VGA Inv., Inc. v Mittal Steel USA, Inc.

2008 NY Slip Op 33581(U)

February 13, 2008

Supreme Court, New York County

Docket Number: 602294/07

Judge: Helen E. Freedman

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[* 1] SCANNED ON 2/21/2008

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

PRESENT: Freedman PART 39

Index Number : 602294/2007

VIGA INVESTMENTS, INC.

vs

MITTAL STEEL USA, INC.

Sequence Number : 001

DISMISS COMPLAINT

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

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

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memo of law

FILED
FEB 15 2008
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 2/13/08

______ J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

☐ DO NOT POST ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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VGA INVESTMENTS, INC.

Plaintiff,

-against-

Index No. 602294/07

MITTAL STEEL USA, INC.,

Defendant.

and

MITTAL STEEL USA, INC.,
ARCELOR MITTAL MEXICO HOLDINGS B.V.,
MITTAL STEEL COMPANY N.V. and ARCELOR
NETHERLANDS B.V.

Counterclaim Plaintiffs,

-against-

VIGA INVESTMENTS, INC., SIDERURGICA DEL
PACIFICO, S.A. DE C.V., and CONJUNCTO
SIDERURGICO DEL BALSAS, S.A. DE C.V.,

Counterclaim Defendants,

and

UBS AG,

Nominal Counterclaim Defendant.

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HELEN E. FREEDMAN, J:

On December 19, 2006, related Mittal steel companies, one in the United States and one in Mexico, entered into two stock purchase agreements, whereby Mittal purchased the stock of

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other companies that were also related to each other. One agreement is known as the Border Steel Agreement and the second is known as the Sicartsa Agreement. The action brought here is based on a dispute under the Border Steel Agreement whereby Mittal Steel USA, Inc. ("Mittal USA") purchased the stock of various border steel entities from Viga Investments, Inc. ("Viga"). The counterclaims are based on disputes under the Sicartsa Agreement.

The Counterclaim Defendants Siderugica del Pacifico, S.A. de C.V. ("Siderpac") and Conjunto Siderurgico del Balsas, S.A. de C.V. ("Conjunto") move for an Order dismissing the counterclaims against Siderpac and Conjunto as asserted against them by Mittal Steel Company N.V. and Arcelor Netherlands B.V. pursuant to CPLR 3211(a)(1) and (8) based on documentary evidence and lack of personal jurisdiction over Siderpac and Conjunto. They also seek to dismiss the Seventh and Eighth Counterclaims based on CPLR 3211(a)(7) for failure to state a cause of action. The latter seek declarations relating to funds held under an Escrow Agreement that the various parties entered into. The motion to dismiss is primarily based on the claim that the Sicartsa Agreement is separate from the Border Steel agreement and that this court lacks jurisdiction over the counterclaim defendants.

Defendants and counterclaimants cross-move for an Order pursuant to CPLR 7501 and 7503 directing all controversies that have arisen among the parties to proceed to a single arbitration in accordance with several agreements or in a single forum. The motion is granted in part and denied in part as is the cross-motion.

The action commenced on July 10, 2007 by Viga against Mittal USA is based on the latter's alleged failure to deliver a Preliminary Closing Balance Sheet pursuant to the Border Steel Agreement. Viga claims that the document delivered did not constitute a Preliminary

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Closing Balance Sheet in that inter alia it failed to provide supporting documentation and was not prepared in accordance with GAAP standards. On or about August 6, 2007, Mittal USA together with Arcelor Netherlands, Mittal N.V. and Arcelor Mittal Mexico filed an answer and counterclaims naming Viga, Siderpac and Conjunto as Counterclaim Defendants (and UBS as a nominal defendant). UBS was named "because it is acting as escrow agent and holding funds that are the subject of this dispute." Defendants, counterclaimants contend that Viga's claim is a pretext for Siderugica's failure and refusal to fulfill its obligation to pay Mittal a post-closing adjustment of $400 million. The parties to both agreements agreed to use UBS AG in New York as an escrow agent to hold portions of the proceeds in escrow pending price adjustment, but it appears that no amounts were held back under the Border Steel transaction.

Plaintiff's allegations

According to plaintiff, the claim in this action involves a dispute under the Border Steel Agreement only regarding the post closing purchase price adjustment under a stock purchase agreement between Viga and Mittal USA for the sale of the capital stock of BSRM Holdings, Inc. and V.I. Holding, Inc. (the "Border Steel Agreement"). That agreement, contained a New York State forum selection clause and New York choice of law provision. The stock purchase agreement between Siderpac and Conjunto as sellers, and Arcelor Mexico, Mittal N.V. ("Mittal N.V.") and Arcelor Netherlands ("Arcelor") as buyers for the sale of the capital stock of Siderugica Lazaro Cardenas las Truchas, S.A. de C.V. ("Sicartsa") and Sicartsa subsidiaries as sellers (the Sicartsa Agreement) contains a forum selection clause conferring jurisdiction on the courts of Mexico City and a Mexican choice of law provision. Siderpac and Conjunto have brought actions in Mexican courts and contend that this court lacks jurisdiction over them and

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over claims under the Sicartsa Agreement..

Plaintiff argues that the Sicartsa Agreement forum selection clause provides for exclusive jurisdiction in the courts of Mexico, although. unlike the forum selection clause in the Border Steel Agreement, the word "exclusive is not used. The forum provision is set forth in Section 11.4 and states:

> [T]he parties hereto expressly submit themselves to the jurisdiction of the competent courts of Mexico City, therefore waiving any other right that they may have to jurisdiction or forum based on their present or future domiciles or corresponding to any other right.

The choice of laws provision in Section 11.6 states:

> "This Agreement shall be governed by and construed in accordance with the laws of Mexico without regard to the conflict of law principle thereof."

According to plaintiff's expert, Ignacio Rey Morales Lechuga, the legal principles prevailing under Mexican contract law and under the Civil Code mandate compliance with the chosen forum for dispute resolution. Similarly, plaintiff contends that under New York law, a forum selection clause is valid and enforceable. *Boss v. Am. Express Fin. Advisors, Inc.* 6 N.Y.3d 242 247 (2006).

There is a forum selection clause naming New York as the appropriate jurisdiction in the Escrow Agreement for disputes arising under it, but Viga asserts that the disputes that have arisen under the Sicartsa Agreement do not involve the escrow agreement. The claims under the seventh and eighth counterclaims relate to the Escrow Agreement, and plaintiff contends that these must be dismissed because there is no justiciable controversy under that Agreement.

Plaintiff further alleges that this Court does not have jurisdiction over either Siderpac or

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Conjunto because neither entity does business in the United States or has any contacts, other than the escrow account, in the United States. Plaintiff avers that these Mexican corporations have no systematic dealings in New York and under neither CPLR 301 nor 302 would they be subject to jurisdiction of New York courts. Moreover, plaintiff asserts that Siderpac and Conjunto were not properly served as neither does business nor has an agent for service in New York. For these entities to be served, plaintiff contends that defendants must meet the requirements under the Hague Convention or the Inter-American Convention, and that the requirements under neither Convention were met.

Defendants' Claims

The Mittal counterclaimants and Arcelor Netherlands assert that the dispute involves a "single transaction" between Mittal, one of the world's largest steel companies, and Siderpac, Mexico's largest distributor and marketer of steel products. The transaction was "documented in two separate stock purchase agreements and a single Escrow Agreement, all of which reference and incorporate each other." These defendants contend that the effort to engage in "piecemeal litigation" is designed to avoid an obligation to pay Mittal $400 million dollars.

Defendants contend that the forum selection clause in the Sicartsa Agreement, as set forth above, is merely permissive, and unlike the New York forum selection clause in the Border Steel Agreement is not exclusive. Defendants aver that the clause merely waives objections to jurisdiction in Mexico based on domicile, but it does not apply to actions commenced outside of Mexico. Defendants further assert that the Escrow agent is now holding over $140 million in New York that both parties seek to recover. They allege that Siderpac and Conjunto have both made demands on this escrow amount and both consented to jurisdiction in New York in

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connection with the Escrow Agreement. They further aver that both are subject to personal jurisdiction because both engaged in sufficiently meaningful contacts with New York in connection with this transaction by opening a New York bank account for the escrow funds. Finally they state that Conjunto and Siderpac were properly served pursuant to the terms of the Escrow Agreement and that they have waived any objections to service.

Defendants invoke the Term Sheet signed on September 30, 2006 between Mittal N.V. and Arcelor, on the one hand and Siderpac, Conjunto, and Viga, on the other. The Term Sheet provided for acquisition of all the capital stock of two entities, Siderugica and BSRM respectively, in the Sicarsta and Border Steel Agreements. The Term Sheet contemplated a single transaction, with disputes under the Term Sheet to be resolved by arbitration in New York in English under Mexican law. The Agreements, entered into on the same day, reference each other under Section 11.5 in that each says that together with the other, the agreements represent the entire understanding among the parties with respect to the subject matter. The agreements both also provide that in the event of a dispute, the parties "shall attempt to reconcile their differences." If they cannot, the disputed items are submitted "for determination to an independent accounting firm of international reputation mutually acceptable to the Purchaser and the Seller." Section 2.3(b)(ii). The determination of this firm shall be final and binding and conclusive on the Seller and Purchaser" and the process " shall be considered an arbitration." (Id.).

Discussion

While it is clear that the two agreements are interrelated and disputes would best be resolved in a single forum, the parties knowingly entered into separate agreements providing for

different fora and different choices of law. Although defendant's expert opines that the Mexican forum selection clause is permissive in that once an action is commenced in a Mexico City court, objections are waived, the language is more specific than that. See *Boss v. Am. Express Fin. Advisors, Inc.* 6 N.Y.3d 242 247 (2006), and cases cited therein. Moreover, at this point an action has been commenced in Mexico City based on these claims. The claims by and against Siderpac and Conjunto should proceed in accordance with Mexican law in Mexico.

Counterclaim defendants also contend that jurisdiction over them has not been properly obtained. They aver that only one has any funds in one New York account and that neither does any business whatsoever in New York. Moreover, service was not made pursuant to any of the international conventions, unlike what has been done in the Mexican action. At this point, there is insufficient evidence to rebut either of these contentions. While, the Escrow Agreement provides that Siderpac and Conjunto expressly consented to jurisdiction in New York in connection with the agreement, and provide for under it, it is not clear that the counterclaims involve a dispute over the Escrow Agreement. The funds in the escrow account are subject to interpretations of the two main agreements. While the agreements list Fulbright & Jaworski LLP as one of the parties to whom notice is to be given in behalf of Siderpac, Conjunto and Viga, the law firm is not listed as an agent for service.

However, based on the terms of the Escrow Agreement, the claims under it will survive this motion to dismiss because jurisdiction over the parties is properly set in New York County.

With respect to Mittal USA's contention that Viga's claims against it are subject to arbitration, this Court agrees that the claims should be arbitrated. Mittal contends that Sideruriga has trumped up the within lawsuit to avoid paying Mittal $420,000. The agreements both state

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that disputes concerning the post-closing purchase price adjustment are to be submitted "for determination to an independent accounting firm of international reputation mutually acceptable to the Purchaser and Seller." They further state that the determination of the accounting firm "shall be binding and conclusive on the Seller and Purchaser," and that the process "shall be considered an arbitration."

Viga argues that its claim is not that over a post-closing purchase price adjustment, rather it is the failure of Mittal USA to deliver a valid Preliminary Closing Balance Sheet as required by Section 2.3(a) of the Border Steel Agreement. Viga claims that with the information provided by Mittal USA it cannot dispute whether the figures were prepared in compliance with the defined Accounting Principles or were the result of an error. Under the agreement the summary was to be presented in accordance with U.S.GAAP principles, and Viga contends it was not for various reasons, particularly the absence of supporting documentation. The arbitration or independent auditing was limited to the right of the "Seller to dispute any amounts reflected on the Preliminary Closing Balance Sheet, but only on the basis that the amounts reflected on the Preliminary Closing Balance Sheet were not arrived at in accordance with Accounting Principles or were arrived at based on mathematical or clerical error."

Viga further argues that counterclaim plaintiffs must necessarily seek to compel two arbitrations, one involving the dispute between Viga and Mittal USA, and the other involving the dispute among Siderpac, Conjunto, and Mittal Mexico because each is a separate stock purchase agreement, and that Mexican GAAP is involved in the Sicartsa Agreement. Finally, Viga again avers that in the absence of jurisdiction over the Mexican entities, this Court cannot mandate arbitration or submission to an independent auditor.

Despite Viga's argument to the contrary, it appears that this dispute comes squarely within the provision of the Border Steel Agreement mandating submission to an independent accounting firm whose work shall be considered an arbitration. The resolution procedures provide for arbitration of disputes concerning whether or not the Preliminary Closing Balance Sheets were prepared in accordance with Accounting Principles. In *Advanstar Communications Inc. v. Beckley-Cardy, Inc.* 93 Civ. 4230, 1994 WL 176981 (SDNY 1994), the court found that a dispute concerning whether calculations in a post-closing balance sheet complied with GAAP was subject to arbitration by an Independent Auditor as provided in the stock purchase agreement. If the proper documentation has not been provided for use by the independent accountant or auditor, it can be requested.

However, this Court will not mandate arbitration under the Sicartsa Agreement at this time, but urges the Mexican Court to require arbitration, preferably using the same auditing firm. That way, the matters, which are clearly related if not interdependent, may be fully and expeditiously resolved.

Based on the foregoing, it is hereby

ORDERED that the first through sixth counterclaims against counterclaim defendants Siderurgica del Pacifico. SA. de C.V. and Conjunto Siderurgico del Balsas, S.A. de C.V. are dismissed in their entirety; and it is further

ORDERED that the Seventh and Eighth counterclaims are held in abeyance pending the audit or arbitration as required below; and it is further

ORDERED that Mittal USA's cross motion to compel arbitration of plaintiff's claims against it is granted; and it is further

ORDERED that the Clerk act accordingly; and it is further

ORDERED that the parties appear for a preliminary conference on March 25 at 9:30 a.m. in Room 208 to determine what, if anything, remains for this Court.

Dated: February 13, 2008

Enter:

Helen E. Freedman, J.S.C.

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