

One Step Up, Ltd. v Webster Bus. Credit Corp.

2009 NY Slip Op 33258(U)

December 22, 2009

Supreme Court, New York County

Docket Number: 601807-2009

Judge: Bernard J. Fried

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

PRESENT: BERNARD J. FRIED

PART 60

Justice

One Step Up, LTD,

Plaintiff,

- v -

Webster Business Credit Corporation,

Defendant.

E-FILE

INDEX NO. #601807-2009

MOTION DATE _____

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 ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

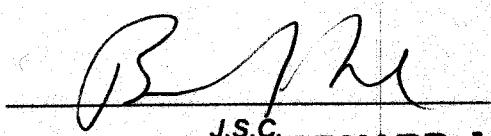
Cross-Motion: Yes No

This motion to dismiss is GRANTED, in accordance with the attached memorandum decision; and it is further

ORDERED that the case be closed.

SO ORDERED

Dated: 12/22/09



^{J.S.C.}
HON. BERNARD J. FRIED

Check one: FINAL DISPOSITION

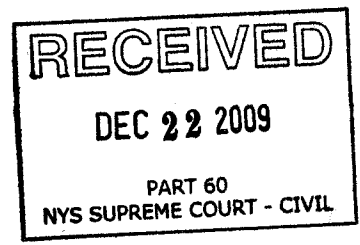
NON-FINAL DISPOSITION

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: IAS PART 60



-----X
ONE STEP UP, LTD., :

Plaintiff, :

-against- :

WEBSTER BUSINESS CREDIT :
CORPORATION, :

Defendant. :
-----X

Index No. 601807/09

E-FILE

Appearances:

For Plaintiffs:

For Defendant:

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Fried, J.:

This is a breach of contract action brought by the plaintiff One Step Up, Ltd. ("OSU") against the defendant Webster Business Credit Corporation ("Webster"). Before me is Webster's motion to dismiss the Verified Complaint, pursuant to CPLR 3211(a)(1) and (a)(7). For the reasons that follow, I grant the motion.

On August 1, 2008, Luxury Ventures, LLC, d/b/a Henricks Jewelers ("Henricks") and Webster entered into an agreement in which Webster provided post-bankruptcy financing to Henricks (the "Loan Agreement"). On October 31, 2008, the parties executed an amendment to the Loan Agreement, upon Henricks' request that Webster fund temporary overadvances to see it through the approaching holiday season (the "Amendment"). The Amendment

required Henricks to arrange for the posting of additional collateral for Webster's benefit in the form of a \$250,000 letter of credit with an expiration date of no earlier than January 31, 2009 (the "Standby L/C"). Henricks' affiliate, OSU, as applicant, posted the Standby L/C, naming Webster as beneficiary. In return for the Standby L/C, Webster and OSU entered into an agreement, dated October 31, 2008, in which Webster granted OSU a junior participation interest in advances to be made to Henricks under the Loan Agreement (the "Junior Participation Agreement").

Webster asserts that Henricks subsequently defaulted under the Loan Agreement. It further asserts that, by letter dated January 9, 2009, it notified Henricks of its default and that a \$900,000 availability reserve against the borrowing base had been established by Webster, pursuant to the terms of the Loan Agreement. On January 20, 2009, Webster made a written request to HSBC, the issuing bank, to draw on the full amount of the Standby L/C (the "Draw Request"), and it received payment on January 27, 2009.

On June 10, 2009, OSU brought the instant action against Webster, seeking to recover \$250,000, plus interest, costs and attorneys' fees. In its Verified Complaint, OSU asserts five causes of action with respect to Webster's alleged wrongful Draw Request: breach of contract, breach of warranty, breach of the implied covenant of good faith and fair dealing, unjust enrichment and money had and received.

By its motion to dismiss,¹ Webster argues that the lack of either a contractual agreement or privity of contract between itself and OSU is dispositive as to the first and third

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OSU requests leave to replead, to the extent that I grant Webster's motion to dismiss.

causes of action. It further argues that the documentary evidence accompanying its motion supports its position that the remaining causes of action should also be dismissed.

On a motion to dismiss made pursuant to CPLR 3211, the complaint “is to be afforded a liberal construction,” and the plaintiff is afforded the “benefit of every possible favorable inference.” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). When a motion is based on documentary evidence, pursuant to CPLR 3211(a)(1), dismissal of a cause of action is warranted “only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Id.* at 88). Under CPLR 3211(a)(7), “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.” (*Id.* at 88, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

As an initial matter, OSU argues that the documentary evidence submitted in support of Webster’s motion is not properly before me because it was “submitted in reply.” (Tr, at 22). However, OSU’s argument is without merit. Webster attaches eight documents as exhibits in support of its motion: the Summons and Verified Complaint; the Loan Agreement; the Amendment; the Junior Participation Agreement; the Standby L/C; a notice of default from Webster to Henricks, dated January 9, 2009 (the “Default Notice”); Webster’s Draw Request to HSBC, dated January 20, 2009; and a borrowing base certificate created by Henricks, dated January 22, 2009 (the “Borrowing Base Certificate”). Webster’s reply papers include an affidavit of Andrew Wierman, a Vice President of Webster. Wierman’s affidavit provides the foundation required for the admissibility of Webster’s documentary evidence as business records made and maintained in the regular course of its business. (*See* CPLR 4518). Thus, I find that the documentary evidence accompanying

Webster's moving papers is properly before me. (CPLR 3211[c] ["[E]ither party may submit any evidence that could properly be considered on a motion for summary judgment."]).

First Cause of Action - Breach of Contract

The moving party is required to plead the following elements in a cause of action for breach of contract: the existence of a binding contract; plaintiff's performance of the contract; defendant's material breach of the contract; and damages. (*Furia v Furia*, 116 AD2d 694, 695 [2d Dep't 1986]). Dismissal of the first cause of action is warranted, based on OSU's failure to identify the existence of a contract that is alleged to have been breached by Webster.

OSU alleges a breach of contract with respect to Webster's drawing on the Standby L/C, which it terms the "OSU/Webster LC Agreement." (Compl, ¶ 30). However, the Standby L/C did not create a contractual relationship between Webster, the beneficiary, and OSU, the applicant. (See *Fertico Belgium S.A. v Phosphate Chemicals Export Ass'n, Inc.*, 100 AD2d 165, 172-174 [1st Dep't 1984]). As the Court of Appeals recently restated, "[t]hree distinct contractual relationships are usually present when a letter of credit is issued," none of which includes a contractual relationship between the beneficiary and the applicant arising from the letter of credit. (*Nissho Iwai Europe PLC v Korea First Bank*, 99 NY2d 115, 120 [2002], citing *First Commercial Bank v Gotham Originals, Inc.*, 64 NY2d 287, 294 [1985]).

The other contracts involved, here, are the Loan Agreement, as amended, and the Junior Participation Agreement, neither of which is alleged to have been breached by Webster.

Second Cause of Action - Breach of Warranty

OSU also alleges that Webster breached the warranty it owed OSU under the Standby L/C. The Uniform Commercial Code, Section 5-110, governing letters of credit, provides: “(a) If presentation is honored, the beneficiary warrants: . . . (2) to the applicant that the drawing does not violate any agreement between the applicant and beneficiary or any other agreement intended by them to be augmented by the letter of credit.” However, Webster demonstrates that its Draw Request did not violate any agreement, intended or otherwise, between OSU and itself. Indeed, the only Agreement existing between OSU and Webster at the time of the Draw Request was the Junior Participation Agreement, which is not alleged to have been breached by Webster. (Pl Br, at 6). OSU specifically alleges that Webster breached its warranty by wrongfully certifying to HSBC that a draw event, as defined in the Loan Agreement, had occurred. (Compl, ¶ 17). A “Draw Event” is defined in the Loan Agreement, as amended, as the earlier occurrence of January 15, 2009 and an “Event of Default under Section 8.4, 8.5 or 8.6.” (Loan Agreement, § 4.9).

However, as I discuss below, the documentary evidence accompanying Webster’s moving papers demonstrates that its Draw Request was within its contractual rights. First, an explanation of certain definitions in the Loan Agreement, as amended, is required: “Overadvance” is defined simply as the amount of advances made to OSU in excess of the amount available under the Loan Agreement’s borrowing base formula; and “Determined Overadvance” is defined as “an amount equal to any Overadvance then existing, calculated as if the [Standby L/C] was \$0.”

Pursuant to the Standby L/C, Webster was required to deliver to HSBC a written statement signed by an authorized officer certifying that a Draw Event had occurred and that the amount of its Draw Request did not exceed the Determined Overadvance. As demonstrated by the Borrowing Base Certificate, at the time of Webster's Draw Request, Henricks was in an Overadvance position of (\$183,880). However, the Draw Request of \$250,000 did not exceed the Determined Overadvance, which was brought up to (\$433,880) when the Standby L/C was valued at \$0.

Despite this, OSU takes issue with a \$900,000 availability reserve (used in the calculation of the borrowing base) established by Webster and as indicated on the Borrowing Base Certificate. It contends that Webster did not exercise good faith in the context of its Permitted Discretion when it created the availability reserve. (Tr, at 19). "Permitted Discretion" is defined in the Loan Agreement as "a determination made in good faith and in the exercise of reasonable (from the perspective of a secured asset-based lender) business judgment." However, as explained by Webster in the Default Notice, numerous events of default existed under the Loan Agreement, including Henricks' failure to make a \$100,000 payment due on December 31, 2008. Webster argues that, given the events of default, it acted within its contractual rights under the Loan Agreement when it established the availability reserve.

Indeed, in this respect, the Loan Agreement provides that: "during the period commencing on January 1, 2009, through the Maturity Date, Lender shall have the right to establish reserves in such amounts, and with respect to such matters, as Lender in its Permitted Discretion shall deem necessary or appropriate[.]" Considering the documentary

evidence submitted by Webster and the details it has set forth with respect to its creation of the availability reserve, I find that it has sufficiently demonstrated that it exercised good faith within the bounds of its contractual rights and did not breach any of its warranties under UCC 5-110. Aside from its conclusory assertions, OSU does not offer any evidence to the contrary. Thus, I find that dismissal of the second cause of action is also warranted.

Third Cause of Action - Breach of Covenant of Good Faith and Fair Dealing

“In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance.” (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). However, there must be an enforceable contract between the parties for this covenant to apply. (*American-European Art Assocs., Inc. v Trend Galleries, Inc.*, 227 AD2d 170, 171 [1st Dep’t 1996]). Here, the covenant does not apply, as OSU has failed to identify the existence of an enforceable contract, between itself and Webster, that is alleged to have been breached by Webster. As such, dismissal of this cause of action is warranted.

Fourth and Fifth Causes of Action - Unjust Enrichment and Money had and Received

OSU alleges that Webster was unjustly enriched when it received payment upon its drawing on the Standby L/C. “To state a cause of action for unjust enrichment, a plaintiff must allege that it conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff therefor.” (*Smith v Chase Manhattan Bank, USA, N.A.*, 293 AD2d 598, 600 [2d Dep’t 2002], quoting *Nakamura v Fujii*, 253 AD2d 387, 390 [1st Dep’t 1998]). However, “[a] claim for unjust enrichment, or quasi contract, may not be maintained where a contract exists between the parties covering the same subject matter.” (*Goldstein v CIBC World Markets Corp.*, 6 AD3d 295, 296 [1st Dep’t 2004]). This

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prohibition applies to parties to the contract covering the subject matter, along with non-parties to the contract. (See *Bellino Schwartz Padob Advertising, Inc. v Solaris Marketing Group, Inc.*, 222 AD2d 313, 313 [1st Dep't 1995]).

“The elements of a claim for money had and received are: (1) defendant received money belonging to the plaintiff; (2) that defendant benefitted from the receipt of the money; and (3) that under principles of good conscience, defendant should not be allowed to retain the money.” (*Fesseha v TD Waterhouse Investor Services, Inc.*, 193 Misc 2d 253, 260 [Sup Ct, NY County 2002], *aff'd* 305 AD2d 268 [1st Dep't 2003]).

Webster argues that the existence of binding contracts between the parties covering the subject matter of this action (i.e., the Standby L/C) precludes OSU's fourth and fifth quasi-contract causes of action. At least three agreements at play in this action cover the subject matter of OSU's fourth and fifth causes of action. First, the terms of the Standby L/C, which imposed obligations upon Webster, OSU and HSBC, covered Webster's right to draw on the collateral posted by OSU and HSBC's obligation to make the payment accordingly. Second, the Loan Agreement, as amended, between Webster and Henricks covered the rights and obligations of the parties with respect to, *inter alia*, reserves, overadvances and the Standby L/C. Finally, the Junior Participation Agreement between Webster and OSU covered, *inter alia*, OSU's right to receive junior participation interest in advances made to Henricks upon Webster's draw on the Standby L/C.

Thus, I find that dismissal of the fourth and fifth causes of action is also warranted. Webster has demonstrated the existence of valid contracts covering their subject matter.

Therefore, in light of the foregoing, Verified Complaint is dismissed. I also deny OSU's request for leave to replead, given the substantial defects in its pleading. (See *Thompson v Cooper*, 24 AD3d 203, 205 [1st Dep't 2005] ["Leave will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law."]).

Accordingly, it is

ORDERED that Webster's motion to dismiss is granted and the Verified Complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: December ²²₂ 2009

ENTER:



J.S.C.

HON. BERNARD J. FRIED