SMT Global Logistics Ltd. v Top Air Express, LLC
2025 NY Slip Op 34826(U)
December 15, 2025
Supreme Court, New York County
Docket Number: Index No. 654280/2024
Judge: Kathleen Waterman-Marshall

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHLEEN WATERMAN-MARSHALL** **PART** **31M**

Justice

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SMT GLOBAL LOGISTICS LIMITED,

Plaintiff,

- v -

TOP AIR EXPRESS, LLC,MARTIN ZHU, JOHN DOES, JANE DOES, ABC-XYC CORP. 1-10

Defendant.

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INDEX NO. 654280/2024

MOTION DATE 11/08/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 17, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for DISMISS.

Upon the foregoing documents, the motion by defendants Top Air Express, LLC ("Top Air") and Martin Zhu ("Mr. Zhu") (collectively, "Moving Defendants"), for an order dismissing the complaint in its entirety pursuant to CPLR 3211(a)(1) (documentary evidence), (a)(5) (statute of limitations), and (a)(7) (failure to state a claim), is granted in part.

Brief Background

The factual allegations in the complaint are straightforward and reveal a dispute involving a contract for the air charter of cargo. The complaint alleges that, on August 28, 2020, plaintiff SMT Global Logistics Limited ("SMT"), which provides "air logistics services to freight forwarders", entered into an Air Charter Agreement with Top Air, as "Carrier," for "Two (2) cargo Charter flights" from Hong Kong to Delhi on September 8 and 9 of 2020 for $500,000 (*see* Complaint ¶¶ 2, 20 – 28, NYSCEF Doc. No. 1). Mr. Zhu, the alleged sole member of Top Air, executed the Agreement on its behalf (*id.* ¶¶ 4, 17, 33).

In accordance with the Agreement, SMT paid the $500,000 contract price on August 31, 2020, by wire (*id.* ¶ 29). However, Top Air did not provide any charter flights on September 8 or 9, 2020, or within thirty days thereafter (*id.* ¶¶ 30 – 32).

The Agreement provides, at Section 5.4, that SMT may cancel it if "the flight has not taken place for any reason after the expiration of thirty (30) days after scheduled departure," requiring Top Air to "immediately refund" all deposits paid to it (*id.* ¶¶ 32, 34, 44, 45). On September 28, 2020, SMT made formal demand to Top Air for return of its $500,000 payment (*id.* ¶ 35, 36). On January 5, 2021, Top Air refused to refund the $500,000 and instead proposed that SMT's payment be converted into a credit towards a future charter flight (*id.* ¶37 – 39). On March 11, 2021, SMT refused the offer and demanded a full refund by March 15, 2021 (*id.* ¶¶ 40 – 41). Top Air failed to refund SMT and failed to provide other flights to SMT (*id.* ¶¶ 46 – 48, 50).

The Complaint also alleges, "upon information and belief," that Moving Defendants: "actually did not plan or make any efforts to comply with the Agreement"; "did not make sufficient efforts to

comply with the terms" of the Agreement"; was sued for breach of contract in two other actions; "closed its business to avoid complying with the Agreement and having to refund" SMT; and that "it is reasonable to believe that [Top Air's] representation was not accurate" (*id.* ¶¶ 50 – 58).

Upon those allegations, the Complaint asserts six causes of action, each of which seeks damages in the sum of $500,000. plus pre-judgment interest and costs, and the like, as follows: first cause of action, for breach of contract; second cause of action, for conversion; third cause of action, for breach of implied good faith and fair dealing; fourth cause of action, to piercing the corporate veil; fifth cause of action, for unjust enrichment; and sixth cause of action, for successor liability/*de facto* merger.

The Agreement, attached as Exhibit A to the Complaint (NYSCEF Doc. No. 2), provides in Section 8, entitled "CLAIMS":

> 8.1 No action shall be maintained unless a written notice, describing the goods concerned, the approximate date of the damage and the details of the claim is present to an office of Carrier in the case of damage to cargo within seven (7) days from the date of receipt thereof; in case of delay of goods within fourteen (14) days from the date the goods are placed at the disposal of the person entitled to delivery; and in the case of loss (including non-delivery of cargo) within forty-five (45) days from the date of shipment. Any right to damages against Carrier shall be waived unless an action is brought within two (2) years after the occurrence of the events giving rise to the claim. All claims for cargo damage will be made directly to the Carrier.

Dismissal under CPLR 3211(a)

The law on dismissal at the pleadings stage is clear and long well-settled. On all motions to dismiss under CPLR 3211, the complaint should be liberally construed, the facts presumed to be true, and the pleading accorded the benefit of every possible favorable inference (*see e.g. Leon v Martinez*, 84 NY2d 83 [1994]).

Under CPLR 3211(a)(1), dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*id.*; citing *Heaney v Purdy*, 29 NY2d 157 [1971]).

When moving to dismiss on the basis of the expiration of the statute of limitations (CPLR 3211[a][5]), the defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the cause of action has expired" (*MTGLQ Investors, LP v Wozencraft*, 172 AD3d 644 [1st Dept 2019]). If established, the burden shifts to the plaintiff to raise a question of fact whether the action is timely, or the statute of limitations is inapplicable via evidentiary facts (*id.*; *Wilson v Southampton Urgent Med. Care, P.C.*, 112 AD3d 499 [1st Dept 2013]).

On a motion to dismiss under § 3211(a)(7), the complaint is afforded the benefits of liberal construction, a presumption of truth, and any favorable inference *(see e.g. M & E 73-75, LLC v 57 Fusion LLC*, 189 AD3d 1 [1st Dept 2020]; *Askin v Department of Educ. of City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013]). The motion must be denied if, from the four corners of the pleadings, "factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001] [internal quotation omitted]). A complaint should not be dismissed so long as, "when the plaintiff's allegations are given the benefit of every possible inference, a cause of action exists," and a plaintiff may cure potential deficiencies in its pleading through affidavits and other evidence (*R.H. Sanbar Projects v Gruzen Partnership*, 148 AD2d 316, 318 [1st Dept 1989]). However,

bare legal conclusions and factual allegations which are inherently incredible or contradicted by documentary evidence are not presumed to be true (*Mark Hampton, Inc. v Bergreen*, 173 AD2d 220 [1st Dept 1991]).

First Cause of Action, for Breach of Contract

Moving Defendants argue that the Complaint is barred by the expiration of the two-year statute of limitations contained in Section 8 of the Agreement. They contend that the Complaint, filed in August of 2024 – more than two years after SMT's March 11, 2021 last demand for a refund (the date most favorable to SMT) – is untimely.

Questions of contract construction and interpretation are questions of law reviewable by the Court (*see e.g. William Press v State of New York*, 37 NY2d 434 [1975]). A basic tenet of contract construction requires that, where a written agreement that is complete, clear and unambiguous on its face, the court must enforce it according to the plain meaning of its terms (*R/S Assocs. v New York Job Dev. Auth.*, 98 NY2d 29, 32 [2002] ["We have long adhered to the 'sound rule in the construction of contracts, that where the language is clear, unequivocal and unambiguous, the contract is to be interpreted by its own language'."]; *Excel Graphics Techs., Inc. v CFG/AGSCB 75 Ninth Ave., LLC*, 1 AD3d 65, 69 [1st Dept 2003] ["A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms"]; *Noor Staffing Grp., LLC v 622 Third Ave., LLC*, 195 AD3d 489, 490 [1st Dept 2021] [same]). It is equally well-settled that the court should read the writing as a whole (*Williams Press*, 37 NY2d at 440) and "are obliged to interpret a contract so as to give meaning to all of its terms" (*Mionis v Bank Julius Baer & Co., Ltd.*, 301 AD2d 104, 109 [1st Dept 2002]).

The Agreement is complete, clear and unambiguous on its face; indeed, Moving Defendants admit as much insofar as they fail to identify any ambiguity (and there is none). It follows, therefore, that the plain meaning of the terms contained in Section 8, individually and read as a whole, provide for a contractually shortened two-year limitations period only as relates to an action for loss or damage to cargo that was delivered to or in possession of Top Air. Section 8 requires written notice "describing the goods concerned," and details of the damage including the date:

- in the case of damage to cargo within seven (7) days from the **date of receipt thereof**;
- in case of delay of goods within fourteen (14) days from the **date the goods are placed at the disposal of the person entitled to delivery**; and
- in the case of loss (including non-delivery of cargo) within forty-five (45) days from the **date of shipment**.

[emphasis added]

The Complaint does not allege damage to any cargo, delayed delivery of any cargo, or loss or non-delivery of any cargo placed in possession of Top Air. Rather, the Complaint alleges that Top Air never arranged for any of the two charter flights at all, and then refused to refund SMT its $500,000 payment, in direct breach of the Agreement. Section 8 does not provide a shortened limitations period for a straightforward breach of contract claim – it only shortens the period in which to bring a claim for loss and damage to cargo. Indeed, reading Section 8 to shorten the statute of limitations for all breaches of the Agreement would run afoul of the parties' reasonable expectations, and render the Section 5 of the Agreement – which permits SMT to cancel and demand a refund where, as alleged here, Top Air does not provide the bargained for flights – "superfluous and without meaning" (*Bruckmann, Rosser, Sherrill & Co., LP v Marsh USA, Inc.*, 87 AD3d 65, 70 [1st Dept 2011] [citing *Mionis v Bank Julius Baer & Co., Ltd.*, 301 AD2d 104]). The Court has considered the Moving Defendants' contention (raised at oral argument) that Section 8 in fact precludes any breach of contract claims because it incorporates the "Toronto Treaty," and finds it to be without merit.

Thus, the first cause of action, for breach of contract, is timely brought within six years of the date of Top Air's alleged breach – whether it is calculated from September 9, 2020 or March 11, 2021 (*see* CPLR § 213).

Moreover, affording the Complaint liberal construction and presuming the truth of its allegations, it states a cause of action for breach of contract: a valid contract, i.e., the Agreement; performance by SMT by way of payment of $500,000; breach by Top Air, in that it failed to provide flights or refund the $500,000; and damages (*see 34-06 73, LLC v Seneca Ins. Co.*, 39 NY3d 44, 52 [2022] [setting forth elements of breach of contract claim]).

Second Cause of Action, for Conversion

The statute of limitations on a conversion claim is three years (CPLR § 214[3]; *McGough v Leslie*, 65 AD3d 895 [1st Dept 2009]). Here, using the date most favorable to SMT, the conversion claim accrued no later than March 15, 2021 – the last time SMT demanded a refund from Top Air. Thus, SMT was required to bring a conversion claim no later than March 15, 2024. The instant action was filed in August 2024, approximately four months beyond the statute of limitations for such cause of action.

Even if the conversion claim was timely brought, it should nevertheless be dismissed as duplicative of the breach of contract claim. A conversion claim "cannot be validly maintained where damages are merely being sought for breach of contract" (*Peters Griffin Woodward, Inc. v WCSC, Inc.*, 88 AD2d 883 [1st Dept 1982]; *Feesha v TD Waterhouse Investor Services, Inc.*, 305 AD2d 268, 269 [1st Dept 2003]). "A conversion claim cannot be based only on the allegation that a defendant received money and failed to remit payment to the plaintiff" (*Interstate Adjusters v First Fid. Bank, N.J.*, 251 AD2d 232, 234 [1st Dept 1998]). Here, SMT has simply repackaged its breach of contract claim as conversion. It alleges that it paid Top Air pursuant to the Agreement, and that Top Air failed to perform under the Agreement and failed to return SMT's payment. This is a breach of a contract claim, not conversion (*Peters Griffin Woodward*, 88 AD2d 883).

Third Cause of Action, for Breach of Implied Good Faith and Fair Dealing

"Where a cause of action for breach of the implied covenant of good faith and fair dealing is based on the same operative facts and seeks the same damages as a cause of action for breach of contract the good faith claim is duplicative and should be dismissed" (*AEA Middle Market Debt Funding LLC v Marblegate Asset Management, LLC*, 214 AD3d 111 [1st Dept 2023] [Renwick, J.P.]). The Complaint, in the third cause of action, alleges that Top Air violated the implied covenant of good faith by failing to perform under the Agreement, including refunding its $500,000 payment – the exact same facts supporting the breach of contract claim, Moreover, the exact same breach of contract damages –$500,000 plus interest, etc. – are sought on this cause of action. Consequently, the third cause of action, for breach of implied good faith and fair dealing, is duplicative of the breach of contract claim and is dismissed.

Fourth Cause of Action, Piercing the Corporate Veil

Piercing the corporate veil is not an independent cause of action (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]; *245 E. 19 Realty LLC v 245 E. 19th St. Parking LLC*, 223 AD3d 604, 605 [1st Dept 2024] [dismissing independent claim for piercing the corporate veil notwithstanding that veil piercing may still be available]). For this reason alone, SMT's cause of action to pierce the corporate veil should be dismissed as it is not a cognizable standalone cause of action.

This claim is also subject to dismissal as the Complaint sets forth only conclusory allegations that simply recite the veil piercing factors and "does not allege any fraud or malfeasance to support" SMT's attempt to reach Mr. Zhu or the other non-moving defendants (*Skanska USA Bldg. Inc. v Atl. Yards B2 Owner, LLC*, 146 AD3d 1, 12 [1st Dept 2018]).

Fifth Cause of Action, for Unjust Enrichment

"The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Clark-Fitzpatrick, Inc v Long Is. R.R. Co.*, 70 NY2d 382 [1987]). Here, the Agreement governs the subject matter of the Complaint, and all of SMT's claims, and the Complaint seeks the very same damages for unjust enrichment as sought for breach of contract. Thus, the fifth cause of action, for unjust enrichment is duplicative of the breach of contract claim, and is dismissed.

Sixth Cause of Action, Successor Liability / *De Facto* Merger

"It is the general rule that a corporation which acquires the assets of another is not liable for the torts of its predecessor" (*Schumacher v Richards Shear Co*., 59 NY2d 239, 244 [1983]). However, a successor entity can be held liable for the torts of its predecessor, under the successor liability exception, where: "(1) it expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations" (*id*. at 245).

Somewhat similarly, under the *de facto* merger doctrine, where there has been "a consolidation or merger of seller and purchaser" the purchaser may be held liable for the seller's torts where there is: "(1) continuity of ownership; (2) cessation of ordinary business operations and the dissolution of the selling corporation as soon as possible after the transaction: (3) the buyer's assumption of the liabilities ordinarily necessary for the uninterrupted continuation of the seller's business; and (4) continuity of management, personnel, physical location, assets and general business operation" (*Matter of New York City Asbestos Litig.*, 15 AD3d 254, 355-56 [1st Dept 2005]). The *de facto* merger doctrine is "based on the concept that a successor that effectively takes over a company in its entirety should carry the predecessor's liabilities as a concomitant to the benefits it derives from the good will purchased" (*Grant-Howard Associates v General Housewares Corp*., 63 NY2d 291 [1983]).

SMT has not alleged sufficient facts to support its successor liability claim. SMT does not allege that Top Air was purchased by a successor corporation or that there was a consolidation or merger of Top Air with another entity. Thus, there is no succession of Top Air. SMT merely asserts, "upon information and belief," that Top Air transferred its assets to Mr. Zhu and the non-moving defendants and then ceased business. This is insufficient for imposing successor liability.

SMT has also not alleged sufficient facts to support its *de facto* merger claim. It does not allege that the individual non-moving defendants merged with Top Air, assumed Top Air's liabilities, or continued to operate Top Air with substantially the same: management, personnel, physical location, assets, and general business operation. There is no allegation that the individual non-moving defendants merged with Top Air. Thus, there is insufficient basis to support a successor liability / *de facto* merger claim, and these claims are dismissed.

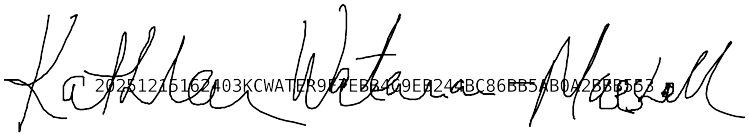
Accordingly, it is hereby

ORDERED that the motion by Top Air and Mr. Zhu to dismiss the Complaint is granted solely to the extent that the second (conversion); third (breach of implied good faith and fair dealing); fourth (piercing the corporate veil); fifth (unjust enrichment); and sixth (successor liability/*de facto* merger) causes of action are dismissed; and it is further

ORDERED that the Complaint remains viable as to the first cause of action, for breach of contract, as against Top Air and is dismissed as to Mr. Zhu; and it is further

ORDERED that Top Air shall serve an Answer to the Complaint within twenty (20) days of the date of this Decision and Order; and it is further

ORDERED that the parties shall appear for a **Preliminary Conference on April 8, 2026 at 10:00 am, before Part 31**, 111 Centre Street, Room 623, New York, New York. Counsel are reminded of the Part Rules, particularly those governing conferences and conference orders.



12/15/2025
DATE

KATHLEEN WATERMAN-MARSHALL, J.S.C.

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