

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ABC LEATHER DISTRIBUTORS, INC.,

Plaintiff, CONSENT PRE-TRIAL ORDER

- against - _____ Civ. _____ (LLS)

THE SUNNYSIDE BANK, N.A.,

Defendant.

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The parties, having exchanged proposed findings and counter-findings of fact in accordance with the pre-trial procedures of United States District Judge Louis L. Stanton, hereby submit the following:

A. Agreed Findings of Fact

1. Plaintiff ("ABC") is a New Jersey corporation engaged in the business of importing, processing and selling leather, having its principal place of business in Jersey City, New Jersey.

2. At all relevant times herein, ABC's president was one Samuel Smith.

3. Defendant ("Sunnyside") is a national banking association engaged in the business of banking in the state of

New York, having its principal place of business in New York, New York.

4. In or about January 1975, ABC opened a checking account with Sunnyside at its main branch in New York City.

5. One of ABC's suppliers after January 1975 was a Brazilian export company, Brazilian Leather Exports ("BLE").

6. BLE's bank in Brazil was the Commercial Bank of Brazil ("CBB").

7. On or about December 1, 1975, on written application by ABC, Sunnyside opened an irrevocable documentary letter of credit to the benefit of CBB in Brazil (the "CBB credit") in the amount of \$700,000 and with an expiration date of June 1, 1976. A copy of the CBB credit will be marked as Joint Trial Exhibit 1.

8. On or about December 8, 1975, ABC executed a demand note in the amount of \$700,000 to the benefit of Sunnyside to cover the CBB credit. A copy of this demand note will be marked as Joint Trial Exhibit 2.

9. The business purpose of the CBB credit, as communicated to Sunnyside, was to induce CBB to provide inventory financing to ABC's Brazilian supplier, BLE.

10. Sunnyside personnel drafted the wording of the CBB credit.

11. On April 13, 1976 Jonathan Jones of Sunnyside's International Department telephoned Samuel Smith with regard to a telex. A copy of the telex will be marked as Joint Trial Exhibit 3.

12. On or about April 20, 1976, Sunnyside remitted payment of \$700,000 to CBB.

13. On or about April 20, 1976, Sunnyside sent an advice of payment to ABC. This advice of payment will be marked as Joint Trial Exhibit 4.

14. ABC did not receive any documentation from Sunnyside with respect to the drawing of the CBB credit until the commencement of this action.

15. On or about May 1, 1976 Sunnyside called the \$700,000 demand note and demanded payment in full. ABC made payment in full on or about May 31, 1976.

16. In August 1976 Sunnyside received documents from CBB purporting to fulfill the documentary requirements of the CBB credit. These documents will be marked respectively as follows: a signed sight draft for \$700,000 dated March 21, 1976--Joint Trial Exhibit 5A; a bank statement relating to BLE's accounts at CBB--Joint Trial Exhibit 5B; and two telegrams from CBB to BLE--Joint Trial Exhibits 5C, 5D.

B. Plaintiff's Proposed Findings of Fact

1. ABC communicated to Sunnyside in April 1976 that it did not intend to be obligated under the CBB credit after the expiration date of June 1, 1976 and unless the requisite documents were received. (Testimony of Samuel Smith; text of CBB credit, Joint Trial Exhibit 1).

2. After April 13, 1976 ABC made continued demands on Sunnyside for the documents called for under the CBB credit. Documents reflecting such demands will be marked as Plaintiff's Exhibits 1, 2, and 3. (Testimony of Samuel Smith; Deposition of Jonathan Jones, pp. 31-33; Telegrams from ABC to Sunnyside, Plaintiff's Exhibits 1, 2, and 3).

3. Sunnyside did not request on April 13, 1976 or thereafter a waiver of the documentary requirements of the CBB credit and no such waiver was ever given. (Testimony of Samuel Smith; Deposition of Jonathan Jones, pp. 38-41; Deposition of Harvey Harris, vice-president of Sunnyside's Commodity Finance Division, pp. 102-06).

4. In March and April of 1976 BLE was not in material breach of any of its obligations to CBB. (Testimony of Daniel Darnel, former president of BLE).

C. Defendant's Proposed Findings of Fact

1. During the telephone conversation between Smith and Jones with regard to the telex received on April 13, 1976,

Jones read the entire telex to Smith and advised Smith that the documentary requirements had not been received. (Testimony of Jonathan Jones; Deposition of Samuel Smith, pp. 59-62).

2. By word and conduct, ABC waived its right to insist that the required documents be received before payment was made under the CBB credit. (Testimony of Jonathan Jones; Testimony of Frederick Foster; CBB credit, Joint Trial Exhibit 1; CBB telex, Joint Trial Exhibit 3; Advice of payment, Joint Trial Exhibit 4; Smith letter to Jones dated April 30, 1976, Defendant's Exhibit A).

3. BLE had failed to repay amounts due CBB and was in default at the time CBB drew under the CBB credit. (BLE loan application form, Joint Trial Exhibit 6; BLE bank statement, Joint Trial Exhibit 5B; two telegrams from CBB to BLE, Joint Trial Exhibits 5C and 5D; Testimony of Ricardo Ramirez, vice-president of CBB).

D. Expert Witnesses

The plaintiff does not intend to call upon any expert witness to testify.

The defendant intends to call upon the following expert witness to testify:

1. Frederick Foster

E. Premarked Joint Trial Exhibits

The parties hereby stipulate and agree that the following exhibits may be received, with the Court's approval, in evidence at trial as premarked joint trial exhibits:

1. CBB letter of credit
2. \$700,000 demand note to benefit of Sunnyside
3. CBB telex to Sunnyside
4. Advice of payment from Sunnyside to ABC
- 5A. Signed draft for \$700,000
- 5B. BLE bank statement
- 5C. Telegram from CBB to BLE dated Feb. 21, 1976
- 5D. Telegram from CBB to BLE dated March 10. 1976

F. Premarked Disputed Exhibits

The parties have not been able to agree on the admissibility of the following premarked exhibits which they intend to offer at trial.

The plaintiff will offer the following exhibits to be received in evidence, to which the defendant objects:

1. Telegram from ABC to Sunnyside dated April 15, 1976

(Defendant objects on grounds of authenticity pursuant to Fed. R. Evid. 901).

2. Telegram from ABC to Sunnyside dated April 22, 1976

(Defendant objects on grounds of authenticity pursuant to Fed. R. Evid. 901).

3. Telegram from ABC to Sunnyside dated May 5, 1976

(Defendant objects on grounds of authenticity pursuant to Fed. R. Evid. 901).

The defendant will offer the following exhibit to be received in evidence, to which plaintiff objects:

- A. Smith letter to Jones dated April 30, 1976

(Plaintiff objects on grounds of hearsay pursuant to Fed. R. Evid. 802).

G. Type of Trial and Estimated Length

1. Plaintiff has made a demand for trial by jury.
2. Plaintiff estimates that it will take half a day to present its case.
3. Defendant estimates that it will take half a day to present its case.

Dated: New York, New York

(Date)

FIRM NAME

By _____
(Signature)

Address and telephone No.
Attorneys for Plaintiff(s)

FIRM NAME

By _____

(Signature)

Address and telephone No.

Attorneys for Defendant(s)

So Ordered.

Dated: New York, New York

(Date)

U. S. D. J.