

Leyland Warwick Assoc., LLC v Tarragon Corp.

2008 NY Slip Op 31254(U)

April 28, 2008

Supreme Court, New York County

Docket Number: 0603079/2007

Judge: Herman Cahn

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: Cahn

PART 49

Justice

Index Number : 603079/2007

LEYLAND WARWICK ASSOCIATES,

vs.

TARRAGON CORPORATION,

SEQUENCE NUMBER : 002

OTHER

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

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

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

FILED
APR 30 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/28/08

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

-----X
LEYLAND WARWICK ASSOCIATES, LLC and,
WARWICK GROVE COMPANY, LLC,

Plaintiffs,

- against -

TARRAGON CORPORATION,

Defendant.
-----X

FILED
Inlet No. 603079/07
APR 30 2008
COUNTY CLERK'S OFFICE
NEW YORK

HERMAN CAHN, J.:

In this breach of contract and conversion action, plaintiffs Leyland Warwick Associates, LLC (Leyland) and Warwick Grove Company, LLC (Warwick Grove) move for an order, granting them an attachment against defendant Tarragon Corporation (Tarragon), CPLR 6212.

For the following reasons, plaintiffs' motion is denied.

Background

The Parties

Leyland is a New York limited liability company with its principal place in Tuxedo, New York.

Warwick Grove is a New York limited liability company with its principal place of business at the same address as Leyland. Leyland is a member of Warwick Grove.

Tarragon is a publicly traded Nevada corporation that specializes in real estate development projects. Tarragon maintains an executive office at 423 West 55th Street, New York, New York.

Warwick Grove and its Operating Agreement

Tarragon and Leyland formed Warwick Grove to develop and build a planned community for active adults in Warwick, New York. On August 11, 2003, Tarragon and Leyland entered into an Operating Agreement governing their relationship (Kaufman Aff, Exh A, hereinafter “Operating Agreement”).

Tarragon agreed to finance the project and Leyland agreed to manage it (id., § 7.4). According to plaintiffs, much of the project’s financing is derived from a construction loan obtained from Wachovia Bank, N.A. (see also Operating Agreement, § 4.6). According to Howard Kaufman, executive vice president and general counsel of Leyland Alliance LLC (Leyland Alliance),¹ the construction loan is secured by Warwick Grove’s assets and guaranteed by Tarragon. Further, according to Kaufman, the construction loan documents permit Wachovia to disburse loan proceeds in varying monthly advances to Tarragon, who would in turn transfer the money to Warwick Grove. The construction loan documents have not been provided to the court.

Paragraph 12.2 of the Operating Agreement provides that “[i]f a Member has received distribution in violation of this Agreement or the Act, it shall be liable to the Company to return such distribution.”

The Operating Agreement maintains an article for dispute resolution which states:

16.1. Application of Section. In the event that a Member or Manager withholds its consent or approval with respect to any matter where such consent or approval is required under this Agreement and where a “reasonableness” standard applies to such consent or approval, then if the other Member of [sic] Manager believes that

¹ Leyland Alliance is the sole member of Leyland (Operating Agreement, § 7.5.1).

such consent or approval was withheld or denied unreasonably, the provisions of this Article will apply.

The first step of the dispute resolution process involves resolution through mediation (Operating Agreement, § 16.2). If the matter cannot be resolved by mediation, then “any Member(s) may submit any dispute to binding arbitration in the City of New York, pursuant to the Commercial Arbitration Rules of the American Arbitration Association . . .” (id., § 16.3).

With respect to jurisdiction, the Operating Agreement provides:

Each of the Members irrevocably and unconditionally (a) agrees that any suit, action or other legal proceeding arising out of or relating to this Agreement will be brought in the courts of record of the State of New York in New York County . . . ; (b) consents to the jurisdiction of each such court in any such suit, action or proceeding Notwithstanding the provisions of the Section 18.17, the Members acknowledge that before a Member may file legal action against one or more Members, such Member must have complied with the remedies available pursuant to Article XVI of this Agreement, to the extent applicable

(id., § 18.17).

The Present Dispute

Plaintiffs claim that in the spring of 2007, Tarragon began to experience liquidity problems. As a result, plaintiffs further claim that Tarragon withheld monies it received in connection with the construction loan that were to be distributed to Warwick Grove. Specifically, in May 2007, Tarragon transferred to Warwick Grove \$1,224,875.00 out of \$1,483,907.00 of the construction loan proceeds advanced by Wachovia. Plaintiffs allege that Tarragon converted \$259,032.00 for its own use. In addition, plaintiffs claim that in June 2007, Tarragon transferred \$1,454,235.00 out of \$1,728,472.00 of the construction loan proceeds advanced to it by Wachovia, allegedly converting an additional \$274,237.00 for its own use.

Plaintiffs allege that the total monies converted by Tarragon amounts to \$533,269.00.

Tarragon counters, among other contentions, that: (1) the dispute of the subject funds is subject to the dispute resolution procedures under Article 16 of the Operating Agreement; and (2) plaintiffs have no basis for an attachment pursuant to CPLR 6201 (1) or 6201 (3).

Discussion

To the extent that Tarragon contends arbitration is a more appropriate forum to hear this case, Tarragon's right to compel arbitration has been waived, as it has actively participated in this case (Sherrill v Grayco Bldrs., Inc., 64 NY2d 261 [1985]; De Sapió v Kohlmeier, 35 NY2d 402 [1974] [procuring deposition of plaintiff and interposing a cross claim on apportionment of liability constitutes waiver of any right to arbitration]; Johnson v Brookdale Assocs., 271 AD2d 382, 382 [1st Dept 2000] ["[d]efendant waived any right to arbitrate the claim by affirmatively participating in this lawsuit"]; Bucci v McDermott, 156 AD2d 328 [1st Dept 1989] [participation in litigation for one year waives right to arbitration]). "Once the right to arbitrate a particular dispute has been lost by an election to litigate it cannot be recaptured" (Sherrill, 64 NY2d at 274).

As to the sufficiency of the motion for an attachment, "[a]ttachment is a provisional remedy designed to secure a debt by preliminary levy upon the property of the debtor to conserve it for eventual execution" (Michaels Electrical Supply Corp. v Trott Electric, Inc., 231 AD2d 695, 695 [2d Dept 1996]; Siegal v Northern Boulevard & 80th St. Corp., 31 AD2d 182 [1st Dept 1968]). Due to the harsh nature of attachment, the courts strictly construe the attachment statute "in favor of those against whom it may be employed" (Glazer & Gottlieb v Nachman, 234 AD2d 105, 105 [1st Dept 1996]; see also J.V.W. Inv. Ltd. v Kelleher, 41 AD3d 233, 234 [1st Dept

2007]; Elton v Leather Corp. v First Gen. Resources Co., 138 AD2d 132, 135 [1st Dept 1988]).

In order to obtain an attachment, a plaintiff must demonstrate that: (1) there is a cause of action; (2) a likelihood plaintiff will succeed on the merits; (3) one or more grounds for attachment exists; and (4) the amount demanded from the defendant exceeds all counterclaims known to the plaintiff (CPLR 6212 [a]; see also Faberge Intl. v Di Pino, 109 AD2d 235 [1st Dept 1985]). Here plaintiffs fail to establish that a ground for attachment exists under CPLR 6201 (1) or CPLR 6201 (3).

Pursuant to CPLR 6201:

[a]n order of attachment may be granted in any action . . . where the plaintiff has demanded and would be entitled in whole or in part, or in the alternative to a money judgment against one or more of the defendants when:

1. the defendant is a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in the state;

...

3. the defendant, with the intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, or encumbered or secreted property, or removed it from the state or is about to do any of these acts.

The underlying purpose of CPLR 6201 (1) is to obtain jurisdiction over a non resident and provide adequate security for a potential judgment against a nonresident where there is an identifiable risk (see Elton Leather Corp., 138 at 136). As jurisdiction over Tarragon, a foreign corporation, has already been obtained, the first aim is satisfied (see Sylmark Holdings Ltd. v Silicone Zone Intl. Ltd., 5 Misc 3d 285, 301 [Sup Ct, NY County 2004]). With respect to the

second purpose, plaintiffs fail to show an identifiable risk that the defendants will be unable to satisfy any potential judgment obtained by plaintiffs (see id.). Rather, plaintiffs simply assert that defendant may be experiencing liquidity problems. Such a blanket assertion without further substantive proof is not a sufficient basis to warrant an order of attachment under CPLR 6201 (1).

Where a plaintiff seeks an order of attachment pursuant to CPLR 6201 [3], it must show that the defendant is acting with an intent to defraud (Mitchell v Fidelity Borrowing LLC, 34 AD3d 366, 366-67 [1st Dept 2006], citing Benedict v Brown, 289 AD2d 433, 433 [2001]). Fraud is not lightly inferred and plaintiffs must proffer evidence as opposed to mere conclusions (Benedict, 289 AD2d at 433). Moreover, “[t]he fact that the affidavits in support of an attachment contain allegations raising a suspicion of an intent to defraud is not enough” (Mitchell, 34 AD3d at 366, quoting Rosenthal v Rochester Button Co., 148 AD2d 375, 376 [1st Dept 1989]). Here there is “no showing of a secreting or disposal of any particular assets of the [plaintiff] with the intent to defraud . . .” (Rosenthal, 148 AD2d at 376).

Plaintiffs claim that defendant retained a portion of monies it received from the construction loan, all of which was owed to plaintiff for its own use. Defendant counters that the monies were not taken surreptitiously, but retained in connection with an alleged contract dispute not before this court, which was explained to plaintiffs at the outset. “[T]he mere removal, assignment or other disposition of property is not grounds for attachment” (Corsi v Vroman, 37 AD3d 397, 397 [2d Dept 2007] [internal quotation omitted]; see also Rosenthal, 148 AD2d at 376). As such, attachment on this ground is not warranted.

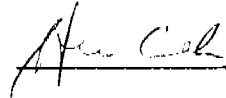
Conclusion

Accordingly, it is,

ORDERED that the plaintiffs' motion for an order of attachment is denied.

Dated: April 28, 2008

ENTER:



J.S.C.

FILED
APR 30 2008
COUNTY CLERK'S OFFICE
NEW YORK