Turbo Dynamics Corp. v Deutsche Bank AG
2014 NY Slip Op 32131(U)
August 5, 2014
Sup Ct, New York County
Docket Number: 651846/14
Judge: Peter H. Moulton

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SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 57

- X

TURBO DYNAMICS CORPORATION, :

Index No.: 651846/14

Plaintiff, :

-against- :

DEUTSCHE BANK AG and SOCIETE DE MAINTENANCE DES ÉQUIPMENTS INDUSTRIELS SPA, a/k/a Industrial Equipment Maintenance of Sonelgaza Group, a/k/a MEI, :

Defendants. :

- X

Moulton, J.:

Plaintiff Turbo Dynamics Corporation ("TDC") moves for a preliminary injunction. The motion is opposed by defendant Deutsche Bank AG ("DB AG"). Defendant Societe de Maintenance des Équipments Industriels SPA ("MEI") has not appeared in this action.

BACKGROUND

IN 2010 TDC and MEI entered into a contract whereby MEI purchased from TDC spare parts for Mistsubishi gas turbines, for an aggregate purchase price of $4.691,925. MEI is apparently located in Algeria. Pursuant to the contract TDC purchased a performance bond from Deutsche Bank, AG's Paris Branch ("DB AG Paris"), in the amount of $469,192.50. TDC deposited equivalent cash collateral with DB AG Paris to secure the performance bond. This transaction was effected by a duly signed Application submitted to DB AG Paris, requesting DB AG Paris to issue a guarantee via Banque National d'Algerie ("BNA"), and a counter-guarantee in favor of MEI.

The Application, and a "Special Conditions" form incorporated by reference in the Application were both signed on August 11, 2010, by Mansour Levy, plaintiff's CEO.

The Special Conditions signed by plaintiff contained a forum selection clause designating the Commercial Court in Paris, France, as the exclusive forum for all disputes and providing for the application of French law to such disputes.

TDC alleges that it performed its obligations pursuant to the spare parts contract. MEI notified DB AG Paris to reduce the face amount of the guarantee as TDC's performance progressed. TDC points to an undated letter from MEI on letterhead which TDC states it received in August 2011. The letter states in part that "TDC has completed this order in a timely manner to our best satisfaction with high quality of service."

Despite this statement, MEI did not thereupon authorize the release of the remainder of the guarantee. In March 2012 it authorized the release of $200,000, leaving a balance of $126,548.10. Despite requests by TDC to MEI, this balance remains outstanding.

On June 16, 2014, TDC was notified by DB AG Paris that BNA issued a call for payment to MEI of the balance. Thereupon TDC brought the instant action seeking various relief against DB AG and MEI. DB AG Paris is not named separately as a party defendant herein. This court signed a temporary restraining order on June

19, 2014 that states in relevant part:

> [P]ending a hearing and determination of this application for preliminary injunctive relief, or the further order of this Court, Deutsche Bank, it [sic] agents, employees and all persons acting in concert with it or at its direction, are temporarily enjoined and restrained from making any payment pursuant to a certain Performance Bond in the original amount of $469,192.50, issued by Deutsche Bank on behalf of plaintiff in favor of [MEI].

The parties subsequently submitted papers concerning plaintiff's application for a preliminary injunction.

DISCUSSION

A party seeking a preliminary injunction must show a likelihood of success on the merits, irreparable injury absent the preliminary injunction, and that the balance of equities weighs in its favor. (See Bell & Co., P.C. v Rosen, 114 AD3d 411.)

DB AG argues that a preliminary injunction is barred by New York State's separate entity rule. The rule provides that even if a bank is subject to personal jurisdiction due the presence of a New York branch, the other branches of the bank will be treated as separate entities for certain purposes, including attachments, restraints and turnover orders. (Tire Engineering and Distribution LLC v Bank Of China, Ltd, 740 F3d 108.) Historically, the rule has been applied even to separate branches of a bank located in the same city. (See Det Bergenske Dampskibsselskab v Sabre Shipping

Corp., 321 F2d 50 (2nd Cir 1965.) The principal that branches of banks are regarded as separate entities for some purposes is reflected in New York's UCC § 5-116. Plaintiff argues that this rule is anachronistic and cite cases going back to 1980 doubting the rule's continued viability. (Eg Digitrex, Inc. v Johnson, 491 F Supp 66, 69.) Plaintiff also points out that the Second Circuit recently certified a question to the New York Court of Appeals concerning whether the rule continues to bar ordering a bank operating branches in New York to restrain monies held in foreign branches of that bank. (See Tire Engineering and Distribution LLC v Bank of China, 22 NY3d 1113, modified, 22 NY3d 1152.) As of the date of the instant opinion the New York Court of Appeals has not issued its answers to the certified question.

It is not necessary to reach the question of the applicability of the separate entity rule because the Special Conditions signed by plaintiff includes a binding forum selection clause requiring any dispute concerning the "interpretation or performance" of the guarantees in question. Such provisions are routinely enforced where, as is the case here, there is no showing of fraud or overreaching. (See British West Indies Guar. Trust Co. v Banque Inernationale a Luxembourg, 172 AD2d 234.) Plaintiff seeks to avoid the consequences of the forum selection clause by arguing that there is no dispute about either the interpretation of, or the performance on, the guarantees. If that were the case

then the instant action would not exist. DG AG has hotly contested TDC's premise. The principal of DG AG Paris has submitted an affidavit stating that it is obligated under the terms of the counter-guarantee to honor BNA's demand for the balance. Accordingly, there is a very live dispute concerning the parties' rights and responsibilities under the guarantees.

Because the forum selection clause binds TDC plaintiff is unable to demonstrate likelihood of success on the merits.

Additionally petitioner has not demonstrated irreparable harm. Plaintiff is seeking payment of a sum of money allegedly misappropriated by MEI. It offers only conclusory statements that it cannot obtain money damages against MEI for the balance. Where plaintiff can be made whole with money damages, it cannot show irreparable harm. (See Credit Index, LLC v Riskwise International LLC, 282 AD2d 246.)

CONCLUSION

For the reasons stated, plaintiff's motion for a preliminary injunction is denied. The temporary restraining order is vacated. This constitutes the decision and order of the court.

DATE: August 5, 2014

J.S.C.

PETER H. MOULTON
J.S.C.