

685 Fed.Appx. 59

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United States Court of Appeals,  
Second Circuit.

**FEILIKS INTERNATIONAL LOGISTICS HONG KONG LTD.**, Feiliks Logistic PTE. Ltd.,

Plaintiffs-Counter-Defendants -Appellants,  
Tay Kim Leng, aka Regina Tay, Yao Qin, aka Gavin Yao, **Skylift Consolidator (PTE) Ltd.**, **Jiangsu Feiliks International Logistics Inc.**, Counter-Defendants,

v.

**FEILIKS GLOBAL LOGISTICS CORP.**, Defendant-Appellee,

Ami Kwan Chi Wey, aka Ami Wey, individually and derivatively on behalf of Feiliks Global Logistics Corp., Defendant-Counter-Claimant-Appellee.

16-1159

|  
April 3, 2017

### Synopsis

**Background:** Plaintiffs filed action asserting breach of contract against international freight forwarding company for failure to repay \$300,000 loan, and breach of fiduciary duty by company's corporate officer. The United States District Court for the Eastern District of New York, Cogan, J., 2016 WL 1069069, entered judgment against plaintiffs after bench trial. Plaintiffs appealed.

**Holdings:** The Court of Appeals held that:

[1] corporate officer's sworn affidavit that she was a United States citizen was sufficient to establish diversity jurisdiction;

[2] frustration of performance excused defendant company's failure to repay \$300,000 loan, where plaintiff lenders breached their implied duty of good faith and fair dealing under loan agreement; and

[3] breach of fiduciary duty claim, asserted directly rather than derivatively on behalf of defendant company, could not be maintained by plaintiffs.

Affirmed.

West Headnotes (5)

#### [1] Federal Courts

🔑 Foreign states and citizens

Even if defendant corporate officer had dual citizenship, her United States citizenship determined diversity in action alleging breach of contract and breach of fiduciary duty.

[Cases that cite this headnote](#)

#### [2] Federal Courts

🔑 Weight and sufficiency

Corporate officer's sworn affidavit that she was a United States citizen was sufficient to establish diversity jurisdiction in action alleging breach of contract and breach of fiduciary duty by officer, where there was zero evidence to the contrary.

[Cases that cite this headnote](#)

#### [3] Contracts

🔑 Performance prevented by other party or third person

#### Contracts

🔑 Acts or Omissions Constituting Breach in General

Frustration of performance excused international freight forwarding company's failure to repay \$300,000 loan, where plaintiff lenders breached their implied duty of good faith and fair dealing under loan agreement by undermining company's business by diverting customers to competitors.

[Cases that cite this headnote](#)

#### [4] Corporations and Business Organizations

🔑 [Derivative or direct action](#)

Breach of fiduciary duty claim, asserted directly rather than derivatively on behalf of international freight forwarding company, could not be maintained by plaintiffs against corporate officer, where alleged harm caused by corporate officer befell company and was not sustained by plaintiffs except derivatively as shareholders.

[Cases that cite this headnote](#)

#### [5] Attorney and Client

🔑 [Disqualification proceedings;standing](#)

Failure to grant motion to disqualify counsel based on joint representation was not abuse of discretion, where motion was erroneously styled, failed to identify conflict of interest, cited no case law, and was filed three days before trial in apparent bid for delay.

[Cases that cite this headnote](#)

Appeal from a judgment of the United States District Court for the Eastern District of New York (Cogan, J.).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that the judgment of the district court be **AFFIRMED**.

#### Attorneys and Law Firms

\*61 FOR APPELLANTS: [PAUL D. SARKOZI](#), Tannenbaum, Helpert Syracuse & Hirschtritt LLP, New York, NY, ([Frank Xu](#), Law Office of Frank, Xu, PLLC, on the brief).

FOR APPELLEES: [VINCENT CHIRICO](#), Chirico Law, PLLC, Brooklyn, NY.

PRESENT: [DENNIS JACOBS](#), [DEBRA ANN LIVINGSTON](#), Circuit Judges, [LEWIS A. KAPLAN](#),\* District Judge.

\* Judge Lewis A. Kaplan, of the United States District Court for the Southern District of New York, sitting by designation.

#### SUMMARY ORDER

Feiliks International Logistics Hong Kong Ltd. (“Feiliks HK”) and Feiliks Logistic Pte. Ltd. (“Feiliks Singapore”) appeal from the entry of judgment against them following a bench trial in the United States District Court for the Eastern District of New York (Cogan, J.). On appeal following a bench trial, we review the district court's findings of fact for clear error and its conclusions of law de novo. [Diesel Props S.R.L. v. Greystone Bus. Credit II LLC](#), 631 F.3d 42, 51-52 (2d Cir. 2011). We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review.

In March 2013, Feiliks Singapore, an international freight forwarding company, and Ami Wey, an American who had been in the freight forwarding business for many years, formed a new company, incorporated in New York, called Feiliks Global Logistics Corp. (“Feiliks US”). Eighty percent of Feiliks US was owned by Feiliks Singapore. Wey owned the other twenty percent and served as the company's controller. In addition to the combined \$200,000 in startup capital contributed by Feiliks Singapore and Wey, Feiliks US received a \$300,000 loan from Feiliks HK (the majority owner of Feiliks Singapore) in April 2013.

In September 2014, following a breakdown in the relationship between Wey and Feiliks US officers affiliated with Feiliks Singapore and Feiliks HK, appellants filed the present action asserting: (1) breach of contract against Feiliks US and Wey for failing to repay the \$300,000 loan; and (2) breach of fiduciary duty against Wey for allegedly exploiting corporate opportunities for personal gain, exceeding her power and authority as a corporate officer, failing to repay the \$300,000 loan, and

initiating a state court action that allegedly harmed Feiliks US. The district court dismissed these claims.<sup>1</sup>

<sup>1</sup> The district court also dismissed Wey's counterclaims. With respect to Wey's breach of fiduciary duty counterclaim against Feiliks Singapore, the court ruled that although Feiliks Singapore breached its fiduciary duty, Wey failed to prove damages. Appellants devote half of the argument section in their opening brief contesting the district court's finding regarding Feiliks Singapore's fiduciary breach. Because this counterclaim was dismissed, the issue is moot.

With respect to breach of contract, the district court found that: (1) appellants' decision to withdraw business from Feiliks US undermined their breach of contract claim; and (2) Wey could not be held personally liable because she did not sign the loan agreement in her individual capacity. With respect to breach of fiduciary duty, the district court held that appellants improperly asserted a direct, rather than derivative, claim.

1. Federal jurisdiction was premised on diversity of citizenship pursuant to 28 U.S.C. § 1332(a). Appellants (Feiliks HK and Feiliks Singapore) are foreign entities; appellees (Feiliks US and Wey) are United States citizens. After the district court sua \*62 sponde inquired about Wey's citizenship, Wey testified by affidavit that she was naturalized as a United States citizen in approximately 1990, and appellants offered no reason to doubt that testimony. Although appellants brought this case in federal court under diversity jurisdiction, and at no time sought to dismiss or remove it, they now argue that diversity is lacking because Wey is allegedly a Taiwanese citizen, and because Wey did not produce records of her United States naturalization.

[1] [2] Neither Wey's alleged foreign citizenship nor her failure to produce original naturalization records precludes diversity jurisdiction in this case. First, even if Wey is a dual citizen, it is her United States citizenship that determines diversity. Action S.A. v. Marc Rich & Co., 951 F.2d 504, 507 (2d Cir. 1991). Second, subject matter jurisdiction need only be proved by a preponderance of the evidence, Tandon v. Captain's Cove Marina of Bridgeport, Inc., 752 F.3d 239, 243 (2d Cir. 2014), and that proof need not take any specific form. With zero evidence to the contrary—in a diversity case brought by her adversaries—Wey's sworn affidavit stating that she is

a United States citizen is sufficient to establish diversity jurisdiction.

2. Appellants argue that the district court erred by dismissing their breach of contract claim against Feiliks US and Wey. This argument is meritless. With respect to Wey, the district court's finding that she did not sign the loan agreement in an individual capacity is supported by the evidence and is not clearly erroneous.

[3] With respect to Feiliks US, the district court's finding, perhaps more accurately phrased as a determination that appellants had breached their implied duty of good faith and fair dealing under the loan agreement by undermining the company's business—including by diverting customers to Feiliks US's competitors—is amply supported by the record. This frustration of performance excused Feiliks US's failure to repay the loan. See Lowell v. Twin Disc, Inc., 527 F.2d 767, 770 (2d Cir. 1975) (“[W]henver the cooperation of the promisee is necessary for the performance of the promise, there is a condition implied that the cooperation will be given.” (internal quotation marks and alterations omitted)); Grad v. Roberts, 14 N.Y.2d 70, 75, 248 N.Y.S.2d 633, 198 N.E.2d 26 (1964) (“Persons invoking the aid of contracts are under implied obligation to exercise good faith not to frustrate the contracts into which they have entered.”).<sup>2</sup>

<sup>2</sup> Contrary to appellants' contention, Feiliks US and Wey asserted this position as an affirmative defense below. See, e.g., App'x at 86, 159, 218.

[4] 3. Appellants challenge the dismissal of the breach of fiduciary duty claim against Wey. This argument is raised for the first time in their reply brief; it is therefore waived.<sup>3</sup> See JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V., 412 F.3d 418, 428 (2d Cir. 2005) (“[A]rguments not made in an appellant's opening brief are waived even if the appellant ... raised them in a reply brief.”). In any event, the argument would fail. The alleged harm caused by Wey's purported breach of fiduciary duty befell Feiliks US, and was not sustained by appellants except \*63 derivatively as shareholders. See Excimer Assocs., Inc. v. LCA Vision, Inc., 292 F.3d 134, 139-40 (2d Cir. 2002) (“[T]he critical question posed by the direct injury test is whether the damages a plaintiff sustains are derivative of an injury to a third party. If so, then the injury is indirect; if not, it is direct.” (internal quotation marks omitted)); Abrams v. Donati, 66 N.Y.2d

951, 953, 498 N.Y.S.2d 782, 489 N.E.2d 751 (1985) (“But allegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually.”); [Barbaro v Spinelli](#), 121 A.D.3d 727, 728, 994 N.Y.S.2d 624 (2d Dep’t 2014) (“A shareholder, even in a closely-held corporation, may not recover in his or her individual capacity for wrongs against the corporation.”). Therefore, appellants’ breach of fiduciary duty claim, which was asserted directly rather than derivatively on behalf of Feiliks US, was properly dismissed.

3 Appellants make references to Wey’s allegedly improper conduct in their opening brief. However, they do not contest the district court’s ruling that their fiduciary breach claim should have been brought derivatively. The arguments in their opening brief are directed solely at their breach of contract claim and Wey’s dismissed breach of fiduciary duty counterclaim.

[5] 4. Finally, appellants contend in their reply brief that the joint representation of Feiliks US and Wey by defense

counsel created a conflict of interest that tainted the trial. Because this argument was not advanced in appellants’ opening brief, it is waived. See [JP Morgan Chase Bank](#), 412 F.3d at 428. Regardless, it is meritless. “A failure to disqualify counsel will be overturned only upon a showing that the district court abused its discretion.” [Bobal v. Rensselaer Polytechnic Inst.](#), 916 F.2d 759, 764 (2d Cir. 1990). Appellants’ motion to disqualify counsel, which was erroneously styled as a “Motion for Temporary Restraining Order” (ECF 29), was unintelligible, failed to identify a conflict of interest, cited no case law, and was filed three days before trial in an apparent bid for delay. The district court did not abuse its discretion by denying the motion.

Accordingly, we hereby **AFFIRM** the judgment of the district court.

#### All Citations

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