Bank of India, N.Y. Branch v Essar Steel Holdings Ltd.
2017 NY Slip Op 32032(U)
September 25, 2017
Supreme Court, New York County
Docket Number: 655315/2016
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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BANK OF INDIA, NEW YORK BRANCH

Plaintiff,

- v -

ESSAR STEEL HOLDINGS LIMITED,

Defendant.

INDEX NO. 655315/2016

MOTION DATE 1/6/2017

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40

were read on this application to/for Dismiss

HON. SALIANN SCARPULLA:

In this breach of contract action, plaintiff Bank of India, New York Branch ("BOI-NY") seeks damages for the failure of defendant Defendant Essar Steel Holdings Limited ("Essar") to reimburse BOI-NY for payments that it made under a standby letter of credit. Essar moves to dismiss the complaint, pursuant to CPLR 3211 (a) (8), for lack of personal jurisdiction. Essar contends that it is a foreign corporation without any presence in New York, and that it did not transact any purposeful business here related to the letter of credit. BOI-NY counters that Essar negotiated and entered into the letter of credit in New York, was obligated to make payment here, and reached into the state numerous

time by email and phone regarding extensions and modifications to the same letter of credit.

Background

BOI-NY is the licensed branch of an Indian banking corporation, with an office at 277 Park Avenue in Manhattan. Essar is a corporation organized under the laws of Mauritius, with its principal place of business there.

On March 5, 2007, Essar entered into a purchase agreement with Minnesota Steel Industry LLC, which required it to obtain a $6 million standby letter of credit (SLC) in favor of the State of Minnesota. Essar contacted BOI-NY in New York to negotiate for BOI-NY to issue the SLC (Sharma aff, ¶ 3). On October 12, 2007, Essar then entered into several related agreements with BOI-NY to effectuate the SLC (*id.*, ¶ 4). First, Essar executed, in New York, an SLC agreement (the SLC Agreement), by which Essar agreed to reimburse and indemnify BOI-NY for all amounts it paid under the SLC (*id.*, ¶ 5). The SLC Agreement indicates, at the top of the first page: "Place: NEW YORK" (Sharma aff, exhibit B at 1).

Essar then entered into a letter of credit security agreement, also executed in New York (Sharma aff, exhibit C). It next executed a security and pledge agreement, pledging its interest in a certificate of deposit that it was going to maintain in an account at BOI-NY, in the principal amount of $1.5 million, and a letter of set-off and appropriation in favor of BOI-NY (Set-Off Letter) (Sharma aff, exhibits D and E). The Set-Off Letter, like the SLC Agreement, indicated on the first page that it was executed in New York

(Sharma aff, exhibit E at 1). Essar directed BOI-NY, in writing, to courier the SLC advice to the law firm representing the State of Minnesota (Sharma aff, exhibits F and G).

On July 8, 2008, Essar negotiated with BOI-NY, by letter and follow up email, for an extension of the SLC Agreement until October 18, 2009 (Sharma aff, ¶ 9; exhibit H). Essar sought and obtained from BOI-NY additional yearly extensions of the SLC Agreement from 2009 through 2015 (Sharma aff, exhibits I and J). On December 19, 2014, BOI-NY issued its final extension of the SLC Agreement (Sharma aff, exhibit K).

On December 15, 2015, the State of Minnesota demanded payment from BOI-NY of the drawing amount of $6 million under the SLC (Sharma aff, exhibit L). On that same day, Essar sent a letter to BOI-NY requesting that BOI-NY honor the SLC and make payment to the State of Minnesota (Sharma aff, exhibit M). BOI-NY performed its obligations and released the $6 million to the State of Minnesota on December 15, 2015 (Sharma aff, ¶ 15; complaint, ¶ 14). Essar then failed to pay BOI-NY under the SLC.

BOI-NY commenced this action for breach of contract for Essar's alleged breach of the SLC Agreement. In moving to dismiss for lack of personal jurisdiction, Essar argues that there is no general personal jurisdiction over it, because it was not incorporated and did not have a principal place of business in New York, and was not doing business here (*see* aff of Sushil Baid in support). It urges that it is not subject to long-arm jurisdiction under CPLR 302, because it did not transact business here. It contends that its promise to make payment to a New York corporation does not confer long-arm jurisdiction over it. It argues that sending payments to New York, and

corresponding and phoning BOI-NY in New York, also are an insufficient basis for personal jurisdiction.

BOI-NY responds by submitting the affidavit of it vice-president and acting chief executive, Sunil Sharma, who attests that Essar reached into New York to negotiate and then execute the contracts with BOI-NY; subsequently negotiated seven extensions and modifications of the SLC Agreement over the course of seven years; deposited a $1.5 million certificate of deposit with BOI-NY in an account in New York; contacted BOI-NY in New York to induce it to perform its obligations and to pay under the SLC; and agreed to repay BOI-NY in New York (Shamar aff, ¶¶ 3-14). BOI-NY argues that these jurisdictional facts clearly exceed the threshold required to demonstrate that Essar is subject to jurisdiction here.

Discussion

On a CPLR 3211 motion to dismiss, plaintiff's complaint is afforded a liberal construction, and the facts therein are accepted as true, the plaintiff is accorded the benefit of all possible favorable inferences, and the court determines only if the facts alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The court may consider affidavits submitted by the plaintiff to remedy any defects in the pleading to determine whether the plaintiff has a cause of action, not whether it properly labeled or artfully stated one (*Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 52 [2016]). While the ultimate burden of proof lies with the party asserting jurisdiction, to successfully oppose a motion to dismiss for lack of personal jurisdiction, "the plaintiff need only make a prima facie showing that the defendant was

subject to the personal jurisdiction of the court" (*America/Intl. 1994 Venture v Mau*, 146 AD3d 40, 51 [2d Dept 2016]; *see also Nick v Schneider*, 150 AD3d 1250, 1251 [2d Dept 2017]).

Under New York's long-arm statute (CPLR 302 [a] [1]), personal jurisdiction may be exercised over a defendant which transacts business that is substantially related to the plaintiff's claims. Specifically, the statute provides, in relevant part,

> "(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent:
>
> 1. transacts any business within the state or contracts anywhere to supply good or services in the state"

(CPLR 302 [a] [1]). The inquiry under this provision is twofold: "under the first prong the defendant must have conducted sufficient activities to have transacted business in the state, and under the second prong, the claims must arise from the transactions" (*Rushaid v Pictet & Cie*, 28 NY3d 316, 323 [2016]; *see D&R Global Selections, S.L. v Bodega Olegario Falcon Pineiro*, 29 NY3d 292, 298 [2017]).

The transacting business requirement requires fewer contacts than doing business under CPLR 301, and, in fact, may be satisfied by proof of one transaction, so long as the claim arises from that very transaction (*Rushaid v Pictet & Cie*, 28 NY3d at 323 n 4). Jurisdiction is proper even if the defendant never physically enters the state, "so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" (*Fischbarg v Doucet*, 9 NY3d 375, 380

[2007] [internal quotation marks and citation omitted]). The requirement of purposeful, not passive, activity means intended or volitional activity by defendant constituting a transaction of business (*see Rushaid v Pictet & Cie*, 28 NY3d at 326-327; *Licci v Lebanese Can. Bank, SAL*, 20 NY3d 327, 340 [2012]). The plaintiff's claim must have an "articulable nexus" or "substantial relationship" with the defendant's transaction of business, and this inquiry is relatively permissive, just so long as the claim is not "completely unmoored" from the transaction (*D&R Global Selections, S.L. v Bodega Olegario Falcon Pineiro*, 29 NY3d at 298-299 [internal quotation marks and citations omitted]).

In addition, the court's assertion of jurisdiction over a defendant must also comport with due process, that is, it must be predicated on defendant's minimum contacts with New York (*George Reiner & Co. v Schwartz*, 41 NY2d 648, 650 [1977]; *International Shoe Co. v Washington*, 326 US 310, 316 [1945]). This requires finding an act by which the defendant "purposefully avails itself of the privilege of conducting activities within [New York], thus invoking the benefits and protections of its laws" (*George Reiner & Co. v Schwartz*, 41 NY2d at 650-651 [internal quotation marks, citation, and emphasis omitted]; *see also Licci v Lebanese Can. Bank, SAL*, 20 NY3d at 338).

In this case, BOI-NY has met its prima facie burden of demonstrating that its claim arose from Essar's transaction of business in New York under CPLR 302 (a) (1). It has presented proof, not contradicted by Essar, that Essar reached into New York to negotiate the contracts, and executed them in New York (Sharma aff, ¶¶ 3-5, and exhibits

B, C, D, and E). In fact, the SLC Agreement clearly states, at the top of the first page, "Place: NEW YORK," indicating that it was executed here (Sharma aff, exhibit B at 1). In addition, BOI-NY presented proof that, in connection with the pledge and security agreement, which was part of the parties' transaction, Essar pledged its interest in a certificate of deposit, in the principal amount of $1.5 million, maintained in Essar's account at BOI-NY, as partial security for its obligations under the SLC (Sharma aff, ¶ 7, and exhibit D).

Moreover, for seven years after the initial transaction, Essar reached out to BOI-NY to negotiate modifications and extensions of those agreements (Sharma aff, ¶¶ 9-12). The transaction was the foundation for the continuing relationship between the parties, which lasted for seven years, with Essar reaching out to BOI-NY by phone and email to negotiate for the modifications and extensions of the SLC Agreement. Further, the letter of credit security agreement, and the security agreement for the pledge of the certificate of deposit, both provided for the application of New York law (Sharma aff, exhibit C, § 13; Sharma aff, exhibit D, § 17). In sum, Essar purposefully availed itself of New York law by engaging in those negotiations, executing the contracts in New York, and establishing a continuing relationship between the parties (*see Wilson v Dantas*, 128 AD3d 176, 181-184 [1st Dept 2015], *affd* 29 NY3d 1051 [2017]). Thus, viewing the transaction as a whole, and based on the totality of the circumstances, Essar can be said to have transacted business in New York (*id.* at 183-184).

As to the second prong of the test, BOI-NY's claim clearly arises from Essar's New York transactions. The standard only requires a plaintiff to show that "in light of all

the circumstances, there [is] an articulable nexus or substantial relationship between the business transaction and the claim asserted" (*Licci v Lebanese Can. Bank, SAL*, 20 NY3d at 339 [internal quotation marks and citation omitted]). BOI-NY's claims arise from the SLC, and all of Essar's New York contacts are related to that agreement.

Finally, a finding that New York courts have personal jurisdiction over Essar also comports with due process. "So long as a party avails itself of the benefits of the forum, has sufficient minimum contacts with it, and should reasonably expect to defend its actions there, due process is not offended if that party is subjected to jurisdiction" (*Wilson v Dantas*, 128 AD3d at 186 [internal quotation marks omitted], quoting *Deutsche Bank Sec., Inc. v Montana Board of Invs.*, 7 NY3d 65, 71, *cert denied* 549 US 1095 [2006]). Here, Essar had sufficient minimum contacts with New York by purposefully entering the state to negotiate and execute contracts with BOI-NY, a New York entity, and those contracts established an ongoing relationship between the parties that lasted seven years. The nature and quality of Essar's New York activities are sufficient to satisfy due process.

Essar's reliance on *Magwitch, L.L.C. v Pusser's Inc.* (84 AD3d 529 [1st Dept 2011]) is unavailing as that case is distinguishable on its facts. In *Magwitch*, the defendant, a company incorporated in the British Virgin Islands (BVI), executed a promissory note in favor of a bank in BVI, and the plaintiff, a New York corporation, purchased the note, through an assignment agreement, at a discounted price. That assignment agreement was governed by BVI law, and was executed in the BVI by all parties except plaintiff, who signed it in New Jersey, where plaintiff's sole owner and

manager resided. The assignment of the security agreements was signed in the BVI by defendant Charles Tobias, a BVI resident who controlled the corporate defendants, and was governed by BVI law. The Court found no basis for jurisdiction under CPLR 302 (a) (1), because it determined that defendants' actions in simply sending payments to a New York bank account and in corresponding to a New York address and having phone conversations with the plaintiff's principal while he was in New York, did not amount to purposeful activity by which they availed themselves of the privilege of conducting business in the state (*Magwitch, LLC v Pusser's Inc.*, 84 AD3d at 531).

Here, in contrast, Essar negotiated and signed the SLC and accompanying agreements, some of which were explicitly governed by New York law, in New York; Essar also reached out to negotiate extensions of the SLC Agreement numerous times over the course of seven years through emails and letters to BOI-NY in New York. The SLC was issued in New York, and Essar was obligated to perform the contracts in New York. In addition, Essar had a bank account in New York with BOI-NY. Unlike the defendants in *Magwitch*, Essar purposely availed itself of the benefits of transacting business here (*cf. Shalik v Coleman*, 111 AD3d 816 [2d Dept 2013] [insufficient basis for jurisdiction where foreign defendant only made note payments to plaintiff's New York office and contacted plaintiff there by phone and email]; *First Natl. Bank & Trust Co. v Wilson*, 171 AD2d 616 [1st Dept 1991] [out-of-state note payable in New York not enough for jurisdiction over non-domiciliary]).

Accordingly, it is

ORDERED that the defendant's motion to dismiss based on lack of personal jurisdiction is denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on November 1, 2017 at 2:15 p.m.

This constitutes the decision and order of the Court.

9/25/2017
DATE

Saliann Scarpulla
SALIANN SCARPULLA, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE