UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SACV 16-99-JLS (KESx) Date: June 3, 2016
Title: Shopko Stores Operating Co., LLC v. Balboa Capital Corporation

Present: **Honorable JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE**

Terry Guerrero	N/A
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF:	ATTORNEYS PRESENT FOR DEFENDANT:
Not Present	Not Present

PROCEEDINGS: (IN CHAMBERS) ORDER (1) DENYING DEFENDANT'S MOTION TO DISMISS (Doc. 19), AND (2) DENYING PLAINTIFF'S MOTION TO DEPOSIT DISPUTED FUNDS (Doc. 33)

Before the Court is Defendant Balboa Capital Corporation's Motion to Dismiss. (MTD, Doc. 19.) Plaintiff ShopKo Stores Operating Co. opposes the Motion. (Opp., Doc. 32.) Balboa replied. (Reply, Doc. 36.) Also before the Court is ShopKo's Motion to Deposit Disputed Funds. (Dep. Mot., Doc. 33.) Balboa filed an opposition and ShopKo replied. (Dep. Opp., Doc. 34; Dep. Reply, Doc. 35.) Because these two Motions relate to the same underlying set of facts, the Court considers them in a single order. For the reasons stated below, the Court (1) DENIES Balboa's Motion to Dismiss, and (2) DENIES ShopKo's Motion to Deposit Disputed Funds.

I. BACKGROUND

ShopKo is a retailer that operates more than 330 stores in small- to mid-sized cities throughout the United States. (Complaint ¶ 7, Doc. 1.) In connection with its need to finance the acquisition of certain capital equipment, ShopKo entered into negotiations with Balboa concerning Balboa's equipment leasing program. (*Id.* ¶ 8.) Ultimately,

ShopKo entered into thirteen capital leases with Balboa. (*Id.*)[1] These leases had similar, although not identical, terms. (*Id.*) For eight of the leases, ShopKo was obligated to make a total of twelve quarterly payments over a three-year term (the "Three-Year Leases"). (*Id.* ¶ 9.) Thereafter, for a nominal payment of approximately one dollar, ShopKo would own the capital equipment at issue in each particular lease. (*Id.*) For the remaining five leases, ShopKo was obligated to make twenty quarterly payments over a five-year lease term (the "Five-Year Leases"). (*Id.* ¶ 10.) Thereafter, for a nominal payment of approximately one dollar, ShopKo would own the previously-leased equipment. (*Id.*) For all thirteen leases, Balboa was authorized to withdraw each quarterly payment directly from ShopKo's bank account. (*Id.* ¶ 11.)

Each lease incorporated by reference a single Master Lease. (Complaint, Ex. A at 5, "Master Lease," Doc. 1-1.) As relevant to the instant Motions, § 3 of the Master Lease states the following:

> The rent payable with respect to any Schedule(s) shall be the amount shown on such Schedule(s). Lessee shall pay to Lessor the rent for each Schedule, in advance, for each period or any part thereof that each Lease is in effect as delineated on the Schedule. The first such payment, with respect to any Schedule, shall be made at the Lessors discretion on any day occurring in the quarter following the Commencement Date. A prorata portion of the rental charges based on a daily rental of one-ninetieth (1/90) of the aggregated average of the quarterly rentals calculated from the Commencement Date to the beginning of the Base Term shall be due and payable at the Commencement Date.

(Master Lease § 3.) In turn, the "Commencement Date" was defined as "the day that the leased property has been delivered to and accepted by Lessee." (*Id.* § 1.) The "Base Term" is set at "the Lessors sole discretion on any day occurring in the quarter following the Commencement Date[.]" (*Id.* § 3.)

[1] Although not stated in the SAC, it is undisputed that two of the thirteen leases were actually between Balboa and non-party SVS Trucking LLC, ShopKo's wholly owned subsidiary. (*Compare* MTD at 2-3 *with* Opp. at 3, n.1.)

Shortly after execution, Balboa assigned the rights for eleven of the leases to one of three third parties: Pacific Western Bank, Susquehanna Bank, or Bank of Birmingham. (Complaint ¶ 12.) One additional lease was assigned to Pacific Western Bank approximately two months later. (*Id.*) At the time each lease was assigned, Balboa sent a letter to ShopKo providing notice of assignment. (*Id.* ¶ 13.) Many of these letters reiterated the quarterly payment terms set forth in the applicable lease schedule. (*Id.* ¶ 14.) For example, with respect to the Three-Year Leases, the letters state that ShopKo owed eleven quarterly payments followed by one final quarterly payment. (*Id.*) As for the Five-Year Leases, the letters stated that ShopKo owed nineteen quarterly payments followed by one final quarterly payment. (*Id.*) Within weeks after execution of the leases, ShopKo made an initial deposit under each lease. (*Id.* ¶ 15.) Between two and five weeks after ShopKo's initial deposit and after the aforementioned assignment, Balboa withdrew from ShopKo's account an amount "approximately equal" to the amount of the first quarterly payment as set forth in the thirteen lease schedules. (*Id.*)

The allegations surrounding one of the Three-Year Leases, "Lease 000," are illustrative. Lease 000 was executed on June 25, 2012. (*Id.* ¶ 16.) Lease 000 is a three-year lease agreement pursuant to which ShopKo was obligated to make twelve quarterly payments of $129,565.78. (*Id.*) Additionally, ShopKo was obligated to make, and in fact made, a deposit of $43,188.59, which would be applied to the last quarterly rental payment. (*Id.*) On June 26, 2012, the day following execution, Balboa assigned Lease 000 to Pacific Western Bank and provided notice of assignment to ShopKo. (*Id.* ¶ 17.) Both the lease schedule and the letter of assignment stated that ShopKo was obligated to make twelve payments under Lease 000. (*Id.*) The letter of assignment directed that all of ShopKo's payments be made to Pacific Western Bank. (*Id.*)

According to the Complaint, "[d]espite the clear terms of the lease schedule and the assignment letter, on August 20, 2012, about two months after the lease was assigned, Balboa made an unscheduled and unauthorized withdrawal of $128,126.15 from ShopKo's bank account." (*Id.* ¶ 18.) Thereafter, on October 2, 2012, the "actual first quarterly payment" under Lease 000 was withdrawn from ShopKo's account. (*Id.* ¶ 19.) As alleged, "[i]t was only after all 12 scheduled payments were withdrawn that ShopKo became aware of the extra, unauthorized thirteenth withdrawal Balboa made on August 20, 2012[.]" (*Id.* ¶ 20.) After ShopKo learned of the allegedly unauthorized withdrawal

in connection with Lease 000, ShopKo further discovered similar allegedly unauthorized withdrawals for each of the other twelve leases. (*Id.* ¶ 21.) According to ShopKo, "the manner in which Balboa withdrew the 'extra' payment was part of a scheme by Balboa to defraud ShopKo." (*Id.* ¶ 22.) As set forth in the Complaint, these unauthorized withdrawals, which occurred between August 20, 2012 and September 17, 2015, totaled $781,401.46. (*Id.* ¶¶ 24-25.)

ShopKo filed the instant Complaint on January 22, 2016. (*See generally* Complaint.) ShopKo alleges eighteen causes of action against Balboa. (*Id.* ¶¶ 26-135.) Thirteen of these claims are for breach of contract, with each claim corresponding to a different lease schedule. (*Id.* ¶¶ 47-124.) ShopKo's remaining claims are for: (1) tortious interference and intentional deceit (Cal. Civ. Code § 1709), (2) actual fraud (Cal. Civ. Code § 1572), (3) negligent misrepresentation (Cal. Civ. Code § 1572), (4) breach of the implied covenant of good faith and fair dealing, and (5) violation of California's Unfair Competition law (Cal. Bus. & Prof. Code § 17200). (*Id.* ¶¶ 26-46, 125-135.) Balboa's Motion to Dismiss followed. (MTD, Doc. 19.)

II. BALBOA'S MOTION TO DISMISS

A. Legal Standard

1. Rule 12(b)(1)

A defendant may move to dismiss an action for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). Fed. R. Civ. P. 12(b)(1). "Dismissal for lack of subject matter jurisdiction is appropriate if the complaint, considered in its entirety, on its face fails to allege facts sufficient to establish subject matter jurisdiction." *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 984-985 (9th Cir. 2008). In considering a Rule 12(b)(1) motion, the Court "is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988). "The party

asserting federal subject matter jurisdiction bears the burden of proving its existence." *See Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010).

2. Rule 12(b)(6)

In deciding a motion to dismiss under Rule 12(b)(6), courts must accept as true all "well-pleaded factual allegations" in a complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Furthermore, courts must draw all reasonable inferences in the light most favorable to the non-moving party. *See Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). However, "courts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). "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.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). "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." *Id.* (citing *Twombly*, 550 U.S. at 556).

B. Discussion

1. Subject Matter Jurisdiction

Balboa contends that "ShopKo failed to identify its member(s) and the citizenship of its member(s)," and, therefore, "the Court must dismiss the Complaint due to lack of subject matter jurisdiction." (MTD at 6.) Even assuming, without deciding, that ShopKo's Complaint is deficient in the manner suggested, Balboa still cannot prevail on its argument under Rule 12(b)(1). As the Ninth Circuit has made clear, "[a] district court may consider evidence in determining citizenship and amount-in-controversy under general provisions of the diversity jurisdictional statute[.]" *Coleman v. Estes Exp. Lines, Inc.*, 631 F.3d 1010, 1016 (9th Cir. 2011). Here, ShopKo submits an affidavit from Gary L. Gibson, Vice President and Treasurer for ShopKo, wherein Gibson states that ShopKo's "sole member, ShopKo Holding Co." is a "Wisconsin Limited Liability

Company with a principal place of business in Wisconsin, who has as its sole member Specialty Retail Shops Holding Corp., a Delaware corporation whose principal place of business is in Wisconsin." (Gibson Affidavit ¶ 21, Doc. 32-1.) Because ShopKo's Complaint alleges that Balboa is "a California corporation" that maintains its principal place of business in Irvine, California (Complaint ¶3), the facts set forth in Gibson's affidavit confirm the existence of complete diversity. Therefore, with this evidence in hand, the Court DENIES Balboa's Motion to Dismiss under Rule 12(b)(1).

2. Failure to State a Claim

Next, the Court considers Balboa's remaining arguments for dismissal under Rule 12(b)(6). (MTD at 10-25.)

a) Standing

Balboa contends that ShopKo does not have standing to bring claims on those leases Balboa entered into with SVS Trucking, ShopKo's wholly-owned subsidiary. (MTD at 10-11.) To establish Article III standing, ShopKo must show that (1) it has suffered an injury in fact, (2) the injury is fairly traceable to the challenged action of the defendant, and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *See Spokeo, Inc. v. Robins*, No. 13-1339, __ S. Ct. __, 2016 WL 2842447, at *5 (May 16, 2016) (citing *Lujan v. Defendants of Wildlife*, 504 U.S. 555, 560 (1992)). An "injury in fact" must be "concrete and particularized" and "actual or imminent[.]" *Id.*

Here, ShopKo has alleged that Balboa breached its agreement with respect to Schedule Nos. 211267-000 and 21267-001 by withdrawing a purportedly unauthorized thirteenth payment payment "from ShopKo's bank account." (Complaint ¶¶ 116, 122.) These withdrawals occurred on April 17, 2015 and September 17, 2015, respectively, and were in the amounts of $54,853.79 and $86,862.49. (*Id.*) Because these withdrawals were made by Balboa and came directly from ShopKo's bank account, there is no doubt that ShopKo has alleged sufficient facts to satisfy Article III standing. It is irrelevant that

the leases were with SVS Trucking. As a result, the Court DENIES Balboa's standing argument and will not dismiss these claims on standing grounds.

b) Ambiguity in Contract Terms & Extrinsic Evidence

Balboa's remaining arguments for dismissal are rooted in a single premise: namely, that each lease schedule "specifically incorporated the terms of the Master Lease," and, in turn, that the "Master Lease specifically authorized [Balboa's] collection of pro-rated rent." (MTD at 11-12.) Therefore, according to Balboa, because each of ShopKo's claims depend on this purportedly "unauthorized" pro-rata withdrawal, "all of ShopKo's claims must be dismissed with prejudice." (*Id.* at 15.) In addition to this generalized challenge to all of ShopKo's claims, Balboa also individually challenges the sufficiency of ShopKo's non-breach of contract claims (i.e., for tortious fraud, actual fraud, negligent misrepresentation, breach of the covenant of good faith, and UCL violations). (MTD at 15-25.) However, these individualized arguments also rely on acceptance of Balboa's position as to the effect of the terms in the Master Lease. (*See, e.g.*, MTD at 16, 19, 21-22, and 24.) Because the Court rejects Balboa's premise, its Motion to Dismiss must be denied.

The Ninth Circuit has concluded that, under California law, "it matters not how clearly a contract is written, nor how completely it is integrated, nor how carefully it is negotiated, nor how squarely it addresses the issue before the court: the contract cannot be rendered impervious to attack by parol evidence." *Trident Ctr. v. Conn. Gen. Life Ins. Co.*, 847 F.2d 564, 569 (9th Cir. 1988). Therefore, so long as "one side is willing to claim that the parties intended one thing but the agreement provides for another," then "the court must consider extrinsic evidence of possible ambiguity." *Id; see also DairyAmerican, Inc. v. N.Y. Marine & Gen. Ins. Co.*, 406 F. App'x 174, 176 (9th Cir. 2010) ("Under California law, a court must give both parties the opportunity to present extrinsic evidence as to the parties' intent in drafting a contract." (citing *Trident*, 847 F.2d at 569)); *Atl. Richfield Co. v. Ramirez*, 176 F.3d 481, 490 (9th Cir. 1999) ("California law, however, holds that 'courts may not dismiss on the pleadings when one party claims that extrinsic evidence renders the contract ambiguous."); *Lambotte v. IAC/InteractiveCorp.*, No. CV 08-04263CAS, 2008 WL 4829882, at *5 (C.D. Cal. Nov.

4, 2008) (holding that plaintiffs' statements at oral argument, as to their intent to offer additional extrinsic evidence, were sufficient to bar a dismissal at the pleading stage). As the Ninth Circuit made clear in *Trident*, however, there is nothing in California law that forecloses a defendant from prevailing on these same grounds when raised at summary judgment after the completion of discovery. *Trident*, 847 F.2d at 570, n.6.

Here, ShopKo alleges that "[a]ny position by Balboa that the extra quarterly payments withdrawn from ShopKo's bank account were permissible under the pro-rated rent provision in each lease is without merit[.]" (Complaint ¶ 31.) Moreover, in Opposition to the instant Motion, ShopKo contends that "Balboa expressly represented throughout negotiations with ShopKo that the payment terms included 12 or 20 quarterly payments" and that "Balboa fraudulently omitted its intent to withdraw an extra quarterly payment above and beyond the 12 or 20 quarterly payments explicitly stated in these documents." (Opp. at 1.)

In addition, ShopKo argues that the Master Lease definitively states "[t]he rent payable with respect to any Schedule(s) ***shall be the amount shown on such Schedule(s)***." (*Id.* at 11 (emphasis in original).) Although ShopKo concedes that the same provisions later reference a pro-rata payment, ShopKo contends that "per the first sentence of this clause, pro-rata rent is only payable if it is set forth in the applicable Lease Schedule." (*Id.*) According to ShopKo, this interpretation of the Master Lease is supported by the letters notifying ShopKo of the lease assignments, which reference only the twelve or twenty quarterly payments and make no mention of an additional pro-rata charge. (*Id.* at 11-12.) Taken together, these allegations amount to a "claim that the parties intended one thing but the agreement provides for another." *Trident*, 847 F.2d at 569. Therefore, following *Trident*, ShopKo is entitled to an opportunity for discovery and to present the Court with extrinsic evidence in support of its interpretation of the Master Lease.

In Reply, Balboa argues that the Ninth Circuit and the Court of Appeals of California have effectively overruled *Trident*. Specifically, Balboa cites to *Skilstar, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005 (9th Cir. 2012). In *Skilstar*, the Ninth Circuit held that "[a] party's assertion of ambiguity does not require the district court to allow additional opportunities to find or present extrinsic evidence if the court considers the contract language and the evidence the parties have presented and concludes that the

language is reasonably susceptible to only one interpretation." *Skilstar*, 669 F.3d at 1017 (citation omitted). However, the quoted passage in *Skilstar* cites exclusively to *Hervey v. Mercury Cas. Co.*, 185 Cal. App. 4th 954, 961 (2010), a decision by the California Court of Appeal. *Skilstar*, 669 F.3d at 1017, n.11. In contrast, the court in *Trident* was interpreting a decision by the California Supreme Court. *See Trident*, 847 F.2d at 569 (citing *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33 (1968)). As a result, the Court cannot conclude that *Skilstar* was intended to overrule *Trident*.

Perhaps more importantly, this Court would deny Balboa's motion even under the *Skilstar* standard. Based on a review of the intrinsic and extrinsic evidence submitted by the parties – specifically, the express language of the Master Lease, the allegations in the Complaint, the Gibson affidavit, and the affidavit submitted by Michelle A. Chiongson – the Court finds that the language of *this* contract is more than reasonably susceptible of ShopKo's interpretation. Therefore, dismissal is inappropriate.

C. Conclusion on Balboa's MTD

Accordingly, for the reasons stated above, the Court DENIES Balboa's Motion to Dismiss in its entirety.

III. SHOPKO'S MOTION TO DEPOSIT DISPUTED FUNDS

For its part, ShopKo requests that the Court "permit ShopKo, pursuant to Rule 67, to deposit with the Court future quarterly payments for the leases that Balboa holds[,] as a credit against the disputed amount of the extra 'payments' for the 13 leases at issue in this litigation." (Mot. to Dep. at 1.) Stated simply, ShopKo wishes to deposit its future payments – which it is obligated to make under the two leases which remain active – with the Court so that, should it prevail in this action, ShopKo could use these funds as a credit towards its anticipated recovery. ShopKo asserts that "Rule 67 broadly applies wherever there is a genuine dispute concerning the disposition of a sum of money." (Mot. to Dep. at 4.) The benefit to ShopKo is obvious: by shielding the money in an account controlled by the Court, ShopKo eliminates any risk that Balboa will be unable to satisfy a future

judgment against it. However, the Court concludes that neither the language nor the purpose of Rule 67 supports ShopKo's motion.

Rule 67 provides as follows:

> [i]f any part of the relief sought is a money judgment or the disposition of a sum of money or some other deliverable thing, a party . . . may deposit with the Court all or part of the money or thing, whether or not that party claims any of it.

Fed. R. Civ. P. 67(a).

The first problem with ShopKo's request is that it does not comport with the plain language of the rule. The rule allows a party to deposit with the court "the money or thing" that is sought in relief. Here, however, the money that ShopKo seeks to deposit with the Court – i.e., future payments owed to Balboa – is not actually "the money or thing" sought in relief. Rather, what ShopKo seeks are the funds previously withdrawn by Balboa, which, as far as the Court is aware, remain in Balboa's possession. Viewed in this light, ShopKo's proposed use of Rule 67 is functionally a request for the Court to alter the terms of the active leases and/or compel Balboa to deposit with the Court certain funds in its possession. This plainly falls outside of Rule 67's plain language.

Moreover, a review of the circumstances wherein courts have applied or referenced the rule underscores that Rule 67 is not available for the purpose and in the manner ShopKo requests. *See, e.g.*, *Star Envirotech, Inc. v. Redline Detection, LLC*, No. SACV 12-1861-JGB (DFMx), 2016 WL 1069039, at *6 (C.D. Cal. Mar. 17, 2016) (permitting defendant to deposit $73,700.80 with the court where defendant owed said amount to plaintiff, but third-party attorney placed a lien on funds); *Cruz ex rel. Cruz v. Alhambra Sch. Dist.*, 601 F. Supp. 2d 1183, 1198 (C.D. Cal. 2009) (allowing plaintiffs to recover post-judgment interest and admonishing that defendant "should have deposited the money with the court pursuant to [Rule 67(a)] to halt the accrual of interest."); *Metro. Life Ins. Co. v. Leonis*, No. 14-CV-01104-JST, 2014 WL 6065819, at *2 (N.D. Cal. Nov. 12, 2014) (permitting plaintiff-in-interpleader MetLife to deposit $21,000 life insurance benefit with court pursuant to Rule 67, while court determined which claimant was entitled to the funds); *Methven & Associates Prof'l Corp. v. Paradies-Stroud*, No. [], 2014 WL 231654, at *2 (N.D. Cal. Jan. 21, 2014) (describing Rule 67 as the mechanism

for depositing disputed property with the court as required in an interpleader action); *Jagar v. Jagar*, No. C-09-01455 EDL, 2010 WL 890938, at *1 (N.D. Cal. Mar. 10, 2010) ("The core purpose of Rule 67 is to relieve a party who holds a contested fund from responsibility for disbursement of that fund amount those claiming some entitlement thereto . . . It follows logically that a district court should not grant a Rule 67 motion unless the question of entitlement is genuinely in dispute."). This is neither an interpleader case, nor a case in which ShopKo is ready to satisfy a judgment but is uncertain of who is entitled to recover. Instead, ShopKo seeks to use Rule 67 to avoid its future obligations under the leases that remain active – a proposed use of Rule 67 entirely unsupported by any legal authority, including that which is cited in ShopKo's Motion.

For these reasons, the Court DENIES ShopKo's Motion to Deposit Disputed Funds.

IV. CONCLUSION

Accordingly, for the aforementioned reasons, the Court DENIES Balboa's Motion to Dismiss. The Court also DENIES ShopKo's Motion to Deposit Disputed Funds.

Initials of Preparer: __tg__