

CISG-online 4210	
Jurisdiction	USA
Tribunal	U.S. District Court for the Southern District of Florida
Date of the decision	24 October 2018
Case no./docket no.	1:18-cv-21372-KMM
Case name	<i>GO Traders S.A. v. International Textile Mills, LLC et al.</i>

Order on Motion to Dismiss

THIS CAUSE came before the Court upon Defendants International Textile Mills, LLC («ITM»), Intertex Miami, LLC («Intertex»), Jose Mugrabi («Mugrabi»), and David Ojalvo's («Ojalvo») («Defendants») Motion to Dismiss Plaintiff GO Traders S.A.'s («Plaintiff») claims for breach of contract and fraudulent transfer. («Motion») Plaintiff filed a response in opposition. («Response») Defendants filed a reply. («Reply») The motion is now ripe for review.

I. Background¹

This case arises from a dispute regarding a contract for sale of denim textiles between Plaintiff and Defendant ITM. Plaintiff is a company incorporated under the laws of the Republic of Peru. Defendant ITM is a dissolved limited liability company incorporated under the laws of Florida. Defendant ITM was voluntarily dissolved on December 11, 2017 and at dissolution transferred substantially all of its assets to its members and to Defendant Intertex. Intertex has the same officers, members and business focus as ITM. Defendants Mugrabi and Ojalvo were members of ITM.

The contract between Plaintiff and Defendant ITM is governed by the United States Convention on the International Sale of Goods («CISG»). Agreements between Plaintiff and Defendant ITM were executed pursuant to the U.S.-Peru Trade Promotion Agreement («TPA»), which provided tax and other benefits to Plaintiff for trading textiles of United States origin. Defendant ITM was unable to prove to Peruvian authorities that the textiles were of United States origin. The Supreme Court of Peru found that Defendant ITM evaded its responsibilities in certifying the origin of the textiles and found Plaintiff liable for damages in the amount of \$45,160 plus pre- and post-judgment interest and attorneys' fees and cost.

In a two-count Complaint, Plaintiff alleges that: (1) Defendant ITM breached its contract under the CISG by failing to prove that the textiles they traded were of United States origin; and (2) Defendants fraudulently transferred the assets of Defendant ITM to Defendants Intertex,

¹ The background facts are taken from the Complaint («Compl.»), and accepted as true for purposes of ruling on this Motion to Dismiss. See *Fernandez v. Tricam Indus., Inc.*, No. 09-22089-CIV, 2009 WL 10668267, at *1 (S.D. Fla. Oct. 21, 2009) («On a motion to dismiss, the Court must construe the complaint in the light most favorable to the plaintiff and accept the factual allegations as true.»).

Mugrabi, and Ojalvo. Defendants move to dismiss the Complaint, arguing that (1) Plaintiff's breach of contract claim is barred by the applicable statute of limitations; (2) Plaintiff fails to properly allege a claim for fraudulent transfer; and (3) Plaintiff fails to plead any allegation of fact with regard to Defendants Mugrabi and Ojalvo.

II. Legal Standard

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to «state a claim to relief that is plausible on its face.» *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This requirement «give[s] the defendant fair notice of what the claim is and the grounds upon which it rests.» *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citation and alterations omitted). When considering a motion to dismiss, the court takes the plaintiff's factual allegations as true and construes them in the light most favorable to the plaintiff. *Pielage v. McConnell*, 516 F.3d 1282, 1284 (11th Cir. 2008).

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III. Discussion

A. Breach of Contract

Defendants move to dismiss Plaintiff's breach of contract claim arguing that (1) the breach of contract claim is barred by the statute of limitations; and (2) Plaintiff failed to give notice as required by Article 39 of the CISG.

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i. Statute of Limitations

Defendants move to dismiss Plaintiff's breach of contract claim, arguing that it is barred by the statute of limitations. In opposition, Plaintiff argues that the breach of contract claim falls within the statute of limitations because of the finality accrual rule or, in the alternative, that the statute should be equitably tolled.

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A 12(b)(6) dismissal «on statute of limitation grounds is appropriate only if it is 'apparent from the face of the complaint' that the claim is time barred.» *La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845 (11th Cir. 2004) (internal citations omitted); *see also State Farm Mut. Auto. Ins. Co. v. B & A Diagnostic, Inc.*, 104 F. Supp. 3d 1366, 1376 (S.D. Fla. 2015). Additionally, «[t]he statute of limitations is an affirmative defense, and the burden of proving an affirmative defense is on the defendant.» *Clark v. Ashland, Inc.*, No. 2:13-cv-794, 2015 WL 1470657, *4 (M.D. Fla. Mar. 31, 2015).

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Under Florida law, a breach of contract claim must be brought within five years of the breach. Fla. Stat. § 95.11(2)(b) (2018). Here, the date of the alleged breach was not pled in the Complaint and Defendants provided no information regarding when the breach occurred. Accordingly, it is not apparent on the face of the Complaint that the claim is time barred and Defendants have not proved the affirmative defense otherwise. *See La Grasta*, 358 F.3d at 845. Thus, Defendants' Motion to Dismiss the breach of contract claim as time barred is DENIED.

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ii. Article 39 of the CISG

Defendants also argue that Plaintiff's breach of contract claim must be dismissed under Article 39 of the CISG for failure to allege notice to Defendants regarding a lack of conformity of the goods. Plaintiff argues that Defendants had notice as required under Article 39 of the CISG because ITM knew of the lack of conformity when the matter was being heard before the Supreme Court of Peru.

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Article 39 of the CISG provides in relevant part that:

- (1) The buyer loses the right to rely on a lack of conformity of the good if he does not give notice to the seller specifying the nature of the lack of conformity *within a reasonable time after he has discovered it or ought to have discovered it*.
- (2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee.

(emphasis added). Plaintiff argues that Defendants received notice because Defendant ITM was required to prove to Peruvian authorities that the textiles were of United States origin and could not do so.

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Article 39 does not define «reasonable time;» however, neither Party provided the Court with the date that the matter was filed or heard by the Supreme Court of Peru. Reading the Complaint in light most favorable to the Plaintiff, it is plausible that Defendants had notice of the lack of conformity by nature of the proceedings in Peru. *See Iqbal*, 556 U.S. at 678. Accordingly, Defendants' Motion to Dismiss the breach of contract claim for failure to allege notice is DENIED.

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B. Fraudulent Transfer

Defendants move to dismiss Plaintiff's fraudulent transfer claim brought under the Florida Uniform Fraudulent Transfer Act («FUFTA»). Fla. Stat. § 726.105 (2018). To plead a cause of action for fraudulent transfer under FUFTA, a plaintiff must «allege (1) there was a creditor sought to be defrauded; (2) a debtor intending fraud; and (3) a conveyance of property which could have been available to satisfy the debt.» *Oginsky v. Paragon Prop. of Costa Rica LLC*, 784 F. Supp. 2d 1353, 1369–70 (S.D. Fla. 2011). Because of difficulty in proving actual intent, FUFTA looks to indicia of intent commonly known as «badges of fraud.» *Oginsky*, 784 F. Supp. 2d at

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1370.² FUFTA identifies eleven badges of fraud that can be used to adduce intent. Fla. Stat. § 726.105(2).³

Defendants argue that Plaintiff has failed to properly allege a claim for fraudulent transfer because Plaintiff only made a «threadbare recital of the elements of a cause of action that was held to be insufficient in *Oginsky*.» Motion at 5–6. Plaintiff argues that, unlike the plaintiffs in *Oginsky*, Plaintiff alleges «at least three» of the badges of fraud listed in FUFTA.⁴

Here, Plaintiff alleged three of the badges of fraud used to identify intent: (1) the transfer was to an insider; (2) the transfer was substantially all of ITM’s assets; and (3) ITM removed or concealed assets. See Fla. Stat. § 726.105(2)(a), (e), (g).⁵ Thus, unlike the plaintiffs in *Oginsky*, Plaintiff here has pled just beyond a «‘formulaic recitation of a cause of action’s elements [that] will not do.’» *Oginsky*, 784 F. Supp. at 1371 (quoting *Twombly*, 550 U.S. at 555); see also *Court-Appointed Receiver for Lancer Mgmt. Grp. LLC v. 169838 Canada, Inc.*, No. 05-60235-CIV, 2008 WL 2262063, at *3 (S.D. Fla. May 30, 2008) (identifying three badges of fraud in its analysis denying the motion to dismiss). Accordingly, Defendants’ Motion to Dismiss the fraudulent transfer claim is DENIED.

C. Defendants Mugarbi and Ojalvo

Finally, Defendants Mugarbi and Ojalvo seek to dismiss all claims against them, arguing that Plaintiff has not alleged any facts directed at them. Motion at 6. Here, Plaintiff has made allegations against Mugarbi and Ojalvo by (1) identifying both Mugarbi and Ojalvo as «member[s],» Directors (Mugarbi), and Managers (Ojalvo) of ITM; (2) alleging that ITM transferred all or substantially all of its assets to its members; and (3) alleging that Intertex has the same officers and members as ITM. While Plaintiff makes no specific allegations against Mugarbi or Ojalvo except in their capacity as members, the allegations set forth by

² This Court applies Federal Rule of Civil Procedure 8 to FUFTA claims. See *Gulf Coast Produce, Inc. v. Am. Growers, Inc.*, No. 07-80633-CIV, 2008 WL 660100, at *1 (S.D. Fla. Mar. 7, 2008). «To satisfy the pleading requirements of Federal Rule of Civil Procedure 8, a complaint must contain a short and plain statement showing an entitlement to relief, and the statement must ‘give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.’» *Id.* (citations omitted).

³ The eleven badges of fraud that FUFTA identifies are (1) the transfer or obligation was to an insider; (2) the debtor retained possession or control of the property transferred after the transfer; (3) the transfer or obligation was disclosed or concealed; (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit; (5) the transfer was of substantially all the debtor’s assets; (6) the debtor absconded; (7) the debtor removed or concealed assets; (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred; (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred; (10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor. Fla. Stat. § 726.105(2).

⁴ In *Oginsky*, the Court granted Defendant’s motion to dismiss where Plaintiffs did «not allege[] the existence of any of these badges of fraud» and merely recited the cause of action’s elements. *Oginsky*, 784 F. Supp. 2d at 1370–71.

⁵ Plaintiff alleges all three of the badges of fraud in just one brief sentence of the Complaint. With this sentence, Plaintiff has just barely met the bare-bones pleading threshold required under Federal Rule of Civil Procedure 8(a).

Plaintiff satisfy the «exceedingly low notice pleading standard of Rule 8.» *See Fed. Trade Comm’n v. Student Aid Ctr., Inc.*, 281 F. Supp. 3d 1324, 1331 (S.D. Fla. 2016). Accordingly, Defendants’ Motion to Dismiss as to Defendants Mugrabi and Ojalvo is DENIED⁶.

IV. Conclusion

UPON CONSIDERATION of the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that Defendant’s Motion to Dismiss is DENIED.

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⁶ Defendants Mugrabi and Ojalvo argue that this Court would have no subject matter jurisdiction over the claims against them if Plaintiff’s allegations were found to be insufficient, but provide no supporting authority suggesting this to be true. Regardless, the Court found that the allegations against Defendants Mugrabi and Ojalvo are sufficient to withstand the Motion and thus, Defendants Mugrabi and Ojalvo’s jurisdictional challenge is denied.