

**DWHK Recovery Co. v DAEHA Co.
Ltd.**

2007 NY Slip Op 30996(U)

April 25, 2007

Supreme Court, New York County

Docket Number: 0116222/2004

Judge: Richard B. Lowe

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

PRESENT: Lowen
Justice

PART 56m

DWHK Recovery Company LTD.

INDEX NO. 116222/04

MOTION DATE 3/19/07

MOTION SEQ. NO. 006

MOTION CAL. NO. _____

- v -

Dasha Company Limited

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

FILED

MAY 01 2007

NEW YORK
COUNTY CLERK'S OFFICE

THIS IS FILED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

Dated: 4/25/07

HON. RICHARD B. LOWEN, JR.

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: PART 56

-----X
DWHK RECOVERY COMPANY, on behalf of the
Trust Created by a Trust Agreement and Assignment for
the Benefit of the Creditors of Daewoo Hong Kong
Limited,

Plaintiff,

-against-

Index No. 116222/04

DAEHA COMPANY LIMITED, DAEWOO
ENGINEERING & CONSTRUCTION CO., LTD and
DAEWOO CORPORATION,

Defendants.

DECISION AND ORDER

FILED

MAY 01 2007

NEW YORK
COUNTY CLERK'S OFFICE

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

By this instant order to show cause, the plaintiffs move for a permanent injunction enjoining and restraining the defendants from commencing or continuing to prosecute any lawsuit, including the action commenced by Daewoo Engineering & Construction Co., Ltd. ("DWEC") in the Seoul Central District Court of Korea on September 12, 2006 (Registered No. 2006-4406) against Plaintiff and the Korea Asset Management Corporation (the "Korean Action"). Plaintiffs DWHK Recovery Company ("DWHK-R") also move for (1) an order of severance pursuant to CPLR § 603 and CPLR 3212 (e), severing the issues of the loan interest due under the terms of the Agreements and of the amount of the reasonable attorney's fees due Plaintiff after this court has found in its favor on the issue of liability and the amount of loan principal payable to Plaintiff; (2) an order of reference pursuant to CPLR § 4311, directing the Special Referee to hear and report with recommendations to this Court, concerning the amount of loan interest and attorneys fees owed; (3) a disclosure order pursuant to CPLR §§ 5229 and 6220 directing a schedule by which DWEC's U.S. subsidiary in New York Daewoo America Development, Inc. ("DADI") must disclose the whereabouts of its assets or

any debts owed; (4) a restraining order pursuant to CPLR § 5229 restraining defendants, DADI, and DADI's subsidiaries from transferring any assets or debts owed to the defendants and/or DADI until the final judgment is satisfied; (5) an order of attachment pursuant to CPLR §§ 6201(1), 6202, 6210, and 6211 against the property of the Defendants, DADI or DADI's subsidiaries in the amount of \$65,950,030.00; and (6) a protective order pursuant to CPLR § 3103 striking the disclosure requests served upon Plaintiff on February 7, 2007 by defendant DWEC..

Background

The underlying facts in this matter are extensively discussed in this court's decision and order dated January 30, 2007. The decision granted the plaintiffs' motion for summary judgment against the defendants DWEC and Daeha Company Limited ("Daeha") on the issue of liability under a Loan Agreement and an Amended Loan Agreement in the amount of \$65,950,030.00. A finding on the total amount of damages was deferred and this court referred to a Special Referee to hear and report as to the amount of interest accrued on the judgment as well as the amount of attorney's fees payable to the plaintiff by the defendant. Familiarity with the decision is presumed.

Through this order to show cause, the plaintiffs argue that based on the alleged prior bad faith conduct of the defendants, additional orders are necessary to protect its ability to collect on the judgment.

A majority of the relief seeking restraints which is requested in the order to show cause has been resolved by the parties (*See Stipulation and Order*, April 2, 2007). Furthermore, the parties agree that much of the need for relief has been obviated by the defendants posting of an undertaking in the amount of \$65,950,030.00 on April 13, 2007. Remaining for disposition is only that part of the order to show cause which seeks a permanent injunction preventing defendants from pursuing

the Korean action.

The Korean Action

Plaintiff seeks the issuance of a permanent injunction enjoining DWEC from further prosecution of its action in Korea. The action before this court was commenced on November 16, 2004 whereby DWHK-R, as trustee of Daewoo Hong Kong Limited (“DWHK”), sought to collect a debt owed by the defendants under a Loan Agreement and Amended Loan Agreement. A motion to dismiss this action was denied by this court on November 11, 2005. Thereafter, on July 18, 2006, the plaintiffs filed a motion for summary judgment. On September 12, 2006, less than two months after DWHK-R filed its summary judgment motion, and almost two years after DWHK-R brought the action in this court, DWEC commenced a parallel lawsuit against DWHK-R in Korea (the “Korean Action”).

The Korean action is brought against DWHK-R as well as a non-party to this action, Korean Asset Management Corporation (“KAMCO”). The complaint in the Korean action seeks a declaratory judgment that “[p]laintiff has no guarantee liability to Defendant DWHK Recovery Company Ltd. with respect to the Loan Agreement and the Amendment to the Loan Agreement between Daewoo Hong Kong Limited and Daeha Company Limited” (*See Howes Aff., Ex. A at 1*).

In its decision and order dated January 30, 2007, this court considered a request by DWEC to stay this action pending the Korean courts determination in the action before it. When denying the stay, several observations were made. First, this court held that DWEC had “no good faith excuse for its extraordinary delay in bringing the Korean Action . . . [and] DWEC offered no credible excuse for its two-year delay in commencing the Korean Action” (*Decision, January 30, 2007 at 9-10*). Citing to case law holding that a court will not defer an action in favor of a parallel

proceeding which is brought in bad faith, this court found that the excuses made by DWEC for its extraordinary delay were unacceptable and uncredible and the application for a stay was denied. (*Decision, January 30, 2007 at 11, citing to Kayser v Horton*, 42 AD2d 839 at 840 [4th Dept 1973]).

The plaintiffs now argue a permanent injunction prohibiting the Korean action from going forward should be ordered because this court has already held the forum selection clause in the loan agreements mandate New York to be the proper forum, because there has been a judgment on the merits made in this matter which should be protected, and because the Korean action was brought in bad faith.

Discussion

A court should use its injunctive power to prohibit a person from pursuing an action in a foreign court rarely and sparingly (*Arpels v Arpels*, 8 NY2d 339, 341 [1960]). “The doctrine of comity militates against staying proceedings previously commenced in a foreign court of competent jurisdiction (*Indosuez International Finance B.V. v National Reserve Bank*, 263 AD2d 384, 384 [1st Dept 1999]). However, the grant of a permanent injunction against a defendants’ pursuit of a foreign litigation may be appropriate in certain circumstances (*Indosuez International Finance, B.V. v National Reserve Bank*, 304 AD2d 429 [1 st Dept 2003]).

In *Indosuez*, the appellate court held the trial court’s grant of a permanent injunction enjoining the defendants’ from proceeding with a simultaneous foreign litigation was appropriate under the circumstances. Those circumstances included a mandatory choice of law and forum selection clause between the parties; a judgment on the merits in the New York action; and clear evidence that the defendant’s were engaging in bad faith litigation (*Id* at 430). In light of these facts,

the issuance of an injunction was found to not upset comity between the two courts.

Many of the circumstances in the *Indosuez* case are present in the matter before this court. First, and foremost there is an enforceable forum selection clause in the agreements. In its January decision this court held that the parties explicitly agreed that New York is the only forum that can decide issues related to the controversy in both this and the Korean actions (*Decision, January 30, 2007 9-10*). This court also held that the relevant agreements contain enforceable forum selection clauses which must be enforced under New York General Obligations Law § 5-1402 (*Decision, January 30, 2007 at 10*). Also rejected were the forum non conveniens arguments raised by DWEC. The presence of the forum selection clause is an influential factor in this court's instant decision as to whether to stay the Korean action.

Indeed, there has been a reaffirmed commitment by courts to enforce forum selection clauses (*E&J Gallo Winery v Andina Licores S.A.*, 446 F3d984, 992 [9th Circuit 2006])(citing *Carnival Cruise Lines, Inc. v Shute*, 499 US 585 [1991]). It has been recognized that forum selection clauses are increasingly important in international business transactions and parties are entitled to certainty when choosing the regulation of their contracts and the costs associated therewith (*Id*). Furthermore, in many cases, much like this one, a failure to issue an anti-suit injunction would effectively nullify the forum selection clause. "Without an anti-suit injunction . . .[a] forum selection clause effectively becomes a nullity. The potential implications for international commerce are considerable" (*Id* at 992).

Defendant has offered no strong reason for allowing it to depart from the clause for which the parties bargained. While it may argue a permanent injunction would violate principles of comity, where the parties are bound by a forum selection clause, "comity [is] not implicated because there

[is] no possibility of treading on the legitimate prerogatives of the foreign jurisdiction[.] . . .” (*Indosuez*, 304 AD2d at 430). Therefore, the presence of a forum selection clause between the parties is an influential factor which warrants the issuance of an anti-suit injunction in this matter.

Secondly, like *Indosuez*, there is a judgment on the merits in this action. This court granted DWHK-R’s motion for summary judgment in its entirety against DWEC (*Decision, January 30, 2007 at 26-27*). The First Department has held that once there has been a New York judgment on the merits of an action, the courts of this State are entitled to protect that judgment through the means of an anti-suit injunction (*Indosuez at 430-31*)(citing *Farrell Lines, Inc. v Columbus CelloPoly Corp.*, 32 F.Supp.2d 118, 131 [1997]).

Lastly, like in *Indosuez*, there is evidence of bad faith conduct on the part of the defendants. As discussed *supra*, this court found defendants’ had no good faith excuse for having waited two years after the filing of this complaint, to file the Korean action (*Decision, January 30, 2007 at 9*). This court also determined the evidence is strong that DWEC commenced the Korean Action in an effort to avoid a determination on the summary judgment motion (*Decision, January 30, 2007 at 11*). Indeed, DWEC threatened to commence a lawsuit against DWHK-R in Korea unless it agreed to withdraw its summary judgment motion, and when they did not, the Korean action was filed (*Decision, January 30, 2007 at 11*). This is clear evidence of harassing and bad faith foreign litigation contemplated by the court in *Indosuez* (*Indosuez at 431*). Also, a post-judgment pursuit of a foreign proceeding in order to achieve an opposite result to that obtained in this court is viewed by some courts as “the paradigm of bad faith forum shopping” (*Mastercard Int’l Inc. v Fed’n Internationale de Football Ass’n*, No. 06-3036, 2007 US Dist. LEXIS 14208 [SDNY Feb. 28, 2007])

Many of the factors in this matter are considered highly relevant by the *Indosuez* court

when considering the remedy of an “anti-suit” injunction. Therefore, this court has the ability to issue the injunction. Defendants, however, still attempt to distinguish this matter.

First, the defendants argue that unlike the case at bar, the *Indosuez* matter did not involve a bond pending appeal. The defendants have procured a bond in order to secure the judgment given by this court. Because there is no indication that the defendant in *Indosuez* posted a bond, defendants argue the matter is distinguishable.

This argument is irrelevant. The purpose of an anti-suit injunction is not only to protect a plaintiff’s ability to collect a judgment. For example, as the *Indosuez* court points out, anti-suit injunctions are “consonant with [a] policy of enforcing . . . forum selection clauses”(*Indosuez*, 304 AD2d at 430). Furthermore, the plaintiffs should not be forced to incur the expense of litigation in Korea; such expense not being covered by the amount of the bond. Therefore, the posting of a bond really does little to influence this court’s opinion that an injunction is warranted.

Defendants also argue that KAMCO’s status as a defendant in the Korean action prevents this court from issuing an anti-suit injunction. DWEC argues that this court cannot issue an anti-suit injunction because the parties in this case and the Korean Action are not identical. Defendant cites to *China Trade and Development Corp. v M.V. Choong Yong*, 837 F2d 33 [2d Cir. 1987]) which stands for this proposition.

Subsequent to *China Trade*, the Second Circuit court held there was an exception to the necessity of identical parties by holding that where the two actions are “sufficiently similar”, identity of parties is not necessarily required (*Paramedics Electromedicina Comercial, Ltda. v GE Med. Sys. Info. Technologies, Inc.*, 369 F.3d 645, 652-53 [2d Cir. 2004]). In this matter, the inclusion of KAMCO as a defendant in the Korean Action should not prevent this court from issuing a permanent

injunction. First, the issues in both actions are identical. Second, DWEC has not made any separate claims against KAMCO nor has it sought any relief from KAMCO that it is not already seeking from DWHK-R. In fact, the only relief sought in the Korean action is against DWHK-R. In the Korean Action, the defendants seek only a declaratory judgment that DWEC has no guarantee liability to DWHK-R with respect to the loan agreements in this case (*Howes Aff., Ex. A at 1*). It appears as though KAMCO may be an unnecessary party. Therefore, the permanent injunction may be issued despite the inclusion of an additional party in the Korean Action.

Lastly, defendants argue DWHK-R has failed to make a showing of irreparable harm and therefore is not entitled to the issuance of an anti-suit injunction. However, the defendants do not cite to any case requiring such a showing in support of the injunction. Therefore, this argument fails.

The particular circumstances in this matter support a finding that the issuance of an anti-suit injunction is proper and it will not offend principles of comity.

Conclusion

Therefore, based on the foregoing it is hereby

ORDERED that DWEC and its attorneys are hereby restrained from proceeding in the Korean Action and are hereby restrained from seeking any type of judicial relief in the Korean Action.

This shall constitute the Order and Decision of the Court.

Dated: April 25, 2007

ENTER:


RICHARD B. LOWE, Jr.

J.S.C.

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