

**ACP Cocoa, LLC v Niche Cocoa Indus., Ltd.**

2023 NY Slip Op 33033(U)

August 31, 2023

Supreme Court, New York County

Docket Number: Index No. 650003/2023

Judge: Robert R. Reed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 43

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ACP COCOA, LLC	INDEX NO. <u>650003/2023</u>
Plaintiff,	MOTION DATE <u>03/09/2023</u>
- v -	MOTION SEQ. NO. <u>001</u>
NICHE COCOA INDUSTRY, LTD.,	
Defendant.	<b>DECISION + ORDER ON MOTION</b>

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HON. ROBERT R. REED:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2  
 were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT.

Upon the foregoing documents, plaintiff’s motion for summary judgment in lieu of complaint is granted.

On July 9, 2020, ACP Cocoa, LLC (“ACP” or “buyer”) and Niche Cocoa Industry, LTD (as “Niche” or “seller”) entered into a prepayment agreement relating to the delivery of cocoa products by Niche to ACP under the commercial contract. There were several subsequent amendments to the prepayment agreement, culminating in amendment no. 4 which was executed on November 22, 2021. Amendment No. 4 (also entitled a “deed in variation”) provides in section 8.3 that Niche agreed that “the Buyer shall have the right to take, and shall not be prevented from taking, proceedings against the Seller to settle any dispute or claim arising out of, or in connection with, this Deed, its subject matter or formation (including non-contractual disputes or claims) in any other court of competent jurisdiction and that the Buyer may take such proceedings in any number of jurisdictions, whether concurrently or not, to the extent permitted by law.”

Then on or about November 29, 2021, ACP and Niche entered into a settlement agreement to resolve various issues between them. In connection with the settlement agreement between ACP and Niche, the prepayment agreement was amended, and a new repayment schedule for the outstanding loan was established. As set forth in the settlement agreement, Niche agreed to “accept service of process for any lawsuit related to any dispute or controversy arising from or in any way connected or related to [the Settlement Agreement] by Federal Express or other overnight/international delivery service to Niche’s office” in Tema, Ghana. Under the newly established schedule and the settlement agreement, Niche’s payments to ACP were due on December 31, 2021, March 31, 2022, and June 30, 2022. According to ACP, no payments were made as of December 26, 2022. These outstanding payments and Niche’s refusal to meet its obligations propelled ACP to commence this case, filing a summary judgment in lieu of complaint on March 9, 2023. According to ACP, as of December 26, 2022, a total amount of \$1,649,940.39 was due and owing from Niche. Niche did not oppose ACP’s motion to this day.

A party bringing a motion for summary judgment in lieu of complaint establishes its prima facie entitlement under CPLR 3213 to recover the sums due to it by proffering the instrument for the payment of money only, documentation showing what is owed, and the affidavit of an appropriate person with knowledge attesting to the default (*Carrera Casting Corp. v. Cord*, 106 AD3d 422 [1st Dept 2013]). Once the plaintiff makes its prima facie showing, the burden shifts to the non-movant defendant to produce admissible evidentiary proof sufficient to establish a triable issue regarding a bona fide defense (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v. Navarro*, 25 NY3d 485, 492 [2015]).

Summary judgment pursuant to CPLR 3213 herein is appropriate and is granted in ACP's favor because the prepayment agreement as amended, the settlement agreement, the sworn statement of a director of ACP, and the business records of ACP attested to and authenticated by an ACP director establish ACP's entitlement to payment of the amounts owed by Niche. As set out in detail in the affidavit of ACP Director Pat Morabito, the amounts owed by Niche are apparent or readily calculable from the documentary evidence and ACP's business records, and as of December 26, 2022, such amounts owed were \$1,649,940.39, with post-default interest and enforcement legal fees continuing to accrue. Moreover, this court's jurisdiction over Niche appears to be appropriate based on Niche's agreements and acknowledgements set forth in the prepayment agreement and the settlement agreement. In either event, Niche has not even opposed ACP's motion.

Finally, pursuant to the settlement agreement, Niche agreed to accept service of process for any lawsuit related to any controversy "connected or related to" the settlement agreement via Federal Express international delivery. ACP has produced evidence of such delivery (see NYSCEF Doc. No. 18). Accordingly, ACP has established prima facie evidence of its entitlement to summary judgment in lieu of complaint.


Accordingly, it is hereby

**ORDERED** that ACP's motion for summary judgment in lieu of complaint is granted, and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the sum of \$1,649,940.39, plus additional post-default interest that continues to accrue until entry of a judgment at the rate of \$412.41 per day since December 26, 2022, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs and it is further

**ORDERED** that, within twenty (20) days after this decision and order is uploaded to NYSCEF, plaintiff shall serve a copy of this decision and order on defendant, as well as, on the Clerk of the Court (60 Centre Street, Room 141 B), who shall enter judgment accordingly, and it is further

**ORDERED** that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

8/31/23  
DATE

  
ROBERT R. REED, J.S.C.

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