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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 63

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BANCO INTERNACIONAL DE COSTA RICA, S.A., as the representative for and on behalf of BANCO INTERNACIONAL DE COSTA RICA, S.A.; KFW IPEX-BANK GMBH; ROCHDALE INTERNATIONAL TRADE FIXED INCOME FUND; FEDERATED PROJECT AND TRADE FINANCE CORE FUND; and HSBC CUSTODY SERVICES (GUERNSEY) LIMITED as Custodian and Agent for ROCHDALE GML TRADE FINANCE FUND LIMITED,

Plaintiffs,

-against-

Index No. 650585/2014

BANANA INTERNATIONAL CORPORATION; BANACOL DE COSTA RICA, S.A.; and BANACOL CORPORATION,

Defendants.

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ELLEN M. COIN, J.

Plaintiffs Banco Internacional de Costa Rica, S.A. (BICSA), as the representative for and on behalf of Banco Internacional de Costa Rica, S.A., KFW IPEX-Bank GmbH, Rochdale International Trade Fixed Income Fund, Federated Project and Trade Finance Core Fund, and HSBC Custody Services (Guernsey) Limited, as custodian and agent for Rochdale GML Trade Finance Fund Limited (collectively, Lenders), move, pursuant to CPLR 3212, for an order granting summary judgment in their favor on the breach of contract claim, and awarding them a money judgment in the amount of $21,686,020.09, together with fees, expenses, and prejudgment interest. Defendant Banana International Corporation (BIC or Borrower) and defendants Banacol De Costa Rica, S.A. (BCR) and Banacol Corporation (Banacol) (both,

Guarantor Defendants) cross-move, pursuant to CPLR 3124 and 3126, for an order directing plaintiffs to comply with all outstanding discovery demands.

This action arises out of an amended and restated secured export finance agreement (amended finance agreement) entered into by BICSA, as the collateral agent and administrative agent for the Lenders, the Lenders, and BIC, as the borrower, dated December 13, 2012. This action also arises out of an irrevocable and unconditional guarantee of payment executed on May 20, 2010, and ratified and confirmed on December 19, 2012, by nonparty C.I. Banacol (CIB), an entity affiliated with BIC and having common ownership and management, the Guarantor Defendants, and nonparties Agricola el Retiro, S.A. and Rio Cedro S.A. (both, Guarantor Nonparties).

The amended finance agreement provided BIC with access to a maximum of $30 million in financing from the Lenders, subject to certain terms and conditions. Pursuant to that agreement, BIC agreed that its repayment obligation would be secured by money due it from nonparty Fruitpoint, B.V., pursuant to the terms of an export agreement between BIC and Fruitpoint (Fruitpoint contract). Because the Fruitpoint contract proceeds served as the primary collateral for the Lenders' financing, the amended finance agreement protected them by requiring those proceeds to be deposited into an escrow account maintained at nonparty Citibank N.A. (collection account), pursuant to the terms of an amended and restated collateral agency and account agreement (collateral assignment agreement) executed on December 13, 2012.

Earlier, by a notice of assignment of rights dated February 17, 2012, BIC notified Fruitpoint that BIC had irrevocably assigned its right to receive payment under the Fruitpoint contract to BICSA, and that all Fruitpoint's payments under the Fruitpoint contract must be made

into the collection account. By acknowledgment of assignment of rights under the Fruitpoint contract dated February 17, 2012 (acknowledgment agreement), Fruitpoint agreed to make all payments due BIC under the Fruitpoint contract directly into the collection account. The acknowledgment agreement is expressly irrevocable, and cannot be modified, without BICSA's written consent (*see* acknowledgment agreement).

BIC covenanted that it would issue irrevocable instructions to Fruitpoint to deposit all sums due BIC into the collection account, and that the funds would then be used to satisfy repayment of the loan, with any excess funds to be disbursed at BIC's election (*see* amended finance agreement §§ 5.7, 5.8; collateral assignment agreement § 3.1).

BIC also covenanted that it would not make any changes to the irrevocable instructions (*see* collateral assignment agreement § 7.1). BIC covenanted that it would grant the Lenders a security interest in the Fruitpoint contract, and would not take any action that would terminate, discharge, or prejudice the validity or effectiveness of that lien (*see id.*). BIC covenanted that it would not take any action that would impair or limit: the ability of any party to comply with the amended finance agreement (*see id.* §§ 7.1 [b]); the rights of the Lenders in the Fruitpoint contract (*see id.* § 7.1 [c]); or BIC's ability to pledge and assign the receivables from the Fruitpoint contract (*see id.* § 7.1 [d]). BIC covenanted that it would not amend, waive, or modify any obligation owing to it from Fruitpoint (*see id.* § 7.4).

BIC also covenanted to deliver to BICSA a certificate on specified dates disclosing expected payments to BIC under the Fruitpoint contract (expected payment certificate), with an amended certificate to be sent within two business days, if any event occurred that made the expected payment certificate inaccurate (*see* amended finance agreement §§ 5.10 [a], [b]).

In the amended finance agreement, BIC agreed to maintain certain ratios related to BIC's cash flow coverage of the debt service through sales to Fruitpoint (*see id.* §§ 5.12, 5.14). BIC also agreed that, to the extent that it would be unable to meet such coverage, it would deposit money into the collection account to cover the expected shortfall in coverage (*see id.* §§ 5.10 [c], [d]).

In relevant part, the amended finance agreement defines an event of default to include the commencement by the Borrower or the Guarantor Defendants of "any case, proceeding or other action . . . under any existing or future law of any jurisdiction relating to bankruptcy, insolvency, reorganization or relief of debtors" (*see id.* § 7 [f]).

BIC also agreed to provide prompt written notice to BICSA and the Lenders, should any default or delineated event of default occur, pursuant to the amended finance agreement (*see id.* § 5.6).

Pursuant to the guarantee, the Guarantor Defendants unconditionally and irrevocably jointly and severally guarantied, as primary obligors, prompt payment of BIC's debt to BICSA for the benefit of the Lenders (*see* guarantee § 2).

By notice of default dated January 14, 2014, BICSA informed BIC that it was in default of the financial covenants for 2013 imposed by sections 5.14 (A) and © of the amended finance agreement.

By letter dated January 17, 2014, BIC informed BICSA and the Lenders that: (1) BIC had terminated the contract between itself and Fruitpoint because it was financially unable to purchase fruit and raw materials; (2) the termination would cause Fruitpoint to cease payments into the collection account after the December 31, 2013 shipment; (3) effective January 1, 2014,

CIB and its affiliates will sell fruit directly to Fruitpoint, and request that Fruitpoint pay CIB directly for that fruit; and (4) that CIB had filed for reorganization pursuant to the bankruptcy laws of Colombia.

By letter dated January 20, 2014, BIC admitted to BICSA that BIC was in breach of sections 5.14 (A) and © of the amended finance agreement, and that the events listed in its January 17, 2014 letter were "serious defaults."

By notice of acceleration dated January 29, 2014, BICSA, with the Lenders' authorization, advised BIC, the Guarantor Defendants, and the Guarantor Nonparties that BIC was in default of the amended finance agreement, and accelerated the maturity of the loans. In the notice, BICSA demanded payment in full of the outstanding amount, consisting of $23,747,367 in principal, together with $1,894,346.69 in accrued interest, no later than February 5, 2014.

Plaintiffs allege that BIC and the Guarantor Defendants failed to pay the accelerated debt, and failed to pay the regularly scheduled payment of principal and interest due on February 17, 2014.

On March 26, 2014, plaintiffs and Fruitpoint entered into a settlement and release agreement, pursuant to which Fruitpoint paid plaintiffs the sum of $5,103,838.72, which would otherwise have been remitted to the collection account.

Subsequently, plaintiffs commenced this action against the Borrower and the Guarantor Defendants for breach by nonpayment of the amended finance agreement, the acknowledgment agreement, collateral assignment agreement, and the guarantee. Plaintiffs seek to recover $25,231,578, the accelerated balance due, together with interest, costs, and fees.

In their answer, defendants deny all allegations of breach and misconduct, and allege affirmative defenses, including defenses based on: failure to state a cause of action; failure to mitigate damages; unjust enrichment; statute of frauds; and failure to join a necessary party.

Plaintiffs now seek summary judgment on the breach of contract cause of action asserted against BIC, the Borrower.

In opposition, defendants contend that the motion is premature, that significant discovery remains outstanding, that triable issues of material fact exist regarding the amount in controversy, and that necessary and indispensable parties have not been joined in this action. Defendants cross-move to compel plaintiffs to comply with outstanding discovery demands.

A plaintiff demonstrates a prima facie case for summary judgment on a breach of contract action where it proves the existence of a contract to pay money and the defendant's failure to pay the balance due and owing (*see Citibank (South Dakota), N.A. v Keskin,* 121 AD3d 635, 636 [2d Dept 2014]; *Yonkers Ave. Dodge, Inc. v BZ Results, LLC*, 95 AD3d 774, 774 [1st Dept 2012]; CPLR 3212).

Plaintiffs have established their entitlement to summary judgment by producing the executed amended finance agreement and related documents, and an affidavit by BICSA's credit manager, Fabio Arciniegas, in which Arciniegas details defendants' breaches (*see* Fabio Arciniegas Aug. 7, 2014 aff). "[T]he affidavit of a corporate officer with personal knowledge, together with authenticated business records, is admissible in support of a motion for summary judgment" (*IRB-Brazil Resseguros S.A. v Eldorado Trading Corp. Ltd.*, 68 AD3d 576, 577 [1st Dept 2009]).

Further, defendants do not dispute the existence of a duly executed amended finance

agreement among BICSA, the Lenders, and BIC, and the related documents. In addition, BIC does not dispute plaintiffs' allegations that: BIC received funds from the Lenders, pursuant to the terms of the amended finance agreement; BIC defaulted under that agreement; the Lenders properly accelerated BIC's payment obligations; and BIC breached that agreement by failing to pay the accelerated indebtedness, and accrued fees and expenses.

The amended finance agreement enumerates events of default (*see* amended finance agreement §§ 7 [a] - [k]), and permits BICSA and the Lenders, upon notice, to declare their financial commitments terminated and the loans, together with accrued interest and other amounts, due and payable immediately (*see id.* §§ 7 [a] - [c]).

In its January 20, 2014 letter, BIC admitted to BICSA that BIC's "non-compliance with the required [financial] ratios was expected," and that it "was not in compliance" with its contractual obligation to maintain certain ratios related to its cash flow coverage of the debt service through sales to Fruitpoint, as set forth in the amended finance agreement §§ 5.14 (A) and ©.

Further, in the January 20, 2014 letter, BIC described the events listed in its January 17, 2014 letter as "serious defaults." Those events include BIC's termination of the Fruitpoint contract because BIC was financially unable to purchase fruit and raw materials; the cessation by Fruitpoint of payments into the collection account after the December 31, 2013 shipment; the direct sale of fruit by CIB and its affiliates to Fruitpoint, effective January 1, 2014; Fruitpoint's direct payment to CIB for that fruit; and CIB's filing for reorganization, pursuant to the bankruptcy laws of Colombia.

BIC does not dispute that its unilateral transfer of the Fruitpoint receivables to CIB

breached numerous material provisions of the amended finance agreement, collateral assignment agreement, and related documents. For example, BIC failed to instruct Fruitpoint to deposit all Fruitpoint contract receivables into the collection account, in breach of amended finance agreement § 5.8 and collateral assignment agreement §§ 7.2 and 7.4.

BIC's termination of the Fruitpoint contract resulted in other breaches because the termination nullified the Lenders' security interest in the Fruitpoint contract, in breach of collateral assignment agreement §§ 7.1 (a) and (c). The termination also prevented BIC from pledging and assigning receivables from the Fruitpoint contract, in breach of collateral assignment agreement § 7.1 (d), and waived Fruitpoint's obligation to BIC, in violation of collateral assignment agreement § 7.4.

BIC's authorization of direct sales of fruit from CIB to Fruitpoint breached §6.1 of the amended finance agreement, which prohibits export sales to Fruitpoint through any entity other than BIC.

The record conclusively demonstrates that BIC did not provide the Lenders with an amended expected payment certificate, in breach of amended finance agreement §§ 5.10 (a) and (b). It also demonstrates that BIC failed to provide formal notice to BICSA and the Lenders of many of its contractual breaches, other than its breach of the financial ratios that it was required to maintain, pursuant to amended finance agreement §§ 5.14 (A) and (C).

Last, CIB's declaration of bankruptcy constitutes an event of default, as defined by section 7 (f) of the amended finance agreement.

There is no dispute that any of these breaches constitutes grounds to accelerate the balance due, pursuant to section 7 of the amended finance agreement.

Plaintiffs also seek summary judgment on the breach of contract cause of action asserted against the Guarantor Defendants.

In opposition, defendants again argue that triable issues regarding the amount of damages exist, that necessary and indispensable parties have not been joined, and that additional discovery is required.

Plaintiffs have demonstrated a prima facie right to recover under the guarantee, by producing a duly executed unconditional guarantee of payment of BIC's debt to the Lenders under the amended finance agreement, and demonstrating that the Guarantor Defendants failed to pay the accelerated indebtedness (*see* Arciniegas aff ¶¶ 11 [a], 39). "On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty" (*City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998]; CPLR 3212).

The guarantee provides, in relevant part, as follows:

> "(a) The Guarantors hereby unconditionally and irrevocably jointly and severally guarantee, as primary obligor, to [BICSA], for the ratable benefit of the Lenders and their respective successors, endorsees, transferees and assigns, the prompt and complete payment and performance by [BIC] when due (whether at the stated maturity, by acceleration or otherwise) of the Obligations. It is expressly agreed that each Guarantor waives its rights in regard to the benefit of order, the benefit of discussion and the benefit of division. . . .
> (b) The Guarantors further agree jointly and severally to pay any and all expenses (including, without limitation, all fees and disbursements of counsel) which may be paid or incurred by [BICSA] . . . or any Lender in enforcing, or obtaining advice of counsel in respect of, any rights with respect to, or collecting, any or all of the Obligations and/or enforcing any rights with respect to,

or collecting against, the Guarantors under this Guarantee"

(guarantee § 2).

The guarantee also provides, in relevant part, that "this Guarantee shall be construed as a continuing, absolute, and unconditional guarantee of payment without regard to . . . any defense, set-off or counterclaim (other than a defense of payment or performance) which may at any time be available to or be asserted by [BIC]" (guarantee § 6).

Such provisions are enforceable. It is well established that a contractual waiver-of-defense provision is enforceable, absent fraud, novation, or modification (*see Bank of Suffolk County v Kite*, 49 NY2d 827, 828 [1980]; *Quest Commercial, LLC v Rovner*, 35 AD3d 576, 576-577 [2d Dept 2006]; *Chemical Bank v Allen*, 226 AD2d 137 [1st Dept 1996]). Defendants do not argue the existence of fraud, novation or modification.

Thus, the Guarantor Defendants explicitly and knowingly agreed to pay BIC's debt to plaintiffs, and waived any right that they may otherwise have had to raise any affirmative defenses that could be asserted by BIC.

Last, plaintiffs have demonstrated that they are entitled to judgment on the issue of liability, with production of the amended finance agreement, the Arciniegas affidavit, BIC's own admissions, and BICSA's demand for payment dated January 29, 2014.

For the foregoing reasons, plaintiffs have demonstrated a prima facie entitlement to summary judgment against BIC and the Guarantor Defendants, and, therefore, the burden shifts to defendants to demonstrate the existence of a bona fide defense. "To defeat a motion for summary judgment, . . . the opposing party must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist. A bona fide triable issue must be

established and reliance upon mere suspicion or surmise is insufficient for this purpose" (*Kornfeld v NRX Tech., Inc.*, 93 AD2d 772, 773 [1st Dept 1983], *affd* 62 NY2d 686 [1984] [internal citations omitted]). Defendants have failed to sustain their burden.

Defendants have failed to demonstrate that they are entitled to further discovery. "A determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (*Ruttura & Sons Constr. Co. v J. Petrocelli Constr.*, 257 AD2d 614, 615 [2d Dept 1999]). "[A]n opposing party must demonstrate how further discovery might reveal material facts in the movant's exclusion knowledge; mere speculation will be insufficient" (*Scofield v Trustees of Union Coll. in Town of Schenectady*, 267 AD2d 651, 652 [3d Dept 1999] [internal citation omitted]).

Contrary to defendants' contention, plaintiffs' responses to Defendants' First Set of Requests for the Production of Documents to All Plaintiffs were timely served. Pursuant to this court's June 11, 2014 preliminary conference order, plaintiffs were directed to respond to those demands within 45 days after receipt of the demands. Defendants served discovery demands on July 29, 2014, and, therefore, plaintiffs' responses were due no later than September 13, 2014, a Saturday. Plaintiffs timely served Responses and Objections to Defendants' First Set by regular mail and email on Monday, September 15, 2014, the first business day after the weekend deadline (*see* NY General Construction Law § 25-a; CPLR 2103 [b] [2]). Therefore, plaintiffs did not violate the preliminary conference order.

Although in the responses and objections plaintiffs offered to meet and confer with defendants, there is no evidence in the record that defendants contacted plaintiffs. Defendants

failed to annex to the cross-motion a statement certifying that they conferred with plaintiffs in an attempt to resolve the discovery dispute prior to filing the cross-motion, in violation of section 202.7(c) of the Administrative Rules of the Unified Court System and Uniform Civil Rules of the Trial Courts.

In any event, the discovery demanded by defendants would not raise any triable issues sufficient to deny summary judgment in favor of plaintiffs.

Contrary to defendants' contention, documentation and communications between plaintiffs and Fruitpoint regarding the March 2014 settlement and release agreement are not necessary for complete relief to be granted among the parties to this action. The record shows the amount of funds plaintiffs received directly from Fruitpoint.

Similarly, the documentation and communications between the Lenders and the nonparty insurance carriers who provided insurance to the Lenders to cover the risks associated with providing financing to BIC are not relevant to the outcome of this action. The amended finance agreement binds BIC to repay the Lenders, and does not bind the insurance carriers. There is no dispute that this is not a subrogation action.

Defendants' contention that summary judgment must be denied on the ground that plaintiffs have failed to join necessary and indispensable parties, including Fruitpoint and the Lenders' insurance carriers, is without merit.

The court may dismiss an action if the court cannot proceed in the absence of an entity or person who should be a party to the action (*see* CPLR 3211 [a] [10]). Section 1001 (a) of the CPLR provides that "persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in

the action shall be made plaintiffs or defendants."

In determining whether a nonparty is indispensable, the court must consider a number of facts, including whether the plaintiffs have another, effective remedy, in the event that the action is dismissed; whether prejudice to the defendants or the unnamed party will accrue, unless the party is joined; whether, and by whom, prejudice might have been avoided; the feasibility of a protective order; and whether an effective judgment may be rendered in the absence of the party not joined (*see du Pont-de Bie v Tredegar Trust Co.*, 61 AD3d 610, 611-612 [1st Dept], *lv denied* 13 NY3d 708 [2009]; *Lewis v Proctor & Gamble, Inc.*, 18 Misc 3d 1110[A], 2007 NY Slip Op 52488[U], *2-3 [Sup Ct, NY County 2007]; CPLR 1001 [a], 1003, 3211 [a] [10]).

Here, the undisputed terms of the amended finance agreement and the guarantee establish that BIC and the Guarantor Defendants are the sole contractual parties. Defendants do not argue that the remaining guarantors are necessary parties, nor could they, given that the guarantors are expressly jointly and severally liable for BIC's debt.

Contrary to defendants' contention, Fruitpoint is not a necessary and indispensable party. Although Fruitpoint executed, and allegedly breached, an irrevocable acknowledgment agreement obligating it to distribute payments into the collection account for the benefit of plaintiffs, there is no dispute that pursuant to the March 26, 2014 settlement and release agreement, Fruitpoint paid plaintiffs directly the amount that otherwise would have been paid into the collection account for BIC's benefit. While defendants question the fact and amount of the payment, the record conclusively demonstrates that the payment was made, which must be credited toward the amount that plaintiffs seek to recover in this action.

Similarly, contrary to defendants' contention, the Lenders' insurance carriers are not

necessary and indispensable parties. Those carriers are not parties to any of the financial agreements at issue here.

Defendants argue that BIC, having paid $1,282,243.48 for insurance coverage, is entitled to discovery from plaintiffs regarding that coverage and any proceeds paid under the policies. If defendants did, indeed, purchase coverage for the benefit of the Lenders pursuant to the terms of the amended finance agreement, they can obtain information about payments, if any, made under such policies directly from the carriers. There is no indication in the record that defendants attempted to seek such information from the carriers themselves.

However, while plaintiffs have established their right to summary judgment on the issue of liability, their submissions, on their face, fail to show the absence of triable issues as to the amount of their damages.

In their cause of action for breach of contract in the complaint, plaintiffs seek to recover $25,231,578.00 in principal, together with $234,092.97 in accrued interest through February 20, 2014. However, in their summary judgment motion, plaintiffs (1) allege that accrued interest as of April 1, 2014 amounts to $515,588.14; (2) that application of the Fruitpoint payment of $5,103,838.72 "satisfied BIC's then outstanding indemnity and interest obligations, and the balance of US $4,476,852.20 has been applied to a reserve dedicated to cover future fees, expenses and interest." (Arciniegas aff ¶38 at 11; emphasis added). Plaintiffs allege that as at July 31, 2014, defendants owed $21,686,020.09 in principal.

The court's computations do not match those of plaintiffs as to the principal balance due and owing. Moreover, plaintiffs' "reserve" of the balance paid by Fruitpoint must be used to reduce any damage award. Thus, issues of fact remain as to the amount of plaintiffs' damages.

It appearing to the court that plaintiffs are entitled to judgment on liability on their claim for breach of contract, and that the only triable issue of fact arising on plaintiffs' motion for summary judgment relates to the amount of damages to which plaintiffs are entitled, it is

ORDERED that the motion is granted with regard to liability; and it is further

ORDERED that the issue of the amount of damages is hereby referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR §4317, the Special Referee shall determine the aforesaid issue; and it is further

ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Special Referee Clerk to arrange a date for the reference to a Special Referee; and it is further

ORDERED that the cross-motion is denied in its entirety.

Dated: May 7, 2015

ENTER:

Ellen M. Coin, A.J.S.C.