SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

Baosteel Resources International Company Limited, Plaintiff, -against- Ling Li a/k/a Larry Li, Songqiang Chen, Metawise Group, Inc., Metamining, Inc., Spiro Mining, LLC and Coal Creek Minerals, LLC Defendants.	:	Index No. 651305/2014 DECISION AND ORDER Motion Sequence No. 003

Hon. Anil C. Singh, J.:

This is an action sounding in replevin, conversion, breach of contract, and foreclosure of UCC interests brought by plaintiff Baosteel Resources International Company Limited ("Plaintiff" or "Baosteel") against individual defendants Ling Li a/k/a Larry Li ("Li") and Songqiang Chen ("Chen") and corporate defendants Metawise Group, Inc. ("Metawise"), Metamining, Inc. ("Metamining"), Spiro Mining, LLC ("Spiro"), and Coal Creek Minerals, LLC ("Coal Creek") (collectively, "Defendants"). Plaintiff moves for summary judgment according to CPLR 2214(b) (i) against Spiro for $5,280,924.66 plus interest; (ii) against the corporate defendants for $5,280,924.66 plus interest; (iii) against the individual defendants for $5,280,924.66 plus interest; and (iv) to sever the claim for the cost and expenses of enforcement. Defendant Chen and the corporate defendants together oppose on all grounds claiming that triable issues of fact exist, plaintiff has not sustained its burden

to submit competent evidence supporting its motion, and plaintiff's motion is defective on its face. Defendant Li opposes granting summary judgment against the individual defendants. Li also cross-moves pursuant to CPLR 2215 for an order pursuant to CPLR 3025(b) granting leave to serve the proposed "Amended Answer, Affirmative Defenses and Crossclaim of Defendant Ling Li a/k/a Larry Li." Plaintiff opposes Li's cross-motion for leave to serve an amended answer.

Facts

The Memorandum of Understanding

In 2011, Baosteel entered into a Memorandum of Understanding (the "MOU") with Metamining, Metawise, and the individual defendants. The MOU agreed that Baosteel would enter into a "definitive, binding agreement" (i) to purchase 150,000 metric tons of coal and (ii) to consider acquiring up to a 45% ownership interest in a Metamining subsidiary, Ouro Mining, Inc ("Ouro Mining"). If Baosteel decided to invest in Ouro Mining, it agreed that the investment would subject to relevant Chinese governmental approvals. Then, Baosteel conducted due diligence with respect to Ouro Mining and elected not to invest in the company.

The CPA

Baosteel subsequently entered into the Commodities Purchase Agreement (the "CPA") with Spiro on November 11, 2011. Pursuant to the CPA, Spiro agreed

to sell and plaintiff agreed to buy 150,000 metric tons of "Low VOL PCI" ("Coal"), to be shipped in three shipments between February 15, 2012 and May 15, 2012. The term of the CPA (the "Term") was to end no later than six months from execution. As security for the payment of the purchase price for the coal, plaintiff was required to deposit $5 million by wire transfer to Spiro according to Article 13 of the CPA. Pursuant to Article 12 of the CPA, Spiro was required to provide notice to Baosteel of the vessel on which the delivery was shipped and the estimated date of arrival at the delivery port, for each shipment. Baosteel would then be required to post an irrevocable letter of credit for the purchase price. When Spiro received plaintiff's payment for each delivery, Spiro was to refund a portion of plaintiff's deposit, with interest at the rate of 5% per annum, compounded annually, such that after the completion of all three deliveries, the entire deposit with interest was to be refunded.

Plaintiff was entitled a full refund of its deposit, together with interest accrued, in the event Spiro was not able to deliver the coal or the agreement was otherwise terminated. See CPA, Article 18.

The CPA expressly defined that the parties were "buyer/creditor and seller/debtor". Furthermore, the "Buyer has no fiduciary relationship with or duty to the Seller nor any of the other parties to the Security Documents, Corporate Guarantees or Personal Guarantees arising out of or in connection with this Agreement or any of such other documents and guarantees." CPA, Article 26. The

CPA expressly disclaims that the agreement created a joint venture or partnership. The CPA could only be amended or modified in a writing signed by both parties.

The Guarantees

On or about November 11, 2011, the individual defendant executed and delivered to Baosteel their personal guaranty (the "Guaranty"). Pursuant to the Guaranty, each individual defendant guaranteed "any and all obligations of the Seller in respect of the Purchase Agreement . . . [and] any and all obligation of Seller and Guarantor for reasonable attorneys' fees and all other costs and expenses incurred by the Buyer in the enforcement of the Purchase Agreement and/or this Guaranty." As set forth in paragraph 4 of the Guaranty, their obligations were to be "absolute and unconditional." The individual defendants also agreed that their obligations would not be conditioned upon Baosteel proceeding against Spiro or any other individual or corporate guarantor.

On or about November 15, 2011, Metamining and Metawise (the "Corporate Guarantors") executed and delivered to Baosteel the Security and Guarantee Agreement (the "SGA"). The Corporate Guarantors' obligations under the SGA are identical in all material respects to those of the individual defendants under the Guaranty.

Defendants' Default

On or about November 21, 2011, Baosteel undisputedly made the deposit of $5 million in accordance with the CPA. Spiro never delivered any coal during the term or the CPA, nor has Spiro delivered any coal to this date. By email dated June 5, 2012, Luo Jin reminded defendants of their obligation to deliver the coal and that they would be required to refund the deposit with interest if they did not perform. Metamining's Vice President George Wang responded via email on June 6, 2012, confirming the payment of the $5 million deposit and alerting Ms. Luo that Metamining was in the final government authorization process to fulfill the contract.

Mr. Wang wrote again on June 15, 2012 to provide months for the expected deliveries. He followed up in August 2012 by email to push back the deliveries by one month. However, by email dated September 26, 2012, Mr. Dong Ji of Metamining wrote to Baosteel to renegotiate the purchase price because of changes in the global market.

Then, on January 5, 2013, Baosteel sent a notice of default and demand for a refund of the deposit. Metamining informed Baosteel that its board of directors objected to repaying the deposit in currency as required by the CPA and wanted to repay it by delivering coal. Mr. Ji explained that Metamining had used up the deposit. By email dated February 17, 2013, Baosteel rejected defendants' suggestion that the repayment obligations set forth in the CPA could be ignored. Baosteel agreed to extend the delivery date to March 2013, but simultaneously warned that the company

would take other legal measures if the company were still unable to deliver the coal. Spiro failed to make any deliveries of coal. No defendant returned any portion of the deposit.

Discussion

Summary Judgment Standard

The standards for summary judgment are well settled. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 (1985). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion. See id. Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law See Alvarez v. Propect Hosp., 68 N.Y.2d 320, 324 (1986). Moreover, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. See Zuckerman v. City of New York, 49 N.Y.2d 557, 560 (1980). In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility. Garcia v. J.C. Duggan, Inc., 180 A.D.2d 579, 580

(1st Dept 1992), citing Assaf v. Ropog Cab Corp., 153 A.D.2d 520, 521 (1st Dept 1989). The court's role is issue-finding, rather than issue-determination. Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957) (internal quotations omitted).

Plaintiff Is Entitled to Summary Judgment

Even viewing the evidence in the light most favorable to the defendants, plaintiff has established its prima facie entitlement to summary judgment.[1] The elements of a breach of contract claim are the formation of a valid contract, performance by the plaintiff, defendants' default, and the resulting damage. Flomenbaum v New York Univ., 71 A.D.3d 80 (1st Dept 2009); Clearmont Prop., LLC v. Eisner, 58 A.D.3d 1052, 1055 (3d Dept 2009). Plaintiff has stated a *prima facie* case for summary judgment by showing the existence of a valid contract and

[1] As a preliminary matter, the Court does not find the motion defective on its face. Defendants argue that plaintiff failed to comply with CPLR 2101(b) in attaching as exhibits English translations, but not original documents in Chinese. However, CPLR 2012(b) requires that papers served or filed shall be in English where practicable. See CPLR 2012(b). The requirement of an English translation only applies when the affidavit or exhibit is served or filed in a foreign language. Id. Defendants do not object to the translation of the documents, and therefore, have not raised a challenge since the English papers were filed. Even if plaintiff was required to file the Chinese language documents with translation, plaintiff has also rendered this point moot by filling the Chinese language originals on reply. See Polish American Immigration Relief Committee, Inc. v. Relax, 568 N.Y.S.2d 754 (1st Dept 1991); M.B.S. Moda, Inc. v Fuzzi S.P.A., 38 Misc. 3d 1208(A) (Sup. Ct. N.Y. Cnty. 2013).

Defendant Li also contends that a statement of material facts pursuant to rule 19-a of the Rules of the Commercial Division of the Supreme Court was required, but the Court finds that it was not. Rule 19-a states that "the court may direct that there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried." However, this rule does not mandate the submission by a moving part of a statement of undisputed facts, but merely authorizes the Court to direct a movant to provide a statement. The Court did not require it here. Thus, plaintiff was under no obligation to submit a statement of undisputed facts.

defendant Spiro's default thereunder. See Amante v. Pavarini McGovern, Inc., 127 A.D.3d 516, 517 (1st Dept 2015). Although defendants attempt to argue otherwise, there can be no real dispute of material fact that the CPA controls the deposit. Furthermore, defendants defaulted on CPA and now, according to the CPA, must return the deposit.[2]

To determine the meaning of a contract, a court looks to the intent of the parties as expressed by the language they chose to put into their writing. Ashwood Capital, Inc. v OTG Mgt., Inc., 99 A.D.3d 1 (1st Dept 2012); Bank of Tokyo-Mitsubishi, Ltd., N.Y. Branch v. Kvaerner a.s, 243 A.D.2d 1, 6 (1st Dept 1998). A clear, complete document will be enforced according to its terms. Ashwood Capital, 99 A.D.3d at 7.

When the parties have a dispute over the meaning, the court first asks if the contract contains any ambiguity, which is a legal matter for the court to decide. Id. Whether there is ambiguity "is determined by looking within the four corners of the document, not to outside sources." Kass v. Kass, 91 N.Y.2d 554, 566 (1998). The court examines the parties' obligations and intentions as manifested in the entire agreement and seeks to afford the language an interpretation that is sensible, practical, fair, and reasonable. Riverside S. Planning Corp. v CRP/Extell Riverside,

[2] Defendants argue that there is no competent evidence presented, but the Court looks to the CPA, SGA, and personal guaranty documents to decide since all other extrinsic evidence is excluded when there is no ambiguity in the terms of the agreement. See Kass, 91 N.Y.2d at 566.

L.P., 13 N.Y.3d 398, 404 (2009); Abiele Contr. v. New York City School Constr. Auth., 91 N.Y.2d 1, 9-10 (1997); Brown Bros. Elec. Contr. v. Beam Constr. Corp., 41 N.Y.2d 397, 400 (1977).

A contract is not ambiguous if, on its face, it is definite and precise and reasonably susceptible to only one meaning. White v. Continental Cas. Co., 9 N.Y.3d 264, 267 (2007); Greenfield v. Philles Records, 98 N.Y.2d 562, 569 (2002). An ambiguous contract is one that, on its face, is reasonably susceptible of more than one meaning. Chimart Assoc. v. Paul, 66 N.Y.2d 570, 573 (1986). Usually, the construction of an ambiguous contract is a matter for the fact finder and summary judgment is inappropriate. China Privatization Fund (Del), L.P. v. Galaxy Entertainment Group Ltd., 95 A.D.3d 769, 770 (1st Dept 2012).

The CPA Controls

The parties do not dispute that there is a valid contract, but they do not agree as to which documents define the agreement. The CPA and related security and guaranty documents completely control the relationship between Baosteel and the defendants. Defendants contend that the Court should admit the MOU as part of the agreement. However, the Court must exclude extrinsic evidence to an agreement, when, as here, the CPA is clear and unambiguous as to what documents it includes in the agreement. Article 33 of the CPA, entitled "ENTIRE AGREEMENT" states:

> "[t]his Agreement, the Security Documents, the Corporate Guarantees, the Personal Guarantees and any Purchase Order issued hereunder represent the entire agreement of the parties with respect to the subject matter hereof and thereof, and there are no promises undertaking, representations or warranties by the parties relative to such subject matter not expressly set forth or referred to herein or therein."

The parties thus expressly defined the documents contained in the agreement and did not include the MOU. Moreover, as the Court stated on the Motion to Dismiss, the list of documents designated as the "entire agreement" by Article 33 of the CPA includes no reference to the MOU. See Decision and Order dated May 6, 2015. Defendants point out that the CPA refers to the MOU in its first paragraph. See Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment ¶ 4. However, as this Court has previously found the CPA expressly states which documents are included in the "ENTIRE AGREEMENT" and there is no reference to the MOU. A mere reference stating that the agreement is consistent with the MOU will not suffice to have the MOU govern the transaction. There is no dispute between the parties that the MOU was signed. The plain language of the CPA precludes defendant from attempting to introduce the MOU, which is outside the four corners of the CPA. It is completely irrelevant as defendants contend that the same law firm prepared both documents. The Court finds no ambiguity to be resolved by a fact finder that the agreement does not include the MOU. As such, the Court will not look to the MOU for help interpreting the CPA on this motion. New

York law does not permit parties to introduce extrinsic evidence to help define unambiguous terms. W.W.W. Assocs. v. Giancontieri, 77 N.Y.2d 157 (1990); Nachem v Property Mkts. Group, Inc., 82 A.D.3d 573 (1st Dept 2011).

Defendant Li argues that the United Nations Convention on the International Sale of Goods ("CISG"), 52 Federal Register 6262, 6264-6280 (March 2, 1987), provides an additional basis for admitting parol evidence indicating that the parties did not intend the CPA to supersede an earlier agreement by which plaintiff would invest in Ouro Mining and that the $5-million-dollar deposit was an investment, not a deposit as the Court has already determined. The CSIG does not contain a parol evidence rule. Id. Defendant Li cannot simultaneously argue that it was a contract for the sale of goods in order for the CSIG to apply and to be able to admit parol evidence and that he should be able to submit parol evidence to demonstrate that the contract was not for a sale of goods but for an investment.

Therefore, the Court will look to the clear, defined terms of the CPA and other documents in the agreement.

Plaintiff Performed Its Obligations Under the CPA

The Court now turns to the nature of the transaction as required by the contract. There can be no dispute of material fact that the CPA is a contract between buyer and seller. On the first page, the CPA defines the agreement as between Spiro, "hereinafter referred to as "Seller," and Baosteel, "hereinafter referred to as the

"Buyer." See the CPA. Throughout the document, Spiro is repeatedly referred to as the Seller, and Baosteel is referred to as the Buyer.

Furthermore, the CPA states that the Buyer shall make a "deposit" of five million dollars to the Seller. See CPA, Article 13. Neither party disputes that plaintiff performed their obligation and paid Spiro the $5-million-dollar deposit. Nor does either party dispute that therefore, Spiro was required to deliver the coal pursuant to the CPA.

Even if the Court Were to Consider Parol Evidence, The Contract Was a Sale of Goods

Even if the Court were to consider parol evidence, defendants' argument that the MOU created an investment also fails. Defendants argue that the MOU created an investment contract under which Baosteel was paying for an option to invest in the "Heavener Project" owned by Spiro affiliate Ouro Mining. The terms of the MOU state that Baosteel, a party to the agreement, is looking for a partner "for the development of and trade in coal" in the United States. Baosteel along with the other party to the MOU, Metamining, agree to "seek to cooperate and collaborate in the development of the Project to their mutual benefit." The MOU divided the obligations into Article I, the Secured Coal Purchase Agreement and Article II, Project Cooperation; Purchase Option. The court notes that the MOU states that the

option is regarding purchasing an ownership interest in Ouro Mining, not Spiro Mining. See MOU Article II.

In Article I, Baosteel agrees to purchase 150,000 metric tons of coal from Spiro. Article I further requires that Baosteel will pay "US$5million in advance as deposit within seven (7) bank working days after signing the Purchase Agreement and the perfection of the collateral under the related Security Documents." Thus, the MOU characterizes the $5 million dollars as a deposit for the purchase. See MOU Article I.

The MOU in Article II does grant, subject to conditions, Baosteel an exclusive option to "acquire an interest in the voting share capital of Ouro." Id. The value of Ouro Mining would be determined by the parties after Baosteel completed its due diligence. Id. Baosteel "may exercise (but shall have no obligation to exercise) such Option." Id.

The characterization of the $5 million-dollar deposit as consideration for a turn to work with Baosteel, as defendants argue, cannot be supported by the clear language in the MOU. Although Mr. Chen alleges that he was told that Baosteel had agreed to invest in the Heavener project and that the five million dollars were part of that investment, he makes nothing more than conclusory allegations. See Chen Affidavit ¶¶ 14-16, 19. He claims that the parties negotiated the CPA in order to get around Chinese regulations. Id.

Defendants seek to introduce parole evidence in the form of post agreement emails to support defendant Chen's assertions. Defendants specifically point to an email from Ji Dong to Luo Jin dated February, 15, 2013. See Reply Affirmation of Steven Sinatra Exhibit M. Jidong on behalf of defendant Metaming asserts that the company believed that "the lending/borrowing agreement of relevant capital was made in order to accommodate" Baosteel's arrangements for due diligence. Id. However, Luo Jin wrote back on behalf of Baosteel to clarify that the CPA expressed the "true intentions of both parties." See Reply Affirmation of Steven Sinatra Exhibit N. George Wang sent three emails confirming the progress of Spiro and Metamining being able to deliver the shipload of coal as agreed to under the CPA. See Reply Affirmation of Steven Sinatra Exhibits H, I, J. Ji Dong then attempted to renegotiate the pricing for the shipment of coal in order to repay the five million dollars. See Reply Affirmation of Steven Sinatra Exhibit L. He repeatedly refers to the five million dollars as the "downpayment." See Id. Despite the repeated references to the five million dollars and to the shipment of coal or iron ore in return and in fulfillment with the CPA, Ji Dong subsequently sent the email trying to convince Baosteel that Metamining considered the five million dollars as an investment and so Baosteel should as well. Defendants at best can show that defendants at one point wanted to make the $5-million-dollar sum into an investment instead of a deposit.

Nonetheless, no party presents evidence that Baosteel agreed that the $5 million-dollar deposit was actually a non-refundable investment as the defendants characterize and not a deposit for the receipt of coal. Conclusory allegations are not sufficient to a triable issue of fact at the summary judgment stage. Ramos v. Howard Indus., Inc., 10 N.Y.3d 218 (N.Y. 2008). As such, defendants' argument fails on these grounds as well, and the Court then need only consider what was required under the CPA in the event of default.

The Terms of the CPA in the Event of Default

The parties expressly contracted that in the event that the Seller "is unable to supply the commodity in the quantity and quality required...Seller shall forthwith repay to Buyer the then outstanding balance of Buyer's Deposit, including accrued and unpaid interest thereon from the Deposit Date to the date of the refund at the rate of 5% compounded annually." See CPA Article 18. The Court finds that this clearly entitles plaintiff to summary judgment against Spiro to recover the amount of the deposit, as the coal was never delivered.

The Guarantees

Plaintiff has also stated a *prima facie* case for summary judgment against the individual and corporate guarantors by showing there is no dispute of material fact as to the existence of the guarantees, the existence of underlying debt, and the

guarantors failure to perform under the guarantees. See Moon 170 Mercer, Inc. v. Vella, 122 A.D.3d 544 (1st Dept 2014).

"A guaranty is a promise to fulfill the obligations of another party, and is subject 'to the ordinary principles of contract construction.'" Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v. Navarro, 25 N.Y.3d 485, 492 (2015) (citations omitted). The Court thus will look to the plain, unambiguous terms of the Guaranty and the SGA.

The CPA includes that in the event Spiro fails to repay the repayment amount, "Buyer may proceed to enforce the security arrangements and guarantees." Defendants do not dispute that they signed the SGA and Guaranty. The underlying debt also cannot be disputed as discussed above. Furthermore, defendants do not dispute that they have not performed under the guarantees.

Defendants challenge that the individual defendants acted out of the ordinary and based on oral assurances that there was nothing for them to be concerned about when signing the Personal Guaranty and that they failed to consult an attorney. However, courts have regularly held that "absolute and unconditional" guaranties are valid and foreclose defendants from asserting a fraud in the inducement defense. Cooperative Centrale Raiffeisen-Boerenleenbank, B.A., at 494. The individual defendants do not dispute that they the signed the Guaranty. Article 4 of the Guaranty states that the obligations under the Guaranty "are and shall be absolute

and unconditional." Thus, the Court rejects this challenge and only needs to look to the clear, enforceable terms.

Defendants also argue that plaintiff was required to first pursue alternative remedies. The terms of the Guaranty state that "each Guarantor hereby unconditionally guarantees and promises to pay." The individual guarantors expressly waived certain rights and defenses including that they could require the Buyer to proceed against the Seller and exhaust any other remedies. See Guaranty, Article 5. Thus, their argument that plaintiff must pursue other remedies first has no merit.

The SGA signed by the Corporate Guarantors mirrors the language of the personal guaranty. Thus, the parallel argument made by defendants regarding needing to pursue other remedies also falls flat.

Thus, the Court also grants summary judgment in favor of the plaintiff against the individual and corporate guarantors.

Defendant Li's Cross-Motion for Leave to
Serve the Amended Answer under CPLR 3025

Defendant Li's request to amend his Answer is denied in part and granted in part.

Under CPLR 3025, the Court may "permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just

including the granting of costs and continuances." See CPLR 3025(c). However, the Court should decline to grant leave to amend when the amendment is palpably insufficient or clearly devoid of merit. Priestley v. Panmedix Inc., 134 A.D.3d 642 (1st Dept 2015).

Defendant Li's Proposed Amended Affirmative Defenses

Defendant's proposed amendments concern the illegality of the transaction under Chinese law and Li's failure to be represented by counsel.[3] Neither of these claims have merit.

The Court rejects defendant Li's argument that this transaction was illegal under Chinese law. Chinese law would prohibit investments without proper approval, but it does not prohibit a simple buying and selling transaction. As discussed, even with the admission of parol evidence, this is simply a sale of goods. The parties expressly agreed in the MOU that if the investment project with Ouro Mining went forward, the agreement would be subject to the relevant governmental approval. See MOU Article II. Baosteel clearly stated that if it agreed to invest, they would comply with Chinese law. Baosteel did not act in accordance with this agreement which further demonstrates that it did not believe that the $5-million-

[3] Defendant Li proposes adding the following affirmative defenses: 1) that parol evidence should be admitted to demonstrate the parties to the CPA and related contracts "never intended to be bound"; 2) that all of the written contracts, including the Guaranty, "were all null and void *ab initio* and/or unenforceable" because they were intended to get around the Chinese regulatory approval process; 3) that "pursuant to the doctrine of unclean hands, based on Baosteel's conduct to intentionally avoid and evade the applicable laws of the the PRC governing foreign investments"; and 4) that the documents were contracts of adhesion with respect to Li.

dollar deposit was a disguised investment as defendants' claim. As demonstrated by the text of the CPA and Baosteel's decision to not go through the proper governmental channels, the $5-million-dollar deposit was for a sale of goods, not for an investment. The Court has already found that the agreement was one between buyer and seller, and not one creating an investment. As such, it was not illegal under Chinese law.

Additionally, the parties contracted to have the CPA governed by New York law. See CPA, Article 31. The Court has already held that the contractual choice of New York law is valid and enforceable. See Decision and Order dated May 6, 2015 New York law prohibits raising illegality after the contract was executed. Lloyd Capital Corp. v. Pat Henchar, Inc., 80 N.Y.2d 124 (1992). Allowing the defense of illegality would result in an unwarranted forfeiture by plaintiff and reward the defendants with a large windfall. This type of use of claiming illegality after the fact as a sword for personal gain is disfavored under New York law. Benjamin v. Koeppel, 85 N.Y.2d 549, 553 (N.Y. 1995). Plaintiff has fully performed its obligation to wire the money for the deposit, and New York law clearly prohibits the deposit transforming into a windfall for defendants. The Court thus refuses to acknowledge illegality as a defense.

It is not relevant that Li freely elected to not seek the advice of counsel. Skluth v. United Merchants & Mfrs., Inc., 163 A.D.2d 104 (1st Dept 1990) (holding that

there is no requirement that consultation with a lawyer must occur to render a contractual obligation enforceable, so long as the agreement was knowingly and voluntarily entered into and there was an opportunity to consult with counsel). Therefore, the Court denies Li's motion for leave to amend his affirmative defenses because the proposed amendments are devoid of any merit.

Defendant Li's Proposed Cross-Claim

Defendant Li also seeks contractual indemnification against the other defendants to the extent that Li is liable, that the other defendants shall be liable to him in that amount. Counsel for defendant Chen and the corporate defendants acknowledge on the record that "if anything goes wrong, [defendant Chen] will indemnify Mr. Li." See Transcript of Proceedings at pg. 34. Therefore, the Court grants defendant Li's motion to amend his Answer with respect to his proposed cross-claim.

Accordingly it is,

ORDERED that plaintiff's motion for summary judgment is granted as follows, against Spiro Mining LLC, Metamining, Inc., Coal Creek Minerals, LLC, and Metawise Group, Inc., in the amount of $5,280,924.66 plus interest; and against Larry Li and Songqiang Chen in the amount of $5,280,924.66 plus interest; and it is further

ORDERED that the claim for costs and expenses is severed and referred to a special referee to herein report; and it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this Court on the issue of the amount of damages; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referee Part, which shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee's Part in accordance with the Rules of the Part; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules of the Trial Courts; and it is further

ORDERED that defendant Li's motion to amend his Answer with respect to the proposed affirmative defenses is denied; and it is further

ORDERED that defendant Li's motion to amend his Answer with respect to the proposed cross-claim is granted.

Date: November 16, 2016
New York, New York

Anil C. Singh