

**Gryphon Domestic VI, LLC v APP International  
Finance Co., B.V.**

2005 NY Slip Op 30064(U)

May 23, 2005

Supreme Court, New York County

Docket Number: 0603315/3315

Judge: Helen E. Freedman

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

PRESENT HELEN E. FREEDMAN  
*Justice*

PART 39

GRYPHON DOMESTIC VI, LLC, et al.

INDEX NO. 603315/02

Plaintiffs,

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

- v -

MOTION SEQ. NO. 20

APP INTL. FIN.CO., D.V., et al.

Defendants.

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 [x] No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with accompanying memorandum decision.

Dated: <sup>23</sup> May 10, 2005

  
\_\_\_\_\_  
Helen E. Freedman, J.S.C.

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK IAS PART 39

-----X  
GRYPHON DOMESTIC VI, LLC, OCM,  
OPPORTUNITIES FUND II, L.P., OCM,  
OPPORTUNITIES FUND III, L.P., COLOMBIA/HCA,  
MASTER RETIREMENT TRUST, GRAMERCY  
EMERGING MARKETS FUND, and WARNER  
MANSION FUND,

Index No. 603315/02

Plaintiffs/Judgment-Creditors,

-against-

APP INTERNATIONAL FINANCE COMPANY, B.V.,  
P.T. LONTAR POPYRUS PULP PAPER INDUSTRY,  
ASIA PULP & PAPER COMPANY LTD., INDAH KIAT  
INTERNATIONAL FINANCE COMPANY B.V., and  
P.T. INDAH KIAT PULP & PAPER CORPORATION,

Defendants/Judgment-Debtors.

-----X  
Helen E. Freedman, J.

In their ongoing effort to enforce their unpaid judgment against foreign companies whose assets are located outside this country, the moving plaintiffs<sup>1</sup> apply pursuant to CPLR 5225(a) for a “turn-over” order directing the defendants<sup>2</sup> to deliver cash, stock certificates and other personal and real property to them. In opposition, the defendants claim that they were not properly served

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<sup>1</sup>Five of the six plaintiffs join in this motion: Gryphon Domestic VI, LCC, OCM Opportunities Fund II, L.P., OCM Opportunities Fund III, L.P., Columbia/HCA Master Retirement Trust, and Gramercy Emerging Markets Fund. The sixth plaintiff, Warner Mansion Fund, did not move.

<sup>2</sup>APP International Finance Company, B.V. (“APP Finance”), P.T. Lontar Papyrus Pulp & Paper Industry (“P.T. Lontar”), Asia Pulp & Paper Company Ltd. (“Asia Pulp & Paper”), Indah Kiat International Finance Company B.V. (“Indah Kiat Finance”), and P.T. Indah Kiat Pulp & Paper Corporation (“Indah Kiat Pulp & Paper”).

with this motion and also challenge it on the merits. They also cross-move for an order (1) vacating restraining notices that the plaintiffs purportedly served on them in September and October 2004 (the “Restraining Notices”) and (2) deeming the record for this motion to include papers from earlier motions that addressed restraining notices that the plaintiffs served, their applications for contempt, and another “turn-over” proceeding that they brought against a third party. For the reasons set forth below, the motion is granted in part and the cross-motion is granted.

*Background* – At the outset, a significant new development in this case must be addressed. By order and decision entered May 17, 2005 (the “Modifying Order”), the Appellate Division, First Department modified the judgment of this Court, entered April 13, 2004 (the “Judgment”), that the moving plaintiffs sought to enforce through this motion. After this Court had issued an order granting plaintiffs summary judgment, the Judgment was entered awarding the moving plaintiffs damages totaling about \$ 354 million<sup>3</sup> for the defendants’ defaults under three note issues: (1) the “Indah Kiat 02 Notes”, issued by Indah Kiat Finance and guaranteed by Indah Kiat Pulp & Paper; (2) the “Indah Kiat 06 Notes”, issued by Indah Kiat Finance and guaranteed by Indah Kiat Pulp & Paper; and (3) the “Lontar Notes”, issued by APP Finance and guaranteed by both Asia Pulp & Paper and P.T. Lontar.

Upon the defendants’ appeal, the First Department in the Modifying Order affirmed the award premised on the Indah Kiat 02 Notes, which totals about \$ 109.4 million, but vacated the awards premised on the Lontar and Indah Kiat 06 Notes. With respect to those two issues, the

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<sup>3</sup>Non-moving plaintiff Warner Mansion Fund was granted judgment in the amount of \$ 41 million. Also, by order dated January 7, 2005, the Court granted summary judgment to the trustee under the notes’ indentures for the benefit of all holders.

Court held that the plaintiffs failed to prove that they had complied with certain pre-conditions to note-holders' lawsuits set forth in the governing indentures. Accordingly, the First Department remanded the action for further proceedings.

As a result of the Modifying Order, the judgments as against defendants APP Finance, P.T. Lontar, and Asia Pulp & Paper are vacated. The Judgment as against defendants Indah Kiat Finance and Indah Kiat Pulp & Paper, in respect of the Indah Kiat 02 Notes, remains. All of the moving plaintiffs hold Indah Kiat 02 Notes, and from here onward they will be referred to as the "Judgment Creditors"; Indah Kiat Finance and Indah Kiat Pulp & Paper will be referred to as the "Judgment Debtors".

The Judgment Debtors are foreign corporations who are not authorized to do business in New York, and who do not conduct any business or hold any property in the State. Indah Kiat Finance is a Dutch corporation whose principal place of business is in the Netherlands; Indah Kiat Pulp & Paper is an Indonesian company with its principal place of business in Indonesia. The Court has personal jurisdiction over the Judgment Debtors because they consented in the indenture governing the Indah Kiat 02 Notes (the "Indenture") to the non-exclusive jurisdiction of the state and federal courts in New York City, and appointed an agent to accept service of process in New York.

*Restraining Notices* – The cross-motion to vacate the Restraining Notices will be addressed first. The Restraining Notices issued against APP Finance, P.T. Lontar and Asia Pulp & Paper are vacated because they are no longer judgment debtors subject to enforcement devices.

The Judgment Debtors,<sup>4</sup> who are still subject to the Judgment, claim that the Judgment Creditors did not properly serve them, but the issue of service does not need to be reached. The Restraining Notices against the Judgment Debtors were ineffective in any event because their property is located outside of New York, and restraining notices issued by this Court do not reach property in other jurisdictions. See *ABKCO Indus. v. Apple Films, Inc.*, 39 N.Y.2d 670, 674-75 (1976); *Natl. Union Fire Ins. Co. of Pitts. v. Adv. Empl. Concepts, Inc.*, 269 A.D.2d 101, 101 (1st Dept. 2000); see also Dec. & Ord. dated Feb. 9, 2005 (holding the Judgment Debtors and others cannot be found in contempt for transferring assets located outside New York). Accordingly, the Restraining Notices are ineffective and are vacated pursuant to CPLR 5240.

*Delivery orders* – Post-judgment enforcement orders that direct a judgment debtor to “turn over” its property to the judgment creditor are governed by CPLR § 5225(a), which provides as follows:

**(a) Property in the possession of judgment debtor.** Upon motion of the judgment creditor, upon notice to the judgment debtor, where it is shown that the judgment debtor is in possession or custody of money or other personal property in which he has an interest, the court shall order that the judgment debtor shall pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it is sufficient value to satisfy the judgment, to a designated sheriff. Notice of the motion shall be served on the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested.

Again, APP Finance, P.T. Lontar and Asia Pulp & Paper are not judgment debtors and are immune from a delivery order. The Judgment Debtors oppose this turnover motion on a number

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<sup>4</sup>As noted, the parties submitted this motion after the Judgment was entered but before the First Department modified it, so they joined in opposing the motion and cross-moving for relief in their capacity as judgment debtors. The motion and cross-motion are moot insofar as they pertain to APP Finance, P.T. Lontar, and Asia Pulp & Paper.

of grounds. First, they contend that this Court cannot compel them to turn over property located outside of New York. However, inasmuch as the Court has obtained personal jurisdiction over the Judgment Debtors and the Judgment has been entered against them in this action, the Court can order them to satisfy it by delivering their property, regardless of its location. *See Starbare II, L. P. v. Sloan*, 216 A.D.2d 238, 239 (1st Dept. 1995) (directing judgment debtor to turn over property in New Jersey); *In re Gaming Lottery Secs. Litig.*, N.Y.L.J., Feb. 20, 2001 at 39, col. 4 (S.D.N.Y. 2001) (relying on *Starbare II, L. P.* and directing turn-over of property in Scotland).

Second, the Judgment Debtors claim that the Judgment Creditors never properly served them with notice of the turnover motion pursuant to CPLR 5225(a), which requires that “[n]otice of the motion shall be served on the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested.” In September and October 2004, the Judgment Creditors made at least ten separate attempts to serve the Judgment Debtors. Their methods included (1) personal delivery notice to their representatives in The Netherlands and Indonesia pursuant to CPLR 311(a), (2) delivering notice to the foreign business addresses of the Judgment Debtors by international registered mail, first class mail, and certified mail, (3) twice mailing notice to the New York City offices of CT Corporation (“CT Corp.”) in its alleged capacity as the Judgment Debtors’ agent for service, and (4) serving the Secretary of State of New York and taking other steps to effect service pursuant to BCL § 307.

At least one of those methods constituted good service on the Judgment Debtors, namely mailing the notice of motion by certified mail, return receipt requested, in October 2004 to CT Corp., while mailing a copy to the Judgment Debtors at their business addresses. The Judgment Debtors were contractually obligated to accept service by that method. Parties to a

contract may waive their right to statutory service and agree to some other form of notice. See *Pohlers v. Exeter Mfg. Co.*, 293 N.Y. 274, 278-79 (1944); *Natl. Equip. Rental, Ltd. v. Dec-Wood Corp.*, 51 Misc.2d 999, 1000 (App. Term, 1st Dept. 1966). For alternative service under a contract, parties can designate agents to accept process on their behalf. *Natl. Equip. Rental, Ltd.*, 51 Misc.2d at 1000; see also *Comprehensive Merchandising Catalogs, Inc. v. Madison Sales Corp.*, 521 F.2d 1210, 1212 (7th Cir. 1975)(applying New York law). In this case, the Indenture contained provision under which the Judgment Debtors submitted to the jurisdiction of “any New York State or United States Federal court sitting in New York City” for claims arising from the Indenture or the Indah Kiat 02 Notes, and appointed CT Corp. as their agents for service:

[a]s long as any of the Notes remain [o]utstanding, each [Judgment Debtor] will at all times have an authorized agent in New York City, upon whom process may be served in any legal action or proceeding arising out of or relating to this Indenture or any Note. . . . Service of process upon such agent and written notice of such service mailed or delivered to [a Judgment Debtor] shall be deemed in every respect effective service of process upon the [Judgment Debtor], in any such legal action or proceeding. Each [Judgment Debtor] hereby irrevocably appoints CT Corporation as its agent for such purpose, and covenants and agrees that service of process in any suit, action or proceeding may be made upon the [New York City] office of [CT Corp.] Notwithstanding the foregoing, [a Judgment Debtor] may, with prior written notice to the [Indenture trustee], terminate the appointment of CT Corporation and appoint another agent for the above purposes so that the [judgment debtor] shall at all times have an agent for the above purpose in New York City.

The Judgment Creditors complied with the service requirements under the Indenture by sending notice of the turnover motion to CT Corp. by certified mail, return receipt requested and mailing copies to the Judgment Debtors at their business addresses.

In opposition, the Judgment Debtors acknowledge that they knew about the turnover motion through the Judgment Creditors’ numerous attempts to serve notice, but contend that

service was defective because the Judgment Debtors had “discharged” CT Corp. shortly after the Judgment Creditors commenced this action in September 2002. When the Judgment Creditors served CT Corp. in October 2004, the Judgment Debtors point out, they already knew that CT Corp. had been terminated as agent two years earlier; moreover, after they received the notices of the motion, CT Corp. confirmed by letter to the Judgment Debtors that it had been discharged. However, the Judgment Creditors could still made good service by mailing notice to CT Corp., because the Judgment Debtors breached their obligations under the Indenture by failing to inform its trustee in advance that they were discharging CT Corp., and by failing to immediately name a replacement agent. As a result, the appointment of CT Corp. remained irrevocable under the Indenture.

As a third basis to oppose the turnover motion, the Judgment Debtors claim that the Judgment Creditors failed to submit proof that they are “in possession or custody of money or other personal property in which [they have] an interest,” pursuant to CPLR 5225(a). The Judgment Creditors seek an order directing the Judgment Debtors to turn over (1) money held in their accounts with foreign banks; (2) the paper, pulp, and packaging mills that Indah Kiat Pulp & Paper owns in Indonesia, (3) the stock certificates for the Judgment Debtors’ alleged wholly-owned subsidiaries and “related entities,” and (4) various moveable assets, insurance proceeds, and supply contracts relating to the Indonesian mills.

Some of that property lies outside the scope of a delivery order pursuant to CPLR 5225(a). The money in the Judgment Debtors’ foreign bank accounts is the banks’ property; the Judgment Debtors only possess the banks’ indebtedness to them for the money. *See in re Delaney*, 256 N.Y. 315, 320-21 (1931). To reach the bank deposits, the Judgment Creditors

would have to bring a special proceeding under CPLR 5225(b) naming the banks as respondents. Also, the Judgment Debtors' mills and other real property in Indonesia are exempt, inasmuch as delivery orders under CPLR 5225 can only apply to money or personal property.

The Judgment Creditors also seek property which does not belong to the Judgment Debtors, but instead belongs to their subsidiaries and other corporate affiliates. A delivery order could reach shares of affiliates that the Judgment Debtors own and possess, but it would not apply to the affiliates' shares of third companies. The Judgment Creditors have not shown any grounds for disregarding the corporate form and holding subsidiaries and other affiliates of the Judgment Debtors liable.

However, the Judgment Creditors have made a *prima facie* showing that P.T. Indah Kiat Pulp & Paper possesses stock certificates for a number of their subsidiaries and affiliates. As evidence, the Judgment Creditors submit (1) a corporate organization chart produced by a non-party in response to an information subpoena and (2) consolidated financial statements and SEC registration statements. The Judgment Debtors wrongly claim that the Judgment Creditors' evidence is inadequate, but they never deny that P.T. Indah Kiat Pulp & Paper owns the stock certificates.

Finally, the Judgment Debtors oppose a turnover order by invoking principles of international comity. They claim that the order would jeopardize an ongoing restructuring by some of the defendants of billions of dollars of their indebtedness to other creditors, a number of which are the export credit agencies of foreign countries. However, the Judgment Debtors offer no explanation why an order directing them to satisfy the judgment in this action would disrupt their restructuring of different indebtedness to other creditors.

The Judgment Debtors also contend that ordering them to deliver money or personal property located in Indonesia would conflict with anti-suit injunctions issued by that country's courts. As evidence, they submit the affidavit of Marx Andryan, an Indonesian attorney acting as counsel for Indah Kiat Pulp & Paper and some of its affiliates, who states that the Indonesian courts have issued orders "which effectively prohibit the [Judgment Creditors] from prosecuting any enforcement or payment lawsuit or proceeding relating to the subject Indentures and accessory [documents] (including, the Notes) or taking any step with respect thereto." But an order by a foreign court that enjoins and restrains the parties in proceedings in that court does not affect the courts of this state and their proceedings. *Dobson v. Pearce*, 12 N.Y. 156 (1854); *Canadian Imperial Bank of Com. v. Pamukbank Tas*, 166 Misc.2d 647 (Sup. Ct. N.Y. Co. 1994). Accordingly, the Indonesian courts' rulings do not bar this Court from ordering the Judgment Debtors to turn over their property in Indonesia to satisfy the Judgment of this Court. However, inasmuch as the Judgment Debtors apparently can satisfy the Judgment by delivering assets located outside of Indonesia<sup>5</sup>, the turn-over order is stayed insofar as it pertains to property currently in that country.

That branch of the cross-motion seeking to expand the record for this motion to include papers for earlier motions is denied. The present record suffices.

In sum, the restraining orders are vacated, but the motion for a delivery order is granted to the extent that the Judgment Debtors are directed to either (1) pay the Judgment Creditors enough money to satisfy the Judgment in respect to the Indah Kiat 02 Notes or (2) deliver to a designated

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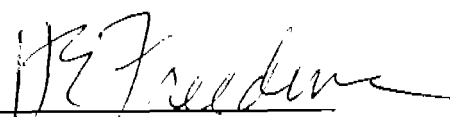
<sup>5</sup> For example, the business offices of Indah Kiat Finance are located in the Netherlands.

sheriff stock certificates of equivalent value that, as of this date, are located outside of Indonesia. In furtherance of the delivery order, the Judgment Debtors are enjoined from transferring their assets into Indonesia from this date until the Judgment is satisfied.

Settle order.

Dated: May 23, 2005

ENTER:



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Helen E. Freedman, J.S.C.