Turbo Dynamics Corp. v Deutsche Bank AG
2015 NY Slip Op 30025(U)
January 7, 2015
Supreme Court, 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

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TURBO DYNAMICS CORPORATION, :

Index No.:
Plaintiff, : 651846/14

-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 default judgment against defendant Societe de Maintenance des Équipments Industriels SPA ("MEI"), an Algerian entity that has not appeared in this action. Defendant Deutsche Bank AG ("DB AG") moves to dismiss. Plaintiff has not opposed this motion.

BACKGROUND

The relevant history of this case is discussed in the decision of this court dated August 5th, 2014 ("August 5th decision"), familiarity with which is assumed. In summary, in 2010 TDC and MEI entered into a contract whereby MEI purchased from TDC spare parts for Mistsubishi gas turbines. The aggregate purchase price was $4,691,925. 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.

The Application, and a "Special Conditions" form incorporated by reference in the Application were both signed on August 11, 2010, by Mansour Lavi, 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. The complaint avers that 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 of the guarantee.

Thereupon TDC brought the instant action seeking various

relief against DB AG and MEI. This court signed a temporary restraining order on June 19, 2014 that provided that Deutsche Bank, and its agents and all persons acting in concert with it or at its direction, were temporarily enjoined and restrained from making any payment pursuant to the Performance Bond.

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

In the August 5th decision this court denied the motion for a preliminary injunction, finding, inter alia, that the plaintiff had failed to demonstrate a likelihood of success on the merits. I found that the forum selection clause in the Special Conditions document signed by plaintiff required that this dispute be adjudicated in France according to its terms.

DISCUSSION

DB AG moves to dismiss based on this court's prior finding concerning the forum selection clause in the Special Conditions document signed by plaintiff. As this motion is unopposed, the motion is granted. The clerk shall enter judgment dismissing the complaint against DG AG.

Plaintiff's motion for a default judgment against MEI is denied without prejudice. It is unclear whether this court has jurisdiction over MEI. (See Lawati v Montague Morgan Slade Ltd., 102 AD3d 427, 431.) The verified complaint states simply that

personal jurisdiction lies against MEI because it ordered goods from plaintiff for shipment from New York. According to plaintiff this action constitutes transacting business, and thus falls within section 302(a)(1) of New York's Long Arm Statute. (CPLR 302(a)(1).) Those alleged facts, standing alone, do not confer jurisdiction over MEI for transacting business in New York. (See Success Marketing Electronics v Titan Security, Inc., 204 AD2d 711, 712; Southern Industries of Clover, Ltd. v Tex-Cellence, Inc.,. 7 Misc3d 1007[A].)

Also, the affidavit of service of the summons and complaint, which reflects that service was effected in "Algiers" (presumably speaking of the capital of Algeria, but the affidavit does not specify a nation) is not accompanied by certificate of conformity (CPLR 2309©.) Accordingly it is insufficient to establish personal service of the complaint. (Eg Bloomingdale Road Judgment Recovery v Wise, 29 Misc3d 1078.)

CONCLUSION

For the reasons stated, the motion to dismiss of defendant DG AG is granted. The clerk shall enter judgment dismissing the complaint with respect to DG AG. Plaintiff's motion for a default judgment is denied without prejudice to resubmission with proof that this court has personal jurisdiction over defendant

MEI.

This constitutes the decision and order of the court.

DATE: January 7, 2015

J.S.C.

PETER H. MOULTON
J.S.C.