Pharma Consult, Inc. v Nutrition Technologies LLC
2004 NY Slip Op 30026(U)
January 29, 2004
Supreme Court, New York County
Docket Number: 5_30060/1233
Judge: Jane S. Solomon
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SCANNED ON 2/3/2004

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. JANE S. SOLOMON PART 55
Justice

Pharma Consult, Inc.

- v -

Nutrition echnologies LLC

INDEX NO. 601233/03

MOTION DATE 1/22/04

MOTION SEQ. NO. 0

MOTION CAL. NO.

The following papers, numbered 1 to 4 were read on this motion tolfor attachment

	PAPERS NUMBERED
Notice of Motion1 Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

ENTERED
FEB 03 2004

FILED
FEB - 4 2004
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: 1/29/04

Dated: 1/29/04

Jane S. Solomon
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55
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PHARMA CONSULT, INC. (F/k/a J.W.S. DELAVAU CO.), PHARMA CONCEPTS, INC. (f/k/a ACCUCORP, INC.), L&R REALTY ASSOCIATES, INC., LR PHARMACEUTICALS, L.P., LESLIE J. LEFF, RONNIE H. LEFF, THE RICHARD M. LEFF 10-YEAR GRANTOR RETAINED ANNUITY TRUST, THE LORRAINE T. LEFF 12-YEAR GRANTOR RETAINED ANNUITY TRUST and JANAK V. VYAS,

Plaintiffs,

-against-

NUTRITION TECHNOLOGIES LLC (f/k/a DELAVAU HOLDINGS, L.L.C.), KEVIN LANG, TIM TANTILLO, TIMOTHY C. COLLINS, GREGORY B. MURPHY, STEPHEN BRYAN, MICHAEL C. DURAN, ROBERT L. BERNER III and PETER E. BERGER,

Defendants,

NUTRITION TECHNOLOGIES LLC (f/k/a DELAVAU HOLDINGS L.L.C.),

Counterclaim Plaintiff.

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DECISION AND ORDER

Index No. 603356/03

JANE S. SOLOMON, J.:

Defendants and counter-claim plaintiffs Nutrition Technologies LLC (f/k/a Delavau Holdings, L.L.C.), Kevin Lang, Tim Tantillo, Timothy C. Collins, Gregory B. Murphy, Stephen Bryan, Michael C. Duran, Robert L. Berner III and Peter E. Berger ("Buyers") move for an order of attachment in aid ***of*** arbitration pursuant to CPLR 7502(c). The motion is denied fc the following reasons.

The individual plaintiffs reside in Pennsylvania. No plaintiff claims a New York domicile, and the corporate plaintiffs are not qualified to do business in New York. Plaintiffs (hereafter referred to as "Sellers") owned companies in the business of supplying vitamins and other nutritional supplements to the pharmaceutical, nutritional supplement and food industries. They sold substantially all their assets in the companies (referred to collectively as "Delavau") to the Buyers pursuant to an asset purchase agreement dated July 12, 2002. The closing occurred in September 2002. The sale price was $163,525,000, subject to adjustments based on a calculation of Delavau's closing net book value and various offsets.

The asset purchase agreement contained an arbitration clause. It also provided for Sellers to deposit five million dollars into an escrow to be used to satisfy claims under Section 8.02 of the asset purchase agreement. In that section, Sellers agreed to indemnify defendants for losses due to "the investigation, cleanup, containment and remediation of contamination . . ." arising from a breach of warranty by Sellers. In addition to the escrow, section 8.02(b) of the purchase agreement provides for a "basket" of $1.55 million, which limits Sellers' liability for certain breach of warranty claims to the extent that they do not exceed the "basket" amount.

Following the closing, disputes arose. Sellers

commenced this action in April 2003, seeking declaratory judgment with respect to Buyers' alleged breach of warranties. In a decision and order dated October 2, 2003 and filed October 8, 2003, Justice Moskowitz of this court directed the parties to proceed with the arbitration, and held Sellers' cross-motion to dismiss the counterclaims in abeyance pending the outcome.[1]

The parties engaged in discovery in this action. Buyers served document requests on Sellers in May 2003. Sellers objected to eleven items, which called for the production of information concerning their assets, bank accounts, investments, tax returns, gifts, etc., on the ground that the request called for improper prejudgment disclosure. Buyers did not seek to compel disclosure of the disputed material.

Buyers contend in the arbitration that they are entitled to a refund of $6,211,008, and Sellers claim that they are entitled to certain offsets. At one point, Sellers conceded the legitimacy of some of Buyers' claims, worth $1.2 million, but, after consulting with accountants, have since concluded that the amount of the concession was excessive. The dispute in arbitration does not involve indemnification for a breach of warranty by Sellers, so the escrow fund is not available to satisfy the arbitration claim.

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[1] That decision and order describes the underlying dispute in much greater detail than called for here.

On this motion, Buyers seek an order of attachment of Sellers' assets under CPLR 7502(c). They argue that an attachment in the amount of $10 million is justified because (1) Sellers are not New York domicilaries, (2) they objected to Buyers' discovery demands regarding the nature of their assets, and (3) they did not pay Buyers on the arbitrable claims they conceded. All of this, Buyers contend, shows that the arbitration award may be rendered ineffectual.

As relevant, CPLR 7502(c) provides that:

> The supreme court in the county in which an arbitration is pending, . . . may entertain an application for an order of attachment in connection with an arbitrable controversy, but only on the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. The provisions of articles 62 and 63 of this chapter shall apply to the application, . . . except that the sole ground for granting of the remedy shall be as stated above.

Article 62 addresses attachment. Under CPLR 6201, an order of attachment may be granted where the plaintiff has demanded and would be entitled to a money judgment against one or more defendants, when the defendant is a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in New York.[2] Each of the Sellers fits one of these descriptions

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[2] Their order in the caption notwithstanding, Buyers are counterclaim plaintiffs and Sellers are defendants on the counterclaim.

CPLR 6212(a) provides that on a motion for an order of attachment, the plaintiff shall show, by affidavit and such other written evidence as may be submitted, 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 CPLR 6201 exist, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff. Buyers have satisfied **all** of these conditions except that they have not shown that it is probable that they will succeed on the merits, but they contend that they need not do so.

In opposition, Sellers contend that Buyers' motion is based on an incorrect evidentiary standard, i.e., Buyers must show that they will succeed on the merits. Sellers further argue that Buyers have not established that the arbitration award **will** be rendered ineffectual. In support of this argument, Sellers claim that the escrow account is located in New York, and when considered together with the $1.55 million "basket".,provides sufficient security for a potential arbitration award in Buyers' favor. They acknowledge that the escrow is not intended to satisfy the arbitration claims, but argue that the arbitrator has broad powers and could order that the escrow fund be released for that purpose.

DISCUSSION

With respect to Sellers' contention that Buyers' motion

must fail because they have not demonstrated a likelihood of success on the merits, the parties have hit upon an apparent anomaly in Article 75. Recently, the Appellate Division, First Department, held in Erber v Catalyst Trading, LLC (303 AD2d 165 [1st Dept 20031) that the criteria for provisional relief set forth in CPLR articles 62 and 63 are not relaxed when relief is sought in aid of arbitration under CPLR 7502(c), and in particular, that the moving party must demonstrate that it is likely to succeed on the merits of the dispute that is to be arbitrated. That position is not unique to the Erber decision, and was perhaps best articulated by the United States Court of Appeals for the Second Circuit in S.G. Cowan Securities Corp. v Messih, which questioned whether due process would allow a court to grant a preliminary injunction or attachment where the applicant had no chance of success on the merits and the harm done to the enjoined or attached party would be irreparable. 224 F3d 79, 84 (2d Cir. 2000).

These rulings are in apparent conflict with that part of CPLR 7502(c) which provides that the "sole ground for the granting of the remedy" is whether a potential award "may be rendered ineffectual." They also require the court to consider the merits of the claim to which arbitration is sought in direct contradiction to CPLR 7501, which states that "In determining any matter arising under this article, the court shall not consider

whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute".

Thankfully, the court does not need to reach this issue to determine the motion. Buyers fail to demonstrate that the award to which they may be entitled may be rendered ineffectual without an attachment. This is a threshold issue under CPLR 7502(c).

In the cases Buyers cite, attachment was granted where the applicant clearly demonstrated how the potential award would be rendered ineffectual. See, Drexel Burnham Lambert Inc. v Ruebsamen, 139 AD2d 323 (1st Dept 1988) (respondent had recently suffered substantial investment losses of its U.S.-based assets, and resided in a country where a judgment for the potential award would be unenforceable ; Countv Natwest Securities Corp. v Jesup, Josephthal &Co., Inc., 180 AD2d 468 (1st Dept 1992)(respondent engaged in liquidating and transferring assets); and Habitations Limited, Inc. v BKL Realtv Sales Corp., 160 AD2d 423 (1st Dept 1990) (individual respondent a non-domiciliary of state who was shown to have traditionally failed to pay creditors, who stated that he intended to remove assets from the state, and who stripped assets from corporate shell respondent).

In this case, Buyers do not demonstrate how an award in their favor may be rendered ineffectual. Sellers received a large infusion of cash from the Delavau sale in September 2002,

and there is no evidence that the funds have been, or may be, secreted such that Buyers would be unable to locate the assets or levy upon them. Whether the objection to Buyers' discovery requests regarding tax information and the nature and location of Sellers' assets was proper is not before the court because Buyers acquiesced to it; however, the objection to what is normally post-judgment disclosure appears to be well-founded. Finally, the question of Sellers' obligation to pay part or all of the amount contested in the arbitration rests in the arbitrator's discretion (see, Justice Moskowitz's decision and order of October 2, 2003, pp. 18-19), and does not provide a basis for directing an attachment of Sellers' assets.

"Attachment is considered a harsh remedy and the statute is strictly construed in favor of the party against whom it may be employed." Glazer & Gottlieb v Nachman, 234 AD2d 105 (1st Dept 1996). For the reasons above, the court exercises its discretion granted under the statute to deny the application. Accordingly, it hereby is

ORDERED that the motion for an attachment is denied.

Dated: January 29, 2004 ENTER:

J.S.C.

Jane S. Solomon

FILED
FEB - 4 2004
COUNTY CLERK'S OFFICE
NEW YORK