pursuant to which, the inferior and non-conforming goods it shipped to Turkey were "conforming." Defendant submits the "proforma invoice" dated November 9, 2006 relating to a transaction between defendant, as seller, and HZH GMB GERMANY as buyer. The defendant also asserts that plaintiff will not prevail on the merits. In support thereof,

defendant attaches an e-mail dated November 8, 2006 from Ingrid Kalt to defendant, specifically to Afshar. The e-mail states that it is from a company known as HZH GmbH. Plaintiff, in its reply, submits the affidavit of Joachim Seidel, who unequivocally states that Ms. Kalt has no affiliation with plaintiff, that HZH is not a "sister" company of plaintiff, that Ms. Kalt has no authorization to speak or act on behalf of plaintiff, and that HZH did nothing in the transaction between plaintiff and defendant other than to give defendant's name to plaintiff as a possible supplier of the newsprint which plaintiff was acquiring for its customer in Turkey.

A simple and plain reading of the "proforma" invoice also confirms that it is unrelated to the transaction between the parties to the action. The name Germex GmbH does not appear on the document and there is no indication otherwise that the document has any relation to the plaintiff.

Moreover, Seidel's affidavit states that plaintiff has never received any "proforma" invoice from the defendant. Plaintiff also furnishes the affidavit of Joseph A. Meckes, Esq., who engaged in communication with Afshar on behalf of the plaintiff as this dispute was developing. In his affidavit, Meckes asserts, in pertinent part:

"I then, on April 20, 2007, sent a letter to defendant by e-mail, facsimile and U.S. mail requesting that defendant provide me with a copy of said "proforma" invoice. That letter also stated "...the transaction between Germex and J&A was governed by the terms of Germex's purchase order, which J&A accepted when it shipped product' . . . J&A did not forward a copy of such 'proforma' invoice. In fact, subsequent to my April 20, 2007 letter to J&A, I did not receive any further communication from J&A."

It is clear from the submissions herein that defendant never forwarded the "proforma" invoice to the plaintiff at any time for the transaction herein or otherwise reject the terms of plaintiff's clear and unequivocal purchase order of November 17, 2006. Thus, this court finds that when defendant shipped pursuant to the terms of the purchase order, it, in fact, accepted those terms.

The allegations in the supporting papers are sufficient to establish the need for continuing the levy upon defendant's bank accounts at Commerce bank and the probability of success against the defendant. Thus, the Order of Attachment against the property of the defendant, i.e., the defendant's bank account at Commerce Bank, is confirmed.

Defendant's cross motion to dismiss plaintiff's complaint is dependent upon this court viewing the alleged "proforma" invoice as setting the terms of the transaction between the parties hereto. Since the "proforma" invoice is unrelated to the plaintiff and this transaction, the "terms" contained therein do not apply to this action. Accordingly, defendant's cross motion is denied.

Dated: NOV 20 2007

*U. Walz*  
J.S.C.

**ENTERED**

NOV 26 2007  
NASSAU COUNTY  
COUNTY CLERKS OFFICE