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| Natixis, N.Y. Branch v BNP Paribas |
| 2022 NY Slip Op 30038(U) |
| January 7, 2022 |
| Supreme Court, New York County |
| Docket Number: Index No. 651510/2020 |
| Judge: Andrea Masley |
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| This opinion is uncorrected and not selected for official publication. |

[NYSCEF] 11, Lozevski² aff at ex 1, Purchase Agreement at 10-19/169.³) On December 5, 2019, Hontop agreed to resell the crude oil to Petrobras Global Trading B.V. (Petrobras); this agreement was amended on January 10, 2020, reducing the number barrels Petrobras was to purchase and extending the payment due date to February 10, 2020. (*Id.* at ex 2, Petrobras Purchase Agreement and Subsequent Variations at 21-39/169.) The Petrobras Purchase Agreement required that Petrobras provide an irrevocable standby letter of credit opened by a “first class international bank” acceptable to Hontop. (*Id.* at 4/7⁴.) On December 10, 2019, prior to Hontop’s purchase of the crude oil from SIETCO, Natixis issued an irrevocable standby letter of credit No. SB-49201 (Natixis SBLC) in the amount of \$75 million for the benefit of Hontop, securing Petrobras’ payment. (*Id.* at ex 3, Natixis SBLC at 41-44/169.) The Natixis SBLC had an original expiry date of January 31, 2020, which was later extended to February 28, 2020. (*Id.*; *Id.* at ex 4, Natixis SBLC Amendment 2 at 47-48/169.)

On December 13, 2019, BNP issued a standby letter of credit for the benefit of SIETCO to secure Hontop’s payment for the crude oil. (*Id.* at ex 5, BNP SBLC at 50-54/169.) On December 23, 2019, BNP lent Hontop \$66,889,196.76 for payment of the crude oil based on a provisional invoice as the final price could not be confirmed until delivery. (NYSCEF 11, Lozevski aff ¶ 7.) BNP lent Hontop an additional \$4,334,054.34 to cover the difference between the final and provisional invoices. (*Id.*)

On February 5, 2020, Hontop sent a SWIFT message to Natixis, stating

² Zoran Lozevski is the “the Head of Global Trade Solutions, APAC of BNP Paribas, Singapore.” (NYSCEF 11, Lozevski aff ¶ 1.)

³ Page numbers reference NYSCEF pages. The court implores parties to separately file exhibits in NYSCEF.

⁴ Page 4 of the 7-page agreement.

“HONTOP ENERGY (SINGAPORE) PTE LTD ('HONTOP') HEREBY GIVES YOU NOTICE THAT BY A DEED OF CHARGE DATED 26 AUGUST 2013, HONTOP HAS ABSOLUTELY ASSIGNED AND CHARGED TO BNP PARIBAS (THE 'ASSIGNEE') BY WAY OF FIRST FIXED SECURITY AND ASSIGNMENT, INTER ALIA, ALL OUR RIGHTS, INTEREST, TITLE AND BENEFITS IN AND TO THE SBLC AND ALL THE MONIES AND CLAIMS FOR MONEYS DUE OR TO BECOME DUE OR PAYABLE TO HONTOP, ALL PAYMENTS OF WHATSOEVER NATURE, ALL CLAIMS FOR COMPENSATION AND DAMAGES, WHETHER AGREED OR OTHERWISE, AND ALL CLAIMS AND CAUSES OF ACTION FOR MONEY, LOSS OR DAMAGE THAT MAY ACCRUE OR BELONG TO HONTOP, ARISING OUT OF OR OTHERWISE IN CONNECTION WITH THE SBLC. WITH IMMEDIATE EFFECT, HONTOP IRREVOCABLY INSTRUCTS AND AUTHORIZES YOU TO PAY ALL SUCH PROCEEDS UNDER THE SBLC DIRECTLY TO OUR ACCOUNT MAINTAINED WITH THE ASSIGNEE WITH DETAILS AS FOLLOWS:

INTERMEDIARY BANK : BNP PARIBAS NEW YORK BRANCH
SWIFT CODE : BNPAUS3N
BENEFICIARY BANK : BNP PARIBAS SINGAPORE BRANCH
SWIFT CODE : BNPASGSG
BENEFICIARY NAME : HONTOP ENERGY (SINGAPORE) PTE. LTD
ACCOUNT NO : 00050.041175.001.76.USD

OR AS THE ASSIGNEE MAY DIRECT (IN EACH CASE WITHOUT ANY SET-OFF, COUNTERCLAIM OR WITHOLDING [sic] WHATSOEVER) AND HONTOP IRREVOCABLY AUTHORIZES AND INSTRUCTS YOU TO PAY THE SAME TO THE ABOVE ACCOUNT OR AS THE ASSIGNEE MAY DIRECT.

THIS NOTICE AND THE INSTRUCTIONS CONTAINED HEREIN ARE IRREVOCABLE AND MAY NOT BE MODIFIED OR VARIED WITHOUT THE PRIOR CONSENT IN WRITING OF THE ASSIGNEE.

PLEASE NOTE THAT THE RELEVANT ASSIGNMENT IS WITHOUT PREJUDICE TO THE ASSIGNEE'S RIGHTS TO ACT AS AN ADVISING BANK AND/OR NOMINATED BANK UNDER THE SBLC. HONTOP SHALL REMAIN FULLY LIABLE TO PERFORM ALL OUR OBLIGATIONS UNDER THE SBLC AND THE ASSIGNEE IS UNDER NO LIABILITY WHATSOEVER IN THE EVENT OF ANY FAILURE BY HONTOP TO PERFORM OUR OBLIGATIONS THEREUNDER.

PLEASE ACKNOWLEDGE RECEIPT OF THE ABOVE NOTICE AND CONFIRM THAT YOU HAVE NOT RECEIVED ANY NOTICE OF ANY THIRD PARTY INTEREST IN THE SBLC BY SENDING THE ASSIGNEE THE FOLLOWING AUTHENTICATED SWIFT:

QUOTE

TO : BNP PARIBAS, SINGAPORE
FROM : NATIXIS, NEW YORK

DATE :
RE : YOUR REFERENCE : SB-49201

OUR REFERENCE : 00050EL11967044

WE ACKNOWLEDGE AND AGREE TO THE ARRANGEMENTS SET
OUT IN YOUR NOTICE DATED 05 FEB 2020. WE HAVE NOT
RECEIVED ANY NOTICE OF THIRD PARTY INTEREST IN THE SBLC.

UNQUOTE

AN ORIGINAL OF THIS NOTICE WILL FOLLOW IN DUE COURSE.

REGARDS
CFOC TEAM 1”

(*Id.* at ex 9, 2/5/20 Hontop Swift Message at 139-141/169.) On February 6,
2020, Natixis responded with a SWIFT message stating,

“ATTN: CFOC TEAM 1

RE YOUR MT799 DATED FEBRUARY 5, 2020 YOUR REF.
00050EL11967044 OUR STANDBY LETTER OF CREDIT REF.
SB-49201.

WE ACKNOWLEDGE RECEIPT OF YOUR NOTIFICATION [sic] AND
AGREE TO ASSIGNMENT AS SET OUT IN YOUR NOTICE.
TO DATE, WE HAVE NO RECORD OF RECEIVING ANY
NOTICE OF A THIRD PARTY INTEREST [sic] IN THIS SBLC.

REGARDS,
NATIXIS
L/C DEPT”

(*Id.* at ex 10, Natixis SWIFT Message at 144.)

On February 10, 2020, Petrobras failed to make payment to Hontop in the
amount of \$71,242,809.36. (NYSCEF 11, Lozevski aff ¶ 12.) On February 13, 2020,

BNP made a draw request to Natixis for the amount of \$71,242,809.36 on the Natixis SBLC. (*Id.* at ex 13, Draw Letter at 151-158/169.) The request was supported by three documents: (1) a sight draft, dated February 13, 2020, listing the BNP Paribus New York as the intermediary bank, BNP as the beneficiary bank, and Hontop as the beneficiary name; (2) a beneficiary statement, declaring Petrobras's failure to pay on "for and on behalf of" Hontop; and (3) a drawing certification executed "for an on behalf of" Hontop. (*Id.*)

On February 18, 2020, Natixis received a Notice of Charge and Assignment from Hontop, again noticing the assignment as detailed in its February 5, 2020 SWIFT message, including paying the proceeds without any set-off, and confirming Natixis's "acknowledgment and consent to the arrangement (including the charge and assignment) and confirmation that you have no notice of any third party interest in the SBLC sent by you via SWIFT message of 6 February 20." (NYSCEF 18, Notice of Charge and Assignment.)

On February 20, 2020, Natixis wrote to Hontop in response to the draw request, notifying Hontop that Natixis was exercising its right of setoff pursuant to the February 19, 2019 revolving trade facility letter between those parties. (NYSCEF 19, Notice of Setoff; see *also* NYSCEF 11, Lozevski aff at ex 18, Natixis SWIFT Message at 169.) Natixis stated that it set off \$45,984,140.62, the amount that Hontop allegedly owed Natixis. (*Id.*) On February 21, 2020, BNP confirmed receipt of the \$25,258,668.74 and demanded that Natixis remit the remaining balance and explain why there was a shortfall in payment. (NYSCEF 20, BNP SWIFT Message.)

On March 5, 2020, Natixis initiated this action, seeking a judgment declaring that it was entitled to set off Hontop's debt from the payment made under the Natixis SBLC, and that it has fully discharged all of its payment obligations under the Natixis SBLC with respect to the February 2020 Draw Request. BNP now moves for summary judgment dismissing the complaint.

Discussion

Under CPLR 3212, "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) Once the movant has made such a showing, the burden shifts to the opposing party to demonstrate, with admissible evidence, facts sufficient to require a trial, or summary judgment will be granted. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].)

BNP asserts that Natixis waived any alleged right to setoff when Natixis accepted the terms of the assignment, which specifically stated that payments to BNP would be made "without any set-off, counterclaim or withholding whatsoever." (NYSCEF 11, Lozevski aff at ex. 9, BNP SWIFT Message at 139-141/169.) BNP argues that despite this clear language in its SWIFT Message, Natixis failed to reserve any right of setoff.

Natixis asserts that it only acknowledged and consented to the assignment and did not waive any rights. Natixis argues that the plain language of Hontop's notice evidences that its purpose was to instruct and authorize Natixis to send the funds to BNP and not Hontop. It argues that Hontop did not have the authority to waive Natixis's rights. Natixis further argues that, even if the court's accepts BNP's interpretation, the

intent to waive a right must be unmistakable, and had Hontop intended by this notice to seek a waiver, the request is not clear and certainly not unmistakable.

“Contractual rights may be waived if they are knowingly, voluntarily and intentionally abandoned. Such abandonment may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage. However, waiver should not be lightly presumed and must be based on a clear manifestation of intent to relinquish a contractual protection. Generally, the existence of an intent to forgo such a right is a question of fact.”

(*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006] [internal quotation marks and citations omitted].) Assuming that Natixis had a right of setoff pursuant to the Revolving Trade Facility Agreement, it is unequivocally clear that Natixis waived that right when it agreed to the assignment, which included a proposal that any proceeds paid to BNP could not be subject to a setoff. Natixis could have objected, but it did not. In fact, it responded by virtually repeating the acceptance language that Hontop provided. BNP is entitled to the full amount requested as Natixis agreed there would be no setoff. This is not a determination that Natixis has forever waived the setoff provision contained in the Revolving Trade Facility Agreement; rather, this is a case specific determination based on Natixis’s acceptance of the terms of the assignment of this particular SBLC to BNP.

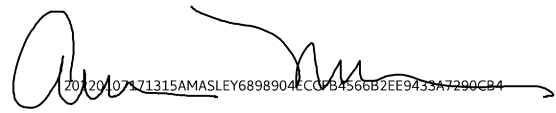
Further, although Natixis now challenges BNP’s status as a holder in due course, it never challenged BNP’s status prior. As the evidence clearly shows, Natixis honored the draw request and paid BNP the requested amount minus the amount of the setoff. Natixis cannot now claim that BNP was not a holder in due course.

All remaining arguments have been considered and are without merit.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.



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1/7/2022
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE