

**Larsen & Toubro Limited v Millenium Management,
Inc.**

2006 NY Slip Op 30330(U)

March 6, 2006

Supreme Court, New York County

Docket Number:

Judge: Richard B. Lowe

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PART 56

Index Number : 106534/2002

LARSEN & TOUBRO LTD.

vs

MILLENIUM MANAGEMENT

Sequence Number : 003

PARTIAL SUMMARY JUDGMENT

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 3/6/2006

[Signature]
RICHARD J. LONE III 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 : IAS PART 56

-----X
LARSEN & TOUBRO LIMITED,
Plaintiff,

- against -

Index No. 106534/2002

MILLENIUM MANAGEMENT, INC., KYLCO
MARITIME, LTD., VASSILIOS M. LIVANOS,
NICOLAS A. COTZIAS, JR., THEOTOKIS S. MILAS,
and EMANUEL KYPRIOS,
Defendants.

**DECISION
AND ORDER**

-----X
RICHARD B. LOWE, III, J.:

Before the court is a motion by plaintiff Larsen & Tourbro Limited (Larsen) to confirm an arbitration award pursuant to CPLR 7511 (e), decided on August 31, 2004 against defendants Millenium Management, Inc. (Millenium) and Kylco Maritime, Ltd. (Kylco). Plaintiff also moves pursuant to CPLR 3212 for summary judgment against individual defendants Vassilios M. Livanos (Livanos), Nicolas A. Cotzias, Jr. (Cotzias), Theotokis S. Milas (Milas), and Emanuel Kyprios (Kyprios) as guarantors of Millenium and Kylco.

BACKGROUND

The general facts of this matter have been previously discussed in the court's decision dated July 21, 2005 (the "Decision") and shall not be repeated here, except to the extent necessary to decide this motion.

The arbitration award was decided on August 31, 2004 against the defendants, which the court in its Decision upheld as to defendants Millenium and Kylco, but dismissed against the individual defendants as exceeding the panel's authority. In the arbitration award decision, the dissenting arbitrator stated that Larsen's claim under the Promissory Note should not be allowed

* 3]
without the arbitration panel also passing judgment on the defendants' counterclaims.

During the course of the arbitration proceedings and thereafter, the arbitration panel provided defendants numerous opportunities to bring their counterclaims and defenses. On April 9, 2004, during the arbitration proceedings, the defendants first requested the arbitration panel issue a broad subpoena for files and records (*see Yudes Aff, Ex. 1; Livanos Aff, Ex. B*). On May 26, 2004, the arbitration panel denied the request because the panel found it overly broad (*see id.*, Ex. 2). On September 8, 2004, after the arbitration award was decided, the arbitration panel again requested a narrower subpoena (*see id.*, Ex. 3).

The defendants never provided the requested subpoena. Instead, during the intervening eighteen months, the "focus" of the defendants was not to prepare its defenses and counterclaims for the arbitration panel, but to move the court to vacate the arbitration award (Livanos Aff ¶ 14). After the court rendered its Decision, the defendants then turned to "settlement discussions," an appeal of the court's Decision, and on Larsen's "present motion" (Livanos Aff ¶ 17). It was only on February 14, 2006, a few weeks prior to the oral argument of this motion, that the defendants reiterated their demand for a subpoena (*see Yudes Aff, Ex. 4; Livanos Aff, Ex C*). However, the defendants failed to furnish the subpoena to the panel.

DISCUSSION

To obtain summary judgment, the movant must establish its cause of action "sufficiently to warrant the court as a matter of law in directing judgment' in its favor (CPLR 3212 [b]), and it must "set forth evidence that there is no factual issue" requiring an adjudication on the facts (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]). On the other hand, to defeat a motion for

summary judgment the opposing party must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212 [b]).

I. Millenium and Kylco

The only issue as against Millenium and Kylco is whether to confirm the arbitrators’ award, entered on August 31, 2004. The defendants oppose confirmation, arguing that because the arbitration has not concluded, affirming the arbitrators’ award at this stage is premature.

State policy favors and encourages arbitration *as the means of expediting resolution of disputes* and conserving judicial resources (*Rio Algom, Inc. v Sammi Steel Co.*, 168 AD2d 250 [1st Dept 1990] [emphasis added], citing *Matter of Nationwide Gen. Ins. Co. v Investors Ins. Co. of Am.*, 37 NY2d 91, 95 [1975]). “Where the parties have chosen arbitration as their forum, they are *precluded from using the courts as a vehicle to protract litigation*” (*id.* [emphasis added], quoting *Matter of Weinrott [Carp]*, 32 NY2d 190, 199 [1973]). As our Court of Appeals provides, “the Arbitration Law contemplates *prompt action*” (*Nagy v Arcas Brass & Iron Co.*, 242 NY 97, 99 [1926] [emphasis added]). “[T]oo long a delay in seeking appropriate relief may be easily construed as an indication that [a] claim is waived” (*id.*).

There is no dispute that eighteen months have elapsed since the arbitrators’ partial award determination was rendered. Nonetheless, the defendants have failed to pursue their defenses and counterclaims. The defendants try to rationalize this lapse of time by averring that they were “focusing” on their motion to vacate the arbitrators’ award, on their appeal of this court’s Decision, as well as “on settlement discussions and then on [Larsen’s] present motion” (Livanos Aff ¶ 17). However, these justifications do not change the fact that eighteen months have elapsed since the arbitrators rendered their decision. Indeed, the defendants’ rationalizations only demonstrate that

* 5]
the defendants have abandoned the arbitration and, in turn, their defenses and counterclaims.

For one, as the court noted in its Decision, “[t]he submissions contain numerous requests from the arbitration panel seeking evidentiary support for any defenses and counterclaims and, in any event, the panel granted defendants’ request for an oral hearing to establish their counterclaim for damages under the Sale Agreement” (*id.* at 6). That the defendants failed, during the time of the arbitration, to pursue their defenses and counterclaims shows that the defendants, even if they had viable arguments, abandoned their defenses and counterclaims. In addition, they failed, after the panel’s award was rendered, to prosecute their arguments with the arbitration panel, after being given more than enough time to prosecute their claims against the plaintiff. Other than their letter of February 14, 2006, noting that they desired the issuance of a subpoena but not furnishing the required information for the issuance thereof, the defendants have utterly failed to make any reasonable demonstration of wanting to continue their defenses and counterclaims against the plaintiff.

To the extent the defendants were “focusing” on their motion to vacate the arbitration award, their appeal of the court’s Decision, and defending against this motion, concentrating on these matters does not toll the arbitration. The court will not allow the defendants to utilize this process “as a vehicle to protract litigation” (*Rio Algom, Inc.*, 168 AD2d at 250). Indeed, these disputes should have been resolved months ago, and not by way of a summary judgment motion made eighteen months after the decision of the arbitration panel was rendered.¹

Because the defendants have waited too long “in seeking appropriate relief” (*Nagy*, 242 NY

¹ The court notes that, during oral argument, the defendants argued that the plaintiffs should have set a deadline with the arbitrators (*see* March 1, 2006 minutes). The court finds this argument unreasonable. Here, it is the defendants who are bringing their defenses and counterclaims against the plaintiff. As such, it is the responsibility of the defendants to pursue their claims, and *not* the plaintiff’s obligation.

at 99), the court construes the delay as the indication that the defendants have waived their defenses and counterclaims. Accordingly, the plaintiff's summary judgment is granted and the arbitrators' partial arbitration award is confirmed.

II. The Individual Defendants

As to individual defendants Livanos, Cotzias, Milas, and Kyprios, they argue that because there is a viable defense of failure of consideration, summary judgment should be denied as to the individual defendants. The court disagrees.

Generally, a guarantor may claim a failure of consideration as a defense by showing that the creditor totally or partially failed to perform its obligation to the principal (*see Walcutt v Clevite Corp.*, 13 NY2d 48, 56 [1963]; *see also Durable Group, Inc. v De Benedetto*, 85 AD2d 524 [1st Dept 1985]).

In this case, however, there is no dispute that there was consideration given to the defendants.

The Guarantee is explicit in its terms:

[T]he Guarantors have agreed to execute this Guarantee in consideration of the Seller [Larsen] agreeing, at the request of the Guarantors, to advance the said Credit to the buyer and for other valuable consideration provided by the Seller (the sufficiency of which the Guarantors hereby acknowledge).

(*See Yudes Aff*, Ex. 3). Here, there is no dispute that credit was extended, nor is there any argument to the contrary that "the sufficiency of" the consideration was "acknowledged" by the individual defendants. Because the parties have plainly expressed their intent in writing, the "contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed" (*Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1999]; quoting *Breed v Insurance Co.*, 46 NY2d 351, 355 [1978][internal quotations omitted]). Here, there is no question

* 7]
that the individual defendants received consideration for the Guarantee.

In addition, the court's Decision found that "the Promissory Note expressly required Millenium and Kylco to make each payment without set-off, deduction or counterclaim of any type" (*id.* at 7). That the individual defendants are personal guarantors of Millenium and Kylco under the Promissory Note, they are also liable under the Guarantee and Promissory Note for the judgment rendered by the arbitration panel against Millenium and Kylco.

Finally, the court again reiterates the fact that the defendants have had more than enough time to bring their defenses and counterclaims against Larsen and have failed to do so. As previously noted, this court is not to be used "as a vehicle to protract litigation" (*Rio Algom, Inc.*, 168 AD2d at 250). Accordingly, the court finds that individual defendants Livanos, Cotzias, Milas, and Kyprios are personally liable pursuant to the Guarantee and under the Promissory Note.

III. Judgment

The arbitration panel's judgment awarded to Larsen the sum of \$4,433,475 from Millenium and Kylco, "reflecting the principal amount due under the Promissory Note, unpaid interest thereon to June 1, 2003, and a portion of the arbitrators' fees" (Decision at 4). The principal amount due under the Promissory Note is \$4,158,830.00. Unpaid interest until June 1, 2003 is \$262,195.00. The share of arbitration fees is \$12,350.00. The arbitration panels' judgment also includes such interest "at the rate of 4.25% p.a. [as] shall accrue on the principal amount from the date of the award until payment has been made in full or the award has been reduced to a judgment" (*see Yudes Aff*, Ex. 6 at 12 [arbitrators' partial award decision]). Such interest on the principal amount shall be calculated from the panel's decision of August 31, 2004.

As to the individual defendants, the Guarantee provides that:

[T]he Guarantors shall pay to the Sellers on demand interest on such sum from and including the due date therefor to the date of actual payment (as well after as before judgment) at a rate at all times to the interest rate then applicable to the Advances evidenced by the Promissory Note plus 2% annum.

(See Yudes Aff, Ex. 3 ¶ 5.3).

As well, the Guarantee allows the plaintiff to recover “on demand all reasonable costs, fees and expenses (including, but not limited to, reasonable legal fees and expenses) and Taxes thereon incurred by the Seller in connection with the preserving or enforcing of, or attempting to preserve or enforce any of its rights under this Guarantee” (*see* Deosthalee Aff, Ex. 3 ¶ 6.1).

Accordingly, the court appoints a Special Referee to resolve the issue of interest due and owing to the plaintiff by the individual defendants as well as attorneys fees and costs as against the individual defendants.

CONCLUSION

Accordingly, it is hereby


ORDERED that the plaintiff’s motion for summary judgment is granted in favor of the plaintiff and against the individual defendants Livanos, Cotzias, Milas, and Kyrios to the extent that defendants Livanos, Cotzias, Milas, and Kyrios are personally liable for the debts of defendants Millenium and Kylco pursuant to the Guarantee.

ORDERED that the plaintiff's motion to confirm the arbitrators' partial award is granted against Millenium Management, Inc. and Kylco Maritime, Ltd.; and it is further

SETTLE ORDER.

Dated: March 6, 2006

ENTER:



RICHARD B. LOWE, III

RICHARD B. LOWE, III, J.S.C.