

**AIG Asian Infrastructure Fund, L.P. v Bayan  
Telecommunications Holdings Corp.**

2004 NY Slip Op 30072(U)

May 20, 2004

Supreme Court, New York County

Docket Number: 0600260/0260

Judge: Charles E. Ramos

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

PRESENT: Charles Edward Ramos

PART 53

0600260/2003

AIG ASIAN INFRASTRUCTURE FUND  
VS  
BAYAN TELECOMMUNICATIONS

SEQ 1

SUMMARY JUDGMNT/LIEU COMPLAINT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ,..	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

MAY 26 2004

NEW YORK  
COUNTY CLERK'S OFFICE

*Motion is decided in accordance with  
accompanying Memorandum Decision.*

MOTION/CASE IS RESPECTFULLY REFERRED TO  
JUSTICE

Dated: 5/20/04

  
**CHARLES E. RAMOS** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK:COMMERCIAL DIVISION

-----X  
AIG ASIAN INFRASTRUCTURE FUND, L.P.,

Plaintiff,

-against-

Index No. 600260/03

BAYAN TELECOMMUNICATIONS HOLDINGS  
CORPORATION, and BENPRES HOLDINGS  
CORPORATION,

Defendants.

-----X

**Charles Edward Ramos, J.S.C.:**

Plaintiff AIG Asian Infrastructure Fund L.P. (AIG) moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint to recover \$44,485,987.18. Defendants Bayan Telecommunications Holdings Corporation (Bayantel) and Benpres Holdings Corporation (Benpres) cross-move, pursuant to CPLR 3211 (a) (8), to dismiss the action for lack of personal jurisdiction.

Plaintiff is a Bermuda limited partnership whose partners include citizens of foreign states and a number of substantial pension and institutional investors from the United States. Defendant Bayantel, a Philippines corporation, is a telecommunications service provider, offering a full range of switched and dedicated local exchange networks, wireless, national and international long distance services to residential and business carrier customers in the Philippines. Defendant Benpres, also a Philippine corporation, is a holding company that has interests in broadcasting and cable communications, power generation and distribution, and banking, and controls Bayantel.

On January 16, 1998, the Issue Date, plaintiff entered into

a Subscription Agreement, to purchase from defendant Bayantel 700,000 shares of Preferred Stock at a price of \$50.00 per share, for a total purchase of \$35,000,000. The purchase was evidenced by the issuance of two stock certificates representing 100,000 and 600,000 shares, respectively. The terms and conditions of the Preferred Stock are set forth in the Certificate as to Terms and Conditions of Series A Convertible Preferred Stock of Bayantel, dated January 6, 1998, and attached as Schedule C to the Subscription Agreement. Also on January 16, 1998, defendant Benpres issued an irrevocable and unconditional guarantee of Bayantel's obligations under the subscription Agreement.

Plaintiff alleges that, under the Terms and Conditions Paragraph 7 (d), if Bayantel does not consummate an Initial Public Offering (IPO), prior to the Final Maturity, which is defined as the fifth anniversary of the Issue Date that falls on January 16, 2003, Bayantel shall redeem the Preferred Stock in cash, in an amount equal to the aggregate of the Face Value of the shares (i.e., the purchase price of the shares), plus accrued and unpaid dividends to the date fixed for redemption and an additional final dividend that will provide plaintiff with an effective annual yield of six and one-half percent (6.5%) compounded annually, from the Issue Date to the later of Final Maturity or the date of payment. Plaintiff asserts that Bayantel had not commenced an IPO, and that consequently it was required under Paragraph 7 (d) to redeem the Preferred Shares in accordance with the payment formula stated in the Terms and

Conditions, and that it has not done so, and neither has Benpres, its guarantor, resulting in a default.

Plaintiff calculates the amount due as \$44,485,987.15. The face value of the Preferred Stock is \$35,000,000, plus an annual compounded yield of 6.5% for a total of \$47,953,033, less advance dividends of \$3,46,045.82. Plaintiff has brought this motion for summary judgment in lieu of complaint, claiming that the Subscription Agreement **with** its Terms and Conditions and the Guaranty constitute instruments for the payment of money only, that these obligations are due and owing, and that they have not been satisfied by either of the defendants, who refuse to pay to redeem the Preferred Stock.

Defendants argue that they are Philippine corporations, that conduct business operations in the Philippines and not in New York, and that there are not minimum contacts for personal jurisdiction in this State. Plaintiff maintains that jurisdiction is founded on consent, based upon the terms of the Stock Subscription Agreement and the Guaranty that contain, respectively, Bayantel and Benpres' formal agreement to jurisdiction.

Defendants argue that the consent to jurisdiction is invalid, in that plaintiff has already elected to bring an action for securities fraud, based on the same transaction, in the Federal District court for the Southern District of New York, and that plaintiff is precluded by the terms of the consent from pursuing a separate action in state court, once it has elected to

proceed in Federal court. Defendants rely upon AGR Financial, L.L.C. v Ready Staffing, Inc., 99 F Supp2d 399 (SD NY 2000). Plaintiff counters that, the AGR Financial case is distinguishable in that the forum selection clause in that case was an exclusive forum selection, whereas, the forum selection provisions of the instant Subscription Agreement and Guaranty are not exclusive, and so will not serve to preclude the relief sought in state court.

The Subscription Agreement Section 8.3 provides as follows:

Jurisdiction: Agent for Service of Process

Each of the parties hereby irrevocably submits to the non-exclusive jurisdiction of any New York State or Federal court sitting in **New** York City and any appellate court for any appeal thereof in any action proceeding against such party arising out of or relating to this Agreement, and each of the parties irrevocably agrees that all claims in respect of such action or proceeding may be heard and determined in such New York State court or in such Federal court. Each of the parties hereby irrevocably waives to the fullest extent permitted by applicable law the defense of an inconvenient forum to the maintenance of such action or proceeding. Each of the parties hereby irrevocably appoints CT Corporation System, with an office on the date hereof at 1633 Broadway, New York, New York 10019, as its agent to receive on its behalf and on behalf of its property, service of copies of the summons and complaint and any other process that may be served in any such action or proceeding.

The Guaranty in Section 5.3 parallels the consent language quoted above, and goes on to provide:

[n]o failure or delay by the Investors in exercising any right, power or privilege hereunder shall operate as a waiver thereof nor shall any partial exercise thereof or the exercise of any other right, power or

privilege. The rights and remedies herein provided shall be cumulative and not exclusive of any rights or remedies provided by law.

In essence, the defendants read these provisions as providing an either/or alternative between New York State courts and Federal courts located in New York, and that once a choice is made the other option is no longer viable, citing AGR Financial. Plaintiffs argue that this reading would create exclusive jurisdiction *in* one forum, where the language of the jurisdictional provisions of the Subscription Agreement and the Guaranty clearly indicate that they create non-exclusive jurisdiction.

The parties to an agreement may consent in advance to submit to the jurisdiction of a court which would otherwise not have personal jurisdiction over them. Banco do Comercio e Industria de Sao Paulo S. A. v Esusa Engenharia e Construcoes S.A., 173 AD2d 340 (1st Dept 1991). The United States Court of Appeals for the Second Circuit Court of Appeals in John Boutari and Son, Wines and Spirits, S.A. v Attiki Importers and Distributors Inc., 22 F3d 51, 53 (2d Cir 1994) quoting **Judge** Weinfeld in City of New York v Pullman, Inc., 477 F Supp 438, 442 n.11 (SDNY 1979) held that:

an agreement conferring jurisdiction in one forum will not be interpreted as **excluding** jurisdiction elsewhere unless it contains specific language of exclusion \* \* \*

The forum selection clause in AGR Financial clearly indicates the parties intent to make jurisdiction exclusive. There the forum selection clause vests AGR with the right to

elect the forum site, unless it expressly waives it in writing, so that once AGR chooses either and a Federal court in New York or a New York state court exclusive jurisdiction is set and can only be changed by written waiver of AGR. No such language is present in either the Subscription Agreement, nor the Guaranty to support a similar reading. These forum selection clauses explicitly indicate that the forum selection is non-exclusive, and where the language follows this format, it has been found to grant concurrent jurisdiction in the courts of the State of New York and the Federal courts in New York. Congress Financial Corp. v Bortnick, 2000 WL 1634248 (SD NY 2000). Consequently, this court has personal jurisdiction over the defendants, based upon their consents in the Subscription Agreement and Guaranty.

While plaintiff alleges that there was a preliminary meeting in New York in an attempt to establish jurisdiction under CPLR 302 (a) (1), the court need not address this argument, because there is jurisdiction premised upon consent.

Defendants contend that summary judgment in lieu of complaint is unavailable. They assert that the documents relied upon by plaintiff are not instruments for the payment of money only, as required by CPLR 3213, and that plaintiff has not alleged, nor complied, with the condition precedent to payment that it present its shares for redemption. Plaintiff argues that the documents here are analogous to the document that was found to be an instrument for the payment of money only in Diversified Investors Corp. v DiversiFax, Inc., 239 AD2d 231 (1st Dept), ly

dismissed 90 NY2d 935 (1997). In Diversified Investors, the agreement provided that the debt would be automatically reinstated and unconditionally due on October 13, 1995, upon the failure of Fax to register the shares.

A document will come within the ambit of CPLR 3213, "if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms." Interman Indus. Prods. v R.S.M. Electron Power, 37 NY2d 151, 155 (1975). The document will not qualify for treatment under the section, "if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document." Weissman v Sinorm Deli, Inc., 88 NY2d 437, 444 (1996).

Section 7 (d) of the Terms and Conditions appended to the Subscription Agreement provides that

If the Bayantel IPO is not consummated prior to the Final Maturity, then at the Final Maturity, the Corporation shall redeem all the outstanding Convertible Preferred Stock by paying therefor in cash an amount ( the "Yield to Final Redemption") equal to the aggregate of the Face Value of the shares to be so redeemed, plus accrued and unpaid Dividends thereon to the date fixed for redemption (net of the Benpres Advance), and an additional final dividend that **will** provide the holders of the Convertible Preferred Stock with an effective annual yield (in U.S. dollars) of six and one-half percent (6.5%) compounded annually from the Issue Date to the Final Maturity or the date of actual redemption (in the case of a payment default), whichever is later.

Section 7 (e) provides "that payment of the redemption price will be made upon presentation of share certificates for the Convertible Preferred **Stock** to be redeemed \* \* \*."

Plaintiff has not alleged that the shares have been presented for redemption.

Unlike the agreement in Diversified Investors, here the language of the Subscription Agreement, quoted above, speaks of redemption of shares and not the reinstatement of a debt. In addition, payment is made conditional upon the presentation of the shares. The terms of the Subscription Agreement provide for more than the mere payment of money only, it calls for the buying back of the shares, that involves a duty on the part of plaintiff to present the shares to obtain payment. Under the circumstances, it cannot be said that the Subscription Agreement is an instrument susceptible to enforcement, under the provisions of CPLR 3213. Weissman v Sinorm Deli, Inc., supra.

The right to payment from Benpres on the Guaranty occurs when the right to redemption **arises** under the Terms and Conditions appended to the Subscription Agreement. As with the obligation of Bayantel, the obligation of Benpres will not arise until the five years have passed without an IPO, and the plaintiff has presented its shares for redemption. Thus, the Guaranty suffers from the same infirmities as the Subscription Agreement in that it calls for more than the payment of money and also requires proof extraneous to the instrument of the satisfaction of a condition precedent, the presentation of the shares. This renders the Guaranty as well not suitable for treatment, under CPLR 3213.

Consequently, the motion for summary judgment in lieu of

complaint must be denied and dismissed. The matter cannot be converted to an action, at this time, because plaintiff fails to allege that a condition precedent, presentation of the shares, has been satisfied in order to state a claim for breach of contract .

Plaintiff may bring a new plenary action for breach of contract under a complaint that corrects the deficiency in its motion papers, or it may amend the complaint in the federal action to assert the claim in that court.


Accordingly, it is

ORDERED that the cross motion by defendants to dismiss for **lack** of personal jurisdiction is denied; and it is further

ORDERED that the motion by plaintiff for summary judgment in lieu of complaint is denied, and the matter is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that Clerk is directed to enter judgment accordingly.

Dated: May 20, 2004

  
\_\_\_\_\_  
J.S.C.

**FILED** **ES E DAMOS**  
**MAY 26 2004**  
NEW YORK  
COUNTY CLERK'S OFFICE