SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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VALLEY NATIONAL BANK,

Plaintiff,

- v -

GVC, LTD.,

Defendant.

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INDEX NO. 652147/2022

MOTION DATE 02/17/2023, 02/22/2023

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 003) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 108, 109, 115, 116, 118, 119, and 123

were read on this motion to CHANGE VENUE.

The following e-filed documents, listed by NYSCEF document numbers (Motion 004) 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 107, 110, 111, 112, 113, 117, 120, and 124

were read on this motion to DISMISS.

Upon the foregoing documents, defendant's motion to change venue and plaintiff's cross-motion to amend the summons (Mot. Seq. No. 003), and plaintiff's motion to dismiss defendant's counterclaims (Mot. Seq. No. 004), are consolidated for disposition, in accordance with the following memorandum.

The Motion to Change Venue (Mot. Seq. No. 003)

Defendant's motion to change venue is denied for the reasons set forth in the opposition papers (NYSCEF Doc. Nos. 90-91) and the exhibits attached thereto, in which the court concurs, as summarized herein. CPLR 503 provides that venue shall be "in the county in which one of the parties resided when it was commenced; [or] the county in which a substantial part of the events or omissions giving rise to the claim occurred" (CPLR 503[a]). On a motion to change venue, the burden is on the defendant to demonstrate that venue is improper (*Moodie v Kehoe*,

155 AD3d 455 [1st Dept 2017]). Where a defendant fails to meet that burden, plaintiff is not required to demonstrate that its choice was proper (*Mejia v J. Crew Operating Corp.*, 140 AD3d 505, 506 [1st Dept 2016] ["In view of defendants' failure to meet their initial burden, it is unnecessary to consider the sufficiency of plaintiff's opposition to the motion"]).

The initial summons and complaint placed venue of the action in New York County on the basis that defendant resides and transacts business in New York County, and that plaintiff transacts business in New York County (NYSCEF Doc. No. 55 at 1, 3). Defendant established that its residence and place of business are in Bronx County (Lavallie aff., NYSCEF Doc. No. 60; Division of Corporations Entity Information, NYSCEF Doc. No. 61). It is undisputed, however, that plaintiff maintains a place of business in New York County, which it asserts is its principal office in the state (Bargiel aff., NYSCEF Doc. No. 91).

CPLR 503(c) provides that "A domestic corporation, or a foreign corporation authorized to transact business in the state, shall be deemed a resident of the county in which its principal office is located." Where a foreign entity designates a principal office location in its application to conduct business within the state, that designation is controlling (*Janis v Janson Supermarkets LLC*, 161 AD3d 480 [1st Dept 2018]). Moreover, the court notes that, as a chartered national bank, plaintiff is not required to obtain authorization to do business within the state (Banking Law § 200 [excepting "a bank organized under the laws of the United States" from the requirement of registration with the Superintendent of the Department of Finance]), and thus is under no obligation to designate a particular county of residence. Similarly, foreign insurance companies are not required to designate a county of residence in New York (*Valley Psychological, P.C. v Government Empls. Ins. Co.*, 95 AD3d 1546, 1548 [3d Dept 2012]; *Providence Washington Ins. Co. v Squier Corp.*, 31 AD2d 514 [1st Dept 1968]). Thus, the

courts have found such companies properly venued in whichever county they maintain their principal office within the state (*Valley Psychological, P.C.*, 95 AD3d at 1548 ["Defendant . . . maintains that its principal place of business in this state is located in Nassau County. Therefore, Albany County was not a proper venue for this action"]; *Providence Washington Ins. Co. v Squier Corp.*, 31 AD2d at 514 [1st Dept 1968] ["Since it appears that plaintiff maintains its principal office for the conduct of its business in this State in New York County, plaintiff had the right to designate this county as the place of trial"]). The court finds this reasoning persuasive, and therefore finds that plaintiff properly laid venue of this action in New York County.

Defendant's reliance on *TD Bank, N.A. v Crown Leasing Partners, LLC* (224 N.C. App. 649 [2012]) is unavailing, as that case interprets North Carolina law as to venue rather than New York State law. Defendant's assertion that this matter is a consumer credit transaction, and thus must be venued where defendant resides, is also unavailing, as this action does not arise out of "a transaction wherein credit is extended to an individual and the money, property, or service which is the subject of the transaction is primarily for personal, family or household purposes" (CPLR 105[f])

Plaintiff's cross-motion to amend its summons to state that venue is based on maintaining "its principal office in New York in the County of New York and a substantial part of the events giving rise to the claim occurred in the County of New York" is granted in part. As set forth above, plaintiff has sufficiently established, for purposes of venue, that it maintains its principal office in the state of New York in New York County. Contrary to defendant's argument, such an allegation is not contradicted by plaintiff's statement in the complaint that its principal place of business is in Wayne, New Jersey. Moreover, it is entirely possible for a party to be resident in multiple locations for purposes of venue (*Clarke v Michael Ahern Prod. Services, Inc.*, 181

AD2d 514, 515 [1st Dept 1992] ["We agree with the IAS court that defendant failed to satisfy its burden of disproving plaintiff's Bronx County residence, at best demonstrating only that plaintiff also had a Westchester County residence at the time the action was commenced"]). However, as set forth in the affidavit of Michael Lavallie, defendant's owner, and not effectively contested by plaintiff, defendant's business activities all take place in Bronx County, and he never visited plaintiff's locations in New York County (Lavallie aff., NYSCEF Doc. No. 60, ¶¶ 6, 17). While plaintiff asserts that the documents out of which this claim arises were prepared at its offices in New York County, it also concedes that said documents were sent to defendant for execution, which would have taken place at defendant's offices in Bronx County (Bargiel aff., NYSCEF Doc. No. 91, ¶ 9). Therefore, it cannot be said that a substantial part of the events giving rise to this action took place in New York County (*Aldridge v Governing Body of Jehovah's Witnesses*, 204 AD3d 1469, 1470 [4th Dept 2022] [defendant "engaged in significant events or omissions material to . . . plaintiff's claim . . . in Kings County, despite the fact that other material events . . . occurred elsewhere"]). Accordingly, an amended summons may be served listing only the location of plaintiff's principal office in New York County as the basis for venue.

The Motion to Dismiss Counterclaims (Mot. Seq. No. 004)

Defendant alleges seven counterclaims: violation of General Business Law § 349 (first counterclaim; breach of contract (second counterclaim); breach of the implied covenant of good faith and fair dealing (third counterclaim); fraud and intentional misrepresentation (fourth counterclaim); civil conspiracy (fifth counterclaim); tortious interference with current and prospective business relations (sixth counterclaim); and violation of UCC 5-114 (seventh counterclaim). Defendant alleges generally that it entered into several premium finance agreements with Agile Premium Finance ("Agile") as well as a Letter of Credit Agreement with

plaintiff, while plaintiff concealed that Agile is a division of plaintiff (counterclaims, NYSCEF Doc. No. 51, ¶¶ 2-4). Defendant also asserts that plaintiff improperly demanded payment under the premium finance agreements after defendant and Agile had worked out a deferral of payments due to defendant's financial distress occasioned by the COVID-19 pandemic (*id.*, ¶¶ 31-40). When defendant inquired of plaintiff as to the basis for the payment demand, plaintiff commenced a lawsuit against it in the Superior Court of the State of New Jersey (*id.*, ¶ 42). Plaintiff then allegedly retaliated against defendant by demanding early payment on the letter of credit (*id.*, ¶ 56). As litigation regarding the premium finance agreements continued, plaintiff elected not to renew the letter of credit, and then allowed what defendant asserts was an improper draw on the letter of credit (*id.*, ¶¶ 59-65).

A claim under General Business Law § 349 requires proof that "(1) the defendant's conduct was consumer-oriented; (2) the defendant's act or practice was deceptive or misleading in a material way; and (3) the plaintiff suffered an injury as a result of the deception" (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.*, 37 NY3d 169, 176 [2021], *rearg denied*, 37 NY3d 1020 [2021]). Here, defendant alleges, in effect, a private dispute with plaintiff that has no impact on the consuming public at large. Accordingly, the first counterclaim must be dismissed (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20, 25 [1995] ["Private contract disputes, unique to the parties, for example, would not fall within the ambit of the statute"]).

Defendant's second counterclaim for breach of contract is flawed in two respects. A claim for breach of contract requires allegations of "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Housing Corp.*, 79 AD3d 425 [1st Dept 2010]). Among other things, the

complaining party must cite the essential terms of the contract and the specific provisions giving rise to defendant's liability (*Matter of Sud v. Sud*, 211 AD2d 423 [1st Dept 1995]). Here, defendant does not allege any provisions of the letter of credit agreement, let alone the specific ones giving rise to liability. Moreover, defendant asserts that plaintiff should not have honored the draw on the letter of credit at all, as defendant had not defaulted on its payments to Everest Insurance Company, whose policy was secured by the letter of credit. 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 . . . contract" (*First Commercial Bank v Gotham Originals, Inc.*, 64 NY2d 287, 294 [1985], *citing* former UCC 5-114[1]). 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). Here, defendant does not allege that Everest's presentation to plaintiff was improper, only that there were no grounds to make the draw in the first place. That dispute, however, must be resolved between defendant and Everest (*id.*). As defendant does not allege that Everest made an improper presentation to plaintiff, plaintiff did not breach the letter of credit agreement.

For the same reasons, the third counterclaim for breach of the implied covenant of good faith and fair dealing is also defective. The implied covenant exists only "in aid and furtherance of other terms of the agreement of the parties" (*Murphy v Am. Home Products Corp.*, 58 NY2d 293, 304 [1983]). Where the facts underlying the claim for breach of the implied covenant are the same as those underlying the breach of contract claim, the claim for breach of the implied covenant should be dismissed as duplicative (*Baker v. 16 Sutton Place Apartment Corp.*, 2 AD3d 119, 121 [1st Dept 2003]). Such is the case here.

The fourth counterclaim for fraud is not pled with sufficient specificity (CPLR 3016[b]). "Generally, in a claim for fraudulent misrepresentation, a plaintiff must allege a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]). Allegations of fraud must include who spoke, what they said, and the date on which they said it (*E1 Entertainment U.S. LP v. Real Talk Entertainment, Inc.*, 85 AD3d 561, 562 [1st Dept 2011]). Nowhere in the counterclaims does defendant allege who spoke on behalf of plaintiff, or when the alleged misrepresentations were made. To the extent that defendant bases this counterclaim on plaintiff's alleged concealment of its connection with Agile, all four premium finance agreements bear Agile's logo, under which is printed "A Division of Valley National Bank" (NYSCEF Doc. Nos. 67-70). A party claiming fraud cannot show justifiable reliance when it was in possession or had access to sufficient information to reveal the true facts of the situation (*HSH Nordbank v. UBS AG*, 95 AD3d 185, 193-194 [1st Dept 2012]). Finally, defendant's allegations that plaintiff entered into the letter of credit agreement while intending not to perform it are insufficient o establish a claim for fraud (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995] ["General allegations that (a party) entered into a contract while lacking the intent to perform it are insufficient to support the claim"]).

Defendant's remaining claims suffer from similar pleading defects. The fifth counterclaim for civil conspiracy fails because New York does not recognize a separate tort of civil conspiracy (*Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016]). The sixth counterclaim for tortious interference inadequately pleads what plaintiff did to "intentional[ly]

and improper[ly] procur[e] a breach" of defendant's contract with Everest (*White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]). Finally, nothing in UCC 5-114, which governs assignment of the proceeds of a letter of credit, creates a cause of action in favor of defendant.

Accordingly, it is

ORDERED that defendant's motion to change venue is denied; and it is further

ORDERED that plaintiff's cross-motion is granted to the extent that, within 20 days from the filing of this order, plaintiff shall serve a copy of this order with notice of entry and the amended summons in conformity herewith; and it is further

ORDERED that plaintiff's motion to dismiss defendant's counterclaims is granted, and defendant's counterclaims are severed and dismissed; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 1166, 111 Centre Street, New York, New York, on July 12, 2023, at 10:00 AM, as previously scheduled.

This constitutes the decision and order of the court.

Louis L. Nock

7/10/2023
DATE

LOUIS L. NOCK, J.S.C.

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