SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOBIS PART 6

Index Number : 158153/2012
DD MANUFACTURING NV [DDM]
vs
ALONI DIAMONDS, LTD.
Sequence Number : 002
MODIFY ORDER/JUDGEMENT

INDEX NO. _____
MOTION DATE 6-14-13
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for modify judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). E-File: 46-60
Answering Affidavits — Exhibits _____ | No(s). 61
Replying Affidavits _____ | No(s). 62

Upon the foregoing papers, it is ordered that this motion is

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION
and ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 8/20/13

_____, J.S.C.
JOAN B. LOBIS

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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In the Matter of the Arbitration between
DD MANUFACTURING NV (DDM) and
EREZ DALEYOT,

Petitioners,

Index No. 158153/12

-against-

Decision and Order

ALONI DIAMONDS, LTD., and JACOBS
BRONWASSER,

Respondents.

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JOAN B. LOBIS, J.S.C.:

Respondents Aloni Diamonds, Ltd., and Jacobs Bronwasser (altogether Aloni) bring this motion for an order pursuant to Section 5519(c) of the Civil Practice Law and Rules staying the enforcement of a judgment against Aloni pending the outcome of Aloni's appeal of that judgment. Petitioners DD Manufacturing NV and Erez Daleyot (altogether DDM) oppose the motion. For the reasons below, the motion is denied.

Aloni and DDM are international diamond merchants and members of various bourses affiliated with the World Federation of Diamond Bourses. For a time, DDM and Aloni were involved in a joint venture focusing on the mining, refining, certification, and sale of diamonds, with operations in Africa, Europe, and North America. A dispute arose between the parties, and on July 14, 2011, arbitration was initiated. Both parties submitted claims for monies owed. The arbitration hearings were conducted over three days in Amsterdam. On September 27, 2012, the arbitrators rendered a decision directing Aloni to pay to DDM the total sum of $7,933,440.00 (the Award).

On October 24, 2012, Aloni requested that the arbitrators adjust the Award amount due to alleged miscalculations, an application which the arbitrators rejected. On November 12, 2012, Aloni commenced a separate proceeding in the Amsterdam District Court to set aside the Award based on the same alleged miscalculations (the Dutch Proceeding). The Dutch Proceeding is still pending.

Meanwhile, DDM sought to confirm the Award in Israel and in New York. On November 19, 2012, DDM filed a verified petition with this Court to confirm the Award. Aloni opposed the petition and advanced various arguments including the alleged miscalculations. In a decision and order dated March 14, 2013, this Court dismissed Aloni's arguments, confirmed the Award, and directed judgment to be entered against Aloni (the Judgment). The Judgment ordered Aloni to pay DDM the full amount of the Award plus interest and costs in the total amount of $8,055,663.53.

On March 26, 2013, Aloni filed a Notice of Appeal, together with an undertaking in the full amount of the Judgment (New York Undertaking). This effectuated an automatic stay pursuant to Section 5519(a)(2) of the Civil Practice Law and Rules pending the appeal.

Prior to confirming the Award in this Court, however, DDM sought and obtained a temporary attachment order in the District Court of Tel-Aviv, Israel. This action resulted in an agreement between the parties, whereby Aloni deposited various assets, in the form of currency,

diamond merchandise, and real estate, in lieu of an attachment order (Israeli Securities). The agreement was approved by the District Court of Tel-Aviv on March 11, 2013, and the Israeli Securities were posted in full shortly thereafter.[1]

Aloni now brings this motion seeking to modify the automatic stay effectuated under Section 5517(a)(2) of the Civil Practice Law and Rules. Aloni seeks to withdraw the New York Undertaking since it has posted the Israeli Securities. Aloni argues that Section 5519(c) grants this Court the broad discretion to effect this modification. The movant argues that it should not be required to maintain two undertakings. Aloni asserts that DDM would not be prejudiced if Aloni withdraws the New York Undertaking since DDM has acknowledged the Israeli Securities to be sufficient security for the Award. Aloni submits the affirmation of Gideon Shpak, Aloni's Israeli counsel, who confirms the posting of the Israeli Securities and argues that maintaining the New York Undertaking to continue the stay is inconsistent with the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (9 U.S.C. § 201 et seq.) (New York Convention).

In opposition, DDM argues that the motion should be denied, as the required undertaking to stay the enforcement of a money judgment in New York is unavoidable. DDM further contends that the Israeli Securities do not constitute an undertaking under New York law, that it did not consent to the Israeli Securities being adequate to stay the enforcement of the Judgment,

[1] According to Aloni, DDM agreed that the Israeli Securities will serve as a guarantee under the New York Convention, so far as the assets are not diminished, and that no further guarantee will be required by DDM. After reviewing the unsigned document intended to memorialize the court proceeding on March 11, 2012, however, the Court notes that the document contains no such language. In opposing the motion, DDM does not address this.

and that it did not consent to waiving the undertaking requirement. DDM further disputes the applicability of the New York Convention to Aloni's motion. In reply, Aloni concedes that the Israeli Securities do not constitute an undertaking under New York Law, but urges the Court to adopt a broad interpretation of the law.

The application is denied. Section 5519(c) of the Civil Practice Law and Rules states in relevant part that a court may stay all proceedings to enforce a judgment pending an appeal in a case not already provided for in subdivision (a), or may grant a limited stay or may vacate, limit, or modify any stay imposed by subdivision (a). Aloni's arguments rest solely on the latter portion of this statute, asking the Court to *modify* a stay by removing the undertaking requirement. This undoubtedly presupposes that a stay has already been procured. It does not follow, however, that the discretion to modify a stay is equivalent to the discretion to remove the automatic mechanism necessary to procure that stay. In other words, without the posting of any undertaking there would be no stay in place, and consequently, Aloni's request would be rendered moot. In the absence of a stay, the plain language of the statute prevents the Court from issuing a new stay since Section 5519(a)(2) already provides a mechanism permitting a party to automatically stay the enforcement of money judgment pending an appeal. None of the cases cited by Aloni compels a different result. See, e.g., Shmueli v. NRT N.Y., Inc., 2012 N.Y. Slip Op. 31455(U) (Sup. Ct. N.Y. Co. May 22, 2012); Sure-Fit Plastics L.L.C. v. C & M Plastics Inc., 267 A.D.2d 761 (3d Dep't 1999). In fact, courts have routinely denied applications for a discretionary stay under Section 5517(c) where an automatic stay is otherwise available. See, e.g., Sullivan v. Troser Mgt., Inc., 30 A.D.3d 1118 (4th Dep't 2006); Norcross v. Cook, 199 A.D.2d 1079 (4th Dep't 1993); Chase Lincoln First Bank v. El

Sawah, 142 A.D.2d 1005 (4th Dep't 1988).

Furthermore, Aloni's statement that it seeks to avoid posting two undertakings in two countries is insufficient to prejudice DDM's right to enforce the Judgment. In balancing Aloni's right to appeal against DDM's right to collect the Judgment in the event of an unsuccessful appeal, fairness dictates that an undertaking in the total amount of the Judgment is warranted. It is undisputed that DDM has not collected any portion of the Award in any jurisdiction. Thus, DDM has an unfettered right to collect the entire amount of the Award in New York, irrespective of the Israeli Securities.

Aloni's reliance on the 1958 Convention on New York Convention is equally unavailing. The New York Convention was intended to encourage the enforcement of international arbitration awards and unify the standards by which these awards are enforced in its member countries. See Scherk v. Alberto-Culver Co., 417 U.S. 506, 520, n. 15 (1974). Aloni relies on Article VI, which provides that, if an arbitral award is non-binding or if an application has been made to set aside or suspend the award in the country where the arbitral proceedings occurred, any court before which recognition and enforcement is sought may "adjourn the decision on the enforcement of the award" and may "order the other party to give suitable security." Aloni argues that the pending Dutch Proceeding implicates this provision and that it has already provided suitable security by posting the Israeli Securities. This argument, however, fails to address Article III of the New York Convention, which compels the procedural rules of the "territory where the award is relied upon" to govern the proceedings. While Article VI permits a discretionary stay with adequate

security, Article III compels New York law to govern the process. Given the procedural posture of this case, any stay granted pending an appeal would require the posting of an undertaking pursuant to New York law. See C.P.L.R. § 5519(a). Accordingly, it is

ORDERED that the motion is denied.

Dated: Aug. 20, 2013

ENTER:

JOAN B. LOBIS, J.S.C.