

**Pacific Alliance Asia Opportunity Fund LP v Kwok
Ho Wan**

2018 NY Slip Op 31373(U)

June 28, 2018

Supreme Court, New York County

Docket Number: 652077/2017

Judge: Barry Ostrager

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 61

-----X

PACIFIC ALLIANCE ASIA OPPORTUNITY FUND L.P.

INDEX NO. 652077/2017

Plaintiff,

MOTION DATE _____

- v -

MOTION SEQ. NO. 003

KWOK HO WAN,

DECISION AND ORDER

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190

were read on this application to/for Order of Attachment

HON. BARRY R. OSTRAGER:

Plaintiff Pacific Alliance Asia Opportunity Fund L.P. (“PAX”) is an investment fund. Defendant Kwok Ho Wan (“Kwok”) is a Chinese national, purportedly worth upwards of \$17 billion, who is seeking asylum in the United States and currently residing in a luxury apartment at The Sherry-Netherland Hotel (the “Residence”) in New York City. The Residence is owned by an entity of which Kwok is apparently the sole shareholder. Plaintiff moves for an order of attachment on the Residence. For the reasons stated *infra*, that motion is denied without prejudice.

In 2008, PAX entered into an agreement with Spirit Charter Investment Limited (“Spirit”), one of Kwok’s business entities, under which PAX provided Spirit with a loan facility in the principal amount of \$30 million. Kwok executed a personal guarantee of that loan. In September 2009, Spirit executed a deed under which Shiny Times Holdings Limited (“Shiny Times”), a business listing Kwok as its sole shareholder and director, assumed the loan debt that Spirit owed to PAX. Kwok again executed a personal guarantee in favor of PAX to secure Shiny Times’ repayment obligations.

In April 2013, the parties entered into a Deed of Settlement, whereby the outstanding loan amount would no longer be due and owing to PAX if PAX purchased certain apartments from Beijing Pangu Investment Inc. (“Beijing Pangu”), another Kwok business entity, and Shiny Times’ made certain installment payments to PAX. Beijing Pangu was required to satisfy ten conditions precedent in connection with the sale and purchase of each of the apartments by PAX. If any such condition was not met for any of the apartments by July 2013, the Deed of Settlement would be terminated in its entirety.

PAX alleges that Beijing Pangu failed to satisfy at least four of the conditions precedent by July 2013 as contemplated by the Deed of Settlement, thereby terminating such agreement and reinstating the obligations of Shiny Times under the loan as well as Kwok’s personal guarantee of the loan. Shiny Times failed to repay the loan sums due and owing, and a notice of demand was sent to Kwok pursuant to his personal guarantee. Kwok has not paid any amount due and owing to PAX under the guarantee, and as a result, PAX initiated the instant lawsuit against Kwok seeking repayment of the roughly \$88 million then due.

PAX now moves for an order, pursuant to CPLR § 6201 and 6212, attaching the Residence and Genever Holdings, LLC (“Genever”), the company that owns the Residence and

is wholly owned by Kwok. Additionally, PAX seeks to attach any proceeds from any potential future sale of the Residence, which is presently listed for sale.

Discussion

To grant an order attaching the Residence and/or Genever, PAX must establish that “(i) there is a cause of action; (ii) it is probable that [it] will succeed on the merits; (iii) at least one ground for attachment provided in [CPLR §] 6201 exists; and (iv) the amount demanded from the defendant exceeds all counterclaims known to the plaintiff.” *Melcher v. Apollo Med. Fund Mgmt. LLC*, No. 604047/2003, 2013 WL 6123785 (N.Y. Sup. Ct. Nov. 18, 2013). PAX asserts that it can satisfy the requirements of CPLR § 6201(3) because it can show that “the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff’s favor, has assigned, disposed of, encumbered or secreted property or removed it from the state, or is about to do any of these acts.” CPLR § 6201(3).

On the evidence presently before the Court, PAX fails to meet the high burden of proving Kwok’s fraudulent intent to frustrate enforcement of a potential judgment in this action. The Residence was purchased by Genever on March 24, 2015 and was listed for sale shortly thereafter in September 2015. The Residence remains on the market and PAX does not assert that a sale of the Residence is imminent. Genever’s purchase of the Residence and subsequent attempts to sell the Residence do not necessarily portend an intent to frustrate enforcement of a judgment in this action.

In any event, Genever, the owner of the Residence, is not a party to this action, and PAX has not sufficiently shown why Genever should be subject to an attachment by virtue of Kwok’s alleged conduct. While it is apparently true that Kwok is the sole shareholder of Genever, “[e]vidence of domination alone does not suffice without an additional showing that it led to

inequity, fraud or malfeasance.” *TNS Holdings, Inc. v. MKI Sec. Corp.*, 92 N.Y.2d 335, 339 (1998). PAX fails to make such a showing of fraud.

While PAX barely fails to meet the heavy burden for an attachment, the Court believes that discovery, which may now proceed, may shed light on Genever and/or Kwok’s purported fraudulent intent in purchasing and attempting to sell the Residence to avoid enforcement of a judgment in this action. Plaintiff may renew its motion if, as, and when discovery provides evidence of Genever and/or Kwok’s intent, as well as a basis for a veil piercing claim by which to attach Genever’s property. Plaintiff may also attempt to preserve the status quo by amending its complaint to add other parties and seeking a preliminary injunction enjoining the sale of the Residence, assuming Plaintiff can establish the basis for such relief.

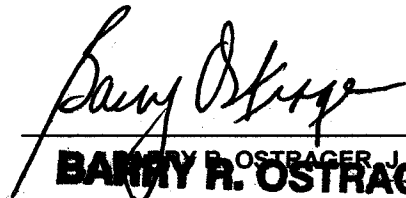
Accordingly, it is hereby

ORDERED that Plaintiff’s motion for an order of attachment is denied without prejudice to renew; and it is further

ORDERED that Defendant provide Plaintiff with immediate written notice of any contract for sale or assignment of the Residence; and it is further

ORDERED that the parties appear on July 10, 2018 at 9:30 a.m. to enter into an expedited discovery schedule with the Court.

6/28/2018
DATE



BARRY R. OSTRAGER, J.S.C.
JSC

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: