

Weiss v Benetton U.S.A. Corp.

2011 NY Slip Op 32955(U)

October 27, 2011

Sup Ct, Nassau County

Docket Number: 1987/11

Judge: Roy S. Mahon

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON
Justice

MELVIN I. WEISS,

Plaintiff(s),

- against -

BENETTON U.S.A. CORPORATION and
BENETTON TRADING USA INC.,

Defendant(s).

TRIAL/IAS PART 6

INDEX NO. 1987/11

MOTION SEQUENCE
NO. 1 & 2

MOTION SUBMISSION
DATE: August 9, 2011

The following papers read on this motion:

- Notice of Motion X
- Notice of Cross Motion X
- Affirmation in Reply X
- Affirmation in Opposition X
- Memorandum of Law X

Upon the foregoing papers, the motion by the plaintiffs for an Order striking the answer of the defendants, granting Summary Judgment to the plaintiff, pursuant to CPLR Section 3212 for the relief in the Complaint and the cross-motion by the defendants pursuant to §3212 seeking Summary Judgment in favor of the defendants, Benetton U.S.A. Corporation and Benetton Trading USA, Inc., dismissing the plaintiff's complaint in its entirety, are both determined as hereinafter provided:

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc.**, 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994):

"It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Of course, summary judgment is a

drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York*, *supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

The instant action arises out of an irrevocable standby letter of credit dated July 25, 1995.

A review of the respective submissions establishes that two non-party entities clothing-store entities, Westban Corp. and ESW Corp. were Licenses of the defendant Benetton U.S.A. Corporation. In order to purchase merchandise from Benetton U.S.A., the non-party principal shareholders of Westban Corp. and ESW Corp. Danny Markowitz requested that plaintiff provide a standby letter of credit. Said letter provided:

"July 25, 1995

BENEFICIARY:
BENETTON U.S.A. CORPORATION
SS EAST 59TH STREET
NEW YORK, NY 10022
ATTENTION: GIANCARLO BRIGUGLIU

RE: IRREVOCABLE STANDBY LETTER OF CREDIT NO.: S113744

GENTLEMEN:

FOR THE ACCOUNT OF MELVYN I. WEISS WE HEREBY ISSUE IN YOUR FAVOR OUR IRREVOCABLE LETTER OF CREDIT NO. S113744, FOR A MAXIMUM AMOUNT OF \$500,000.00 (FIVE HUNDRED THOUSAND DOLLARS).

THIS LETTER OF CREDIT IS EFFECTIVE IMMEDIATELY.

THIS LETTER OF CREDIT EXPIRES AT OUR COUNTERS ON JULY 31, 2996.

FUNDS UNDER THIS LETTER OF CREDIT ARE AVAILABLE TO YOU AGAINST YOUR DRAFT(S) AT SIGHT DRAWN ON US, MENTIONING THEREON OUR OUR LETTER OF CREDIT NUMBER S11344 AND THE ORIGINAL OF THIS LETTER

OF CREDIT.

IT IS A CONDITION OF THIS LETTER OF CREDIT THAT IT SHALL BE DEEMED AUTOMATICALLY EXTENDED WITHOUT AMENDMENT FOR ADDITIONAL PERIODS OF ONE YEAR FROM THE PRESENT AND EACH FUTURE EXPIRATION DATE, UNLESS SIXTY (60) DAYS PRIOR TO THE THEN RELEVANT EXPIRATION DATE WE NOTIFY YOU IN WRITING BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, THAT WE ELECT NOT TO RENEW THIS LETTER OF CREDIT FOR ANY ADDITIONAL PERIOD.

UPON YOUR RECEIPT OF SUCH NOTIFICATION, YOU ARE AUTHORIZED TO DRAW YOU ONE (1) SIGHT DRAFT ON US MENTIONING THEREON OUR LETTER OF CREDIT.

PARTIAL DRAWINGS ARE PERMITTED

WE HEREBY AGREE WITH YOU THAT EACH DRAFT DRAWN UNDER AND IN COMPLIANCE WITH THE TERMS AND CONDITIONS OF THIS LETTER OF CREDIT WILL BE DULY HONOURED IF PRESENTED ON OR BEFORE THE EXPIRATION DATE.

THIS LETTER OF CREDIT IS TRANSFERABLE WHOLE ONLY BUT NOT IN PART. HOWEVER NO TRANSFER SHALL BE EFFECTIVE UNLESS ADVICE OF OUR REF. NO. S113744

SUCH TRANSFER IS RECEIVED BY US IN THE FORM ATTACHED SIGNED BY YOU. THIS STAND BY LETTER OF CREDIT MAY BE TRANSFERRED ONE OR MORE TIMES. THE RIGHT TO TRANSFER THIS LETTER OF CREDIT IS NOT SUBJECT TO THE CONSENT OF THE ACCOUNT PARTY.

UNLESS OTHERWISE EXPRESSLY STATED, THIS LETTER OF CREDIT IS SUBJECT TOT THE UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (1993 REVISION) INTERNATIONAL CHAMBER OF COMMERCE. PUBLICATION NO. 500.

VERY TRULY YOURS

_____/s
 AUTHORIZED SIGNATURE

_____/s
 AUTHORIZED SIGNATURE"

In conjunction with the foregoing Thomas J. Barlow, Esq., general counsel to the defendants sets forth in his affidavit in support of the defendants' application:

"At the time the letter of credit was issued, and through 2002, Westben and ESW purchased merchandise directly from Benetton Group S.p.a. merchandise as part of an internal corporate re-organization. As such Westben and ESW began purchasing merchandise from TRADING a that time. Nonetheless, an authorization/license agreement was not formally entered into between TRADING and Westben/ESW until 2005. At no time did the actual business relationship between/among Benetton and Westben/ESW (both of which were operated by Danny Markowitz) change.

To be clear, at no time did Westben and/or ESW purchase merchandise from USA.

Furthermore, although said letter of credit named USA as the sole beneficiary during its entire existence, there was never an agreement that USA would only draw upon the letter of credit if debt was owed by Westben and/or ESW to USA. In fact, such an agreement would be against good business practice as Westben/ESW never purchased merchandise from USA. Moreover, an examination of the language contained in the letter of credit reveals no such condition precedent.

According to the letter of credit, upon good faith belief of an existent debt, the only condition(s) precedent that existed were as follows: (a) USA must present an original copy of the letter of credit; and (b) USA must mention letter of credit number S113744.

Moreover, it was the reasonable expectation of the defendants that the letter of credit served as a security interest to protect against the risk of no-payment of debt by Westben and /or ESW, in connection with their license agreement related to the operation of two United Colors of Benetton stores. In fact, the letter of credit would protect against any material breach of the authorization agreement entered into by Westben and /or ESW.

Benetton would not have allowed this change in corporate structure to cause Benetton to become an unsecured partner while the essential essence of the relationship between WEISS, the defendants and Westben/ESW remained unchanged. In fact, had Benetton believed that no security existed with respect to the Westben/ESW relationship/authorization agreement, Benetton would have immediately demanded that a replacement letter of credit or other form of security be issued to protect its interests. If Westben/ESW had failed to provide such replacement security, the authorization agreements with Westben and ESW would have been immediately revoked.

By 2008 Westben and ESW accrued a collective debt to TRADING of approximately \$1,000,000 that they could not satisfy. Accordingly, USA, as beneficiary of the of credit, wrote to HSBC (the issuing bank) requesting payment \$500,000 under the letter of credit and payment was received.

Thereafter, USA transferred the \$500,000 received under the letter of credit to TRADING, thereby satisfying the entire outstanding debt owed by ESW and reducing a portion of the outstanding debt owed by Westben. It should be noted that one of USA's duties is to assist TRADING in collecting accounts receivables from clients. Therefore, the request by USA for payment under the letter of credit was completely appropriate and expected."

Danny Markowitz the principal shareholder (*supra*) sets forth in his affidavit:

"As far back as 1995 Westben and ESW had entered into agreements with Defendant Benetton U.S.A. Corporation whereby my two companies would purchase goods from Benetton U.S.A. Corporation for resale to general public.

I asked my friend, Melvyn Weiss, to post a standby letter of credit on behalf of my business naming Benetton U.S.A. Corporation as the beneficiary, in the sum of \$500,000.00. The standby letter of credit naming Benetton U.S.A. Corporation as the beneficiary was renewed each year thereafter.

The understanding between ESW, Westben, Melvyn Weiss, and Benetton U.S.A. Corporation was that Benetton U.S.A. Corporation could only collect pursuant to the letter of credit if my companies owed Benetton U.S.A. Corporation money and failed to repay it.

On or about November 2005 Westben and ESW ceased to do business with Benetton U.S.A. Corporation and entered into a new agreement with Benetton Trading USA Inc.

The standby letter of credit was not changed or modified. No standby letter of credit was issued to Benetton Trading USA Inc. by Melvyn Weiss.

My companies continued to do business with Benetton Trading USA Inc. for several years, until December 2008 when both companies surrendered their leases and ceased to conduct business.

At that time, there was an indebtedness to Benetton Trading USA Inc. There was no indebtedness to Benetton U.S.A. Corporation.

Even though no money was owed to Benetton U.S.A. Corporation, and contrary to the understanding of the parties, that entity wrote to HSBC Bank seeking to collect pursuant to the standby letter of credit and HSBC did in fact pay Benetton U.S.A. Corporation the sum of \$500,000.00.

Thereafter that sum was credited against the money owed by ESW and Westben to Benetton Trading USA Inc.

Benetton Trading USA Inc. then initiated a lawsuit against Westben to recover an alleged remaining balance owed to it, which is further evidence that the money was owed to Benetton Trading USA Inc. and not Benetton U.S.A. Corporation."

A review of the foregoing creates an issue of fact as to which entity the non-party Westben Corp. and ESW Corp. received merchandise from and for whose benefit the letter of credit was issued.

Based upon this issue of fact the plaintiff's application for an Order striking the answer of the defendants, granting Summary Judgment to the plaintiff, pursuant to CPLR Section 3212 for the relief in the Complaint and the cross-motion by the defendants pursuant to §3212 seeking Summary Judgment in favor of the defendants, Benetton U.S.A. Corporation and Benetton Trading USA, Inc., dismissing the plaintiff's complaint in its entirety, are both denied.

SO ORDERED.

DATED: 10/27/2011

..... *Ray S. Malin*
J.S.C.

ENTERED
NOV 02 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE