Arm Internet Inv. I Ltd. v C Media Ltd.
2020 NY Slip Op 33220(U)
September 30, 2020
Supreme Court, New York County
Docket Number: 655844/2016
Judge: Robert R. Reed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: <u>HON. ROBERT R. REED</u>   PART 43

Justice

---X

ARM INTERNET INVESTMENT I LIMITED,

Plaintiff,

- v -

C MEDIA LIMITED, SONG XUESONG,

Defendant.

---X

INDEX NO.	<u>655844/2016</u>
MOTION DATE	<u>11/02/2020</u>
MOTION SEQ. NO.	<u>004</u>

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102

were read on this motion for   <u>CONTEMPT</u>   .

Upon the foregoing documents, it is ordered that this motion is granted in part and denied in part.

On March 22, 2017, plaintiff moved for summary judgment to recognize and enforce a final money judgment in favor of plaintiff, in the principal amount of $24.9 million, plus interest and court costs, issued by the High Court of the Hong Kong Special Administrative Region, Court of First Instance. Before this court was able to determine the merits of plaintiff's motion, the parties entered into a stipulation of settlement that this court so ordered on November 1, 2018 -- with plaintiff's motion being marked resolved pursuant to the parties' stipulation of settlement (see NYSCEF Doc. No. 78).

The stipulation of settlement provided, *inter alia*, (1) that defendants C Media Limited and Song Xuesong and non-party Chum Capital Group Limited (Chum) would, by a date certain, transfer unencumbered shares of specific companies to plaintiff or its designee; (2) that such shares would be sold by plaintiff or its designee in an effort to satisfy the agreed upon judgment amount; (3) that defendants would pay to plaintiff any shortfall from the sales proceeds of such

shares; and (4) that, if the sales of the said shares generated less than $32,780,682.00, plaintiff was empowered to enter judgment in this action against defendants jointly and severally for $32,780,682.00 (less any amounts already collected). Plaintiff asserts, on the current motion, that defendants breached the stipulation of settlement by delivering to plaintiff encumbered shares with diminished value and/or shares with restrictions making them unable to be sold in their present state.

Plaintiff moves, pursuant to CPLR 5104 and Judiciary Law 753 (A)(3), to compel defendants and non-party Chum to comply with the November 1, 2018 stipulation of settlement and order and, further, to hold said defendants and non-party Chum in civil contempt for failing to comply with the terms of the said stipulation of settlement, and, finally, to award attorneys' fees to plaintiff for having been required to interpose this motion. Defendants oppose, arguing that they have substantially complied with the terms of the stipulation of settlement by providing $8.8 million worth of shares and that they are making every effort to comply with the remaining portions of the agreement. Defendants assert that the parties were in discussions regarding a payment plan and that good faith repayment efforts continue. Therefore, defendants submit, an order to compel and/or for contempt is unnecessary.

The court has authority to punish a litigant that disobeys a lawful mandate (Judiciary Law 753[A][3]; *see also* CPLR 5104 [enforcing a judgment or order by contempt]). "In order to find a party in civil contempt of court pursuant to Judiciary Law 753, the applicant must demonstrate by clear and convincing evidence that the alleged contemnor has intentionally engaged in conduct which violated a lawful order of the court clearly expressing an unequivocal and explicit mandate ... thereby prejudicing the right of party to the litigation" (*Miller v. Miller*, 61 AD3d 651). "Nonetheless, contempt is a drastic remedy, which should not issue absent a clear right to

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such relief" (*A&F Hamilton Heights Cluster, Inc. & Urban Green Management, Inc.*, 2018 N.Y. Misc. LEXIS 5134; *see also Coronet Capital Co. v. Spodek,* 202 AD2d 20.)

The burden of proof is on the party seeking a civil contempt order, and here, plaintiff has failed to meet its burden with the required clear and convincing evidence. What appears clear from the submissions of the parties to the stipulation of settlement is that, by the mandated date certain, defendants and non-party Chum failed to provide shares of the type that could be promptly sold to meet the agreed upon judgment amount, inclusive of fees. What is not clear is that defendants and non-party Chum acted with willfulness or any contumacious intent. Indeed, defendants' unrefuted claims that the parties have engaged in good faith discussions on repayment suggests the opposite conclusion. Non-compliance with an order in and of itself, without more, does not equal contempt. This is particularly so where the order is one merely giving judicial resonance to substantive terms negotiated by the parties themselves.

Paragraph 12 permits plaintiff to enter judgment for the agreed upon judgment amount in the event of noncompliance. For whatever reason, plaintiff eschews that remedy at the moment, and, instead, seeks an order from this court compelling defendants and non-party Chum to do now what they already failed to do by the date provided in the stipulation of settlement. To the extent plaintiff seeks no more than issuance of an order to compel defendants and non-party Chum within a certain timeframe to attempt to arrive at substantive compliance with the terms of the November 1, 2018 stipulation of settlement and order, the court is prepared to and shall provide the relief plaintiff requests.

However, the court sees no reason to reward plaintiff with attorneys' fees or costs on this motion to compel when it ignores the express remedy of judgment entry provided for in paragraph 12 of the stipulation of settlement. Plaintiff, notably, fails to direct the court to any

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section of the stipulation of settlement providing for an additional award of attorney's fees. In essence, plaintiff seeks attorneys' fees for relief that has previously been provided by this court -- inasmuch as the November 1, 2018 stipulation and order mandated delivery of certain shares by a date certain. Plaintiff, moreover, has not established that defendants' actions were in any way undertaken to delay or prolong litigation, or to harass or maliciously injure another (22 NYCRR 130-1.1[c] [2]). Awards of costs, of course, are in the court's discretion (*see* CPLR 8106) -- and the court finds no reason to grant such relief on this motion.

Accordingly, it is

ORDERED that, within 30 days of the entry of this order, defendants C Media Limited and Song Xuesong and non-party Chum Capital Group Limited shall jointly and severally transfer or cause to be transferred, free and clear of any lien, pledge or encumbrance, 10 (ten) million shares of KONE to plaintiff Arm Internet Investment I Limited or its designated entity, together with properly executed instruments of transfer and all other necessary documents, so that plaintiff Arm Internet Investment I Limited or its designated entity can immediately sell the 10 (ten) million KONE shares; and it is further

ORDERED that the portion of plaintiff Arm Internet Investment I Limited's motion seeking to hold defendants C Media Limited and Song Xuesong and non-party Chum Capital Group Limited in contempt of court is denied; and it is further

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ORDERED that the portion of plaintiff Arm Internet Investment I Limited's motion

seeking an award of attorneys' fees is denied.

This constitutes the Decision and Order of the court.

9/30/2020		
DATE		**ROBERT R. REED, J.S.C.**

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE

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