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

PRESENT: BERNARD J. FRIED Justice PART 60

FBEM

Application of Mitsubishi Corp.

-v-

Curaco Ulities

INDEX NO. #604429-2006
MOTION DATE
MOTION SEQ. NO #001
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

FILED
JAN 11 2007
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the attached memorandum decision.

SO ORDERED

FILED
JAN 11 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/11/07

J.S.C.

BERNARD J. FRIED
J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

☐ DO NOT POST [ ] REFERENCE

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

Case 7150

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 60

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MITSUBISHI CORPORATION

Petitioner,

INDEX NO.: 604429/2006

-against-

CURACAO UTILITIES COMPANY N.V.,

Respondent.

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FRIED, J.:

On December 28, 2006, Petitioner Mitsubishi Corporation ("Mitsubishi") (a Japanese corporation with its principal place of business in Tokyo, Japan) moved for temporary and preliminary injunctive relief pursuant to CPLR 7502(c) to enjoin Respondent, Curacao Utilities Company, N.V. ("CUC") (a limited liability company organized and existing under the laws the Netherlands Antilles [also its principal place of business]) from drawing down funds on an irrevocable letter of credit (the "Letter of Credit"), (Donald Gray Aff, Ex. B). Thereafter, on Friday, January 29, 2007, I granted the temporary restraining order and scheduled the parties to come in for oral argument on the preliminary injunction. I have read the papers submitted and heard oral argument on this matter on January 5, 2007.

In 1999, Mitsubishi and CUC entered into a Turnkey Engineering, Procurement and Construction Agreement (the "EPC Agreement") , pursuant to which Mitsubishi was to design and construct a power plant (the "Plant"), including turbines, boilers, a desalinization plant and air compressors, for CUC. (Donald Gray Aff., ¶4). In order to guaranty its

obligations under the contract and to ensure that CUC would have funds available if Mitsubishi failed to either make payments or perform warranty work, Mitsubishi provided respondents with an irrevocable letter of credit, through a third party bank, The Bank of Tokyo-Mitsubishi, Ltd. (the "Bank"). (Donald Gray Aff., ¶4 and Ex. 4). The EPC agreement provides that all disputes between the parties (that cannot be settled between themselves and after submission to senior management of Owner and Contractor) are subject to Arbitration. (EPC Agreement, at Ex. A to David Gray Aff.).

A dispute presently exists between the parties regarding Mitsubishi's performance under the EPC Agreement. CUC claims that Mitsubishi has failed to meet its warranties and performance standards and had refused to re-perform, repair, or replace its faulty work or to provide CUC with the money to do so, despite demands from CUC and the government of Curacao. (Gray Aff. ¶22). CUC cites five items as among Mitsubishi's most critical failures including alleged deficiencies with: (1) the Plant's three economizer units (resulting in a chemical substance injuring people and property near the plant), (2) the Plant's circulating water piping, (3) the plant's four circulating water pumps, (4) the Plant's salt water desalinization unit number 8, and the Plant's fuel intake filtering system. (Gray Aff. ¶¶ 24, 26, 27, 30.). CUC further alleges that the plant cannot run safely, cleanly, economically, or at a continuous capacity as a result of these failures and further claims that it has repeatedly requested that Mitsubishi repair or replace defective items and has met with Mitsubishi regarding these issues to no avail. (Gray Aff. ¶¶25, Respondent's M.O.L., p.7). Because of Mitsubishi's repeated failures to act, CUC asserts that it must take steps to repair the plant.. (Respondent's M.O.L., p. 7).

By a drawing dated December 19, 2006, CUC demanded payment of $7,348,073.00 under the Letter of Credit. (Morishita Aff., at Ex. C). The Bank of Tokyo-NY received CUC's drawing under the Letter of Credit on December 20, 2006, and rejected that drawing on December 22, 2006, based on a defect in the draft attached to the drawing. (Morishita Aff. at ¶¶24-27). Subsequently, Mitsubishi sent a letter to CUC objecting to CUC's demand for payment under the Letter of Credit, claiming that the demand violated the EPC Agreement. (Morishita Aff. ¶28, Ex. D). CUC then corrected its previously defective draft.

By a second drawing, dated December 26, 2006, CUC again demanded payment for over $7 million under the Letter of Credit. The next day, Mitsubishi served on CUC a Notice of Intent to Arbitrate, advising CUC of its intention to commence arbitration proceedings to seek a declaratory judgment that the EPC agreement (and in particular Articles 4.8.1 and 15.4.1(ii) and Article 20 thereto) requires a determination that amounts be "due" to CUC. (Movant's M.O.L. pp2-3). Mitsubishi argued that a drawing under the Letter of Credit is not permitted until a determination by the Arbitral Tribunal is made that such disputed amounts are indeed "due" and payment has not been made within thirty days after demand. (Movant's M.O.L, pp. 2-3). The current share ownership of CUC is as follows: Aqualectra (a holding company responsible for water and electricity production for Curacao) owns 49% of CUC, and Curacao Electric Company ("CEC") owns 51%. (Morishita Reply Aff., ¶2). Mirant Corporation ("Mirant") (a Delaware corporation with its principal place of business in Atlanta Georgia, in turn, owns 50% of CEC (with Mitsubishi owning the other 50%). (*Id.*, ¶2). Consequently, Mirant indirectly owns a 25.5% interest in CUC. (*Id.* at ¶2). It also holds a $40 million convertible preferred equity interest in Aqualectra. (*Id.* at ¶2). CUC is

a special purpose entity formed solely to hold and own the Curacao utilities plant that is the subject of the EPC Agreement. (*Id.* at ¶6).

Mitsubishi seeks a preliminary injunction in aid of arbitration, under CPLR §7502(c), on two grounds. First, if CUC has already drawn down the funds, then there will be no dispute for the arbitrators to resolve. Second, if CUC is not enjoined from drawing down the funds, it will be unable to pay any arbitral award later rendered against it.[1]

As to the first argument, even if CUC is not enjoined from drawing down the funds, the arbitrators would have the authority to determine whether CUC or Mitsubishi is entitled to the $7 million, and the panel could, of course, order CUC to return those funds to Mitsubishi. Consequently, germane to determining whether this preliminary injunction should issue is the question of whether Mitsubishi has shown that an arbitration award against CUC would be rendered valueless if CUC has already drawn down on the Letter of Credit. Mitsubishi alleges that, if CUC is not enjoined from drawing down the funds, that any arbitral award in Mitsubishi's favor will be rendered ineffective because Mirant intends to sell all of its Carribean business (including CUC) and that this sale could result in an impairment loss to Mirant. (Morishita Reply Aff. at ¶9) . It further argues that after this purported sale, Mirant will no longer be involved in CUC to "answer for CUC's improper diversion of the letter-of-credit funds and CUC's failure to

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Mitsubishi also raised the argument that under UCC §5-108 and §5-109, although an issuer is under strict obligation to honor presentation under §5-108, that, where the parties have contracted for arbitration of all disputes, CUC's attempt to draw down on the Letter of Credit amounts to fraud or forgery under §5-109. While this argument presents an intriguing legal question, it is not necessary for me to reach this question, because plaintiff's motion must be denied on other grounds.

adhere to the requirement in the EPC Agreement for drawing on the letter of credit." (Id. at ¶10).

CPLR §7502(c) provides that "the supreme court in the county in which an arbitration is pending, or if not yet commenced, in a county specified in subdivision (a), may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief." The standard appears not dissimilar from the irreparable injury standard of the traditional three-pronged test for injunctive relief. Moreover on these facts, the answer under either standard turns on whether Mitsubishi has demonstrated that CUC would be unable to satisfy an arbitral award ordering that CUC return funds drawn down from the Letter of Credit.

To show that it would suffer either an ineffectual award or an irreparable injury unless CUC is enjoined from drawing down on the letter of credit, Mitsubishi would need to establish that, CUC lacks sufficient funds to pay an arbitral award in favor of Mitsubishi. Otherwise, the award would not be rendered ineffectual, nor would the injury to Mitsubishi be irreparable. Rather, there must be a showing either that CUC is insolvent or would be unable to pay an award.

While neither side has presented any cases discussing when an arbitral award would be rendered ineffectual under CPLR §7502(c) in a letter of credit situation, two recent Southern District cases and one Northern District case discuss whether irreparable injury has been demonstrated when a movant has alleged that a currently solvent party would be unable to satisfy an arbitral award rendered subsequent to a respondent's drawing down funds under

a letter of credit. These cases are instructive as to whether I should enjoin Mitsubishi from drawing down the funds on the rationale that it would render an arbitral award in Mitsubishi's favor ineffective.

In *Fluor Daniel Argentina, Inc. v. ANZ Bank*, (13 F.Supp.2d 562, 566 [S.D.N.Y. 1998]) the District Court found that a movant's failure to show irreparable harm was fatal to its motion for preliminary injunction. There, the plaintiff corporation, Fluor Daniel Argentina, Inc. ("FDA"), a provider of engineering construction and construction management services, moved for a temporary restraining order and a preliminary injunction, prohibiting the defendant beneficiary (Minera Alumbrera, Ltd. ["Minera"], a corporation owned by three international mining companies) from drawing on and the defendant banking group from paying on a letter of credit (or alternately prohibiting Minera from removing the funds from the United States). (*Id.* at 563-564). Plaintiff argued that it was highly unlikely that Minera would have assets which it could reach in satisfaction of any final judgment obtained in its favor, however, the court found that FDA had not satisfied the irreparable harm standard. *Fluor* recognized, as a matter of law, that monetary loss alone will generally not amount to irreparable harm, and a preliminary injunction is usually inappropriate where the potential harm is strictly financial. It held that, "even in those unusual circumstances where monetary loss may support a finding of irreparable harm, such as where insolvency threatens to frustrate a damage award, conclusory assertions of a defendant's financial weakness do not demonstrate a likelihood of such harm." Noting that, on its face, none of FDA's evidence suggested that Minera was near insolvency, the court found that FDA offered "little more than speculation and surmise in support of its claim of inordinate

financial risk." While FDA argued that all of Minera's assets related to a mining facility already the subject of lawsuits and that the corporation's prospects were rendered uncertain by market fluctuation, the court nonetheless focused on Minera's current solvency and the fact that the book value of the company's assets exceeded the amount of the letter of credit. The court added that certain risks were foreseeable to the parties when they entered into their agreement and that ensuring the legal certainty of letters of credit was important for policy reasons, as the value of letters of credit depends upon that certainty. Finally, it held that to enjoin payment on a letter of credit solely because of foreseeable risks would frustrate the ability of parties to undertake the risks of engaging in international transactions.

In *General Transportation Services v. Kemper Insurance Company*, (2003 WL 21703635 [N.D.N.Y. 2003]) the plaintiff, insured, sought, among other relief, to enjoin Defendants, Kemper, the insurer, and the defendant bank, from attaching, calling, or drawing down upon a letter of credit. A temporary restraining order and an order to show cause for a preliminary injunction were initially granted in state court. However, before the state court could hear argument on the order to show cause, the action was removed to federal court, which denied Plaintiff's motion for a preliminary injunction and denied Defendant's cross-motion to dissolve the temporary restraining order as moot. The court then issued a written decision explaining the bases for these rulings. Arguing that it would suffer irreparable harm if the court did not issue an injunction pending the completion of the arbitration because Defendant Kemper faced immediate insolvency, the plaintiff pointed to various facts, including that ratings of Defendant company's strength had been downgraded on AM Best, that Kemper had defaulted on $700 million of its notes, that Fitch Ratings had downgraded

the rating on Kemper's notes, that the Illinois Department of Insurance was investigating Defendant Kemper's financial stability (and denied Kemper's request to make interest payments on certain notes), and that Kemper had substantially reduced its workforce, engaging in significant layoffs. Following *Fluor*, the District Court found that Plaintiff had not established that there would be irreparable harm absent injunctive relief. As in *Fluor*, the court in *General Transportation* commented, that, as a general rule, monetary injury does not amount to irreparable harm. Further, it stated that, while a narrow exception to the general rule may apply in situations when a defendant may become insolvent and its assets may be dissipated, a party moving for injunctive relief cannot rely upon conclusory assertions to demonstrate the likelihood of such harm. Moreover, it held that to enjoin a party from drawing down on a letter of credit, the party seeking the injunction must show that the party it is seeking to enjoin is "imminently in danger of insolvency."

Finally, in *Mitsubishi Power Systems, Inc. v. the Shaw Group, Inc.*, (2004 WL 527047 [S.D.N.Y. 2004]), a case substantially similar to ours, the District Court denied Plaintiff Mitsubishi Power Systems ("MPS")'s motion for a preliminary injunction and dissolved a previously issued temporary restraining order enjoining Defendants (the Shaw Group, Inc. and its wholly-owned subsidiary Stone & Webster Michigan, Inc. [together, "Shaw"]) from drawing down a $25 million letter of credit securing MPS's obligations under a contract where MPS argued that it would suffer irreparable harm from Shaw's draw down. Arguing that Shaw sought to draw down on the letter of credit because of its deteriorating finances and alleging that there was a substantial chance Shaw would become bankrupt within the next year and possibly as soon as within the next six months, MPS relied on the

following facts: (1) Standard & Poor's had downgraded Shaw's credit rating during the past year to an investment grade below a 'junk' rating; (2) Shaw had been in default of its senior credit facilities since March 2003; (3) Shaw had incurred at least $50 million in losses in the quarter ending November 30, 2003; (4) Shaw had continued to incur significant operating cash flow deficits in recent quarters (amounting to $279 million over the last five quarters so that its liquid reserves had been reduced from $457 million as of August 31, 2002 to $82 million as of November 30, 2003); and (5) Shaw's stock decreased in value by nearly 50% over the past two years. MPS also introduced the findings of an insolvency expert who opined that companies in Shaw's position file for bankruptcy 82-94% of the time. Shaw countered these assertions by introducing its own evidence of the company's solvency, including showings of the company's total net equity, cash and cash equivalents, evidence that Shaw had cured its defaults and/or obtained waivers, evidence of improvement in the company's debt to equity ratio, evidence of projected profits and an anticipated rise in stock price, and testimony of an expert who challenged the predictions of MPS's expert. Again, the court concluded that a showing of potential monetary loss was an inadequate reason to enjoin a defendant from drawing down on a letter of credit, and held that MPS had not shown that Shaw was insolvent or that there was a substantial chance that Shaw would be insolvent upon final resolution of the parties' pending arbitration proceeding. The court stated that Plaintiff had "...at most, shown that there is a possibility that the company may be insolvent by the time this case is fully litigated," and further stated that "mere possibility is speculative and cannot satisfy [the] burden to show that plaintiff is likely to suffer irreparable harm if equitable relief is denied." (*Id.*, *citing General Transportation* 2003 WL 21703635, at *3-4).

As in the cases discussed above, Mitsubishi has argued that, unless the defendant company, CUC, is enjoined from drawing down on the Letter of Credit, it will be unable to satisfy an arbitration award if one is issued against it. As evidence that any arbitration award would be rendered ineffectual under CPLR 7502(c) and/or that Mitsubishi would suffer irreparable harm for that reason, Mitsubishi has submitted a series of news articles discussing Mirant's past bankruptcy and future plans to sell its assets. (Morishita Reply Aff., ¶¶ 4, 9,10 and Ex. E). Mitsubishi has also submitted the affidavit of Masayuki Morishita ("Morishita") (the Assistant General Manager of the Power Systems Export Unit of Mitsubishi), which states that, according to Mirant's most recently filed 10-K (dated March 14, 2006), as of December 31, 2005, CUC was in default under its senior debt facility (putting payment of dividends at risk). (Morishita Reply Aff. ¶9). The Morishita Affidavit also discusses Mitsubishi's "grave concerns" that CUC will improperly divert the proceeds from the letter of credit in a manner that will prevent such amount from being recoverable by Mitsubishi in arbitration. (Morishita Reply Aff. ¶11).

I am persuaded, for the reasons set forth in the cases just discussed, that speculation that CUC may be insolvent at the time an arbitral award is rendered is insufficient to warrant the issuance of a preliminary injunction. Such conclusory assertions regarding the future plans of shareholder Mirant and possible resulting effects on CUC do not cause this matter to fall within the narrow exception discussed in *Fluor* and in *General Transportation* to the general rule that letters of credit are inviolate. (13 F.Supp.2d 562, 564; 2003 WL 21703635 at *3). Only where a movant can show that a party is in imminent danger of insolvency, should a court enjoin that party from drawing down on a letter of credit in order to prevent

irreparable harm to the movant and to prevent an arbitral award from being rendered "ineffectual" under CPLR 7502(c). Here, Mitsubishi has presented only evidence of Mirant's past bankruptcy and speculation that CUC may become insolvent in the future (Morishita Aff., ¶4). CUC, on the other hand, submitted evidence at oral argument that the corporation is currently solvent in the form of financial statements with the auditor's report for December 31, 2005 and 2004 and unaudited financial Statements for the quarter ending September 30, 2006. Consequently, Mitsubishi has not made the necessary showing of imminent insolvency and, for that reason, is not entitled to injunctive relief.

Where, as here, the potential harm at issue is strictly financial, and where the movant has shown only the "mere possibility" that the plaintiff will suffer irreparable harm, a preliminary injunction should not issue. (*Fluor* 13 F.Supp.2d 562, 564; *Mitsubishi Power Systems*, 2004 WL 527047 [S.D.N.Y]).

For the reasons set forth above, it is

ORDERED that Plaintiffs' motion for a preliminary injunction is DENIED; and it is further ORDERED that the temporary restraining order issued on December 29, 2007 and extended on January 5, 2007 is vacated; and it is further

ORDERED that this petition is dimissed.

DATED: 1/11/07

J.S.C.