

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

BURRELL COLOR, LLC,

Plaintiff,

v.

DONALD J. BURRELL, ALICE M. BURRELL,
and THE BANK OF NEW YORK,

Defendant.

DECISION AND ORDER

Ind # 2005/01317

This is a motion under CPLR 6212 and CPLR 6201(1) for an order of attachment against the balance of funds held by the escrow agent, The Bank of New York (BNY) which was scheduled for payment to Mr. and Mrs. Burrell on February 4, 2005, upon the nonoccurrence of certain events described in the Escrow Agreement. It appears that the Burrells sold their interest in ten corporations to Eastman Kodak Company pursuant to stock purchase agreements that contemplated that a percentage of the purchase price, totaling in excess of \$6 million, would be placed in escrow and released to the Burrells in three stages over two years, the last payment being due February 4, 2005. Kodak's interest in the agreement was subsequently assigned to plaintiff.

Under the Escrow Agreement, Kodak (and now plaintiff) could make a claim to any portion of the escrow funds by serving an "Effective Notice of Direction" to BNY. The Burrells were permitted to dispute the "direction" within 30 days, or serve a notice in writing that the direction is not disputed. Where

disputed, the Escrow Agreement provides a mechanism for voluntary agreement by the parties, and a provision for arbitration if the parties could not agree. The Escrow Agent could only make payment, in the event of an effective disputed direction, in accordance with a voluntary agreement ("Agreed Order") or an "Arbitration Order" directed to BNY. In the absence of an outstanding direction, or in the case of funds slated for payment on the indicated dates (30 days after the sale, one year after the effective date, and two years after the effective date) which are not subject to a then existing disputed direction, payment by electronic transfer was to be made to the Burrells. On the other hand, if a direction by the plaintiff was not disputed by the Burrells within 30 days after service thereof, payment must be made by BNY "in accordance with such direction." A tardy notice of dispute must be "ignore[d]" by the escrow agent. The Escrow Agreement was to terminate upon exhaustion of the escrow account, presumably on February 4, 2005.

In this case, with the February 4th payment to the Burrells fast approaching, plaintiff served an effective notice of direction with respect to the remaining balance of \$856,415.99, on February 1, 2005. Thereafter, the Burrells acknowledged service and stated that they would investigate the claims in the direction, but not until after the February 4th presumptive deadline. When BNY informed plaintiff that it intended to make

payment to the Burrells on February 4, plaintiff filed suit and sought a temporary order of attachment, by order to show cause which was granted ex parte. The order to show cause brought on this motion for an order of attachment pursuant to CPLR 6212 and 6201(1). The Burrells vigorously oppose the attachment, and seek a substantial undertaking if it is continued.

DISCUSSION

To obtain an attachment, CPLR 6212 requires, insofar as is pertinent here, that plaintiff establish (1) grounds for the attachment under CPLR 6201, (2) that there is a cause of action, and (3) that it is probable that the plaintiff will succeed on the merits. Many of defendants' objections to the attachment have no merit, but one objection does have merit.

First, under CPLR 6201(1), that defendants have consented to jurisdiction is not determinative if there is sufficient reason to order an attachment for security reasons. ITC Entertainment, Limited v. Nelson Filmo Partners, 714 F.2d 217, 220 (2d Cir. 1983); Elton Leather Corporation v. First General Resources Company, 138 A.D.2d 132, 135-36 (1st Dept. 1988). Second, defendants' objection that the escrowed funds do not belong to them and, therefore, are beyond the attachment statute is without merit. CPLR 6202; CPLR 5201(a) ("any debit which is past due or which is yet to become due"); Koroleski v. Badler, 32 A.D.2d 810 (2d Dept. 1969) ("judgment debtor retained sufficient control over

the fund"). See Gala Enterprises, Inc. v. Hewlett Packard Co., 970 F.Supp. 212, 217 (S.D.N.Y. 1997) ("Escrow accounts may be subject to writs of attachment . . ."). It is only in the case of a defendant who "retain[s] no interest in the escrowed funds" that the escrow account is not attachable. Lang v. State, 258 A.D.2d 165, 171 (1st Dept. 1999). See also, D. Siegel, New York Practice §488 at 791 (3d ed. 1999).

Third, defendants' reading of the Escrow Agreement is not satisfactory; plaintiffs have shown a probability of success on the merits. The parties offer two plausible readings of the agreement. Defendants contend that the agreement does not tolerate a notice of direction after 30 days prior to a scheduled payment. Thus, according to defendants, plaintiff's notice four days prior to the scheduled payment and termination of the agreement is ineffectual. Plaintiff, however, contends that the agreement does not address the tardiness of a notice of direction, as it does for example in the case of a tardy notice of dispute (which must be "ignore[d]"), and that therefore an effective notice of direction was served, has gone undisputed, requiring payment in accordance with the direction, not to the Burrells (§3(e)).

Plaintiff rightly posits both of these scenarios as leading to an absurd result not in keeping with the parties' manifest intent when entering into the stock purchase and escrow

agreements. An agreement will not be interpreted by a court in a manner which produces an absurd or unreasonable result at variance with the parties' evident intent, which "is a paramount consideration when construing a contract." Reape v. New York News, Inc., 122 A.D.2d 29, 30 (2d Dept. 1986) ("even the actual words provided therein may be transplanted, supplied or entirely rejected to clarify the meaning of the contract"). See also, Castellano v. State of New York, 43 N.Y.2d 909, 911-12 (1978) (affirming that, when "words may be transposed, rejected, or supplied, to make its meaning more clear," this is "a question of interpretation," instead of "a reformation"); TRI-Messine Constr. Co., Inc. v. Telesector Resources Group, Inc., 287 A.D.2d 558 (2d Dept. 2001). Accordingly, plaintiff does not insist in this motion that payment be made in accordance with the direction, but only that the 30 day dispute period be measured as of the date it served the direction, and that the other dispute resolving and payment mechanisms of the Escrow Agreement otherwise be observed.

Defendants' insistence that the agreement effectively provides that a notice of direction cannot be effective unless served in time to allow the 30 day dispute period to expire before scheduled payment is not required by any express term of the agreement. As stated, the agreement treats a tardy notice of dispute as ineffectual, because it must be "ignore[d]" by BNY,

but it nowhere prescribes treatment of a notice of direction as ineffectual, whether because of its timing or otherwise. Such an omission, in the face of language specifically addressing the tardiness of a notice of dispute, is telling. If the parties had intended that a notice of direction be ineffectual for any reason, words were certainly available, but not chosen by these sophisticated businessmen, to make that intent clear.

In other words, both party's divergent reading of the agreement may place undue emphasis on the scheduled payment dates. Service of the direction triggered a 30 day dispute period, regardless of its timing, and, the way the agreement reads, payment "in accordance with such direction" could be forestalled only by a notice of dispute from the Burrells. (§3(f)). Otherwise, payment must be made in accordance with the direction. Moreover, a payment in accordance with the direction could be forestalled by a notice of dispute only when the latter is received "during the Dispute Period." §3(e) (emphasis supplied). Nothing in the agreement expressly provided that the 30 day dispute period could be truncated by the scheduled payment dates.

Defendants decry a scenario in which the "plaintiff could wait until the last minute, as it did here, serve a Notice of Direction just prior to the expiration of the escrow agreement, and eliminate the Burrells' ability to adequately investigate the

claims made in the direction and make an informal decision as to whether or not it should be disputed." Defendants suggest that, "by sandbagging and waiting until the last moment despite prior knowledge of all . . . [their claims to the money], plaintiff is able to force the Burrells to make an important decision without the time necessary to adequately investigate and evaluate the matter." Defendant's Memorandum of Law, at 17.¹ But taking defendants' argument to its logical extreme belies the fallacy of this reasoning. If plaintiff served the notice of direction as much as 29 days prior to the scheduled payment date, defendants would have had the necessary time to investigate and evaluate plaintiff's proposed directions that they now claim is lacking, but still compel payment to themselves on the scheduled date simply by the device of refusing to interpose a notice of a meritorious dispute. Reiss v. Financial Performance Corp., 97 N.Y.2d 195, 201 (2001) (courts "should not assume that one party

¹ Defendants employ this argument to avoid what they characterize is plaintiff's argument-in-equity that the funds not be disbursed while its claims are pending. But plaintiff does not make an equitable claim for reformation of the contract, and, as stated above, the court is only engaging in the familiar process of contract interpretation when considering this probability of success issue. Castellano v. State of New York, 43 N.Y.2d 909, 911-12 (1978) (affirming that, when "words may be transposed, rejected, or supplied, to make its meaning more clear," this is "a question of interpretation," instead of "a reformation"); TRI-Messine Constr. Co., Inc. v. Telesector Resources Group, Inc., 287 A.D.2d 558 (2d Dept. 2001).

intended to be placed at the mercy of the other").² In both scenarios, the party in question, plaintiff under defendants' scenario and defendants in this latter scenario, would unfairly benefit from a device unilaterally employed to defeat the intent of the agreement to preserve funds in escrow pending resolution of disputes. The answer is to hold the 30 day dispute period inviolate, preserving to the parties an orderly dispute resolving mechanism while the funds continue in escrow. This is an interpretation more in keeping with the language quoted above from §3(e) and §3(f), each of which emphasizes that a payment in accordance with a direction cannot be forestalled except by an effective notice of dispute served "during the Dispute Period." Just as plaintiff is not entitled to payment pursuant to the direction (in the absence of a dispute interposed by the date of scheduled payment), defendants are not entitled to payment pursuant to §3(g)(iii) simply because the scheduled payment date falls prior to the expiration of the 30 day dispute period because they unilaterally chose not to dispute the direction prior to the scheduled payment date but well before expiration of the dispute period.³

² The principle was distinguished in Reiss, but on facts wholly different than those present here.

³ Defendants rely on the parties' prior conduct in a similar circumstance of a direction served shortly prior to a scheduled payment date, and plaintiff's subsequent service of a direction more than 30 days prior to the next scheduled payment date. It

Accordingly, plaintiff shows a probability of success on the merits of their claim for anticipatory breach. Defendants contend that this interpretation of the Escrow Agreement cannot square with the interests in finality, certainty, and closure to the transaction. But the agreement evidences another paramount interest of the parties, i.e., that funds be held in escrow until resolution of any disputes arising from the potential liabilities of the corporations sold to plaintiff's predecessor as they

may reasonably be argued that the parties' conduct when the escrow fund was flush with cash is hardly a true reflection of the parties' intent when drafting these provisions. For an illustration of the converse situation, see Judge Posner's opinion in Matter of Xonics Imaging, Inc., 837 F.2d 763, 767 (7th Cir. 1988). See also, Matter of Elcona Howes Corp., 863 F.2d 483, 487 (7th Cir. 1988) (Posner, J.) ("a practice may be evidence of an obligation, may give meaning to vague terms, and so on; but it is not the equivalent of it"). In any event, plaintiff correctly points out that the parties agreed to non-waiver provisions, §8(b), concerning such parole conduct. "If every forbearance to enforce a contract to its hilt operated to modify the contract against the party exercising forbearance, such forbearance would become rare; promisees would always insist on exact performance of the promisor's obligation and default and litigation would become more frequent." Id. 863 F.2d at 487. The point is that, while the parties' conduct in performance of the contract "[may] be used to indicate their intent," United States Fidelity and Guaranty Co. v. Delmar Dev. Partners, LLC, ___ A.D.3d ___, 788 N.Y.S.2d 252, 254 (3d Dept. 2005) (quoting Estate of Hath v. NYCO Minerals, Inc., 245 A.D.2d 746, 749 (3d Dept. 1997)); see also, Town of Pelham v. City of Mt. Vernon, 304 N.Y. 15, 23 (1952), it may not be determinative, especially if there is only isolated conduct referred to. It will be for the trier of fact to determine the ultimate effect of defendants' claim concerning the parties subsequent course of conduct, and whether it was referable to the parties' intent, or instead was only a reaction to avoid further controversy (created by the timing of the first direction) when confronted with defendants' Indiana counsel's lengthy e-mail (submitted as part of defendants' exhibits).

became known. An interpretation which truncates the 30 day dispute period, either to compel payment to the Burrells under §3(g) or to compel payment to the plaintiffs under §3(e)-(f), would do considerable violence to the agreement as a whole. Reis v. New York News, Inc., supra.

Nevertheless, plaintiff is not entitled to an order of attachment. Although as plaintiff contends the statute itself requires no showing that a non domiciliary is insolvent or will secret assets, and although Professor Siegel has opined that plaintiff's burden under subdivision (1) is "ever so much lighter" than plaintiff's burden under subdivision (3) of CPLR 6201, Siegel's Practice Review, No. 95 (May 2000), courts have consistently held that a prejudgment order of attachment under subdivision (1) should only be granted in the court's discretion when there is "a showing that drastic action is required for security purposes.'" Reading & Bates Corp. v. Nat'l Iranian Oil Co., 478 F.Supp. 724, 726-27 (S.D.N.Y. 1979) (quoting Incontrade, Inc. v. Oilborn Int'l, S.A., 407 F.Supp. 1359, 1361 (S.D.N.Y. 1976)). See Bank of China, New York Branch v. NBM, LLC, 192 F.Supp.2d 183, 187-88 (S.D.N.Y. 2002) (collecting cases for the proposition that, "where jurisdiction over a defendant exists" and the only purpose of a prejudgment attachment is security, "a different analysis should apply than that used for jurisdictional attachments'" (quoting Reading & Bates, 478 F.Supp. at 726); 2

N.Y. Practice Series, Commercial Litigation in New York State Courts §15:24 (2d ed. 2004) (same).

This additional showing is required because, otherwise, "an attachment order would raise a serious equal protection concern: the attachment procedure would discriminate against non domiciliaries residing outside the state by allowing their property to be attached while the property of New York domiciliaries and residents is protected unless there is a showing that such New York domiciliaries and residents are attempting to dispose of their assets to frustrate the plaintiff's ability to collect a judgment." Id. §15:24, at 897. See Ames v. Clifford, 863 F.Supp. 175, 177 (S.D.N.Y. 1994). Inasmuch as the 1977 amendments were designed to rid New York's attachment statutes of constitutional concerns, CPLR 6201, Practice Commentaries, C6201:1 at 11 (McKinney's 1980), and because a statute should be interpreted so as to avoid constitutional concerns, McKinney's Consolidated Laws of New York, Book 1, Statutes §150 (1971), the court reads the "drastic action" requirement into the statute as nearly every court that has considered it has. Sylmark Holdings Limited v. Silicone Zone International Limited, 5 Misc.3d 285, 301 (Sup. Ct. N.Y. Co. 2004) (request that plaintiff prove "an identifiable risk that the defendant will not be able to satisfy any such judgment"); Credit Agricole Indosuez v. Rossiyskiy Credit Bank, 38 U.C.C. Rep.

Serv.2d 973 (1999 WL 1293466) (Sup. Ct. N.Y. Co. May 10, 1999) (granting attachment upon showing that defendants "have been rendered incapable of meeting their financial obligations"), aff'd, 265 A.D.2d 257 (1st Dept. 1999), rev'd on other gr., 94 N.Y.2d 541 (2000).

CONCLUSION

The motion for an attachment is denied. The parties indicated that they would negotiate the notice of direction, and ultimate payment to the Burrells. I would like a schedule put in place for the negotiations and offer the services of the court to aid settlement. It appears from defendants' submissions that a great deal of plaintiff's concerns may be easily resolved. A conference is scheduled March 3, 2005, at 9:00am.

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: February __, 2005
Rochester, New York