

Dickerson OL2 LLC v Natixis, N.Y. Branch
2019 NY Slip Op 31517(U)
May 27, 2019
Supreme Court, New York County
Docket Number: 652399/2018
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 48

-----X
DICKERSON OL2 LLC,

Plaintiff,

-against-

Index No. 652399/2018

NATIXIS, NEW YORK BRANCH,

Defendant.
-----X

Masley, J.

Plaintiff Dickerson OL2 LLC (Dickerson OL) moves for an order, pursuant to CPLR 3213, granting summary judgment in lieu of complaint in its favor in the amount of \$821,466.77, together with interest from December 19, 2017, costs, and disbursements. Defendant Natixis, New York Branch (Natixis) cross-moves for an order, pursuant to CPLR 3211 (a) (4), dismissing this action.

In this action, Dickerson OL, as beneficiary, seeks to recover funds allegedly due it pursuant to an irrevocable letter of credit issued by Natixis on January 27, 2017 (Natixis letter of credit).

This action is one of five pending before this court arising out of 11 letters of credit issued by Natixis on January 27, 2017 (*see Natixis Funding Corp. v GenOn Mid-Atlantic, LLC*, Sup Ct, NY County, index no. 650817/2018 [*Natixis* action]; *Dickerson OL1 LLC v Natixis, New York Branch*, Sup Ct, NY County, index no. 652396/2018; *Dickerson OL3 LLC v Natixis, New York Branch*, Sup Ct, NY County, index no. 652400/2018; *Dickerson OL4 LLC v Natixis, New York Branch*, Sup Ct, NY County, index no. 652395/2018).

Dickerson OL alleges the following:

Natixis issued the Natixis letter of credit as security for lease payment obligations incurred by nonparty GenOn Mid-Atlantic, LLC (GenMa) in connection with a sale-leaseback transaction for certain units in a Maryland power plant owned by Dickerson OL. To implement the sale-leaseback transaction, Dickerson OL and GenMa entered into a Sale-Leaseback Agreement, Lease Agreement, and Participation Agreement.

To protect Dickerson OL in the event that GenMa, as the Facility Lessee, were to default on its Lease Agreement payment obligations, each Participation Agreement required GenMa to provide "qualified" credit support for its lease payment obligation in the form of either a third-party guaranty, surety bond, or letter of credit. For the credit support to be considered "qualified," the letter of credit, or other form of security, must be irrevocable, unconditional, and not collateralized by GenMa's assets.

On December 19, 2017, Dickerson OL submitted a Drawing Request against the Natixis letter of credit. Natixis refused to honor that request and, to date, has not paid any amount pursuant to that request.

Dickerson OL now seeks summary judgment in lieu of complaint on the ground that the Drawing Request fully complied with the draw terms and conditions set forth in the Natixis letter of credit, and that, therefore, pursuant to UCC §§ 5-108 (a) and 5-111 (a), it is entitled to payment in full from Natixis.

In opposition, Natixis contends, first, that this action must be dismissed pursuant to CPLR 3211 (a) (4), on the ground that the issues raised in this action will be decided in the pending *Natixis* action.

A CPLR 3211 (a) (4) dismissal is not appropriate in the circumstances presented here.

"Pursuant to CPLR 3211 (a) (4), a court has broad discretion in determining whether an action should be dismissed based upon another pending action where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same" (*A.F. Rockland Plumbing Supply Corp. v Hudson Shore Associated Ltd. Partnership*, 96 AD3d 885, 886 [2d Dept 2012] [internal quotation marks and citation omitted]; *SafeCard Servs. v American Express Travel Related Servs. Co.*, 203 AD2d 65, 65-66 [1st Dept 1994]). Furthermore, "the court need not dismiss upon this ground but may make such order as justice requires" (*SafeCard Servs. v American Express Travel Related Servs. Co.*, 203 AD2d at 65, quoting CPLR 3211 [a] [4]).

Although the action at bar and the *Natixis* action have not been consolidated, they are related and this court is deciding concurrently the motions pending in each. In the *Natixis* action order and decision resolving the motions to dismiss (*see Natixis* action motion sequence nos. 001, 002) (*Natixis* action order), this court dismissed the complaint primarily on the ground that the *Natixis* action plaintiffs failed to allege sufficient facts that could be held to demonstrate that the *Natixis* letters of credit and draw requests made by the *Natixis* action defendants in June, November, and December 2017 were tainted by fraud and unenforceable. This court also held that, therefore, the *Natixis* action plaintiffs failed to assert legally cognizable claims of fraud, unjust enrichment, and money had and received.

In the *Natixis* action order, this court resolved all of the New York Uniform Commercial Code (UCC) and fraud issues raised in the action at bar relating to the *Natixis* letter of credit identifying Dickerson OL as the beneficiary and the Dickerson OL Drawing Request. Therefore,

the Natixis action order is incorporated herein.

For that reason as well, no ground exists that would warrant dismissal or stay of the action at bar.

Turning to the merits of the CPLR 3213 motion, Natixis contends, next, that the Natixis letter of credit does not qualify for accelerated treatment under that section on the ground that the court must consult other documents to determine whether the Drawing Request is tainted by fraud.

"CPLR 3213 . . . allows actions based upon an instrument for the payment of money only to be commenced with a motion for summary judgment rather than a complaint . . . A party utilizing this accelerated judgment procedure prevails 'if, upon all the papers and proof submitted, the cause of action . . . shall be established sufficiently to warrant the court as a matter of law in directing judgment' for the plaintiff (CPLR 3212 [b]). A defendant can defeat a CPLR 3213 motion by offering evidentiary proof sufficient to raise a triable issue of fact"

(*Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 383 [2004], citing *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]; CPLR 3213). Natixis has failed to raise any such triable issues.

In support of the motion, Dickerson OL submits an irrevocable letter of credit dated January 27, 2017 issued by Natixis and identifying Dickerson OL as the beneficiary. A letter of credit qualifies as an instrument for the payment of money only, within the meaning of CPLR 3213 (see *Citibank, N.A. v Silverman*, 85 AD3d 463, 464 [1st Dept 2011]). "[B]y conditioning payment solely upon the terms set forth in the letter of credit, the justifications for an issuing bank's refusal to honor the credit are severely restricted, thereby assuring the reliability of letters of credit as a payment mechanism" (*Nissho Iwai Europe v Korea First Bank*, 99 NY2d 115, 121

[2002], quoting *Voest-Alpine Intl. Corp. v Chase Manhattan Bank*, 707 F2d 680, 682 [2d Cir 1983]).

The Natixis letter of credit provides, in relevant part, as follows: "We irrevocably authorize you [Dickerson OL] to draw on us [Natixis] for the account of the Applicant [Natixis Funding Corp.] in any amount up to an aggregate amount" within specified time frames (Natixis letter of credit at 1).

Dickerson OL also submits its December 19, 2017 Drawing Request in the amount of \$821,466.77. On its face, the Drawing Request strictly complies with the terms and conditions for draws set forth in the Natixis letter of credit. The amount of the draw does not exceed the maximum amount set forth in Schedule 1 of the Natixis letter of credit.

The Natixis letter of credit entitled Dickerson OL to draw in certain circumstances, including, in relevant part, when a notice of termination of the Natixis letter of credit was issued and the Facility Lessee failed to provide replacement qualifying credit support within a specified time period (*see* Natixis letter of credit, Annex 1; Drawing Request).

Those circumstances have occurred:

On October 26, 2017, Natixis issued a Notice of Termination of the Natixis letter of credit to Dickerson OL, effective December 27, 2017. GenMa, the Facility Lessee, did not provide the required replacement credit support.

On December 19, 2017, less than 30 days prior to the termination date of the Natixis letter of credit, Dickerson OL drew on that letter of credit in the maximum amount permitted.

On December 20, 2017, Natixis issued to Dickerson OL a Notice of Noncompliance in which it refused to honor the Drawing Request. Natixis based its refusal on a single specified

ground, that "sufficient funds are not available for drawing under the Letter of Credit to satisfy the Drawing Request at this time" (Notice of Noncompliance).

Last, Dickerson OL demonstrated that Natixis failed to pay any amount in satisfaction of the Drawing Request and that Dickerson OL has not retracted the Drawing Request (*see* Jacqueline Solone May 11, 2018 aff, ¶ 10).

As this court held in the *Natixis* action order, pursuant to UCC §§ 5-108 (a), 5-103 (d) (the independence principle), and UCC § 5-109 (a) (the fraud exception), the Natixis letter of credit is valid and enforceable and no ground exists that would permit Natixis to dishonor a facially compliant draw request.

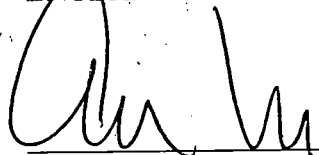
Accordingly, it is

ORDERED that the motion for summary judgment on the complaint herein is granted and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$821,466.77, together with interest at the statutory rate from the date of December 19, 2017, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the cross motion is denied in its entirety.

Dated: May 27, 2019

ENTER:



HON. ANDREA MASLEY
J.S.C.