SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS J.S.C. PART 46
Justice

AERSALE, INC.

-v-

EVERGREEN INTERNATIONAL AIRLINES, INC.

INDEX NO. 100745/13

MOTION DATE

MOTION SEQ. NO. 01

The following papers, numbered 1 to 5, were read on this motion to/for Vacate a restraining notice and an information subpoena

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s). 1-3

Answering Affidavits — Exhibits No(s). 4

Replying Affidavits No(s). 5

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

The court grants defendant's motion to vacate the restraining notice and information subpoena served by plaintiff on defendant 5/17/13, pursuant to the accompanying decision. C.P.L.R. § 5240.

FILED
JAN 07 2014
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 12/20/13

Lucy Billings, J.S.C.

LUCY BILLINGS J.S.C.

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
COUNTY OF NEW YORK: PART 46

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AERSALE, INC.,

Plaintiff

- against -

EVERGREEN INTERNATIONAL AIRLINES, INC.,

Defendant

----------x

Index No. 100742/2013

DECISION and ORDER

APPEARANCES:

For Plaintiff
Patrick J. Sweeney Esq.
Holland & Knight, LLP
31 West 52nd Street, New York, NY 10019

For Defendant
Christopher R. Gette Esq.
Skadden, Arps, Slate, Meagher & Flom, LLP
4 Times Square, New York, NY 10036

LUCY BILLINGS, J.:

On May 16, 2013, plaintiff entered a judgment by confession against defendant for $289,634.35, plus interest at $71.42 per day commencing May 17, 2013, which arose from defendant's default under a lease for an aircraft jet engine. On May 17, 2013, plaintiff served a restraining notice and an information subpoena on defendant pursuant to C.P.L.R. §§ 5222(b) and 5224(a)(3), to enforce the judgment.

On May 21, 2013, at 3:34 p.m., plaintiff's General Counsel emailed to defendant's Chief Financial Officer (CFO), advising of the amounts of the judgment and daily interest and of the restraining notice's prohibition against transfer of defendant's

assets until the judgment and interest were paid. Plaintiff's General Counsel warned that, if defendant violated the restraint, plaintiff would seek contempt penalties against defendant and its personnel and demanded that defendant take the necessary steps to avoid a violation.

On May 22, 2013, at 8:39 a.m., plaintiff's General Counsel emailed to defendant's CFO again, this time demanding that defendant return the leased engine to plaintiff pursuant to an Amended Order and Injunction on Consent entered April 17, 2013, in a prior action by plaintiff against defendant in this court under Index No. 654579/2012. This Order required defendant to return the engine within three days after the defaults on which the judgment entered May 16, 2013, was premised. The email therefore referred to and reminded defendant of those defaults: the defaults that amounted to the $289,409.35 judgment before the addition of $225.00 in costs.

Later on May 22, 2013, before any intervening communications between the parties, defendant responded to the two emails from plaintiff's General Counsel as well as its preceding restraining notice. First, defendant's CFO responded by email to plaintiff's General Counsel that "we are wiring the 290k to you today." Opp'n Aff. of Michael Hendrickson Ex. 10. Second, defendant wired $290,062.17 to plaintiff: the judgment of $289,634.35, plus daily interest of $71.42 through May 22, 2013.

On the same date, at 1:25 p.m., defendant's attorney emailed plaintiff's attorney that defendant had paid the full amount due

pursuant to the judgment entered in this court by plaintiff May 16, 2013, and that therefore defendant considered the restraining notice no longer in effect. The parties agree that plaintiff received this communication approximately 90 minutes after plaintiff received defendant's payment.

Plaintiff, however, did not apply defendant's payment to the debt on which the judgment was premised, but applied the payment to other debts plaintiff claimed were owed to it by defendant. Consequently, defendant now moves to vacate the restraining notice and accompanying information subpoena on the ground that defendant has satisfied the judgment that the restraining notice and subpoena were to enforce. C.P.L.R. § 5240.

I. BACKGROUND TO THE JUDGMENT BY CONFESSION

The judgment by confession was the product of the parties' second Settlement Agreement dated March 28, 2013, which included Amendment No. 2 to the lease and was intended to cure defendant's default under a first Settlement Agreement with Amendment No. 1 to the lease and to satisfy defendant's rental and use fees owed under the lease. The parties stipulate to all these documents' authenticity and admissibility.

The second Settlement Agreement required payments by defendant to plaintiff of $100,000.00 on each of the dates March 15, April 1, and April 15, 2013, and $189,409.35 on April 30, 2013: a total of $489,409.35. After deduction of defendant's payment due March 15, 2013, which defendant made, it confessed a judgment of $389,409.35. Then, on April 6, 2013, defendant paid

the $100,000.00 installment due April 1, 2013. When defendant failed to pay the final two installments of another $100,000.00 due April 14 and $189,409.35 due April 30, 2013, plaintiff entered the judgment by confession, reduced by defendant's $100,000.00 payment earlier in April.

The second Settlement Agreement also obligated defendant to pay its April 2013 rent and use fees "plus any other sums due and owing under the Lease" by April 30, 2013. Hendrickson Opp'n Aff. Ex. 6, at 2. As of May 22, 2013, defendant had defaulted in these obligations as well. They were among the debts to which plaintiff applied defendant's $290,062.17 payment on that date.

II. SPECIFYING THE DEBT TO WHICH THE DEBTOR'S PAYMENT APPLIED

Defendant debtor, when paying its creditor plaintiff, was entitled to specify the debt to which the payment applied, because the funds transmitted were the debtor's property, the disposition of which was in the debtor's control. Snide v. Larrow, 62 N.Y.2d 633, 634 (1984); National Bank of N.Y. City v. ESI Group, 201 A.D.2d 469, 471 (2d Dep't 1994). How the payment was to be applied may be determined through verbal communication, conduct, circumstances, or a combination of these means. L&T E. 22 Realty Co. v. Earle, 192 Misc. 2d 75, 76-77 (App. Term 2d Dep't 2002).

On May 22, 2013, defendant demonstrated how plaintiff was to apply defendant's payment in at least three ways. (1) Defendant responded directly to a demand for the amount of the judgment and accrued interest. (2) Defendant responded by paying the precise

amount of the judgment plus accrued interest, prefaced by an email that "we are wiring the 290k to you today." Id. Ex. 10. See L&T E. 22 Realty Co. v. Earle, 192 Misc. 2d at 76-77. Although "290k" is imprecise, it is a shorthand, rounded number that obviously refers to a number comprised of 290 thousand plus an understood number of hundreds according to the formula from plaintiff's General Counsel to which defendant's email responded. (3) Defendant's attorney followed up his client's payment with an email reinforcing that defendant had paid the full amount due pursuant to the judgment, which nullified plaintiff's enforcement devices. Moreover, this debt was defendant's only debt owed to plaintiff that was reduced to a judgment, agreed to by defendant, or referred to in plaintiff's emails that precipitated the payment, in contrast to other debts claimed and later demanded by plaintiff, which defendant has disputed and to which it has claimed offsets. See National Bank of N.Y. City v. ESI Group, 201 A.D.2d at 471.

Notably, when plaintiff terminated the lease May 15, 2013, due to defendants' defaults, plaintiff did not quantify any amounts owed by defendant other than the $100,000.00 due April 15 and $189,409.35 due April 30, 2013. Plaintiff simply demanded that:

> LESSEE SHALL PAY TO LESSOR . . . THE TERMINATION DAMAGES AMOUNT AND ALL OTHER AMOUNTS DUE AND OWING UNDER THE LEASE AGREEMENT AND SETTLEMENT AGREEMENT;

Hendrickson Opp'n Aff. Ex. 9, at 3, and that:

> LESSEE INDEMNIFY LESSOR FOR ALL COSTS, EXPENSES, AND DAMAGES INCURRED BY LESSOR IN CONNECTION WITH THE EXERCISE OF ITS

> REMEDIES AND OTHERWISE INCURRED BY LESSOR AS A RESULT OF THE EVENT OF DEFAULT, INCLUDING BUT NOT LIMITED TO ANY AND ALL COSTS INCURRED IN CONNECTION WITH THE FAILURE OF THE LESSEE TO RETURN THE ENGINE IN THE CONDITION REQUIRED BY THE TERMS AND CONDITIONS OF THE LEASE AGREEMENT.

Id. Neither this notice, nor anything in the record, discloses any specific, certain, or liquidated debt, other than the judgment and accrued interest on the judgment, actually owed by defendant or even billed by plaintiff as of May 22, 2013, when plaintiff applied defendant's $290,062.17 payment to debts other than that judgment and accrued interest. Nor does plaintiff dispute that it never billed defendant for any amounts beyond the judgment amount.

Only in a later affidavit dated May 28, 2013, did plaintiff's Contract Administration Director claim that, as of May 23, 2013, defendant owed rent for April 14 to May 23, 2013, of $80,000.00; use fees for March and April 2013 of $87,964.00; interest of $27,147.52 on defendant's arrears; and attorneys' fees and expenses of $39,945.70. In his affidavit dated June 13, 2013, in this action, the same witness interpolates that total as of May 22, 2013.

As the use fees were not calculable until defendant's utilization rates subsequently became available, most of these amounts were not due as of April 30, 2013. Therefore they did not constitute "other sums due and owing under the Lease," besides the judgment amount, required to be paid as of April 30, 2013, under the second Settlement Agreement. Id. Ex. 6, at 2. Nor did most of these amounts constitute a "balance of monies due

and owing at that time under the Lease Agreement," required to be paid by the Amended Order and Injunction on Consent in the prior action, based on the second Settlement Agreement. Id. Ex. 8, at 4 (Schedule A). According to plaintiff's Contract Administration Director, "Under the Second Amendment, AerSale extended the time for Lessee to pay Rent and Use Fees for April 2013." Id. Ex. 12 ¶ 20. Only "Rent due and payable April 14, 2013 would be paid no later than April 30, 2013," not rent from April 14, 2013, forward. Regarding the use fees, interest, and attorneys' fees and expenses, plaintiff has not shown that these claimed amounts were calculated for plaintiff to pay as of April 30, 2013.

Plaintiff nonetheless maintains that, once defendant's payment left its hands and reached plaintiff, plaintiff was free to apply the payment however plaintiff chose. Snide v. Larrow, 62 N.Y.2d at 634; Shihab v. Bank of New York, 211 A.D.2d 430, 431 (1st Dep't 1995); Comparato v. Wegman, 272 A.D.2d 907 (4th Dep't 2000); Wilcox v. John-Sandy, 216 A.D.2d 727, 728 (3d Dep't 1995). Yet plaintiff does not maintain that, by the time plaintiff received the direction from defendant's attorney regarding how to apply the payment, approximately 90 minutes after receiving the payment, plaintiff already had disposed of the funds so that it was impossible to apply them as defendant directed. Only after receiving the direction from defendant's attorney, did plaintiff indicate, simply, that it "elected to apply the funds first to the later outstanding debts and then to the judgment debt," again without specifying what later debts, and without any

indication that the funds had been applied, let alone unalterably or irretrievably, before defendant's direction. Aff. of Ryan Smith Ex. G, at 1.

III. WHEN THE SPECIFICATION MUST BE MADE

The only controlling time limitation for a debtor's direction regarding how a creditor is to apply the debtor's payment was laid down in Bank of Cal. v. Webb, 94 N.Y. 467, 472 (1884): "the debtor must exercise his option as to the application when he makes the payment." (emphasis added) After that point, the creditor "may control . . . application" of the payment, and,

> unless the debtor intervenes and requests him to exercise his option, there can be no limit of time within which he must make the application.

Id. Thus defendant was to direct how plaintiff was to apply the payment "when" defendant made its payment, leaving the question whether "when" necessarily is interpreted as "simultaneously" or whether it may be interpreted to include any period after the payment. Id. Plaintiff, in contrast, was under "no limit of time" to determine how to apply the payment. Id. Nevertheless if, before plaintiff applied the payment, defendant intervened and gave plaintiff a direction, then plaintiff was to apply the payment as directed.

Here, however, defendant gave its direction simultaneously with its payment in two ways. (1) On May 22, 2013, before there were any further communications between the parties, defendant responded to plaintiff's demands early that morning and the

preceding afternoon for the amount of the judgment and accrued interest, by complying with plaintiff's demand. (2) Defendant paid the precise amount of the judgment plus accrued interest, which, since plaintiff had not quantified any other debt then outstanding, unmistakably represented that the payment was to be applied to that judgment and accrued interest. L&T E. 22 Realty Co. v. Earle, 192 Misc. 2d at 76-77.

The communication from defendant's attorney, that defendant had paid the full amount due pursuant to the judgment, was but a supplemental follow-up to defendant's payment, again without any other communication between the parties intervening between defendant's payment and its attorney's email. Nevertheless, given that the payment was from a bank in Roseburg, Oregon, plaintiff was in McMinnville, Oregon, and its attorney was in New York, to conclude that this email, following the payment within approximately 90 minutes as the email did, was not "when" plaintiff made the payment as well would be a constrained interpretation of the time limitation. Plaintiff does not dispute that this communication designated the debt to which the payment applied. This action thus is not one where the debtor never designated the debt to which the debtor's payment applied or gave the direction months after the payment. E.g., id. at 471-72; Comparato v. Wegman, 272 A.D.2d 907; Wilcox v. John-Sandy, 216 A.D.2d at 728.

Significantly, plaintiff never specified, on May 22, 2013, or before May 28, 2013, what "later outstanding debts" it applied

defendant's payment to. Smith Aff. Ex. G, at 1. Plaintiff also did not indicate then, nor has it shown now, that, before defendant intervened and gave plaintiff a direction, plaintiff already had applied the payment. In that event, even if the follow-up communication from defendant's attorney were not considered to have been "when" defendant made the payment, plaintiff was to apply the payment as directed. Bank of Cal. v. Webb, 94 N.Y. at 472.

IV. WHICH DEBTS THE DEBTOR'S PAYMENT MAY BE APPLIED TO

Both the timing of defendant's payment, in response to plaintiff's demands within well less than a day, and the amount of defendant's payment, the exact amount of the judgment and accrued interest, in compliance with plaintiff's demand, left no ambiguity regarding which debt the payment was intended to satisfy. Nor has plaintiff indicated any confusion or lack of understanding regarding which debt defendant intended to satisfy with its payment. Defendant's payment of the exact amount of the judgment with accrued interest by itself designated the debt to which the payment applied, so that it was impossible to interpret the payment as referable to any debt other than the judgment and accrued interest. National Bank of N.Y. City v. ESI Group, 201 A.D.2d at 471; L&T E. 22 Realty Co. v. Earle, 192 Misc. 2d at 76-77. To do so would suggest that defendant was calculating amounts due to plaintiff when it had never specified them or billed defendant for them.

Even absent the debtor's direction, the "presumption . . .

is that a payment is to be applied to that portion of the debt first becoming due." Snide v. Larrow, 62 N.Y.2d at 634. See Shihab v. Bank of New York, 211 A.D.2d at 431; Wilcox v. John-Sandy, 216 A.D.2d at 728. Plaintiff admits that it "elected to apply the funds first to the later outstanding debts," without offering any basis for overcoming the presumption that defendant's payment be applied to the earlier outstanding amounts included March 28, 2013, in the second Settlement Agreement, Lease Amendment No. 2, and confession of judgment. Smith Aff. Ex. G, at 1.

To be sure, if required to apply defendant's payment to the judgment and accrued interest, plaintiff may not then use the restraining notice to collect the judgment with accrued interest, because it has been satisfied. Concomitantly, plaintiff may no longer effectively use the enforcement device to collect unliquidated debts neither reduced to a judgment nor undisputed by defendant. This impact hardly may be considered prejudicial.

V. CONCLUSION

The restraining notice restrains defendant from making any payments anywhere but to plaintiff until defendant has paid plaintiff the amount owed pursuant to the judgment, not until defendant has paid plaintiff every amount plaintiff claims defendant owes. Since defendant has paid plaintiff the precise amount owed pursuant to the judgment, in direct response to plaintiff's demand for that precise amount, and in a single, unmistakable payment designated to meet plaintiff's demand, the

court grants defendant's motion to vacate the restraining notice served by plaintiff on defendant May 17, 2013. C.P.L.R. § 5240; Costello v. Casale, 39 A.D.3d 797 (2d Dep't 2007); Paz v. Long Is. R.R., 241 A.D.2d 486, 487 (2d Dep't 1997). See VisionChina Media Inc. v. Shareholder Representative Servs., LLC, 109 A.D.3d 49, 60-61 (1st Dep't 2013). Since defendant has satisfied the judgment entered May 16, 2013, that the accompanying information subpoena sought to enforce, the court also vacates the information subpoena. C.P.L.R. § 5240.

Upon presentation of an affidavit showing service of this order with notice of entry at least 10 days in advance, the Clerk of the Court or the Commissioner of the New York City Department of Finance, whoever retains custody of the $90,000.00 provided by defendant pursuant to the order dated May 31, 2013, shall disburse the undertaking to defendant forthwith. The Clerk or Commissioner may deduct any required fees from the disbursement. This decision constitutes the court's order.

DATED: December 20, 2013

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.