

**Nam Tai Electronics, Inc. v UBS Painewebber
Incorporated**

2005 NY Slip Op 30343(U)

October 6, 2005

Supreme Court, New York County

Docket Number: 602976/03

Judge: Charles E. Ramos

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

Charles Edward Ramos

PART 53

PRESENT.

Index Number : 602976/2003 *Justice*

NAM TAI ELECTRONICS INC.

vs

UBS PAINWEBBER INC.

Sequence Number : 009

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ 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

is decided in accordance with
accompanying memorandum decision and order.

FILED

OCT 28 2005

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/6/05

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
NAM TAI ELECTRONICS, INC.,

Plaintiff,

-against-

Index No. 602976/03

UBS PAINWEBBER INCORPORATED a.k.a.
UBS WEALTH MANAGEMENT USA,

Defendant.
-----X

Charles Edward Ramos, J.S.C.:

The plaintiff's motion to renew and reargue (mo. seq. no.009) is granted as to renewal only to provide that a court of competent jurisdiction is available to all parties to determine the issues herein presented. The following decision and order shall stand in the place and stead of this Court's prior decision and order dated May 12, 2005.

Motion sequence numbers 004 and 005 are consolidated herein for purposes of disposition.

In sequence number 004, defendant UBS Painewebber Incorporated a.k.a. UBS Wealth Management USA (UBS) moves for an order dismissing the amended complaint in its entirety, pursuant to the doctrine of international comity and CPLR 3211 (a) (1)4, 3211 (a) (7)1, and 3016 (b). In sequence number 005, plaintiff Nam Tai Electronics, Inc. (Nam Tai), moves for an order granting permission to file a revised memorandum of law in opposition to UBS' motion to dismiss, pursuant to Commercial Division Rule 18.

In the complaint, Nam Tai, a British Virgin Islands (BVI) corporation headquartered in Hong Kong, alleges that, in 1997,

UBS, a stock brokerage firm headquartered in New York, breached certain contractual and fiduciary obligations owed to Nam Tai. Nam Tai alleges that it is a third-party beneficiary of a contract between UBS and non-party Tele-Art, Inc., a BVI corporation headquartered in Hong Kong, to immediately sell certain Nam Tai common stock beneficially owned by Tele-Art. Nam Tai also alleges that UBS breached fiduciary duties owed as trustee of the stock and fraudulently failed to disclose to Nam Tai the existence of a secret agreement with nonparty the Bank of China, another Tele-Art creditor and third-party beneficiary to the UBS/Tele-Art contract, to sell the stock for the benefit of the Bank of China only. On these allegations, Nam Tai seeks an accounting and restitution of the funds due Nam Tai after the stock sale.

Tele-Art retained UBS to sell the stock in compliance with an order issued in 1997 by the High Court of the British Virgin Islands in proceedings to pay certain debts (see Matter of Tele Art Inc., High Court of Justice, BVI, suit no. 69 of 1997, Sept. 15, 1997, Georges, J., [the Tele-Art liquidation proceedings]) adjudicated in liquidation proceedings commenced by Nam Tai against Tele-Art to liquidate Tele-Art's assets and distribute them to its creditors, including Nam Tai and the Bank of China (see Matter of Tele Art Inc., High Court of Justice, BVI, suit no. 196 of 1993).

In 1997, UBS sold 67,500 shares of Nam Tai common stock owned by Tele-Art for approximately \$1.1 million and transferred

that entire sum to the Bank of China. In August 2002, Nam Tai redeemed 169,727 of the remaining shares at \$18.41 a share and, thus, obtained more than \$3.1 million worth of Nam Tai stock. The remaining 138,500 Nam Tai shares are presently being held by the BVI High Court in the Tele-Art liquidation proceedings.

UBS seeks to dismiss the amended complaint, first, under the doctrine of international comity on the ground that this dispute arises out of the order issued in the Tele-Art liquidation proceedings still pending in the BVI and, therefore, is more properly resolved by the BVI High Court.

In opposition, Nam Tai contends that the dispute arises not out of the court order, but out of the contract between UBS and Tele-Art to which Nam Tai is a third-party beneficiary.

As a threshold matter, Nam Tai's motion for permission to file a revised memorandum of law in opposition to the motion no longer than 30 pages in length is granted without opposition. Only the revised brief was considered in connection with the motion.

The dispute, at bottom, arises directly out of the BVI High Court order issued in the Tele-Art liquidation proceedings. Therefore, pursuant to the doctrine of international comity, this court declines to exercise jurisdiction (see Nam Tai Elecs., Inc. v Bank of China, US Dist Ct, CD Cal, case no. CV 03-3052-GHK [SHx]).

International comity is "the recognition which one nation allows within its territory to the legislative, executive or

judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws" (Allstate Life Ins. Co. v Linter Group Ltd., 994 F2d 996, 998-999 [2d Cir], cert denied 510 US 945 [1993], quoting Hilton v Guyot, 159 US 113, 164 [1895]; Ecoban Fin. Ltd. v Grupo Acerero Del Norte, S.A. de C.V., 108 F Supp 2d 349 [SD NY 2000] , affd sub nom Ecoban Fin. Ltd. v Altos Hornos de Mexico, S.A. de C.V., 2001 WL 40895 [2d Cir], cert denied sub nom Ecoban Fin. Ltd. v Grupo Acerero Del Norte, S.A. de C.V., 534 US 814 [2001]).

Pursuant to New York law, international comity "is particularly appropriate and important with respect to foreign bankruptcy proceedings, where equitable principles demand that all claims against a debtor's limited assets be addressed in a single proceeding" (Ecoban Fin. Ltd. v Grupo Acerero Del Norte, S.A. de C.V., 108 F Supp 2d at 351-352). Centralizing a corporation's liquidation in one proceeding "enables the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion" (Cunard S.S. Co. Ltd. v Salen Reefer Servs. AB, 773 F2d 452, 458 [2d Cir 1985]).

Comity is the rule, not the exception, and "should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect" (id. at 457). Comity is appropriately exercised when there is a showing that the case is related to a foreign judicial

proceeding before a court of competent jurisdiction and the foreign proceeding has not nor will not result in injustice to New York citizens, unfair prejudice to a creditor's New York statutory remedies, or violation of New York public policy (Ecoban Fin. Ltd. v Grupo Acerero Del Norte, S.A. de C.V., 108 F Supp 2d 349, supra; Society of Lloyd's v Grace, 278 AD2d 169 [1st Dept 2000], appeal withdrawn 96 NY2d 859 [2001]; SNR Holdings, Inc. v Ataka Am., Inc., 54 AD2d 406 [1st Dept 1976]).

Here, there can be no real dispute that the BVI High Court is a court of competent jurisdiction to determine issues relating to the liquidation of Tele-Art, a BVI corporation, and the disbursing of its assets to its creditors, including Nam Tai, another BVI corporation (see Nam Tai Elecs., Inc. v Bank of China, supra; Yuen v U.S. Stock Transfer Co., 966 F Supp 944 [CD Cal 1997]) . Indeed, Nam Tai commenced liquidation proceedings against Tele-Art before that court.

Next, a comparison of the claims and the factual allegations set forth in Nam Tai's amended complaint with the terms of the BVI High Court order demonstrates that any resolution of the dispute will involve an analysis, interpretation, and clarification of the BVI High Court order and whether the parties to the proceedings (Tele-Art in directing UBS, the Bank of China, and Nam Tai), together with UBS, acted in accordance with the terms and tenor of the court order.

In the amended complaint, Nam Tai alleges that UBS, retained pursuant to court order, failed to immediately sell the Nam Tai

shares owned by Tele-Art in order to fully satisfy Tele-Art's debts to Nam Tai, even though the shares were sufficiently liquid and the price per share exceeded the minimum price set by court order. In the order, the BVI High court directed that the Nam Tai shares beneficially owned by Tele-Art and Robert Yuen, a Tele-Art principal,

be sold on the NASDAQ National Market at a minimum price of \$17 per share by Paine Webber [UBS] or Merrill Lynch as stockbroker engaged by [Tele-Art] initially in sufficient quantities so as to realize sufficient money to satisfy in full:

(i) the indebtedness of [Tele-Art] to the Bank of China (which as at 11th September, 1997 amounts to \$5,406,081.10 and on which interest continues to accrue at a daily rate of \$1911.67);

(ii) the Judgment debt of [Nam Tai] in Suit No. 196 of 1993 (which said Judgment debt is the sole basis for the winding up proceedings herein and which together with interest as at 10th September, 1997, amount to \$931,908.52 and on which interest continues to accrue at a daily rate of \$109.46) together with the sum of \$90,000 to be paid into Court as a fund to provide security for the costs of [Nam Tai]

(Tele-Art liquidation proceedings Order, ¶ 1 [a] [emphasis added]). The order also provides that "[t]he sale of the said initial quantities of shares and payment to the Bank of China and [Nam Tai] shall take place immediately" (id. 7, 1 [b] [emphasis added]).

In the amended complaint, Nam Tai alleges that UBS entered into a secret agreement with the Bank of China to pay the bank before Nam Tai and to Nam Tai's exclusion. The order provides that "[t]he proceeds of the sale of the said initial quantities of shares shall be applied firstly to satisfy [Tele-Art's] indebtedness to the Bank of China and thereafter to satisfy the

judgment debt of [Nam Tai] in Suit No. 196 of 1993 and the fund for security for costs as per paragraph 1 (a) above" (id. 1, 1 [c] [emphasis added]).

In the amended complaint, Nam Tai alleges that UBS did not follow its instructions regarding the sale of the shares and disbursement of the sale proceeds. The order also provides that "[u]nder the joint instructions of the Bank of China, [Nam Tai] and [Tele-Art] . . . the share certificates of [Tele-Art] in Nam Tai . . . which are now in the possession of the stock transfer agent shall be delivered to the broker aforesaid and the share certificate(s) representing the remainder of the shares, after compliance with paragraph 1 above, shall be held by the broker aforesaid to the Order of [Tele-Art]" (id. ¶ 2 [a] [emphasis added]).

Clearly, the dispute here and the BVI High Court order are indivisibly intertwined. The Tele-Art liquidation proceedings are still pending. The BVI High Court is, therefore, the most appropriate forum for resolution of the dispute. For this reason, this Court declines to exercise jurisdiction over the dispute and dismisses the amended complaint. Comity may "take the form of 'a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state' " (Bigio v Coca-Cola Co., 239 F3d 440, 454 [2d Cir 2000], quoting In re Maxwell Communication Corp., 93 F3d 1036, 1047 [2d Cir 1996]). Or, comity occurs when a "domestic court considers whether to proceed with litigation properly within its

jurisdiction because of the pendency or availability of litigation in a foreign forum" (Diorinou v Mezitis, 237 F3d 133, 139 [2d Cir 2001]). Having dismissed the action, this court need not decide whether Nam Tai's individual causes of action meet the pleading requirements set forth in the CPLR.

Accordingly, it is

ORDERED that the motion is granted and the complaint is dismissed with costs and disbursements to defendant UBS PaineWebber Incorporated a.k.a. UBS Wealth Management USA as taxed by the Clerk of the Court on condition the defendants consent to the jurisdiction of the courts of The British Virgin Islands within 10 days of service upon counsel of a copy of this order with notice of its entry, and if such consent is not forthcoming, the motion is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: October 6, 2005



HON. CHARLES E. RAMOS

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.

FILED**OCT 28 2005****NEW YORK
COUNTY CLERK'S OFFICE**