

EG Trading Group Inc. v PGB Group Texas LLC

2025 NY Slip Op 32039(U)

June 5, 2025

Supreme Court, New York County

Docket Number: Index No. 652558/2024

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

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EG TRADING GROUP INC.,

Plaintiff,

- v -

PGB GROUP TEXAS LLC, MARCO INTERNATIONAL CORPORATION, TRUIST BANK, PGB GROUP CORP,

Defendant.

-----X

INDEX NO. 652558/2024

MOTION DATE 03/05/2025

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 40, 41, 42, 43, 44, 45, 46, 47, 48, 50, 51, 53

were read on this motion to/for DISMISSAL.

Defendant Brown Brothers Harriman & Co. (“BBH”) moves to dismiss pursuant to CPLR § 3211(a)(7) and for costs pursuant to 22 NYCRR 130-1.1. Plaintiff opposes the instant motion and cross-moves seeking additional time to file a second amended summons and amend its complaint to add additional parties¹. Defendant BBH has elected to have the instant motion apply to the proposed amended complaint. For the reasons set forth below, the motion to dismiss is granted and the cross-motion is denied.

Factual Allegations

Plaintiff EG is a supplier of cement. Defendants Marco International Corporation (“Marco”) and PGB Group Texas LLC (“PGB”) are parties to a contract in which PGB agreed to deliver cement to Marco and Marco agreed to pay PGB \$3.3 million for the delivery. Marco obtained a letter of credit from BBH, *see* NYSCEF Doc. 14. The letter of credit named PGB as

¹ Specifically, plaintiff requests to assert new causes of action against Truist Bank, a former defendant that plaintiff voluntarily withdrew the action against.

its beneficiary and provided for BBH to distribute Marco's payment to PGB upon PGB's presentment of certain required documentation, essentially proving it shipped the purchased goods. Id. Plaintiff allegedly supplied PGB the cement PGB sold to Marco, and PGB allegedly assigned to plaintiff the right to receive a portion of the letter of credit's proceeds if those proceeds were paid to PGB.

Although EG's "negligence" allegations are difficult to decipher, EG appears to allege a supposed cause of action against BBH for wrongful dishonor of the Letter of Credit. (See id. ¶ 30 ("An issuing bank can be held liable for wrongful dishonor pursuant to Section 5-111 of the UCC"), ¶ 31 ("If an issuing bank wrongfully refuses to honor a letter of credit when the beneficiary has complied with the terms, the bank can be held liable for wrongful dishonor."); see also id. at ¶¶ 29, 32, 35 (other allegations suggesting wrongful dishonor claim)). The Complaint also asserts a claim for breach of contract. (Id. at ¶¶ 15-25).

Standard of Review

When considering a motion to dismiss based upon CPLR § 3211(a)(7), the court must accept the alleged facts as true, accord the plaintiff the benefit of every possible favorable inference, and determine whether the facts alleged fit into any cognizable legal theory. *Leon v. Martinez*, 84 NY2d 83 [1994]. On a motion to dismiss the court "merely examines the adequacy of the pleadings", the court "accept as true each and every allegation made by plaintiff and limit our inquiry to the legal sufficiency of plaintiff's claim." *Davis v Boenheim*, 24 NY3d 262, 268 [2014].

Pursuant to CPLR 3025 (b), "[a] party may amend his or her pleading, . . . , at any time by leave of court . . . [and] [l]eave shall be freely given upon such terms as may be just including the granting of costs and continuances." The Court of Appeals recognizes that "[a]s a general

rule, ‘leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit ..., and the decision whether to grant leave to amend a complaint is committed to the sound discretion of the court.’” *Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015] (internal citation omitted). “[P]laintiff need not establish the merit of its proposed new allegations but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit . . .” *MBIA Ins. Corp. v Greystone & Co. Inc.*, 74 AD3d 499, 500 [1st Dept 2010] (internal citations omitted).

Discussion

Preliminarily the Court notes there does not appear to be an operative complaint on the docket. The complaint referenced and attached by the movant is the complaint this Court will reference with respect to this motion, along with the proposed amended complaint attached by plaintiff.

In support of its causes of action against BBH, plaintiff attaches to its complaint a letter that Truist Bank, sent to EG purportedly memorializing the partial assignment. The assignment letter notifies EG that the assignment is “not a transfer of the letter of credit and does not give [EG] any interest in the credit”. Thus, appearing on its face to defeat any allegations plaintiff asserts against BBH based on the letter of credit, because here it is clear and undisputed that plaintiff is neither a party to the Letter of Credit nor its beneficiary.

The only cause of action in the complaint, was read by the movant as an attempt to assert a wrongful dishonor cause of action, which BBH contends plaintiff lacks standing to assert. Pursuant to New York’s Uniform Commercial Code only the “applicant,” or the “beneficiary, successor, or nominated person presenting on its own behalf” can sue an issuing bank for wrongfully dishonoring a beneficiary’s attempt to draw on a letter of credit. NY UCC § 5-

111(a)-(b). The proposed amended complaint does not cure this deficiency; however, the proposed amended complaint asserts an additional cause of action for fraud.

“To establish fraud, a plaintiff must show a misrepresentation or a material omission of fact which was false and known to be false by [the] 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.” *Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 151 AD3d 83 at 85 [1st Dept 2017]. “The element of justifiable reliance is ‘essential’ to any fraud claim” [internal citations omitted]. *Id.* Further, CPLR § 3016(b) provides that when a cause of action is based upon fraud “the circumstances constituting the wrong shall be stated in detail.”

Here, the Court finds that the proposed amended complaint lacks the requisite factual allegations to state a claim for fraud, consequently allowing plaintiff to amend the complaint would be futile.

As to the portion of the motion to dismiss that seeks sanctions, the Court does not find plaintiff’s conduct so frivolous as to warrant an imposition of sanctions at this time, thus that portion of the motion is denied.

As to the portion of plaintiff’s cross-motion, that was noticed in part as seeking additional time to file a second amended summons, but briefed as a request for an extension of time to serve the complaint, that portion is granted without opposition, to the extent that plaintiff is granted additional time to serve the complaint on the remaining parties in this action, specifically PGB Group Texas LLC, Marco International Corporation, and PGB Group Corp. Accordingly, it is hereby

ORDERED that plaintiff shall file and serve the summons and complaint on the remaining defendants in this action, specifically PGB Group Texas LLC, Marco International Corporation, and PGB Group Corp., within 20 days of service of this Order with Notice of Entry; and it is further

ORDERED that the complaint is dismissed in its entirety as against Brown Brothers Harriman & Co.; and it is further


ORDERED that the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk’s Office, who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website).


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LYLE E. FRANK, J.S.C.

6/5/2025
DATE

CHECK ONE:

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