

Sung Hwan Co. Ltd. v Rite Aid Corp.

2009 NY Slip Op 31727(U)

July 29, 2009

Supreme Court, New York County

Docket Number: 112444/2001

Judge: Richard B. Lowe

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

PRESENT: _____

PART 56

Index Number : 112444/2001

SUNG HWAN CO. LTD.,

VS.

RITE AID CORPORATION,

SEQUENCE NUMBER : 005

OTHER RELIEFS

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

FILED
AUG 04 2009

COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION

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

Dated: 7/29/09

RICHARD B. LOWE III

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 56

-----x
 SUNG HWAN CO. LTD.,

Plaintiff,

Index No. 112444/2001

-against-

DECISION AND ORDER

RITE AID CORPORATION,

Defendant.

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

Rite Aid Corporation (“Rite Aid”) moves to release its \$9,750,498.26 bond, posted on May 23, 2007 (“Appeal Bond”) in order to secure a stay of enforcement proceedings during the pendency of its appeal of this Court’s May 10, 2007 order granting summary judgment and May 21, 2007 judgment in favor of plaintiff Sung Hwan Co. Ltd. (“Sung Hwan”).

BACKGROUND

The factual and legal background for this matter have been set forth in prior orders of this court and of the Appellate Division, First Department, and most recently, in this Court’s decision May 1, 2007 Decision and Opinion and the Appellate Division decision decided December 6, 2007 (*Sung Hwan Co., Ltd. v Rite Aid Corp.*, 46 AD3d 288 [1st Dept 2007]), and will be repeated here only if pertinent.

Since 2001, plaintiff has sought the enforcement here of the judgment it received in the District Court of Seoul, Republic of Korea (the “Korean court”), and defendant has consistently opposed that enforcement, alleging, *inter alia*, that the Korean court wrongfully exercised personal jurisdiction over defendant in that suit.

In its May 10, 2007 decision, this Court granted Sung Hwan's motion for summary judgment on the grounds that the Court of Appeals decision settled all outstanding jurisdictional issues (*see Sung Hwan Co., Ltd. v Rite Aid Corp.*, 7 NY3d 78 [2006]). The decision also held that Rite Aid should have sought to vacate the default judgment in South Korean court. On May 21, 2007, this Court entered a judgment in the amount \$9,750,498.26.

In order to stay enforcement proceedings during the pendency of its appeal of that judgment and order, Rite Aid filed the Appeal Bond pursuant to CPLR § 5519. On appeal, the Appellate Division reversed this Court's summary judgment decision, vacated the judgment and remanded the case for further proceedings (*Sung Hwan Co.*, 46 AD3d at 290). The Appellate Division denied Sung Hwan's motions for leave for reargument and leave to appeal to the Court of Appeals. Rite Aid now moves this Court to release the Appeal Bond.

DISCUSSION

Rite Aid argues that the purpose of the Appeal Bond, to secure the judgment and stay enforcement proceedings during the pendency of its appeals, has been satisfied. Sung Hwan, on the other hand, argues that the reversal of a lower court's decision by an intermediate appellate court does not release the Appeal Bond. Sung Hwan also argues that it will be prejudiced by the release of the Appeal Bond because Rite Aid is undergoing severe financial problems.

CPLR § 5519 states, in relevant part, that service of a notice of appeal "stays all proceedings to enforce the judgment . . . pending the appeal" where:

the judgment or order directs the payment of a sum of money, and an undertaking in that sum is given that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay the amount directed to be paid by the judgment or order, or the part of it as to which the judgment or order is affirmed

(CPLR § 5519[a][2]). CPLR § 5519(d) states that on “appeal from an order affirming a judgment or order, the undertaking shall secure both the order and the judgment or order which is affirmed.” Additionally, CPLR § 5519(e) states that if the judgment “appealed from is affirmed or modified, the stay shall continue for five days after service upon the appellant of the order of affirmance or modification.” When a motion for permission to appeal is involved, the stay shall generally continue for five days after the motion is either denied or granted (*see* CPLR § 5519[e][i] -- [ii]).

The language of CPLR § 5519 suggests that filing an undertaking in order to appeal a judgment or order secures only the judgment or order that is on appeal. The undertaking is a condition for staying a proceeding without further court order. Under CPLR § 5519(e), the stay is automatically lifted once the appeal is denied. Consistent with procedures for a stay, once the appeal has been decided, the undertaking should remain in effect only when necessary to secure an otherwise enforceable judgment. As noted in *Robert Stigwood Org., Inc. v Devon Co.* (91 Misc 2d 723 [NY County Sup Ct 1977]):

Underlying [CPLR § 5519(a)(2)] is the statutory intent that should a party be denied the fruits of his judgment below because of the delay engendered by an appeal, that party is entitled to have his victory secured so that *when the stay of enforcement resulting from the appeal* is vacated by affirmance, a ready fund with which to satisfy the judgment shall be available.

(*id.* at 723-724; *HGCD Retail Servs., LLC v 44-45 Broadway Realty Co.*, 820 NYS2d 843 [NY Sup Ct April 17, 2006]). The language in *Robert Stigwood* suggests that once the stay is terminated by action of an appellate court, the bond is either released to the non-appealing party to satisfy its judgment or released back to the issuer of the undertaking.

The holding in *C.T. Chemicals (U.S.A.) Inc., v Vinmar Impex, Inc.* (189 AD2d 727 [1st

Dept .993]) is instructive because the procedural history of the case is similar. In *C.T. Chemicals*, the defendant appealed a summary judgment order in favor of plaintiff (*id.* at 727). The Appellate Division affirmed but modified the order. The defendant filed an undertaking and sought leave to reargue before the Appellate Division (*id.* at 728). Upon reargument, the Appellate Division reduced the amount of its prior award, and denied leave to appeal to the Court of Appeals. Regarding the undertaking, the First Department held that when the Appellate Division reverses a decision of either a lower court or itself, that decision and the appeal bond which secures it is vacated and released (*id.* at 729).

Citing to *Robinson v Plimpton* (25 NY 484 [1862]), *Consol. Indem. & Ins. Co. v Dein* (233 App Div 380 [1st Dept 1931]) and *Self Serv. Super Market, Inc. v Harris* (3 NY2d 615 [1958]), Sung Hwan argues that the ruling of an intermediate appellate court is irrelevant to the release of an appeal bond if the ruling is subsequently reversed by the Court of Appeals. Cases relied upon by Sung Hwan, however, were decided before the drafting of the CPLR, making them of little precedential value, and are distinguishable from the instant matter. Unlike the procedural history of the instant matter, those cases involved a direct line of appeals from the trial court up to the Court of Appeals, and there were no denials of leave to appeal by the intermediate appellate courts.

By denying leave to appeal its decision, the Appellate Division effectively tables the issues decided on appeal until this Court issues a subsequent judgment or order upon further proceedings (2 Weinstein-Korn-Miller, CPLR Manual § 26.02 [5]). Any subsequent appeal by Sung Hwan will be based on an entirely different judgment or order. Specifically, the Appellate Division remanded to this Court the question of corporate identity and rejected arguments that

Rite Aid waived that defense (*Sung Hwan*, 46 AD3d at 289). The Appellate Division's holding vacated this Court's judgment and, by implication, the undertaking that secured it.

In the instant matter, consistent with the holding in *C.T. Chemicals* (189 AD2d at 728), the Appellate Division specifically vacated this Court's judgment and order, thereby vacating the stay and, implicitly, the undertaking filed to secure both the stay and judgment. While Sung Hwan's argument about Rite Aid's financial difficulties is compelling, and consistent within the overall purpose of securing a judgment, CPLR § 5519 and recent case law indicate that undertakings only secure specific judgments. The equitable principles advanced by Sung Hwan simply do not justify expanding the legal principles at issue on this motion.

CONCLUSION

Therefore, based on the foregoing, it is hereby:

ORDERED that defendant's motion is granted; and it is further

ORDERED that defendant's bond, filed on May 23, 2007, in the amount of \$9,750,498.26, is released.

Dated: July 29, 2009

ENTER:



JUDITH A. JOHNSON

J.S.C.

COUNTY CLERK'S OFFICE
NEW YORK

AUG 07 2009

FILED