SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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BANQUE INDOSUEZ,

Plaintiff,

-against-

Index No.
121719/94

SOPWITH HOLDINGS CORP., ALGOL INVESTMENT COMPANY LIMITED, TRISHA INVESTMENTS LIMITED, and OPTIMUM INVESTMENTS, INC.,

Defendants.

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SOPWITH HOLDINGS CORP., ALGOL INVESTMENT COMPANY LIMITED, TRISHA INVESTMENTS LIMITED, HUNGARIAN INVESTMENTS, INC., and OPTIMUM INVESTMENTS, INC.,

Plaintiffs,

-against-

Index No.
107868/95

BANQUE INDOSUEZ, JORGE GUTIERREZ, and CLEMENCIA "ROSIE" GUTIERREZ,

Defendants.

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and two additional related actions.

Index No.
126843/95
Index No.
600445/96

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BEATRICE SHAINSWIT, J.:

Plaintiff Banque Indosuez moves, pursuant to CPLR 6301, for an order restraining defendants Sopwith Holdings Corp. ("Sopwith"), Algol Investment Company Limited ("Algol"), Trisha Investments Limited ("Trisha"), Hungarian Investments, Inc. ("Hungarian"), Optimum

Investments, Inc. ("Optimum"), Roberto Blatt ("Blatt"), Martin Lustgarten ("Lustgarten"), and Raul Fischbach ("Fischbach") (collectively, "defendants") from attempting to enforce this Court's judgment, entered June 11, 1998, against the Bank. The law firms Katz, Barron, Suitero, Faust & Berman, P.A. and Newman & Company, P.C., who represented Sopwith, Trisha, and Hungarian, move for an order enforcing an attorney's lien, pursuant to Judiciary Law § 475, in an amount equal to 50% of the judgment granted to Sopwith, Trisha, and Hungarian. Trachtenberg & Rodes LLP moves for an order enforcing an attorney's lien in the amount of $28,625.36, pursuant to Judiciary Law § 475.

Background

At trial, the facts established common connections between the individual defendants and the five defendant companies. The five defendant companies are all owned by Blatt, Lustgarten, and Fischbach, and their wives, parents, and children. All are residents of Caracas, Venezuela, and all live in the same apartment house. Four of the five companies share the same mailing address, and the fifth uses Fischbach's Miami apartment as its mailing address. When the individual defendants decided to begin foreign exchange trading in 1990, Lustgarten was Fischbach's prospective son-in-law and Blatt's nephew.

The five companies are owned and controlled by various individuals or combinations thereof: Trisha is owned by Mr. and Mrs. Lustgarten; Optimum is owned by the Fischbach family, and a power of attorney has been given to Lustgarten; Sopwith is owned by Lustgarten and Blatt; Algol is owned by the Blatt family; and Hungarian is owned by Blatt's mother.

The Bank contended, at trial, that defendants owed money as a result of net losses in their foreign exchange trading accounts. Defendants countered that the trades that resulted in those losses

were unauthorized. In reaching its verdict, the jury found that none of the trades made by the bank for defendants were unauthorized, and therefore awarded the Bank $3,138,180.90 against Algol and Optimum, and based upon indemnity provisions, found the individual defendants Lustgarten, Blatt, and Fischbach personally liable to varying degrees for the obligations of Algol and/or Optimum. The jury nevertheless found that the Bank converted the funds of Sopwith, Trisha, and Hungarian when it used their respective funds to cover the trading losses of Algol and Optimum. Pursuant to this verdict, the Court entered judgment awarding Sopwith, Trisha, and Hungarian a total of $2,401,666.61 against the Bank.

On January 26, 1999, the Appellate Division affirmed the judgment. See Banque Indosuez v Sopwith Holdings Corp., 257 AD2d 519 (1st Dept 1999). Cross motions for leave to appeal were denied by the Court of Appeals on May 4, 1999. Banque Indosuez v Sopwith Holdings Corp., 93 NY2d 806 (1999).

On May 11, 1999, this Court signed an order to show cause containing a temporary restraining order preventing defendants from making any attempt to enforce the judgment. Following a hearing held on September 27, this Court directed that the temporary restraining order continue in effect until determination of the instant motions.

In moving for the restraining order, the Bank asserts that it is entitled to set off the amounts it was awarded against Algol, Optimum, and the individual defendants to reduce the amounts the Bank owes to Sopwith, Trisha, and Hungarian. The Bank claims that if Sopwith, Trisha, and Hungarian were to obtain the approximately $2.4 million in assets, the likelihood is that the money would disappear. The Bank asserts defendants are non-resident aliens who have never disclosed the existence of significant assets in the United States, and that defendants are not generally subject to

jurisdiction for discovery in aid of execution under CPLR Article 52. The net result of a set-off, the Bank asserts, is that Algol, Optimum, and the individual defendants are liable to the Bank in the amount of $736,514.29.

The Bank intends to move to amend the judgment to reflect the net amount of $736,514.29 and attorneys' fees, costs, and disbursements. The Bank claims that the recovery it will seek for legal expenses greatly exceeds the portion of the judgment in favor of Sopwith, Trisha, and Hungarian and, accordingly, an injunction against enforcement of the judgment is necessary. The Bank contends a restraining order is necessary to protect it from defendants' threat to enforce the judgment immediately pending entry of a revised form of judgment.

Defendants maintain that the judgment is final and beyond the jurisdiction of this Court to alter. Although the final paragraph of the judgment recites that the Court shall retain jurisdiction for the purpose of determining attorneys' fees and other costs and disbursements, defendants claim the Court did not retain jurisdiction for any other purpose. Defendants further assert that a set-off is not appropriate due to a lack of the requisite mutuality, and that Sopwith, Trisha, and Hungarian will be taking steps to enforce the judgment, not render it ineffectual, and that the Bank is precluded from setting off the judgments against the portion protected by the attorneys' lien under Judiciary Law § 475.

Discussion

It has long been recognized that a set-off is proper only where there is mutuality between the parties, each of whom owes a sum certain to the other. See Scammon v Kimball, 92 US 362, 367 (1875) ("[s]et-off must be understood as that right which exists between two parties each of whom, under an independent contract, owes an ascertained amount to the other to set off their respective

debts by way of mutual deduction . . . ."). More than one century later, this basic principle remains unchanged. See Matter of Midland Ins. Co., 79 NY2d 253, 259 (1992) ("Under our decisions, debts and credits are mutual when they are 'due to and from the same person in the same capacity.'") (quoting Beecher v Peter A. Vogt Mfg. Co., 227 NY 468, 473 [1920]); id., at 264 ("Before an offset will be allowed, the claims must be mutual, i.e., owed between the same persons and in the same right."); Fehlhaber Corp. v O'Hara, 53 AD2d 746, 747 (3d Dept 1976) ("It is axiomatic that 'claims or demands sought to be set off must not only be mutual to the extent that they are owing by each to the other . . . .'") (citations omitted).

In the present case, such mutuality is lacking, as the judgment awarded Sopwith, Trisha, and Hungarian approximately $2.4 million from the Bank and the Bank was awarded more than $3.1 million from Algol and Optimum. Although the entities are no doubt related, as evidenced by their organization and somewhat overlapping owners, the ownership is not identical and the Appellate Division specifically found that the finding of individual liability was not based upon piercing of the corporate veil. Indeed, in signing the judgment, this Court struck the three paragraphs ordering and adjudging the three individual defendants personally and individually liable pursuant to the doctrines of alter ego and piercing the corporate veil. See Judgment, at 8-9. The jury specifically found that three of the five companies were entitled to a recovery from the Bank. It would be contrary to the body of set-off and mutuality case law to prevent Sopwith, Trisha, and Hungarian from collecting on the judgment because the Bank is due additional money from Algol and Optimum.

The Court is sympathetic to the Bank's concerns. Defendants are non-resident aliens who have never disclosed the existence of significant assets in the United States. However, the Bank chose to conduct business in the United States with individuals who reside in Venezuela. It is not

the province of the Court, at this stage of the litigation, to disrupt the jury's finding, especially when the judgment has been affirmed on appeal. Furthermore, as the Appellate Division stated, "[t]he bank could have easily protected itself from the inequities it now claims by properly monitoring the margin accounts or by obtaining cross collateral agreements." Banque Indosuez, supra, 257 AD2d, at 521. In any event, the Bank still has avenues to pursue its judgment not only from Algol and Optimum, but also from Lustgarten, Blatt, and Fischbach, who were all found personally liable to varying degrees in the judgment pursuant to the indemnity agreements.

Moreover, the Bank's request for an order restraining defendants from enforcing the judgment is contrary to established case law holding that attorneys' liens take priority to set-offs. In fact, New York courts have long held that an attorneys' lien is superior to the right of the parties to a set-off, as a set-off would destroy the judgment to which the lien attaches. See Rebmann v Wicks, 259 AD2d 972, 973 (4th Dept 1999) ("Supreme Court properly determined that the attorney's charging lien is superior to defendant's right of setoff pursuant to the judgment obtained by defendant in a subsequent action."); Weiser v City of New York, 16 AD2d 666, 667 (2d Dept 1962) (attorneys' lien has priority over a set-off of a judgment); Dunn v Bleeck, 246 AD 382, 384 (3d Dept 1936) (set-off not permitted if it would defeat an attorney's lien); Kretsch v Denofrio, 137 AD 617 (1st Dept 1910) (if attorneys have a valid lien, it is superior to the right of a set-off, for a set-off would destroy the judgment to which the lien attaches). The reasoning behind this principle is that an attorney acquires a vested property interest in the cause of action, superior to the future judgment creditors, upon commencement of the action or proceeding. LMWT Realty Corp. v Davis Agency Inc., 85 NY2d 462, 467 (1995). See also, Estate of Dresner v State of New York, 242 AD2d 627, 628 (2d Dept 1997) (same); Lopez v City of New York, 152 Misc2d 817, 820 (Sup Ct, Bronx

Cty1991) (because an attorney's lien comes into existence when complaint is served and is superior to the lien of any judgment creditor, "[i]t has long been held that parties cannot offset judgments so as to defeat an attorney's lien.").

As for the request by the Bank for costs and attorneys' fees, the final paragraph of the June 11 judgment states:

> pursuant to the agreement of counsel, (i) taxation of costs and (ii) the claims brought by BANQUE INDOSUEZ for attorneys' fees and other costs and disbursements, pursuant to the provisions of the agreements between the parties, and all discovery, if any, that may be sought pertaining thereto, shall be and the same hereby are stayed and deferred pending the final determination of any and all appeals from this judgment, and the Supreme Court of the State of New York, County of New York, shall retain jurisdiction of this matter for the purpose of adjudicating said claims of BANQUE INDOSUEZ and taxing costs.

Judgment at 9-10. Accordingly, the parties agreed that the claims for attorneys' fees, costs, and disbursements would be determined following all appeals of the judgment. The parties further agreed that this Court retains jurisdiction for the purpose of adjudicating such claims.

Because the Appellate Division has affirmed the judgment and the Court of Appeals has denied leave to appeal, pursuant to the June 11 judgment, this Court may address the claims for the Bank's attorneys' fees, costs, and disbursements. At this time, however, such action is premature, as the Bank has yet to submit to the Court a motion or any documentation for such costs.

As for the claim by the Bank that the defendants' attorneys' lien claims have not been adequately proven, copies of retainer agreements have been provided to the Court. See Newman Reply Aff. in Opposition, Exh. B. These agreements provide that Katz, Barron, Suitero, Faust & Berman, P.A. would be entitled to a contingency fee of 47% and Newman & Company, P.C. to 3% of the judgment obtained by Sopwith, Trisha, and Hungarian. The agreements specifically state that

they apply to claims by Sopwith, Trisha, and Hungarian against the Bank. Accordingly, the request by Katz, Barron, Suitero, Faust & Berman, P.A. and Newman & Company, P.C. to enforce an attorney's lien in an amount equal to 50% of the judgment granted to Sopwith, Trisha, and Hungarian in their claims against the Bank is granted.

As for the motion by Trachtenberg & Rodes to enforce an attorneys' lien, the Court concludes that Trachtenberg & Rodes has failed to provide adequate documentation. It is unclear from the May 5, 1998 correspondence from Trachtenberg & Rodes to Lustgarten whether Trachtenberg & Rodes' representation was for claims against the Bank or for defending claims brought by the Bank. See Rodes Aff., Exh. A. Although Trachtenberg & Rodes asserts it was co-counsel of record for Sopwith, Trisha, and Hungarian, the May 5 letter states that the attorneys' fees sought are in reference to "Banque Indosuez v Sopwith Holdings Corp., et al., New York County Index No. 121719/94." In that action, the Bank recovered against Algol and Optimum. Moreover, the documentation fails to adequately explain what the majority of attorneys' fees derive from. Instead, more than $27,000 is attributed to an unpaid prior statement, without further explanation. It being unclear to the Court at this time that the amount sought by Trachtenberg & Rodes is appropriate, Trachtenberg & Rodes' motion for an order enforcing a lien is denied without prejudice to renewal.

Accordingly, it is

ORDERED that the temporary restraining order signed on May 11, 1999 and continued on September 27 is vacated; and it is further

ORDERED that the Bank's motion for an order restraining defendants from enforcing the June 11, 1998 judgment is denied; and it is further

ORDERED that the motion by Katz, Barron, Suitero, Faust & Berman, P.A. and Newman

& Company, P.C. for an order enforcing an attorney's lien in the amount equal to 50% of the judgment granted to Sopwith, Trisha, and Hungarian is granted; and it is further

ORDERED that the motion by Trachtenberg & Rodes LLP for an order enforcing an attorney's lien in the amount of $28,625.36 is denied without prejudice to renewal.

Dated: January 12, 2000

ENTER:

J.S.C.