

ERA Capital L.P. v Soleil Chartered Bank
2023 NY Slip Op 30121(U)
January 10, 2023
Supreme Court, New York County
Docket Number: Index No. 651984/2019
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MELISSA A. CRANE PART 60M

Justice

-----X

ERA CAPITAL L.P.,

Plaintiff,

- v -

SOLEIL CHARTERED BANK, SOLEIL CAPITALE CORPORATION, REGIONS BANK

Defendant.

-----X

INDEX NO. 651984/2019

MOTION DATE 09/16/2022

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 164, 165, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 199, 200, 201

were read on this motion to/for

JUDGMENT - SUMMARY

INTRODUCTION

This dispute arises from a failed letter of credit ("LC") transaction that involved plaintiff ERA Capital L.P. ("ERA") and defendants Soleil Chartered Bank, Soleil Capitale Corporation (collectively, "Soleil), and Regions Bank ("Regions"). ERA alleges that Regions, who advised¹ on the LCs, failed to investigate Soleil and instead negligently told plaintiff that Soleil was "good" to be the LC's issuer even after Regions received information that Soleil previously dishonored several LCs in prior transactions and had reason to suspect that Soleil would issue LCs with no intention of making good on them should the need arise. By this motion, Regions moves for summary judgment in its favor. For the following reasons, the court denies the motion in part.

FACTUAL BACKGROUND

Amira Shapira ("Shapira") is the managing director and decision maker for ERA, a real estate investment company (Shapira Depo. Trans. [NYSCEF Doc. No. 139], at 8-9, 10:2-15). ERA was the beneficiary on the two LCs in this case: 1) the \$900,000 LC ("\$900K LC") issued by Soleil on February 26, 2018 (\$900K LC [NYSCEF Doc. No. 140]); and (2) the \$1.8M LC issued by Soleil on March 22, 2018 (\$1.8M LC [NYSCEF Doc. No. 141]).

Regions provides various financial and banking-related services in the U.S. and served as ERA's primary U.S. bank since about April 2015, after Shapira (often also called "Amir") opened

¹ Under UCC § 5-102(a)(1), an "Adviser" on a letter of credit "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 issued, confirmed, or amended." By comparison, under UCC § 5-102(a)(4) a "Confirmer" means "a nominated person who undertakes, at the request or with the consent of the issuer, to honor a presentation under a letter of credit issued by another."

two accounts there (Lambert Aff. [NYSCEF Doc. No. 143]). Carson Strickland (“Strickland”) was a Senior VP in Regions’ Global Trade Finance Department, that markets LCs and other cross-border financing products (Strickland Depo. Trans. [NYSCEF Doc. No. 148], at 9:13-10:2). Donald N. McCorkell, Jr., (“McCorkell”) is also a Senior VP at Regions and is the LC department manager whom Shapira was referred to after he requested assistance with ERA’s needs in the LC transactions (1/2/18 and 1/23/18 Emails Between Shapira and Regions [NYSCEF Doc. No. 145], Exh. 11 to Bliss Aff.).

On April 6, 2015, Shapira contacted Regions about opening a commercial checking account (“Deposit Account”), and a foreign exchange account (“F/X Account”) (January 2018 Emails [NYSCEF Doc. No. 144], Exh. 10 to Bliss Aff.). Shapira managed these accounts by himself (Shapira Depo. Trans., at 19-21, 33-35, 39-46). At times, when a transaction was complicated or involved foreign currency, Shapira might talk to an account manager. However, Regions’ employees did not guide him through the decision to buy or sell a given currency at a specific rate (*id.*, at 43-44).

In late December 2017, Amir Bramly (“Bramly”), an Israeli businessman, contacted Shapira and requested a loan from ERA for a real estate transaction in Europe (*id.*, at 69:10-72:15). The loan was for \$500,000 for an individual named Roy Tvzi Horovitz. A standby LC was to secure the loan (*id.*, at 16:6-17:5, 102:21-23, 274:14-21).

On January 2, 2018, Shapira contacted Regions and requested assistance with a real estate transaction in Holland. Specifically, ERA needed to borrow Euros against an LC its partner in that transaction had provided (1/2/18 and 1/23/18 Emails Between Shapira and Regions, Exh. 11 to Bliss Aff.). Montalvo responded that Regions could not assist, because most of their lending transactions related to real property (*id.*).

On January 23, 2018, Shapira emailed Montalvo again and clarified that he was not asking for credit, but instead “...[needed] the bank to receive on [ERA’s] behalf an unconditional bank LC” and asked her to refer him to someone in the commercial department who could help (*id.*). Miralles responded that McCorkell was the LC department’s head and provided Shapira with his contact information (*id.*).

On January 23, 2018, the same day, Shapira emailed McCorkell the following:

“Dear Mr. McCorkel [sic], I was referred to you by Rosy Miralles from the real estate finance department. I understand that you are the head of the LC department at Regions. Our entity, ERA Capital LP, holds several accounts at Regions, managed by Mercy Montalvo. We are engaged in a real estate deal in Europe, where we are asking one of our partners to issue a bank LC to us (ERA Capital LP) to secure (as a collateral) an advance we are providing on behalf of our partner. We would like the LC to be unconditional for 12 month[sic]; in case we are not paid back, we can redeem the collateral without any legal complications. Unfortunately, I do not have any experience with LC's and I do not know how it works and what we should ask from our partner and his bank. We need to complete the transaction as soon as possible. Could you please guide me on the process and what do we need to request from the other party? Thank you”

(McCorkell Aff. [NYSCEF Doc. No. 164], Exh. C) (emphasis added).

After that email, Shapira and McCorkell continued their discussion over a phone call that afternoon (Shapira Depo. Trans., at 126-129). Shapira testified that the call was very helpful, and that he explained ERA's needs to McCorkell and how "[it] [was] looking for...solid security for a loan [it] [would] be [providing] to a third-party" (*id.*). He also mentioned "[he] had no experience in such security, which was a LC that was proposed to be given to [ERA]," and that he wanted the LC to be "bulletproof" collateral (*id.*). In using that word to describe the collateral, Shapira meant an LC with "solid security," that he defined as "security that will have no complication [or] realization in [the] case of [a] default" (*id.*, at 128). McCorkell informed Shapira that he could help facilitate ERA's need in the transaction, and "explained how [LCs] worked and the conditions under which Regions would either advise or confirm [one]" (*id.*, at 127). He also "mentioned that [it is] better for [ERA] to have a U.S. bank," "discussed...SWIFT as a secure method of transmitting letters of credit, and [explained]...[how] [ERA] [would] be very secure with the [LC]" that is transmitted through SWIFT's secure system (*id.*, at 132).

The two also discussed potential issuers that Bramly mentioned to Shapira in prior communications, such as InterBank, H.S.B.C., Standard Chartered Bank, and BankWinter (*id.*, at 130). Shapira did not recall whether McCorkell explained the difference between confirming and advising banks, but also did not deny that McCorkell explained to him at some point in their conversation (*id.*, at 129). Nonetheless, McCorkell's explanation of standby LCs was consistent with Shapira's understanding prior to their discussion (*id.*, at 135). About an hour and a half after the call, McCorkell emailed Shapira to confirm their conversation and accommodation:

"Amir, nice speaking to you earlier. We would be happy to accommodate the standby letter of credit in your favor. As discussed, we would need your customer's bank (preferably a US based bank) to do the following. Issue a standby letter of credit in favor of ERA Capital in the amount of \$XXX, advised and confirmed by Regions Bank. The letter of credit must be subjected to the UCP600 or the ISP98. The credit must be irrevocable and must show a definite expiry date. The credit can be automatically renewable with 60 notice of non-renewal notification clause. The credit must be in US dollars and be payable against a simple statement that "Applicant has defaulted under that certain agreement between ERA Capital and XXX, dated xx/xx/xxxx"

(McCorkell Aff. [NYSCEF Doc. No. 164], Exh. D) (emphasis added).

The next day, Bramly sent Shapira a WhatsApp message with information related to the LC transaction they had discussed (2/25/18 Message From Bramly To Shapira [NYSCEF Doc. No. 147], Exh. 13 to Bliss Aff.). The message contained two documents: 1) a proposed draft LC; and 2) a document that listed, amongst other things, the issuing bank's SWIFT code information (*id.*). The proposed draft listed the issuer's name as "S CHARTERED BANK, NEW YORK," but did not list applicant or beneficiary names (*id.*, at 9). The second document listed Standard Chartered Bank as the issuer and provided its SWIFT information, address, city, and postal code (*id.*, at 3). Shapira forwarded Bramly's message to McCorkell.

On January 30, 2018, Shapira sent McCorkell a 'corrected draft' of the LC and asked him to confirm that the changes made were correct (McCorkell Aff., Exh. F). The draft was for a \$900,000 irrevocable standby LC that would be issued by "S CHARTERED BANK" in ERA's

favor as beneficiary, and listed IR Real Investments GMBH as the applicant (*id.*). On January 31, 2018, at 10:50 am, McCorkell replied that he was on a plane but just landed and that the draft Shapira had emailed him “[was] fine” (*id.*, Exh. G).

On February 21, 2018, on an unrelated LC transaction, also involving Soleil, McCorkell forwarded an email containing an RMA² to Strickland and asked him the following: “Ever heard of this customer [Petroleo] sir? Never heard of them. They have an account with 1,100.00 and they use it exclusively for UBER riders and at Walgreens” (McCorkell Aff., Exh. H).

At 11:46 am, Strickland replied that he was not familiar with Petroleo, but assumed they were a branch client (*id.*, Exh. I). He also commented that “Soleil is kind of shady – one of those companies that will just issue [LCs] because they are on SWIFT...” (*id.*) Strickland testified that his comment was “off-the-cuff” after he conducted “a less than two-minute Google search on his phone, saw [Soleil’s] website’s landing page....and did not look at any other pages [on] [it] or the list of 35 [LCs] exceeding \$250 million issued by [Soleil] contained there” (Strickland Depo. Tran., at 20-22). McCorkell replied later that “[he] [would] go back to them [and] [would] ask for more information” (McCorkell Aff., Exh. I).

On February 25, 2018, Bramly sent Shapira a SWIFT message with a copy of the LC (2/25/18 Message With Draft LC From Bramly to Shapira [NYSCEF Doc. No. 149]). This copy identified the issuer as Soliel for the first time (*id.*). A day later, on February 26, 2018, Shapira sent McCorkell the standby LC Soliel issued, informed him that he should receive it today despite the delay, and asked that he “confirm once the SWIFT [hits] the bank and that everything looks in order” (*id.*, Exh. J). The copy Shapira forwarded identified the issuer as Soleil Chartered Bank, not Standard Chartered Bank.

At 9:51 am on that same day, McCorkell responded to Shapira’s email and stated the following:

“Amir, they totally threw me with the name of the issuing bank. *I have asked my compliance officer to quickly do a background check on Soleil Chartered Bank and get back to me.* In the past communications they list themselves as S. Chartered Bank, which I interpreted to be Standard Chartered Bank. Hold tight and I will get back to you shortly”

(*id.*, Exh. K) (emphasis added).

At 10:44 am, 53 minutes after he stated to Shapira that he requested his compliance officer to run a background check, McCorkell sent another message to Shapira which stated the following:

“Amir, *this bank is good* but I would have preferred Standard Chartered Bank. One change needed to be made on the LC. It is asking for an authenticated SWIFT if/when you are claiming and I am sure you do not have SWIFT capabilities. Please have them change that to ‘Written certification signed by an authorized officer of ERA Capital L.P.’ ”

(*id.*, Exh. L).

² Strickland testified that an RMA is an authentication on the SWIFT network to send and receive authenticated messages, and that arrangements for RMAs from banks for trade services transactions, referred to as MT700s, were approved by McCorkell in his capacity as operations manager (Strickland Depo. Trans., at 13-15:12).

At 11:27 am, Shapira replied that he did not think the SWIFT could be changed at that point and asked if Regions would cover ERA with the SWIFT request when/if it was needed (ERAs Demand Letter Dated 11/27/2018 [NYSCEF Doc. No. 152], Exh. 18 to Bliss Aff.).

McCorkell responded a minute later that they “[could] change it via an amendment...” and that “[Shapira] cannot be expected to submit a draw via SWIFT as a non-user” (*id.*, at 18). Shapira testified that he and McCorkell continued this conversation afterwards over the phone (Shapira Depo. Trans., at 193-194). During the call, Shapira reiterated the importance for ERA to have a solid, secure LC, and McCorkell stated that he was surprised SWIFT identified the issuer as Soleil, and that “he would ‘verify, check, and get back to [Shapira]’” (*id.*).

The “background check” McCorkell referred to in his email was a “regulatory compliance check required by the Bank Secrecy Act and anti-money laundering regulations and [involved] reviewing the OFAC website [and] [determining] if any of the parties were listed” (“OFAC Check”) (McCorkell Depo. Trans., [NYSCEF Doc. No. 146], at 67-68). McCorkell watched as the check was conducted, and the results were returned, without any positive hits (*id.*, at 91:19-92:13). He also felt comfortable with “advising” the LC (*see fn. 1*) as it was issued through SWIFT, meaning Soleil was vetted, verified, and had passed a rigorous screening test designed to eliminate fraudulent parties in similar transactions (*id.*, at 78, 146-147). Regions regularly conducted OFAC Checks for all LC transactions (*id.*, at 70-71). The next day, February 27, 2018, Shapira followed up with McCorkell and emailed him the following: “Hi Donald, Did the representative for the LC creator spoke to you. I want to make sure everything is ok. Please contact me when you can...” (2/27/18 Emails Between Shapira McCorkell [NYSCEF Doc. No. 193], Exh. H to Shapira Aff.).

Shortly thereafter, on March 1, 2018, at 2:17 pm, Strickland sent McCorkell an article from the Documentary Credit World titled “Fraudulent Letters of Credit; Commercial Fraud” (“DCW Article”) and stated that “[he] saw [the article] in the [DCW] [and] [hoped] [the] transaction went away” (McCorkell Aff., Exh. M). The article summarized legal proceedings against Soleil in New York State Supreme Court initiated by a LC customer who sought recovery on “partial payment of an...issuance fee for a \$25 million [LC]” (McCorkell Aff., at ¶ 17).

Strickland testified that his comment referred to the unrelated Petroleo transaction with Soleil and was based on his own impression that receiving a LC request from a customer that he did not know and did not interact with was unusual, as customers who intended to receive LCs typically contacted the bank in advance (Strickland Depo. Trans., at 24-25, 31-32). He also recognized Soleil’s name from the RMA, which he explained was “an unusual request to receive from a company that [Regions] never talked to before (*id.*, at 23). McCorkell testified that he only glanced at the article’s headline and that he remained unconcerned about the ERA transaction because the article involved the unrelated Petroleo transaction (McCorkell Depo. Trans., at 52-55, 56:21-57:10). He was also unconcerned because the disputes and cases the article referenced were between an account party and an issuer, and stemmed from the payment of LC issuance fees, not an issuer’s potential dishonor of a demand under an LC, and because “[he] [was] not a lawyer and

would not advise a customer regarding litigation, particularly concerning an off-the-cuff remark by a member of the sales team” (*id.*, at 53:6-17).

Also on March 1, 2018, at 12:20 pm, Shapira asked McCorkell for “an official bank confirmation regarding the LC [ERA] obtained” (11/27/18 Demand Letter From ERA with Exhibits, Exh. 18 to Bliss Aff., at pg. 16). An hour and a half later, McCorkell reached out to Audra Hudgins, another Regions employee, and asked if it had (3/1/18 Internal Regions Emails [NYSCEF Doc. No. 187], Exh. C to Frydman Aff.). At 3:18pm, Hudgins replied it had, but that “[Regions] was waiting for [Montalvo] to agree that she [would] comply with [the authentication requirements imposed by Soleil] in the event of a drawing (*id.*). At 3:58 pm, 2 hours after Shapira’s initial inquiry, and an hour and 41 minutes after receiving the DCW Article from Strickland, McCorkell replied to Hudgins stating: “Before you send it to the client let me know. May hold off on advising it” (*id.*).

A minute later, McCorkell replied to Shapira that “[they] [were] waiting on one thing internal before [they] release[d] the credit...” and asked him to “[p]lease bear with [him]...to ensure [they] have all the bases covered” (11/27/18 Demand Letter From ERA with Exhibits, Exh. 18 to Bliss Aff., at pg. 16). Shapira replied that evening that “he assumed the LC [was] in place and all [was] correct” after their conversation on Tuesday, and requested that McCorkell “confirm by Friday as [ERA] [had] commenced into a legal engagement assuming [it] [had] the security in place” (*id.*, at 15).

The next day, March 2, 2018, at 6:24 am, McCorkell replied that they were “[j]ust waiting on [Montalvo] to sign off on one thing”, and that “[Shapira] should have it [that day]” (*id.*). McCorkell did not tell Shapira about the DCW article, Strickland’s comments from the prior day, or raise any concerns about Soleil being the bank to issue the LC. At 7:05 am, Shapira thanked McCorkell and acknowledged the email update (3/1/18 Email To McCorkell [NYSCEF Doc. No. 194], Exh. I to Shapira Aff.). At 5:29 pm that afternoon, Jessica Foster, a Regions employee from McCorkell’s group, emailed Shapira the following message about the LC’s details:

“Hello, I wanted to point out the paragraph below that is in your issued swift LC from Soleil Chartered Bank. It states that you will draw via the swift system and that you [sic] signatures will be authenticated by your Banker here at Regions. Swift is an electronic transmission system so signatures could not be authenticated. I would suggest that you request an amendment as per the paragraph below in yellow.

WE SOLEIL CHARTERED BANK UNDERTAKE TO PAY YOU UPON RECEIPT OF YOUR FIRST WRITTEN DEMAND ANY SUMS UP TO THE MAXIMUM AMOUNT OF USD NINE HUNDRED THOUSAND ONLY CLAIMED WITHIN VALIDITY TIME OF THIS STANDBY LETTER OF CREDIT, WITH THE SIGNATURES DULY AUTHENTICATED BY YOUR BANKER’S STATING THAT IR REAL INVESTMENTS GMBH HAS FAILED TO FULFILL THEIR CONTRACTUAL REQUIREMENT”

(McCorkell Aff., Exh. O).

At 5:36 pm, Shapira replied that the LC had been circulated between Regions and Soleil, and that McCorkell already confirmed that the wording was correct after speaking with a Soleil representative (*id.*). At 5:58pm, McCorkell replied that he would handle it on Monday (*id.*). At

no time did he mention any concern about Soleil (Shapira Aff. [NYSCEF Doc. No. 189], at ¶ 35). On the same day, Regions sent ERA the letter advising on the LC, that contained the following disclaimer: “THIS LETTER IS SOLELY AN ADVICE OF THE ENCLOSED IRREVOCABLE STANDBY LETTER OF CREDIT AND CONVEYS NO ENGAGEMENT OR RESPONSIBILITY ON OUR PART” (McCorkell Aff., Exh. N).

On March 5, 2018 at 11:20 am, Shapira sent McCorkell a follow up email and asked “if all is good with the [LC]” (*id.*, Exh. O). At 11:24 am, McCorkell replied that “[they] were good to go” (*id.*). At 11:46 am, Shapira again emailed McCorkell and asked that he send an official confirmation of the LC for [ERA’s] records (*id.*). At 11:49 am McCorkell emailed Foster and asked whether she sent the original LC to Shapira (*id.*). At 11:53 am, Foster responded that she sent Shapira the scanned copy on Friday, March 2, 2018 (*id.*).

In a separate transaction, on March 22, 2018, at 6:00 pm, Shapira notified McCorkell that ERA was to receive a \$1.8M SWIFT LC from IR Real Investment GMBH that Soleil would issue that day and asked if he could confirm that Regions received and validated the LC on ERA’s behalf (*id.*). When he requested that Regions confirm it received and validated the LC, Shapira testified that he meant he “wanted... to make sure [the] [LC] arrived correctly and [that] [its] wording [was] correct” (Shapira Depo. Trans., at 240:19-241:6). Additionally, he also testified that he did not have any communications with McCorkell about Soleil’s suitability to issue the \$1.8M LC, and that any communications they did have were “routine email transmittals that did not mention Soleil’s suitability to issue the [LC]” (*id.*, at 238:11-21, 251:12-252:5). He also testified that he proceeded with the later \$1.8M LC because McCorkell previously stated that Soleil “[was] good” in connection with the first \$900K LC, and that he assumed Soleil was an appropriate issuer for this second \$1.8M LC as a result (*id.*, at 251:12-25).

On March 27, 2018, Regions sent ERA a letter advising on the \$1.8M LC (McCorkell Aff., Exh. P). This letter also contained the same disclaimer: “THIS LETTER IS SOLELY AN ADVICE OF THE ENCLOSED IRREVOCABLE STANDBY [LC] AND CONVEYS NO ENGAGEMENT OR RESPONSIBILITY ON OUR PART” (*id.*). Again, at no time did McCorkell or anyone else at Regions raise concerns about Soleil with Shapira.

On September 14, 2018, Regions, on ERA’s behalf, sent Soleil a SWIFT message that demanded payment on the \$1.8M LC and the related SWIFT handling charges (*id.*, Exh. R). On September 28, 2018, Regions received a SWIFT message from Soleil stating that it had dishonored the demand due to ERA’s failure to deposit \$1.8 million with it as a condition to a drawing, and that it had cancelled the \$1.8M LC (*id.*, Exh. S). Ultimately, the first LC for \$900k was not dishonored, but Soleil did dishonor the second LC for \$1.8 million.

DISCUSSION

1. Breach of Fiduciary Duty (Third Cause of Action)

Regions argues the court must dismiss the Breach of Fiduciary Duty claim because no fiduciary relationship existed between the parties as a matter of law.

The parties have argued under the laws of all sorts of jurisdictions. However, given that the parties have not argued a conflict exists in the substantive law of all three jurisdictions, the court will apply New York law (*Matter of Allstate Ins. Co. [Stolarz] New Jersey Mfrs. Ins. Co.*, 81 NY2d 219, 224 [1993]; *TBA Glob., LLC v. Proscenium Events, LLC*, 114 AD3d 571, 572 [1st Dept 2014]; *SNS Bank, N.V. v. Citibank, N.A.*, 7 AD3d 352, 354 [1st Dept 2004]; *Excess Ins. Co. Ltd. v. Factory Mut. Ins. Co.*, 2 AD3d 150, 151 [1st Dept 2003], *affd sub nom. Excess Ins. Co. Ltd. v. Factory Mut. Ins.*, 3 NY3d 577 [2004]).

Regions' submissions establish that the parties held a standard bank-customer relationship that the FX and Checking Accounts' agreements governed. Later, this also included Regions advising on ERA's LCs transactions. However, Regions' letter advising on the LC contained strong disclaimer language stating: "THIS LETTER IS SOLELY AN ADVICE OF THE ENCLOSED IRREVOCABLE STANDBY LETTER OF CREDIT AND CONVEYS NO ENGAGEMENT OR RESPONSIBILITY ON OUR PART" (McCorkell Aff., Exh. P). Given this language, ERA could not reasonably have expected Regions to be acting under a fiduciary duty.

Moreover, the relationship the record reflects does not amount to anything more than an arm's length bank-customer relationship (*See Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank, Nat'l Ass'n*, 731 F.2d 112, 122 (2d Cir. 1984) ("New York law is clear that the usual relationship of bank and customer is that of debtor and creditor."); *Greenberg, Trager & Herbst, LLP v. HSBC Bank USA*, 73 A.D.3d 571, 572 (1st Dep't 2010) ("fiduciary relationship ... does not exist between a bank and its customer") (*citing Dobroski v. Bank of Am., N.A.*, 65 A.D.3d 882 (1st Dep't 2009) *aff'd*, 17 N.Y.3d 565 (2011) (the relationship between a bank and a customer "is a contractual one and does not give rise to a fiduciary relationship); *Curtis-Shanley v. Bank of Am.*, 109 A.D.3d 634, 635 (2d Dep't 2013) (granting summary judgment for bank on customer's claim for breach of fiduciary duty for bank's refusal to issue letter of credit; bank-customer relationship is not fiduciary); *Zaidi v. JP Morgan Chase Bank, N.A.*, 2021 WL 848864, at *7 (E.D.N.Y. Mar. 5, 2021) ("Typical banking transactions do not create a fiduciary relationship.") (*citing Aaron Ferer & Sons*, 731 F.2d 112)); *Faith Assembly v. Titledge of New York Abstract, LLC*, 106 A.D.3d 47, 62 (2d Dept 2013) ("[A]rms-length business relationship does not give rise to a fiduciary obligation."))

Additionally, ERA's alleged reliance on Regions' superior knowledge and expertise concerning LCs and LC transactions is unavailing, because it ignores the reality that the parties were actually engaged in an arm's length business transaction (*RNK Capital LLC v Natsource LLC*, 76 AD3d 840, 842 [1st Dept 2010]. Further, plaintiffs' own "subjective claims of reliance on defendants' expertise" do not suffice to establish a fiduciary relationship (*Societe Nationale D'Exploitation Industrielle Des Tabacs Et Allumettes v Salomon Bros. Intl.*, 251 AD2d 137 [1998], *lv denied*, 95 NY2d 762 [2000]).

Summary judgment requires ERA to point to facts in the record to support its claim. It has not done that. The cases ERA cites to support its argument, *Stonecreek-AAA, LLC v. Wells Fargo Bank N.A.*, 2013 WL 5416970 [SD Fla Sept. 26, 2013]; *Picini v. Chase Home Finance LLC*, 854 F Supp 2d 266, 273 [EDNY 2012]; and *Fleet Bank v. Pine Knoll Corp.*, 290 AD2d 792 [3d Dept 2002], are inapposite because they involve motions to dismiss, not summary judgment after full

development of the record. Thus, the court grants the portion of Regions' motion to dismiss the claim for breach of fiduciary duty (third cause of action).

2. Negligent Misrepresentation (Second Cause of Action)

Regions argues summary judgment must be granted on the Negligent Misrepresentation claim because ERA cannot prove a *prima facie* case without an expert, and the court would not have the proper basis or data to determine if other reasonable banks in similar circumstances would have considered the information or recommended against Soleil (Regions' Memo. of Law [NYSCEF Doc. No. 160], at 17). To the extent on these facts that plaintiff even needs an expert to begin with, Regions itself is an expert in this area, as it routinely advises on LCs. Although it may be a risky choice, if plaintiff even needs an expert, plaintiff can always call someone from Regions, for instance Strickland, as an adverse witness on its case in chief.

A. McCorkell's Communications With Strickland and Shapira About the Bank

Regions fails to eliminate all triable issues of fact with regard to whether McCorkell was negligent when he represented that Soleil was "good" despite receiving information that indicated otherwise from his other experienced colleagues at Regions.

The elements of negligent misrepresentation are: "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011], quoting *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]).

The chronology surrounding Regions' submissions ultimately fails to eliminate the triable issues of fact concerning the Negligent Misrepresentation claim. Shapira has demonstrated that he repeatedly asked McCorkell to investigate Soleil and get back to him. McCorkell, an experienced banking officer at Regions, told Shapira after asking his "compliance offer to quickly do a background check" (McCorkell Aff., Exh. K), that Soleil was "good" even after learning from Strickland that Strickland had never heard of Soleil, and that Soleil seemed "shady – one of these companies that will just issue LCs because they are on Swift..." (*id.*, Exh. I). Shortly after receiving the DCW Article on March 1, 2018 at 2:17 pm, McCorkell still confirmed with Shapira that the transaction was a go and continued assisting him (McCorkell Aff., Exh. O). Thus, Regions' submissions raise issues of fact as to whether it ignored potential red flags concerning Soleil and its suitability as an issuer, and was negligent because it never conveyed this information to plaintiff, continued to assist with the underlying LC transactions and informed ERA that Soleil was "good" for the LC transaction.

Although Soleil ultimately made good on the first LC for \$900,000, and Shapira did not have communications with McCorkell about Soleil's suitability as issuer for the \$1.8M LC (*id.*, at 238:11-21, 251:12-252:5), but for McCorkell's misrepresentation that Soleil was acceptable, the \$1.8M LC transaction might not have happened. Shapira testified that he would not have entered into either LC with Soleil, and would not "have allowed ERA to lend on any LC issued by [it]..." (Shapira Aff., at ¶ 28). Shapira also testified that he proceeded with the \$1.8M LC transaction

because McCorkell had previously confirmed to him that Soleil was “good” in connection with the \$900K LC transaction, and due to that confirmation, Shapira assumed Soleil was also “good” as an issuer for the later \$1.8M LC transaction (Shapira Depo. Trans., at 251:12-25).

Regions’ submissions also fail to eliminate the triable issues of fact concerning the discrepancy in the dates the OFAC Check was performed and date the results were printed. At his deposition, McCorkell initially testified that “[t]he OFAC Check was on the 27th when the [LC] was advised” and that “[t]he document is dated February 27, when the actual LC was input in the system (McCorkell Depo. Trans., at 87). This was a single day after he confirmed with Shapira that the bank was “good” (id., at 86-91). However, after the lunch break on the same day, McCorkell changed his position and instead testified stated that the OFAC Check was performed on February 26, 2018, and that the February 27, 2018 date was just the date the document was printed (Aff. of Donald N. McCorkell, Jr. [NYSCEF Doc. No. 142], Exh. 8 to Bliss Aff.). The discrepancy in these dates, and Regions’ failure to clear up these issues, ultimately preclude granting summary judgment in its favor and dismissing negligent misrepresentation claim.

B. “Background Check” (OFAC vs. SWIFT)

Even assuming it did clear these timing issues, whether McCorkell properly used and relied upon the OFAC Check and its subsequent results when advising Shapira that the bank was good on February 26, 2018 is also a question of fact. Given Strickland’s concerns that Soleil appeared to be “one of these companies that will just issue LCs because they are on SWIFT, according to their website,” there is a question about whether it was negligent for McCorkell nevertheless to tell Shapira that the bank was good because it was on the SWIFT network, and because the OFAC Check’s results confirmed that Soleil was not on the regulatory list (see *Banque Indosuez v. Barclays Bank*, 181 A.D.2d 447, 447, 580 N.Y.S.2d 765 [1st Dept. 1992]; see also *North Star Contracting Corp. v MTA Capital Const. Co.*, 120 AD3d 1066, 1069 [1st Dept 2014]). Thus, the court denies that part of Regions’ motion for summary judgment seeking to dismiss the negligent misrepresentation claim.

Accordingly, it is

ORDERED that the court grants that part of defendant Regions’ motion for summary judgment seeking dismissal of the claim for Breach of Fiduciary Duty (Third Cause of Action) and otherwise denies the motion; and it is further

ORDERED that the parties are to appear for a virtual pre-trial conference, via Microsoft Teams, on January 31, 2023 at 3:00 pm.

1/10/2023

DATE



MELISSA A. CRANE, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN

CHECK IF APPROPRIATE: