

**Matter of XTF Global Asset Mgt.,LLC v Marco Polo  
Network Inc.**

2010 NY Slip Op 30422(U)

March 1, 2010

Supreme Court, New York County

Docket Number: 603465/09

Judge: Joan B. Lobis

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SCANNED ON 3/4/2010

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

PRESENT: LOBIS  
Justice

PART 6

XTF GLOBAL ASSET Mgmt

INDEX NO. 603465/09

MOTION DATE 12/4/10

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

MARCO POLO NETWORK INC

The following papers, numbered 1 to 13 were read on this motion to/for attachment

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

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1-4  
5-9  
10-13

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To effect entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1412).

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

Dated: 3/1/10

JBK  
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  
NEW YORK COUNTY: IAS PART 6**

-----X  
**IN THE MATTER OF THE PETITION OF  
XTF GLOBAL ASSET MANAGEMENT,  
LLC,**

**Petitioner,**

**Index No. 60365/09**

**FOR AN ORDER PURSUANT TO  
SECTIONS 7502(C), 6313, AND 6201(3) OF  
THE CIVIL PRACTICE LAW AND RULES  
FOR A PRELIMINARY INJUNCTION, A  
TEMPORARY RESTRAINING ORDER,  
AND AN ORDER OF ATTACHMENT IN  
AID OF ARBITRATION AGAINST**

**Decision, Order  
and Judgment**

**MARCO POLO NETWORK INC.,**

**Respondent.**  
-----X

**JOAN B. LOBIS, J.S.C.:**

Petitioner XTF Global Asset Management, LLC ("XTF") brings this special proceeding for injunctive relief in aid of arbitration against respondent Marco Polo Network Inc. ("Marco Polo"). XTF and Marco Polo entered into a Shareholder Agreement (the "Agreement") for a company known as Marco Polo XTF Inc. (the "Company"). Both parties are shareholders in the Company; XTF owns 150,000 shares, Marco Polo owns 850,000. The parties provided for arbitration of all disputes arising out of the Agreement and consented to jurisdiction in New York.

The Agreement contained a put option, which gave XTF the right to sell its entire equity share to Marco Polo in exchange for a cash payment of \$650,000, which XTF exercised on or about June 5, 2009. Marco Polo had ninety (90) days to close the transaction. This did not happen. On October 23, 2009, XTF commenced an arbitration proceeding before the American

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Arbitration Association. In aid of that arbitration, pursuant to C.P.L.R. § 7502(c), XTF seeks to restrain Marco Polo from transferring, selling, assigning, or encumbering any of its interest in the Company. While not disputing the underlying default in closing on the put transaction, Marco Polo argues that XTF is not entitled to any preliminary injunctive relief or attachment. Pending a determination of the motion, the parties stipulated to continue a temporary restraining notice contained in petitioner's order to show cause. For the reasons stated below, petitioner's request for relief is granted.

Petitioner argues that in order to prevail, petitioner need only establish that its award may be rendered ineffectual without provisional relief. C.P.L.R. § 7502(c); In re Witham v. VFinance Investments, Inc., 52 A.D.3d 403 (1st Dep't 2008). Petitioner asserts that Marco Polo has insufficient assets to pay its liability, and that it is contemplating certain restructuring transactions with foreign affiliates and other entities. It claims that Marco Polo is now a holding company and has agreed to sell a majority of its interest in the Company.

Respondent argues that the petition must be dismissed. It argues that petitioner is not entitled to an attachment or an injunction as a pre-judgment remedy, since the matter is a contract dispute and petitioner is seeking money damages. Credit Agricole Indosuez v. Rossiyskiy Kredit Bank, 94 N.Y.2d 541, 548 (2000), citing Siegel, N.Y. Prac. § 327, at 498 (3d ed). Respondent also argues that the relief must not be granted, because there are sharp issues of fact regarding petitioner's claim that Marco Polo is dissipating assets. Respondent asserts that it is seeking to raise capital and that by doing so it is acting in a way that would benefit petitioner's interest.


The requirements for provisional relief under C.P.L.R. § 7502(c) are not coterminous with the standard for provisional relief under C.L.P.R. § 6200 et seq and § 6300 et seq. Over time, the law on what must be shown for a court to grant relief under Section 7502(c) has evolved. Courts initially held that the minimal showing that the arbitration award would be ineffectual was sufficient. See In re H.I.G. Capital Mgmt., v. Ligator, 233 A.D.2d 270 (1st Dep't 1996); Nat'l Telecomm. Ass'n. v. Nat'l Communications Ass'n, 189 A.D.2d 573 (1st Dep't 1993); County Natwest Sec. Corp. USA v. Jessup, Josephthal & Co., 180 A.D.2d 468, 469 (1st Dep't 1992); Drexel Burnham Lambert Inc. v. Ruebsamen, 139 A.D.2d 323, 328 (1st Dept. 1988). More recent cases in both the First and Second Department support respondent's argument that courts, when considering applications under Section 7502(c), cannot ignore the traditional criteria for injunctive relief, i.e., "probability of success on the merits, the danger of irreparable harm in the absence of an injunction, and a balance of the equities in favor of granting the injunction." In re Advanced Digital Sec. Systems v. Samsung Technician Co. Ltd., 53 A.D.3d 612, 613 (2d Dep't 2008) (citations omitted); see also Interoil LNG Holdings v. Merrill Lynch PNG LNG, 60 A.D.3d 403, 404 (1st Dep't 2009). Here, petitioner has adequately made a showing that the traditional tests have been met. Respondent has not set forth any basis to dispute that petitioner will prevail on the merits. Respondent admits it has defaulted on an obligation to the close on the put. The equities favor the non-defaulting party. The only issue that respondent raises about the factual assertions is whether petitioner has established that respondent's efforts to reorganize will be a detriment to petitioner. Yet, respondent does not deny that it is unable to meet its financial obligation to petitioner and does not deny that it is looking to restructure. It is not plausible that this could be done without irreparable harm to petitioner's position.

Respondent's reliance on Credit Agricole as the basis for this court to deny petitioner relief, arguing that petitioner is a general creditor without a security interest, is misplaced. Credit Agricole did not involve an application in aid of arbitration. Section 7502 provides that the court "may entertain an application for an order of attachment or for preliminary injunction in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such relief." Applying Credit Agricole would give no effect to the language quoted. The court must assess whether petitioner's award would be rendered meaningless if no preliminary injunction was granted. Respondent's default and admitted attempts to restructure satisfy C.P.L.R. § 7502(a). See Witham v. Vfinance Inv., Inc., 17 Misc.3d 1136(A) (N.Y. Sup. Ct. 2007). Petitioner will be irreparably harmed if all of the Company's assets are transferred or pledged by respondent's efforts to attract capital, leaving petitioner without recourse.

The motion for a preliminary injunction is granted. The temporary restraining order in the order to show cause shall continue. Petitioner shall post an undertaking in the amount of five hundred dollars (\$500) as security for any damages to respondent in the event that the preliminary relief was improvidently granted.

This constitutes the decision, order, and judgment of the court.

Dated: March 1, 2010

  
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 JOAN B. LOBIS, J.S.C.

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 1-1-10