

**Vanpoy Corp. S.R.L. v Soleil Chartered Bank**

2021 NY Slip Op 30569(U)

February 25, 2021

Supreme Court, New York County

Docket Number: 650406/2017

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

INDEX NO. 650406/2017

VANPOY CORP. S.R.L.,

Plaintiff,

MOTION DATE 02/22/2021, 02/22/2021

- v -

MOTION SEQ. NO. 005 006

SOLEIL CHARTERED BANK

DECISION + ORDER ON MOTION

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170

were read on this motion to/for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 006) 154, 155, 156, 157, 158, 171, 172, 173, 174

were read on this motion to/for PARTIAL SUMMARY JUDGMENT

I. BACKGROUND

The plaintiff, Vanpoy Corp. SRL, seeks to recover \$380,140.80 plus interest as damages for breach of a Standby Letter of Credit issued by the defendant, Soleil Chartered Bank. In 2015, the plaintiff entered into a contract with non-party broker Jay International Ltd UK (Jay) whereby plaintiff agreed to supply non-party Chart & Capstone Integrated SRL (C&C) with imported frozen seafood. To ensure payment to the plaintiff, Jay agreed to open a Letter of Credit with the defendant in the amount of \$500,000.00. The Standby Letter of Credit was issued October 12, 2015, and expired October 3, 2016. The plaintiff alleges that in January and February of 2016, it supplied seafood in four shipments and by seven Bills of Lading, totaling \$450,140.80. C&C accepted and unloaded all shipping containers sent and returned the containers empty. Payment was first demanded of C&C in February 2016, and not received. The plaintiff then

requested a drawdown from the Standby Letter of Credit in that amount. It did this through a SWIFT communication by its own banking institution, Santander Uruguay. Several more such communications followed. The defendant or C&C eventually paid the plaintiff \$50,000 in June 2016 and \$20,000 in August 2016, but refused further payment, leaving an unpaid balance of \$380,140.80.

The plaintiff commenced this action on January 24, 2017, asserting theories of breach of contract, unjust enrichment and account stated. The defendant answered and discovery was conducted. The plaintiff now moves pursuant to CPLR 3212 for summary judgment on the causes of action alleging breach of contract and account stated (MOT SEQ 005). The defendant opposes the motion and moves separately for partial summary dismissing the cause of action for account stated (MOT SEQ 006). The plaintiff opposes the defendant's motion. The plaintiff's motion is granted in part and the defendant's motion is denied.

## II. DISCUSSION

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once such a showing is made, the opposing party, to defeat summary judgment, must raise a triable issue of fact by submitting evidentiary proof in admissible form. See Alvarez v Prospect Hosp., *supra*; Zuckerman v City of New York, *supra*.

To meet its burden, the plaintiff submits the pleadings, the subject Standby Letter of Credit and underlying contracts, the subject Bills of Lading, the invoices submitted by the plaintiff to C&C, sworn deposition testimony of Govind Srivastava, Dario DeFrancesco and Roberto Zukelman and email communications between those parties. By this evidence, the

plaintiff has demonstrated, by proof in admissible form, a *prima facie* claim for breach of contract in that there was “formation of a contract between the parties, performance by the plaintiff, the defendant’s failure to perform, and resulting damage.” Flomenbaum v New York Univ., 71 AD3d 80, 91 (1<sup>st</sup> Dept. 2009); see Clearmont Prop., LLC v Eisner, 58 AD3d 1052, 1055 (3<sup>rd</sup> Dept. 2009).

Dario DeFrancesco and Roberto Zukelman, each with decades of experience in importing and exporting, handled these transactions and communications on behalf of the plaintiff. Both testified that the defendant, mostly by Srivastava, advised them that it was working with C&C and was in the process of getting payment issued to the plaintiff, and never mentioned that payment was refused due to any problem with the seafood. They also testified that the Bills of Lading were properly delivered to C&C with each seafood shipment and there were no complaints made by C&C about the delivery or quality of the seafood. DeFrancesco explained that in international commerce, once a shipping container is returned empty, “that means the merchandise has been received and accepted.” E-mail communications exchanged between DeFrancesco, Zukelman and Srivastava in July 2017 support the plaintiff’s position.

In opposition, the defendant fails to raise any triable issue of fact. The defendant submits an affidavit of Govind Srivastava, who describes himself as an “authorized representative” of the defendant bank, and asserts that full payment was not made to the plaintiff because the demand for a drawdown was not “compliant” since the plaintiff did not also present the Bills of Lading to the bank. However, neither Srivastava nor the bank provides any factual support or persuasive legal authority for that assertion. As observed by the plaintiff, the Standby Letter of Credit contains no such requirement and, in any event, the plaintiff presented the Bills of Lading to C&C with the shipments of fish. Indeed, at his deposition, Srivastava conceded as much. He also did not dispute the testimony of the plaintiff’s witnesses that such a requirement was never communicated to the plaintiff when the plaintiff demanded payment from C&C and the defendant. Srivastava alternatively testified that he could not recall if that requirement was

communicated to the plaintiff in subsequent discussions. In his affidavit, Srivastava speculates that the plaintiff's drawdown demand may have been an attempt to "perpetrate a fraud" since C&C told someone at the defendant bank that the "fish was bad." However, nothing is submitted to support the defendant's bald and belated claims of fraud and "bad fish" even though the parties conducted extensive discovery.

The court does not reach the plaintiff's cause of action for account stated, which seeks the same damages as the breach of contract cause of action, \$380,140.80.

As noted, while the defendant opposes the plaintiff's motion, in its own motion it seeks dismissal only of the account stated cause of action. In light of the granting of the plaintiff's motion on the breach of contract cause of action, the defendant's motion is denied as moot. Even if the cause of action for account stated were subject to dismissal as duplicative, as the defendant argues, the judgment in favor of the plaintiff would be the same.

Finally, the plaintiff's application for attorney's fees is denied. Attorney's fees that are merely incidents of litigation are not recoverable absent a specific contractual provision or statutory authority. See Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010); Coopers & Lybrand v Levitt, 52 AD2d 493 (1<sup>st</sup> Dept. 1976). Here, there is no such provision or statute alleged.

Any remaining request for relief not addressed herein is denied.

### III. CONCLUSION

Accordingly, it is

ORDERED that the plaintiff's motion pursuant to CPLR 3212 for summary judgment (MOT SEQ 005) is granted as to the first cause of action of the complaint, breach of contract, and otherwise denied, it is further

ORDERED that the defendant's motion pursuant to CPLR 3212 for partial summary judgment (MOT SEQ 006) is denied, and it is further

ORDERED that the Clerk shall enter judgment in favor of the plaintiff and against the defendant in the sum of \$380,140.80, plus costs and statutory interest from January 24, 2017.

This constitutes the Decision and Order of the court.



NANCY M. BANNON, J.S.C.  
**HON. NANCY M. BANNON**

2/25/2021

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE