MyPart Software, Ltd. v Fluent Trade Tech. Ltd.
2017 NY Slip Op 32499(U)
November 22, 2017
Supreme Court, New York County
Docket Number: 650316/2017
Judge: Marcy Friedman

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: MARCY S. FRIEDMAN PART 60
Justice

MyPart Software Ltd.,
Petitioner,

-against-

INDEX NO. 650316/2017
MOTION SEQ. NO. 002, 003

Fluent Trade Technologies Ltd. S.A.R.L., Gil Niehous, and Yehezkel Zion,
Respondents.

The following papers, numbered 1 to _____ were read on this petition:

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | No (s). _____
Answering Affidavits — Exhibits | No (s). _____
Replying Affidavits | No (s). _____
Cross-Motion: ☐ Yes ☐ No

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

Respondents Fluent Trade Technologies Ltd., SARL (Fluent), Gil Niehous and Yehezkel Zion move to renew and reargue this petition for an attachment in aid of arbitration. The petition was granted by this court's decision on the record on March 30, 2017, which was so ordered on July 19, 2017. By separate written order dated April 3, 2017, the court granted the petition for the attachment.[1] Petitioner MyPart Software Ltd. (MyPart) separately moves to reduce the undertaking required by that decision.

The renewal branch of the motion seeks to submit affirmations, pursuant to CPLR 2106 (b), in support of respondents' defense to petitioner's claim for payment for services rendered to Fluent. At the time the petition was heard, respondents submitted affirmations that did not contain the statements required by CPLR 2106 (b) – namely, that the affirmations were made under the penalties of perjury by persons physically located outside the U.S., and that the affirmants understand that the documents may be filed in a legal action or proceeding. The court rejects respondents' contention that CPLR 2106 (b) is inapplicable to affirmations submitted for religious reasons by persons outside the country. The court, however, finds that respondents demonstrate an excuse for their failure to submit affirmations in compliance with the statute, based on the error of their counsel, or, alternatively, that the interests of justice warrant the court's exercise of discretion to grant leave to renew. (See CPLR 2221 [e]; Tishman Constr. Corp. of New York v City of New York, 280 AD2d 374, 376-377 [1st Dept 2001]; see also Simpson v Tommy Hilfiger U.S.A., Inc., 48 AD3d 389, 391-392 [2d Dept 2008].) Leave to renew to submit the now properly affirmed statements is therefore granted.

[1] The decision on the record and written order are collectively referred to as the Prior Decision and Order.

The affirmations do not persuade this court that an order of attachment should not be granted. The court assumes for purposes of the renewal motion that the affirmation of Moshe Roffe raises a factual issue as to whether petitioner's principal, Matan Kollnescher, falsified test data. Petitioner nevertheless makes a sufficient showing of the likelihood of success on the merits of its claim that fees are due to petitioner, as evidenced, for example, by the emails of Niehous acknowledging the debt. (E.g. Order To Show Cause Seeking Order Of Attachment And Preliminary Injunction In Aid Of Arbitration, Exs. 32, 34, 43 [OSC].) The existence of a factual dispute as to petitioner's ultimate entitlement to the fees does not preclude a finding that the petitioner has made a showing of likelihood of success on the merits, and therefore of entitlement to an attachment. (See Mishcon De Reya New York LLP v Grail Semiconductor, Inc., 2011 WL 6957595, *5, 11 Civ 04971 [RJH] [SD NY, Dec. 28, 2011] [applying New York law]; Genger v Genger, 2014 WL 1398235, *2, 2014 NY Slip Op 30950, [Sup Ct, NY County, Apr. 10, 2014].) Upon renewal, the court accordingly adheres to its initial decision awarding an attachment.

In the branch of their motion for leave to reargue, respondents contend that the attachment should not be awarded against the individual respondents, Niehous and Zion. (Resps.' Memo. In Supp. at 3-5.)[2] Leave to reargue is granted. Upon reargument, the court adheres to the Prior Decision and Order. As held above, petitioner made a sufficient showing of likelihood of success on the merits of its claim that fees are owed to MyPart for services rendered by Kollnescher and MyPart to Fluent. As to the basis for issuing the attachment as to the individuals, as well as Fluent, the court made a factual finding in the Prior Decision, which is not disputed by respondents, that Niehous personally guaranteed payment of up to $250,000 for consultation fees for services rendered by Kollnescher/MyPart in 2014. (See Guarantee, dated Sept. 7, 2015, OSC, Ex. 26 [referring to Kollnescher as Kolensher, MyPart Software Ltd. as Mypart Ltd. and Gil Niehous as Gill Newhouse].) The Prior Decision also made a finding that attempts to collect on the guaranty in Niehous's home state of Israel had been unsuccessful, and that Neihous was judgment proof there. (Prior Decision at 28.)

The court did not make express findings as to the basis for issuing the attachment as against Zion. In support of the motion for that relief, however, Kollnescher submitted an affirmation detailing Niehous's promises to Kollnescher to pay for the services, and submitting emails evidencing a disregard for the corporate form and "promising payments for MyPart's services by unrelated entities and others," including Zion. (Matan Aff., ¶¶ 99-102; OSC, Exs. 43, 44.) Despite this evidence, Zion failed on the prior motion to submit an affirmation denying, or any other evidence disputing, that he had agreed with or authorized Niehous to represent that payment would be made by him or his company for services rendered to Fluent. The record adequately supports the issuance of the injunction against Zion.

The court accordingly adheres to its decision awarding the attachment not only against Fluent, but also against the individual defendants.

By separate motion, petitioner MyPart seeks an order reducing the amount of petitioner's undertaking from $250,000, the amount set in the Prior Decision and Order, to $5,000 or less, and

[2] The motion to renew and reargue was brought before the order granting the attachment was issued and before respondent had received a transcript of the decision on the record. In the memorandum of law in support, respondents state that they did not believe that the court had ordered the attachment against the individuals, but that "if the Court had intended to make" an order against the individuals, its ruling "would be erroneous." (Resps.' Memo. In Supp. at 5.)

extending the ten day "deadline to post such undertaking following expiry or vacation of the emergency stay of the order of attachment."[3]

Commentaries and court procedures suggest that an undertaking on an attachment should generally be set in the amount of five to ten percent of the amount restrained. (See e.g. Courthouse Procedures, Procedure III [Ex Parte Applications][C]; 4A West's Mckinney's Forms Civil Practice Law and Rules § 11:6 [d].) CPLR 6212 (b) provides that "plaintiff shall pay to the defendant all costs and damages, including reasonable attorney's fees, which may be sustained by reason of the attachment if the defendant recovers judgment or if it is finally decided that the plaintiff was not entitled to an attachment of the defendant's property." The courts have reiterated that an undertaking must be "sufficient to pay defendant damages, including attorney's fees, in the event … that plaintiff was found not entitled to an attachment." (Mitchell v Fidelity Borrowing LLC, 34 AD3d 366, 367 [1st Dept 2006].) Put another way, the undertaking must be "rationally related to the potential damages in the event the attachment is found to have been unwarranted." (JSC VTB Bank, Etc. v Mavlyanov, 154 AD3d 560, [1st Dept 2017].)

Applying these standards, the court concludes that if it is ultimately determined that petitioner was not entitled to an attachment, respondents will be entitled to considerable attorney's fees for the litigation over the attachment, even if no other damages are proved. The court further holds that $100,000 is rationally related to such potential damages. (See id.) The attachment will therefore be reduced to that amount.

It is accordingly hereby ORDERED that the branch of respondent's motion to renew is granted and, upon renewal, the court adheres its Prior Decision and Order; and it is further

ORDERED that the branch of respondent' motion to reargue is granted and, upon reargument, the court adheres its Prior Decision and Order; and it is further

ORDERED that petitioner's motion to reduce the undertaking is granted to the following extent: The undertaking set forth in the Prior Decision and Order is reduced from $250,000.00 to $100,000.00, conditioned that petitioner shall pay to respondents all costs and damages, including reasonable attorney's fees which may be sustained by reason of the attachment, if respondents recover judgment or if it is finally decided that petitioner was not entitled to an attachment of the property of respondents; and petitioner shall also pay to the Sheriff all of his/her allowable fees; and petitioner shall post the $100,000.00 undertaking within ten (10) days of the date of service of a copy of this order with notice of entry by regular mail; and it is further

ORDERED that upon posting of the undertaking, the Sheriff of the City of New York, or the Sheriff of any County of the State of New York, shall levy within his/her jurisdiction, at any time before final judgment, upon such real and personal property in which respondents have an interest, and upon such debts owing to respondents as will satisfy $250,000.00, the amount of petitioner's demand, together with probable interest, costs, and the Sheriff's fees and expenses, and that the Sheriff proceed herein in the manner and make his return within the time prescribed by law.

This constitutes the decision and order of the court.

[3] In its papers, petitioner specifically refers to the undertaking in the court's April 18, 2017 order of attachment. That order is, in fact, the April 3, 2017 order, which was filed in the County Clerk's Office on April 18, 2017. The emergency stay to which petitioner refers was a motion for a stay which was denied by order of the Appellate Division dated June 13, 2017. That order also vacated an interim stay of the order of attachment that had been granted by a Justice of the Appellate Division. (2017 NY Slip Op 76752 [U], 2017 WL 2541195.)

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Dated: 11-22-17

MARCY S. FRIEDMAN, 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