Kardemir Ithalat Ihracat Ltd. Sti. v Uniwire Trading LLC
2016 NY Slip Op 31681(U)
September 6, 2016
Supreme Court, New York County
Docket Number: 652946/2015
Judge: Jeffrey K. Oing

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48
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KARDEMIR ITHALAT IHRACAT LTD. STI.,

Plaintiff,

-against-

UNIWIRE TRADING LLC and UNIWIRE INTERNATIONAL LTD.,

Defendants.

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Index No.: 652946/2015

Mtn Seq. No. 001

DECISION AND ORDER

JEFFREY K. OING, J.:

Relief Sought

Plaintiff, Kardemir Ithalat Ihracat Ltd. Sti., moves, pursuant to CPLR 3213, for an order granting it summary judgment in lieu of complaint against defendants in the amount of $624,621.18, and for a hearing on the reasonable attorneys' fees.

Defendants, Uniwire Trading LLC and Uniwire International Ltd., cross-move, pursuant to CPLR 7503(a), to dismiss or stay this action and compel arbitration.

Background

Plaintiff is an iron and steel producer incorporated in Turkey. Defendants are Delaware corporations authorized to do business in New York State. On June 18, 2013, plaintiff and defendants entered into an "Exclusive Representation Agreement" (Tulkoff Aff., 10/16/15, ¶ 12). Over a span of several months from 2013 to 2014, they entered into "twenty-one (21) separate

transactions for the sale and purchase of various metal products, with each transaction being memorialized by a sales contract" (Tulkoff Aff., 10/16/15, ¶ 6). These orders totaled $1,024,565.00 (Bakirel Aff., 8/11/15, ¶ 8).

At some point in time, defendants were unable to make payment pursuant to the sales contract. Therefore, on March 28, 2014, the parties executed a promissory note (the "note") in which defendants "promise[d] to pay [plaintiff] ... the sum of Nine Hundred Twenty-four Thousand and 00/100 dollars ($924,000.00) according to the payment schedule ... and with a final maturity date of April 1, 2015" (Bakirel Aff., 8/11/15, Ex. 1). The payment schedule called for twelve installment payments. In the event of a default, the note provided, "[i]f any payment obligation under this Note is not paid within 7 (seven) days after notice to [defendants] that the same is overdue pursuant to the schedule listed on Exhibit A, the remaining unpaid principal balance ... shall become due immediately at the option of Kardemir" (Id.). Furthermore, should defendants default, in addition to the principal and interest hereunder, they agreed to pay "reasonable attorneys' fees and costs incurred by [plaintiff] in exercising any of its rights and remedies" (Id., Ex. E).

Pursuant to the note, defendants made full payments for the first through sixth installments, but only a partial payment for

the seventh installment, and defaulted on the eighth through twelfth installments. By letter dated April 29, 2015, plaintiff's counsel, Leila Mansouri ("Mansouri"), sent a "Promissory Note Default, Notice of Non-Payment" to defendants' managing member and president, Jonathan Tulkoff ("Tulkoff"), that defendants were overdue on their payment and that should defendants not respond by May 9, 2015 plaintiff will commence an action to recover the amount due under the note (Bakirel Aff., 8/11/15, Ex. 4). In a letter dated May 11, 2015, Tulkoff responded to Mansouri's April 29th letter, but without any plans of payment. After several email exchanges without progress or payments, plaintiff commenced this action in August of 2015.

Discussion

Pursuant to CPLR 3213, in order to establish "prima facie entitlement to judgment as a matter of law with respect to a promissory note" a plaintiff must show: (1) the existence of a promissory note executed by the defendant containing an unequivocal and unconditional obligation to repay; and (2) the failure of the defendant to pay in accordance with the note's terms (Zyskind v FaceCake Marketing Technologies, Inc., 101 AD3d 550, 551 [1st Dept 2012]). To establish sufficiently the existence of the note, plaintiff must submit the instrument sued

upon along with affidavit of nonpayment (Poah One Acquisition Holdings V Ltd. v Armenta, 96 AD3d 560, 560 [1st Dept 2012]).

Here, the record demonstrates that plaintiff established the elements for summary judgment in lieu of complaint by submitting the note, signed by defendants, unequivocally stating that "[defendants] promise[d] to pay ... according to the payment schedule" (Bakirel Aff., 8/11/15, Ex. 1). Further, defendants do not dispute the existence of the note nor that they failed to make payments. As such, plaintiff has demonstrated its prima facie entitlement to judgment and the burden now shifts to defendants (Zyskind v. FaceCake Marketing Technologies, Inc., 101 AD3d 550, 551 [1st Dept 2012]["Once the plaintiff submits evidence establishing these elements, the burden shifts to the defendant to submit evidence establishing the existence of a triable issue with respect to a bona fide defense"]).

In their effort to present triable issues of fact, defendants argue that "[they] preserved the right to contest any sums due under the Sales Contracts" because the note is meant to supplement the sales contracts (Tulkoff Aff., 10/16/16, ¶¶ 26, 31). Specifically, defendants point out that the note, while providing that New York law governs over disputes and that plaintiff is "entitled to seek judgment in the New York judicial system," also provides that the arbitration clause "of all

previous contractual dealings ('sales contracts') shall also remain in effect, calling for arbitration in Switzerland" (Bakirel Aff., 8/11/15, Ex. 1). In that regard, section 10 of the note provides the following:

> New York Law: This Note shall be governed by and construed under the laws of the state of New York without regard to the conflicts of laws provisions thereof. If Uniwire fails to make any payment Kardemir is entitled to seek judgment in the New York judicial system. The arbitration clause of all previous contractual dealings ("sales contracts") shall also remain in effect, calling for arbitration in Switzerland, even if this Promissory Note encounters any faults or is dismissed in the New York judicial system.

The arbitration clause in the sales contracts states that any dispute "shall be resolved by arbitration in accordance with the Swiss Rules of International Arbitration" (Tulkoff Aff., 10/16/15, Ex. B).

Plaintiff and defendants disagree on whether the four corners of the note are sufficient to resolve the dispute. While plaintiff argues that this dispute arises solely from the note, defendants claim that the sales contracts and Invoices should be considered together and subject to arbitration. Defendants argue that because the note annexes the payment table and the language of the arbitration clause from the sales contracts the two sets of documents are intertwined. The argument is unpersuasive.

When there are minor references and "no affirmative language making their respective payment obligations interdependent ... [p]laintiff's right to payment can be ascertained from the face of the note itself, without resorting to extrinsic documents" (Scharf v Idaho Farmers Market Inc., 115 AD3d 500, 501 [1st Dept 2014]). Thus, contrary to defendants' assertion, this dispute arises solely from the note. Indeed, adopting defendants' reading of section 10, that the arbitration clause is intertwined with the note so as to require this dispute to be arbitrated, would render meaningless the second clause of section 10, which clearly provides that if defendants fail to make any payment plaintiff "is entitled to seek judgment in the New York judicial system." The principle is well settled that a contract should not be read to render any portion meaningless (Schiavone Const. Co., Inc. v. City of New York, 106 AD3d 427, 428 [1st Dept 2013]).

Defendants also dispute the amount owed under the note due to nonconforming goods. They argue that "each of these disputes regarding the quality of the [g]oods and the proper amount due must be arbitrated" because defendants "specifically reserved [their] right to arbitrate any issues arising out of the Sales Contracts and/or Invoices" because the note states that the arbitration clause in the Sales Contracts "shall" remain in

effect (Tulkoff Aff., 12/29/15, ¶¶ 17, 18). In that regard, defendants provide email exchanges with plaintiff of alleged customer complaints as evidence that the goods were nonconforming (Tulkoff Aff., 10/16/15, Ex. D).

Pursuant to the sales contracts, claims "shall be sent to the Seller by registered mail" (Id., Ex. B). Further, the contract notes, "[s]hould the Buyers fail to notify a claim [sic] within the stipulated period of time (30 days) or strictly in accordance with the manner stipulated herein, then the claim shall be deemed extinguished and barred and the Seller shall be relieved of all responsibility in relation thereto" (Id.). Although defendants raised two alleged customer complaints within thirty days from each order, they failed to do so by the proper procedure outlined in the parties' sales contracts. As such, this argument, supra, is unavailing.

In any event, even if defendants had lodged their complaints in the proper manner, they failed to carry their burden because they did not provide evidentiary proof of the bona fides of the complaints sufficient to raise an issue of fact (Seaman-Andwall Corp. v. Wright Mach. Corp., 31 AD2d 136 [1st Dept 1968] [internal quotation marks omitted]); Bronsnick v. Brisman, 30 AD3d 224, 224 [1st Dept 2006]["Something more than a bald assertion ... is required to create an issue of fact"]). As

plaintiff points out, there is no evidence of actual customer complaints (Bakirel Aff., 12/1/15, ¶¶ 16, 17).

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment in lieu of a complaint is granted against defendants in the amount of $624,621.18, plus interest, and it is further

ORDERED that branch of the motion for attorney's fees is granted to the extent of referring the issue of the amount of reasonable attorney's fees and costs to a Special Referee or Judicial Hearing Officer to hear and report with recommendations, or if the parties so-agree to hear and determine. Plaintiff is directed, within fourteen days from the date hereof, to serve a copy of this order with notice of entry, together with a completed Information Sheet upon the Special Referee Clerk in the General Clerk's office, who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date, and it is further

ORDERED that defendants' cross motion to dismiss or stay the action is denied.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 9/6/16

HON. JEFFREY K. OING, J.S.C