Korea Deposit Ins. Corp. v Jung
2017 NY Slip Op 31870(U)
August 18, 2017
Supreme Court, New York County
Docket Number: 653744/2015
Judge: Lucy Billings

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
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KOREA DEPOSIT INSURANCE CORPORATION, bankruptcy administrator for bankrupt Tomato Savings Bank Co., Ltd., Index No. 653744/2015

Plaintiff

- against - DECISION AND ORDER

MINA JUNG and SUNG-MIN CHOI,

Defendants

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APPEARANCES:

For Plaintiff
Charles A. Michael Esq.
Steptoe & Johnson LLP
1114 6th Avenue, New York, NY 10036

For Defendants
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I. INTRODUCTION

In a decision dated June 17, 2016, the court granted plaintiff's motion to extend its time to serve its summons and complaint on defendants another 120 days beyond the 120 days permitted by C.P.L.R. § 306-b after plaintiff commenced this action November 12, 2015: until July 8, 2016. Defendants now move to dismiss the action based on plaintiff's failure to serve defendants as required by applicable law before expiration of that extended deadline. C.P.L.R. §§ 306-b, 3211(a)(8). Plaintiff claims that it served defendant Jung at 205 West 76th Street, New York, New York, June 14, 2016, and that, while the

extension for service was granted based on delays inherent in serving defendants in the Republic of Korea, the decision did not limit plaintiff to serving defendants there. If the court concludes that any service after the original 120 days was limited to serving defendants in the Republic of Korea, then plaintiff cross-moves to extend further its time to serve Jung. C.P.L.R. § 306-b. In any event, plaintiff also cross-moves to extend further its time to serve defendant Choi, Jung's husband, and to serve him by alternative means. C.P.L.R. §§ 306-b, 308(5).

II. DEFENDANTS' MOTION TO DISMISS THE ACTION AGAINST JUNG

The court's prior decision did not limit plaintiff to serving defendants in the Republic of Korea, as long as plaintiff effected service by July 8, 2016. Defendants challenge only the service in New York, rather than the Republic of Korea, and not the adequacy of the means by which plaintiff effected service on Jung at her dwelling place in New York under C.P.L.R. § 308(2) before July 8, 2016. Therefore the court denies defendants' motion to dismiss the action against Jung. C.P.L.R. §§ 308(2), 3211(a)(8).

III. PLAINTIFF'S CROSS-MOTION TO EXTEND FURTHER ITS TIME TO SERVE CHOI

Plaintiff already sought, and the court already denied, a further extension of time to serve Choi because plaintiff did not show any diligent efforts to complete service on defendants as promptly as possible. Slate v. Schiavone Constr. Co., 4 N.Y.3d 816, 817 (2005); Cassini v. Advance Publs., Inc., 125 A.D.3d 467,

468 (1st Dep't 2015); Khedouri v. Equinox, 73 A.D.3d 532, 532 (1st Dep't 2010); Johnson v. Concourse Vil., Inc., 69 A.D.3d 410, 410 (1st Dep't 2010). See Frank v. Garcia, 84 A.D.3d 654, 654 (1st Dep't 2011). First, plaintiff conceded that it did nothing to serve defendants for 82 days, until February 2, 2016. Second, plaintiff did nothing, itself or through the foreign services business Crowe & Associates that plaintiff retained or another agent, to advise the Central Authority, the body authorized to serve foreign pleadings in the Republic of Korea, regarding the deadline for service or to urge the Central Authority to complete service on defendants as promptly as possible.

The court granted plaintiff one extension of another 120 days because plaintiff satisfied all the other factors under the alternative standard for extending plaintiff's time: that an extension would serve the interests of justice. Leader v. Maroney, Ponzini & Spencer, 97 N.Y.2d 95, 105-106 (2001); Nicodene v. Byblos Rest., Inc., 98 A.D.3d 445, 446 (1st Dep't 2012); Henneberry v. Borstein, 91 A.D.3d 493, 496 (1st Dep't 2012); Lippett v. Education Alliance, 14 A.D.3d 430, 431 (1st Dep't 2005). The court granted this relief, however, upon the explicit expectation that, during the extension of time granted, plaintiff undertake and persist with efforts to monitor and advise the Central Authority in its attempts at service to the extent possible.

Now, plaintiff only further demonstrates its lack of diligence. In May 2016, plaintiff produced a new address for

defendants in the Republic of Korea. Thus, from February 2016, when plaintiff finally undertook to serve them there, to May 2016, when plaintiff through Crowe & Associates and the Central Authority were attempting to serve defendants at an address from which they had moved in 2014, plaintiff knew their new address. Second, even if plaintiff did not learn defendants' new address until May 2016, plaintiff never explains why the source from which plaintiff obtained the new 2014 address was not available to plaintiff when it first investigated defendants preparatory to its action against them and instead used a 2011 address at which to attempt service.

Finally, even if defendants did not move to this new address until May 2016, the attempts that the Central Authority made to serve them at the address provided were not reasonably calculated to find anyone there. The attempts were all on a weekday in the middle of the morning, when persons normally are away from home at work. Thus, even if defendants did not reside at the address, the Central Authority found no one who at least might have advised it that defendants did not reside there. Plaintiff does not demonstrate that it (1) ever, until its cross-motion, sought to ascertain the days and times the Central Authority was attempting service or (2) ever, at any time, advised, let alone urged, the Central Authority to attempt service on weekends or at different times of day. Although plaintiff complains that the Central Authority was not forthcoming regarding its progress in serving Choi, plaintiff does not indicate that it encountered any

difficulty communicating to the Central Authority or that plaintiff asked the Central Authority about the days and times of its attempts. For all these reasons, the court denies plaintiff's cross-motion to extend further its time to serve Choi. C.P.L.R. § 306-b.

IV. PLAINTIFF'S CROSS-MOTION TO SERVE CHOI BY ALTERNATIVE MEANS

Having denied plaintiff a further extension of time, the court turns to the question of whether the court still may authorize service that plaintiff already has effected on Choi by alternative means. C.P.L.R. § 308(5). Defendants maintain that the Hague Service Convention prohibits alternative service otherwise permissible under C.P.L.R. § 308(5).

"The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 362 (1969). The "Convention pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies." Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699 (1988). See U.S. Const. art. VI. Thus,

> Once a central authority receives a request, it must serve the documents by a method prescribed by the internal law of the receiving state or by a method designated by the requester and compatible with that law.

Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. at 699. Plaintiff does not show that the alternative methods it seeks to

use, service via Choi's attorney or via email, or any other alternative to C.P.L.R. § 308(1), (2), or (4) is "a method prescribed by the internal law of the receiving state," the Republic of Korea, or "compatible with that law." Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. at 699.

Whether "there is occasion for service abroad," id. at 704, and whether "recourse to the Convention's means of service" is mandatory, however, is "dependent on the forum's internal law." Id. at 705. Thus the internal law of the forum state, New York, determines whether the method of service requires transmittal of documents abroad and whether the Hague Convention applies. Id. at 700-701. A "method prescribed by the internal law of the receiving state," the Republic of Korea, or "compatible with that law," id. at 699, is required only when the Central Authority is to serve the documents in the Republic of Korea.

In particular, where service on an agent in New York is valid and complete under state law and the federal Constitution's due process guarantees, the Hague Convention is not implicated. Id. at 707; LTD Trading Enters. v. Vignatelli, 176 A.D.2d 571, 571 (1st Dep't 1991); Born To Build, LLC v. Salch, 139 A.D.3d 654, 655 (2d Dep't 2016). See Rego v. Thom Rock Realty Co., 201 A.D.2d 270, 270 (1st Dep't 1994). Under New York law, service by email on foreign defendants is also a permissible means of service, consistent with due process and not prohibited by the Hague Convention, where the methods prescribed by or compatible with the law of defendants' country have proved ineffective.

Alfred E. Mann Living Trust v. ETIRC Aviations S.A.R.I., 78 A.D.3d 137, 141-42 (1st Dep't 2010); Safadjou v. Mohammadi, 105 A.D.3d 1423, 1425 (4th Dep't 2013).

The court may approve an alternative method, whether service on an agent in New York or service by email, only if plaintiff shows that the alternative method is reasonably calculated to apprise Choi of this action and that he is likely to receive the transmitted information. Alfred E. Mann Living Trust v. ETIRC Aviations S.A.R.I., 78 A.D.3d at 142; Safadjou v. Mohammadi, 105 A.D.3d at 1424-25. Plaintiff meets this test.

Shortly after plaintiff commenced this action and served defendants' attorney, Choi filed an affirmation demonstrating his awareness that he is a defendant in this action and his understanding of the claims against him here: that they involve the same issues as in litigation against him in Korea and that the claims here lack merit for the reasons he explains. Plaintiff thus demonstrates that Choi has received the information in the summons and complaint and that service via Choi's attorney has apprised Choi of this action and thus comports with due process and New York law. Alfred E. Mann Living Trust v. ETIRC Aviations S.A.R.I., 78 A.D.3d at 142; Born To Build, LLC v. Salch, 139 A.D.3d at 656; Safadjou v. Mohammadi, 105 A.D.3d at 1425; Esposito v. Ruggerio, 193 A.D.2d 713, 714 (2d Dep't 1993).

Choi nevertheless avoided disclosing to plaintiff his dwelling place, place of business, or other whereabouts.

Esposito v. Ruggerio, 193 A.D.2d at 713. Plaintiff retained a foreign services business that, through the Central Authority in the Republic of Korea, was unable to serve him despite repeated attempts over an extended period. LTD Trading Enters. v. Vignatelli, 176 A.D.2d at 571; Born To Build, LLC v. Salch, 139 A.D.3d at 655-56; Rego v. Thom Rock Realty Co., 201 A.D.2d at 270.

The same factors that previously mandated an extension of time to serve Choi in the interests of justice also mandate an alternative method of service in the interests of elemental fairness. See Safadjou v. Mohammadi, 105 A.D.3d at 1424. When plaintiff served Choi via his attorney, the statutes of limitations applicable to plaintiff's claims had not expired. Plaintiff's failure to serve Choi pursuant to C.P.L.R. § 308(1), (2), or (4) or pursuant to the Hague Convention up to now has not deprived him of full notice of this action shortly after it was commenced and before any statute of limitations expired.

Nor has Choi shown any other prejudice from this alternative method of service. He has vigorously defended against this action and failed to specify any lost rights, change of position, or expense due to plaintiff's service through his attorney.

Plaintiff, on the other hand, has presented evidence that its claims against Choi as the transferor of a fraudulent conveyance, for no consideration, to avoid his debts to plaintiff, are meritorious under various provisions of New York Debtor and Creditor Law (DCL) §§ 273-76, even taking into

consideration the facts defendants present. Any weaknesses defendants may have identified in plaintiff's claims at best raise factual issues, which only dictate that the action be determined based on its merits rather than on Choi's avoidance of service.

All these factors warrant authorization of service pursuant to C.P.L.R. § 308(5) via defendant Choi's attorney that plaintiff effected well within the 120 days permitted by C.P.L.R. § 306-b. Therefore the court grants plaintiff's cross-motion to the extent of permitting service on Choi by that alternative means. C.P.L.R. § 308(5); Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. at 707; Alfred E. Mann Living Trust v. ETIRC Aviations S.A.R.I., 78 A.D.3d at 142; LTD Trading Enters. v. Vignatelli, 176 A.D.2d at 571; Born To Build, LLC v. Salch, 139 A.D.3d at 656.

V. THE ATTACHMENT

In the event that the court denied defendants' motion to dismiss the complaint, as now has occurred, defendants previously cross-moved, in opposition to plaintiff's motion to convert to a prejudgment attachment the temporary restraining order limiting defendant Jung's encumbrances on her real property in New York, to vacate the temporary restraint that the court imposed. The court based that restraint on plaintiff's showing of meritorious claims that Choi, for no consideration, fraudulently conveyed funds to Jung to purchase that property.

The only basis on which defendants have opposed the

attachment and sought to vacate the temporary restraint other than plaintiff's failure to serve them, however, is that an attachment or restraint would prevent Jung from using her real property, an apartment in which she resides, as security for a loan or prevent her from selling the property if she wanted to move from the apartment. Yet neither Jung nor anyone else on personal knowledge attests, and no other admissible evidence supports, her desire to secure a loan or to sell the apartment, a residential condominium unit, or the claimed impediment to either objective.

In fact the original restraint and any prospective attachment applies to only $1,830,000 of the equity in that property: the amount plaintiff showed that Choi, for no consideration, fraudulently conveyed to Jung March 4, 2010, to purchase that property. The restraint or attachment would not restrict her use of the remaining equity in the condominium unit, which she purchased for $4,395,396. If she seeks to sell the apartment, she may seek plaintiff's or the court's permission to do so on the condition that she deposit $1,830,000 of the sale proceeds into the court or an escrow account, for example. Finally, were Jung actually to demonstrate plaintiff's liability for her injury from the restraint or attachment, plaintiff has provided security of $91,500 to cover any such injury. See C.P.L.R. §§ 6212(b), 6312(b), 6313(c).

By assigning or disposing of the $1,830,000 Choi conveyed to Jung for no consideration, to purchase the condominium unit, Jung

has frustrated the enforcement a judgment in plaintiff's favor in the event plaintiff prevails on any of its claims against either Choi or Jung here. C.P.L.R. § 6201(3); Hotel 71 Mezz Lender LLC v. Falor, 14 N.Y.3d 303, 311-12 (2010); Koehler v. Bank of Bermuda Ltd., 12 N.Y.3d 533, 538 (2009); VisionChina Media Inc. v. Shareholder Representative Servs., LLC, 109 A.D.3d 49, 60-61 (1st Dep't 2013). These claims include not only demonstrated violations of DCL §§ 273-76, but also enforcement of any judgments obtained against Choi in the litigation between plaintiff and him in the Republic of Korea where plaintiff already has prevailed in the trial court. C.P.L.R. § 6212(a); VisionChina Media Inc. v. Shareholder Representative Servs., LLC, 109 A.D.3d at 59.

A claim under DCL § 273 requires a showing that a conveyance by or to defendants (1) was without fair consideration and (2) depleted the debtor defendant Choi of his assets. 172 Van Duzer Realty Corp. v. 878 Educ., LLC, 142 A.D.3d 814, 818 (1st Dep't 2016); 2406-12 Amsterdam Assoc. LLC v. Alianza LLC, 136 A.D.3d 512, 513 (1st Dep't 2016); American Media, Inc. v. Bainbridge & Knight Labs., LLC, 135 A.D.3d 477, 478 (1st Dep't 2016); 320 W. 13th St., LLC v. Wolf Shevack, Inc., 85 A.D.3d 629, 629 (1st Dep't 2011). Plaintiff's showing that Choi, while owing plaintiff approximately $60,000,000, which now has evolved into approximately $85,000,000 in judgments obtained in the Republic of Korea, transferred $1,830,000 to his wife, defendant Jung, without consideration, satisfies DCL § 273.

Choi insists that he was solvent when he transferred the funds to his wife March 4, 2010, but his persistent failure to pay his massive debts, transformed into judgments against him, belies his claim. If his assets truly exceeded his liabilities many times over as he claims, surely he would have repaid the debts to stop the mounting interest and plaintiff's eventual entry and enforcement of the judgments. Moreover, in the litigation between plaintiff and Choi in the Republic of Korea, the court already has found that his debts exceeded his liabilities when he transferred the funds to Jung.

As delineated further below, Choi's conveyance with the intent to evade his creditor amounts to a fraudulent conveyance regardless whether his assets technically exceeded his liabilities. E.g., DCL § 276. The indisputable facts that Choi obviously knew of his debt to plaintiff, yet has not found the resources to pay the debt, and therefore knew that any transfer without consideration would be to plaintiff's detriment raise an inference of his fraudulent intent, further supporting plaintiff's claim under DCL § 273. 172 Van Duzer Realty Corp. v. 878 Educ., LLC, 142 A.D.3d at 817-18; 2406-12 Amsterdam Assoc. LLC v. Alianza LLC, 136 A.D.3d at 513; American Media, Inc. v. Bainbridge & Knight Labs., LLC, 135 A.D.3d at 478; 320 W. 13th St., LLC v. Wolf Shevack, Inc., 85 A.D.3d at 629. See Tap Holdings, LLC v. Orix Fin. Corp., 109 A.D.3d 167, 176 (1st Dep't 2013). A claim pursuant to DCL § 273 does not require evidence of actual intent to defraud the creditor. Atsco Ltd. v. Swanson,

29 A.D.3d 465 (1st Dep't 2006); Wall St. Assoc. v. Brodsky, 257 A.D.2d 526, 528 (1st Dep't 1999); Matter of Steele, 85 A.D.3d 1375, 1376-77 (3d Dep't 2011); Fischer v. Sadov Realty Corp., 34 A.D.3d 632, 633 (2d Dep't 2006).

A confluence of factors also raises an inference of Choi's fraudulent intent to support plaintiff's claim under DCL § 276. 320 W. 13th St., LLC v. Wolf Shevack, Inc., 85 A.D.3d at 629; Atsco Ltd. v. Swanson, 29 A.D.3d at 465-66; Shisgal v. Brown, 21 A.D.3d 845, 847 (1st Dep't 2005); Wall St. Assoc. v. Brodsky, 257 A.D.2d at 529. (1) Choi and Jung maintained a close relationship. The conveyance from Choi to Jung was (2) irregular, out of the ordinary course of business, without an explanation why the funds were used to purchase an asset owned solely by Jung and (3) lacked any consideration. Choi (4) obviously knew of his debt to plaintiff, but (5) failed to pay the debt.

The claimed fraudulent conveyance through which Choi transmitted funds to a bank in New York for the purchase of real property here also constitutes a tortious act directed at New York sufficient to confer personal jurisdiction over him. C.P.L.R. § 302(a)(2); SPCA of Upstate N.Y. v. American Working Collie Assn., 18 N.Y.3d 400, 403 (2012); CPC Intl. v. McKesson Corp., 70 N.Y.2d 268, 287 (1987); CIBC Mellon Trust Co. v. HSBC Guyerzeller Bank AG, 56 A.D.3d 307, 308-309 (1st Dep't 2008). Finally, since neither Choi nor Jung claims against plaintiff, its claims exceed any potential counterclaims. C.P.L.R. §

6212(a). Consequently, the court vacates its temporary restraining order, but grants plaintiff's motion for an attachment lien and thus replaces the restraining order with an attachment lien in favor of plaintiff against Jung's real property in the amount $1.830,000. C.P.L.R. §§ 6201(3), 6212(a).

VI. CONCLUSION

In sum, the court denies defendants' prior cross-motion and subsequent motion to dismiss the action based on lack of personal jurisdiction over defendants. C.P.L.R. § 3211(a)(8). The court denies plaintiff's cross-motion to extend further its time to serve defendant Choi, C.P.L.R. §§ 306-b, but grants its cross-motion insofar as it seeks to serve him by alternative means. C.P.L.R. § 308(5). The court grants defendants' prior cross-motion to the extent of vacating the temporary restraining order, but also grants plaintiff's prior motion to convert that order to an attachment lien in favor of plaintiff against defendant Jung's real property at 205 West 76th Street, Unit PH2F, New York County, in the amount $1,830,000. C.P.L.R. §§ 6201(3), 6212(a).

DATED: August 18, 2017

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.