

<b>American Challenger Dev. Corp. v Credit Suisse AG, Cayman Is. Branch</b>
2023 NY Slip Op 30219(U)
January 20, 2023
Supreme Court, New York County
Docket Number: Index No. 652563/2022
Judge: Barry R. 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

AMERICAN CHALLENGER DEVELOPMENT CORPORATION,

Plaintiff,

- v -

CREDIT SUISSE AG, CAYMAN ISLANDS BRANCH, CREDIT SUISSE AG, NEW YORK BRANCH, COLUMN FINANCIAL INC., AND SECTOR FINANCIAL INC.,

Defendants.

Table with 2 columns: INDEX NO., MOTION DATE, MOTION SEQ. NO. and values: 652563/2022, (blank), 001, 002

DECISION + ORDER ON MOTIONS

HON. BARRY R. OSTRAGER

On January 20, 2023, the Court heard oral argument via Microsoft Teams on defendants' Motion Sequence 001 to dismiss plaintiff's complaint and Motion Sequence 002 to stay discovery pending resolution of the motion to dismiss. In accordance with the decision on the record and as further elaborated here, the motions are resolved as follows.

Under CPLR § 3211(a)(7), this Court is tasked with determining whether, after affording the pleadings a liberal construction and accepting the allegations in the Amended Complaint as true, "the facts as alleged fit within any cognizable legal theory ... Under CPLR § 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law ...." Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994) (citations omitted).

The motion to dismiss plaintiff's breach of contract claim is denied. Plaintiff has adequately pled breach of the Purchase Agreement. Of particular importance are the allegations contained in the Complaint that the necessary internal approvals contained in section 8(b)(B) of

the Purchase Agreement were in fact obtained. Cmplt. at ¶¶33–36, 42, 44. There are questions of fact regarding the purported condition precedent and whether the internal approvals were indeed obtained as alleged which are inappropriate for resolution at the instant stage. Defendants rely upon a Termination Notice sent by defendants to plaintiff to support their claim that the internal approvals were not obtained. NYSCEF Doc. No. 13. However, the Termination Notice does not constitute “documentary evidence” for the purposes of a CPLR 3211(a)(1) motion. While correspondences may be considered documentary evidence, they must pass the “essentially undeniable” test. *See Fontanetta v. Doe*, 73 A.D.3d 78, 86 (2d Dept. 2010) (holding that, for a paper to be considered ‘documentary evidence’ pursuant to CPLR 3211(a)(1), the paper must be (1) unambiguous, (2) of undeniable authenticity, and (3) its contents are essentially undeniable). The Termination Notice fails this test because the issue of whether the internal approvals were obtained is a core factual dispute in this case, thus the contents of the letter are not “essentially undeniable.”

The Purchase Agreement, which undisputedly is documentary evidence, does not conclusively preclude plaintiff’s claim for breach of contract. First, at issue in this case is whether the internal approvals required by the Purchase Agreement were obtained; the Purchase Agreement clearly does not resolve this factual dispute. Second, even if it is established that the internal approvals were indeed not obtained, a second issue exists that requires resolution and which cannot be decided at this time. Defendants contend that the Purchase Agreement contains a condition precedent to contract *formation* by virtue of the language contained in sections 6(a)(ii) and 8(b)(B) and that, because the internal approvals were not obtained, the Purchase Agreement never became a binding on the parties. Plaintiff, on the other hand, argues that section 8(b)(B) merely contains a condition precedent to *performance* of the underlying

transactions contemplated by the Purchase Agreement and that section 6(a)(ii) does not modify this condition, thus the contract is binding regardless of the existence of the internal approvals and defendants are in breach of that contract. The language contained in the Purchase Agreement is ambiguous, in part because of these two separate provisions, and does not clearly establish whether the condition contained in the Purchase Agreement was precedent to the formation of the contract or to performance of the underlying transactions. Accordingly, the motion to dismiss plaintiff's claim for breach of contract is denied.

The motion to dismiss plaintiff's breach of the implied covenant of good faith and fair dealing claim is granted as being duplicative of the breach of contract claim. The second cause of action for breach of the implied covenant is predicated entirely on the same conduct underlying the breach of contract claim and both claims seek monetary damages. *See MBIA Ins. Corp v. Merrill Lynch*, 81 A.D.3d 419, 419–20 (1<sup>st</sup> Dept. 2011). However, plaintiff may pursue its theory that defendants breached the covenant in conjunction with their cause of action for breach of the Participation Agreement “because a breach of the covenant of good faith and fair dealing is a breach of the contract itself.” *Parlux Fragrances, LLC v. S. Carter Enterprises*, 204 A.D.3d 72, 92 (1<sup>st</sup> Dept. 2022).

Motion Sequence 002 for a stay of discovery pending resolution of Motion Sequence 001 is denied as moot.

Defendants shall file an answer to the Complaint within 30 days of the date of this Order. The parties shall appear for a Preliminary Conference on March 17, 2023, at 10:00 a.m. The parties shall provide the dial-in for the Preliminary Conference in an e-filed letter by March 3, 2023. Counsel are directed to meet and confer and complete the Preliminary Conference Order form, which is available on the Part 61 website, with a Note of Issue deadline no later than 22

months after the date of the Order and interim deadlines agreed to by the parties. The parties are directed to efile the proposed Preliminary Conference Order with a request to So Order by March 3, 2023. If the propose Preliminary Conference Order is acceptable, it will be So Ordered, and no appearance will be necessary on March 17.

Dated: January 20, 2023.

  
BARRY R. OSTRAGER, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE