Tongyang, Inc. v Tong Yang Am., Inc.
2018 NY Slip Op 32959(U)
November 26, 2018
Supreme Court, New York County
Docket Number: 650894/2014
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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TONGYANG, INC.,

Plaintiff,

- against -

TONG YANG AMERICA, INC. and TONGYANG NETWORKS CORP.,

Defendants.

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DECISION AND ORDER
Index No.: 650894/2014
Mot. Seq. Nos: 001 and 002

O. PETER SHERWOOD, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

This action by plaintiff Tongyang, Inc. (TYI) against its former subsidiary, defendant Tong Yang America, Inc. (TYA), for breach of contract and fraudulent conveyance arises out of TYA's failure to pay certain receivables due to plaintiff. The complaint also alleges a capital reduction payment from TYA in 2015 to its parent Tongyang Networks Corp. (TYN) was a fraudulent conveyance.

In motion sequence number 001, plaintiff moves pursuant to CPLR 3211 (a) (7) to dismiss TYA's sole counterclaim for breach of contract and related second affirmative defense of setoff under Debtor and Creditor Law § 151. TYA opposes the motion and cross-moves pursuant to CPLR 3212 for partial summary judgment to dismiss the complaint (which alleges breach of contract and fraudulent conveyance), to grant TYA's counterclaim, and to dismiss plaintiff's first, second and third affirmative defenses to TYA's setoff claim. In motion sequence number 002, TYN moves to dismiss the complaint as to it for lack of jurisdiction and for failure to state a claim in the second cause of action for fraudulent conveyance under New York Debtor and Creditor Law § 276 (DCL §___).

For the reasons set forth herein, motion sequence number 001 is denied and the cross-motion is granted on TYA's counterclaim for breach of the TYI Guarantys (discussed below) and on its second affirmative defense of setoff. Motion sequence number 002 is granted in part and the second cause of action against TYN is dismissed for failure to adequately plead violation of DCL § 276. That portion of the motion seeking dismissal for lack of jurisdiction is denied as academic. Were the court to reach the jurisdiction issue, dismissal would be granted.

BACKGROUND

Plaintiff is a publicly traded corporation organized and existing under the laws of the Republic of Korea (complaint, ¶ 1, Dkt. 1[1]). TYA, a corporation organized in New York, was plaintiff's wholly-owned subsidiary until January 2013, when plaintiff transferred ownership of its common stock in TYA to defendant TYN (*id.*, ¶¶ 2 and 11). TYN is a publicly traded Korean corporation (*id.*, ¶ 3), in which plaintiff once owned shares (*id.*, ¶ 11). On December 23, 2014, plaintiff divested itself of its shares in TYN leaving TYN unrelated to TYI (*id.*, ¶ 23). In 2015 TYA transferred over $4 million to TYN in the form of a paid in capital reduction (*id.*, ¶ 24). Shortly thereafter, in 2016, TYA filed a certificate of dissolution with the New York Secretary of State (*id.*, ¶ 25).

The complaint alleges TYA was in the business of purchasing and selling furs[2] (*id.*, ¶ 12). TYA ordered furs from plaintiff which procured them from various third-party suppliers (*id.*). The suppliers delivered the furs directly to TYA. After selling the furs, TYA paid plaintiff (*id.*). The complaint alleges that, between April 11 and September 24, 2013, TYA failed to remit $9,009,548.24 to plaintiff (the TYA Receivables) (*id.*, ¶ 13). A payment of approximately $2 million was made in January 2014 leaving a balance of approximately $7 million (*id.*, ¶¶ 30-31).

Plaintiff acknowledges it owes over $4 million to TYA (the TYI Debt) based upon written guarantees whereby plaintiff promised to pay certain obligations on behalf of its subsidiaries and other affiliated entities, including Tongyang Securities, Inc. (TYS), a publicly traded Korean corporation, and Gavinton Limited (Gavinton), a now-dissolved entity that was incorporated in Hong Kong (TYI Guarantys) (*id.*, ¶ 14 and Dkt. 16 to 18). The TYI Debt included repayment under the guarantys of $4,350,597 owed as of July 11, 2013 on a loan TYA had made to Gavinton in 2001 (the Gavinton Loan), and $211,040 that TYA had paid on behalf of TYS stemming from a commercial leasing issue (Yoon affirmation, ¶ 12, Dkt. 32).

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[1] The reference "Dkt.___" refers to the place in the electronic docket of this case, Dkt. Index No. 650894/2017, where the document is stored.

[2] TYA's chief executive officer, Hyung Ro Yoon, provides a different description of TYA's business. He affirms that TYA purchased processed rawhides from American suppliers and sold them to manufacturers in Asia (Yoon aff, ¶ 6). TYA's suppliers drew on lines of credit issued by plaintiff's Korean banks, designating a U.S. bank as the drawee. TYA reimbursed plaintiff for the amount drawn (*id.*).

A. Plaintiff's Rehabilitation Proceeding and TYA's Dissolution

On October 17, 2013, plaintiff TYI entered rehabilitation proceedings in Korea (the Rehabilitation Proceeding) pursuant to that country's Debtor Rehabilitation and Bankruptcy Act (DRBA) (Complaint, ¶ 15, Dkt. 1). In a December 2013 letter, plaintiff asked TYA to pay the TYA Receivables, and stated the payment "will have a substantial impact upon our company's rehabilitation as our company's [sic] undergoing rehabilitation proceedings currently"[3] (December 2013 Letter, attached as Exhibit D to Jeon aff, Dkt. 19). Plaintiff identified Sung Soo Jung (Jung) and Cheol Won Park as the co-administrators in the Rehabilitation Proceeding, but provided no other information about that proceeding.

In an email response to plaintiff, dated December 24, 2013, Rosa Ha, on Yoon's behalf, wrote that TYA would pay down the TYA Receivables as follows: (1) $2 million in January; (2) $2 million in February; (3) $2.5 million in March; and (4) the remaining balance in April (Ha e-mail attached as Exhibit E to Jeon aff., Dkt. 20). On January 8, 2014, TYA wire transferred $2,066,109 from its account at a Manhattan branch of Shinhan Bank to plaintiff (Complaint, ¶ 19; SWIFT Information Sheet, attached as Exhibit F to Jeon aff, Dkt. 21). TYA made no other payments (Complaint, ¶ 20).

By letter dated October 14, 2014, Yoon advised plaintiff and Jung, the co-administrator in the Rehabilitation Proceeding, that TYA was "performing tasks regarding bankruptcy and liquidation of 3 companies including [TYA] and 2 other companies in the United States" (Dkt. 27). Yoon stated that, as of June 11, 2013, plaintiff owed TYA a balance of $4,350,597, which was confirmed by plaintiff's auditor, Pricewaterhouse Coopers LLP (PWC) (*id.*). Yoon asked plaintiff to pay the TYI Debt before TYA liquidated its assets, stating that, "if [plaintiff] fail[s] to reply sincerely to [TYA's] letter until [sic] Oct. 24, 2014, [TYA] will offset [its] obligation against [the TYI Debt]" (*id.*).

Jung responded by letter on October 23, 2014, writing that TYA "knew or should have known" about the commencement of the Rehabilitation Proceeding because TYA had been an affiliate and a TYN subsidiary and because TYN had filed for bankruptcy at the same time as the plaintiff (Dkt. 22). Jung declined payment because the time for TYA to assert a claim had lapsed under Articles 100, 144, 148 and 251 of the DRBA *(id.)*. The due date for reporting an affirmative claim or a setoff in the Rehabilitation Proceeding was November 22, 2013, and TYA failed to declare its intention to file a claim by that date (*id.*). Jung also described plaintiff's confirmation

[3] The translated letter does not bear a specific date other than "Dec. 2013."

of the TYI Debt, set forth in a June 11, 2013 letter to PWC, as a gratuitous act because plaintiff's confirmation of the TYI Debt was made within six months of the commencement of the Rehabilitation Proceeding. Jung denied the claim on that basis under DRBA Article 100 (*id.*).

In 2015, TYA paid 4,158,730,000 Korean Won (KRW) to TYN as a capital reduction payment[4] (Complaint, ¶ 24). TYA subsequently filed a certificate of dissolution with the New York State Secretary of State in June 2016 (*id.*, ¶ 25). Plaintiff alleges that TYA never provided it with notice of the dissolution as required by New York Business Corporation Law § 1007 (a) (*id.*, ¶ 26).

B. Procedural Background of this Case

Plaintiff commenced this action by filing a summons and complaint on February 21, 2017. The complaint asserts two causes of action against TYA for breach of contract and for fraudulent conveyance under Debtor and Creditor Law § 276. The second claim is also asserted against TYN. TYA answered the complaint and asserted 18 affirmative defenses and a single counterclaim for breach of contract. In the counterclaim, TYA alleges plaintiff had guaranteed payment of the Gavinton Loan, as memorialized in both a letter dated April 19, 2001, and the Guaranty (TYA Answer and Counterclaims, Dkt. 3, at 8). TYA's books and records also reflected the parties' mutual obligations and TYA's setoff of the TYI Debt against the TYA Receivables (*id.*).

TYN has filed a motion to dismiss alleging lack of jurisdiction and failure to state a cause of action (Dkt. 65). In opposition to the motion, TYI argues TYN is subject to the jurisdiction of this court and that it has adequately pleaded an actual fraudulent transfer (Dkt. 70).

MOTION SEQUENCE 001

A. The Parties Contentions

In motion sequence number 001, plaintiff moves to dismiss TYA's sole counterclaim, for breach of contract, and TYA's second affirmative defense for a setoff, which plaintiff likens to a permissive counterclaim, on the ground that both claims are governed by Korean law and should be dismissed. In support of the motion, plaintiff proffers an affirmation of Sung-Yong Kim (Kim), an attorney licensed in South Korea and a professor of law at SungKyunKwan University Law School in Seoul, along with translated excerpts from several provisions of the DRBA. Kim affirms that, based on his review of the documents relevant to this action, TYA is barred from asserting an affirmative claim for the TYI Debt pursuant to DRBA Article 251. The article, entitled Immunity of Rehabilitation Claims, states, in relevant part, as follows:

[4] Based on the current exchange rate, 4,158,730,000 KRW equals approximately $3.658 million (Jeon Reply ¶ 7).

> "When it is decided to grant authorization for the rehabilitation plan, the debtor shall be exempted from his/her responsibilities under all of the rehabilitation claims and rehabilitation security rights, with the exception of rights recognized pursuant to the rehabilitation plan or the provisions of this Act and the rights of shareholders and equity right holders, and all security rights over the debtor's assets shall be extinguished"

(DRBA Article 251, Dkt. 29). The TYI Debt did not appear on the schedule of claims presented to the Korean court, and TYA failed to preserve the claim by filing a proof of claim before the meeting of interested parties on March 21, 2014, when a rehabilitation plan was discussed and resolved (Kim aff, ¶¶ 8 [f] and 9). Once the Korean court confirmed the rehabilitation plan, TYA's counterclaim was extinguished and plaintiff was discharged from the Rehabilitation Proceeding.

Plaintiff argues the court should reach the same conclusion under United States bankruptcy law with respect to TYA's counterclaim. Pursuant to 11 USC § 1141 [d], TYA would have been required to file a proof of claim by a certain date or else lose its right to assert the claim once plaintiff was discharged from bankruptcy. Plaintiff submits that TYA lost its right to recovery on the TYI Debt because it did not file a proof of claim.

While there is no conflict of laws regarding the counterclaim, plaintiff admits that an actual conflict exists regarding TYA's setoff defense. Nevertheless, plaintiff maintains that Korean law applies under the interest analysis approach because the parties' substantial contacts and the subject transactions favor the application of Korean law. Kim states that DRBA Article 144 (1) permits a creditor to assert a setoff, but the setoff must be exercised before the time for reporting a proof of claim expires (Kim aff, ¶ 10). He concludes TYA's setoff is barred because TYA never filed a proof of claim. Moreover, "any claim that is not independently enforceable should also be prohibited from being involved as a defense of setoff" (*id.*).

TYA opposes the motion and cross-moves for partial summary judgment on the ground that the Rehabilitation Proceeding is no bar to recovery for a number of reasons (Dkt. 45). First, plaintiff should not be permitted to circumvent the procedures in place here for the recognition of a foreign bankruptcy proceeding (*see* 11 USC § 1515). Chapter 15 of the Bankruptcy Code provides the exclusive means for recognizing those types of proceedings in United States courts, and plaintiff never filed a petition for recognition of the Rehabilitation Proceeding. Therefore, the court should deny the motion to dismiss the counterclaim and grant defendant TYA summary judgment on plaintiff's first and second causes of action.

Next, TYA argues that deference to the Rehabilitation Proceeding under the doctrine of comity would result in an injustice to TYA, a New York citizen, because it was not afforded due process in that proceeding. TYA proffers an affirmation from Chiyong Rim (Rim), an attorney licensed in Korea and a former senior judge in the Bankruptcy Division, Seoul Central District Court, to provide more detail about Korean rehabilitation procedures. Rim explains that if a debtor files a petition for rehabilitation, a Korean court may issue an order that commences the proceeding; appoints a receiver; sets the date when the receiver must submit a schedule of creditors and their claims to the court; and sets the bar date when creditors must file their proofs of claim[5] (Rim aff, Dkt. 36, ¶ 15). It is the Korean court that serves creditors with the order commencing the proceeding.[6] Yoon states that TYA never received notice of the Rehabilitation Proceeding from the Korean court or any other document informing TYA of its right to file a proof of claim or of the meeting of interested parties (Yoon aff, ¶ 17).

As for the schedule of creditors' claims, Rim explains that the court-appointed receiver must list all claims he or she "knows of . . . [and] can easily learn of" and all claims the receiver wishes to challenge (Rim aff, ¶ 16). Claims identified on the receiver's schedule are deemed timely under DRBA Section 151 and those creditors need not file a proof of claim[7] (*id.*, ¶ 17). However, if a claim on the schedule is inaccurate, then the relevant creditor may file a proof of claim to correct the mistake (*id.*). According to the documents Rim reviewed, the Korean court appointed Jung as a joint receiver and set November 22, 2013, as the bar date (*id.*, ¶¶ 14[b] and [c]). Rim submits that Jung, whom plaintiff also employed as a director, was likely aware of the TYI Debt and of TYA's status as a known creditor. Jung, however, omitted the TYI Debt from the schedule of claims presented to the court.

Rim concludes that TYA may maintain its counterclaim even though the Rehabilitation Proceeding has closed. He refers to a decision in Korean Supreme Court 2011GUE 256, in which the court held that when a creditor was not aware of the commencement of the rehabilitation proceeding or the bar date, and when the court-appointed receiver knew of or could have easily determined the existence of a creditor's claim, then "the creditor's claim shall not be discharged after the confirmation of the plan" (*id.*, ¶ 18[c]). In this action, plaintiff's December 2013 letter

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[5] Kim refers to the receiver as an administrator.

[6] Rim's recitation of the facts in Korean Supreme Court 2001GUE 256 suggests that the Seoul District Court serves potential creditors with the order commencing a rehabilitation proceeding and gives notice of the proceeding by publication (Rim aff, ¶18 [a] and 19). Kim confirms that a Korean court must provide notice pursuant to DRBA Section 51 (1) and (2) (iii) (Kim reply aff, 4). Kim did not provide the text of those provisions.

[7] Kim referred to the DRBA articles as "sections."

only casually mentioned the rehabilitation proceeding and omitted reference to the bar date, which, incidentally, had already passed by time the letter was sent. Therefore, TYA was not aware of the specifics of the rehabilitation proceeding and should not be bound by it because plaintiff failed to provide it with "sufficient knowledge requiring TYA to take action" (*id.*, ¶ 20). Further, TYA contends that the deficiencies related to notice violate federal bankruptcy law and TYA's due process rights under the Fifth Amendment and the Fourteenth Amendment of the United States Constitution.

With respect to the setoff defense, and contrary to plaintiff's position, TYA argues that there is no conflict of laws because Korea and New York both recognize the right to setoff mutual debts. Even if there were a conflict, the substantial contacts between TYA and New York favor the application of New York law.

Finally, if the court is inclined to grant plaintiff's motion, TYA argues the motion is premature in the absence of discovery pertaining to the parties' interests and connections to New York.

In response, plaintiff appears to concede TYA never received individual notice of the Rehabilitation Proceeding or of the November 22, 2013 bar date (Jeon Reply aff, ¶ 5; Kim Reply aff, ¶ 6, Dkt 55 & 58). However, plaintiff maintains TYA is precluded from asserting the counterclaim and setoff. DRBA Section 152 (1) provides a mechanism for a creditor to file a proof of claim after the reporting period has passed, so long as the creditor was not at fault for the failure to timely file (Kim Reply aff, ¶ 4). Kim explains that a creditor may file a supplemental proof of claim within one month after the reason for the delay ceases to exist (*id.*). However, Section 152 (3) (i) further provides that a supplemental proof of claim cannot be filed after the meeting of interested parties. Kim suggests TYA was likely aware of the Rehabilitation Proceeding because it was TYN's subsidiary and because of plaintiff's December 2013 letter. Therefore, TYA could have filed a supplemental proof of claim by the end of January 2014, but it failed to do so.

Kim also submits that Rim's translation of Korean Supreme Court 2011GUE 256 is inaccurate because the holding did not require actual knowledge of both commencement of a rehabilitation proceeding and the bar date (Kim Reply aff, ¶ 9). In any event, that action is factually dissimilar. The creditor in Korean Supreme Court 2011GUE 256 learned of the bankruptcy action after the meeting of interested parties was held (Kim Reply aff, ¶ 9). Here, TYA apparently learned of the Rehabilitation Proceeding four months before the March 2014 meeting (apparently, the December 13 letter, Dkt 19). Kim also notes that, even if TYA filed a supplemental proof of claim,

TYA would not be entitled to recover the full amount of the TYI Debt (*id.*, ¶ 13). The TYI Debt would be classified as an unsecured related party guarantee claim, and under the rehabilitation plan, TYA could recover only three-tenths of 10% of its counterclaim or setoff[8] (*id.*).

Plaintiff also argues TYA's reliance on Chapter 15 of the United States Bankruptcy Code is misplaced because plaintiff is not a foreign representative for purposes of a recognition petition. Lastly, the doctrine of comity bars TYA from asserting the counterclaim and setoff.

TYA replies that the court should not extend comity to the Rehabilitation Proceeding. It submits another affirmation from Rim to refute Kim's claim that TYA should have filed a supplemental proof of claim so as to preserve the counterclaim and setoff. Rim states that a creditor with a right to setoff does not need to file a proof of claim under DRBA Section 144 (1), provided that the creditor asserts the claim before the reporting period expires (Rim Reply aff, ¶ 4). Plaintiff, though, chose to notify TYA of the Rehabilitation Proceeding only after the reporting period had passed. Moreover, according to the holdings in Korean Supreme Court 2011GUE 256, discussed above, and Korean Supreme Court 2008DA49707, TYA can assert a setoff even after the Rehabilitation Proceeding closed[9] (*id.*, ¶ 10-11). Under Korean law and federal bankruptcy law, TYA's setoff right is not extinguished because it had no notice of the bankruptcy proceeding.

B. Discussion

1. Legal Standards

On a motion to dismiss brought under CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord [the plaintiff] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]). Allegations that are ambiguous must be resolved in plaintiff's favor (*see JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). A motion to dismiss the complaint will be denied "if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977] [citations omitted]). However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]). "When documentary evidence is submitted by a defendant the standard morphs from whether the plaintiff stated a cause of action to whether it

[8] As similar claims are being repaid at 10%, and only 3 of the 10 payments have been made to date.
[9] Rim did not discuss the specific facts or the holding in Korean Supreme Court 2008DA49707.

has one" (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014] [internal quotation marks and citation omitted]).

"In moving to dismiss an affirmative defense pursuant to CPLR 3211(b), the plaintiff bears the heavy burden of showing that the defense is without merit as a matter of law" (*Granite State Ins. Co. v Transatlantic Reins. Co.*, 132 AD3d 479, 481 [1st Dept 2015]). Where questions of fact exist that require a trial exist, the motion should be denied (*id.*).

In contrast, the movant on 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 Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (*see* CPLR 3212). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, *regardless of the sufficiency of the opposing papers*" (*Vega*, 18 NY3d at 503 [internal quotation marks and citation omitted, emphasis in original]).

The court also may take judicial notice of "the laws of foreign countries . . . if a party requests it, furnishes the court sufficient information to enable it to comply with the request, and has given each adverse party notice of his intention to request it" (CPLR 4511 [b]). It also may consider transactions of foreign statutes and expert affidavits interpreting them as "a basis for constructing foreign law" (*Sea Trade Mar. Corp. v Coutsodontis*, 111 AD3d 483, 484-485 [1st Dept 2013]). Plaintiff and TYA have provided expert affidavits and translations of select provisions of the DRBA and numerous documents.

2. Plaintiff TYI's Motion to Dismiss

a. Application of Chapter 15 of the Bankruptcy Code

The stated purpose of Chapter 15 of the Bankruptcy Code is "to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency" (11 USC § 1501 [a]). The procedure by which a foreign bankruptcy proceeding may be recognized is set forth in 11 USC § 1515, which requires a foreign representative to file a

petition for recognition in bankruptcy court. A foreign representative is "a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding" (11 USC § 101 [24]). A foreign proceeding is "a collective judicial or administrative proceeding in a foreign country . . . under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation" (11 USC § 101 [23]). A foreign main proceeding is "a foreign proceeding pending in the country where the debtor has the center of its main interests" (11 USC § 1502 [4]). If the application meets the standards described in 11 USC § 1517, then the court may enter an order granting recognition. The effects of granting recognition, as detailed in 11 USC § 1520 (a), may include relief under 11 USC § 362 (a) (7), which provides for a stay of "the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor." In addition, a foreign representative may request comity "in a court . . . other than the court which granted recognition," provided that a certified copy of the recognition order is submitted with the request (11 USC § 1509 [c]).

The Rehabilitation Proceeding is the type of event which could qualify both as a foreign proceeding and a foreign main proceeding, and plaintiff's court-appointed receivers could qualify as foreign representatives. Chapter 15, however, does not bear on this action.

The failure to obtain an order of recognition of a foreign bankruptcy proceeding means that "the foreign representative cannot be heard in any court in the United States" (*Matter of Millennium Global Emerging Credit Master Fund Ltd.*, 458 BR 63, 81 [Bankr SD NY 2011], *affd* 474 BR 88 [SD NY 2012]). Plaintiff is not a foreign representative as defined in 11 USC § 101 (24). Rather, the corporation is pursuing a direct claim against TYA for the TYA Receivables (*see Barclays Bank PLC v Kemsley*, 44 Misc 3d 773, 779 [Sup Ct, NY County 2014] [stating that "the plain language of chapter 15 applies only to a 'foreign representative'" and not an individual debtor]). To the extent that TYA relies on *Saad Invs. Co. Ltd. v JPMorgan Chase Bank, N.A.* (2013 WL 1783569 [Sup Ct NY County 2013]), that case is inapposite as the plaintiff in that action "admits it is a 'foreign representative' for purposes of Chapter 15" (2013 WL 1783569, *1). Additionally, and contrary to TYA's position, there is no indication that plaintiff sued TYA for "the express purpose of assisting or facilitating" the Rehabilitation Proceeding, in which event Chapter 15 would apply. (*Varga v McGraw Hill Fin. Inc.*, 2015 NY Slip Op 31453[U], * 27 [Sup

Ct NY County 2015], *affd* 147 AD3d 480 [1st Dept 2017], *lv denied* 29 NY3d 908 [2017]). That proceeding closed more than one year before plaintiff commenced the instant action.

TYA also ignores the importance of the word "pending," which appears in both 11 USC § 1502 (4) and 11 USC § 1517 (b) (1). Although the Bankruptcy Code provides no definition for the word "pending," as used in 11 USC § 1502, it "refers to the location of the foreign case, not the stage of the proceeding" (*Matter of Oversight & Control Commn. of Avánzit, S.A.*, 385 BR 525, 536 [Bankr SD NY 2008]). A bankruptcy case is deemed "pending" until closed (*id.* at 537). Both Rim and Kim concluded that a Korean court terminated the Rehabilitation Proceeding in February 2016. Thus, the Korean Proceeding was no longer pending for purposes of Chapter 15 of the Bankruptcy Code and the Bankruptcy Code does not apply.

Consequently, that branch of TYA's cross motion for summary judgment dismissing plaintiff's first and second causes of action is denied.

b. The Doctrine of Comity

The doctrine of comity "refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states" (*Morgenthau v Avion Resources Ltd.*, 11 NY3d 383, 389 [2008] [internal quotation marks and citations omitted]). It is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws" (*Hilton v Guyot*, 159 US 113, 164 [1895]). Therefore, under the doctrine of comity, New York courts will recognize judgments obtained in a foreign jurisdiction, provided there was no fraud in procuring the judgment and that its recognition would not violate strong public policy (*see Sung Hwan Co., Ltd. v Rite Aid Corp.*, 7 NY3d 78, 82 [2006]). "[W]here there is a conflict between our public policy and application of comity, our own sense of justice and equity as embodied in our public policy must prevail" (*J. Zeevi & Sons. v Grindlays Bank [Uganda]*, 37 NY2d 220, 228 [1975], *cert denied* 423 US 866 [1975]).

Comity is also a doctrine of "'practice, convenience and expediency'" (*Ehrlich-Bober & Co. v University of Houston*, 49 NY2d 574, 581 [1980], quoting *Mast, Foos & Co. v Stover Mfg. Co.*, 177 US 485, 488 [1900]). As such, "American courts have long recognized the particular need to extend comity to foreign bankruptcy proceedings," in part, because "[t]he equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding" (*Victrix S.S. Co., S.A. v Salen Dry Cargo A.B.*, 825 F2d 709, 713-714 [2d

Cir 1987]). For these reasons, courts will defer to a foreign bankruptcy proceeding if "the foreign proceeding has not resulted in injustice to New York citizens, prejudice to creditors' New York statutory remedies, or violation of the laws or public policy of the state" (*Drexel Burnham Lambert Group, Inc. v Galadari*, 777 F2d 877, 880 [2d Dept 1985] [internal quotations marks and citation omitted]). In addition, courts will extend comity to a foreign bankruptcy proceeding if that proceeding was "procedurally fair" (*JP Morgan Chase Bank v Altos Hornos de Mex., S.A. de C.V.*, 412 F3d 418, 424 [2d Cir 2005]). It is well settled that procedural fairness implicates due process considerations (*see Victrix S.S. Co., S.A.*, 825 F2d at 714; *Barclays Bank PLC*, 44 Misc 3d at 780]). In determining whether a foreign proceeding meets procedural fairness, the court must look at the following factors:

> "(1) whether creditors of the same class are treated equally in the distribution of assets; (2) whether the liquidators are considered fiduciaries and are held accountable to the court; (3) whether creditors have the right to submit claims which, if denied, can be submitted to a bankruptcy court for adjudication; (4) whether the liquidators are required to give notice to the debtors' potential claimants; (5) whether there are provisions for creditors meetings; (6) whether a foreign country's insolvency laws favor its own citizens; (7) whether all assets are marshalled before one body for centralized distribution; and (8) whether there are provisions for an automatic stay and for the lifting of such stays to facilitate the centralization of claims"

(*Allstate Life Ins. Co. v Linter Group, Ltd.*, 994 F2d 996, 999 [2d Cir 1993], *cert denied* 510 US 945 [1993], citing *Cunard S.S. Co. v Salen Reefer Services AB*, 773 F2d 452, 459-460 [2d Cir 1985]). Thus, application of the doctrine of comity is within the court's discretion (*Morgan*, 11 NY3d at 390]).

It has been held that "the bankruptcy laws of Korea are substantially similar to the laws of the United States and comport with general notions of due process" (*Daewoo Motor Am., Inc. v General Motors Corp.*, 315 BR 148, 158 [MD Fl 2004], *affd* 459 F3d 1249 [11th Cir 2006], *cert denied* 549 US 1362 [2007]); *Matter of Kyu-Byung Hwang*, 309 BR 842, 846 [Bankr SD NY 2004] [stating that "Korean bankruptcy law . . . is substantially similar to United States law, does not discriminate against non-Korean creditors, and comports with American notions of fairness and due process"]). Nonetheless, the court declines to extend comity to recognize the Rehabilitation Proceeding in this instance.

Based on the parties' submissions, questions exist as to whether TYA had "notice, as well as a full and fair opportunity to participate in all facets of the Korean bankruptcy process" (*Daewoo Motor Am., Inc.*, 315 BR at 160). Plaintiff does not dispute that TYA did not receive individual notice from the Korean court, which, according to Kim, is required under DRBA Section 51 (1) and (2) (iii). Plaintiff's assertion that TYA should have been aware of the Rehabilitation Proceeding because of its status as TYN's subsidiary is speculative and wholly unsupported by any facts. Plaintiff's December 2013 letter fails to sufficiently alert TYA of the Rehabilitation Proceeding or suggest that it needed to act, and Kim did not determine whether the type of notice TYA received of the Rehabilitation Proceeding was reasonable so as to satisfy due process under Korean law. Kim and Rim also cannot agree on whether a creditor must be given notice of both the commencement of the proceeding and the bar date.

Nor does the type of notice TYA received satisfy due process considerations under federal law. In a federal bankruptcy proceeding, a debtor must give "'reasonable notice' to a creditor of the bankruptcy proceeding and the applicable bar date(s), [or else] the creditor's proof of claim cannot be constitutionally discharged" (*Matter of XO Communications, Inc.*, 301 BR 782, 792 [Bankr SD NY 2003], *affd* 2004 WL 2414815, 2004 US Dist LEXIS 2879 [SD NY 2004]). "[N]otice [must be] reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" (*id.*, quoting *Mullane v Cent. Hanover Bank & Trust Co.*, 339 US 306, 314 [1950]). Creditors known to a debtor must receive "actual notice of the bar date" (*Matter of AMR Corp.*, 492 BR 660, 663 [Bankr SD NY 2013]; *Matter of XO Communications, Inc.*, 301 BR at 792). Furthermore, "[a] creditor who is not given notice, even if it has actual knowledge of the reorganization, does not have a duty to investigate or inject itself into the proceedings" (*Matter of Brunswick Hosp. Ctr. v State of N.Y. Dept. of Health*, 1997 WL 836684, * 5, 1997 Bankr LEXIS 2184, *17 [Bankr SD NY 1997]).

The plaintiff in this action was aware of its obligation to repay the TYI Debt, yet it failed to provide TYA with adequate notice of the Rehabilitation Proceeding and of its right to participate in that proceeding. While Kim contends TYA could have filed a supplemental proof of claim, plaintiff's December 2013 letter did not give the date of the meeting of interested parties. Kim also never suggested that it was the burden of TYA to ascertain when the meeting of interested parties was scheduled to take place. Lastly, extending comity to the Rehabilitation Proceeding

would result in significant prejudice to TYA, because it would extinguish its statutory right of setoff, discussed below.

c. Choice of Law

"The first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved" (*Matter of Allstate Ins. Co. [Stolarz-New Jersey Mfrs. Ins. Co.]*, 81 NY2d 219, 223 [1993]). Whereas "matters of procedure are governed by the law of the forum . . . [,] matters of substantive law fall within the course charged by choice of law analysis" (*Tanges v Heidelberg N. Am.*, 93 NY2d 48, 53 [1999] [internal quotation marks and citations omitted]). For an actual conflict to exist, "the laws in question must provide different substantive rules in each jurisdiction that are 'relevant' to the issue at hand and have a 'significant *possible* effect on the outcome of the trial'" (*Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 200 [1st Dept 2013], quoting *Finance One Pub. Co. Ltd. v Lehman Bros. Special Fin., Inc.*, 414 F3d 325, 331 [2d Cir 2005], *cert denied* 548 US 904 [2006]). If there is no conflict, "then the law of the forum state where the action is being tried should apply" (*SNS Bank v Citibank*, 7 AD3d 352, 354 [1st Dept 2004]).

As an initial matter, plaintiff concedes there is no conflict of laws regarding TYA's counterclaim, but argues there is a conflict pertaining to TYA's setoff defense. Section 144 (1) (Right to Setoff) of the DRBA reads:

> "Where any rehabilitation creditor or any rehabilitation secured creditor bears obligations for the debtor at the time that rehabilitation procedures commence, when both of the claims and the obligations can be offset against each other prior to the expiration of the reporting period, the relevant rehabilitation creditor or the relevant rehabilitation secured creditor may perform such setoff without resorting to the rehabilitation procedures only within such reporting period. The same shall apply where the obligations are time-fixed"

(Kim affirmation, exhibit C at 1). Assuming Korean law applies, TYA's setoff would be precluded, based upon its failure to file a timely proof of claim.

New York's Debtor and Creditor Law § 151 provides, in relevant part, as follows:

> "Every debtor shall have the right upon:
> (a) the filing of a petition under any of the provisions of the federal bankruptcy act or amendments thereto or the commencement of any proceeding under any foreign bankruptcy, insolvency, debtor relief or other similar statute or body of law, by or against a creditor;

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> to set off and apply against any indebtedness, whether matured or unmatured, of such creditor to such debtor, any amount owing from such debtor to such creditor, at or at any time after, the happening of any of the above mentioned events, and the aforesaid right of set off may be exercised by such debtor against such creditor or against any trustee in bankruptcy. . . notwithstanding the fact that such right of set off shall not have been exercised by such debtor prior to the making, filing or issuance, or service upon such debtor of, or of notice of, any such petition; assignment for the benefit of creditors; appointment or application for the appointment of a receiver; or issuance of execution, subpoena or order or warrant."

In the complaint, plaintiff acknowledged the mutual obligations that existed between it and TYA, and plaintiff admitted it had filed a petition for rehabilitation in Korea. Assuming New York law applies, TYA has the right to a setoff.

Although plaintiff and TYA assessed the conflict under the interest analysis approach, TYA's claims arise out of a contract, namely the Guaranty. The court notes that the "'center of gravity' or 'grouping of contacts' [is] the appropriate analytical approach to choice of law questions in contract cases" (*Zurich Ins. Co. v Shearson Lehman Hutton, Inc.*, 84 NY2d 309, 317 [1994], quoting Restatement [Second] of Conflict of Laws § 188 [1]). Under this approach, factors for the court to consider in establishing "which State has 'the most significant relationship to the transaction and the parties' . . . [include] the places of negotiation and performance; the location of the subject matter; and the domicile or place of business of the contracting parties" (*id.*, quoting Restatement [Second] of Conflict of Laws § 188 [2]).

The factors, as applied to this action, all weigh in favor of New York law. Although plaintiff is domiciled in Korea, TYA was incorporated in New York and maintained its principal place of business in Manhattan until 2014, when it moved its main office to New Jersey (Yoon aff, ¶¶ 3-4). Yoon drafted and executed the Guaranty in TYA's office in New York, and he signed six amendments to the Guaranty here (*id.*, ¶¶ 8 and 13). The Guaranty, drafted in English, appears on TYA's letterhead. The subject matter of the Guaranty also is located in New York. The Gavinton Loan "was a substantial part of TYA's cash reserves" held in TYA's accounts at New York banks, and repayments on the loan were deposited into those accounts (*id.*, ¶¶ 5, 8 and 13). In addition to repayment of the Gavinton Loan, plaintiff agreed to pay "the amounts recorded on [TYA's] books as due from affiliates and related accrued interest," and the TYA books and records were located in this state (*id.*, Guaranty at 1). One such obligation, which plaintiff acknowledged in

correspondence to PWC, arose out of TYS' commercial leasing activities in Manhattan (Yoon aff, ¶ 12). Finally, plaintiff committed to giving TYA financial support for its operations in New York (*id.*, Guaranty at 1). Thus, New York has the most significant relationship to this action regarding both the counterclaim and setoff.

"The common law right of setoff, codified by [Debtor and Creditor Law] § 151, 'allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding the absurdity of making A pay B when B owes A'" (*Deflora Lake Dev. Assoc., Inc. v Hyde Park*, 689 Fed Appx 99, 100 [2d Cir 2017], quoting *Citizens Bank of Maryland v Strumpf*, 516 US 16, 18 [1995]). The purpose of the statute is to allow a debtor "to utilize (in defending a suit brought against him by the judgment creditor), *all defenses and set-offs* he [or she] might have had against the judgment debtor" (*Matter of Industrial Commr. of State of N.Y. v Five Corners Tavern*, 47 NY2d 639, 646 [1979] [internal quotation marks and citation omitted]). The statute is meant to "'cover the field' in terms of protecting the right of setoff" (*Matter of West Harlem Pork Ctr. v Empire Natl. Bank*, 60 AD2d 859, 860 [2d Dept 1978]). The right to a setoff may be enforced "even after the judgment creditor has undertaken enforcement of his claim against the judgment debtor" (*Aspen Indus. v Marine Midland Bank*, 52 NY2d 575, 582 [1981]).

TYA's setoff of the TYI Debt against the TYA Receivables arose when plaintiff filed the petition to commence the Rehabilitation Proceeding. As plaintiff's liability for the TYI Debt is not contingent upon the happening or fulfillment of some other obligation (*see Matter of Trojan Hardware Co. v Bonacquisti Constr. Corp.*, 141 AD2d 278, 281-282 [3d Dept 1988]), TYA is entitled to a statutory setoff. Furthermore, it would be inequitable to allow plaintiff to recover on its claim while simultaneously denying TYA its statutory right to setoff (*see e.g. Masterwear Corp. v Bernard*, 6 Misc 3d 1006(A), 2004 NY Slip Op 51743(U), *2 [Sup Ct, NY County 2004], citing *George Strokes Elec. & Plumbing v Dye*, 240 AD2d 919, 920 [3d Dept 1997]). Therefore, TYA is entitled to maintain its second affirmative defense of setoff under Debtor and Creditor Law § 151. As a consequence, plaintiff's motion to dismiss TYA's counterclaim and second affirmative defense is denied.

3. TYA's Cross Motion for Partial Summary Judgment

a. The Counterclaim for Breach of Contract

TYA's counterclaim for breach of contract arises out of plaintiff's failure to meet its obligations under the Guaranty. To sustain a cause of action for breach of contract, the proponent of the claim must prove the existence of a contract, plaintiff's performance, defendant's breach,

and damages (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Absent evidence showing the existence of an enforceable agreement, a breach of contract claim shall be dismissed (*see Aksman v Xiongwei Ju*, 21 AD3d 260, 261-262 (1st Dept 2005), *lv denied* 5 NY3d 715 [2005]).

The statement in the complaint that plaintiff had "outstanding obligations" to TYA constitutes a judicial admission (*see Performance Comercial Importadora E Exportadora Ltda v Sewa Intl. Fashions Pvt. Ltd.*, 79 AD3d 673, 674 (1st Dept 2010]). It is well settled that "[f]acts appearing in the movant's papers which the opposing party does not controvert, may be deemed admitted" (*Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 609 [1st Dept 2012] [internal quotation marks and citation omitted]). In its response to the cross motion, plaintiff does not deny executing the Guaranty, nor does it dispute TYA's contention that the TYI Debt has not been repaid.

To be sure, plaintiff argues granting summary judgment on TYA's counterclaim and setoff defense would "justify a fraudulent transfer" (plaintiff's reply memorandum of law, at 23). However, this argument relates to whether the doctrine of comity bars the counterclaim and setoff defense. As noted above, plaintiff offered no substantive defense to the assertion that it breached the Guaranty by failing to repay the TYI Debt. Plaintiff's vague claim that it needs discovery on the circumstances surrounding TYA's receipt of notice of the Rehabilitation Proceeding also fails to raise a triable issue.

Accordingly, TYA is entitled to partial summary judgment on its counterclaim alleging breach of the Guaranty.

b. Plaintiff's First, Second and Third Affirmative Defenses

TYA also cross moves for summary judgment on plaintiff's first, second and third affirmative defenses to the counterclaim. The first affirmative defense discusses Sections 148 and 251 of the DRBA and whether TYA may maintain "[a]ny claims [against plaintiff] . . . because no claim was reported to the Korean bankruptcy court within the time prescribed" (plaintiff's verified answer to counterclaim, ¶ 15). Given the absence of notice of the Rehabilitation Proceeding to TYA, and the due process concerns regarding the lack of adequate notice, summary judgment dismissing the first affirmative defense is granted. Similarly, TYA has demonstrated the lack of merit to the second and third affirmative defenses, both of which pertain to TYA's setoff right.

Accordingly, that branch of the cross motion seeking summary judgment dismissing plaintiff's first, second and third affirmative defenses is granted.

MOTION SEQUENCE 002

A. Parties Contentions

1. Lack of Jurisdiction

In motion sequence 002, defendant TYN claims this court lacks jurisdiction over it, as TYN is a publicly traded corporation in the Republic of Korea (South Korea). The company provides IT services for businesses in Korea. It has also, in the past, sold raw materials, business supplies, and fashion products in Korea. It never provided services or sold goods in New York. It has never had a bank account in New York. It owns shares in companies which do business in New York, including a 69% stake in Ask Alice LLC and (possibly) a stake in Ask Alice Retail, Inc, which is a New York corporation.

Plaintiff does not assert general jurisdiction pursuant to CPLR section 301. Instead, plaintiff argues jurisdiction exists pursuant to 302(a)(2), (a)(3)(i), and (a)(3)(ii) (Opp at 3). TYN contends that merely owning an interest in a New York entity does not make a shareholder subject to jurisdiction of the New York Courts (Memo at 7).

a. CPLR 302(a)(3)(i)

Plaintiff claims that TYN's receipt of the allegedly fraudulent transfer from TYA constitutes a fraudulent act committed in New York State, thereby making TYN subject to New York jurisdiction under CPLR 303 (a)(2) (Opp at 4). Plaintiff notes TYN was TYA's sole shareholder, and so was responsible for TYA's dissolution, and, thus, for the transfer (*id.* at 5-6, citing *Ed Moore Adv. Agency, Inc. v I.H.R., Inc.*, 114 AD2d 484, 486 [2d Dept 1985] [denying motion to dismiss for lack of jurisdiction where allegation was that out of state "defendant committed fraud by acting with [resident entity] to fraudulently place [another entity]'s assets beyond its creditors' reach" by receiving a transfer for no consideration]). Further, this section does not require the injury from the in-state tort to occur in New York (Opp at 6, *Hollins v U.S. Tennis Ass'n*, 469 F Supp 2d 67, 77 [EDNY 2006] [if the "alleged torts occurred in New York, then jurisdiction would be proper under section 302(a)(2) without consideration of where the injury occurred"]).

TYN argues that plaintiff's argument effectively ignores the corporate form, as TYA and TYN are different entities, and plaintiff has not alleged facts sufficient to pierce the corporate veil (Reply at 3-4). TYN points out that the cases cited by plaintiff either involve post-judgment proceedings, where underlying liability had already been established and a judgment granted (*id.*

at 3, citing *Ed Moore Advert. Agency,* 114 AD2d 484), or defendants which transacted business in New York pursuant to CPLR 32(a)(1), which is not applicable here (*id.* at 4).

b. CPLR 302(a)(3)(i)

CPLR 302(a)(3)(i) provides for personal jurisdiction over an entity which "commits a tortious act without the state causing injury to person or property within the state . . . , if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state." Plaintiff argues that the injury was suffered here in New York because TYNs' actions left plaintiff unable to collect on its claim in New York against a New York corporation (Opp at 7, citing *Universitas Educ., LLC v Nova Group, Inc.*, 11CV1590-LTS-HBP, 2014 WL 3883371, 2014 US Dist LEXIS 109077, at *6 [SDNY Aug. 7, 2014] ["Rendering a creditor unable to recover on a defaulted debt in New York through a fraudulent conveyance constitutes injury in New York that is reasonably foreseeable"]). As to the second requirement, plaintiffs argue TYN derives substantial revenue from activities in New York State, as well as owning all of TYA's shares and its equity in Ask Alice LLC, because TYN liquidated TYA and transferred all of its assets to itself, totaling over $3.6 million (Opp at 7-8).

TYN counters that if it has "substantial income from New York activities," as alleged by plaintiff, that is not the standard (Reply at 5). The standard is whether it "derives substantial revenue from goods used or consumed or services rendered, in the state," and plaintiff does not allege that TYN does so. TYN does no business in New York, and has provided no goods or services in New York (*id.*). Further, TYN argues that the transfer was for value, that TYA exchanged cash for TYNs' shares of TYA, pursuant to Business Corporations Law section 1005 (Reply at 5). Nor was an injury suffered in New York, as, at the time of the asset transfer, plaintiff was (and is) a Korean corporation, and did not allege it was doing business in New York (*id.* at 6-7).

c. CPLR 302(a)(3)(ii)

CPLR 302(a)(3)(ii) provides for personal jurisdiction over an entity which "commits a tortious act without the state causing injury to person or property within the state . . . , if he expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce."

In addition to the above, plaintiffs argue TYN derives substantial revenue from interstate or international commerce, as it is a foreign corporation with over 300 employees, $76.8 million

in assets, and $35.6 million in quarterly sales (Opp at 8). It held interests in New York, Delaware, and Thai business organizations, and does substantial business in Korea (*id.*). Further, TYN should have reasonably expected the harm occurring in New York, as the fraudulent transfer of a New York entity's assets would be reasonably expected to harm its frustrated creditors (*id.* at 9). Accordingly, jurisdiction is proper over TYN, as initiator and recipient of the transfer, regardless that it is an out of state entity.

In reply, TYN again points to the setoff argument. TYN believed the setoff to be proper and could not have reasonably expected the injury now asserted by the plaintiff (Reply at 6). Additionally, when plaintiff was informed of the setoff, in October 2014, plaintiff was a shareholder in TYN (Reply at 6 n4, Complaint,¶ 23), and so plaintiff should have anticipated an injury and sought to stay the setoff in bankruptcy court in the United States (Reply at 6 n4).

d. Due Process

TYN argues that due process is not satisfied, because plaintiff's "failure to offer any facts to show that [TYN is] more than [a] mere transferee[] of fraudulently obtained funds is fatal to its jurisdictional claim. . . . The passive receipt of allegedly stolen funds, absent evidence of knowledge or intent, is an inadequate basis for the court's exercise of personal jurisdiction" (*Chapin Home for the Aging v McKimm*, 2014 US Dist LEXIS 132545, at *15-16, ED NY, 11 CV 0667, Block, J., Aug. 7, 2014). Further, any funds received by TYN were in its capacity as TYA's shareholder, and after TYA exercised its right to setoff (Memo at 8). There are no allegations that TYN acted or intended to hinder or delay a payment owed to TYI(*id.*). Further, the only alleged contact TYN had with New York is its ownership interest in TYA.

Plaintiff claims due process is satisfied because TYN knew of TYI's claim against TYA, and participated in the transfer of TYA's assets out of the reach of TYI, citing *First Horizon Bank v Moriarty-Gentile*, (110CV00289 KAM RER, 2016 WL 6581199, 2016 US Dist LEXIS 153050, [EDNY Nov. 3, 2016]). TYN argues that jurisdiction violates due process because TYN consented to the dissolution from Korea without appearing in New York and TYA paid its Korean bank from a bank in New Jersey (*id* at 7). In Motion Sequence Number 001, plaintiff argued vehemently that TYA should be governed by Korean law regarding the setoff. Now, plaintiff contends that New York law should apply to TYN, and that New York has a substantial and overriding interest. Plaintiff is cherry-picking the most favorable law to apply in each situation. This should not be allowed (*id.*).

TYN also disputes plaintiff's new argument that plaintiff is owed money even after a valid setoff (Reply at 8-9). TYN disputes the sufficiency, basis, and truth of plaintiff's proof on this point, specifically the third affirmation of Jang Gyu Jeon and attached exhibits, and puts forth its own calculation of the competing receivables (*id.* at 9-11). TYN points out that plaintiff is inflating its receivable with prejudgment interest, including interest accrued after the 2015 transfer at issue here, which is improper (*id.* at 12-13).

2. Failure to State a Claim

TYN claims plaintiff TYI has failed to state facts supporting its conclusory allegation of TYN's "actual intent" to defraud TYI, and the claim should fail (Memo at 10). Plaintiff notes that TYN has not challenged its constructive fraudulent transfer claims pled under DCL sections 273, 274, and 275. TYN counters that plaintiff's claim hinges on the failure of TYA's setoff argument. If the setoff of debts was proper, then there is no fraudulent transfer. In response, plaintiff argues that the setoff was improper, and that, even after the setoff, TYA would have still owed it millions.

TYN also contends that, contrary to plaintiff's contention, there are not sufficient badges of fraud present to support a fraudulent conveyance claim here. TYN and TYA are not the same entity and the same entity was not on both sides of the transaction. There was consideration, as cash was exchanged for shares. Nor did TYN clearly know of the obligation, that the setoff was improper, or that plaintiff's receivable was greater than TYA's receivable as is required for this claim to survive (Reply at 13). Plaintiff has only stated bald conclusions.

B. Discussion

1. Jurisdiction

Plaintiff concedes there is no general personal jurisdiction over TYN. CPLR 302(a)(2) provides for personal jurisdiction over an entity which "commits a tortious act within the state." While TYN is correct that the cases cited by plaintiff involve different facts, the cases do stand for the premise that an out of state entity which is alleged to have received a fraudulent transfer is considered to have committed a tortious act in this state, for the purpose of determining jurisdiction (*see Ed Moore Adv. Agency, Inc.*, 114 AD2d at 486; *Morgenthau v A.J. Travis Ltd.*, 184 Misc 2d 835, 843 [Sup Ct, NY County 2000] ["Since New York was [the source of] the conveyance [of the criminal proceeds], the alleged tort may be said to have been committed in this State. Moreover, for jurisdiction to be so acquired, it is not necessary that the defendant be physically present in the State. . . . As coparticipants in a tortious act committed in New York State, the defendants are

properly subject to the State's long-arm jurisdiction."] [internal citations omitted], *Banco Nacional Ultramarino, S.A. v Chan*, 169 Misc 2d 182, 188 [Sup Ct, NY County 1996], *aff'd* 240 AD2d 253 [1st Dept 1997] ["the emphasis should be on the locus of the tort, not whether defendant was physically here when the tortious act occurred"]).

The court must then consider whether the exercise of jurisdiction comports with the requirements of due process under the Fourteenth Amendment. "In *International Shoe Co. v State of Washington,* the United States Supreme Court held that a State may constitutionally exercise jurisdiction over non-domiciliary defendants, provided they had "certain minimum contacts with [the forum State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' " (*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 216 [2000], referring to 326 US 310 [1945]). Due process is not satisfied unless a non-domiciliary has "minimum contacts" with the forum State. The test has come to rest on whether a defendant's "conduct and connection with the forum State" are such that it "should reasonably anticipate being haled into court there" (*World–Wide Volkswagen Corp. v Woodson,* 444 U.S. 286, 297 [1980]; *see also, Kulko v Superior Ct. of Cal.,* 436 US 84, 97–98, [1978]). A non-domiciliary tortfeasor has "minimum contacts" with the forum State—and may thus reasonably foresee the prospect of defending a suit there—if it "'purposefully avails itself of the privilege of conducting activities within the forum State' " (*see, World–Wide Volkswagen,* 444 US at 297; *see also, Burger King Corp. v Rudzewicz,* 471 US 462, 475 [1985])" (*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 216 [2000], [citations edited]).

Plaintiff relies on the transfer to provide the grounds for satisfying the requirements of due process, and relies on *First Horizon Bank* (2016 US Dist LEXIS 153050), where the court exercised personal jurisdiction over a non-resident individual in a similar situation. In *First Horizon,* the plaintiff asked the court to exercise jurisdiction over a nonresident individual, Richard Palmer, who had allegedly received a fraudulent transfer from an individual, Cathy Moriarty-Gentile. First Horizon had a monetary judgment against Moriarty-Gentile, which First Horizon was unable to collect. The court held that First Horizon had made a prima facie case for a fraudulent transfer. It found that the transfer had occurred outside New York, and concluded First Horizon had "established that Palmer should have "reasonably expected" his actions to have consequences within New York State and that Palmer derives substantial revenue from interstate or international commerce, permitting the exercise of jurisdiction (*First Horizon Bank*, 2016 WL 6581199, at *3). That court found Palmer engaged in interstate commerce because of his

ownership interest in an entity with restaurants in Los Angeles, "a major international city." which catered to tourists, and because restaurants are inherently connected with interstate commerce (*id* at *4). The court found Palmer had "purposely availed himself of doing business with a New York resident when he continued to operate the . . . restaurants, extended loans and entered into the Stock Sale Agreement with Moriarty-Gentile, a New York domiciliary" (*id.*)]. That satisfied the minimum contacts requirement. As to reasonableness, the court noted that "Palmer was aware of Moriarty-Gentile's poor financial condition, and he should have "reasonably expected" that the conveyance of her interest in [the restaurant would prevent her creditors, including First Horizon Bank, from collecting on defendant's debts. Thus, First Horizon Bank's claim against Palmer "arises out of, or relates to" the thwarting of Moriarty-Gentile's creditors through her conveyance of her interest in the [restaurants]. Consequently, he should have "reasonably expect[ed]" being "haled" into New York state court" (*First Horizon Bank,* 2016 WL 6581199 at *4). That court also considered: "(1) the burden on the defendant; (2) the interests of the forum state; (3) the plaintiff's interest in obtaining relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive social policies" before ruling jurisdiction to be appropriate (*id.*).

Similarly, here, TYN entered into a transaction with a New York resident (TYA), and thus "purposely avail[ed] itself of the privilege of conducting activities within the forum State" (*Burger King Corp. v Rudzewicz*, 471 US 462, 474 [1985]). Considering the factors discussed in *First Horizon Bank* (listed above) before ruling jurisdiction to be appropriate" [2016 US Dist. LEXIS 153050, *4]), the burden on TYN is significant. It is located in South Korea, and does not do business in New York, although it has counsel here. Regarding the interests of New York, this state has a strong interest in stopping fraudulent transfers. The plaintiff's interest in obtaining relief is insubstantial because, unlike *First Horizon Bank*, there is no judgment to date, the setoff is valid and it may be that the plaintiff is not entitled to any recovery from TYA, let alone TYN. The system's interest in efficient resolution does not affect the balance, as this case is in its early stages, and it is not clear that bringing TYN into this litigation at this time will result in any efficiency. The fifth factor is also neutral. On this record, the court concludes that due process will not be offended by a failure to assert jurisdiction over TYN.

2. Failure to State a Claim

To allege a claim under DCL section 276, the claimant must allege that "(1) the thing transferred has value of which the creditor could have realized a portion of its claim; (2) that the thing was transferred or disposed of by the debtor and (3) that the transfer was done with actual intent to defraud" (*Nisselson v Ford Motor Co. (In re Monahan Ford Corp.)*, 340 BR 1, 37 [Bankr EDNY 2006]). Importantly, a claim of actual fraudulent conveyance must plead the requisite "actual intent" with particularity, and the burden of proving intent is on the party seeking to set aside the conveyance (*Paradigm BioDevices, Inc. v Viscogliosi Bros., LLC*, 842 F Supp 2d 661, 667-68 [SDNY 2012] [analyzing DCL § 276 and dismissing the fraudulent transfer claim against all defendants other than the sole beneficiary of the transfer].

First, there is the question of whether the setoff was legitimate. The court addressed this issue in motion sequence number 001. Plaintiff now claims that it is owed more than the setoff amount (TYN Reply Br., Dkt. 92 at p. 8). This claim appears to be based on its demand for prejudgment interest but plaintiff admits the contract between plaintiff and TYA did not provide for interest [Third Jeon Aff, Dkt. 71, at ¶ ¶ 8 and 9) and so it will not be considered in deciding whether the setoff, at the time made, was sufficient. The parties provide differing calculations of the various obligations, and the amount owed by each is unclear. The parties also dispute the amount of the TYA Receivable which set off plaintiff's receivable (Compare *id.* with Dkt. 92, p. 11). Thus, a fact inquiry must be made on the issue.

As to the third element, of intent, plaintiff relies on "badges of fraud:" "(1) a close relationship between the parties to the transfer; (2) the inadequacy of consideration; (3) the transferor's knowledge of the creditor's claims and the transferor's inability to pay them; (4) the retention of control of the property by the transferor after the conveyance; (5) the fact that the transferred property was the only asset sufficient to pay the transferor's obligations; (6) the fact that the same attorney represented the transferee and transferor; and (7) a pattern or course of conduct by the transferor after it incurred its obligation to the creditor" (*A&M Global Mgt. Corp. v Northtown Urology Assoc., P.C.*, 115 AD3d 1283, 1288 [4th Dept 2014]). A close relationship has been alleged, as TYN owned the controlling interest of TYA.

There was no traditional consideration for the transfer, as TYN claims it was made pursuant to BCL section 1005, which permits a corporation, after dissolution and after providing for payment of its liabilities, to "sell its remaining assets, . . . and distribute the same among the

shareholders according to their respective rights." Knowledge of the claims and the transferor's inability to pay them is disputed. While the existence of TYA's debt is undisputed, TYN claims it believed the debt to have been paid by the setoff. Plaintiff has not alleged any facts which would indicate otherwise, and only states, in conclusory fashion, that it was so (Opp at 15). It is not alleged who represented the parties to the transaction, and the implications of TYA's course of conduct after incurring the debt is unclear.

The parties are indisputably close. The issue is whether plaintiff has sufficiently alleged TYN's knowledge. Importantly, a claim of actual fraudulent conveyance must plead the requisite "actual intent" with particularity, and the burden of proving same is on the party seeking to set aside the conveyance. (*Paradigm BioDevices, Inc. v Viscogliosi Bros., LLC*, 842 F Supp 2d 661, 667-668 [SD NY 2012]). Upon the current pleading, a finding of actual intent would require stacking inference upon inference in favor of the plaintiff, in opposition to the burden that applies under applicable law. This branch of the motion must be granted.

CONCLUSIONS

As to motion sequence number 001, the motion of plaintiff TYI to dismiss TYA's (1) sole counterclaim for breach of contract (Gavinton Guarntys) and (2) second affirmative defense (setoff) is denied. The cross motion of defendant TYA for partial summary judgment against plaintiff TYI shall be granted as to (1) TYA's counterclaim for breach of contract (the Gavinton Guarantys) and (2) the second affirmation defense to the complaint (setoff) under New York Debtor and Creditor Law § 151. That branch of the cross-motion seeking to dismiss the complaint shall be denied. The amount of damages (and to which entity they are owed) shall be determined after a trial addressed to the issue. Regarding that branch of TYA's cross-motion to dismiss TYI's first (discharge in bankruptcy) second (bar of setoff claim) and third (foreign law bar) affirmative defenses to TYA's counterclaim for breach of contract (Gavinton Guarantys) shall be granted.

As to motion sequence number 002, the motion of defendant TYN to dismiss the complaint for failure to state a claim as to it shall be granted. That branch of the motion seeking dismissal for lack of jurisdiction is denied as academic.

Accordingly, it is

ORDERED that plaintiff Tong Yang, Inc's motion to dismiss the counterclaim (breach of contract) and the second affirmative defense (setoff) of defendant Tong Yang America, Inc. is denied; and it is further

ORDERED that the branch of the cross-motion of defendant Tong Yang America, Inc. for partial summary judgment dismissing the complaint is denied; and it is further

ORDERED that the branch of the cross-motion of defendant Tong Yang America, Inc. for partial summary judgment against plaintiff Tongyang, Inc. is granted on said defendant's counterclaim for breach of contract (the Guaranty) and second affirmative defense (setoff under Debtor and Creditor Law § 151), with the issue of damages to be determined at the trial in this action; and it is further

ORDERED that the branch of the cross-motion of defendant Tong Yang America, Inc. for partial summary judgment to dismiss the first, second and third affirmative defenses asserted in plaintiff Tong Yang, Inc's answer to said defendant's counterclaim is granted, and said affirmative defenses are hereby stricken and dismissed; and it is further

ORDERED that the motion of defendant Tongyang Networks Corp. to dismiss the complaint as to it is granted; and it is further

ORDERED that counsel for the remaining parties shall appear at a preliminary conference on Tuesday, December 11, 2018 at 11:00 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

DATED: November 26, 2018

ENTER,

O. PETER SHERWOOD J.S.C.