Deutsche Bank Trust Co. Ams. v Soffer
2010 NY Slip Op 31297(U)
May 24, 2010
Sup Ct, NY County
Docket Number: 601109-09
Judge: Judith J. Gische
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SCANNED ON 5/26/2010
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE, Justice — PART 10

Index Number : 601109/2009
DEUTSCHE BANK TRUST
vs.
SOFFER, JEFFREY
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. ____
MOTION DATE ____
MOTION SEQ. NO. ____
MOTION CAL. NO. ____

this motion to/for ____

	PAPERS NUMBERED
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

FILED
MAY 26 2010
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: MAY 24 2010

HON. JUDITH J. GISCHE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☒ REFERENCE Hear + Report

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

---X

Deutsche Bank Trust Company Americas,

Plaintiff (s),

-against-

Jeffrey Soffer and Turnberry Residential Limited Partner, L.P.,

Defendant (s).

---X

Jeffrey Soffer and Turnberry Residential Limited Partner, L.P.,

Third Party Plaintiff (s)

-against-

Bank of America, N.A., individually and as Administrative Agent and Disbursement Agent,

Third Party Defendant (s)

---X

DECISION/ ORDER
Index No.: 601109-09
Seq. No.: 002

PRESENT:
Hon. Judith J. Gische
J.S.C.

T.P. Index No.:
590743-09

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Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Pltf's n/m (3212) w/DWP affirm (2), DCW affid, exhs (sep backs)	1,2,3,4
Defs x/m (stay, 3212[f]) w/JIB, EBH affirm, exhs (3 vols)	5,6
Reject letter sent by court	7
AOS (pltf)	8

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is an action by plaintiff Deutsche Bank Trust Company Americas ("Deutsche Bank") to recover from the defendants Jeffrey Soffer ("Soffer") and Turnberry

Residential Limited Partner, L.P. ("Turnberry"), outstanding sums due under a letter of credit. Deutsche has brought this pre-note of issue motion for summary judgment in its favor. Soffer and Turnberry (collectively "defendants") have cross moved for an order staying this action pending their appeal of a decision made in federal court. Alternatively, defendants argue that because there has been no discovery in this action, Deutsche's motion should be denied as premature (CPLR 3212[f]).

Since issue has been joined, summary judgment relief is available (CPLR 3212[a]; Myung Chun v. North American Mortgage Co., 285 A.D.2d 42 [1st Dept 2001]).

The court's decision and order on this motion and cross motion is as follows:

Arguments Presented

Deutsche and Turnberry entered into a "Letter of Credit and Reimbursement Agreement" dated June 6, 2007 ("LCRA"). The recital section of the LCRA provides that the the "Borrower has requested Issuer to issue its Letter of Credit in the stated amount of Fifty Million Dollars ($50,000,000.00) in favor of Beneficiary. The Letter of Credit shall be used by Borrower for the purposes set forth in Section 3.5 hereof." Turnberry is defined as "Borrower"; Deutsche is defined as the "Issuer." Section 3.5 of the LCRA provides as follows:

> "Use of Letter of Credit, Loan. Neither Borrower nor Borrower's Affiliates are engaged principally in the business of extending credit for the purpose of purchasing or carrying Margin Stock. The Letter of Credit shall be issued at the direction of the Borrower for Borrower's benefit pursuant to the Application. The Letter of Credit shall support the guaranty obligations of Borrower to Beneficiary."

[* 4]

The actual letter of credit itself identifies Bank of America ("BOFA") as the "beneficiary" of the credit, émploying the same definition of that term as used "under the master disbursement agreement dated as of June __, 2007. . . ." The master disbursement agreement is "among Fountainbleau Las Vegas Holdings, LLC and certain of its affiliates, The Beneficiary, Bank of America, N.A. as Bank agent, Wells Fargo Bank, National Association, as trustee, and Lehman Brothers Holdings, Inc., as retail agent and shall include any transferee."

The letter of credit sets forth a detailed mechanism for payment when a draft or demand for payment is presented by BOFA. The letter of credit provides, in relevant part, as follows:

> "This letter of credit sets forth in full our undertaking and such undertaking shall not in any way be modified, amplified or limited by reference to any document, instrument or agreement referred to herein except for the drafts and drawing statements.
>
> We hereby agree with the beneficiary that draft(s) drawn under and document *(sic)* in compliance with the terms and conditions of this letter of credit shall be duly honored on due presentation to Deutsche Bank Trust Company, at its office specified herein.
>
> Except as otherwise expressly stated herein, the letter of credit is subject to the Uniform Customs and Practice for Documentary Credits (1993 revision), International Chamber of Commerce Publication No. 500 (the "UCP")"

References to "Loan Agreement" in the LCRA mean the LCRA, "as amended, supplemented, renewed, extended, replaced, or restated from time to time. . ." There are schedules included with the LCRA setting forth the ownership structure of the

borrower (Turnberry) and its general partner, a limited liability company. The chart provided shows that Soffer is involved in many different entities and he holds different offices in them depending on the type of entity it is (i.e. LLC, corporation, partnership, etc.).

Soffer personally guaranteed Turnberry's obligations under the LCRA by entering into a separate guaranty agreement, also dated June 6, 2007 ("guaranty"). The guaranty provides, in relevant part, as follows:

> "This Guaranty dated as of June 6, 2007 . . . is entered into by Jeffrey Soffer (the "Guarantor") in favor of Deutsche Bank Trust Company Americas (the "issuer"). In consideration of financial accommodations given or to be given or continue to Turnberry Residential Limited Partner, L.P. . . .(the"Borrower"), by Issuer pursuant to the Credit Agreement (as defined below) . . . and in order to induce Issuer to make financial accommodations available to Borrower . . ."

"Credit Agreement" is defined in the guaranty as the LCRA. The guaranty also provides that it is "unconditional." Furthermore, pursuant to the guaranty, Soffer agreed that he undertook such guaranty "as primary obligor and not merely as surety; and Issuer may enforce this Guaranty without any prior enforcement of the Guaranteed Obligations or any security therefor or other guaranty thereof." The guarantor (Soffer) was also required to cash collateralize the letter of credit (Guaranty § 2 [b]). Initially, the cash collateral was $20,000,000.

Soffer and Deutsche subsequently entered into an "Amendment to Guaranty" dated as of May 15, 2008. Under the amendment to the guaranty, Soffer's obligation to cash collateralize the letter of credit was increased to $30,000,000. It was further

agreed that Fontainebleau Resort Properties I, LLC ("Fontainebleau") would provide the cash collateral. These terms are set forth ih the "Third Party Security Agreement" ("security agreement[1]") between Fontainebleau and Deutsche, also dated May 15, 2008. The security agreement identifies Fontainebleau as the debtor and Deutsche as the secured party. Furthermore, the security agreement refers to the LCRA (credit agreement) between Turnberry and Deutsche, identifying Turnberry as the "borrower." The cash collateral is, according to the security agreement, provided by Fontainebleau at the request of Turnberry and Soffer in consideration of "the elimination of certain credit enhancement fees that are payable by subsidiaries of Fontainebleau to the Borrower [Turnberry]."

Deutsche argues that under the credit agreements (LCRA, guaranty, security agr4eement, etc) once it paid monies to BOFA it had the right to apply the cash collateral at hand and then seek the balance from the defendants. According to Deutsche these requirements were met and it is entitle to summary judgment because BOFA presented its sight draft and drawing certificate to Deutsche on May 26, 2009, requesting payment of $50,000,000.00, which it paid. Deutsche then demanded reimbursement from Soffer and Turnberry. Neither Soffer nor Turnberry responded to the demands, and Deutsche applied the $30,000,000.00 cash collateral at hand to the debt. After applying the cash collateral, it is owed a balance of $19,944,323.04, plus interest and attorneys' fees (LCRA § 8 [11]). Deutsche seeks summary judgment in that amount against the defendants, jointly and severally.

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[1]Also identified in the motion papers as the "Pledge Agreement."

Although defendants have asserted third party claims against BOFA alleging that the BOFA improperly drew upon Deutsche's $50,000,000.00 letter of credit, Deutsche contends that when BOFA presented the sight draft to Deutsche, Deutsch was obligated to make the payment demanded, without having to evaluate the state of the underlying business transaction. Thus, according to Deutsche, once it determined the sight draft was facially in order, it had no further obligation to determine whether BOFA had fulfilled its obligations.

Defendants argue that plaintiff's motion for summary judgment must be denied on the merits. Defendants contend that the LCRA and guaranty were executed as part of an overarching project to develop property in Las Vegas, Nevada ("Las Vegas project") and that the letter of credit, LCRA and guaranty were provided to induce Deutsche and other lenders to finance the Las Vegas projected estimated at $1.85 billion.

To prove this point, defendants argue that the fact that all the primary agreements in the Las Vegas project were made as of or dated June 6, 2007 and the LCRA, guaranty and security agreements have the same date as well. Defendants provide copies of the "Credit Agreement" among Fontainebleau entities as borrowers and BOFA as the issuing lender, a "Master Distribution Agreement," also among Fontainebleau entities, BOFA and other lending institutions and a "Completion Guaranty (Las Vegas)" by Turnberry for the benefit of BOFA in connection with the "Turnberry Residential Project." Although Turnberry is not a party to the Las Vegas agreements, defendants argue nonetheless that the Las Vegas project agreements and

the letter of credit agreements must be viewed as a whole because the credit documents were made to finance the Las Vegas project.

In support of their motion for a stay of this action, defendants contend that the action was originally removed from State court to Federal court (No. 09 Civ. 7089 [RJS]) almost immediately after it was commenced, because the third party defendant (BOFA) is a federally incorporated entity. Defendants argue that although the Federal case was thereafter remanded back to this court by Judge Sullivan in his order of November 17, 2009 ("remand"), defendants have appealed that decision and are awaiting a decision on appeal which they believe will reverse Judge Sullivan, sending this case back to Federal court. Furthermore, defendants argue there are three other cases in federal court being coordinated before the multi district litigation panel and, therefore, this court should defer to those actions because they can be better handled by the Federal courts, also eliminating the potential for inconsistent rulings, or this court's own decisions being vacated if, in fact, the case is removed to Federal court once again. Defendants emphasize that the letter of credit issue in this case is but the tip of the iceberg and should not be decided separately before the other issues (i.e. whether the lending institutions acted in good faith, etc.) are decided.

Defendants also urge the court to deny Deutsche's motion for summary judgment on the basis that it is premature and defendants seek discovery from the plaintiff.

Each side disagrees about the current status of the law and how it should be applied in this case. Deutsche argues that the letter of credit is best conceptualized as

an encapsulated and separate transaction, despite the presence of an underlying contract for services, goods, etc., and another contract between the bank and its customer. It argues its approach is consistent with appellate authority in the First Department (Blonder v. Citibank, N.A., 28 AD3d 180 [1st Dept 2006]) and in accordance with the Uniform Customs and Practice for Documentary Credits ("UCP") established by the International Chamber of Commerce. However, defendants argue that the agreement must be read in pari materia with other documents and there is, therefore, a disputed triable issue of fact whether the agreement are integrated and interdependent (Rudman v. Cowles Communications, Inc., 30 NY2d 1 [1972]).

Applicable Law

A movant seeking summary judgment in its favor must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). The evidentiary proof tendered, however, must be in admissible form (Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 [1979]). Furthermore, all the evidence must be viewed in the light most favorable to the party opposing the motion and all reasonable inference must be resolved in that party's favor (Udoh v. Inwood Gardens, Inc., 70 A.D.3d 563 [1st Dept 2010]).

Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]).

If however, the party opposing the motion for summary judgment contends that

discovery is incomplete, the court may consider whether the motion is premature because the information necessary to fully oppose the motion remains under the control of the proponent of the motion (CPLR § 3212 [f]; Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 AD3d 324 [1st Dept. 2004]).

On a motion for summary judgment, it is for the court to decide any issues of law that are raised (Hindes v. Weisz, 303 A.D.2d 459 [2nd Dept 2003]). The issue of whether a written contract is ambiguous is an issue of law that should be decided on summary judgment (Janos v. Peck, 21 A.D.2d 969 [1st Dept 1964]).

Discussion

Although defendants urge the court to consider the LCRA, guaranty and security agreement as part of a larger, vastly complex commercial transaction, the fundamental principle governing letters of credit is the doctrine of independent contracts (Banco Nacional de Mexico, S.A. v. Societe Generale, 34 AD3d 124, 128 [1st Dept 2006]). This approach is consistent with the ICC's Uniform Customs and Practice for Documentary Credits (UCP), rules that banks apply to finance billions of dollars worth of world trade every year (http://www.iccwbo.org/id93/index.html). The defendants expressly consented to the application of those rules in the LCRA and related letter of credit documents and cannot now be heard to complain that is not what was intended.

A letter of credit is a commitment on the part of the issuing bank that it will pay a draft presented to it. The issuer's obligation to pay is fixed upon presentation of the draft(s) and document(s) specified in the letter of credit (Blonder & Co. v. Citibank, N.A.,

28 AD3d 180 [1st Dept 2006]). Although the letter supports an underlying commercial transaction, the issuer of the letter of credit is not required to resolve disputes or questions of fact concerning the underlying transaction (Blonder & Co. v. Citibank, N.A., *supra*). Thus, the issuer must honor the demand for payment, regardless of whether there is a contract dispute (Banco Nacional de Mexico, S.A. v. Societe Generale, *supra*).

Arguments by defendants, that BOFA did not act in good faith and may have committed a fraud, restate the counterclaims they have asserted against BOFA in the third party action. While allegations of fraud may represent a narrow exception to the doctrine of independent contracts, there are no fraud allegations by the defendants against Deutsche. Defendants' claims against Deutsche (and other lenders referred to as "revolving banks") are that Deutsche breached its loan agreement with Fontainebleau by failing to fund its obligations in connection with the Las Vegas project.

On a motion for summary judgment, it is for the court to decide any issues of law that are raised (Hindes v. Weisz, supra) and the issue of whether a written contract is ambiguous or subject to interpretation is an issue of law that the court should resolve on a motion for summary judgment (Janos v. Peck, 21 A.D.2d 969 [1st Dept 1964]). After examining all the agreements presented in support of and opposition to these motions, the court decides that the LCRA, guaranty and security documents are independent contracts, separate and distinct from the Las Vegas project documents (Blonder & Co. v. Citibank, N.A., *supra*; Banco Nacional de Mexico v. Societe Generale, *supra*; *see also*, Ultra Scope International, Inc. v. Extebank, 158 Misc2d 117 [Sup Ct

N.Y. Co. 1992]).

The court also considers whether, as defendants urge, it would be prudent to stay this case so the Federal actions proceed and pending the outcome of their appeal of Judge Sullivan's decision to remand this case to State court. They predict Judge Sullivan's decision will be reversed on appeal and that decisions made by this (the State) court be easily swept aside by the Federal courts, if this case is once again removed to Federal court.

A motion for a stay of proceedings is primarily addressed to court's discretion (CPLR §2201). It involves a weighing of the equities, an evaluation of the extent to which issues overlap, and an analysis of whether more complete relief can be accorded by the Federal court than in State court (Gallo v. Meyers, 50 Misc2d 385 *aff'd* 26 AD2d 773 [2nd Dept 1966]). Generally, an action in a State court will not be stayed pending determination of a Federal action, "where it appears that the action sought to be stayed will have to be determined no matter which way the case in the federal jurisdiction is decided" (Grand Central Building Inc. v. New York Harlem Railroad Company, 59 AD2d 207, 210 [1st Dept 1977]). The State court may take into account which action was commenced first and whether the state claims are encompassed within the federal action (Asher v. Abbott Laboratories, 307 AD2d 211 [1st Dept 2003]). Partly this is to avoid duplication of effort and wasting judicial resources.

The pending appeal only affects whether this case belongs in Federal court or State court; there is no order staying this court from seeing to it that this case is resolved on the merits. Since the case was remanded to State court, there is no

reason why this court should delay resolution of the disputes presented or "wait and see" what happens on appeal or in the other pending Federal actions. This dispute about the LCRA, guaranty, etc., has to be decided in any event and plaintiff has no direct claims against BOFA, a federal incorporated entity, and the reason the case was removed to Federal court in the first place.

The issues in Federal court actions and those before this court are not substantially the same, they do not involve the same parties, and the claims asserted by Deutsche against the defendants can be decided apart from those in the Federal courts. The complaint asserts claims governed by New York contract law and subject to typical defenses, well within the ken of this court. Therefore, there is no basis to stay this action and that branch of defendants' cross motion is denied.

Other arguments, that any decision made here in State court could be "swept aside" or vacated in Federal court present an inaccurate statement of the law (Congregation Adas Yereim v. City of New York, 673 F.Supp.2d 94 [E.D.N.Y. 2009]; In re Candidus, 327 B.R. 112 [Bkrtcy. E.D.N.Y] 2005)

The court has also considered whether, as argued by defendants, Deutsche's motion for summary judgment is premature because there has been no discovery (CPLR 3212 [f]). The discovery sought by the defendants is to establish their claim that all the agreements between these parties and other related entities, whether involving the letter of credit, guaranty, etc., or the overarching Las Vegas project, should be considered holistically. A contract shall be construed according to its plain meaning (W.W.W. Associates, Inc. v. Giacontieri, 77 NY2d 157 [1990]). This is because it is the

best evidence of what the parties intended (Slamow v. Del Col, 79 N.Y.2d 1016 [1992]). Having decided that the LCRA, guaranty, etc., are unambiguous, independent contracts, there is no need to resort to parole evidence or extraneous document to determine the parties' intent. Therefore, defendants are not entitled to the discovery sought and CPLR 3212 [f] is not a reason to deny plaintiff's motion.

Deutsche has proved its claims against the defendants which are that they were required to reimburse Deutsche for any payment made on Turnberry's behalf to the beneficiary of the LCRA (i.e. BOFA). Soffer personally and unconditionally guaranteed payment of Turnberry's obligations under the LCRA. After applying the cash collateral provided as security for the guaranteed obligations (i.e. $30,000,000 plus the interest that had accrued), there remains an unpaid balance due to Deutsche of $19,944,323.04, plus interest through the date of plaintiff's motion (December 7, 2009). Defendants have not presented any triable issue of fact that it does not owe that sum of money to the plaintiff. Therefore, plaintiff is entitled to summary judgment against defendants jointly and severally in the principal amount of $19,944,323.04, with interest from the date of default (May 27, 2009) pursuant to LCRA § 2.8[c]. Deutsche shall settle the judgment on notice.

Under the LCRA and the guaranty, Deutsche is also entitled to recover its reasonable attorney's fees incurred in connection with enforcing plaintiff's rights under the LCRA. The court directs that there be a hearing on the legal fees Deutsche may recover from the defendants. That hearing will be before a special referee who shall hear and report his or her recommendations to the court.

Neither of these motions address the issues in the third party action by the defendants against BOFA. Since those disputes remain to be decided, a preliminary conference is hereby scheduled for **JULY 22, 2010 at 9:30 a.m.** in Part 10. No further notices will be sent.

Conclusion

In accordance with the foregoing,

IT IS HEREBY

ORDERED that plaintiff Deutsche Bank Trust Company Americas' motion for summary judgment against defendants Jeffrey Soffer and Turnberry Residential Limited Partner, L.P. is hereby granted; and it is further

ORDERED that defendants' cross motion is denied; and it is further

ORDERED that plaintiff Deutsche Bank Trust Company Americas is entitled to money judgment against defendants Jeffrey Soffer and Turnberry Residential Limited Partner, L.P., jointly and severally, in the principal amount of NINETEEN MILLION NINE HUNDRED FORTY FOUR THOUSAND THREE HUNDRED TWENTY THREE and 04/100 DOLLARS ($19,944,323.04), with interest from the date of default (i.e. May 27, 2009) and that plaintiff shall settle the judgment on notice; and it is further

ORDERED that there be a hearing on the legal fees plaintiff Deutsche Bank Trust Company Americas may recover from defendants Jeffrey Soffer and Turnberry Residential Limited Partner, L.P. and that the hearing will be before a special referee who shall hear and report his or her recommendations to the court; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order upon the Office

of the Special Referee, Centre Street, Room 119, within sixty (60) days of entry of this decision/order so that the reference framed herein can be assigned; and it is further

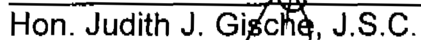
ORDERED that a preliminary conference is hereby scheduled for **JULY 22, 2010 at 9:30 a.m.** in Part 10; and it is further

ORDERED that any requested relief not expressly addressed herein has nonetheless been considered by the Court and is hereby denied; and it is further

ORDERED that this shall constitute the decision and order of the Court.

Dated: New York, New York
May 24, 2010

So Ordered:



Hon. Judith J. Gische, J.S.C.

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