Receivers of Sabena SA v Deutsche Bank A.G.
2014 NY Slip Op 33746(U)
July 2, 2014
Supreme Court, New York County
Docket Number: 653651/2012
Judge: Saliann Scarpulla

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

----------x

THE RECEIVERS OF SABENA SA,

Plaintiff,

-against-

DEUTSCHE BANK A.G. and DEUTSCHE BANK TRUST COMPANY AMERICAS,

Defendants.

----------x

DECISION and ORDER
Index No. 653651/2012
Motion Sequence No. 002

SALIANN SCARPULLA, J.:

In this action plaintiff, The Receivers of Sabena SA ("Sabena"), seeks to recover funds held for a time by defendants Deutsche Bank A.G. and Deutsche Bank Trust Company Americas (collectively, "Deutsche Bank") as an intermediary bank in an electronic funds transfer ("EFT") from a Sudanese company. The EFT was frozen midstream pursuant to a presidential Executive Order, which blocked all funds transfers to and from Sudan. When the funds were unblocked, Deutsche Bank did not remit the finds to Sabena, but rather returned the funds to the sender.

Background

Sabena was the national airline of Belgium, providing air transportation services and aircraft repair services to other airlines. By an order dated November 7, 2001, the Brussels Commercial Court in Belgium declared Sabena to be bankrupt and appointed five individuals

as The Receivers of Sabena. The Receivers of Sabena have the right, *inter alia*, to collect monies owing to Sabena.

In June and August 1997, Sabena contracted with Sudan Airways to provide aircraft repair services. On November 4, 1997, Sudan Airways originated an EFT in the sum of $360,500 for the benefit of Sabena. The National Bank of Abu Dhabi ("NBAD") served as the originating bank for Sudan Airways, Bankers Trust in New York ("Bankers Trust") was the intermediary bank, and Generale Bank in Brussels was the beneficiary bank for Sabena. The same day that the EFT was originated, it was blocked by Bankers Trust (the "Blocked Funds") in compliance with President Clinton's Executive Order No. 13067, issued on November 3, 1997 (the "Executive Order"). Bankers Trust placed the Blocked Funds in a segregated, interest-bearing account.[1]

The Executive Order blocked "all property and interests in property of the Government of Sudan that are in the United States, that hereafter come within the United States, or that hereafter come within the possession or control of United States persons, including their overseas branches." Pursuant to the Executive Order, the U.S. Department of the Treasury thereafter issued the Sudanese Sanctions Regulations (the "Regulations"), 31 CFR Part 538, to carry out the purposes of said Order. The Regulations provide in pertinent part that, unless otherwise authorized, "no property or interests in property of the

---

[1] Deutsche Bank is the successor to Bankers Trust. Unless otherwise specified, references hereinafter to Deutsche Bank include Bankers Trust, as intermediary bank for the EFT.

Government of Sudan, that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons, including their overseas branches, may be transferred, paid, exported, withdrawn or otherwise dealt in." (*Id.*, section 538.201[a]).

The Regulations define the term "interest," when used with respect to property, as "an interest of any nature whatsoever, direct or indirect." (*Id.*, section 538.307). The Regulations further define "Government of Sudan" to include "[t]he state and the Government of Sudan, as well as any political subdivision, agency, or instrumentality thereof," "[a]ny entity owned or controlled by the foregoing" and "[a]ny other person determined by the Director of the Office of Foreign Assets Control to be included" within the first two definitions. (*Id.*, section 538.305). Sudan Airways appears on OFAC's "Specially Designated Nationals and Blocked Persons List" (the "Blocked Persons List") and is, therefore, subject to the Regulations.

In October 5, 2001, Sabena filed a bankruptcy petition with the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"). The petition commenced an ancillary proceeding to Sabena's bankruptcy action then-pending in Belgium. On February 27, 2002, the Bankruptcy Court issued an order which, among other things, enjoined all entities from seizing, transferring or disposing of Sabena's property in the United States, and directed all entities having custody or control of Sabena's property in

the United States to turn over and account for such property to the Receivers (the "Bankruptcy Injunction").

In August 2007, the survivors of the sailors killed in the October 2000 bombing of the U.S.S. Cole were awarded a $12.8 million judgment by a Virginia court against the Republic of Sudan (the "Virginia Judgment"). In April 2008, the survivors filed an action in the United States District Court for the Southern District of New York (the "Southern District"), and sought an order requiring certain New York banks then holding funds blocked pursuant to the Executive Order to turn over such funds to satisfy the Virginia Judgment. In compliance with a July 28, 2008 order of the Southern District, Deutsche Bank deposited the Blocked Funds, along with other blocked funds unrelated to Sabena, into the Southern District's registry pending disposition by the Court. On the day of the deposit, the value of the Blocked Funds was approximately $496,443.

In September 2008, Deutsche Bank filed an interpleader action in the Southern District with respect to the Blocked Funds and other blocked funds (the "SDNY Interpleader"). The Receivers objected to any transfer of the Blocked Funds for payment of the Virginia Judgment. In January 2009, the Receivers and Deutsche Bank filed a stipulation with the Bankruptcy Court (the "Bankruptcy Stipulation") wherein they agreed to modify the Bankruptcy Injunction so as to permit Deutsche Bank to prosecute the SDNY Interpleader and any related action. Notably, the Bankruptcy Stipulation was never approved or so-ordered by the Bankruptcy Court.

In April 2009, the Southern District issued an order which directed that all uncontested blocked funds be turned over to the survivor-plaintiffs in order to satisfy the Virginia Judgment, and the remaining blocked funds (including the Blocked Funds) be returned from the Southern District's registry to those banks from which they had been transferred. The April 2009 order specifically stated that it was without prejudice to the claims of any person who might have a claim to the remaining blocked funds, including the Blocked Funds. On March 10, 2011, the Southern District issued another order which directed the transfer of the remaining blocked funds, including the Blocked Funds, from that Court's registry to the various banks, as soon as the requisite license from the Office of Foreign Assets Control ("OFAC") was received allowing for such transfers. On or about March 11, 2011, OFAC issued a license which authorized the transfer of the blocked funds to the respective banks, including Deutsche Bank. The value of the Blocked Funds on the date of such transfer to Deutsche Bank was approximately $497,915.

On March 5, 2012, acting upon the Receivers' application, the OFAC issued license number SU-3804 (the "License"), which authorized Deutsche Bank to release the Blocked Funds. The Receivers promptly contacted Deutsche Bank, and on March 14, 2012, provided the Bank with wire transfer information for the transfer of the Blocked Funds to Sabena's account. Deutsche Bank requested the Receivers obtain a release from Sudan Airways and NBAD as a condition for completion of the funds transfer to Sabena. Shortly thereafter,

Deutsche Bank informed the Receivers that it had transferred the Blocked Funds to NBAD instead.

Sabena then commenced this action, asserting four causes of action: (1) violation of New York Uniform Commercial Code ("UCC") Article 4A by failing to transfer the Blocked Funds to Sabena; (2) violation of the OFAC License by returning the funds to the originator's bank; (3) violation of the Bankruptcy Injunction by failing to file an interpleader seeking a judicial determination of the rightful owner of the Blocked Funds; and (4) conversion.

Deutsche Bank now moves, preanswer, to dismiss the complaint pursuant to CPLR 3211 (a) (7).

Discussion

A CPLR 3211 (a) (7) motion to dismiss "must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Richbell Info. Servs., Inc. v. Jupiter Partners,* 309 A.D.2d 288, 289 (1st Dept 2003) (internal quotation marks omitted), quoting *511 W. 232nd Owners Corp. v. Jennifer Realty Corp.*, 98 N.Y.2d 144, 151-152 (2002). The pleadings are to be afforded a liberal construction, and the Court is to give the plaintiff "the benefit of every possible favorable inference." *Goshen v. Mutual Life Ins. Co. of N.Y.,* 98 N.Y.2d 314, 326 (2002) (citations omitted). However, while factual allegations in a complaint should be favorably construed, bare legal conclusions and inherently incredible facts are not entitled to preferential consideration. *Matter of Sud v. Sud*, 211 A.D.2d 423, 424 (1st Dept 1995).

Also, "[w]hen the moving party [seeks dismissal and] offers evidentiary material, the court is required to determine whether the proponent of the pleading has a cause of action, not whether [he or] she has stated one." *Asgahar v. Tringali Realty, Inc.*, 18 A.D.3d 408, 409 (2d Dept 2005).

Deutsche Bank argues that because the UCC provides the "exclusive means" for determining the rights and liabilities of the parties to an EFT and, because nothing in Article 4-A permits "a beneficiary to sue an intermediary bank when a funds transferred is not completed," all Sabena's claims should be dismissed. Defendants' Brief, pp. 1-2, 11-12. Additionally, Deutsche Bank challenges Sabena's standing to bring a private cause of action, arguing that the Executive Order states that "nothing contained in this order shall create any right or benefit, substantive or procedural, enforceable by any party against the United States, its agencies or instrumentalities, its officers or employees, or *any other person*." Defendants' Brief, p. 3, citing Executive Order, § 6 (emphasis added).

In *AY Bank Ltd. v. JPMorgan Chase & Co.*, 2006 N.Y. Misc. LEXIS 3785 (Sup. Ct., N.Y. Co. 2006), this Court rejected the no private right of action/lack of standing argument made here by Deutsche Bank. Specifically, the Court held that limiting language contained in an executive order, identical to the limiting language here, is "clearly limited" to the United States government, its employees and those persons related to the government, and does not "preclude claims against people or corporations acting in their private capacities." *Id.* at *16. Thus, Sabena has standing to assert its claims in this action.

First Cause of Action - Violation of the N.Y.U.C.C.

Deutsche Bank argues that Sabena's first cause of action must be dismissed because, pursuant to UCC Article 4-A, a beneficiary of an EFT "has no property interest in any specific funds while [such funds are] in the hands of an intermediary bank," and, thus, Sabena "has no claim against Defendants for the alleged wrongful transfer of these funds." Defendants' Brief, p. 6. In particular, Deutsche Bank points to section 212 of Article 4-A, which states that a "receiving bank is not the agent of the sender or beneficiary of the payment order it accepts, or of any other party to the funds transfer, and the bank owes no duty to any party to the funds transfer except as provided in this article or by express agreement." UCC § 4-A-212; Defendants' Brief, p. 8.[2] Defendants argue that the obligation of payment runs only from the bank sending a payment order to the bank that received it - in this case, NBAD and Deutsche Bank - and only then upon acceptance by the receiving bank. Citing to UCC § 209, which states that an intermediary bank "accepts a payment order only when it executes the order," Deutsche Bank argues that if a payment order did not become executed, such order "has not been accepted." UCC § 4-A-209 (1); Defendants' Brief, p. 8.

---

[2] As defined in the UCC, a "receiving bank" is "the bank to which the sender's instruction is addressed," and a "sender" is "the person giving the instruction to the receiving bank." UCC § 4-A-103 (d) and (e). In turn, an "intermediary bank" is "a receiving bank other than the originator's bank or the beneficiary's bank." UCC § 4-A-104 (2). For the subject EFT, Deutsche Bank was the intermediary bank, which also served as the receiving bank of NBAD.

Deutsche Bank further asserts that even if a funds transfer is accepted, under UCC § 211, "[a]n unaccepted payment order is cancelled by operation of law at close of the fifth funds-transfer business day of the receiving bank after the execution date." UCC § 4-A-211 (4); Defendants' Brief, p. 9. Because the EFT here was blocked pursuant to the Executive Order and was not completed by the close of the fifth funds-transfer business day, Deutsche Bank asserts that it was deemed cancelled under the UCC. Defendants' Brief, p. 12. Finally, Deutsche Bank claims that when the EFT was not completed because of the Executive Order, Deutsche Bank was "obligated to return the [Blocked Funds] to the originating bank [NBAD], and the originator [Sudan Airways] was entitled to a refund from its bank," pursuant to the so-called "money-back guarantee" provisions of UCC § 4-A-402. Defendants' Brief, pp. 9, 13. Deutsche Bank concludes that "it was simply honoring its obligations under the UCC," and that it acted "in a manner that was entirely consistent with the License, which gave no indication as to whom the funds should be directed." *Id.* at 14.

New York courts, applying UCC Article 4-A, have held that EFTs released from a government block at an intermediary bank must be sent to the intended beneficiary rather than being returned to the originator. *Bank of N.Y. v. Norilsk Nickel*, 14 A.D.3d 140 (1st Dep't 2004), *lv. dismissed*, 4 N.Y.3d 846 (2005), is on point. In *Norilsk*, a Serbian company originated a wire transfer for the benefit of a Soviet company in payment under the parties' contract. The funds were frozen at an intermediary bank located in New York pursuant to an executive order and OFAC regulations imposing economic sanctions on Serbia. After

being held at the intermediary bank for about ten years, the funds were unblocked; however, because of competing claims to the funds by two creditors, the intermediary bank did not complete the transfer to the beneficiary and instead commenced an action for interpleader relief. *Bank of N.Y. v. Norilsk Nickel,* 14 A.D.3d at 144.

The Supreme Court denied the beneficiary's and creditor's cross-motions for summary judgment. The Appellate Division, First Department modified, and granted the beneficiary summary judgment on its claim. The First Department held that property rights in the attached funds were governed by the UCC and that the OFAC regulations did not preempt, but merely impeded movement of those funds. *Id.* at 145-146. It explained that, under the UCC, title to the funds passed from the originator to its bank when it initiated the transfer, and that federal law only prevented movement of the funds for ten years. *Id.* at 147. When federal law unblocked the funds, the UCC required that the funds be transferred to the beneficiary. *Id.*

Goodearth Maritime Ltd. v. Calder Seacarrier Corp., 387 Fed.Appx. 19, 21 (2d Cir. 2010), involved funds attached pursuant to maritime law while at an intermediary bank. There, the Second Circuit found that under UCC Art. 4-A, the attachment only interrupted the transfer and did not cancel it by operation of law. *Id.* It further stated that "New York law does not require that funds be returned to the originator following a freeze of assets, even for an extended period of time, and that, in fact, the frozen funds may rightfully go to the beneficiary." *Id.* at 22; *see also European American Bank v. Bank of Nova Scotia*, 12 A.D.3d

189 (1st Dep't 2004)(affirming a decision releasing illegally attached funds at an intermediary bank and ordering that the contemplated transfer from the intermediary bank to the beneficiary's bank be completed).

The foregoing cases show that the Executive Order here did not cause the transfer of the Blocked Funds to fail or be cancelled, the Executive Order was simply an "interruption" of the transfer. Thus, Sabena may plead a cause of action under the UCC, and UCC § 4-A-402 does not shield Deutsche Bank from liability. Accordingly, Deutsche Bank's motion to dismiss is denied with respect to Sabena's first cause of action for violation of the UCC.

Second Cause of Action - Violation of the License

In its second cause of action, Sabena asserts that Deutsche Bank violated the License by sending the Blocked Funds back to Sudan Airways' bank, rather than to Sabena's beneficiary bank. Sabena alleges that the OFAC License, issued at the behest of the Receivers' application, was a "general" license and, thus, the Blocked Funds could only be sent to Sabena's beneficiary bank, because any release of these Funds to Sudan Airways or its bank would require a "specific" license under 31 CFR § 538.403.

31 CFR § 538.403(b) provides, in relevant part, that: "[u]nless otherwise specifically provided in a license . . . if property (including any property interest) is transferred . . . to the Government of Sudan, such property shall be deemed to be property in which there exists an interest of the Government of Sudan." According to Sabena, the foregoing indicates that, unless a license specifically authorizes a transfer of property back to Sudan (or to Sudan

Airways, as to which the parties agree is/was on the "Blocked Persons list" and is/was subject to the OFAC regulations), sending the Blocked Funds to NBAD, the originating bank, violated the License, as it was not a "specific" license. Opp. Brief, p. 16. Sabena also asserts that the transfer of the Blocked Funds to NBAD was "null and void," as specified in 31 CFR § 538.202 (a). *Id.*

Deutsche Bank does not specifically address 31 CFR § 538.403; instead it merely contends that such section "found in Subpart D, contains no such requirement." Reply Brief, p. 9. It also contends that Sabena should have cited to Subpart E, entitled "Licenses, Authorizations, and Statements or Licensing Policy." *Id.* However, it does not explain how Subpart E, when compared to Subpart D, would require such specificity. Because Deutsche Bank makes this motion to dismiss pursuant to CPLR 3211 (a) (7), this Court must give the complaint a liberal construction and afford plaintiff every possible favorable inference. *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 (2002). Inasmuch as Deutsche Bank fails to show that the second cause of action is deficient as a matter of law, dismissal is unwarranted.

Third Cause of Action - Violation of the Bankruptcy Injunction

Sabena alleges that Deutsche Bank violated the Bankruptcy Injunction by sending the Blocked Funds out of the Bankruptcy Court's jurisdiction to Sudan Airways' bank. In relevant part, the Bankruptcy Injunction states that: "all persons and entities are enjoined from . . . transferring, relinquishing or disposing of any property of the Company [Sabena]

in the United States, or the proceeds of such property . . ." and "all persons and entities in possession, custody or control of property of the Company [Sabena] in the United States, or the proceeds thereof, shall turn over and account for such property or its proceeds to the Petitioners [Receivers]." Complaint, Ex. 1.

As noted above, the parties filed the Bankruptcy Stipulation in which they agreed to modify the Bankruptcy Injunction to permit Deutsche Bank to prosecute the SDNY Interpleader and any related action; however, the Bankruptcy Stipulation was never approved or so-ordered by the Bankruptcy Court. Sabena argues that "by filing the Bankruptcy Stipulation, DB [Deutsche Bank] recognized the Blocked Funds were property that Plaintiff was making a claim to and therefore was the subject of the [Bankruptcy] Injunction." Opp. Brief, p. 20. In rebuttal, Deutsche Bank contends that "[t]here is nothing in the Stipulation that references any purported right of Plaintiff, and although the underlying Injunction restrains transfers of any property of the Company . . . [Deutsche Bank's] release of the [Blocked Funds] - which is *not* Plaintiff's property - did not violate the Injunction." Reply Brief, p. 4 (emphasis in original).

Sabena is, in effect, are asking this Court to construe the Bankruptcy Injunction, but this court lacks authority or jurisdiction to review the terms of a bankruptcy decree. *Metropolitan Playhouses, Inc. v. Central Hanover Bank & Trust Co.*, 71 N.Y.S.2d 88, 90 (Sup. Ct., N.Y. Co. 1947), *aff'd* 272 A.D. 1044 (1st Dept 1947). In addition, to the extent that an action involves property of a bankrupt entity, the action cannot be maintained in state

court, where such action is instituted after the filing of the bankruptcy petition, because the bankruptcy court has exclusive jurisdiction to hear and determine the dispute. *Northeastern Real Estate Sec. Corp. v Goldstein*, 276 N.Y. 64, 68 (1937). Indeed, the relevant federal statute states that the bankruptcy court in which a case under Title 11 is commenced or is pending shall have "exclusive jurisdiction" with respect to "all of the property, wherever located, of the debtor as of the commencement of [the bankruptcy] case, and of property of the [bankruptcy] estate." 28 USC § 1334 (e) (1). Accordingly, this Court dismisses Sabena's third cause of action.

Fourth Cause of Action - Conversion

Under a traditional construct, conversion is "'the unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights.'" *Thyroff v. Nationwide Mut. Ins. Co.*, 8 N.Y.3d 283, 288–89 (2007) (*quoting State v. Seventh Regiment Fund, Inc.*, 98 N.Y.2d 249, 259 (2002)). "Where the property is money, it must be specifically identifiable and be subject to an obligation to be returned or to be otherwise treated in a particular manner." *Republic of Haiti v. Duvalier*, 211 A.D.2d 379, 384 (1st Dep't 1995).

The complaint here alleges that: (1) Sabena was the beneficiary of the Blocked Funds, which were placed in a segregated account, and was entitled to the payment of the Funds; (2) after issuance of the License that unblocked the Blocked Funds, Sabena once again became entitled to the payment of such Funds; (3) Deutsche Bank's improper transfer of the Funds

is a "distinct act of domain wrongfully exerted of Plaintiff's personal property in denial of or inconsistent with its rights therein and constitutes conversion." Complaint, ¶¶ 57-59.

Deutsche Bank argues that Article 4-A precludes a conversion claim and that the UCC provides the "exclusive means" for determining the claims and liabilities of the parties in an EFT. Defendants' Brief, p. 2. However, Sabena correctly contends that legal claims, such as conversion, and other common-law and equitable principles, can be considered by this Court because they are not inconsistent with Article 4-A. *See e.g., Regions Bank v. Wieder & Mastroianni, P.C.*, 423 F.Supp.2d 265, 269 (S.D.N.Y. 2006) ("Article 4A is not the exclusive means by which a plaintiff can seek to redress an alleged harm arising from a funds transfer" and "[n]owhere does Article 4A expressly or impliedly preclude common law claims for conversion") (citations and internal quotation marks omitted); *Sheerbonnet, Ltd. v Am. Express Bank, Ltd.*, 951 F.Supp. 403, 414 (S.D.N.Y. 1996) (court denied motion to dismiss common law conversion and other equity claims where they did "not conflict with any of Article 4-A's provisions"). Therefore, defendants' motion to dismiss is denied as to the fourth cause of action for conversion.

In accordance with the foregoing it is

ORDERED that defendants' motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) is denied; and it is further

ORDERED that the Court, *sua sponte,* dismissed the third cause of action; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days of the date of this decision and order; and it is further

ORDERED that counsel for the parties are directed to appear before this Court for a preliminary conference in Room 208, 60 Centre Street, on August 20, 2014, at 2:15 p.m..

This constitutes the decision and order of this Court.

Dated: New York, New York
July 2, 2014

ENTER:
Saliann Scarpulla, J.S.C