

32 Misc. 3d 1232(A), *; 936 N.Y.S.2d 58, **;
2010 N.Y. Misc. LEXIS 6658, ***; 2010 NY Slip Op 52415(U)

Fortis Bank (Nederland) N.V., Plaintiff, against Abu Dhabi Islamic Bank, Defendant.

601948/09

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

32 Misc. 3d 1232(A); 936 N.Y.S.2d 58; 2010 N.Y. Misc. LEXIS 6658; 2010 NY Slip Op 52415(U)

August 25, 2010, Decided

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the L/C terms at their [Fortis'] counter and have been forwarded to the issuing bank [Awal]...."

On June 16, 2008 by SWIFT message, AWAL requested that ADIB add its confirmation to the Letter of Credit. On June 14, 2008 by SWIFT message to Fortis, ADIB, in exchange for a fee of \$499,999.96 from Awal, did add its confirmation to the

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Discussion

Under *CPLR 3212(b)*, summary judgment shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.

In order to grant summary judgment, a court must find that there are no genuine issues of material fact, that the movant has established his cause of action or defense sufficiently to warrant judgment in his favor, and that the proof provided is in an admissible form. *Menekou v Crean*, 222 AD2d 418, 419-420, 634 N.Y.S.2d 532 (2d Dept 1995). If the movant, Fortis here, sufficiently shows there are no genuine issues of material fact, the burden then shifts to the non-moving party to establish, with admissible proof, that an issue of material fact exists [***17] *Id.* at 420.

For a motion to compel, as made by ADIB here, "*CPLR 3101(a)* provides for "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." The words "material and necessary" have been interpreted broadly and cover any good faith request for information that will assist in the preparation for trial. *Allen v Crowell-Collier Publ'g Co.*, 21 NY2d 403, 406-407, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968).The Fraud Rule

Article 5 of the UCC includes the fraud rule that the parties did not expressly incorporate into the Letter of Credit, but which governs it nonetheless (*see* n 3, *supra*). It defines a letter of credit as "a definite undertaking . . . by an issuer to a beneficiary at the request or for the account of an applicant or, in the case of a financial institution, to itself or for its own account, to honor a documentary presentation by payment or delivery of an item of value." The special section on fraud in a letter of credit transaction is § 5-109. Under the UCC's conception of the fraud rule, it is the beneficiary of the letter of credit that must have committed the fraud in order for relief to be granted. In the case here, ADIB, at various [***18] times, has alleged fraud perpetrated by Awal, Bunge and Fortis. Although Article 5 is somewhat opaque on what exactly constitutes material fraud, Comment 1 of *section 5-109* states that fraud occurs "only when the beneficiary has no colorable right to expect honor and where there is no basis in fact to support such a right to honor."

Generally, the fraud rule in the law of letters of credit is a rule whereby, "although documents presented are facially in strict compliance with the terms and co

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Park alleged that [***21] the Army had defrauded them by delaying presentation of documentation on the letters of credit until it appeared that the purchaser would be unable to pay for the goods. National City then paid

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Even without ADIB's prior knowledge of the structure of the Letter of Credit, it does not seem fraud was involved in the underlying transaction. Turning to ADIB's primary "evidence" of fraud, that is, Ms. Chen's declaration, the court gives it little consideration, if it is to be considered at all. Ms. Chen's declaration fits the black-letter definition of hearsay and is compounded by several additional [***26] layers of hearsay.

Had Ms. Chen's declaration been in admissible form it still would not be a particularly compelling piece of evidence. The declaration reports information of which Ms. Chen simply has no personal knowledge. Ms. Chen merely repeats information she has gleaned from her informal inquiries. Affidavits made without personal knowledge have virtually no probative value. *Roche v Hearst Corp.*, 72 AD2d 245, 249, 424 N.Y.S.2d 930 (3d Dept 1980).

Beyond admissibility and probative value, the fraud that allegedly permeated the underlying transaction here is not as obvious from Ms. Chen's declaration as ADIB seems to think it is. It appears the "synthetic" or "structured" Letter of Credit used in this case may be something of a novel and unusual device in trade finance. It differs from traditional notions of how a letter of credit is structured and what it is supposed to facilitate. Being novel and unusual, however, is not the same as being fraudulent. ADIB asserts that the "synthetic" or "structured" Letter of Credit's actual purpose was to raise funds for ATS by somehow disadvantaging ADIB. While ADIB says that the "synthetic" or "structured" Letter of Credit is fraudulent in that it appears to [***27] underpin a loan rather than a sale of goods, it has not explained what the practical difference between the two arrangements is *viz.* ADIB. The Letter of Credit was set up in a

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the structure of the transaction before undertaking its own reimbursement obligation. The burden has thus shifted from Fortis to ADIB. ADIB has not met the burden of demonstrating a genuine issue of material fact. The proof ADIB offers of a material question, Ms. Chen's declaration, is not in an admissible form, and is inconsequential as well.

Accordingly, defendant's motion to compel discovery is denied, and plaintiff's motion for summary judgment is granted.

Settle Order.

Dated: August 25, 2010

ENTER:

/s/ Melvin L. Schweitzer

J. S. C

