

<b>Shandong Yuyuan Logistics Co., Ltd. v Soleil Chartered Bank</b>
2019 NY Slip Op 33033(U)
October 4, 2019
Supreme Court, New York County
Docket Number: 653707/2018
Judge: Andrew Borrok
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. ANDREW BORROK

PART

IAS MOTION 53EFM

*Justice*

-----X

INDEX NO. 653707/2018

SHANDONG YUYUAN LOGISTICS CO., LTD.,

MOTION DATE 12/21/2018

Plaintiff,

MOTION SEQ. NO. 002

- v -

SOLEIL CHARTERED BANK, SOLEIL CAPITALE  
CORPORATION, GOVIND SRIVASTAVA

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

were read on this motion to/for

DISMISSAL

Soleil Chartered Bank (**Soleil Bank**), Soleil Capitale Corporation (**Soleil Capitale**), and Govind Srivastava move to dismiss the complaint of the plaintiff, Shandong Yuyan Logistics, Co., Ltd. (**Shandong**) pursuant to CPLR §§ 3211 (a) (1) and (7). For the reasons set forth on the record (10/07/2019) and as otherwise set forth below, the motion is denied.

**THE FACTS RELEVANT TO THE MOTION**

Rhada International Corp. (**Rhada**) placed an order with Shandong to buy 1500 metric tons of urea for \$345,000 (Complaint, ¶ 12). Rhada was to remit payment to Shandong in the form of an irrevocable letter of credit (*id.*, ¶ 13). On September 9, 2016, Soleil Bank issued an irrevocable letter of credit in the amount of \$345,000 for the benefit of Shandong (the **Letter of Credit**) (*id.*, ¶ 15). The Letter of Credit was payable upon presentment by the beneficiary, Shandong, to the

issuer, Soleil Bank, of certain documents, including bills of lading for the shipment of urea (the **Sale Documents**) (*id.*, ¶¶ 15-16).

After the shipment arrived on October 13, 2016 in Davao, Philippines, the port of discharge, Shandong submitted the Sale Documents to Soleil Bank (*id.*, ¶¶ 17-18). On October 27, 2016, Soleil Bank sent a notice through the Society for Worldwide Interbank Financial Telecommunication (**SWIFT**) from the account of Soleil Capitale rejecting the Sale Documents due to a discrepancy and advising that it was holding the Sale Documents pending the receipt of instructions for their disposal (*id.*, ¶ 19). On November 25, 2016, Shandong sent Soleil Bank a notice via SWIFT indicating that Rhada had accepted the discrepancy and requested that Soleil Bank complete the transaction (*id.*, ¶ 20). Shandong sent subsequent messages to Soleil Bank and Soleil Capitale on December 1, 8, and 16, 2016, advising them that Rhada had taken delivery of the urea and requesting payment under the Line of Credit (*id.*, ¶ 21). Shandong sent additional SWIFT messages to Soleil Bank on December 22 and 29, 2016, requesting that Soleil Bank either remit payment or return the Sale Documents (*id.*, ¶ 22).

By email, dated December 29, 2016, Soleil Bank informed Shandong that Rhada did not have sufficient funds to cover the taxes, duties, and shipment costs due and owing, and that Soleil Bank had paid \$45,000 on behalf of Rhada and had taken ownership of the shipment of urea (*id.*, ¶ 23). In a subsequent email, dated January 4, 2017, Soleil Bank informed Shandong that Soleil Bank had stored the urea in a warehouse and was trying to sell it on Shandong's behalf, to which Shandong replied via email, dated January 5, 2017, again requesting payment or return of the Sale Documents (*id.*, ¶¶ 24-25). Ultimately, Soleil Bank sold the urea and made payments to

Shandong totaling \$106,000, leaving a balance of \$238,080 which remains unpaid to date (*id.*, ¶¶ 28-30).

Shandong commenced the instant action against Soleil Bank, Soleil Capitale, and Govind Srivastava asserting causes of action for breach of contract and unjust enrichment and seeking \$238,080 in damages. The defendants' motion to dismiss the complaint is now before the court.

## DISCUSSION

A party may move for judgment dismissing one or more causes of action on the ground that the pleadings fail to state a cause of action for which relief may be granted (CPLR § 3211 [a] [7]).

On a motion to dismiss pursuant to CPLR § 3211 (a) (7), the court must afford the pleadings a liberal construction and accept the facts alleged in the complaint as true, according the plaintiff the benefit of every favorable inference (*Morone v Morone*, 50 NY2d 481, 484 [1980]). The court's inquiry on a motion to dismiss is whether the facts alleged fit within any cognizable legal theory (*id.*). Bare legal conclusions are not accorded favorable inferences, however, and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999]). A party may also move to dismiss based on documentary evidence pursuant to CPLR § 3211 (a) (1). A motion to dismiss pursuant to CPLR § 3211 (a) (1) will be granted only where the documentary evidence conclusively establishes a defense to the plaintiff's claims as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]).

### Personal Jurisdiction and Forum Non Conveniens

As an initial matter, the court notes that at oral argument on the record, whether based on New York State Supreme Court Justice Gerald Lebovits' decision in *Kuliarchar Sea Foods (Cox's Bazar) Ltd. v Soleil Chartered Bank* (2018 WL 1638809 [Sup Ct, NY County, April 5, 2018, No. 654930/2017]), or New York State Supreme Court Justice Nancy Bannon's decision in *Vanpoy Corp. S.R.L. v Soleil Chartered Bank* (2019 WL 1059518 [Sup Ct, NY County, Feb. 21, 2019, No. 650406/2017]), or the First Department's affirmation of Justice Lebovits' decision in *Kuliarchar Sea Foods (Cox's Bazar) Ltd. v Soleil Chartered Bank* (168 AD3d 441 [1st Dept 2019]), collateral estoppel, or otherwise, the defendants conceded personal jurisdiction and forum non conveniens and withdrew these branches of their motion to dismiss.

### Breach of Contract

To state a cause of action for breach of contract, a plaintiff must allege (i) the existence of a valid contract, (ii) the plaintiff's performance, (iii) the defendant's breach, and (iv) resulting damages (*Second Source Funding, LLC v Yellowstone Capital, LLC*, 144 AD3d 445, 445-46 [1st Dept 2016]). Here, the Amended Complaint alleges that the defendants issued the Letter of Credit with Shandong as the beneficiary, and that, pursuant to the terms of the Letter of Credit, the defendants were required to remit payment to Shandong upon presentment of the Sale Documents (Complaint, ¶¶ 32-33). The Amended Complaint further alleges that the defendants breached the Letter of Credit by failing to remit payment after the Sale Documents were duly presented (*id.*, ¶ 33). Moreover, the Amended Complaint alleges that the defendants breached the Letter of Credit by failing to hold the Sale Documents upon rejection of their tender and by using the Sale Documents to obtain possession of the urea and subsequently to sell it to a third

party (*id.*, ¶¶ 34-37). The Amended Complaint alleges that the defendants' breaches of the Letter of Credit resulted in damages to Shandong (*id.*, ¶ 38).

Although the defendants argue (i) that Shandong failed to perform under the Letter of Credit because there was a discrepancy in the sale of the urea or the presentment of the Sale Documents and (ii) that Soleil Capitale and Govind Srivastava cannot be held liable for any alleged breach of contract because neither Soleil Capitale nor Govind Srivastava were parties to the Letter Agreement, neither argument is availing.

First, the Amended Complaint alleges that Shandong made a proper presentation and fully upheld its obligations under the Letter Agreement (*id.*, ¶ 18). However, even if there were a discrepancy, the Amended Complaint states that Shandong notified the defendants that Rhada accepted the discrepancy and requested that the transaction be completed in accordance with the Letter of Credit (*id.*, ¶ 20).

In addition, the Amended Complaint sufficiently alleges facts to support the inference that Govind Srivastava, Soleil Bank, and Soleil Capital are alter-egos of one another under New York law so as to pierce the corporate veil of Soleil Bank (*see Kuliarchar Sea Foods (Cox's Bazar) Ltd.*, 168 AD3d at 441). Specifically, the Amended Complaint alleges that both Soleil Bank and Soleil Capital are wholly owned and dominated by Govind Srivastava, operate out of the same business address (*i.e.*, Govind Srivastava's apartment in Manhattan), share the same telephone number, executives, and employees, and they use the same SWIFT code for transactions (including the transaction at issue in this case) (Complaint, ¶¶ 6-8). Taking the facts alleged as

true and affording them every favorable inference, the Amended Complaint sufficiently pleads a cause of action for breach of contract against Soleil Bank, Soleil Capitale, and Govind Srivastava. Accordingly, the motion to dismiss the first cause of action is denied.

### **Unjust Enrichment**

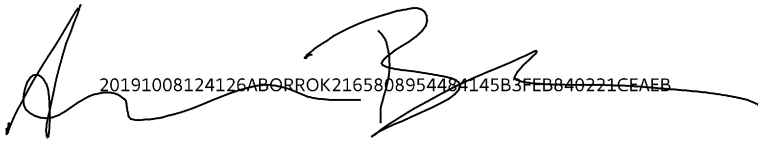
To prevail on a cause of action for unjust enrichment, a plaintiff must establish “(1) the other party was enriched, (2) at that party’s expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered” (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]). The Amended Complaint alleges that Shandong is the rightful owner of the urea, and that the defendants wrongfully used the Sale Documents to obtain the urea and then sold it to a third party and retained the proceeds (Complaint, ¶¶ 39-43). The Amended Complaint argues that the defendants have therefore been unjustly enriched at Shandong’s expense (*id.*, ¶¶ 44-46). Accordingly, the Amended Complaint states a cause of action for unjust enrichment.

To the extent that the defendants argue that the unjust enrichment cause of action must be dismissed because an express agreement governs the dispute, this argument is unpersuasive. At this stage of the proceedings, the plaintiffs are permitted to plead contract and quasi contract claims in the alternative (*Beach v Touradji Capital Mgt. L.P.*, 85 AD3d 674, 675 [1st Dept 2011]). In any event, the cause of action for unjust enrichment is not premised on the alleged breach of the Letter Agreement, “but rather it arises from facts wholly independent of any contract upon which plaintiff sues” (*Sebastian Holdings, Inc. v Deutsche Bank AG*, 78 AD3d 446, 448 [1st Dept 2010]). The defendants’ alleged failure to remit payment to Shandong upon

proper presentment of the Sale Documents or, in the alternative, to return the Sale Documents to Shandong constitute a breach of the Letter of Credit. The defendant's alleged use of the Sale Documents to take possession of the urea and subsequent sale of the urea and retention of the profits constitute a factually distinct cause of action for unjust enrichment separate and apart from the cause of action for breach of contract.

Accordingly, it is

ORDERED that the motion to dismiss is denied in its entirety.

<u>10/4/2019</u>			
<b>DATE</b>		<b>ANDREW BORROK, J.S.C.</b>	
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
	<input checked="" type="checkbox"/> DENIED		