SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

MASCIS INVESTMENT PARTNERSHIP, and LES PYRENNEES INVESTMENT PARTNERSHIP, in its capacity as a Managing Partner of Mascis Investment Partnership,

Plaintiffs,

– against –

SG CAPITAL CORPORATION,

Defendant.

Index No.: 654981/2016

DECISION/ORDER

Plaintiffs Mascis Investment Partnership (Mascis) and Les Pyrennees Investment Partnership (Les Pyrennees) moved for an order of attachment, pursuant to CPLR 6201 (CPLR 6201 motion), attaching assets of defendant SG Capital Corporation (SG Capital), consisting of portfolio investments held with JP Morgan Chase Bank (JP Morgan) in the amount of $21,824,690. Prior to determination of this initial motion, Great Wall Holdings Partnership (Great Wall), a partner of Mascis, commenced a Canadian arbitration proceeding related to the breakup of Mascis. Plaintiffs then separately moved for an order of attachment in aid of arbitration, pursuant to CPLR 7502 (c) (CPLR 7502 motion).[1]

As pleaded in the complaint, Les Pyrennees and Great Wall Holdings Partnership (Great Wall) are the owners and managing partners of Mascis. (Compl., ¶¶ 2, 3.) This partnership

[1] After hearing of the initial motion, the court was informed that Great Wall had initiated an arbitration proceeding. On the date scheduled for a decision on the record, the court granted plaintiffs' application to move for an attachment pursuant to CPLR 7502. The court reserved decision on the CLPR 6201 motion so that both motions could be determined together. While the CPLR 7502 motion was being briefed, the parties agreed to proceed with mediation. The court held both motions in abeyance until the parties informed the court, by letter dated February 22, 2017, that the mediation had been unsuccessful.

dispute involves a breakdown in the relationship between Jorge Massa Dustou and his nephew Fernando Cisneros. Massa is the manager of Les Invalides LLC and Trocadero LLC, which hold 100% of the assets of Les Pyrennees. (Aff. of Jorge Massa Dustou, dated Sept. 20, 2016, ¶ 1 [First Massa Aff.].) Great Wall and SG Capital are wholly owned and controlled by Cisneros.[2] In 2016, Les Pyrennees and Great Wall agreed to end their partnership. (Compl., ¶ 5.) In connection with the termination of the partnership, nearly half of Mascis' assets, valued at approximately $42.2 million, were transferred to SG Capital. (Id. ¶ 8.) A portion of the transferred assets is the subject of the requested attachment.

The transfer of assets followed negotiations regarding a split of Mascis, as evidenced by a series of email communications between Cisnernos and Massa. (Aff. of Fernando Cisneros, dated October 5, 2016 [First Cisneros Aff.], Exs. 2-7, 16.) The transfer was performed at the direction of both Cisneros and Massa. More particularly, as the representatives of the Management Committee of the Les Invalides and Trocadero Trusts, Massa and his wife, Ana Cisneros de Massa, signed the instructions to execute the transfer. Cisneros signed for the Titanium Trust. (First Cisneros Aff., Ex. 8.) The parties dispute whether an agreement was reached as to the transfer of Mascis' liabilities, and whether the transfer was authorized by the Mascis partnership agreement.

Motion for Attachment Pursuant to CPLR 6201

The standards for issuance of an attachment are well settled. CPLR 6212 requires that on a motion for an order of attachment, "the plaintiff shall show, by affidavit and such other written

[2] The complaint pleaded that SG Capital is a wholly owned subsidiary of Great Wall, which is in turn wholly owned by Cisneros. (Compl., ¶¶ 3,7.) On the CPLR 7502 motion, Massa asserts that the complaint was in error, and that SG Capital is wholly owned by Fernando Cisneros, who also owns Great Wall. (See Third Aff. of Jorge Massa, ¶ 4.) In either event, the parties do not dispute that both entities are controlled by Cisneros.

evidence as may be submitted, that there is a cause of action, that it is probable that the plaintiff will succeed on the merits, that one or more grounds for attachment provided in section 6201 exist, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff." The grounds for attachment set forth in CPLR 6201 include that "the defendant is a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in the state." Here, SG Capital is a company incorporated in the British Virgin Islands, with its principal place of business there. (Compl., ¶ 3.) Plaintiffs' counsel represents, and defendant does not dispute, that it is not qualified to do business in New York. (Aff. of David Zaslowsky, dated Sept. 20, 2016 [Zaslowsky Aff.], ¶ 4.)

It is further settled, however, that even where the statutory grounds for an attachment are met, "the party seeking attachment must demonstrate an identifiable risk that the defendant will not be able to satisfy the judgment." (VisionChina Media Inc. v Shareholder Representative Servs., LLC, 109 AD3d 49, 60 [1st Dept 2013]; accord Morgan v Worldview Entertainment Holdings, Inc., 141 AD3d 461, 462 [1st Dept 2016].) The Courts' focus on the need for an attachment, in addition to the statutory requirements, is reflected in the legislative history of the attachment statute, which emphasizes that Courts should "consider whether [an attachment] is actually needed in the case of a foreign corporation." (NY Adv Comm on Prac & Proc 3d Prelim Rep, 144 [1959].) The importance of need as a factor is also reflected in CPLR 6223 (a), which requires that the Court vacate an attachment if it "determines that the attachment is unnecessary to the security of the plaintiff." (See also Siegel, NY Prac, § 317 [5th ed] ["Even if the plaintiff makes out a case for attachment under CPLR 6201, its granting is still discretionary with the court. . . . [I]f the judge should perceive from the papers that the plaintiff does not need an attachment, either for jurisdiction or security, discretion is appropriately exercised against it even

though a CPLR 6201 showing has been made"].)

As the Appellate Division of this Department has explained, the risk that the defendant will be unable to satisfy the judgment "should be real, 'whether it is a defendant's financial position or past and present conduct.'" (VisionChina, 109 AD3d at 60, quoting Ames v Clifford, 863 F Supp 175, 177 [SD NY 1994] ["New York courts have required an additional showing that something, whether it is a defendant's financial position or past and present conduct, poses a real risk to the enforceability of a future judgment"].) "The court may consider the defendant's history of paying creditors, or a defendant's stated or indicated intent to dispose of assets." (Id. [internal citations omitted].) "There must be more than a showing that the attachment would, in essence, be 'helpful'. . . . The mere fact that defendant is a non-domiciliary residing without the State of New York is not sufficient ground for granting an attachment." (Id. at 61-62 [internal quotation marks, brackets, and citations omitted].)[3] "Attachment is a 'harsh' remedy, and is construed narrowly in favor of the party against whom the remedy is invoked." (Id. at 59 [internal quotation marks and citations omitted].)

This Department has held attachment of a nondomiciliary's assets proper where the plaintiff has made a showing that the defendant was in "serious financial distress" (Elton Leather Corp. v First Gen. Resources Co., 138 AD2d 132, 134 [1st Dept 1988] [reversing order vacating attachment where, as demonstrated in SEC filing, one defendant's liabilities far exceeded its assets and another had not made timely payment to secured creditors].) The Department has also approved attachment upon a showing of the likelihood that the defendant's assets would be dissipated or encumbered. (Morgan, 141 AD3d at 462 [affirming attachment where the

[3] Federal Courts, applying New York law, have frequently stated that "attachment should issue only upon a showing that drastic action is required for security purposes." (Bank of China, N.Y. Branch v NBM L.L.C., 192 F Supp 2d 183, 188 [SD NY 2002] [emphasis in original, internal quotation marks and citation omitted]; Elliott Assocs., L.P. v Republic of Peru, 948 F Supp 1203, 1211 [SD NY 1996] [same].)

defendants' affiliate, their only source of revenue, would imminently receive and distribute funds to investors, leaving insufficient assets to satisfy a judgment]; County Natwest Secs. Corp., USA v Jesup, Josephthal & Co., Inc., 180 AD2d 468, 469 [1st Dept 1992] [holding that the plaintiff had shown that the arbitration award would be rendered ineffectual, where the respondent was "no longer actively functioning," had resigned its seat on the New York Stock Exchange, and there was "some indication that it ha[d] engaged in liquidating and transferring assets"].)

In contrast, the Department has held that the grant of an attachment is an abuse of discretion, where "there is no evidence that the [defendants] lack sufficient assets if a judgment is rendered against them. Nor is there evidence that the [defendants] have hidden or will choose to hide or otherwise dispose of their assets." (VisionChina, 109 AD3d at 61.)

Here, plaintiffs do not submit any evidence of a risk that defendant will not be able to satisfy a judgment in their favor. Indeed, in their moving papers, plaintiffs do not attempt to demonstrate such a risk, and merely assert that "[d]efendant, knowing that a claim is now being made against its account at JP Morgan, could easily transfer the contents of the account outside the jurisdiction." (Pls.' Memo. In Supp. at 5.)

The parties dispute the ease with which SG Capital's assets can be liquidated. The court need not, however, resolve this dispute. Although the liquidity of assets is a factor that may be considered in determining the need for an attachment, it is not, without more, sufficient to support the attachment. (See Herzi v Ateliers De La Haute-Garonne, 2015 WL 8479676, * 3 [SD NY, Oct. 13, 2015, No. 15-CV-7702 (RJS)] [awarding attachment under New York law, based on evidence "suggest[ing]" that the defendant "may attempt to transfer overseas or otherwise conceal what assets it has in New York," the liquidity of the defendant's New York

assets, and the fact that the defendant was a foreign company "without any apparent business operations in New York"].)

Significantly, plaintiffs do not claim that the transfer to SG Capital was made in a secretive manner. On the contrary, as discussed above, representatives of all three of the trusts with ownership interests in Mascis signed instructions directing that the transfer take place. Nor do plaintiffs' factual allegations support a finding that the assets will be imminently dissipated. Rather, the assets were transferred to SG Capital in March 2016, six months prior to the filing of the action, and there is no claim that they were improperly invested or dissipated during this period. Moreover, the assets at the JP Morgan account in New York are nearly double the amount of the requested attachment. (See Founders Ins. Co. Ltd. v Everest Nat. Ins. Co., 41 AD3d 350, 351 [1st Dept 2007] [in analogous context of preliminary injunction in aid of arbitration, denying injunction based on, among other factors, the respondents' possession of assets considerably exceeding the amount sought in the arbitration].)

On the reply, plaintiffs submit an affirmation which purports to show the need for the attachment. In this affirmation, Massa asserts that in 2009, Cisneros lost several million dollars when given full discretion to invest Mascis' assets. (Second Massa Aff., ¶¶ 12, 13.) The conclusory assertion that the assets are in danger of being lost because Cisneros made unprofitable investments eight years ago, during the height of a financial crisis, is insufficient to warrant an order of attachment, particularly given the absence of any allegation that he failed to pay creditors at that time or that he is currently in financial distress. Massa's questioning of Cisneros' honesty based on his record as a high school student (id. ¶ 16) also does not provide persuasive support for plaintiffs' claim that an identifiable risk exists that a judgment will not be satisfied but, rather, evidences the unfortunate breakdown of the family relationship.

Given that plaintiffs fail to make the required showing of risk pursuant to CPLR 6201, the court need not and does not reach the question of likelihood of success on the merits. The court notes, however, that sharp disputes of fact exist as to whether an agreement had been reached on the allocation of liabilities between Great Wall and Les Pyrenees prior to the asset transfer—an issue that will be considered in the arbitration proceeding. A question also exists as to the viability of the two causes of action pleaded in the complaint for constructive trust and unjust enrichment.

Motion for Attachment Pursuant to CPLR 7502 (c)

CPLR 7502 (c) provides that a court

> "may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration that is pending . . . , but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. The provisions of articles 62 and 63 of this chapter shall apply to the application . . . , except that the sole ground for the granting of the remedy shall be as stated above."

Plaintiffs fail to meet this standard. Plaintiffs' contention that an arbitration award will be rendered ineffectual is based largely on the conclusory allegations made in support of plaintiffs' claim of risk under CPLR 6201— namely, that the assets of SG Capital are liquid and therefore transferable, and that Cisneros' investments in 2009 failed. (Pls.' Memo. In Supp. at 8-9.)

Plaintiffs further assert that the arbitration award may be rendered ineffectual because SG Capital is a shell corporation that "was never 'actively functioning.'" (Id. at 10.) Cisneros acknowledges that SG Capital was created to receive assets from Mascis, but attests that since its creation "it has become increasingly involved in [his] ongoing real estate operations in Peru," taking on approximately $8 million in debt to finance these projects. (Second Cisneros Aff., ¶¶

30, 43-44.) Even assuming that SG Capital is a shell corporation, that factor cannot serve, on this record in which there is no evidence that SG Capital is in financial distress or has secreted assets or evaded creditors, to warrant an attachment. (See Habitations Ltd. v BKL Realty Sales Corp., 160 AD2d 423, 424 [1st Dept 1990] [awarding attachment in aid of arbitration where the petitioner demonstrated not only that the corporate respondent was "merely a shell, with no appreciable liquid assets," but also that the individual respondent had stripped the corporation of assets, "historically failed to pay his creditors," and "stated to others that he intend[ed] to remove his assets from the State and d[id] not intend to satisfy the award"].)

In sum, SG Capital's assets of more than $42 million significantly exceed the award sought, and plaintiffs fail to make a colorable showing that its assets have been or will be transferred or dissipated. Plaintiffs' CPLR 7502 (c) motion should therefore be denied.

It is accordingly hereby ORDERED that plaintiffs' motions for an attachment are denied; and it is further

ORDERED that the temporary restraining order dated September 21, 2016 is vacated.

This constitutes the decision and order of the court.

Dated: New York, New York
April 21, 2017

MARCY FRIEDMAN, J.S.C.