

**Paribas v Natixis**

2022 NY Slip Op 30066(U)

January 7, 2022

Supreme Court, New York County

Docket Number: Index No. 651764/2020

Judge: Andrea Masley

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 48EFM

-----X

BNP PARIBAS, SINGAPORE BRANCH	<b>INDEX NO.</b>	<u>651764/2020</u>
Plaintiff,	<b>MOTION DATE</b>	<u>                    </u>
- v -	<b>MOTION SEQ. NO.</b>	<u>001</u>
NATIXIS, NEW YORK BRANCH,		
Defendant.	<b>DECISION + ORDER ON</b>	
	<b>MOTION</b>	

-----X

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 35, 36, 38, 39, 40, 41, 42

were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT.

In motion sequence number 001, plaintiff BNP Paribas, Singapore Branch (BNP) moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint in its favor in the amount of \$46,076,165.15 plus interest and costs. This action is one of two pending before this court arising out of a standby letter of credit issued by defendant Natixis, New York Branch (Natixis) on December 10, 2019. (*See Natixis New York Branch v BNP Paribas*, Index No. 651510/2020.)

### Background

On October 21, 2019, BNP's customer, nonparty "Hontop Energy (Singapore) Pte Ltd. (Hontop), agreed to purchase 1,000,000 barrels of crude oil +/- 10% from Shell International Eastern Trading Company ('SIETCO')." (NYSCEF Doc. No. [NYSCEF] 8,

Lozevski<sup>1</sup> aff ¶ 3; NYSCEF 9, SIETCO Contract.) BNP was to finance Hontop's purchase of the oil. (NYSCEF 8, Lozevski aff ¶ 4.)

On December 5, 2019, Hontop agreed to resell the crude oil to nonparty Petrobras Global Trading B.V. (Petrobras). (NYSCEF 10, Petrobras Contract I.) Petrobras Contract I required Petrobras to provide an irrevocable standby letter of credit, securing its payment for the oil, by December 9, 2019. (*Id.* § 10.) On December 10, 2019, prior to Hontop's purchase of the crude oil from SIETCO, Natixis issued an irrevocable standby letter of credit No. SB-49201 (Natixis SBLC) in the amount of \$75 million for the benefit of Hontop, securing Petrobras' payment. (NYSCEF 11, Natixis SBLC.) The date of expiry was set for January 31, 2020. (*Id.* at 1.)

On December 13, 2019, BNP issued a standby letter of credit for SIETCO's benefit to secure Hontop's payment for the oil. (NYSCEF 13, BNP SBLC.) On December 23, 2019, BNP lent Hontop \$66,889,196.76 to pay for the oil. (NYSCEF 8, Lozevski aff ¶ 7.) "This amount of \$66,889,196.76 was based on a provisional invoice issued by SIETCO as the final price and the final discharge quantity of oil can only be confirmed when delivered/ lifted." (*Id.*) On January 14, 2020, BNP lent Hontop another \$4,334,054.34, which covered the difference between the provisional invoice amount and the final invoice amount. (*Id.*)

On January 7, 2020, Petrobras and Hontop entered into a second contract which superseded Petrobras Contract I. (NYSCEF 10, Petrobras Contract II.) Petrobras Contract II lowered the amount of crude oil to be resold to 950,000 barrels. (*Id.*)

---

<sup>1</sup> Zoran Lozevski is the "the Head of Global Trade Solutions, APAC of BNP Paribas, Singapore." (NYSCEF 8, Lozevski aff ¶ 1.)

Section 8 of Petrobras Contract II again required the transaction to be secured by a standby letter of credit from Petrobras in the amount of \$75,000,000. (*Id.* § 8.)

On January 11, 2020, Natixis issued an Amendment 2 to the Natixis SBLC which extended the date of expiry to February 28, 2020. (NYSCEF 12, Amendment 2.) If Petrobras defaulted on its payment obligations for the crude oil, Hontop was entitled to draw on the Natixis SBLC two days after payment was due. (NYSCEF 11, Natixis SBLC at 2.)

On February 5, 2020, BNP sent Natixis a SWIFT message informing Natixis that Hontop assigned to BNP all of Hontop's

“RIGHTS, INTEREST, TITLE AND BENEFITS IN AND TO THE [NATIXIS] SBLC AND ALL THE MONIES AND CLAIMS FOR MONEYS DUE OR TO BECOME DUE OR PAYABLE TO HONTOP, ALL PAYMENTS OF WHATSOEVER NATURE, ALL CLAIMS FOR COMPENSATION AND DAMAGES, WHETHER AGREED OR OTHERWISE, AND ALL CLAIMS AND CAUSES OF ACTION FOR MONEY, LOSS OR DAMAGE THAT MAY ACCRUE OR BELONG TO HONTOP, ARISING OUT OF OR OTHERWISE IN CONNECTION WITH THE [NATIXIS] SBLC.”

(NYSCEF 17, 2/5/20 SWIFT Message at 1-2.) The message further instructed Natixis to pay proceeds under the Natixis SBLC to Hontop's account maintained by BNP or as BNP directs “without any set-off, counterclaim, or withholding whatsoever.” (*Id.* at 2.) The message explicitly states that Hontop shall remain liable to perform its obligations under the Natixis SBLC, and BNP was not liable for Hontop's failure to do so. (*Id.* at 2-3.) In response, Natixis acknowledged and agreed to the assignment set forth in the message. (NYSCEF 18, 2/5/20 Natixis Response [“WE ACKNOWLEDGE RECEIPT OF YOUR NOTIFICATION AND AGREE TO ASSIGNMENT AS SET OUT IN YOUR

NOTICE. TO DATE, WE HAVE NO RECORD OF RECEIVING ANY NOTICE OF A THIRD PARTY INTEREST IN THIS SBLC.]

After Petrobras failed to make payment, on February 13, 2020, BNP made a draw request to Natixis for the amount of \$71,242,809.36. (NYSCEF 21, 2/13/2020 Draw Letter.) The request was supported by three documents: (1) a sight draft, dated February 13, 2020, listing the intermediary bank as BNP Paribas New York, the beneficiary bank as BNP, and the beneficiary name as Hontop; (2) a beneficiary statement, declaring Petrobras' failure to pay on "for and on behalf of" Hontop; and (3) a drawing certification executed "for an on behalf of" Hontop. (*Id.*) On February 20, 2020, Natixis paid BNP \$25,258,668.74 after exercising its alleged right of setoff against the Natixis SBLC. (NYSCEF 26, 2/20/20 SWIFT Message.) Natixis stated that it set off \$45,984,140.62 that Hontop allegedly owed Natixis pursuant to a February 19, 2019 revolving trade facility letter. (*Id.*; see NYSCEF 32, Trade Facility Letter.)

On March 18, 2020, BNP initiated this CPLR 3213 action against Natixis seeking the remaining monies allegedly owed. Prior to the filing of this action, Natixis filed an action before this court, *Natixis, New York Branch v BNP Paribas*, Index No. 650510/2020 (*Natixis Action*), seeking a declaration that it was entitled to set off Hontop's debt from the payment made under the Natixis SBLC, and that it has fully discharged all of its payment obligations under the Natixis SBLC with respect to the February 2020 draw request. (See Index No. 650510/2020, NYSCEF 1, Summons and Complaint.) BNP's motion for summary judgment is pending in that related action, which is addressed in a separate decision.

## Discussion

CPLR 3213 provides, in relevant part, that “[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint.”

“CPLR 3213 affords a speedy and efficient remedy to secure a judgment in certain cases where service of formal papers would be unnecessary for the expeditious resolution of the dispute between the parties. This accelerated procedure applies solely to an action based upon a judgment or an instrument for the payment of money only. In order to succeed on the motion, the cause of action must be proven by the instrument itself and a failure to make payments according to its term.”

(*Tech. Tape, Inc. v Spray Tuck, Inc.*, 131 AD2d 404, 405-406 [1st Dept 1987]

[citations omitted].) It must be a written unconditional instrument. (*Id.* at 406.)

“The instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document.” (*Weissman v Sinorm Deli*, 88 NY2d 437, 444 [1996] [citation omitted].)

In support of its motion, BNP submits proof of the Natixis SBLC, its presentation under the Natixis SBLC, and Natixis’s failure to make the payment as issuing bank.

The Natixis SBLC provides:

“[h]erein, effective immediately and expiring on 31 January 2020<sup>2</sup> at the counters of BNP Paribas, Singapore. Funds under the letter of credit are available to you against your draft(s) draw at sight on Natixis against the presentation of following document, mentioning thereon our letter of credit No. SB-49201: beneficiary’s statement declaring that the applicant has

---

<sup>2</sup> As previously stated, the date of expiry was extended to February 28, 2020. (NYSCEF 12, Amendment 2.)

failed to comply with its payment obligation two days after due date accompanied by your written drawing certification in the from attached hereto as annex and made a part hereof.”

(NYSCEF 11, Exhibit(s) ¶ 2.) BNP has demonstrated that it complied with the conditions of the Natixis SBLC by submitting proof of the draw request dated February 13, 2020 in the amount of \$71,242,809.36, along with the documents required by the Natixis SBLC. (NYSCEF 21, Drawing Documents.)

In opposition, Natixis argues that BNP’s status as a holder is in dispute, and thus, this court cannot grant summary judgment pursuant to CPLR 3213. Natixis also argues that an issue of fact also exists as to whether it was permitted to exercise its right of setoff.

“Plaintiff made a prima facie case with respect to the letter of credit on which it seeks to recover by submitting the letter of credit and the forbearance agreement, in which defendant acknowledged his repayment obligations under the letter of credit and the amount thereof” (*Citibank, N.A. v Silverman*, 85 AD3d 463, 464 [1st Dept 2011].) “[I]f a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms, the moving party would be entitled to summary judgment unless the other party came forward with evidentiary proof sufficient to raise an issue as to the defenses to the instrument.” (*Interman Indus. Prods., Ltd. v R. S. M. Electron Power, Inc.*, 37 NY2d 151, 155 [1975].)

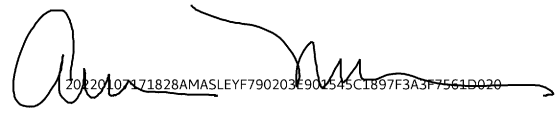
Natixis fails to raise an issue of fact. As held in the *Natixis* action, Natixis’s waived any right of setoff and was not entitled to deduct \$45,984,140.62 from the payment to BNP. Further, Natixis never challenged BNP’s status as a holder in due course until now, and in fact, honored the draw request, paying BNP the amount

requested minus the amount of the setoff. Natixis cannot claim now that BNP was not a holder in due course.

All remaining arguments have been considered and are without merit.

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment on the complaint herein is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$46,076,165.15, together with interest at the rate of 9% per annum from the date of February 20, 2020 until the date of the decision and order on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

  
20220107171828AMASLEYF790203E900545C1897F3A3F7561D020

1/7/2022  
DATE

\_\_\_\_\_  
ANDREA MASLEY, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED  DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART  OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT  REFERENCE