

<b>JP Morgan Chase Bank, N.A. v Della Natura Commodities, Inc.</b>
2013 NY Slip Op 33198(U)
January 24, 2013
Supreme Court, Queens County
Docket Number: 16278/12
Judge: Augustus C. Agate
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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24  
Justice

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JP MORGAN CHASE BANK, N.A.,

Index No.: 16278/12

Plaintiffs,

Motion Dated:  
October 16, 2012

-against-

Cal. No.: 9

DELLA NATURA COMMODITIES, INC. d/b/a  
WENAWE ORGANIC PET FOOD IMPORTER, ET  
AL.,

M# 1

Defendants.

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The following papers numbered 1 to 6 read on this motion by defendants Laura Cuner and Martin Valerga, also known as Martin Valegra (collectively referred to as defendants), to dismiss the complaint.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1 - 3
Answering Affidavits - Exhibits.....	4 - 6
Plaintiff's Memorandum of Law	
Defendants' memorandum of La	

Upon the foregoing papers it is ordered that this motion by defendants is determined as follows:

Plaintiff JPMorgan Chase Bank, N.A. (plaintiff), commenced this action sounding in breach of contract, common-law indemnification, conversion and unjust enrichment on August 3, 2012, by filing a summons and complaint. Defendants have not submitted to the jurisdiction of this court. Defendant Martin Valerga, also known as Martin Valegra (Valerga) was the Vice-President of defendant Della Natura Commodities, Inc., doing business as Wenaewe Organic Pet Food Importer (Della Natura), and defendant Laura Cuner (Cuner) was the President of Della Natura. Plaintiff has alleged that defendants agreed to certain wire transfers which allegedly resulted in plaintiff's loss of funds. Cuner allegedly resides in Canada and Valerga allegedly resides in the County of Queens.

Defendants have moved to dismiss the complaint for lack of

personal jurisdiction and have argued that Cuner, as a resident of Canada at the time of the transactions in question, had no connection or contacts with the State of New York which would be sufficient to support this court's jurisdiction over her. Despite defendants' argument that Cuner did not transact business in New York, she was the president and part owner of Della Natura, a business that was incorporated under the laws of the State of New York. The evidence in the record has also demonstrated that Cuner was a signatory on the accounts that are the subject of the instant action. In light of this evidence, Cuner, in her role as president and part owner of Della Natura, has purposefully availed herself of the privilege of conducting business in the state and is, thus, subject to personal jurisdiction within the state (see *Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 466 [1988]; *Humitech Dev. Corp. v Comu*, 16 Misc3d 1109[A] [2007]). Furthermore, as a signatory on the accounts at issue, she is subject to personal jurisdiction within the state (see *Kreutter v McFadden Oil Corp.*, 71 NY2d at 466). Therefore, defendants are not entitled to the dismissal of the complaint against Cuner on the basis of lack of personal jurisdiction.

Although defendants had argued that this court lacked personal jurisdiction over Valerga, in reply to the instant motion, they have conceded that this court has personal jurisdiction over Valerga in light of the affidavit of service of Michael Ballato.

In the alternative, defendants have argued that, pursuant to CPLR 3211 (a)(7), plaintiff's complaint has failed to state a cause of action. On a motion to dismiss a complaint pursuant to CPLR 3211 (a)(7), the allegations in the complaint are accepted as true (see *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Nonnon v City of New York*, 9 NY3d 825, 827 [2007]), and the pleadings are to be liberally construed (CPLR 3026; see *Leon v Martinez*, 84 NY2d at 88). Initially, defendants have argued that they cannot be held liable, in their individual capacities, for the actions of Della Natura. However, the complaint has alleged that defendants personally signed and agreed to indemnify plaintiff, in their individual capacities, for claims, losses or damages relating to the transactions at issue. Therefore, when plaintiff's allegations are accorded "the benefit of every possible favorable inference," the complaint has alleged facts sufficient to support a legally cognizable cause of action against defendants, individually as they "fit within [a] cognizable legal theory" (*Leon v Martinez*, 84 NY2d at 88; see *Nonnon v City of New York*, 9 NY3d at 827).

Defendants have further argued that they cannot be held

liable for Della Natura's alleged breach of contract. The essential elements of a claim for breach of contract are: "the existence of a contract, the plaintiff's performance pursuant to that contract, the defendants' breach of their obligations pursuant to the contract, and damages resulting from that breach" (*Elisa Dreier Reporting Corp. v Global NAPS Networks, Inc.*, 84 AD3d 122, 127 [2011]). In the instant action, the complaint has alleged that defendants both agreed to various wire transfer requests on behalf of Della Natura, that plaintiff performed the requests pursuant to the agreement, that defendants breached the agreement by failing to indemnify plaintiff for its losses relating to the wire transfers, and that plaintiff was damaged as a result of defendants' breach. Therefore, having accorded plaintiff's allegations every possible favorable inference, the facts, as alleged, warrant the denial of the instant motion as to plaintiff's cause of action for breach of contract (*Leon v Martinez*, 84 NY2d at 87-88; see *Nonnon v City of New York*, 9 NY3d at 827; *JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2010]).

The court will turn next to defendants' argument that no basis for a conversion cause of action has been asserted. "A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). "Two key elements of conversion are (1) plaintiff's possessory right or interest in the property ... and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (*id.*, at 50 [internal quotes and citation omitted]). Inasmuch as the allegations of plaintiff's complaint have alleged facts sufficient to constitute a legally cognizable cause of action for conversion, defendants are not entitled to the relief sought (*Leon v Martinez*, 84 NY2d at 87-88; see *Nonnon v City of New York*, 9 NY3d at 827).

Defendants have argued that the claim for unjust enrichment is precluded by the claim for breach of contract. "[W]here there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract, and will not be required to elect his or her remedies" (*Goldman v Simon Prop. Group, Inc.*, 58 AD3d 208, 220 [2008]; see *Sabre Intl. Sec., Ltd. v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 438-439 [2012]). In light of the allegations in the complaint and the ongoing dispute as to agreement at issue, plaintiff need not have elected its remedies.

Lastly, defendants have argued that plaintiff's claim for common-law indemnification is not viable because plaintiff negligently lifted the freeze on Della Natura's bank account. "The principle of common-law, or implied, indemnification permits a party who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages the party paid to the injured party" (*Arrendal v Trizechahn Corp.*, 98 AD3d 699, 700 [2012]). Upon review of the complaint in the instant action, and accepting plaintiff's allegations as true, the complaint has alleged facts sufficient to support a legally cognizable cause of action against defendants for common-law indemnification because the allegations fit within a legally cognizable theory (see *Leon v Martinez*, 84 NY2d at 87-88; see *Nonnon v City of New York*, 9 NY3d at 827).

Accordingly, defendants' motion to dismiss the complaint is denied in its entirety.

Dated: January 24, 2013

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AUGUSTUS C. AGATE, J.S.C.