

**Lek Sec. Corp. v BNY Convergenx Execution
Solutions, LLC**

2008 NY Slip Op 32127(U)

July 25, 2008

Supreme Court, New York County

Docket Number: 0108986/2008

Judge: Joan A. Madden

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

PRESENT: MADDEN
Justice

PART 11

LEK SECURITIES CORP.

INDEX NO. 108984/08

MOTION DATE 7-10-08

-v-
BNY CONVERGEX EXECUTION SOLUTIONS, LLC

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for injunctive relief of arbitrator

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 is decided in accordance with the award memorandum DECISION GRANT & JUDGMENT

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representatives must appear in person at the Judgment Clerk's Desk (Room 1419).

Dated: July 25, 2008

[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 : IAS PART 11

-----X

LEK SECURITIES CORP.,

Petitioner,

INDEX NO. 108986/08

-against-

BNY CONVERGEX EXECUTION SOLUTIONS, LLC,
MICHAEL A. OMILINSKY, AND VINCENT J.
GIOVINAZZO,

Respondents.

-----X

Joan A. Madden, J.:

In this proceeding for an injunction in aid of arbitration,¹ petitioner Lek Securities Corporation (“Lek”) submits a proposed order to show cause seeking a temporary restraining order (“TRO”) enjoining and restraining respondents BNY Convergex Execution Solutions, LLC, Michael A. Omilinsky and Vincent J. Giovinazzo (together “Convergex”), their agents, employees and others from “publishing false information about claimant and from doing any other acts likely to injure claimant’s business reputation” until arbitration takes place in this matter. Prior to signing the proposed order to show cause containing the TRO, the parties appeared before this Court for oral argument and subsequently submitted papers as to whether the TRO should be issued. Convergex opposes the TRO and the underlying proceeding, and cross-moves for discovery in aid of arbitration.

¹In the underlying arbitration, Lek seeks compensatory and punitive damages, and injunctive relief based on allegations that employees of Convergex told Lek’s customers that Lek was being investigated for “severe accounting irregularities.” Lek alleges those statements were false and defamatory.

UNFILED JUDGMENT
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As a preliminary matter, the TRO must be denied as Lek has not shown that circumstances exist which warrant the imposition of a pre-publication restraint on speech. Prior restraints on speech are strongly disfavored due to their potential to chill permissible speech. See Vance v. Universal Amusement Co., Inc., 445 U.S. 308, 316 (1980); Harman v. City of New York, 140 F3d 111, 120 (2nd Cir 1998); Ramos v. Madison Square Garden Corp., 257 AD2d 492 (1st Dept 1999). “Free speech is protected from censorship ‘unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.’” Rosenberg Diamond Development Corp. v. Appel, 290 AD2d 239 (1st Dept 2002)(quoting Terminiello v. City of Chicago, 337 US 1, 4 [1949]). Specifically, prior restraints on speech are not permitted where as here, they are sought merely to enjoin the publication of libel. See Rosenberg Diamond Development Corp. v. Appel, supra at 239.

Lek points out that a prior restraint on speech may be appropriate if the alleged statements are “made as part and parcel of a course of conduct deliberately carried on to further a fraudulent or unlawful purpose.” Trojan Electric & Machine Co., Inc. v. Heusinger, 162 AD2d 859, 860 (3rd Dept 1990). However, in connection with this proceeding, Lek fails to provide sufficient proof to support its allegations that Convergenx made the alleged statements as part of any unlawful and fraudulent scheme or has engaged in other intentional actions showing such a scheme to damage Lek’s business reputation.

Next, for a court to grant an injunction in aid of arbitration, it must be shown that an arbitral award would be rendered ineffectual without it. See CPLR 7502 (c); Founders Insurance Co., Ltd. v. Everest National Insurance Co., 41 AD3d 350 (1st Dept 2007); Cullman Ventures, Inc. v. Conk, 252 AD2d 222 (1st Dept 1998). Moreover, the petitioner must satisfy the test for

granting injunctive relief by showing: (1) a likelihood of success on the merits, (2) irreparable injury if the TRO is not granted, and (3) a balancing of equities in its favor. See Erber v. Catalyst Trading, LLC., 303 AD2d 165 (1st Dept 2003); Cullman Ventures, Inc., *supra* at 230.

Even assuming that it can be shown that the arbitral award would be rendered partially ineffectual if certain purported defamatory statements are made prior to its issuance, Lek will not be able to satisfy the three-part test needed to grant injunctive relief. First, the allegations relating to the false statements lack the specificity needed to demonstrate that Lek is likely to succeed on the merits. See Sirianni v. Rafaloff, 284 AD2d 447 (2nd Dept 2001). Lek has also failed at this juncture to show that irreparable injury will result if the TRO is not granted as it has not shown that its injury resulting from the future statements is definite and imminent. See Board of Education of the Roosevelt Free Union School District v. Board of Trustees of the State University of New York, 185 Misc2d 704, 710 (Sup Ct, NY Co. 2000), *aff'd as modified*, 282 AD2d 166 (1st Dept 2001) (“irreparable harm is injury that is neither remote nor speculative, but actual and imminent”). Finally, the equities do not balance in Lek’s favor particularly since, as indicated herein, prior restraints on speech are strongly disfavored.

At oral argument, Lek’s attorney indicated that if the TRO were denied, Lek would not pursue its application for an injunction in aid arbitration. Accordingly, the Court deems the order to show cause signed without the TRO, and the proceeding is dismissed. The cross-motion seeking discovery with respect to the allegations asserted by Lek in support of its application for injunctive relief, is denied as moot.

In view of the above, it is

ORDERED that Lek’s request for a temporary restraining order in aid of arbitration is


denied; and it is further

ORDERED and ADJUDGED that the proceeding is dismissed; and it is further

ORDERED that the cross-motion is denied.

DATED: July 15, 2008

ENTER:



J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).