

Dover Capital Ltd. v Galvex Estonia OU
2007 NY Slip Op 31733(U)
June 11, 2007
Supreme Court, New York County
Docket Number: 0113485/2006
Judge: Richard B. Lowe
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PRESENT: _____
Justice

PART 57

Dover Capital Limited

INDEX NO. 113485/06

MOTION DATE 4/5/07

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

Gulruex Estonia II

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
JUN 21 2007
COUNTY CLERK'S OFFICE
NEW YORK

DECISION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 6/11/07

[Signature]
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
DOVER CAPITAL LIMITED and
GALVEX CAPITAL, LLC,

Plaintiffs,

Index No. 113485/06

-against-

GALVEX ESTONIA OU, CENTRE REINSURANCE LIMITED,
AND CRS III LIMITED,

Defendants.

-----X
Hon. Richard B. Lowe, III:

Plaintiffs move for an order enjoining defendant Galvex Estonia OU (“Galvex Estonia”) from proceeding with an action filed in Estonia.

Background

In this action Plaintiffs Galvex Capital LLC (“Galvex Capital”) and Dover Capital Ltd. (“Dover Capital”) seek to collect monies owed to them by Galvex Estonia pursuant to certain agreements . Plaintiffs also seek certain declaratory relief relating to those agreements from Galvex Estonia and Centre Reinsurance Limited and CRS III Limited (the “Centre Defendants”).

Galvex Estonia, along with other non parties to this action, owns, operates, and manages a steel galvanizing plant in Estonia. These non-parties include Galvex Intertrade OU (“Intertrade”), Galvex Trade Ltd (“Trade”) and Galvex Services OU (“Services”) which, until approximately August 2006, were owned by Galvex Holdings Ltd (“Holdings”)(Holdings, Intertrade, Trade, Services and Galvex Estonia are collectively referred to as “Galvex”). Galvex was founded by two investors, Daniel Bain and Barry Bernsten. Bain was the chairman of the

board of directors of Holdings, an officer and director of Galvex Estonia, and a director of non-parties Intertrade and Trade.

In connection with his various roles at Galvex, Bain entered into numerous contracts on its behalf. It is these contracts which are the subject of this action. Specifically, Holdings entered into services agreements with the Plaintiffs in this action, Dover Capital and Galvex Capital. First, on January 1, 2003, Holdings entered into a services agreement pursuant to which Dover Capital agreed to provide Holdings with certain services. Thereafter, on December 17, 2004, Bain allegedly caused Holdings to enter into a second services agreement, this time with Plaintiff Galvex Capital who was to provide services.

Bain also allegedly had Holdings' operating subsidiaries, Defendant Galvex Estonia and non-parties Trade, Intertrade, and Services become liable for Holdings' obligations under the services agreements with Dover Capital and Galvex Capital by causing them to enter into a deed of accession with respect to each agreement. The deeds purport to obligate Galvex Estonia to pay the fees and expenses for the services provided by Plaintiffs to Holdings.

Plaintiffs commenced the instant action on or about September 20, 2006 alleging various breaches of contract by Galvex Estonia. Shortly thereafter, on December 20, 2006 the complaint was amended to add the Centre defendants

On or about November 23, 2006, Galvex Estonia filed a suit against Bain in Harju County, Estonia. Service of process has not yet been accomplished. The Estonian action seeks monetary damages from Bain as a result of alleged breaches of his fiduciary duties to Galvex Estonia as its officer and director. Neither Dover Capital, Galvex Capital, nor the Centre Defendants are parties to the Estonian action. There is also another action pending before this

court known as *Bain v Silver Point* (Index No. 114284/06).

Plaintiffs ask this court to enjoin Galvex Estonia from prosecuting its claims against Daniel Bain in Estonia. They allege the action was filed only in retaliation to the filing of this instant action. They argue that the Estonian action was filed solely to harass Bain. Specifically, the plaintiffs allege that non-party Silver Point, a hedge fund that controls Gavlex Estonia, supposedly threatened to crush Bain with extended and protracted litigation in retaliation for his filing of actions before this court.

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 [1st Dept 1999]). A party seeking to enjoin its adversary from proceeding with a foreign action must demonstrate that the foreign action was filed in bad faith or for the purpose of defrauding or harassing the other party (*See e.g. Chayes v Chayes*, 180 AD2d 566, 566-677 [1st Dept 1992]; *Sarepa, S.A. v PepsiCo, Inc.*, 225 AD2d 604, 604 [2nd Dept 1996](reversing trial court's order enjoining defendant from proceeding with Spanish suit because plaintiff failed to "clearly show" that the foreign action had been filed with malicious intent)).

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 (304 AD2d 429 [1st Dept 2003]). Those circumstances included a judgment on the merits in the New York action, a mandatory forum selection clause contained in

the parties' agreement, and clear evidence that the defendant's were engaging in bad faith litigation (*Id* at 430). While acknowledging that foreign suit injunctions should be issued sparingly, the court found that under the circumstances, the issuance of an injunction would not upset comity between the two courts.

Those circumstances are not present in the instant litigation. The Plaintiffs contend that the Estonian action must have been intended to "retaliate" against Bain because it was filed after this action and because of purported prior threats to sue Bain. However, the fact that a parallel suit is filed does not necessarily warrant an anti suit injunction. Indeed, "these factors are likely to be present whenever parallel actions are proceeding concurrently, and an anti-suit injunction grounded on these . . . factors alone would tend to undermine the policy that allows parallel proceedings to continue and disfavors anti-suit injunctions (*China Trade & Dev. Corp. v M.V. Choong Yong*, 837 F2d 33, 36 [2d Cir. 1987]).

Furthermore, as to Bain's allegations of defendants' threats of suing him around the country, if the suit is indeed baseless and merely a bad faith attempt to harass Bain, then it is within the Estonian court's province to make that determination. While the court notes that many of the parties are interrelated, the supposed threats were made by Silver Point, which is not even a party to this instant action. Furthermore, many of the plaintiffs' allegations are vague and conclusory. For example, plaintiff seems to suppose that because the complaint in the Estonian action acknowledges this instant action, clearly this is a demonstration that "the Estonian action was filed . . . for purely vexatious and retaliatory purposes" (Pl. Memorandum of Law, p. 2). The court disagrees with this conclusion. These allegations alone made do not affirmatively demonstrate to this court that the action was filed in bad faith (*Chayes* at 566-67).

The defendants argue that injunctive relief should not be granted because there is no identity of parties in the two matters and the resolution of the case before this court is not dispositive of the action to be enjoined (*Paramedics Electromedicina Comercial Ltda v GE Med. Sys. Info Technologies, Inc.*, 369 F3d 645, 652-53 [2d Cir. 2004]). This court agrees. The parties in the two actions are not the same. The plaintiffs here, Dover Capital and Galvex Capital, are not parties to the Estonian action; and Daniel Bain, the defendant in the Estonian Action, is not a party to this action. In addition there are causes of action here against two additional defendants, the Centre defendants. While exact similarity of the parties is not always necessary (*see Paramedics* at 553), here there is a substantial difference between the two actions which precludes the issuance of an injunction. Plaintiffs, which are a corporations, do not cite any authority that supports their contention that they may be considered the same party as Bain for purposes of this motion.

Furthermore, the issues are not identical for purposes of issuing an anti suit injunction against a foreign litigation. In this action, we have a third party suing under a theory of breach of contract. In the Estonian action, the corporate defendant is suing its principle for breaches of fiduciary duty to the Company. The two actions allege different claims against different parties on the basis of different theories of liability, therefore, an anti-suit injunction is not warranted (*See China Trade & Dev. Corp. v M.V. Choong Yong*, 837 F.2d 33 [2d Cir 1987]).

Lastly, the plaintiff relies upon a forum selection clause in the services agreements in support of this motion. The clause reads:

Any action or proceeding seeking to enforce any provision
of, or based on any right arising out of, this Agreement

may be brought against any of the parties in the Courts of
The State of New York . . .

On motions such as the instant one, courts have acknowledged that a forum selection clause may be a factor to consider when deciding the issue. In *Indosuez*, the presence of a mandatory forum selection clause was a factor considered by the court when granting a stay of a foreign action (*Indosuez* at 430). The court found the injunction was consistent with the courts' preference to enforce such clauses (*Id*). However, in this instant matter, the forum selection clause is permissive rather than mandatory and therefore, to deny a stay of the foreign litigation would not offend this preference.

Furthermore, the relevant clause is in the services agreement to which Bain, the party in the foreign action, is not bound. Therefore, the clause is not enforceable against him because he is not a party (*See, e.g. L-3 Commc'ns Corp. v Channel Techs., Inc.*, 291 AD2d 276-77 [1st Dept 2002]).

The plaintiff has failed to come forward with sufficient grounds to compel this court to bypass well established rules directing comity be given to foreign tribunals. Therefore, it is hereby

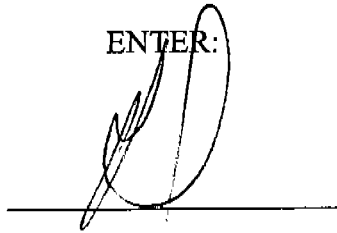
ORDERED that the motion to stay the foreign action in Estonia is denied.

This shall constitute the Order and Decision of the Court.

Dated: June 11, 2007

ENTER:

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JUN 21 2007
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HON. RICHARD J. LOWE, JR.