

<b>ERA Capital L.P. v Soleil Chartered Bank</b>
2021 NY Slip Op 31736(U)
May 19, 2021
Supreme Court, New York County
Docket Number: 651984/2019
Judge: Melissa A. Crane
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

<p><b>PRESENT:</b>    <u>HON. MELISSA ANNE CRANE</u></p> <p style="text-align: center;"><i>Justice</i></p> <p>-----X</p> <p>ERA CAPITAL L.P.</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>SOLEIL CHARTERED BANK</p> <p style="text-align: center;">Defendant.</p> <p>-----X</p>	<p><b>PART</b></p>	<p><b>IAS MOTION 15EFM</b></p> <p><b>INDEX NO.</b>            <u>651984/2019</u></p> <p><b>MOTION DATE</b>        <u>01/14/2020,</u>                                   <u>01/14/2020</u></p> <p><b>MOTION SEQ. NO.</b>    <u>001 003</u></p> <p style="text-align: center;"><b>DECISION + ORDER ON MOTION</b></p>
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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 40, 41, 43

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 42, 44

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

The court consolidates motions 1 and 3 for disposition.

In this action, plaintiff ERA Capital L.P. (ERA) alleges that defendants Soleil Chartered Bank (Soleil Bank) and Soleil Capitale Corporation (Soleil Capitale) (together, Soleil) wrongfully dishonored a \$1.8 million letter of credit. (Compl., ¶ 1 [NYSCEF Doc. No. 2].) Plaintiff further alleges that defendant Regions Bank (Regions), plaintiff's advisor in the letter of credit transaction, failed to investigate Soleil adequately and negligently approved Soleil as the issuer of the letter of credit. (*Id.*) Plaintiff asserts a cause of action for breach of contract against Soleil Bank and Soleil Capitale and asserts causes of action for negligence and breach of fiduciary duty against Regions. (*Id.*, ¶¶ 30-48.) In Motion Sequence No. 1, the Soleil defendants move pursuant to CPLR 327 (a) to dismiss this action based on inconvenient forum. (Soleil Notice of Motion [NYSCEF Doc. No. 9].) In the alternative, Soleil Capitale moves pursuant to

CPLR 3211 (a) (1) and 3211 (a) (7) to dismiss the action against it based on documentary evidence and failure to state a cause of action. (Id.) In Motion Sequence No. 3, Regions also moves pursuant to CPLR 3211 (a) (1) and 3211 (a) (7) to dismiss the action against it based on documentary evidence and failure to state a cause of action. (Regions Notice of Motion [NYSCEF Doc. No. 23].)

As is appropriate on a motion to dismiss, the court derives the following facts from plaintiff's complaint. ERA is engaged in the real estate business. (Compl., ¶ 2.) Since 2015, Regions has been ERA's primary banker in the United States. (Id., ¶ 6.) In or around early 2018, ERA asked Regions whether it could assist ERA in obtaining a letter of credit to serve as collateral for a loan that ERA intended to make to non-party IR Real Investments GMBH (IR Real) for the purchase of real property. (Id., ¶ 6.) ERA specifically disclosed to Regions that "it had no experience with letters of credit" and asked Regions "to 'guide' plaintiff, including regarding what information was needed about the issuing bank." (Id., ¶ 8.) Regions advised ERA that it "did have the requisite experience with letters of credit" and agreed to "counsel and assist" plaintiff in obtaining the letter of credit and to "act as an advisory bank" in connection with the letter of credit. (Id., ¶¶ 7, 8.)

In late January 2018, ERA provided Regions with a draft letter of credit Soleil would issue, "asked whether Regions approved Soleil as issuing bank[,] and if that bank was 'good to proceed.'" (Id., ¶ 9.) Regions told ERA that it would conduct a background check on Soleil and advised that "'this bank is good . . .,'" then "after further investigation and levels of approval" advised ERA that "'we are good to go.'" (Id., ¶¶ 10, 11, 12.)

ERA alleges upon information and belief that Regions "as advising bank made a request to Soleil in New York to issue the subject letter of credit." (Id., ¶ 13; id., Ex. A [Letter of Credit]

[NYSCEF Doc. No. 3].) According to ERA, Soleil Capitale issued the letter of credit on behalf of Soleil Bank and the letter of credit is payable at Soleil Capitale's business address in New York. (Id., ¶ 4.)

“In reliance upon Region's investigation and advice, ERA Capital loaned \$862,000 to IR Real to be secured by a letter of credit issued by Soleil.” (Id., ¶ 14.) On or about September 14, 2018, IR Real defaulted on the loan and, on the same date, Regions sent Soleil a demand for payment pursuant to the Letter of Credit. (Id., ¶¶ 18, 19.) Soleil responded, without further explanation, that the demand was “non-compliant.” (Id., ¶ 20.) In response to subsequent follow up inquiries from ERA, Soleil advised ERA, again, without further explanation, that it had cancelled the letter of credit due to “fraudulent presentation.” (Id., ¶¶ 18-22.)

On a motion to dismiss pursuant to CPLR 3211 (a) (7), “the pleading is to be afforded a liberal construction (see, CPLR 3026). [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (Leon v Martinez, 84 NY2d 83, 87-88 [1994]; see 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) However, “the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupported based upon the undisputed facts.” (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003]; see also Water St. Leasehold LLC v Deloitte & Touche LLP, 19 AD3d 183 [1st Dept 2005], lv denied 6 NY3d 706 [2006].) When the court considers documentary evidence under CPLR 3211 (a) (1), “a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (Leon, 84 NY2d at 88.)

The court first addresses the Soleil's motion to dismiss pursuant to CPLR 327 (a) for forum non-conveniens. The forum non-conveniens doctrine permits the court to dismiss or stay any action "[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum." (CPLR 327[a].) "Among the factors to be considered are the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit." (Islamic Republic of Iran v Pahlavi, 62 NY2d 474, 479 [1984], cert denied 496 US 1108 [1985]. See also Grizzle v Hertz Corp., 305 AD2d 311 [1st Dept 2003].) The court may also consider the residence of the parties, the location of the various witnesses, and the location of the transaction or event giving rise to the cause of action. (Id. at 312.) No one factor is controlling. (Grizzle, 305 AD2d at 312.) "[T]he burden of establishing that New York is an improper forum is a heavy one and rests on the shoulders of the defendants." (Shah v Shah, 215 AD2d 287, 288 [1st Dept 1995].)

Soleil has not met its burden to show that New York is an improper forum. Soleil contends that Florida is the more appropriate venue for this dispute. (Soleil Memo. In Supp, at 4-5 [NYSCEF Doc. No. 12].) The sole basis Soleil offers is that ERA and Region's principal places of business are located in Florida. (Id., at 4-5.) Soleil states that "it is likely that the majority of the witnesses are located in Florida" and that "the relevant documents are largely located in Florida." (Id., at 4.) Soleil concludes that "[s]ince a large amount of the witnesses and documents are located in Florida, Defendants will have a considerable burden obtaining documents and testimony of potential witnesses by Subpoena, as New York State Court Subpoenas are not valid outside the State of New York." (Id., at 5.) Soleil does not provide further explanation for these assertions or submit any supporting evidence.

Soleil’s conclusory assertions do not provide a basis for this court to dismiss this action pursuant to CPLR 327 (a). Florida residents are not beyond the subpoena power of New York State Courts and Soleil has not identified any non-party in Florida from whom it intends to seek discovery. (ERA Memo. In Opp., at 20 [NYSCEF Doc. No. 41].)<sup>1</sup> Soleil also fails to address plaintiff’s allegations supporting jurisdiction and venue in this court, namely—Soleil Capitale is located in New York, Soleil Capitale issued the letter of credit on behalf of Soleil Bank, and the letter of credit is payable at Soleil Capitale’s business address in New York. (Compl., ¶ 4.) As plaintiff correctly states, “Soleil fails to provide a basis for finding the Florida courts would have jurisdiction over Soleil.” (ERA Memo. In Opp., at 20.) There is no basis on the record before this court to find that New York is an inconvenient forum.

The remainder of defendants’ motions rely on CPLR 3211. On a motion to dismiss pursuant to CPLR 3211 (a) (7), “the pleading is to be afforded a liberal construction (see, CPLR 3026). [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (Leon v Martinez, 84 NY2d 83, 87-88 [1994]; see 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) However, “the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupported based upon the undisputed facts.” (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003]; see also Water St. Leasehold LLC v Deloitte & Touche LLP, 19 AD3d 183 [1st Dept 2005], lv denied 6 NY3d 706 [2006].) When documentary evidence under CPLR 3211 (a) (1) is considered, “a dismissal is warranted only if the

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<sup>1</sup> ERA submitted one consolidated brief in opposition to both motions. (NYSCEF Doc. Nos. 41 and 42.)

documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (Leon, 84 NY2d at 88.)

### Soleil Capitale

Soleil Capitale contends that plaintiff’s cause of action for breach of contract against it is subject to dismissal pursuant to CPLR 3211 (a) (1) and 3211 (a) (7) because it is not a party to the letter of credit. Plaintiff argues that the letter of credit supports the allegations against Soleil Capitale, because Soleil Capitale issued the letter of credit and the dishonor of the letter of credit. (Pl’s Memo in Opp, at 21-22.)

The court declines to dismiss ERA’s claim against Soleil Capitale because it is not clear from the face of the document that Soleil Capitale is not a party to the letter of credit. Soleil Capitale’s name appears on the document twice, both times without an explanation as to its role. (Letter of Credit, [NYSCEF Doc. No. 3].) Soleil argues that Soleil Capitale’s involvement was the use of its SWIFT account, and that the use of the account as the basis for naming Soleil Capitale as a defendant is without legal basis. (Soleil’s Memo in Supp, at 6.) However, again, the extent of Soleil Capitale’s involvement is not clear from the face of the letter of credit, and this combined with the use of Soleil Capitale’s SWIFT account renders it inappropriate to dismiss Soleil Capitale at this juncture.

### Regions

The court now turns to Region’s motion to dismiss. In the motion, Regions contends that plaintiff’s tort claims are subject to dismissal because the contracts between ERA and Regions and the terms of Article 5 of the Uniform Commercial Code regarding the duties of an adviser on a letter of credit govern the parties’ relationship. (Regions Memo. In Supp., at 1-2.) Regions contends that Alabama law should apply to the causes of action plaintiff asserted against it, but

that the result is the same under Alabama, Florida, or New York Law. (Id., at 8.) Accordingly, no conflict of laws analysis is necessary.

### Regions Advisory Role

Regions argues that, because it was an adviser to the letter of credit, its only obligation was “to convey accurate information of issuance, amendment and terms and conditions.” (Regions’ Memo in Supp, at 11.) ERA argues the UCC statutes for advising banks to letters of credit are not applicable, because “the claim does not arise out of Regions’ ‘advising bank’ ministerial acceptance of the LC and demand for payment from Soleil.” (Pl’s Memo in Opp, at 10.) It is undisputed that Regions was an adviser to the letter of credit. (See Regions Undertaking on Letter of Credit, [NYSCEF Doc. No. 26].) There is, however, a question of fact as to whether the conduct ERA alleges, occurred within Regions’ role as adviser.

On January 23, 2018, Amir Shapira, Managing Director with ERA, emailed Donald McCorkell, SVP with Regions. (Regions’ ex. J, ex. A, [NYSCEF Doc. No. 34].) In that email, Shapira informed McCorkell that ERA was asking for one of ERA’s partners to issue a bank letter of credit and asked for guidance in the process. (Id.) McCorkell responded that Regions could accommodate the letter of credit and told Shapira what the customer bank would need to do. (Id.) Shapira forwarded the draft copy of the letter of credit to McCorkell on January 24, 2018. (Id.) Shapira forwarded a corrected draft letter of credit to McCorkell on January 30, 2018, that McCorkell said was “fine”, and the final letter of credit on February 26, 2018. (Regions’ ex. J, ex. B, NYSCEF Doc. No. 34.) In response to the final letter of credit, McCorkell informed Shapira that he thought they had been dealing with Standard Chartered Bank, not Soleil Chartered Bank, and that he asked his compliance officer to “quickly do a background check” on SCB. (Id.) On February 26, 2018, McCorkell emailed Shapira that “this

bank is good but I would have preferred Standard Chartered Bank.” (Regions’ ex. J, ex. C, [NYSCEF Doc. No. 34].) The letter of credit was issued on March 22, 2018. (Letter of Credit, [NYSCEF Doc. No. 3].) On March 27, 2018, Regions sent a letter to ERA, in which they state that they advise the letter of credit at the request of SCB and that the letter conveys no engagement or responsibility on the part of Regions. (Regions’ ex. B, [NYSCEF Doc. No. 26].)

While it is undisputed that Regions acted as adviser to the letter of credit, the timing of these communications creates a question of fact as to whether Regions was acting as adviser to the letter of credit, or as something else, when it undertook the actions at issue. ERA and Regions first began communicating about the letter of credit two months before the first documentation of Regions as adviser. It cannot be determined as a matter of law whether Regions’ advice to ERA in preparation for the letter of credit is conduct within its role of adviser on the subsequent letter of credit.

Regions claims that the UCC limits its obligations as adviser.<sup>2</sup> (Regions’ Memo in Supp, at 10.) The letter of credit expressly incorporates “the Uniform Customs and Chamber of Commerce, Paris France, Publication No. 600” (“UCP 600”). (Letter of Credit, NYSCEF Doc. No. 3 [caps omitted].) However, in defining what an adviser or advising bank is to a letter of credit, these two statutes are substantially similar. Under UCP 600, an advising bank “means the bank that advises the credit at the request of the issuing bank.” (UCP 600, Article 2.) Under the NY UCC, an adviser “means a person who, at the request of the issuer, a confirmer, or another adviser, notifies or requests another adviser to notify the beneficiary that a letter of credit has been issue, confirmed, or amended.” (NY UCC § 5-102 [a] [1].) The issuing bank, or in the case of the UCC, a confirmer or another adviser, must request that a party become an adviser.

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<sup>2</sup> Regions briefs cite the Alabama provisions of the UCC; however, as Regions notes in their papers, New York has adopted the identical UCC Article 5.

Regions was asked by the issuing bank, as indicated in its initial advisory letter: “At the request of Soleil Chartered Bank, we hereby advise the following standby letter of credit...” (Regions’ ex. B, [NYSCEF Doc. No. 26] [caps omitted]). This raises another issue of fact as to whether the conduct ERA alleges against Regions occurred while Regions was acting in the role of adviser to the letter of credit, as ERA could not request that Regions advise the letter of credit in the capacity that UCP 600 and the NY UCC define.

An issue of fact exists as to whether Regions was acting as adviser to the letter of credit when the conduct ERA alleges against Regions occurred. Therefore, the court will not consider the statutory limitations of obligations imposed on an adviser to a letter of credit in determining whether or not to dismiss the causes of action against Regions for negligence and breach of fiduciary duty. Nor will the UCC be deemed to have displaced the common-law claims.

#### Negligence Cause of Action

Regions claims that the UCC has displaced the negligence cause of action, and because, as adviser to the letter of credit, Regions did not owe a duty to ERA that could give rise to a negligence claim. (Regions’ Memo in Supp, at 8, 9.) However, whether Regions negligently misrepresented that Soleil was suitable or whether Regions was acting pursuant to a contract, is not a determination the court can make at this juncture.

Regions further argues that the publicly available information that ERA found is not material or does not show that Soleil was an unsuitable issuer of the letter of credit. (Id., at 12, 13.) However, whether the publicly available documents that ERA found is material or shows Soleil’s unsuitability as issuer of the letter of credit is inherently a fact-based inquiry. Finally, the economic loss rule does not apply because plaintiff has stated a cause of action for negligent misrepresentation (see Greenstreet of New York, Inc v Davis, 166 AD3d 470, 471 [1<sup>st</sup> Dep’t

2018]; Chanin v Machinski, 139 AD3d 490, 491 [1<sup>st</sup> Dep't 2016]; North Star Contracting Corp., v MTA Capital Constr. Co., 120 AD3d 1066, 1070 [1<sup>st</sup> Dep't 2016]; Indosuez v Barclay's Bank, PLC, 181 AD2d 447, 466 [1<sup>st</sup> Dep't 1992]; LBBW Luxemburg S.A. v Wells Fargo Securities LLC, 10 FSupp3d 504, 526-27 [SDNY 2014]).

#### Breach of Fiduciary Duty Cause of Action

Regions argues that, because its relationship with ERA is that of a banker and customer, it does not have a fiduciary duty to ERA. (Regions' Memo in Supp, at 16, 17.) ERA argues that the years-long banking relationship, combined with ERA asking for assistance in obtaining the letter of credit, its lack of experience with letters of credit, Regions' expertise and superior knowledge in the area, and Regions' awareness of ERA's dependence on it, is sufficient to create a fiduciary relationship. (Pl's Memo in Opp, at 16.)

The elements of a breach of fiduciary duty are "the existence of a fiduciary relationship, misconduct by the other party, and damages directly caused by that party's misconduct." (Pokoik v Pokoik, 115 AD3d 428, 429 [1st Dept 2014].) A fiduciary relationship "arises between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relationship." (Oddo Asset Management v Barclays Bank PLC, 19 NY3d 584, 592 [2012] quoting EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11 [2005].) "Put differently, a fiduciary relation exists when confidence is reposed on one side and there is resulting superiority and influence on the other." (Roni LLC v Arfa, 18 NY3d 846 [2011] [internal quotes omitted].)

As a rule, there is no fiduciary duty where parties are "engaged in arm's-length transactions pursuant to contracts between sophisticated business entities..." (Sebastian Holdings, Inc. v Deutsche Bank AG, 78 AD3d 446, 447 [1st Dept 2010].) The relationship

between a bank and a customer “is a contractual one and does not give rise to a fiduciary relationship.” (Dobroshi v Bank of AM., NA, 65 AD3d 882, 885 [1st Dept 2009].) However, beyond the contractual nature of the relationship, “a court will look to whether a party reposed confidence in another and reasonably relied on the other’s superior expertise or knowledge. Thus, the ongoing conduct between parties may give rise to a fiduciary relationship that will be recognized by the courts.” (Weiner v Lazard Freres & Co., 241 AD2d 114, 122 [1st Dept 1998].) Thus, a cause of action for breach of fiduciary duty may survive “for pleading purposes, where the complaining party sets forth allegations that, apart from the terms of the contract...created a relationship of higher trust than would arise” from the underlying agreement alone. (EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 20 [2005].)

Because a fiduciary duty can be inferred from circumstances beyond the contractual nature of a relationship, finding “the existence of a fiduciary relationship inevitably requires a fact-specific discovery.” (Roni LLC v Arfa, 18 NY3d 846, 848 [2011] [internal quotes omitted]; see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co., 11 NY3d 146, 158 [2008] [“Determining whether a fiduciary relationship exists necessarily involves a fact-specific inquiry”].)

ERA has sufficiently pleaded facts beyond the typical bank-customer relationship that could give rise to a fiduciary relationship. ERA alleges that it asked Regions “to assist it in obtaining a letter of credit,” explicitly disclosed “that it had no experience with letters of credit” and asked Regions “to ‘guide’ plaintiff. . . .” (Compl., ¶ 8.) ERA asserts that Regions “agreed to counsel and assist plaintiff in obtaining the letter of credit in plaintiff’s favor and also act as an advisory bank in connection thereto.” (Id.) ERA thus asserts that the parties’ conduct went beyond the bank-customer relationship and that plaintiff placed higher trust in Regions. Because

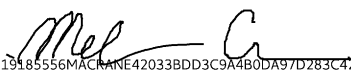
determining whether a fiduciary duty exists in this instance is a question of fact, it cannot be decided on the motion to dismiss stage. Thus, the branch of Regions' motion to dismiss the cause of action for breach of fiduciary duty is denied.

Accordingly, it is

ORDERED THAT the motion of the Soleil defendants (mot. seq. 1) to dismiss is denied; and it is further

ORDERED THAT the motion of Regions Bank (mot. seq. 3) to dismiss is denied.

The parties are to appear for a compliance conference on May 26, 2021 at 11:00 am over Microsoft teams.

  
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<u>5/19/2021</u> DATE					<u>MELISSA ANNE CRANE, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/>	GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE