

Globex Intl., Inc. v Mago Foods LLC

2016 NY Slip Op 30096(U)

January 14, 2016

Supreme Court, New York County

Docket Number: 653827/2013

Judge: Saliann Scarpulla

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

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GLOBEX INTERNATIONAL, INC.,

Plaintiff,

-against-

DECISION/ ORDER
Index No. 653827/2013

MAGO FOODS LLC, and
MAGO INTERNATIONAL, LLC,

Defendants.

-----X
HON. SALIANN SCARPULLA, J.:

In this action for breach of contract and attorneys’ fees, costs, and disbursements, plaintiff Globex International, Inc. (“Globex”) moves, pursuant to CPLR § 3212, for summary judgment in the sum of \$272,312.50 against defendants Mago Foods LLC (“Mago”) and Mago International, LLC.¹

On or about March 22, 2013, Globex and Mago entered into a written sales contract, entitled “Order Confirmation/Sales Contract No. 68335-68344,” for 272,250 chicken leg quarters, at a price of \$1.25 per kilogram, for a total sale amount of \$340,312.50 (“Contract”). With respect to Mago’s payment, the Contract says: “30%

¹ In its complaint, Globex makes allegations regarding the relationship between Mago and Mago International, LLC, including that they are alter egos, and in its notice of motion for summary judgment, seeks judgment against both defendants. Yet Globex does not offer any proof of an alter ego or other relationship between these two companies, and does not pursue any discussion of this in its motion papers.

PREPAYMENT - 7 DAYS BEFORE LOADING, 70% - BALANCE AGAINST FAXED (E-MAILED) COPIES OF SHIPPING DOCUMENTS.” The amount of the prepayment was changed from 30% to 20%, which is reflected in a handwritten notation on the Contract: “20% down: \$68,000.” Originally, the Contract indicated that Dubai was the destination for the goods, but was later amended to Mersin, Turkey. The Contract is signed on the first page by Cem Sayilir (“Sayilir”), the president of Mago.

During his deposition, Sayilir testified about the Contract, and stated, in part:

Q: You said here [in your third-party complaint against ZUMRE GIDA SAN IC DIS TIC. LTD. STI. (“Zumre”)] on or about March 21, Mago and Globex entered into a contract of sale for certain quantity of poultry. Is that reflected in Mago’s Exhibit 3 that is dated the following day, March 22? Is that what you are referring to?

A: This is Dubai. No.

Q: But it was amended to Mersin at your request?

A: Later on.

Q: That’s what you are referring to, other than the amendment for Mersin, correct?

A: Yeah. I requested him to ship it to Mersin.

Q: And then that was the deal that you had reflected in Mago’s Exhibit 3, [the Contract], correct?

A: Yes.

Globex argues that it is entitled to a judgment because Mago did not perform its only contractual obligation—payment in full for the goods that it bought. Globex argues that, consistent with the Contract, it provided all of the required shipping documents to Mago, and, as a result, expected payment.

According to Globex, it provided the bill of lading to Mago on May 3, 2013, when Globex's documentation coordinator sent Mago shipping documents. In her affidavit, Anna Kameneva, the documentation coordinator for Globex, avers that she emailed Sayilir the required documents for order 68335-68344, including the Zim Integrated Shipping Services Ltd. ("Zim") bill of lading, which is annexed to her affidavit. Sayilir's acknowledgment of receipt of these documents without objection or complaint is reflected in a May 6, 2013 email reply from Sayilir, in which he states: "they are fine Anna." During his deposition, Sayilir admitted that he received a copy of the Zim bill of lading:

Q: At some point in time you obtained a copy of a Zim bill of lading, correct?

A: Yes.

The subject cargo was shipped by Zim, and, although Zim set the shipment's estimated time of arrival as May 26, 2013, it arrived in Mersin, Turkey on May 20, 2013.

Globex also relies on a set of May 23, 2013 emails between Vince McBean of Globex and Sayilir, to establish that the Contract represented a meeting of the minds on all terms. McBean writes: "In the meantime please confirm when you will be sending us the final payment for order 68335-68344," and in response, Sayilir states: "yes, i will pay on 26th."

Globex's complaint contains two causes of action: (1) a breach of contract claim; and (2) a claim for attorneys' fees, costs, and disbursements. In its answer, Mago

“admit[s] that [it] entered into a contract with Globex to ship poultry, valued at \$340,312.50 (the ‘Cargo’), to Mersin, Turkey.” The answer contains a counterclaim for breach of contract, and Mago also commenced a third-party action against Zumre.²

In Mago’s counterclaim, it states that “[o]n or about March 21, 2013, Mago Foods and Globex entered into an oral contract by which Globex agreed to ship the Cargo to Mersin, Turkey, and sell the Cargo to the Buyer.” As for the Contract, Mago states in a footnote:

On or about March 22, 2013, Globex emailed a document entitled Order Confirmation/ Sales Contract to Mago Foods. Mago Foods rejected the terms set forth in the document, and neither Mago Foods nor Mago International ever signed the document. The document does not reflect any agreement between the parties.

In its counterclaim, Mago further states that Globex shipped the subject cargo to Mersin, Turkey, but “Globex never effectuated a sale of the Cargo.” Mago states, “Globex released the Cargo before the Buyer paid for it,” and, therefore, “Mago Foods was left with nothing—it had no Cargo and received no proceeds from its sale.” Mago alleges that it contacted the buyer for payment numerous times, but the buyer has refused to pay. Thus, according to Mago, Globex’s breach was that it “fail[ed] to sell the Cargo

² The crux of Mago’s third-party complaint is that Mago contracted with Zumre, “a purchaser and wholesale importer of goods, including poultry,” located in Turkey, for the sale of the subject cargo that was to be shipped by Globex. According to Mago, “GLOBEX was to hold the Cargo upon its arrival in Turkey until ZUMRE - the Buyer - paid for it. Once ZUMRE paid, GLOBEX was to release the Cargo.” Mago alleges that, although Zumre did not pay, Globex released the Cargo to Zumre.

in exchange for the agreed-upon sum from the Buyer. Rather, Globex released the Cargo and Mago Foods never received proceeds from its sale.”

Discussion

I. Globex's breach of contract claim

Globex argues that it is entitled to summary judgment on its breach of contract claim, as there is uncontroverted evidence that Mago breached the written Contract for the sale of poultry when it did not pay the outstanding balance.

“[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant successfully makes its *prima facie* showing, “the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*id.*).

In New York, a plaintiff alleging a claim for breach of contract must establish “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages” (*Harris v. Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

In order to establish the existence of a written contract between Globex and Mago, Globex relies on a copy of the signed “Order Confirmation/Sales Contract.” The first

page of the Contract is signed by a representative of Globex—Sayilir. It states that chicken leg quarters are sold to Mago at a cost of \$340,312.50. The payment terms are written as: “30% PREPAYMENT - 7 DAYS BEFORE LOADING, 70% - BALANCE AGAINST FAXED (E-MAILED) COPIES OF SHIPPING DOCUMENTS.”

During his deposition, Sayilir was asked if he signed this document:

Q: Is that an order confirmation sales contract between Mago Foods and Globex International?

...

A: Yeah. This is order confirmation, 20 percent, yeah.

Q: And you signed that; did you not?

A: Yes, I signed it.

In its memorandum in opposition to Globex’s motion, Mago concedes the existence of the written Contract, yet, in its counterclaim, Mago pleads the existence of an oral agreement and denies the validity of the written Contract, stating that it was unsigned. Further, during his deposition, Sayilir testified that he thought the agreement was oral, and that there was no signed agreement. He then conceded that he signed a “sales contract,” and testified that the oral agreement between Globex and Mago was “reduced to writing.” In response to an interrogatory, Mago responded: “Defendants do not contend the contract is an oral contract.”

Globex argues that it satisfied the Contract by shipping the goods to Mersin, Turkey and emailing the shipping documents to Mago, as agreed. Globex further argues that it has satisfied the third and fourth elements of a breach of contract claim by

establishing that, despite receipt of the shipping documents, Mago did not pay the remaining 80% balance of \$272,312.50, due on the Contract with Globex. On this point, Globex argues that Mago satisfied only a fraction of its contractual obligations when it paid the 20% prepayment deposit to Globex on April 11, 2013.

In opposition, Mago argues that Globex did not satisfy its obligations under the Contract, because Mago did not receive a bill of lading or proof of insurance. Mago argues: “Globex did not provide Mago with a bill of lading or proof of insurance as required by UCC § 2-320 (2) (a) & (c).” Mago states that the Contract is “a CIF contract” and, therefore,

constitutes a sale of goods by delivery not of goods but of documents; e.g. a bill of lading, invoice and policy or certificate of insurance, and that it is incumbent on the seller to deliver or tender delivery of the documents to the buyer within a reasonable time after the date agreed upon for the shipment of the goods.

Based upon the proof set forth by Globex, the Court finds there is no question of fact that the written Contract existed between the parties. Likewise, there is no question of fact with respect to Mago’s receipt of the bill of lading. As noted by Globex in its papers, there is no proof that Mago raised lack of a bill of lading as an issue prior to this litigation. Kameneva’s affidavit testimony that she sent the bill of lading to Mago, Sayilir’s email responses that he received Globex’s claim documents, by stating that “they are fine,” and his later email response that he will pay the balance on the shipment, support a finding that Mago received the bill of lading. Similarly, according to the

submissions, Mago never raised lack of proof of insurance at any point during the pre-litigation dealings between the parties. Additionally, according to the affidavit of Svetlana Dushin on behalf of Globex, the subject cargo was insured.

Under the New York Uniform Commercial Code (“UCC”), § 2-320, entitled “C.I.F. and C. & F. Terms,” requires, *inter alia*, that a seller, at his own expense, deliver the sold goods to the carrier, procure a bill of lading and insurance, “prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract,” unless the parties agree otherwise (UCC 2-320 [2] [d]). Additionally, unless the parties agree otherwise, “the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents” (UCC 2-320[4]). Pursuant to the first comment of the statute, “[d]elivery to the carrier is delivery to the buyer for purposes of risk and ‘title’” (UCC 2-320, Comment 1). Importantly, with respect to the seller’s provision of the certificate of insurance to the buyer:

The seller’s failure to tender a proper insurance document is waived if the buyer refuses to make payment on other and untenable grounds at a time when proper insurance could have been obtained and tendered by the seller if timely objection had been made

(UCC 2-320, Comment 9).

Here, according to the emails, Mago did not withhold payment on the ground of Globex’s failure to provide it with the insurance certificate. In fact, this alleged failure

by Globex is not raised anywhere in the record, other than Mago 's memorandum of law in opposition to Globex's motion. Accordingly, this objection is waived pursuant to the UCC. In sum, I find that Globex met its obligations under the Contract. Mago 's failure to make its payment due under the Contract on May 3, 2013, when it was emailed the shipping documents, is a breach thereof. Mago 's reasons for its failure to pay Globex for the shipment are either waived by the UCC, not valid, as Globex has irrefutably established that it provided Mago with the bill of lading, or not related to the obligations set forth under the Contract.

While it is true that Globex did not seek summary judgment on Mago's counterclaim in its notice of motion, nor did not put forth any arguments specifically directed at this relief in its moving papers, because Mago's breach of contract counterclaim is based on the same contract and the same set of factual circumstances at issue in Globex's breach of contract cause of action, the Court searches the record and dismisses Mago's breach of contract counterclaim as against Globex (*cf. LD Exch., Inc. v. Orion Telecomms. Corp.*, 755 NYS2d 630, 631 [2d Dept 2003] [affirming denial of summary judgment on a breach of contract claim due to questions of fact, and stating that because of this "and since the defendant's counterclaim is based upon the same facts and thus, is inextricably interwoven with that claim, and in light of the plaintiff's failure to move for dismissal on the counterclaim, we decline to search the record and dismiss the counterclaim."]). To the extent that Mago's counterclaim presents two causes of

action—one for breach of contract and another for the breach of an implied covenant of good faith and fair dealing—the cause of action for breach of an implied covenant of good faith and fair dealing must also be dismissed (*Starvest Partners II, L.P. v. Emportal, Inc.*, 101 AD3d 610, 613 [1st Dept 2012] [citation omitted] [“Moreover, a claim for breach of the implied covenant of good faith and fair dealing ‘may not be used as a substitute for a nonviable claim of breach of contract.’”]).

As stated above, although Mago alleges that it entered into an oral contract with Globex “by which Globex agreed to ship the Cargo to Mersin, Turkey, and sell the Cargo to the Buyer,” this allegation is conclusively refuted by testamentary and documentary evidence. Mago concedes that the Contract is a CIF contract, and, accordingly, Mago did not perform under the contract when it did not pay Globex after receiving the shipping documents via email (*see* UCC 2-320, Comment 1). As noted above, Mago’s belated argument that it did not receive an insurance certificate is waived. Additionally, Mago’s reference to UCC Comment 12 for “options and remedies in the case of improper delivery” is inapplicable because that Comment presupposes payment upon presentment of the shipping documents.³ Moreover, nothing in the Contract requires

³ See UCC 2-320, Comment 12 (emphasis added) (Under a C.I.F. contract the buyer, as under the common law, *must pay the price upon tender of the required documents without first inspecting the goods*, but his payment in these circumstances does not constitute an acceptance of the goods nor does it impair his right of subsequent inspection or his options and remedies in the case of improper delivery. All remedies and rights for the seller’s breach are

Globex to “sell the Cargo to the Buyer,” as alleged in its Answer and Counterclaim.

Thus, issues related to Globex’s alleged improper release of goods to the consignee on the bill of lading, Aby Yatirium, do not raise questions of fact.

II. Globex's claim for attorneys' fees

Globex seeks an award of its attorneys’ fees as against Mago, pursuant to the terms of the Contract. The Contract contains the language: “[t]he prevailing party shall be entitled to recover reasonable attorney’s fees incurred by it.” Because Globex is the prevailing party under the terms of the Contract, the Court awards it attorneys’ fees against Mago in an amount to be determined at a hearing.

In accordance with the foregoing, it is

ORDERED that the Court grants plaintiff Globex International Inc.’s motion for summary judgment on the complaint (mot seq 001) and the Clerk is directed to enter judgment in favor of plaintiff Globex International, Inc. and against defendant Mago Foods LLC in the amount of \$272,312.50, together with the interest at the statutory rate from the date of May 3, 2013 until the date of the decision on this motion, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of

reserved to him. The buyer must pay before inspection and assert his remedy against the seller afterward unless the nonconformity of the goods amounts to a real failure of consideration, since the purpose of choosing this form of contract is to give the seller protection against the buyer’s unjustifiable rejection of the goods at a distant port of destination which would necessitate taking possession of the goods and suing the buyer there.).

costs; and it is further

ORDERED that upon a search of the record, the Court grants summary judgment to plaintiff Globex International Inc. on defendant Mago Foods LLC's counterclaim, the counterclaim is dismissed in its entirety, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the portion of Globex International Inc.'s action that seeks the recovery of attorney's fees as against defendant Mago Foods LLC is severed and the issue of the amount of reasonable attorneys' fees Globex International Inc.'s may recover against defendant Mago Foods LLC is referred to a Special Referee to hear and report to this Court, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR § 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that counsel for Globex International Inc. shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M, 60 Centre Street), who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date; and it is further

ORDERED that Globex International Inc.'s motion for attorneys' fees 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 or the designated referee; and it is further

ORDERED that the third-party complaint of Mago Foods LLC is severed and shall continue.

This constitutes the decision and order of this Court.

Dated: New York, New York
January 14, 2016

ENTER:



SALIANN SCARPULLA, JSC