Baosteel Resources Intl. Co. Ltd. v Ling Li
2015 NY Slip Op 30738(U)
April 29, 2015
Supreme Court, New York County
Docket Number: 651305/2014
Judge: Anil C. Singh

COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 45

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BAOSTEEL RESOURCES INTERNATIONAL COMPANY LTD,

Plaintiff,

Index No. 651305/2014

-against-

DECISION AND ORDER

LING LI a/k/a LARRY LI, SONG QIANG CHEN, METAWISE GROUP INC., METAMINING INC., SPIRO MINING LLC, and COAL CREEK MINERALS, LLC,

Defendants.

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HON. ANIL C. SINGH, J.:

In this action for breach of contract, defendants Ling Li (Li), Song Qiang Chen (Chen), Metawise Group Inc. (Metawise), Metamining Inc. (Metamining), Spiro Mining LLC (Spiro), and Coal Creek Minerals, LLC (Coal Creek) move, pursuant to CPLR 3211, to dismiss the complaint, and pursuant to CPLR 7503 (a) to compel plaintiff Baosteel Resources International Company Ltd (Baosteel) to arbitrate in Hong Kong.

Background

Baosteel is a corporation organized under the laws of, and with its registered office in, Hong Kong. Metawise is a California corporation with offices in California. Li and Chen reside in, and have an office for Metamining in, California. Li and Chen own 50% of the outstanding and issued shares of

Metawise, and 49% of the issued shares of Metamining. Spiro is an Oklahoma limited liability company with an office for transacting business in Oklahoma. Metamining owns 75% membership interest in Spiro. Metawise owns 2% of the outstanding and issued shares of Metamining. Coal Creek is a Delaware corporation.

Baosteel alleges jurisdiction in New York, pursuant to General Obligations Law § 5-1402, as the November 11, 2011 commodities purchase agreement between the Baosteel and Spiro (CPA) provides for the application of New York law and forum.

According to the complaint, this is an action by Baosteel to enforce its rights pursuant to the CPA. Metawise, Metamining and Coal Creek were guarantors of the CPA, and individual defendants Li and Chen both personally guaranteed Spiro's obligations under the CPA. In the complaint, Baosteel alleges that on November 21, 2011, it deposited, by wire transfer, the sum of $5 million with Spiro to be credited against the purchase price to be paid for future deliveries of coal, or under certain circumstances, iron ore. In the CPA, which had a term of six months, Spiro agreed that, in the event it was unable to make the deliveries called for under the CPA, it would refund Baosteel's deposit. Baosteel alleges that Spiro was unable to provide any of the deliveries required by the CPA during its six-month term or thereafter, but has refused to return Baosteel's deposit.

By letter dated January 5, 2013, Baosteel informed Spiro, and the guarantors, that they had defaulted on the account, and Baosteel was entitled to an immediate refund of the deposit with interest at 5% per annum, equal to $5,280,924.66. The complaint contains six causes of action, including breach of contract, replevin, conversion, and foreclosure of UCC interests.

Defendants move to dismiss this action on the ground of lack of jurisdiction based on improper service upon Li, Spiro, Metawise, Metamining, and Coal Creek. In the attorney's affirmation in support of defendants' motion to dismiss, defendants' attorney, states that service of the summons and complaint was insufficient as follows: (1) with respect to Li, it has not been personally served; (2) according to the affidavits of service for Metamining and Metawise, the company's officers were served on May 23, 2014, but the California Secretary of State was not served; (3) according to the affidavit of service, Coal Creek's officer was served on May 15, 2014, but the Delaware Secretary of State was not served; (4) with respect to Spiro, neither its officer, nor the Oklahoma Secretary of State was served.

Defendants further argue for dismissal on the ground that none of the defendants is a New York resident, nor are they doing business in the State of New York, nor does any of them have minimum contacts with this State.

Additionally, defendants challenge the application of the forum selection clause set forth in the CPA on the ground that it does not select the New York courts as the exclusive forum, and, pursuant to the language of the CPA, as well as CPLR 7503 (a), defendants seek an order directing the parties to arbitrate.

The forum selection clause in the CPA states as follows:

> "ARTICLE 32 - SUBMISSION TO JURISDICTION; WAIVERS:
> 32.1 Each of the parties hereby irrevocably and unconditionally:
> (1) submits for itself and its property in any legal action or proceeding relating to this Agreement, or for recognition and enforcement of any judgment in respect thereof, to the non-exclusive general jurisdiction of the courts of the State of New York, the courts of the United States of America for the Southern District of New York, and appellate courts from any thereof"

(Milstein aff, exhibit B at § 32.1).

The court denies defendants' motion to dismiss.

Discussion

Defendants argue that service upon the corporate defendants, Metamining, Metawise, Coal Creek and Spiro, is insufficient, because Baosteel did not serve the Secretary of State for each of these defendants. Defendants argue that because New York law applies, service upon the corporate defendants must be consistent with CPLR 311 (a) (1).[1]

CPLR 311 (a) (1) requires service upon a corporation as

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[1] The parties agree that New York law applies. Pursuant to the CPA, Article 31 - "GOVERNING LAW," the CPA is governed by the laws of the State of New York.

follows:

> "1. upon any domestic or foreign corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service. A business corporation may also be served pursuant to section three hundred or three hundred seven of the business corporation law."

The affidavit of service upon Metawise indicates service of the summons and complaint "personally" on April 30, 2014, upon Song Qiang Chen, an "Authorized Agent thereof" (Milstein aff, exhibit N). Likewise, the affidavit of service upon Metamining reflects service of the summons and complaint "personally" on April 30, 2014, upon Song Qiang Chen, described as an "Authorized Agent thereof" (*id.*).

The affidavit of service upon Coal Creek indicates delivery of service of the summons and complaint upon "DAVID HA (VICE PRESIDENT)," on May 15, 2014. Similarly, service upon Spiro is indicated in an affidavit of service, which reflects delivery of service of the summons and complaint upon "DAVID HA (VICE PRESIDENT)" (*id.*).

The affidavit of the process server constitutes prima facie evidence of proper service (*Sharbat v Law Offs. of Michael B. Wolk, P.C.*, 121 AD3d 426, 427 [1st Dept 2014]). The court finds based upon these affidavits of service, that service upon these corporate defendants was consistent with New York law, since it is not necessary to serve the Secretary of State (CPLR 311 (a)

(1)).

Defendants argue in a conclusory fashion that "plaintiff never personally served upon the individual defendant Larry Li" (Yue reply affirmation, ¶ 27). The affidavit of service of the summons and complaint upon Li indicates that, on May 30, 2014, substituted service was effected by affixing a copy at 205 Roblar Ave, Burlingame, CA, and then mailing a copy to that address, within 20 days, on June 2, 2014. The dates of attempted service at that address are reflected in the affidavit.

Conclusory claims of improper service of process are insufficient to rebut an affidavit of service that is submitted in proper form (*Aames Capital Corp. v Ford*, 294 AD2d 134 [1st Dept 2002]). Baosteel has submitted an affidavit of service establishing a prima facie showing of service, consistent with the requirements of service under CPLR 308 (4), upon Li, and Li's attorney's conclusory statement concerning lack of service is not enough to warrant a hearing.

Additionally, the court finds unavailing defendants' argument that dismissal is appropriate on the ground that none of the defendants is a New York resident, nor are they are doing business in the State of New York, nor does any of them have minimum contacts with this State. Defendants agreed in the CPA to submit to the jurisdiction of the New York courts. Article 32 states, in relevant part:

> "[Each party] submits for itself and its property in any legal action or proceeding relating to this Agreement . . .to the non-exclusive general jurisdiction of the courts of the State of New York . . . consents that any such action or proceeding may be brought in such courts and waives any objection that it may now or hereafter have to the venue of any such action or proceeding in any such court or that such action or proceeding was brought in an inconvenient court . . ."

(Milstein aff, exhibit B, § 32.1 [1] and [2]).

As Baosteel points out, according to General Obligations Law § 5-1402,

> "any person may maintain an action or proceeding against a foreign corporation [or] non-resident . . . where the action or proceeding arises out of or relates to any contract, agreement or undertaking . . . which contains a provision or provisions whereby such foreign corporation or non-resident agrees to submit to the jurisdiction of the courts of this state."

Thus, because the parties in their agreement chose a New York forum, the court finds meritless defendants' arguments concerning their residency or contacts with New York, and that New York courts may exercise jurisdiction.

Additionally, defendants argue that the parties herein should arbitrate this matter pursuant to a memorandum of understanding (MOU), dated November 11, 2011, the same day as the CPA. The MOU is not annexed to either party's papers.

In the affirmation in support of defendants' motion to dismiss, defendants' counsel states that the MOU "covers the same subject matter, the same amount of money and the same commodities as the CPA did" (Yue reply aff, ¶ 16), and that the MOU contains

an arbitration clause, which states, in part:

> "All disputes in connection with the execution of this MOU shall be settled amicably by both Parties through negotiation. In case no settlement can be reached through negotiation within thirty (30) working days after either Party proposes to negotiate, the case under dispute may then be submitted by either Party to Hong Kong International Arbitration Centre for arbitration in Hong Kong . . ."

(Yue aff, ¶ 23).

To support its argument that the CPA incorporates this arbitration clause from the MOU, defendants' counsel points out that the CPA makes reference to the MOU in its first paragraphs.

The CPA begins with this paragraph, in part: "made on this 11th day of November 2011, by and between SPIRO MINING, LLC . . . , as "Seller," and Baosteel Resources . . . as the 'Buyer'"[2] (Milstein aff, exhibit B), and subsequently, within the first few paragraphs, the CPA makes references to the MOU as follows:

> "WHEREAS, on November 11, 2011, Meta and certain of its affiliates entered into a Memorandum of Understanding (the MOU) with Buyer, in which the parties agreed that Buyer would enter into a secured coal purchase arrangement with Seller on the terms set forth herein and in certain related security and guarantee agreements . . .consistent with the requirements of the MOU, Seller has agreed to sell and Buyer has agreed to purchase the commodities in accordance with the terms and conditions hereinafter set forth . . ."

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[2] According to defendants' counsel, the MOU begins with the language that it made on the 11th day of November 2011, "by and among the parties herein, i.e. Party A: Baosteel Resources International Co., Ltd. and Party B: Metamining Inc., its subsidiaries Spiro LLC and Coal Creek LLC and the individuals Larry Li and Song Qiang Chen" (Yue reply aff, ¶ 15).

(*id.*).

Furthermore, defendants argue that the CPA concludes with language that once again arguably incorporates the language of the MOU: "and there are no promises, undertakings, representations or warranties by the parties relative to such subject matter not expressly set forth or referred to herein or therein" (Yue reply aff, ¶ 18). Defendants argue that the term "therein" incorporates the MOU into the CPA. However, this paragraph, Article 33, entitled "ENTIRE AGREEMENT," begins: "[t]his Agreement, the Security Documents, the Corporate Guarantees, the Personal Guarantees and any Purchase Order issued hereunder represent the entire agreement of the parties with respect to the subject matter hereof . . . ," and does not contain any express reference to the MOU.

Although New York public policy favors arbitration, an agreement to arbitrate "must be clear, explicit and unequivocal and must not depend upon implication or subtlety" (*Matter of Wonder Works Constr. Corp. v R.C. Dolner, Inc.*, 73 AD3d 511, 513 [1st Dept 2010][internal quotation marks and citation omitted]; *see also Matter of Aerotech World Trade v Excalibur Sys.*, 236 AD2d 609, 611 [2d Dept 1997]). "If an agreement to arbitrate is incorporated by reference the reference 'must clearly show such an intent'" (*Matter of Wonder Works Constr. Corp.*, 73 AD3d at 513 [citation omitted]).

Here, the language of the CPA establishes that it is an agreement between Spiro, as seller, and Baosteel, as buyer. These are the entities that executed the agreement. The CPA reference to the MOU states that "Meta and certain of its affiliates entered into a Memorandum of Understanding" (Milstein aff, exhibit B). The list of documents under Article 33 that compose the "entire agreement," does not include any reference to the MOU. Furthermore, Article 32, under which the parties submit to "any legal action or proceeding relating to this Agreement, or for recognition and enforcement of any judgment in respect thereof, to the non-exclusive jurisdiction of the courts of the State of New York . . . ," does not contain any reference to the MOU or to arbitration or alternate dispute resolution. There is no language in the CPA pursuant to which the parties agree to arbitrate.

The court denies defendants motion pursuant to CPLR 7503 (a) to arbitrate this action.

In accordance with the foregoing, it is

ORDERED that defendants Ling Li a/k/a Larry Li, Songqiang Chen, Metawise Group Inc., Metamining Inc., Spiro Mining LLC, and Coal Creek Minerals, LLC's motion to dismiss is denied; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this

order with notice of entry; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on _____, 2015 at ____ AM/PM, at 60 Centre Street, Room ___.

Dated:

_____
J.S.C.

order with notice of entry; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on May 19, 2015 at 10 AM/PM, at 60 Centre Street, Room 218.

Date: April 29, 2015
New York, New York

Anil C. Singh