

**Those Certain Underwriters at Lloyds, London v
Occidental Gems, Inc.**

2006 NY Slip Op 30530(U)

June 5, 2006

Supreme Court, New York County

Docket Number: 602698/01

Judge: Leland G. DeGrasse

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. LELAND DEGRASSE

PRESENT:

PART 25

Index Number : 602948/2001

CERTAIN UNDERWRITERS

vs

OCCIDENTAL GEMS, INC.

Sequence Number : 006

CONFIRM/REJECT REFEREE REPORT

INDEX NO. _____

FEB 02 2006

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

is decided in accordance with
accompanying Memorandum Decision.

FILED

JUN 06 2006

COUNTY CLERK'S OFFICE
NEW YORK

JUN 05 2006



Dated: _____

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

-----X
THOSE CERTAIN UNDERWRITERS AT LLOYDS,
LONDON, et ano.,

Plaintiff,

-against-

OCCIDENTAL GEMS, INC., et al.,

Defendants.

Index No. 602948/01

FILED

JUN 06 2006

COX

DeGrasse, J.:

Plaintiffs move for an order confirming the report of Special Referee Sue Ann Hoahng. Defendant Occidental Gems, Inc. cross-moves for an order vacating the report. Occidental, a New York corporation, was in the business of distributing diamonds. Plaintiff Defendant Pravin Mehta was Occidental's president until 1996. Occidental is owned by Gembel Israel 1982, an Israeli company owned by Prabodh Mehta, Rashmi Mehta, Kishore Mehta and Vijay Mehta.¹ Defendant Interings, Inc., another New York corporation, was formed by Pravin and operated by Prakash. Plaintiffs have issued multinational diamond insurance policies to members of the Gembel Group of companies which includes Occidental. The subject of this action is a fidelity loss claim submitted to plaintiffs by Occidental. Under the claim it is alleged that Occidental's gems were stolen and delivered to Interings and other entities through the fraudulent acts of Pravin and Prakash. The relief prayed for in the complaint includes a judgment declaring that the alleged losses were not fortuitous and, therefore, not covered by plaintiffs' policies.

¹The Gembel owners are siblings but not related to Pravin or his brother, defendant Prakash Mehta.

The special referee has been supervising disclosure pursuant to CPLR 3104. Occidental seeks a vacatur of the special referee's directive that Occidental produce Vijay, a resident of Belgium, for a deposition. Occidental asserts that it has no control over Vijay. It is not claimed that Vijay is an officer, director, employee or agent of Occidental. The special referee directed his deposition in reliance upon *Grande Prairie Energy LLC v Alstom Power, Inc.* (5 Misc 3d 1002 [A], 2004 WL 2295660), a case in which a corporation was ordered to produce a resident of Switzerland who was not in its employ. The *Grande Prairie* decision was premised on the corporation's control over the person sought to be deposed. No such control has been shown in this case. The fact that Vijay and other principals of Gembel directed Occidental's activities can be construed as evidence that Vijay had control over Occidental but not of Occidental's control over Vijay. The deposition cannot be ordered absent evidence of control by the corporate party (*see Two Clinton Sq. Corp. v Computerized Recovery Sys.*, 63 AD2d 853 [1978]). Plaintiff's claim of control by Occidental is refuted by the fact that it has not transacted business since 1996. Also, this case presents no basis for a departure from the rule that a party may not be examined through a person it did not employ at the time the examination was ordered or notice therefor served (*see McCormick v Mars Assocs.*, 25 AD2d 433, 434 [1966]). Plaintiff's claim that Vijay, as an owner of Gembel, has an interest in the outcome of this action is also unavailing. If imposed, a CPLR 3126 penalty based upon Vijay's failure to appear for a deposition might be detrimental to his pecuniary interests. However, it would also affect the interests of Occidental itself and the remaining Gembel owners who are not parties to this lawsuit. "It is incumbent upon [a] . . . court to protect the rights of any innocent party whose cause of action or defense would be unfairly impaired by the imposition of a CPLR 3126 penalty on another, contumacious

party" (*Quintanilla v Harchack*, 259 AD2d 681, 682 [1999]).²

Occidental also seeks a vacatur of the special referee's directive that it provide documents and give testimony regarding an arbitration pending in Belgium involving Gembel's owners, Prabodh Mehta, Rashmi Mehta, Kishore Mchta and Vijay Mehta. It is noted that Occidental is not a party to the arbitration. The special referee's report also does not specify the documents to be produced. For the foregoing reasons, plaintiff motion for an order confirming the special referee's report is denied. Occidental's cross motion for an order vacating the report is granted. The branch of the cross motion by which Occidental seeks an order compelling the depositions of Nick Barron and Prakash is denied without prejudice to an application before the special referee. A note of issue shall be filed on or before November 17, 2006.

Dated: June 5, 2006


J.S.C.

FILED
JUN 06 2006
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NEW YORK

² Occidental argued before the special referee that Vijay could be deposed through the Hague Convention of March 18, 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (23 UST 2555). Belgium, however, is not a signatory to the Hague Convention (*see* 28 USC § 1781 note [Belgium not listed as a party to the treaty]). In any event, the Hague Convention is not the exclusive means of obtaining evidence abroad (*see Societe Nationale Industrielle Aerospatiale v United States District Court*, 482 US 522, 536 [1987]). Some guidance on discovery under Belgian law can be found in *In re Vitamins Antitrust Litigation* (120 F Supp 2d 45 [2000]).