

AMP Services Limited v Walanpatrias Foundation

2006 NY Slip Op 30499(U)

March 2, 2006

Supreme Court, New York County

Docket Number: 106462/04

Judge: Barbara R. Kapnick

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

PRESENT: **BARBARA R. KAPNICK**

PART 12

0106462/2004

AMP SERVICES LIMITED

VS

WALANPATRIAS FOUNDATION

INDEX NO. 106462/04

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

SEQ 03

DISC

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

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

Answering Affidavits - Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED

MAR 03 2006

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/2/06

BARBARA R. KAPNICK

J.S.C.

Check one: 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 12

-----X
AMP SERVICES LIMITED as Trustee of
THE WALTER and ANNA BRONNER TRUST,
as assignee of the Estate of HARRY
JOSEPH, deceased, and as assignee of
PETER BRONNER, MONICA BRONNER KRANEPOOL,
ROBERT BRONNER and KARIN BRONNER,

DECISION/ORDER
Index No. 106462/04
Motion Seq, No. 003

Plaintiffs,

- against -

WALANPATRIAS FOUNDATION a/k/a DORAW
and WALANPATRIAS SIFTUNG,

Defendants.

FILED
MAR 03 2006
NEW YORK
COUNTY CLERK'S OFFICE

-----X
BARBARA R. KAPNICK, J.:

Defendant Walanpatrias Foundation a/k/a DORAW ("the Foundation") moves, pursuant to CPLR §§ 327, 2221(a), 3016, 3211 (a) (2), (5), (7) and (8), 3013 and 6314, for an order (i) dismissing each and every cause of action in Plaintiff's Second Amended Complaint for failing to state a cause of action, lack of personal jurisdiction, lack of subject matter jurisdiction, on forum non conveniens grounds and/or on the ground that the second, third and fourth causes of action are barred by the applicable statute of limitations; (ii) vacating the Court's Order of April 27, 2004 that temporarily restrains the Foundation from (a) taking any action to facilitate the transfer to any financial institution of any investment account held in the name of the Foundation, and (b) transferring, collateralizing, assigning or disposing of the assets of certain accounts that the Foundation has with Lehman Brothers International (Europe) and Lehman Brothers Inc. during the

pendency of this action;¹ (iii) awarding the Foundation the costs, fees and other expenses it has incurred in defending this action; and (iv) granting the Foundation such other and further relief as the Court may deem proper.

When this matter initially came before this Court, plaintiff contended that defendant's then-recent transfer of a stock portfolio, valued in excess of \$98 million, from Lehman Brothers, Inc. ("LBI"), with principal offices in New York, to Lehman Brothers International (Europe) ("LBIE"), with principal offices in London, was fraudulent, within the meaning of Debtor and Creditor Law § 276. Prior to that, plaintiff had obtained default judgments in the sum of \$193,651,984.06, in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida (Hon. Mark A. Speiser, J.), against the Foundation, against non-party Gislhaine Whyte and against non-party Mario Simmen, as well as a judgment in the same amount against the Estate of Anna Gravert Bronner, and a judgment in the amount of \$3,770,049.87 against the Estate of Walter Bronner Patrias (the Estates Judgment). The Estates Judgment are nominally against non-party Thomas Myers, as personal representative of the Bronner Estates.² Plaintiff alleged

¹ The temporary restraining order granted on April 27, 2004 was continued by this Court's Decision/Order dated February 7, 2005 which granted plaintiff a preliminary injunction pending the determination of this motion.

² Mr. Myers was appointed as the personal representative by the Circuit Court for Broward County, Florida.

that defendant had caused the stock portfolio to be transferred out of the United States immediately after LBI disclosed information about the Bronner Portfolio to plaintiff, in response to plaintiff's post-judgment subpoena.

On May 19, 2004, plaintiff filed the Bronner Estates Judgment in New York, pursuant to CPLR § 5402.

As noted in this Court's February 7, 2005 order, Judge Speiser vacated the default judgments by order dated August 12, 2004, and, by order dated September 24, 2004, he stayed the order of vacatur "until the Plaintiff's appeal of said Order to the Florida Fourth District Court of Appeal is concluded, an opinion rendered and a mandate issued" to the Circuit Court. Judge Speiser's September 24, 2004 order also froze all funds under the control of LBI and LBIE that plaintiff had identified as belonging, directly or indirectly, to the Foundation.

By Order dated July 6, 2005, the District Court of Appeal of the State of Florida, Fourth District affirmed the trial court's order only to the extent of finding that the court "did not grossly abuse its discretion in granting the motion to vacate the default judgments." They otherwise reversed all other parts of the order and remanded "for a de novo determination of all other issues."

Walter and Anna Bronner appear to have been residents of both Florida and of the Principality of Monaco. The Complaint alleges, in essence, that Walter intended to distribute the bulk of his estate to certain Jewish charities, including the Weizmann Institute of Science in Israel, but that he died suddenly on February 10, 1996, leaving his entire estate to his wife Anna; that Anna, who was 91 at the time, was in declining physical and psychological health; that Whyte, whom Walter had employed for approximately two years prior to his death as a secretary, conspired with Simmen, a lawyer practicing in the Principality of Liechtenstein, and Paul Marie Jacques, a banker in Monaco, to create the Foundation, and coerced Anna into writing a new will, which, among other changes, named the Foundation as her residual legatee.

Plaintiff further alleges that by this time, Whyte, Simmen, and Jacques had gained control of Monavest Corporation, the Panamanian company that the Bronners had formed in 1983 for the purpose of investing their assets, and of which Anna was the sole shareholder after Walter's death. A letter dated April 16, 1998 on Monavest stationary and appearing to bear the signatures of Anna, as President, and Whyte, as Secretary, instructs CIBC Oppenheimer Corp. to change the name of the account that held the Bronner's stock portfolio from Monavest to DORAW, and then to "transfer legal and beneficial title and ownership of the account" to the Foundation. In November 1999, the CIBC account was closed, and the

Bronner account, now in the name of DORAW, was sent to the LBI account that is referred to above.

Anna died in Monaco on January 15, 1999. LBIE currently maintains an account for the Foundation under the name "DORAW." The Depository Trust Corporation (DTC) continues to hold the stock certificates associated with the LBIE account.

The Second Amended Complaint asserts the following five causes of action: (1) that the transfer of the Bronner Investment Portfolio from LBI to LBIE was fraudulent as to plaintiff, pursuant to New York Debtor and Creditor Law § 276 (first cause of action); (2) that Anna's Estate is the true and rightful owner of the "New York Assets" (by which plaintiff means the stock certificates held by the DTC in an account for LBIE for the account of Walanpatrias under the name DORAW); that in equity and good conscience those assets should be returned to Anna's Estate so that Anna's Estate can satisfy the amount that it owes plaintiff under the Bronner Estates Judgment; and that, in any event, plaintiff stands in the shoes of Anna's Estate, pursuant to an assignment of claims by Myers (second cause of action); (3) that, inasmuch as Anna's Estate received all the assets and liabilities of Walter's Estate, Anna's Estate owes plaintiff the \$3,770,049.87 that the Bronner Estates Judgment awarded plaintiff against Walter's Estate; and that, because all of Anna's assets were transferred to the Foundation for less than fair value, plaintiff is entitled to enforce the Estates

judgment as to Walter's Estate against the New York Assets (third cause of action); (4) that because Anna's assets were transferred to the Foundation for less than fair value, plaintiff is entitled to enforce the Estates Judgment against the New York Assets (fourth cause of action); and (5) that plaintiff is entitled to an accounting from the Foundation with regard to all the funds or assets that it obtained from Anna during her lifetime or from Anna's Estate after her death or from Monavest at any time (fifth cause of action).

Plaintiff's second, third, and fourth causes of action seek particular property, i.e. - the New York Assets - as to which plaintiff contends that this court has in rem jurisdiction, not a money judgment. As plaintiff recognizes "[i]n rem jurisdiction... involves an action in which a plaintiff is after a particular thing, rather than seeking a general money judgment, that is, he wants possession of the particular item of property, or to establish his ownership or other interest in it, or to exclude the defendant from an interest in it." Majique Fashions, Ltd. v Warwick & Co., Ltd., 67 AD2d 321, 326 (1st Dept 1979). "In addition, "[j]urisdiction in rem is only possible where the power of the court is sufficient to control the particular res in question..." Shipman Coal Co. v Delaware & Hudson Co., 219 A.D. 312, 315 (1st Dept 1927), affd 245 NY 567 (1927).

Here, it does not appear that there is any such particular thing. The property that plaintiff seeks consists of stock certificates. However securities depositories, such as the DTC, hold these certificates in fungible bulk. The DTC holds a vast number of securities certificates, and it records, in book form, trades among its members in the securities evinced by those certificates. Thus, while the Foundation, as a client of LBIE, owns a share of the securities represented by the certificates held by the DTC, the Foundation does not own anything that is in the possession of DTC.

As the Securities and Exchange Commission has explained,

[t]he physical securities deposited with a securities depository are held in fungible bulk, no significant portion of which is identified or identifiable to a particular participant or pledgee;

Securities Exchange Act Release No. 34-19, 678 [1982-1983 Transfer Binder], Fed Sec L Rep (CCH) § 83,340 at fn 5 (April 15, 1983). LBIE, as a Participant in the DTC, "having securities of a given issue credited to its account has a pro-rata interest in the physical securities of the issue held in custody by the securities depository in its nominee name." Id.

As Larry E. Thompson, the Managing Director and Deputy General Counsel of the Depository Trust and Clearing Company, explains:

Participants, as the beneficial owners of publicly traded securities, deposit such securities at DTC, and the securities are then re-registered into the name of DTC's nominee Cede & Co. . . . Once re-registered in the name of Cede & Co., the securities are returned to DTC for custody, and credited to Participants' DTC accounts in proportion to the amount of shares deposited by each Participant. . . . Once Participants have deposited

shares at DTC, transfers in beneficial ownership are affected by "book-entry" deliveries among the various Participants' DTC accounts (with Cede & Co. remaining the registered owner). . . . [P]hysical possession of securities certificates is not affected

There simply are no particular certificates in the custody of DTC that can be determined to pertain to the DORAW account at LBIE. Citing United States v Banco Cafetero Intl. (608 F Supp 1394 [S.D.N.Y. 1985], affd 797 F2d 1154 [2d Cir 1986]), plaintiff argues that an intangible res, such as an account credit at the DTC, is a proper subject of an in rem proceeding. However, while LBIE has an account credit at DTC, the Foundation does not. Accordingly, there is no basis upon which this court may assert in rem jurisdiction over any securities certificates held by the DTC.

Moreover, even were there a basis for this court to exercise in rem jurisdiction over certain stock certificates, or over a certain portion of LBIE's DTC account, the second, third and fourth causes of action would still have to be dismissed pursuant to UCC § 8-112 (c) which provides that:

[t]he interest of a debtor in a security entitlement may be reached by a creditor only by legal process upon the securities intermediary with whom the debtor's securities account is maintained, except [for an exception not relevant here].

Thus, plaintiff would have to litigate the claims that it asserts against the Foundation's security entitlement against the Foundation's securities intermediary, that is, LBIE. Accordingly, defendant's motion to dismiss will be granted as to the second, third, and fourth causes of action.

Defendant argues that the first and the fifth causes of action must also be dismissed, on the grounds that this court lacks personal jurisdiction over defendant, and that New York is an inconvenient forum.

As to the first cause of action alleging fraudulent transfer, Debtor and Creditor Law § 276 provides that:

Every conveyance made ... with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.

It is indisputable that at the time that the Foundation caused LBI to transfer the assets in the DORAW account to LBIE, plaintiff had a duly entered judgment against the Foundation for a sum of money that greatly exceeded the value of the transferred account.

Because direct proof of the "actual intent" that the statute requires is rare, courts have articulated a number of "badges of fraud," that is, circumstances from which the conveyor's actual intent to defraud may be inferred. See e.g. In re Flutie New York Corp., 310 BR 31 (U.S. Bankr. Ct. - S.D.N.Y. 2004); In re Corcoran, 246 BR 152 (U.S. Bankr. Ct. - E.D.N.Y. 2000). These "badges of fraud," or indicia include:

a close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; the transferor's knowledge of the creditor's claim and the inability to pay it; and retention of control of the property by the transferor after the conveyance.

Wall Street Assocs. v Brodsky, 257 AD2d 526, 529 (1st Dept 1999); see also Dempster v Overview Equities, Inc., 4 AD3d 495 (2d Dept 2004).

Here, the relationship between the parties to the transaction could not be closer. The Foundation transferred the DORAW account from its brokerage account in New York to its brokerage account in London. Plaintiff alleges that the Foundation caused the transfer to take place within one or two days of learning that plaintiff had become aware of the existence of the New York account. It appears that at the time that it transferred the account, the Foundation already knew of the much larger default judgment that had been entered against it in the Florida litigation. Inasmuch as the Foundation transferred the account from one of its accounts to another of its accounts, the issue of consideration does not arise, but the retention of control by the transferor, after the conveyance, could not be clearer.

Accordingly, plaintiff has adequately pled the elements of a fraudulent conveyance. Plaintiff has also, thereby, made a prima facie showing that defendant has committed a tort in New York, and that this court, therefore, has personal jurisdiction over defendant pursuant to CPLR § 302(a)(2). LBI's Answer to Writ of Garnishment, filed on April 16, 2004 in the Florida action, confirms that the assets that had been in the Bronners' account at LBI were transferred to LBIE between March 2 and March 4, 2004.

That portion of the motion seeking to dismiss the first cause of action is, therefore, denied.³

Defendant next moves to dismiss plaintiff's fifth cause of action which seeks an accounting. Plaintiff gives three possible bases for seeking an accounting. The first two pertain to claims that Anna's Estate may have against defendant. Those claims are pending in the Florida litigation, not here. The third pertains to certain federal taxes that may be owed by Anna's Estate. However, plaintiff stands in the shoes of Anna's Estate solely in regard to such claims as it may have against defendant here, and against the defendants in the Florida litigation, not in regard to any taxes that the Estate may owe. Accordingly, the fifth cause of action is dismissed for failure to state a claim.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss is granted to the extent that the second, third, fourth, and fifth causes of action of the Second Amended Complaint are dismissed; and it is further

ORDERED that the first cause of action is hereby severed and continued; and it is further


³ Defendant also moved to dismiss the Complaint on grounds of forum non conveniens (see, CPLR § 327[a]) on the ground that it would suffer hardship if it is required to litigate plaintiff's claims in New York. However, the first cause of action relates to actions which took place in New York and is thus not subject to dismissal on this ground.

ORDERED that defendant is directed to serve an answer to the first cause of action contained in the Second Amended Complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that that portion of defendant's motion seeking to vacate the temporary restraining order of this Court dated April 27, 2004, which was continued by the Decision/Order of this Court dated February 7, 2005, and plaintiff's Order to Show Cause for a temporary restraining order and preliminary injunction signed on October 11, 2005 are scheduled for further oral argument in IA Part 12, 60 Centre Street, Room 341 on March 13, 2006 at 11:00 a.m. in light of this decision.

This constitutes the decision and order of this Court.

Date: March 2, 2006


Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.

FILED
MAR 03 2006
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