Mitsubishi UFJ Inv. Servs. & Banking (Luxembourg) S.A. v Byblos Bank S.A.L.

2024 NY Slip Op 34414(U)

December 16, 2024

Supreme Court, New York County

Docket Number: Index No. 653915/2022

Judge: Louis L. Nock

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

---X

MITSUBISHI UFJ INVESTOR SERVICES & BANKING (LUXEMBOURG) S.A.,

Plaintiff,

- v -

BYBLOS BANK S.A.L.,

Defendant.

---X

INDEX NO. 653915/2022

MOTION DATE 05/31/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, and 98

were read on this defendant's motion to DISMISS THE COMPLAINT.

LOUIS L. NOCK, J.S.C.

This breach of contract action arises out of a $300 million loan advanced to defendant, a Lebanese bank, by plaintiff's predecessor in interest, nonparty Bank of New York Mellon (Luxembourg) S.A. ("BNYM"). Defendant now moves to dismiss this case pursuant to CPLR 3211(a)(1), (2), and (7), stating that a mandatory directive from the Lebanese central banking authority directs it not to repay the $79.1 million outstanding balance on the loan. The motion is denied in accordance with the following memorandum.

Background

Pursuant to a subordinated loan agreement dated December 21, 2012 (the "SLA"),[1] defendant borrowed $300,000,000 (US) from BNYM, with a loan maturity date of December 21, 2022 (SLA [NYSCEF Doc. No. 12] at 6).

[1] The SLA's cover page identifies defendant's counsel, Dechert LLP, as its drafter.

The SLA contains the following "Choice of Law; Jurisdiction" clause at section 17.5 thereof:

> This Agreement and all rights and obligations hereunder shall be governed by and construed in accordance with the laws of the State of New York applicable to contracts made and to be performed entirely within New York, subject to compliance with mandatory provisions of Lebanese law and regulations applicable to subordinated loans entered into by Lebanese banks, including Decision 6830 dated 6 December 1998. The Borrower hereby irrevocably (i) submits to the non-exclusive jurisdiction of any court of the State of New York or the Federal courts of the United States of America located in New York City, the Borough of Manhattan, solely for the purposes of any action, suit or proceeding arising in connection with this Agreement; (ii) waives, in any such action, suit or proceeding brought in a State or Federal court in New York City, to the fullest extent it may effectively do so, the defense of any inconvenient forum to the maintenance of any such action, suit or proceeding arising in connection with this Agreement; and (iii) appoints Law Debenture Corporate Services Inc. with its registered office at 400 Madison Avenue, 4th Floor, New York, New York, 10017, United States of America as its agent for service of process in connection with any such action, suit or proceeding. Nothing contained herein shall preclude the institution of legal proceedings in the courts of any other jurisdiction having or claiming jurisdiction in respect of this Agreement.

Thus, it is clear, that, irrespective of any foreign domicile of the parties, they consciously made New York, and its law, the centerpiece of any litigation that might arise in connection with the SLA. While it is true that the clause's application of New York law must also consider "mandatory provisions of Lebanese law and regulations applicable to subordinated loans," the clause provides an express example of what it means by adding the reference to "Decision 6830 dated 6 December 1998,"[2] which will be treated later on in this discussion.

The Banque du Liban ("BDL") serves as the central bank for Lebanon (*e.g., Daou v BLC Bank, S.A.L.*, 42 F4th 120, 133 [2d Cir 2022] ["BDL, as the central bank of Lebanon, is an agency or instrumentality of the Lebanese state"]). It is empowered under the Lebanese Code of Money and Credit to issue recommendations or directives either to individual Lebanese banks or to all banks in Lebanon (Diab Aff. [NYSCEF Doc. No. 69] ¶ 15). Following a meeting of

[2] The referenced Decision 6830 is actually dated 1997; not 1998 (*see*, NYSCEF Doc. No. 24).

BDL's Central Council over two years ago on September 8, 2022, BDL issued a directive to defendant ***not*** to repay the remaining loan balance at maturity due to an economic crisis affecting Lebanon at that time, stated as follows by the BDL:

> In view of the current exceptional situation resulting from the current circumstances affecting the country and to preserve equality between the depositors and the other creditors, we demand that Byblos Bank SAL:
>
> 1- Not to pay overseas the outstanding balance of the subordinated loan amounting to USD /79,100,000/ . . . .

(BDL Decision 16/22/22 [NYSCEF Doc. No. 13].) The directive is signed by Riad Toufic Salameh as the governor of BDL. On the basis of this directive from Mr. Salameh, defendant did not repay the principal balance due on the loan, amounting to $79,100,000 as of the date of the foregoing BDL Decision.

Plaintiff asserts three causes of action, all sounding in breach of contract: failure to repay the outstanding balance (first cause of action); reliance on Lebanese law to readjust the debt, an event of default under the SLA (second cause of action); and failure to provide consolidated audited financial statements to plaintiff (third cause of action). While defendant asserts that it has not breached any provisions of the contract, it more broadly urges this court to dismiss the entire case under the International Comity Doctrine and the Act of State Doctrine.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiff the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory" (*id.* at 87-88). Ambiguous allegations must be resolved in plaintiff's favor (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together

manifest any cause of action cognizable at law" (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). "[W]here . . . the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration" (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

Plaintiff frames the present dispute between the parties as a straightforward consideration whether the BDL directive is "mandatory" within the meaning of the SLA's choice of law provision. In this regard, the parties submit dueling expert opinions on Lebanese law on whether the BDL Decision is mandatory or not (*compare* NYSCEF Doc. No. 32 [mandatory, per defendant's expert] *with* NYCEF Doc. No. 78 [not mandatory, per plaintiff's expert]).

But despite the effort invested by the parties in their procurement of such expert opinions – conflicting as they are – a much more fundamental approach governs this analysis which could theoretically ascribe a mandatory character to the BDL Decision under Lebanese law, but still reaches the conclusion that it is not to be afforded the effect which defendant seeks in moving to dismiss on the force of that BDL Decision. We must begin with some basic tenets of contractual construction under New York law:

> It is well settled "that a contract should not be interpreted to produce an absurd result, one that is commercially unreasonable, or one that is contrary to the intent of the parties" (*Cole v. Macklowe,* 99 A.D.3d 595, 596, 953 N.Y.S.2d 21 [1st Dept. 2012]). "[T]he aim is a practical interpretation of the expressions of the parties to the end that there be a realization of [their] reasonable expectations" (*Brown Bros. Elec. Contrs. v. Beam Constr. Corp.,* 41 N.Y.2d 397, 400, 393 N.Y.S.2d 350, 361 N.E.2d 999 [1977] [internal quotation marks omitted] [second alteration in original]).

(*Macy's Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 54 [1st Dept 2015].)

Defendant's construction of the SLA's clause, making New York law application "subject to compliance with mandatory provisions of Lebanese law and regulations" is that plaintiff,

advancing 300 million US Dollars of loan proceeds to defendant, actually assented to bear the brunt of a situation where BDL, unilaterally, could do everything and anything it desired to vitiate the loan by the mere stroke of a pen, and that defendant could abide by that result without any recourse to plaintiff against defendant despite plaintiff's advancement of such substantial loan proceeds to defendant. It is beyond cavil that any such interpretation "produce[s] an absurd result, one that is commercially unreasonable . . . ." (*Macy's Inc., supra*.) That, and more. Such an interpretation, which obligates plaintiff entirely, but does nothing to ensure reciprocal performance obligations of repayment on defendant's part, renders the contract completely illusory and without consideration (*e.g., Curtis Properties Corp. v Greif Companies*, 212 AD2d 259, 265-66 [1st Dept 1995] ["Because the promises of both parties to a bilateral contract must be supported by consideration, the contract is unenforceable if the promise of either party is illusory. . . . The courts avoid an interpretation that renders a contract illusory and therefore unenforceable for lack of mutual obligation and prefer to enforce a bargain where the parties have demonstrated an intent to be contractually bound."] [Citations omitted]). Under such circumstances, where the contract is, in reality, no contract at all in the absence of mutually enforceable obligations, defendant's retention of the loan proceeds can no longer be called a *bona fide* incident of banking under the authority of BDL; but rather, an outright conversion of plaintiff's funds in the absence of contract. Plaintiff's right to seek restitution of such funds, and a New York court's enforcement of that right, does not offend any banking regulation or BDL governance of banking because it is not banking, at all. It is an unjustified withholding of plaintiff's funds without any contractual right of possession to begin with.

And there is yet another important tenet of contract construction which must be borne in mind: "A contract should be construed so as to give full meaning and effect to all its provisions"

(*American Express Bank Ltd. v Uniroyal, Inc.*, 164 AD2d 275, 277 [1st Dept 1990], *lv denied* 77 NY2d 807 [1991]). The choice of law clause of the SLA, which makes New York law "subject to compliance with mandatory provisions of Lebanese law and regulations" provides an exemplar to the words "mandatory provisions of Lebanese law and regulations" by its deliberate reference to "Decision 6830 dated 6 December 1998."[3] That decision (NYSCEF Doc. No. 24) is an example of an ordinary-course banking regulation concerning subordinated loans and bonds patently designed to address general commercial aspects of bank stop-payments, bank liquidation, and other conceivable circumstances within any normal banking context. Giving full meaning to the effect of the SLA's mention of Decision 6830, as this court must do (*American Express, supra*), and preserving the SLA's commercial reasonableness, as this court must also do (*Macy's Inc., supra*), this court now reasonably and necessarily interprets the reference to mean "subject to compliance with mandatory provisions of Lebanese law and regulations" similar in nature to "Decision 6830"; i.e., ordinary-course banking laws and regulations which are designed to facilitate effective banking business, and decidedly not unilateral dictates which purport to vitiate and completely nullify a Lebanese bank's obligations to other commercial actors with which it does business, as defendant would have this court believe.

Insofar as defendant might point to the word "including" which prefaces the SLA's reference to Decision 6830, seeking to imply that the reference is not definitional; but rather, supplemental, defendant must bear the burden of such lack of care in articulation by virtue of the undeniable fact that it, through its counsel, was the drafter (*e.g., 327 Realty, LLC v Nextel of N.Y., Inc.*, 150 AD3d 581 [1st Dept 2017]; *see*, SLA cover page [NYSCEF Doc. No. 6]). Thus, in order to preserve the SLA's choice of law provision: (i) as not absurd; (ii) as not commercially

---

[3] *See*, note 2, *supra*.

unreasonable; and (iii) as giving full effect to each component of the provision – as this court must do – the court understands the provision's prefatory "including" expression as more in the nature of 'such as.'[4]

Accordingly, this court denies defendant's motion to dismiss on the force of the choice of law's implication of Lebanese law and regulations, as those laws and regulations are intended to be laws and regulations which facilitate loan activity within the Lebanese banking industry; and not those purporting to destroy it, as defendant's construction ultimately does.[5]

The foregoing disposition does not require the court to engage in what would be surplus analysis of whether BDL Decision 16/22/22 (NYSCEF Doc. No. 13) should or should not be entitled to "International Comity" or the application of the "Doctrine of Act of State." Simply put, even if it is (and this court makes no finding herein in said regard), plaintiff still states valid causes of action for repayment whether predicated on a theory of breach of contract (as said contract is construed hereinabove) or on theories of failure of consideration and illusory contract (taking defendant's construction of the SLA to its ultimate conclusion, as pointed out hereinabove).

---

[4] Other inaccuracies appear in defendant's counsel's draftsmanship of the SLA, such as in section 15 thereof, referring to "sub-clause (d) or (e) of this Clause 15" (NYSCEF Doc. No. 6 § 15.1.5). There are no such sub-clauses. That, in addition to the SLA's misdating of Decision 6830 (*see, supra,* note 2). Thus, the use of the word "including" instead of 'such as,' or the like, constitutes but one of several drafting inaccuracies which, as discussed in the text above, are construed against the drafter.

[5] Lawsuits spawned by similar fact patterns – involving the Lebanese Central Bank's declination to allow for the repayment of loans by Lebanese banks on account of economic circumstances within that country – are no strangers to the federal courts within this district. But the dismissals by said courts of those lawsuits were entirely based on the procedural ground of lack of personal jurisdiction over the Lebanese bank defendants; and not on substantive grounds (*see, Daou v BLC Bank, S.A.L.*, 42 F4th 120 [2d Cir 2022]; *Raad v Bank Audi S.A.L.*, 2024 WL 967172 [SD NY 2024]; *Kreit v Byblos Bank S.A.L.*, 2023 WL 6977448 [SD NY 2023]; *Elghossain v Bank Audi S.A.L.*, 2023 WL 3005524 [SD NY], *Report & Recommendation adopted* 2023 WL 6390160 [SD NY 2023]; *Moussaoui v Bank of Beirut & the Arab Countries*, 2023 WL 5977239 [SD NY 2023], *affd in relevant part* 2024 WL 4615732 [2d Cir 2024]). Here, of course, no jurisdictional impediment exists by virtue of the SLA's broad and unambiguous choice of New York forum provision (as well as its choice of New York law provision and defendant's designation of a New York agent for service of process) (*see*, NYSCEF Doc. No. 12 § 17.5).

Accordingly, it is

ORDERED that defendant's motion to dismiss the complaint is denied; and it is further

ORDERED that an answer, if any, shall be filed on or before twenty days from the date of filing hereof.

This will constitute the decision and order of the court.

ENTER:

12/16/2024					
DATE				**LOUIS L. NOCK, J.S.C.**	
CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION		
	[ ] GRANTED	[X] DENIED	[ ] GRANTED IN PART		[ ] OTHER
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT		[ ] REFERENCE