

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

SORBEE INTERNATIONAL LTD.,	:	— — —	MAY TERM, 2001
		:	
Plaintiff		:	No. 806
		:	
v.		:	Commerce Program
		:	
PNC BANK, N.A., BANCO SANTANDER		:	
AGENCY OF LEBRIJA, and ART D'OR		:	
IBÉRICA, S.A.,		:	
Defendants		:	

OPINION

This Opinion is submitted relative to Plaintiff, Sorbee International Ltd. (“Sorbee”),’s appeal of this court’s Order of October 12, 2001, dismissing Plaintiff’s Motion for Reconsideration of Plaintiff, Sorbee International Ltd. insofar as the claims against Defendant, Banco Santander Agency of Lebrija (“Santander”), were dismissed.¹

Plaintiff contends that this Court erred in dismissing Plaintiff’s claims against Santander on the grounds that the Stipulation entered into between Sorbee and Santander, which resulted in the withdrawal of the draw on the letter of credit by Santander, did not resolve Sorbee’s outstanding claims against Santander for breach of warranty. This Court disagrees.

BACKGROUND

This dispute involved an international commercial transaction involving a letter of credit and the international trade of chocolates.

¹The Order of October 12, 2001 also granted the Motion for Reconsideration insofar as vacating the Order of October 9, 2001 whereby the court dismissed plaintiff’s claims against Art D’Or Iberica, S.A, as well as dismissing the claims against the other two named defendants.

Plaintiff Sorbee, a Pennsylvania corporation, is in the business of manufacturing sugar-free candy and importing and distributing food and beverage products. Am.Compl., ¶ 1.² Defendant, PNC Bank, N.A. (“PNC”) is a national banking association having one of its principal place of business at 1600 Market Street, Philadelphia, Pennsylvania. Am.Compl. & Answer, ¶ 2. Defendant Santander is purportedly a Spanish banking association having one of its international principal places of business at 45 East 53rd Street F 9-10, New York, New York. Am.Compl., ¶ 3. Further, as alleged, Defendant Art D’Or Ibérica, S.A. (“Art D’Or”) is a corporate entity organized in the nation of Spain with a principal place of business at Juan Pedro Vidal, 7, 414740 Lebrija, Spain, which regularly conducts business in the United States and specifically in the Commonwealth of Pennsylvania. *Id.* at ¶ 4.

In 2000, Sorbee decided to expand its product lines with sugar free and sugar chocolate products and began looking for a long-term supply relationship. *Id.* at ¶ 5. Art D’Or indicated that it was interested in a long term relationship, but it would not be able to supply the chocolate products until it constructed a planned factory and would obtain an interim supplier and absorb any price differential until the factory was ready. *Id.* at ¶ 6. Sorbee indicated that it would be interested in using Art D’Or as a supplier and Art D’Or obtained Chocolate Torras as the interim supplier. *Id.* at ¶ 7. It was purportedly agreed that Chocolate Torras would bill Art D’Or at the higher price, with a copy of the pro forma invoice to Sorbee, and then Art D’Or would invoice Sorbee at the original contract price. *Id.* Sorbee would then pay Art

²The Amended Complaint was filed on September 14, 2001 and supersedes all previous complaints filed in this matter. See Vetenshtein v. City of Philadelphia, 755 A.2d 62, 67 (Pa.Comm. Ct. 2000)(an amended complaint virtually withdraws the original complaint and takes its place)(citations omitted). Only Defendant PNC Bank, N.A., on October 3, 2001, ever filed an Answer to the Amended Complaint. Therefore, for purposes of setting forth the background facts, this Court is primarily relying on the allegations in the Amended Complaint.

D'Or for its invoice and Chocolate Torras would pay Art D'Or a commission. Id. Thereafter, Art D'Or was supposed to pay Chocolate Torras its invoice price and absorb the difference. Id.

In mid 2000, Sorbee began importing sugar and sugar free chocolate bars from Art D'Or which were produced by Chocolate Torras. Id. at ¶ 8. As alleged, in accordance with commercial practices, Sorbee had originally provided a standby Letter of Credit from PNC for the benefit of Art D'Or and Santander, Art D'Or's bank. Id. at ¶ 9. Compl., Exhibit A. This Letter of Credit was purportedly designed to guarantee payment if Sorbee defaulted and failed to pay invoices when due. Id. In the event the invoice was unpaid for more than 125 days after the bill of lading date, then the Letter of Credit could be drawn. Id. The Letter of Credit expired on May 10, 2001. Id. The Letter of Credit was purportedly amended to require the Beneficiaries to certify that payment had not been received from Sorbee within 125 days of the bill of lading date. Id. at ¶ 10. Orders had allegedly been filled by Chocolate Torras during the relevant time period. Id. at ¶ 11. Until approximately October, 2000, Sorbee allegedly remitted payment to Art D'Or for its invoices on 60-day terms via wire transfer of funds directly to Art D'Or's bank account. Id. at ¶ 13. Beginning in October, 2000, Art D'Or directed the wire transfers from Sorbee to go to the bank account of Unifood of America in Wilmington, Delaware, Art D'Or's affiliate. Id. at ¶ 14. As alleged, Sorbee consistently paid all proper tendered invoices within 60 days of the bill of lading such that a draw on the Letter of Credit was not supportable. Id. at ¶ 15.

In December, 2000, Sorbee allegedly learned from Chocolate Torras that Art D'Or had not paid Chocolate Torras and that Art D'Or had supposedly falsely told Chocolate Torras that Sorbee had not paid it. Id. at ¶ 16. Sorbee investigated the matter and allegedly learned that Art D'Or had used Sorbee's payments to it for the construction of a new factory instead of paying Chocolate Torras. Id. at ¶ 17. Then,

in late 2000, Chocolate Torras announced it would not provide the product if it was not going to be paid. Id. at ¶ 18. Then, the parties met in Köln, Germany to negotiate a solution. Id. This alleged solution (known as the “Köln Agreement”) provided that Chocolate Torras would contract directly with Sorbee who would pay Chocolate Torras directly. Id. at ¶ 19. Art D’Or would then provide an informational invoice showing its original contract price and would remit the difference to Sorbee to mitigate the increased expense by contracting directly with Chocolate Torras (“the Mitigation Amount”). Id. Art D’Or also allegedly directed Sorbee to send any then outstanding amounts owed for Art D’Or invoices directly to Chocolate Torras. Id. Thereafter, payments and shipment were purportedly made in accordance with the Köln Agreement. Id. at ¶ 20. Art D’Or allegedly made one payment of the Mitigation Amount and then defaulted and now owes Sorbee \$178,292.16 for said amount. Id. at ¶ 21.

On March 13, 2001, Sorbee allegedly received notice from Santander that any Letter of Credit amounts were to be paid to Santander at its account with Chase Manhattan Bank, while no notice of assignment was given to PNC. Id. at ¶ 24. Sorbee allegedly had paid on 60 day terms and there were no payments due Art D’Or and no post assignment invoices that would have been 125 days past the bill of lading date before the Letter of Credit expired on May 10, 2001. Id. at ¶ 26. On or about April 9, 2001, Sorbee allegedly learned that Santander had attempted to tender four “invoices” for payment, which PNC rejected.³ Id. at ¶ 28. The four “invoices” submitted to PNC purportedly have an altered payment due date and three of the four specifically refer to the Chocolate Torras invoices which were allegedly paid.

³This rejection was purportedly because the Letter of Credit was not a documentary letter of credit where the draw on the letter of credit is the primary payment mechanism, but rather that the Letter of Credit was a standby letter of credit which acts as a security device in the event the buyer fails to pay invoices when due. Am.Compl., ¶¶ 28-30.

Id. at ¶ 31.

On or about May 9, 2001, a draw on the Letter of Credit, consisting of eleven invoices, in the amount of approximately \$385,000.00 was submitted. Id. at ¶ 34. Sorbee purportedly made all payments when due, making the certification in support of the attempted draw on the Letter of Credit false or fraudulent. Id. at ¶ 37. Sorbee immediately notified Santander that there were no invoices due and unpaid. Id. As alleged, on that same date, PNC rejected the attempted draw on the grounds that the supporting documentation had discrepancies and was non-conforming. Id. at ¶ 38. Then, Santander re-certified the draw but never forwarded the sight draft or other documents. Id. at ¶ 39.

Santander purportedly occupied different roles in the Letter of Credit transaction which included: (1) its role as advising bank to advise Art D'Or of the issuance of the original Letter of Credit; (2) its role as a co-beneficiary, requiring it to sign the sight draft and the other beneficiary's statement certifying that the invoice amounts were at least 125 days past due of the bill of lading date; (3) its role as confirming bank, requiring it to confirm the validity of the draw and forward materials to PNC; and (4) its role as both co-beneficiary and confirming bank, pursuant to which, Santander warrants that the draw is appropriate and the documentation is proper. Id. at ¶¶ 40-44.

With this background, on May 11, 2001, Sorbee filed its Petition for a Preliminary Injunction and its Complaint for Injunctive and Declaratory Relief. Sorbee also requested expedited discovery which was granted. The matter was then prolonged by various procedural problems, including issues with service as to Art D'Or, withdrawals of counsel for Art D'Or, various hearings and status conferences and the filing of an Amended Complaint on October 3, 2001. The Amended Complaint asserted counts for declaratory judgment against Art D'Or, Santander and PNC, a count for injunctive relief against PNC, a count for

breach of warranty against both Santander and Art D'Or, and counts for breach of contract of both the mitigation amount and the loan amount against Art D'Or.

A hearing was held on October 9, 2001 which addressed both a motion of then counsel for Art D'Or to withdraw and a stipulation entered into by the parties. At this hearing, Plaintiff's counsel represented to the Court that pursuant to a Stipulation, "Banco Santander is withdrawing their [attempted] draw on the letter of credit" and asserted that "there is no current valid, effective draw on the letter of credit and pursuant to its terms the letter of credit is expired." 10/9/2001 N.T. 15-16. The Court, in response, found that the issue of whether or not the letter of credit should be honored was thus moot and agreed to modify the proposed order. *Id.* at 16. Thereafter, the Court issued an Order, dated October 9, 2001, which incorporated the Stipulation and dismissed the Complaint for Declaratory and Injunctive Relief as moot.

On October, 11, 2001, Plaintiff filed an Emergency Motion for Reconsideration, maintaining that it had outstanding claims against Art D'Or and Banco Santander for breach of warranty, breach of contract for the mitigation amount and breach of contract for the loan amount. On October 12, 2001, the Court granted Plaintiff's motion in part, vacating that part insofar as the claims against Art D'Or were dismissed. Then, pursuant to Plaintiff's petition, a default judgment against Art D'Or in the amount of \$378,292.16 was entered on October 26, 2001. Art D'Or's Petition to Open the Default Judgment was denied on February 4, 2002. On that same date, Art D'Or's then counsel was granted its Motion to Withdraw Her Appearance. Plaintiff also filed a Petition to Assess Damages against Art D'Or as to Count V of the Amended Complaint. The Petition was granted on May 7, 2002 and damages in the amount of \$128,928.92 were assessed against Art D'Or.

Now, Plaintiff appeals this Court's dismissal of Banco Santander.

DISCUSSION

This Court denied Plaintiff's Motion for Reconsideration as to its dismissal of Plaintiff's claims against Defendant Santander for the following reasons. First and foremost, the Stipulation between Santander and Sorbee, entered into on October 9, 2001, noted that the attempted draw on the Letter of Credit had been withdrawn. See 10/9/2001 N.T. 15-16; Order dated October 9, 2001. Therefore, any claim of Plaintiff against Santander which relates to the Letter of Credit had been rendered moot.

All of Plaintiff's claims against Santander relate to its attempted draw of the Letter of Credit. For instance, Plaintiff's claim for Declaratory Judgment (Count II) against Defendant Santander, as well as Defendant Art D'Or, was based on the alleged false and fraudulent certification in support of the attempted draws on the Letter of Credit. Am.Compl., ¶¶ 78-73. Similarly, Count III of the Amended Complaint against both Art D'Or and Santander, also seeking declaratory judgment, was based on Santander's alleged failure to present timely and conforming documentation in connection with the attempted draw on the Letter of Credit. Id. at ¶¶ 81-82. Moreover, Count V for breach of warranty alleges the following in pertinent part:

93. Article 5 of the Uniform Commercial Code as adopted by Pennsylvania provides that when a beneficiary presents documents for payment under a Letter of Credit, and any confirming bank transfers a draft, both the beneficiary and confirming bank warrant that the necessary conditions have been complied with. See 13 Pa. C.S.A. § 5111(1).⁴

⁴Section 5111 of Pennsylvania's version of the U.C.C. states as follows:

(a) Wrongful dishonor or repudiation before presentation.—If an issuer wrongfully dishonors or repudiates its obligation to pay money under a letter of

94. By presenting attempted draws to PNC for payment on the Letter of

credit before presentation, the beneficiary, successor or nominated person presenting on its own behalf may recover from the issuer the amount that is the subject of the dishonor or repudiation. If the issuer's obligation under the letter of credit is not for the payment of money, the claimant may obtain specific performance or, at the claimant's election, recover an amount equal to the value of performance from the issuer. In either case, the claimant may also recover incidental but not consequential damages. The claimant is not obligated to take action to avoid damages that might be due from the issuer under this subsection. If, although not obligated to do so, the claimant avoids damages, the claimant's recovery from the issuer must be reduced by the amount of damages avoided. The issuer has the burden of proving the amount of damages avoided. In the case of repudiation the claimant need not present any document.

(b) Wrongful dishonor upon presentation; wrongful honor.--If an issuer wrongfully dishonors a draft or demand presented under a letter of credit or honors a draft or demand in breach of its obligation to the applicant, the applicant may recover damages resulting from the breach, including incidental but not consequential damages, less any amount saved as a result of the breach.

(c) Certain other breaches.--If an adviser or nominated person other than a confirmer breaches an obligation under this division or an issuer breaches an obligation not covered in subsection (a) or (b), a person to whom the obligation is owed may recover damages resulting from the breach, including incidental but not consequential damages, less any amount saved as a result of the breach. To the extent of the confirmation, a confirmer has the liability of an issuer specified in this subsection and subsections (a) and (b).

(d) Interest.--An issuer, nominated person or advisor who is found liable under subsection (a), (b) or (c) shall pay interest on the amount owed thereunder from the date of wrongful dishonor or other appropriate date.

(e) Attorney fees.--Reasonable attorney fees and other expenses of litigation may be awarded to the prevailing party in an action in which a remedy is sought under this division.

(f) Liquidated damages.--Damages that would otherwise be payable by a party for breach of an obligation under this division may be liquidated by agreement or undertaking but only in an amount or by a formula that is reasonable in light of the harm anticipated.

Credit, the Beneficiaries⁵ warranted that the amounts were due and owing.

95. Because the certifications were untrue, the Beneficiaries breached their warranty under Article 5 of the Uniform Commercial Code.

96. Article 5 of the Uniform Commercial Code also provides that when a confirming bank presents a draft for payment under a Letter of Credit, it is warranting that it has a valid basis for collection. 13 Pa. C.S.A. 5111(2).

97. Because Santander tendered the draft for payment it warranted as the confirming bank that the amounts were due and owing and further breached its warranty obligations.

98. If payment were made on the Letter of Credit based upon the false and fraudulent certifications, that would result in damages to Sorbee due to the breach of warranty by Art D'Or and Santander.

99. As a result of Santander's and Art D'Or's breach of their warranty obligations, Sorbee has incurred significant damages, including, but not limited to, the loss of use of approximately \$400,000, damages to its good will and business reputation and attorneys fees.

Am.Compl, ¶¶ 93-99. Even the most liberal reading of the allegations in the Amended Complaint demonstrate that Plaintiff had no other legal claim against Santander except for the ones which relate to its alleged warranty with regard to the draw on the Letter of Credit and its certification of the accompanying documentation, i.e., its alleged tender of four "invoices". See Am.Compl., ¶¶ 23, 28, 32, 35, 39-45, 47, 68-74.

Because, pursuant to the Stipulation, the attempted draw on the Letter of Credit had been withdrawn, Plaintiff no longer had a viable claim for damages or other relief against Santander. The other claims for damages were set forth against Art D'Or alone.

⁵The term "Beneficiaries" refers to both Art D'Or and Santander. Am.Compl., ¶ 9.

CONCLUSION

For the reasons set forth above, this Court denied Plaintiff's Emergency Motion for Reconsideration of its Order of October 9, 2001.

BY THE COURT,

JOHN W. HERRON, J.

Dated: July 16, 2002