ISRAEL DECLARATION EXHIBIT 3

31 of 223 DOCUMENTS

LEHMAN BROTHERS FINANCE S.A., Plaintiff, -against- GRIGORY SHENKMAN (individually and in his capacity as Trustee of the Shenkman Family Trust), SHENKMAN FAMILY TRUST, YELENA SHENKMAN (in her capacity as Trustee of the Shenkman Family Trust) and MILOSLAVSKY PARTNERS, A CALIFORNIA LIMITED PARTNERSHIP, Defendants.

01 Civ. 7701 (MBM)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2001 U.S. Dist. LEXIS 13446

August 31, 2001, Decided
September 4, 2001, Filed

DISPOSITION: [*1] Defendants' motion to modify or dissolve TRO on several grounds granted and TRO vacated.

COUNSEL: For Plaintiff: SUSAN F. DICICCO, ESQ., JEFFREY Q. SMITH, ESQ., King & Spalding, New York, NY.

For Defendants: DAVID SPEARS, ESQ., BRIAN S. FRASER, ESQ., H. ROWAN GAITHER IV, ESQ., CHRISTOPHER W. DYSARD, ESQ., Richards Spears Kibbe & Orbe, New York, NY.

JUDGES: Michael B. Mukasey, U.S. District Judge.

OPINION BY: Michael B. Mukasey

OPINION

OPINION AND ORDER

MICHAEL B. MUKASEY, U.S.D.J.

This is an action to recover damages that allegedly resulted from defendants' failure to deliver shares of Alcatel, S.A., a French telecommunications equipment manufacturer, that were the subject of certain transactions between the parties. Plaintiff claims that defendants breached a contractual obligation to deliver such shares in connection with a hedge transaction known as a prepaid-variable-forward-share-purchase contract, and that as a result plaintiff sold short and suffered damages of approximately $ 2.6 million (Cohen Aff. of 8/10/ *01 P 26*), exclusive of costs and fees. Plaintiff commenced this case in Supreme Court, New York County, and defendant removed to this court on August 17, 2001 with a [*2] temporary restraining order ("TRO") in place that plaintiff has used to attach money and property of defendants in the hands of certain New York investment banks. The TRO was obtained *ex parte* pursuant to *N.Y. C.P.L.R. 6201* (McKinney 1980 & Supp. 2001), which provides in relevant part that an order of attachment "may be granted" in any action for money damages when "the defendant is a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in the state[.]"

Plaintiff is a New York entity; defendants are natural persons who are domiciliaries of California, and entities formed pursuant to the laws of California; defendants apparently are not qualified to do business in New York. Jurisdiction is based on diversity of citizenship. Defendants have conceded *in personam* jurisdiction, such that plaintiffs have no need to rely upon any attached assets for the purpose of establishing *quasi in rem* jurisdiction.

Defendants have moved to modify or dissolve the TRO on several grounds, including that it purports to attach assets located outside the State of New York, that it is over-broad and has the effect of tying up assets far beyond the [*3] amount of any judgment plaintiff might obtain, and that it is actually unnecessary because defendants are persons and entities with the means to respond to any judgment in the amount demanded.

For the reasons summarized below, the motion is granted and the TRO is vacated.

Plaintiff's arguments in favor of retaining the TRO have varied somewhat since the outset of this proceeding. Plaintiff argued in New York Supreme Court that

unless the attachment was granted, defendants might remove assets from New York and thereby prejudice plaintiff's ability to collect a judgment once obtained. Plaintiff argued as well that defendants "may have very little, if any, remaining equity in the Alcatel shares." (Cohen Aff. of 8/10/ 01 P P 28, 29; DeCicco Aff. of 8/13/ *01 P 6*). More recently, plaintiff has noted that defendants allegedly reneged on an agreement to settle the dispute between the parties (Donini Aff. of 8/23/ 01 PP 3-6) as further evidence that plaintiff cannot be relied upon to satisfy a judgment. Most recently, plaintiff has argued that although defendants have presented to the court evidence that they have and control substantial liquid assets in [*4] brokerage accounts, there is no evidence presented of their liabilities, and the assets themselves are shares of Alcatel that have been in steep decline.

The statute that authorizes the attachment plaintiff obtained in New York Supreme Court, *C.P.L.R. 6201, subdivision* 1, provides for the remedy of attachment to serve both jurisdictional and security interests of plaintiffs. *See, e.g.*, David D. Siegel, *New York Practice* § 313, at 475 (3d ed. 1999). Thus, *quasi in rem* jurisdiction can be obtained by attachment of property belonging to an out-of-state defendant, and both the jurisdictional and the security interests of a plaintiff are thereby served. The provision for attachment of the property of an out-of-state defendant does not address solely jurisdictional interests.

> New York courts have long recognized that provisions for attachment against nonresidents are based on the assumption that "there is much more propriety in requiring a debtor, whose domicile is without the state, *to give security for the debt*, than one whose domicile is within. Such a debtor, pending litigation, might sell his property, and remain at home, in which event he could not be reached [*5] by any of the provisional remedies or supplementary proceedings provided by [New York] laws."

ITC Entertainment, Ltd. v. Nelson Film Partners, 714 F.2d 217, 220 (2d Cir. 1983), cited with approval in *Elton Leather v. First Gen. Resources, 138 A.D.2d 132, 136, 529 N.Y.S.2d 769, 771-72* (1st Dep't 1988) (rejecting specifically the holding in *Brastex Corp. v. Allen Intern., Inc., 702 F.2d 326 (2d Cir. 1983)*, that a foreign corporation's post-attachment, pre-confirmation application to do business in New York automatically removes the statutory basis for an attachment).

However, as the statute itself suggests when it provides that an attachment "may" be granted against the assets of an out-of-state defendant in an action for money damages, there should be more to a successful application for an attachment than a showing that money damages are sought from an out-of-state defendant. Although this minimal showing empowers the court to exercise its discretion to grant the remedy, that discretion must be guided by both an assessment of the need for an attachment and a keen awareness of the effect of this remedy.

Attachment has been [*6] recognized to entail "harsh consequences" and courts have been advised to grant it "only upon a showing that drastic action is required for security purposes." *Incontrade, Inc. v. Oilborn Int'l., S.A., 407 F. Supp. 1359, 1361 (S.D.N.Y. 1976).* Here, defendants have informed the court through counsel that because their accounts are cross-collateralized, the attachment thus far obtained by plaintiff has had the effect of tying up assets well beyond even the full value of the damages plaintiff seeks.

As to the need for the attachment, defendants' counsel has submitted to the court account statements of defendant Grigory Shenkman and defendant Shenkman Family Trust that show a value as of July 31, 2001 in excess of $ 8 million. (Gaither Aff. of 8/31/01 PP 2, 3, Ex. 1). In addition, he has submitted account statements that show, at a minimum, that Alec Miloslavsky, represented to be "a general and limited partner of Defendant Miloslavsky Partners, A California Limited Partnership," (*id. P 8*), had a joint account with his wife that showed a portfolio value of more than $ 3.8 million as of August 30, 2001 (*id. P 9*, Ex. 4), and that defendants Grigory and Yelena Shenkman, [*7] as trustees of defendant Shenkman Family Trust, had an account that showed a portfolio value of more than $ 1.1 million as of July 29, 2001 (*id. P 6*).

Defendants' counsel has submitted as well copies of account statements that appear to show substantial balances in accounts "controlled, either directly or indirectly," by defendants, their partners, and/or their families. (*Id.* PP 2, 4). These accounts also show, in the aggregate, substantial balances.

Although I am mindful that account balances can change from day to day, that assets can be moved, and that these defendants, even on the evidence they have submitted in the form of account statements, have substantially leveraged their balances, they appear to have assets significantly in excess of what may be necessary to satisfy any judgment in this case, even with a generous allowance for costs and attorney fees. It also bears emphasis that although plaintiff succeeded in obtaining the

TRO in the first instance, the burden remains on plaintiff to show that it is necessary; defendants are not obligated to prove that it is not. On this record, plaintiff has not shown a need for the TRO directing an attachment. Accordingly, the [*8] TRO is vacated.

SO ORDERED:

Dated: New York, New York

August 31, 2001

Michael B. Mukasey,

U.S. District Judge