SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

X

FRONTIER DEVELOPMENT PLC,

Plaintiff,

-against-

ATARI INTERACTIVE, INC.,

Defendant.

INDEX NO. 656701/16

Motion Seq. No. 001

X

OSTRAGER, J:

Plaintiff Frontier Development PLC ("Frontier") is seeking to attach the defendant's accounts pursuant to CPLR §§ 6201 and 6210 to secure funds in excess of $2.5 million in the event Frontier obtains a judgment in this breach of contract case. Defendant disputes that it owes plaintiff the sums plaintiff claims defendant owes and opposes any attachment. Plaintiff initiated its application for an order of attachment on December 22, 2016 by filing an Order to Show Cause and seeking a Temporary Restraining Order. The Court declined to issue a Temporary Restraining Order and following oral argument on January 5, 2017, the Court denies plaintiff's request for an attachment for the reasons that follow.

Plaintiff, a game developer incorporated under the laws of the United Kingdom, and defendant Atari Interactive, Inc. ("Atari"), a game publisher and licensor incorporated under the laws of the State of Delaware and with a principal place of business in New York County, contracted to develop a video game called the Roller Coaster Tycoon 3 pursuant to a Development Agreement dated May 8, 2003 (the "2003 Agreement"). The 2003 Agreement was modified and supplemented in 2013 (*see* moving papers, Walsh Affidavit, Exhs. A, B, and C). These three agreements collectively govern the present dispute concerning the alleged underpayment of royalties due from game sales.

The 2003 Agreement contains a Choice of Law provision that requires English law to apply to disputes arising thereunder. Paragraph 27 of the 2003 Agreement expressly states: "This Agreement shall be governed by and construed in accordance with English law." Furthermore, neither the modification nor the supplemental agreements executed by the parties in 2013 altered the Choice of Law provision contained in the 2003 Agreement. In addition, paragraph 8 in the 2013 modification agreement provides that "All other terms and conditions of the 2003 Agreement shall remain in full force and effect, except these terms which are expressly modified in this Modification Agreement." No other provision in either of the 2013 agreements addresses or alters the Choice of Law provision in the 2003 Agreement. Thus, English law governs this dispute, including the plaintiff's request for an attachment. Plaintiff has failed to address in its memorandum of law and supporting motion papers the standard for an attachment under English law, and plaintiff's application is therefore defective.

Assuming, *arguendo,* that New York law applies here, the plaintiff has not sufficiently demonstrated its entitlement to an attachment pursuant to CPLR § 6201. In its one-count complaint for breach of contract and breach of the duty of good faith and fair dealing, plaintiff claims it is owed $2,195,471 in royalties. Plaintiff's breach of contract claim is premised on (i) the defendant's failure to permit an audit of the defendant's books and records pursuant to paragraph 15 of the 2003 Agreement (*see* Walsh Aff., Exh. A at 13), and (ii) the defendant's alleged underpayment of royalties since 2013 in contravention of the royalties payment schedule in the 2013 modification agreement (*see* Walsh Aff., Exh. B at 1-2).

Attachment is a drastic provisional remedy and the statute is strictly construed in favor of those against whom attachment is sought. *JVW v Kelleher*, 41 AD3d 233 (1st Dept 2001). A plaintiff seeking attachment pursuant to CPLR § 6212 must show that (a) there is a viable cause of action; (b) it is

probable plaintiff will succeed on the merits; (c) one or more grounds for attachment provided in CPLR § 6201 exist; and (d) the amount demanded exceeds all counterclaims known to plaintiff.

Plaintiff asserts it has satisfied all four prongs and is thus entitled to an attachment. Prongs (c) and (d) are satisfied. Atari is a foreign corporation "not qualified to do business in the state" within the meaning of CPLR § 6201(1) (*see* Brown Affirmation, ¶2; *see also* Brown Aff., Exh. A). Further, defendant has not yet asserted any counterclaims. Plaintiff arguably has a viable cause of action, thereby satisfying prong (a). As for prong (b) of the test for attachment, plaintiff has not sufficiently demonstrated probable success on the merits.

Paragraph 15 of the 2003 Agreement provides plaintiff with the *right* to request and conduct an audit of defendant's books and records once a year, but the provision fails to address a situation, such as this one, where a request for an audit is delayed. Thus, it is unclear, at least at this stage of the litigation, whether Atari breached its obligation under the agreements regarding the audit. Moreover, there are issues of fact as to whether a delayed audit constitutes a breach under the 2003 Agreement.

The plaintiff characterizes defendant's conduct as an obstruction of plaintiff's audit rights, but the motion papers indicate that defendant has had ongoing communications with the plaintiff regarding the audit since April 2016. Specifically, an affidavit submitted by plaintiff's Chief Operating Officer, David Walsh, in support of the motion concedes that defendant responded to plaintiff's audit requests, albeit last minute, and requested alternate dates to conduct the audit. Further, Walsh states that the defendant requested that plaintiff's auditor sign a confidentiality agreement prior to the audit, which their respective counsels subsequently drafted and circulated. The defendant apparently stopped responding to the ongoing communications concerning the audit in the weeks leading up to Christmas, a time period during which, as plaintiff concedes, peak game sales were expected.

Finally, plaintiff extrapolated its claim for damages in excess of $2 million by relying primarily on the number of customer downloads of the game from a website called "Steamspy" through which customers download the Roller Coaster Tycoon 3. In Steamspy's "About" page, a disclaimer expressly states: "Please note that Steam Spy extrapolates data from limited number of user profiles and thus **isn't 100% correct**" (emphasis in original).[1] Therefore, plaintiff's claim for unpaid royalties of $2,195,471 since 2013 is based on an extrapolation of sales data that is overly conclusory and not sufficiently reliable (*see e.g.,* Complaint, ¶17; Walsh Aff., ¶ 12).

Furthermore, plaintiff relies on affidavit statements by Walsh claiming that defendant's financial situation is "precarious" and thereby creates a "very real concern" that the defendant will be unable to pay plaintiff, unless defendant is ordered to hold monies likely to be received from current holiday sales (*see* MOL in support at 7-8; *see also* Walsh Aff., ¶ 34). Plaintiff's belief of defendant's "precarious" financial situation rests, *inter alia*, on: (a) defendant's emergence from Chapter 11 bankruptcy in 2013 (Walsh Aff., ¶ 34); (b) an unrelated royalties dispute between defendant and a non-party Chris Sawyer, creator of the Roller Coaster Tycoon franchise (¶ 35); (c) defendant's repeated late payments of royalties to plaintiff, "sometimes by up to a month" (¶ 36); (d) defendant's suspicious revenue stream in light of the current holiday season (¶ 37); and (e) the alleged poor performance of another gaming product recently released by defendant, Roller Coaster Tycoon World (¶¶ 41-44; *see also* MOL at 9).

However, as defendant argues in its brief in opposition, plaintiff failed to present evidence that defendant cannot pay its vendors as bills become due, or that defendant's inventory of games is underperforming. Plaintiff's reliance on Walsh's affidavit statements, as opposed to the findings of an independent analyst or other evidentiary proof, does not sufficiently justify the extreme remedy of attachment of defendant's funds in excess of $2.5 million. In addition, defendant writes in its brief that

[1] https://steamspy.com/about

"Atari is debt-free and as of January 2, 2017, had a market capitalization in excess of $50 million" (¶ 6), which create issues of fact as to defendant's current financial situation.

In any event, pursuant to the Court's instructions, defendant Atari submitted a letter (*see* NYSCEF Doc. No. 24) in which defendant agreed to permit an audit of its books and records on February 16, 2017. Accordingly, it is hereby

ORDERED that plaintiff's Order to Show Cause seeking an order of attachment pursuant to CPLR § 6201 is denied without prejudice; and it is further

ORDERED that the defendant shall file an answer or move with respect to the complaint by January 31, 2017; and it is further

ORDERED that the parties shall appear to a preliminary conference on February 21, 2017 in Room 341, 60 Centre Street, at 9:30 a.m.

Dated: January 6, 2017

BARRY R. OSTRAGER J.S.C.
JSC