SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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VANPOY CORP. S.R.L.,

Plaintiff,

-against-

SOLEIL CHARTERED BANK and
SOLEIL CAPITAL CORPORATION,

Defendants.

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DECISION and ORDER

Index No.: 650406/17

Motion Seq. 002

NANCY M. BANNON, J.

Plaintiff, a Costa Rican company, seeks to recover on a standby letter of credit (SLC). Defendants move, pursuant to CPLR 327 (a), 3211 (a) (7), and 3211 (a) (8), to dismiss the amended verified complaint.

Defendant Soleil Chartered Bank (SCB) moves for dismissal, arguing that it is registered in the Union of Comoros and, therefore, not subject to this court's jurisdiction. Plaintiff argues that jurisdiction is proper under CPLR 301 and 302 (a) (2), or alternatively, that defendant SCB and Soleil Capital Corporation (SCC), are alter egos, so that jurisdiction over SCC confers jurisdiction over SCB.

Concerning general jurisdiction, the complaint alleges that SCB is engaged in business operations in New York, with a New York telephone number and a primary office located at 55 Wall Street. In its opposition papers, to meet its burden to demonstrate jurisdiction, plaintiff points: (1) to the SLC, which, on its face, indicates that it was issued from the 55 Wall Street address, and (2) to SLC correspondence about the transaction with the same address. Plaintiff also submits an affidavit of service of the verified amended complaint (complaint) upon SCB,

which shows that service was made in New York, upon Adhar Srivastava, an officer and authorized agent of SCB. The service papers contain a copy of the supplemental summons, which appears to have been signed by Adhar Srivastava. Plaintiff submits the affidavit of its officer, Roberto Zukelman, who avers that he personally met with officers of SCB at the Wall Street office and that SCB at all times held itself out as conducting business in New York.

"[A] court may assert general jurisdiction over foreign . . . corporations to hear any and all claims against them when their affiliations with the State are so continuous and systematic as to render them essentially at home in the forum State" (*Daimler AG v Bauman*, 571 US 117, 127 [2014] [internal quotation marks and citation omitted]). Absent exceptional circumstances, home for a registered business entity is either where it is incorporated or where it has its principal place of business (*id.* at 137). Therefore, "[g]eneral jurisdiction . . . calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide" (*id.* at 139, n 20).

The two affirmations of Ravi Verma, SCB's officer, are remarkable for what they do not address: (1) the principal place of business or headquarters of SCB or what relative portion of SCB's business is conducted in New York, versus its other offices. Instead, Verma addresses the percentages of letters of credit issued by SCB for underlying transactions that are outside the State and the percentage of letters of credit issued for the benefit of New York entities. This does not directly address where SCB is primarily conducted its own business endeavors, or even show that SCB's business is limited to letters of credit. Conversely, plaintiff has sufficiently demonstrated New York contacts and that facts may exist to exercise personal jurisdiction over SCB to entitle it to conduct discovery on the issue of jurisdiction or to warrant a hearing and receipt of additional evidence in testimonial or documentary form (*see* CPLR 3211 [d]; *Peterson*

v Spartan Indus., 33 NY2d 463, 467 [1974]). Plaintiff's separate assertion of jurisdiction based on "tagging" an SCB officer in New York, suggests that SCB may have New York-based officers, but this is not alone sufficient to demonstrate general jurisdiction (*BaumanMartinez v Aero Caribbean*, 764 F3d 1062, 1064 [9th Cir 2014] [determining that *Burnham v Superior Court* (495 US 604, 110 [1990] [tagging jurisdiction upon individuals]), does not apply to corporations where the question is whether or not the *corporation* is at home in the state; *see Brandow v Murray & Tregurtha Corp.*, 203 App Div 47, 49 [1st Dept 1922] [officer served with process during isolated business transaction does not confer jurisdiction absent corporation's presence]).

Under the CPLR 302 (a) (1) jurisdictional analysis, a defendant must have conducted sufficient activities to have transacted business in the state and plaintiff's claims must arise from those transactions (*Al Rushaid v Pictet & Cie*, 28 NY3d 316, 323 [2016]). A "purely ministerial" act of merely executing a contract in New York, negotiated elsewhere, is likely "insufficient to confer personal jurisdiction" (*see Wilson v Dantas*, 128 AD3d 176, 183 [1st Dept 2015], *affd* 29 NY3d 1051 [2017]). Conversely, a party that never physically enters New York may be held to transact business in the State when its activities here are purposeful and there is a nexus between the transaction and the claim asserted (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 1988]; *see Al Rushaid*, 28 NY3d at 323).

The business transaction that is the subject of this action is the application, issuance and payment of the SLC, as opposed to the underlying fish sale transaction (*Nissho Iwai Europe v Korea First Bank*, 99 NY2d 115, 120 [2002] ["[L]etters of credit depend upon the certainty of payment to the beneficiary, [therefore,] the issuer's obligation is independent of the rights and

liabilities of the parties to the underlying contract"]). A letter of credit is a "commercial instrument . . . that provide[s] a seller or lender with a guaranteed means of payment from a creditworthy third party in lieu of relying solely on the financial status of a buyer or borrower" (NY PJI 4:1, Comment VII (V), citing *Nissho Iwai Europe PLC*, 99 NY2d 115; *BasicNet S.p.A. v CFP Servs. Inc.*, 127 AD3d 157, 167-168 [1st Dept 2015]).

As stated above, SCB has an office in New York which is the only address reflected on the face of the SLC. Consequently, for purposes of this motion, where inferences are drawn in favor of the nonmoving party (*Wilson*, 128 AD3d at 181), the SLC is presumed to have been issued by SCB in New York. As the SLC's terms specify that payment was at SCB's counter, without reference to any address other than its New York address in the document, the intended location of performance of the SLC must be presumed to be New York (*Shin-Etsu Chem. Co., Ltd. v ICICI Bank Ltd.*, 9 AD3d 171, 176 [1st Dept 2004] [concerning forum non conveniens, citing *Canadian Imperial Bank of Commerce v Pamukbank Tas.*, 166 Misc 2d 647, 651–652, 654 [Sup Court, NY County] for the proposition that the place of issuance of letter of credit is considered the place of performance, and the law of that country the governing law]). The banking system (SWIFT) correspondence that plaintiff submits indicates that correspondence and a payment made on the SLC came from SCB's New York office (*see* plaintiff's opposition, exhibit G). Furthermore, Robert Zuckelman of SCB affirms that plaintiff met with SCB representatives in New York regarding payments under the SLC (*id.*, exhibit H [Zuckelman affirmation, ¶ 9]). These facts demonstrate the transaction of business in New York and "an articulable nexus or substantial relationship between the business transaction [issuance and performance of the SLC] and the claim asserted [,]" the failure to pay out on the SLC (*Wilson*,

128 AD3d at 184 [internal quotation marks and citations omitted]). Regarding that relationship, "causation is not required, and . . . the inquiry under the statute is relatively permissive" (*id.* [internal quotation marks and citations omitted]). The totality of the circumstances suffice to show minimum contacts with the state, and defendants' motion is denied, making it unnecessary to reach the question of alter ego jurisdiction.

The "heavy burden" to demonstrate that New York is not a convenient forum is on the defendant (*Banco Ambrosiano v Artoc Bank & Trust.*, 62 NY2d 65, 74 [1984]; *Yoshida Print. Co. v Aiba,* 213 AD2d 275, 275 [1st Dept 1995] [same]; *see also OrthoTec, LLC v Healthpoint Capital, LLC,* 84 AD3d 702, 702-03 [1st Dept 2011] ["'Generally, unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.' This is true even though plaintiff is not a New York resident" [citations omitted]).

Defendants argue that this forum is not convenient because the letter of credit was issued by a Union of Cormoros bank upon request of a Benin company, for the benefit of a Costa Rican company, for goods shipped from Argentina to Bemin. While defendants' counsel also argues that there are no witnesses in New York, and that the relevant documents are largely located in Costa Rica, the two SCB (Vermi) affidavits submitted on behalf of defendants, contain only conclusory assertions that the forum non conveniences factors have not been met and no demonstration that witness testimony could not be offered here (*Yoshida Print. Co.*, 213 AD2d at 275). Clearly plaintiffs are willing to come to New York (*id.*). While defendants do not discuss or name a witness, plaintiff's corporate officer affirms that he corresponded about the SLC with Govind Srivastava, who held himself out as principal or officer of SCB. The record includes copies of such correspondence. Plaintiff also provides website information from SCC, which is

registered in New York, which shows that Govind Srivastava is the CEO of SCC and a pleading in which SCC interposed counterclaims in New York in a separate action. This suggests that this witness should be available here. Defendants do not demonstrate otherwise. Defendants' assertion that this dispute will be governed by foreign law is unsupported.

Defendants fail to address why SCB, which has an office in New York and, apparently, issued the SLC from that office, and corresponded from and met with plaintiff there, would not be able to produce the documents presented by plaintiff to draw on the SLC. Defendants do not identify documents required to defend against the claim that would be unavailable. The bulk of the documents submitted suggest that many are primarily written in English and defendants make no showing of a burden on the court, or a convincing showing of hardship, sufficient to disturb plaintiff's choice of forum (*Pacific Alliance Asia Opportunity Fund L.P. v Kwok Ho Wan*, 160 AD3d 452, 453 [1st Dept 2018]). While, indeed, as defendants argue, there may be other forums where plaintiff could obtain jurisdiction, this is only one factor, and defendants' conclusory showing on the motion does not carry their burden.

As for the CPLR 3211 (a) (7) motion, the causes of action for unjust enrichment and negligent misrepresentation are dismissed against both defendants as duplicative of the contract claim (*OP Solutions, Inc. v Crowell & Moring, LLP*, 72 AD3d 622, 622 [1st Dept 2010]; *Unclaimed Prop. Recovery Serv., Inc. v UBS PaineWebber Inc.*, 58 AD3d 526, 526 [1st Dept 2009]). Plaintiff also does not allege a special relationship to support the negligent misrepresentation claim (*Baby Phat Holding Co., LLC v Kellwood Co.*, 123 AD3d 405, 408), or a duty extraneous to the SLC to support a tort claim (*OP Solutions, Inc.*, 72 AD3d at 622).

"An account stated is an agreement between parties to an account based upon prior

transactions between them with respect to the correctness of the account items and balance due" (*Ryan Graphics, Inc. v Bailin*, 39 AD3d 249, 250 [1st Dept 2007] [internal quotation marks and citation omitted]). Plaintiff alleges that it sent demands for payment of a sum to defendants on multiple occasions, which were not paid or disputed, and that, thereafter, SCB made partial payment to plaintiff. Defendants' sole argument for dismissal against SCB, that plaintiff does not allege that any invoices were sent to defendants, lacks authority to demonstrate that only invoices suffice to demonstrate the claim.[1]

All of the claims are dismissed against SCC because plaintiff's basis for them is veil piercing, based upon an alter ego theory for jurisdiction purposes, and specifically that SCB is a mere department of parent SCC. However, in separately determining whether or not the complaint demonstrates corporate veil piercing allegations sufficient to impose liability on SCC for failure to pay out on the SLC, when SCC did not issue the SLC, the complaint is devoid of allegations showing SCC's use of SCB in a wrongful or illegal manner to thwart payment to plaintiff. Addressing *Baby Phat Holding Co.* (123 AD3d 405), cited to by defendants, plaintiff argues that an alter ego theory may be employed by a plaintiff to recover for breach of contract. This is correct where there are factual allegations demonstrating the use of domination and control over a subsidiary in a wrongful manner in order to avoid liability, such as by rendering the contracting entity incapable of honoring its obligation, or some other perversion of the corporate form. The complaint is devoid of allegations of SCC's use of domination and control over SCB in order to render SCB incapable of honoring an obligation, or other indicia that, when

[1] Defendants have not argued or provided authority to demonstrate that account stated claims do not arise from letters of credit. Consequently, this is not addressed here, and whether plaintiff ultimately can prevail on this claim is not adjudicated on a CPLR 3211 motion.

executing the SLC, SCC made misrepresentations or engaged in wrongdoing (*see id.* at 407-408).

As plaintiff does not sufficiently allege veil piercing factors, dismissal of the account stated against SCC is also warranted because the complaint only alleges a contract with SCB (*Unclaimed Prop. Recovery Serv., Inc.*, 58 AD3d at 526 ["In the absence of a claim establishing underlying liability, the account stated claim was not viable"]). Consequently, there is no antecedent liability to SCC, concerning which the parties later formed an agreement as to an amount that remained owed.

Defendants' argument that there is no contract with SCB, raised for the first time in reply, may not be considered (*Residential Bd. of Managers of Platinum v 46th St. Dev., LLC*, 154 AD3d 422, 423 [1st Dept 2017]). Plaintiff adequately states a claim by alleging that it was the beneficiary of the SLC issued by SCB, met the SLC's terms for payment, and was refused payment resulting in monetary damages (CPLR 3013; *see BasicNet S.p.A.*, 127 AD3d at 165).

Accordingly, it is hereby,

ORDERED that the defendants' motion to dismiss the complaint is granted to the extent that the complaint is dismissed in its entirety as against defendant Soleil Capitale Corporation and the second and fourth causes of action of the complaint, for unjust enrichment and negligent misrepresentation respectively, are dismissed as against defendant Soleil Chartered Bank; and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

Dated: February 21, 2019 **ENTER:**

HON. NANCY M. BANNON