Mashreqbank PSC, N.Y. Branch v Indian Overseas Bank
2022 NY Slip Op 30704(U)
March 1, 2022
Supreme Court, New York County
Docket Number: Index No. 656179/2020
Judge: Louis L. Nock

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK **PART** 38M

Justice

----------X

MASHREQBANK PSC, NEW YORK BRANCH,

Plaintiff,

- v -

INDIAN OVERSEAS BANK,

Defendant.

----------X

INDEX NO. 656179/2020

MOTION DATE 03/23/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, and 42

were read on this motion for DISMISSAL.

LOUIS L. NOCK, J.

Upon the foregoing documents, it is hereby ordered that defendant's motion to dismiss the complaint due to another action pending pursuant to CPLR 3211(a)(4), for *forum non conveniens* pursuant to CPLR 327, and for lack of personal and subject matter jurisdiction pursuant to CPLR 3211(a)(2) and (a)(8) is denied, based upon the following memorandum decision.

Background

In this action on a letter of credit, plaintiff MashreqBank PSC, New York Branch ("plaintiff"), alleges three causes of action: breach of contract (first cause of action); fraud (second cause of action); and breach of obligations under Uniform Customs and Practice for Documentary Credits, 2007 Revision, International Chamber of Commerce ("ICC") Publication No. 600 ("UCP 600") (third cause of action). Defendant Indian Overseas Bank ("defendant") now moves to dismiss for lack of personal and subject matter jurisdiction, another action pending, and *forum non conveniens*.

On December 26, 2019, defendant issued an irrevocable letter of credit (the "LC") in the amount of $1,238,288, to nonparty Shital Ispat Private Limited ("Shital"), based in India, to support Shital's purchase of two ships to be broken into scrap metal and sold from nonparty Red Snapper Maritime Limited ("Red Snapper"), based in the United Arab Emirates ("UAE") (NYSCEF Doc. No. 1, ¶ 10). Nonparty Noor Bank, located in Dubai, UAE, which is Red Snapper's bank, advised on the transaction. Plaintiff acted as the confirming bank, and nonparty Wells Fargo Bank, NA, New York International Branch, was to act as reimbursing bank (*id.*, ¶ 11). Upon presentation of the proper documentation as required by the LC, plaintiff was to pay Red Snapper the amount of the LC, and defendant, through Wells Fargo, was to reimburse plaintiff (*id.*, ¶ 13).

On January 8, 2020, defendant authorized plaintiff to negotiate the LC, as Shital had taken possession of the two ships (*id.*, ¶ 14). Noor Bank then transmitted the required documentation to plaintiff and represented that they were timely presented and compliant with the LC's terms and conditions (*id.*, ¶¶ 15-16). Noor Bank then confirmed the authenticity of the documents at plaintiff's request and stated that Red Snapper had drawn down the amount of the LC (*id.*, ¶ 17). On January 14, 2020, plaintiff negotiated the LC and paid Noor Bank $1,238,288 pursuant to the LC (*id.*, ¶ 18). Plaintiff then sought reimbursement from Wells Fargo, who informed plaintiff that defendant had not yet authorized reimbursement (*id.*, ¶ 19). On January 21, 2020, after plaintiff contacted defendant to request that it authorize reimbursement, defendant responded that it would not authorize reimbursement because of discrepancies in the required documentation pursuant to the LC (*id.*, ¶¶ 20-21). Plaintiff disputed any discrepancies and alleged that the LC documents were as required for payment and reimbursement (*id.*, ¶ 24).

Defendant then raised additional allegations of discrepancies outside of the LC documents, and informed plaintiff that Shital had commenced an action in the High Court of Gujarat, India (the "Indian action"), to arbitrate a dispute with Red Snapper regarding the underlying transaction, and sought an order restraining defendant from releasing funds under the LC (*id.*, ¶¶ 25-26; NYSCEF Doc. No. 17). Plaintiff then intervened in that action to the extent of obtaining an order allowing it to pursue an action on the LC (NYSCEF Doc. No. 1, ¶ 33; NYSCEF Doc. No. 18). While the High Court of Gujarat, India, subsequently issued an order in the Indian action enjoining plaintiff from proceeding against defendant (NYSCEF Doc. No. 21, ¶ 4); following submission of the instant motion, plaintiff directed this court's attention to an appellate decision of said High Court which terminated the injunction and explicitly allowed plaintiff to proceed with the instant action (NYSCEF Doc. No. 42, High Court Order dated September 13, 2021, ¶ 74).

Plaintiff commenced this action by filing a summons and complaint on November 10, 2020 (NYSCEF Doc. No. 1). Defendant appeared and filed the instant pre-answer motion to dismiss.

Standard of Review

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory" (*Id.* at 87-88). Ambiguous allegations must be resolved in plaintiff's favor (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together

manifest any cause of action cognizable at law" (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). "[W]here ... the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration" (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

Defendant has raised several arguments for dismissing this matter. As the rest of defendant's arguments are effectively moot if the court lacks jurisdiction, the court will address defendant's arguments regarding jurisdiction first.

Lack of Subject Matter Jurisdiction

In determining a motion to dismiss for lack of subject matter jurisdiction, the court must consider that, as a court of general jurisdiction, the Supreme Court "is competent to entertain all causes of actions unless its jurisdiction has been specifically proscribed" (*Matter of Fry v Vil. of Tarrytown*, 89 NY2d 714, 718 [1997]). "Lack of jurisdiction should not be used to mean merely that elements of a cause of action are absent, but that the matter before the court was not the kind of matter on which the court had power to rule" (*Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 21 NY3d 200, 203 [2013] [internal citations and quotation marks omitted]). "Absence of competence to entertain an action deprives the court of subject matter jurisdiction; absence of power to reach the merits does not" (*Lacks v Lacks*, 41 NY2d 71, 75 [1976] [internal citations and quotation marks omitted], *rearg denied* 41 NY2d 862 [1977]). As an example, relevant herein, "[i]mproper venue is not a jurisdictional defect requiring dismissal of the action" (*Lowenbraun v McKeon*, 98 AD3d 655, 656 [2d Dept 2012]).

Here, defendant fails to establish that this court lacks subject matter jurisdiction over this matter. Defendant argues that the parties are not New York domiciliaries, and the subject matter

of the transaction underlying the LC has a primary nexus to India rather than New York. Assuming *arguendo* that defendant is correct, those arguments go to personal jurisdiction and venue rather than subject matter jurisdiction (*e.g. Lacks*, 41 NY2d at 75; *Lowenbraun*, 98 AD3d at 656). Indeed, as both parties at least implicitly acknowledge, the New York courts regularly address matters relating to bank letters of credit (*e.g., J. Zeevi and Sons, Ltd. v Grindlays Bank [Uganda] Ltd.*, 37 NY2d 220, 226, *cert denied* 423 US 866 [1975]).

Lack of Personal Jurisdiction

On a motion to dismiss for lack of personal jurisdiction pursuant to CPLR 3211(a)(8), the plaintiff bears the burden of showing jurisdiction (*Wang v LSUC*, 137 AD3d 520, 521 [1st Dept 2016], *lv denied* 28 NY3d 914, *rearg denied* 29 NY3d 1022 [2017]). The court may assert personal jurisdiction over a non-domiciliary where the action is permissible under the long-arm statute (CPLR 302), and the exercise of jurisdiction comports with due process (*Williams v Beemiller, Inc.*, 33 NY3d 523, 528 [2019]). Due process requires that a nondomiciliary have "certain minimum contacts" with the forum state and "that the maintenance of the suit does not offend traditional notions of fair play and substantial justice" (*id.*, *quoting International Shoe Co. v Washington*, 326 US 310, 316 [1945]). To defeat a motion to dismiss on this ground, a plaintiff need only "make a prima facie showing that the defendant is subject to the jurisdiction of the court" (*Bloomgarden v Lanza*, 143 AD3d 850, 851 [2d Dept 2016]).

As relevant to this matter, the long-arm statute provides that "a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent . . . transacts any business within the state or contracts anywhere to supply goods or services in the state" (CPLR 302[a][1]). "Even one instance of purposeful activity directed at New York is sufficient to create jurisdiction, whether or not defendant was physically present in the State, as

long as that activity bears a substantial relationship to the cause of action" (*Corporate Campaign v Local 7837, United Paperworkers Intl. Union*, 265 AD2d 274, 274-75 [1st Dept 1999]). In resolving this inquiry where banking transactions are concerned, "the quantity and quality of a foreign bank's contacts with the correspondent bank must demonstrate more than banking by happenstance" (*Al Rushaid v Pictet & Cie*, 28 NY3d 316, 327 [2016], *rearg denied* 28 NY3d 1161 [2017]).

Here, defendant issued a letter of credit which set forth that plaintiff, a New York domiciliary, would be the negotiating bank, that Wells Fargo, another New York domiciliary, would be the reimbursing bank, and that reimbursement would take place in New York. This is not, as the Court of Appeals put it, "banking by happenstance" (*Al Rushaid*, 28 NY3d at 327). Moreover, where the transaction at issue calls for payment in New York and the agreement is breached, a sufficient nexus exists between the transaction and New York to exercise jurisdiction under the long-arm statute (*San Ysidro Corp. v Robinow*, 1 AD3d 185, 185 [1st Dept 2003] ["Part of this loan was secured by defendant through a letter of credit payable at UBS in New York"]; *see generally, J. Zeevi and Sons, Ltd., supra*).

Moreover, exercising jurisdiction over defendant herein comports with due process. Generally, where jurisdiction under the long-arm statute is proper, due process is satisfied (*Al Rushaid*, 28 NY3d at 331 ["(While) personal jurisdiction permitted under the long-arm statute may theoretically be prohibited under due process analysis, we would expect such cases to be rare"]). Defendant's use of a correspondent bank account in New York, and agreement to reimburse plaintiff in New York through that account, are sufficient to satisfy the minimum contacts inquiry (*id.*). With regard to "fair play and substantial justice," courts consider "the burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's

interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies" (*id.*, *citing Burger King Corp. v Rudzewicz*, 471 US 462, 477 [1985]). Any burden on defendant litigating this action in New York is obviated by "modern communication and transportation." Based on those considerations, this court concludes that New York has a great interest in ensuring the functioning of its banking system, and that New York will provide plaintiff with convenient and effective relief.

Defendant repeatedly invokes the Indian action and the aspect of India vis-à-vis the underlying commercial transaction as reasons for this court not to exercise jurisdiction. Aside from this consideration being more appropriate to consider in terms of whether New York is a convenient forum, these matters are entirely irrelevant to the instant action. In a letter of credit transaction, "the issuing bank's obligation to honor drafts drawn on a letter of credit by the beneficiary is separate and independent from any obligation of its customer to the beneficiary under the sale of goods contract" (*First Commercial Bank v Gotham Originals, Inc.*, 64 NY2d 287, 294 [1985]). Put differently, "the issuer's obligation to pay is fixed upon presentation of the drafts and the documents specified in the letter of credit. It is not required to resolve disputes or questions of fact concerning the underlying transaction" (*id.* at 295). Thus, the existence of the Indian action, which, pursuant to the Indian High Court documents submitted and relied upon by the parties, is plainly concerned with the underlying transaction rather than defendant's obligations under the LC, is not a consideration against exercising personal jurisdiction over defendant.

CPLR 3211(a)(4) – Another Action Pending

CPLR 3211(a)(4) provides that a court may dismiss a complaint where "there is another action pending between the same parties for the same cause of action in a court of any state or the United States." By its terms, the statute does not apply to an action pending in a foreign court (*see*, *ABKCO Indus., Inc. v Lennon*, 85 Misc 2d 465, 471 [Sup Ct NY County 1975] ["Pendency of suit in a foreign jurisdiction does not support a dismissal on grounds of prior action pending"], *modified on other grounds and otherwise affirmed* 52 AD2d 435 [1st Dept 1976]. Moreover, on a motion to dismiss pursuant to CPLR 3211(a)(4), "[t]he critical element is whether both suits arise out of the same subject matter or series of alleged wrongs" (*Jadron v 10 Leonard St., LLC*, 124 AD3d 842, 843 [2d Dept 2015]). As set forth above, this action and the Indian action concern two separate disputes upon two separate agreements, which, as already stated, must be considered separately (*First Commercial Bank*, 64 NY2d at 294-95). To the extent defendant seeks a stay pursuant to CPLR 2201 based on the Indian action, the Indian High Court has dissolved its injunction against this action, and defendant fails to raise any other acceptable ground for a stay.

CPLR 327 – *Forum Non Conveniens*

Finally, defendant asks the court to dismiss this action in favor of the Indian action, based on the doctrine of *forum non conveniens*. "When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just" (CPLR 327[a]). Courts consider:

> 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. . . . The court may also consider that both parties to the action are nonresidents . . .

> and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction. . . . No one factor is controlling.

(*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985].)

"In general, a decision to grant or deny a motion to dismiss on *forum non conveniens* grounds is addressed to a court's discretion" (*Al Rushaid,* 36 NY3d at 332). Defendant's burden to demonstrate that New York is an inconvenient forum is a heavy one (*Creditanstalt Inv. Bank AG v Chadbourne & Parke LLP*, 14 AD3d 414, 415 [1st Dept 2005]).

Here, as previously stated, the potential hardship to defendant and any burden on the New York courts is slight; modern communication and transportation ease defendant's burden in litigating outside of its home domicile, and the New York courts quite frequently handle such matters. Indeed, repudiation of a contractual obligation to be carried out in New York is a significant nexus between the case and the forum (*J. Zeevi and Sons, Ltd.*, 37 NY2d at 226). Conversely, where courts have granted a motion to dismiss for *forum non conveniens*, the transaction typically has borne no relationship to New York whatsoever (*see, Adamowicz v Besnainou*, 58 AD3d 546, 547 [1st Dept 2009] [New York was an inconvenient forum where "[t]he loan agreement alleged to have been breached was written in French, was executed in France, was to be performed in France, and was allegedly breached in France"]). The parties freely agreed to reimbursement in New York, through a New York bank, in US dollars. In the context of a choice of law case, the Court of Appeals stated "our courts have long deemed the enforcement of commercial contracts according to the terms adopted by the parties to be a pillar of the common law" (*159 MP Corp. v Redbridge Bedford, LLC*, 33 NY3d 353, 359, *rearg denied* 33 NY3d 1136 [2019]). "Freedom of contract prevails in an arm's length transaction between sophisticated parties . . . and in the absence of countervailing public policy concerns there is no

reason to relieve them of the consequences of their bargain" (*Oppenheimer & Co., Inc. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 695 [1995]). These principles are no less relevant here.

Defendant again asserts that the Indian action provides an adequate alternative forum for the parties' dispute, and states further that all the documentary evidence and witnesses with knowledge of the underlying transaction between Shital and Red Snapper are outside of New York. As set forth above, however, the Indian action concerns matters separate to this action on the LC, and none of the evidence or witnesses regarding the underlying transaction will be necessary to determine whether defendant breached its obligations to plaintiff under the LC (*First Commercial Bank*, 64 NY2d at 294-95). Defendant avers that any judgment plaintiff might obtain in this action will be unenforceable in India. However, the record is far from clear in that respect. Moreover, plaintiff has chosen to accept that risk by commencing this action.

Accordingly, it is hereby

ORDERED that the motion to dismiss is denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after the filing hereof; and it is further

ORDERED that counsel are directed to appear for a virtual preliminary conference via Microsoft Teams to be arranged by the court on March 9, 2022, at 10:00 AM.

This constitutes the decision and order of the court.

ENTER:

Louis L. Nock

3/1/2022
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE