

**Castleton Commodities Merchant Trading, L.P. v
Soleil Chartered Bank**

2020 NY Slip Op 33290(U)

October 6, 2020

Supreme Court, New York County

Docket Number: 652242/2020

Judge: Barry Ostrager

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

Table with case details: CASTLETON COMMODITIES MERCHANT TRADING L.P., Plaintiff, - v - SOLEIL CHARTERED BANK and GOVIND SRIVASTAVA, Defendants. Includes a box with INDEX NO. 652242/2020, MOTION DATE, and MOTION SEQ. NO. 001. Section title: DECISION + ORDER ON MOTION.

HON. BARRY R. OSTRAGER

Plaintiff Castleton Commodities Merchant Trading L.P. ("Castleton") has moved herein for summary judgment in lieu of complaint pursuant to CPLR 3213, seeking a judgment in the sum of \$1.2M against defendants Soleil Chartered Bank ("Soleil") and Govind Srivastava ("Srivastava"), jointly and severally. Defendants have opposed the motion and cross-moved to dismiss based on forum non conveniens and failure to state a cause of action. For the reasons that follow, both plaintiff's motion and defendants' cross-motion are denied.

In support of the motion, Castleton submits an affidavit from Alexander Kopko, the Global Head of Fuel Oil Trading for plaintiff Castleton (NYSCEF Doc. No. 4). Kopko asserts that Castleton and nonparty KAMCA Trading SA ("KAMCA") entered into an agreement known as the Master Fuel Oil Supply and Financing Agreement, dated February 13, 2019 (the "Agreement"), "pursuant to which Castleton purchased consignments of fuel oil nominated by KAMCA, and arranged for the fuel to be stored for a defined period of time. Upon the expiration of that time period, the Agreement required KAMCA to accept delivery of and pay [Castleton] the amount owed for the fuel [Castleton] had stored for it. In the event KAMCA failed to do so, the Agreement provides that [Castleton] has the option and contractual right to sell the fuel to

any third party, and KAMCA remains liable for any of [Castleton's] resultant losses and expenses." No one has provided the Court with a copy of that Agreement.

According to Kopko, in April and May 2019 KAMCA defaulted on its obligations under the Agreement. Kopko further contends that, as a result of the default, as "additional security for its obligations and as contemplated in the Agreement, at the end of May 2019, KAMCA obtained a letter of credit from Defendants to this action for the benefit of [Castleton]." This Standby Letter of Credit, which is dated May 31, 2019 and is for \$1,200,000 (the "LC"), was issued by defendant Soleil and executed by defendant Srivastava, as "Managing Director" of Soleil, for the benefit of Castleton ("the LC", NYSCEF Doc. No. 5).

Castleton claims the LC is an "instrument for the payment of money only" within the meaning of CPLR 3213 and that the Kopko Affidavit and supporting documents establish Castleton's prima facie case for a judgment of \$1.2M against Soleil and Srivastava. Defendants oppose, claiming the LC does not qualify for judgment under the expedited procedures in CPLR 3213. Further, defendants assert that New York is not an appropriate forum for adjudication of the dispute and that no basis for liability exists against defendant Srivastava, who signed the LC in his representative capacity only.

Turning first to the cross-motion to dismiss, the Court rejects defendants' claim that New York is not an appropriate forum, as defendants have failed to meet their burden of establishing the factors for *forum non conveniens* identified in *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 (1984). Defendants claim the key witnesses are either in Connecticut, where Castleton maintains its principal place of business, or in Switzerland, where nonparty KAMCA has an office. However, Soleil undeniably provides banking services in New York, as revealed by its New York City address on the LC, and the LC states it "shall be subject to and controlled by the

laws of the State of New York.” Further, defendant Srivastava, who executed the LC as Soleil’s Managing Director, resides in New York. Thus, plaintiff’s choice of forum cannot be disturbed.

The Court also rejects defendants’ claim that Castleton has not stated a cause of action against Srivastava for individual liability, despite Srivastava’s signature on the LC only in his representative capacity as Managing Director for Soleil. In the moving papers, Castleton asserts that Srivastava also serves as the Chief Executive Officer of Soleil and its affiliated companies. Soleil allegedly operates out of condominium Unit 530 at 55 Wall Street in New York City, “which is an apartment at the Cipriani Club Residences owned by Srivastava through an entity named Gharwalla LLC, a New York limited liability company (“Gharwalla”). According to publicly available records, Gharwalla was formed by Srivastava on or about January 11, 2011, and acquired the Manhattan condominium on or about February 16, 2011. Srivastava is the Managing Member and registered agent for Gharwalla, and the condominium is the registered address for service of process on that entity, in addition to serving as the business address for [Soleil].”

Although Srivastava has provided an affidavit (NYSCEF Doc. No. 16), he does not dispute any of these factual allegations; his counsel only argues that Srivastava signed the LC in his representative capacity and that the “alter ego” cases cited by Castleton’s counsel are distinguishable. Accepting plaintiff’s allegations as true, as the Court must on a pre-answer motion to dismiss, the Court finds Castleton has stated a cause of action for individual liability against Srivastava and denies dismissal at the pleading stage without prejudice to a motion for summary judgment at the conclusion of discovery. *See Leon v Martinez*, 84 NY2d 83 (1994).

The final and most significant issue is whether the LC qualifies as “an instrument for the payment of money only” eligible for an expedited judgment in Castleton’s favor pursuant to

CPLR 3213. The answer is no. As Judge Judith Kaye explained in *Weissman v Sinorm Deli*, 88 NY2d 437, 444 (1996), a document comes within CPLR 3213 only “if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms The instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar *de minimis* deviation from the face of the document ...” (citations omitted); *see also*, *JFURTI, LLC v First Capital Real Estate Advisors, L.P.*, 165 AD3d 419, 421 (1st Dep’t 2018) (the documents were not “instruments for the payment of money only,” as contemplated by CPLR 3213, because they contained obligations beyond just the payment of money). A review of the LC and surrounding circumstances illustrates the point.

The LC itself presents three alternative scenarios that would allow Castleton to draw down on the LC. Castleton relies on 2A, which provides for payment upon presentation of the following document:

DEMAND SIGNED BY AN AUTHORIZED REPRESENTATIVE OF THE BENEFICIARY STATING THAT ... THE APPLICANT IS CURRENTLY IN DEFAULT AT THE TIME OF THIS DRAWING AND HAS NOT PERFORMED IN ACCORDANCE WITH THE TERMS OF THE AGREEMENT. THE APPLICANT HAS NOT RECTIFIED THE DEFAULT AS OF THIS PRESENTATION, WHEREFORE, THE BENEFICIARY HEREBY DEMANDS PAYMENT OF THE ABOVE REFERENCED AMOUNT UNDER LETTER OF CREDIT NO SCB1905738CHS WHICH THE BENEFICIARY IS ENTITLED TO DRAW IN ACCORDANCE WITH THE AGREEMENT.

Castleton contends it is entitled to draw down on the May 31, 2019 LC in full based on KAMCA’s default under the parties’ Agreement in April and May of 2019, *before* the LC was even issued. It also relies on the February 10, 2020 Notice of Default it issued to KAMCA, which describes the alleged defaults and demands payment based on a spreadsheet of charges and payments but makes no reference to the LC. Lastly, Castleton provides its April 21, 2020 Demand Letter to Soleil seeking to draw down on the LC based on KAMCA’s alleged default,

without making any reference to the Notice of Default or the particular section of the LC on which Castleton was relying (NYSCEF Doc. Nos. 6 & 7).

By letter dated April 24, 2020, Soleil declined Castleton's demand, stating that: "We have evaluated your claim and as per Standby Letter of Credit your claim is being declined as the presentation is not for lift of products and not in compliance with our other terms and conditions governing the issuance." (NYSCEF Doc. No. 8). In their opposition papers, defendants assert defenses based on the reasoning in Soleil's declination letter, as well as a dispute about charges and payments. Castleton in response provides a revised spreadsheet and argues that the defenses lack merit and are irrelevant.

The Court need not reach those defenses because the Court finds the LC does not qualify as "an instrument for the payment of money only" pursuant to CPLR 3213. As the Court of Appeals stated in *Weissman, supra*: "The instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar *de minimis* deviation from the face of the document ..." Here, the LC itself states that payment is triggered only upon a default by nonparty KAMCA in that KAMCA has not performed its obligations under the Agreement, meaning the Master Fuel Oil Supply and Financing Agreement, dated February 13, 2019, between Castleton and KAMCA. As indicated earlier, no copy of the Agreement has been provided to the Court, but the papers suggest that performance under the Agreement included obligations beyond the payment of a set amount on a particular date specified on the face of a document. Indeed, in Kopko's moving affidavit, Castleton confirms the interrelationship between the Agreement and the LC, explaining that the Agreement "contemplated" the issuance of the LC, but no further details are provided about the interrelationship between the two documents or the precise showing Castleton was required to make to draw down on the LC in full.

As this case is not amenable to expedited treatment under CPLR 3213, Castleton’s motion is denied, and the case is converted to a plenary action, with the papers filed by the parties serving as the pleadings unless counsel stipulate to the e filing of a Complaint and an Answer. Counsel shall promptly meet and confer and prepare a Proposed Preliminary Conference Order using the form available on the Part 61 website and efile it by October 12, 2020. Counsel shall appear for the remote conference scheduled for October 13, 2020 at 9:30 a.m. to proceed with a preliminary conference and discuss settlement.

Accordingly, it is hereby

ORDERED that plaintiff’s motion and defendants’ cross-motion are hereby denied, and a preliminary conference is scheduled for October 13, 2020 at 9:30 a.m.

Dated: October 6, 2020

Barry R. Ostrager

BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE