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Passport Special Opportunities Master Fund, L.P. v ARY Communications, Ltd.
2015 NY Slip Op 51696(U)
Decided on November 17, 2015
Supreme Court, Nassau County
DeStefano, J.
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<p>Passport Special Opportunities Master Fund, L.P., Plaintiff,</p> <p>against</p> <p>ARY Communications, Ltd., Haji Mohammad Iqbal, Mohammad Mehboob, Mohammad Salman Iqbal, Hajra Shafi, and Haji Jan Mohammad, Defendants.</p>
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Vito M. DeStefano, J.

The following papers and the attachments and exhibits thereto have been read on the motions:

Notice of Motion 1
Memorandum of Law in Support 2
Affirmation in Support 3
Affirmation in Opposition 4
Memorandum of Law in Opposition 5
Reply Memorandum of Law 6
Affirmation in Reply 7
Order to Show Cause 8
Affirmation in Support 9
Affirmation in Opposition 10

In this action to recognize a money judgment of the High Court of the Republic of Singapore (CPLR 5303), the plaintiff moves (motion sequence no. 1) for an order pursuant to CPLR 6210 attaching the New York assets of the

defendant Singapore judgment debtors. The plaintiff also moves (motion sequence no. 2) for an order: "(1) deeming that service of process by international registered mail and international courier of the Summons, Complaint and all appendices thereto, Notice of Motion for Order of Attachment and all appendices thereto, Affirmation of Charlene C. Sun dated July 27, 2015 and all exhibits thereto, and Memorandum of Law in Support of Motion for Order of Attachment, as effectuated by Plaintiff, is good and sufficient, or (2) permitting Plaintiff to serve the Summons, Complaint and all appendices thereto, Affirmation of Charlene C. Sun dated July 27, 2015 and all exhibits thereto, and Memorandum of Law in Support of Motion for Order of Attachment, upon defendants by email and overnight courier to defendants' counsel, Stephen H. Nakamura and George R. Brown of Merle, Brown & Nakamura, P.C."

Initially, the court notes that to the extent the plaintiff seeks a determination regarding the propriety of service reputedly effectuated under the Hague Convention (motion sequence no. 2), such relief is unnecessary and premature. In this regard, and as held by the Second Department, service of process by mail on persons abroad is permissible provided that the State of designation does not object in its ratification of such service ([*Fernandez v Univan Leasing*, 15 AD3d 343](#) [2d Dept 2005]). Pakistan, a signatory to the Hague Convention, "has no objection to such service by postal channels directly to the persons concerned" (<http://travel.state.gov/content/travel/en/legal-considerations/judicial/country/pakistan.html>).

Accordingly, service made upon defendants "by postal channels" is presumptively proper (*see Engel v Lichterman* 95 AD2d 536 [2d Dept 1983]). In the event that the propriety of service pursuant to that method is properly challenged by affirmative defense or pre-answer motion, the [*2] court will make appropriate findings and rulings in due course (*see generally Lenchyshyn v Pelko Electric, Inc.*, 281 AD2d 42 [4th Dept 2001]).

The alternative relief requested by the plaintiff, to wit, an order permitting alternative service pursuant to CPLR 308(5), must also be denied. First, assuming *arguendo* that the statute is applicable to service of pleadings outside of

the state of New York (which the court does not decide at this time), as noted, service on the defendants was presumptively proper. An order directing that alternative service be accomplished - when prior service is presumptively proper, is, therefore, unnecessary. In any event, service cannot be considered to be impracticable by other means. The moving papers and opposition papers would have the court speculate and render an advisory opinion on the issue of the possible inadequacy of service already effectuated, which the court is not inclined to do. Furthermore, the court notes that in no event could it authorize alternative service that was in contravention of the service permitted by the Hague Convention. Significantly, no showing has been made by the plaintiff that service on the attorney for the defendants by e-mail or other means is lawful under the Hague Convention.

Finally, the court adds that CPLR 308(5) contemplates a motion without notice. The procedure employed here is, therefore, incorrect, as was noted by the court in conference with the attorneys.

Regarding the plaintiff's motion for an order of attachment, under CPLR 6201 [Grounds for attachment]:

[a]n order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:

1. the defendant is a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in the state; or

* * *

5. the cause of action is based on a judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in this state, or on a judgment which qualifies for recognition under the

provisions of article 53.

Attachment against a non-domiciliary has two purposes: to secure assets for a money judgment or to provide a basis for *quasi in rem* jurisdiction (see *Maitrejean v Levon Properties Corp.*, 45 AD2d 1020 [2d Dept 1974]). "Attachment is * * * strictly a creature of statute and, therefore, because of its harsh nature and, it being in derogation of the common law, the courts have strictly construed the statute creating it in favor of those against whom it may be employed" (*Elton Leather Corp. v First General Res. Co.*, 138 AD2d 132, 135 [1st Dept 1988] quoting *Siegel v Northern Blvd. & 80th St. Corp.*, 31 AD2d 182, 183 [1st Dept 1968]). "The decision whether to grant a motion for an order of attachment or to confirm or vacate such an order ultimately rests within the sound discretion of the court" ([Krineta Enters. Co. Ltd. v Lavidas](#), 48 Misc 3d 1219(A) [Supreme Court NY County 2015]).

The plaintiff's application, though satisfying explicit statutory requirements (CPLR 6201[1], [5] & 6212[a]), fails to demonstrate that an order of attachment is necessary for jurisdictional purposes. Significantly, attachment effected after service of the summons cannot serve as the predicate for *quasi in rem* jurisdiction (*Nemetsky v Banque de Dev. de La Republique Du Niger*, 48 NY2d 962 [1979]; 12-6211 New York Civil Practice: CPLR P 6211.04 ["When an attachment is used for jurisdictional purposes, it is essential that the order be granted before service is commenced']). As noted above in connection with plaintiff's motion concerning service of the summons and complaint, the presumptive regularity of the service plaintiff has accomplished renders meritless the plaintiff's argument concerning the necessity of attachment to secure jurisdiction. Moreover, that actions pursuant to CPLR 5303 for enforcement of foreign country money judgments have been "exempted from the due process requirements of personal jurisdiction" ([Abu Dhabi Commercial Bank PJSC v Saad Trading](#), 117 AD3d 609 [1st Dept 2014]) further undermines plaintiff's jurisdictional argument herein.

Notwithstanding, where attachment is sought to secure payment of a foreign judgment that is likely to be recognized, some showing of necessity—less than what is required for pre-judgment attachments, is required (*eg*

Nippon Emo-Trans, Co., Ltd. v Emo-Trans, Inc., 744 FSupp 1215, 1235 [EDNY 1990]. [\[EN1\]](#)

In *Krineta Enters. Co. Ltd. v Lavidas (supra)*, the Supreme Court, in deciding a motion to confirm an order of attachment, stated the following, which is relevant to the analysis here:

On a motion to confirm an order of attachment, the plaintiff has the burden of establishing "that there is a cause of action, that it is probable that the plaintiff will succeed on the merits, that one or more grounds for attachment provided in section 6201 exist, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff." CPLR 6212(a); see *Ford Motor Credit Co. v Hickey Ford Sales, Inc.*, 62 NY2d 291, 465 N.E.2d 330, [*3]476 N.Y.S.2d 791 (1984); *Faberge Intl., Inc. v Di Pino*, 109 AD2d 235, 491 N.Y.S.2d 345 (1st Dept. 1985); *Computer Strategies, Inc. v Commodore Business Machines, Inc.*, 105 AD2d 167, 483 N.Y.S.2d 716 (2nd Dept. 1984). In addition to the statutory requirements for an attachment, there must be some identifiable necessity for the attachment, such as the "risk that the defendant will not be able to satisfy the judgment." *VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 60, 967 N.Y.S.2d 338 (1st Dept. 2013).

At bar, contrary to the contentions of the defendants, their conduct has gone beyond merely refusing to pay an arbitral award. Instead, defendants have attempted to "unseat" the appointed arbitrator, threatened him with prosecution for contempt, thwarted issuance of the Singapore arbitration award by obtaining injunctive relief in Pakistan—the jurisdiction where the defendants are located, exhorted the Pakistan court to declare New York arbitral enforcement proceedings "illegal" and order that they cease, and contested jurisdiction in New York while failing to cite both New York's liberal jurisdictional policies in terms of enforcement proceedings under CPLR Article 53, and Pakistan's authorization of service by mail under the Hague convention (*see Star Industries Inc. v Innovative Beverages Inc.*, 2007 NYMisc LEXIS 8821 [Supreme Court Nassau County 2007] [order of attachment granted considering evidence that defendants engaged in course of conduct designed to frustrate the enforcement of money judgment]). That the arbitral award remains unpaid, therefore, is but one indication of the need for security (see

Siegel, Practice Commentary, McKinney's Cons Laws of NY, Book 7B, CPLR 6201, at p.19 ["The defendant [a foreign judgment debtor] in such cases is an obvious security risk based on non-payment of the former judgment * * * and the claim is prima facie meritorious based on the judgment itself."]).

Accordingly, it is ordered that the branch of the motion for an order of attachment pursuant to CPLR 6210 is granted. The court shall herewith issue an order of attachment in the form annexed to the motion papers, in conformity with CPLR 6212; the undertaking required in the order of attachment shall be posted as indicated therein.

This constitutes the decision and order of the court.

Dated: November 17, 2015

Hon. Vito M. DeStefano, J.S.C.

Footnotes

[Footnote 1](#): Arguably, the same analysis applies with respect to CPLR 6201[1].

[Return to Decision List](#)