

CISG-online 7255

Jurisdiction	U.S.A.
Tribunal	U.S. District Court for the Southern District of Ohio
Date of the decision	20 March 2012
Case no./docket no.	1:10cv449
Case name	<i>Shanghai Fortune Chemical Co. et al. v. PMC Specialties Grp. Inc.</i>

Opinion & Order

This matter is before the Court upon Plaintiffs Majestic International Trading Company, Ltd. («Majestic») and Shanghai Fortune Chemical Company's («Shanghai») Motion for Judgment on the Pleadings. Defendant PMC Specialties Group, Inc. («PMC») has filed a Response in Opposition and Majestic and Shanghai have filed a Reply. Also before the Court is Third Party Defendant Gibraltar Trading Corporation's («Gibraltar») Motion for Reconsideration. PMC has filed a Response in Opposition and Gibraltar filed a Reply. 1

I. Background

This case arises out of a sale of goods. Plaintiffs Majestic and Shanghai are both Chinese companies which manufacture and distribute saccharin and saccharin-related products. Defendant/Third-Party Plaintiff PMC imports saccharin from China and other countries for sale in the United States. PMC is a Delaware corporation with its principal place of business in Cincinnati, Ohio. PMC has brought third-party claims against Third-Party Defendant Gibraltar, alleging that Gibraltar acted as Shanghai's shipping agent and/or supplier. Gibraltar is also a Delaware corporation, but with its principal place of business in Flushing, New York. 2

Plaintiffs' claims against PMC are based on two purchase orders for OCBS-M, a chemical used in making saccharin. PMC has brought counterclaims based on the OCBS-M orders, as well as seven separate purchase orders for sodium saccharin. PMC's third-party claims against Gibraltar are also based on the sodium saccharin orders. The cover sheet for each of these purchase orders designates Gibraltar as the «Supplier.» 3

Upon motions to dismiss filed by PMC and Gibraltar, this Court held that the claims between Plaintiffs and PMC were governed by the United Nations Convention on the International Sale of Goods («CISG»); and this Court has supplemental jurisdiction over the claims PMC has brought against Gibraltar. 4

In their Motion for Judgment on the Pleadings, Plaintiffs move to dismiss PMC's counterclaims based on the sodium saccharin orders.¹ Plaintiffs argue that their names do not appear on the purchase orders, and therefore they are not parties to those contracts. 5

In its Motion for Reconsideration, Gibraltar first argues that if PMC's counterclaims against Plaintiffs are dismissed upon Plaintiffs' Motion for Judgment on the Pleadings, PMC's claims against it should also be dismissed because it eliminates this Court's basis for supplemental jurisdiction. In the alternative, Gibraltar argues that even if PMC's counterclaims remain, PMC has failed to provide evidentiary support for this Court's exercise of supplemental jurisdiction over PMC's claims against Gibraltar. 6

II. Analysis

A. Plaintiffs' Motion for Judgment on the Pleadings

Federal Rule of Civil Procedure 12(c) provides that «[a]fter the pleadings are closed – but early enough not to delay trial – a party may move for judgment on the pleadings.» The standard for evaluating a motion for judgment on the pleadings is the same standard applicable to a motion to dismiss under Rule 12(b)(6) for failure to state a claim. *Ziegler v. IBP Hog Market, Inc.*, 249 F.3d 509, 511–12 (6th Cir. 2001). 7

In reviewing a motion to dismiss for failure to state a claim, this Court must «construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff.» *Bassett v. National Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008), quoting *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). «[T]o survive a motion to dismiss a complaint must contain (1) 'enough facts to state a claim to relief that is plausible,' (2) more than 'a formulaic recitation of a cause of action's elements,' and (3) allegations that suggest a 'right to relief above a speculative level.'» *Tackett v. M & G Polymers, USA, LLC*, 561 F.3d 478, 488 (6th Cir. 2009), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). «A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.» *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949-50 (2009). Although the plausibility standard is not equivalent to a «'probability requirement,' ... it asks for more than a sheer possibility that a defendant has acted unlawfully.» *Id.* at 1949, quoting *Twombly*, 550 U.S. at 556. 8

Plaintiffs argue that PMC's counterclaims on the saccharin orders are based on the allegations that (1) Gibraltar is the shipping agent for Plaintiffs; and (2) PMC paid Plaintiffs under the saccharin orders. Plaintiffs argue that this first allegation is a legal conclusion that there is an agency relationship between Plaintiffs and Gibraltar, and is therefore not entitled to a presumption of truth under the Rule 12(b)(6) standard of review. Plaintiffs argue that the second allegation, even if true, would be insufficient to prove that there was an agency 9

¹ Plaintiffs' Motion is not directed to the claims based on the OCBS-M orders.

relationship between Plaintiffs and Gibraltar. Finally, Plaintiffs argue that PMC has failed to properly allege an alter-ego or veil-piercing theory.

In response, PMC first argues that its claims against Plaintiffs do not depend upon an alter-ego or veil-piercing theory.² Next, PMC argues that because its claims are under the CISG, PMC may vary or contradict the terms of the written documents because the CISG does not have a parol evidence rule or a statute of frauds.

10

Plaintiffs acknowledge that parol evidence is admissible under the CISG, but point out that the purchase orders contain a merger clause which states that «any additional or different terms and conditions proposed or expressed by the Seller are null and void unless specifically agreed to in writing by Buyer.» Plaintiffs argue that this merger clause prevents PMC from introducing parol evidence. Other federal courts have rejected this same argument:

11

the CISG does not merely lack a parol-evidence rule, it *commands* courts to consider extrinsic evidence that illuminates the parties' intent. CISG Art. 8; *MCC-Marble Ceramic Center, Inc., v. Ceramica Nuova d'Agostino, S.p.A.*, 144 F.3d 1384, 1387 (11th Cir. 1998); *accord Guang Dong Light Headgear Factory Co. v. ACI Int'l, Inc.*, 521 F.Supp.2d 1153, 1166 (D. Kan. 2007); *Claudia v. Olivieri Footwear Ltd.*, No. 96 Civ. 8052(HB)(THK), 1998 WL 164824, at *4–5 (S.D.N.Y. Apr. 7, 1998). CISG Advisory Council opinions and the one U.S. court to explicitly consider this issue have held that «'extrinsic evidence ... should not be excluded, unless the parties actually intend the Merger Clause to have this effect'» and that «'Article 8 requires an examination of all relevant facts and circumstances when deciding whether the Merger Clause represents the parties' intent.'» See *TeeVee Toons, Inc. v. Gerhard Schubert GmbH*, No. 00 Civ. 5189(RCC), 2006 WL 2463537, *8 (S.D.N.Y. Aug. 23, 2006) (quoting CISG-AC Opinion no. 3 ¶ 4.5 (Oct. 23, 2004)).

Cedar Petrochemicals, Inc. v. Dongbu Hannong Chemical Co., Ltd., 2011 WL 4494602, *5 (S.D.N.Y. 2011) (emphasis in original) (footnote omitted). Accordingly, this Court finds it would be premature at this stage of the proceedings to make any determination regarding the intent of the parties with regards to the merger clause.

Likewise, the Court finds that at this time, it need not make a determination as to whether there is an agency relationship between Plaintiffs and Gibraltar. PMC has alleged that Gibraltar was Plaintiffs' «shipping agent.» The Court finds that this allegation does not amount to a legal conclusion, but merely alleges a fact which may lead to a finding of an agency relationship when the record is more fully developed.³ The Court finds that PMC has sufficiently plead its

12

² However, PMC notes that discovery may prove that Gibraltar has no separate legal existence apart from Shanghai.

³ Contrary to the implication in Plaintiffs' argument that the existence of an agency relationship is a legal conclusion, under Ohio law, «the existence of an agency relationship is a question of fact, rather than one of law.» *Brainard v. American Skandia Life Assur. Corp.*, 432 F.3d 655, 661 (6th Cir. 2005) (citing *McSweeney v. Jackson*, 691 N.E.2d 303, 307 (1996)).

counterclaims against Plaintiffs based on the sodium saccharin orders, and therefore, Plaintiffs' Motion for Judgment on the Pleadings is DENIED.

C. * Gibraltar's Motion for Reconsideration

Although a motion for reconsideration is not mentioned in the Federal Rules of Civil Procedure, it is often treated as a motion to amend judgment under Rule 59(e). *McDowell v. Dynamics Corp. of America*, 931 F.2d 380 (6th Cir. 1991); *Shivers v. Grubbs*, 747 F.Supp. 434 (S.D. Ohio 1990). There are three grounds for amending a judgment: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; and (3) to correct a clear error of law or to prevent manifest injustice. *GenCorp., Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999); *Berridge v. Heiser*, 993 F.Supp. 1136, 1146–47 (S.D. Ohio 1997).

13

Gibraltar's first argument was contingent upon this Court dismissing PMC's counterclaims against Plaintiffs. Since that has not come to pass, the Court will address Gibraltar's alternative argument that PMC has failed to provide evidentiary support for this Court's exercise of supplemental jurisdiction over PMC's claims against Gibraltar.

14

In its Motion for Reconsideration, Gibraltar argued that this Court incorrectly decided Gibraltar's jurisdictional challenge as a facial challenge, instead of a factual challenge; and therefore PMC must provide evidence, as opposed to mere allegations, that Plaintiffs were involved in the sodium saccharin orders. However, it appears that Gibraltar has abandoned this argument. In its Reply, Gibraltar specifically denies that it is seeking reconsideration based on a «clear error of law.»⁴ Therefore, the Court will not address this argument at this time.

15

Based on the foregoing, Gibraltar's Motion for Reconsideration is DENIED.

16

III. Conclusion

Based on the foregoing, the Court hereby ORDERS as follows:

17

1. Plaintiffs' Motion for Judgment on the Pleadings is **denied**; and
2. Third Party Defendant's Motion for Reconsideration is **denied**.

It is so ordered.

* Editor's note: (Mis-)numbering in the original.

⁴ Instead, Gibraltar only argues that dismissal of the sodium saccharin claims against Plaintiffs dictate dismissal of PMC's claims against Gibraltar.