Choi v Beautri Realty Corp.
2016 NY Slip Op 31128(U)
June 8, 2016
Supreme Court, New York County
Docket Number: 650124/2014
Judge: David B. Cohen

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY PART 58

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JANG CHOI,

Plaintiff(s),

-against-

BEAUTRI REALTY CORP.,

Defendant(s).

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Index No.: 650124/2014

DECISION/ORDER
Hon. David B. Cohen

Motion Seq. 2

Recitation, as required by CPLR §2219(a), of the papers considered in reviewing the underlying motion:

Papers	Number
Order to Show Cause	1
Affirmation in Opposition and Affidavits	2
Reply	3

Upon the foregoing cited papers, the decision/order on this motion for pre-judgment attachment and to vacate the stay is:

Plaintiff seeks the attachment of the property owned by defendant located at 9 West 32nd Street, New York New York (the "Property"). The parties are involved in parallel litigation in South Korea. After losing at the trial level South Korean court, plaintiff was awarded $2,100,000 by the intermediate level appellate court. Defendant has appealed that decision to South Korean highest court, and that appeal has been accepted and is currently awaiting a decision by that Court. After winning in at the intermediate level Court, plaintiff commenced this action under CPLR 3213 and Article 53 of the CPLR, seeking recognition and enforcement of the judgment. On April 1, 2014, Judge Mills issued a stay in this matter pursuant to CPLR 5306 pending resolution of the appeal.

The parties were also involved in a separate litigation involving the Property and had filed a Notice of Pendency in connection with the litigation. That litigation has been dismissed pursuant to an Order of the Appellate Division dated January 7, 2016. Defendant has or will move for the cancellation of the Notice of Pendency. Plaintiff now seeks an order of attachment pursuant to CPLR 6202 of the Property and to vacate the stay.

Attachment is a "harsh" remedy, and is construed narrowly in favor of the party against whom the remedy is invoked (*Penoyar v Kelsey*, 150 NY 77, 80 [1896]; *DLJ Mtge. Capital, Inc. v Kontogiannis*, 594 F Supp 2d 308, 319 [ED NY 2009]). Whether to grant a motion for an order of attachment rests within the discretion of the court (*see Morgenthau v Avion Resources Ltd.*, 11 NY3d 383 [2008]. In *VisionChina Media Inc. v Shareholder Representative Services, LLC*, the Court wrote:

> In addition to establishing that a defendant subject to the court's personal jurisdiction meets the statutory requirements for an attachment, the party seeking attachment must demonstrate an identifiable risk that the defendant will not be able to satisfy the judgment (*Hotel 71 Mezz Lender LLC v Falor*, 14 NY3d 303, 310-311 [2010]; *Koehler v Bank of Bermuda Ltd.*, 12 NY3d 533, 538 [2009]). The risk should be real, "whether it is a defendant's financial position or past and present conduct" (*Ames v Clifford*, 863 F Supp 175, 177 [SD NY 1994]; *see also General Textile Print. & Processing Corp. v Expromtorg Intl. Corp.*, 862 F Supp 1070, 1073 [SD NY 1994]). The court may consider the defendant's history of paying creditors (*see Habitations Ltd. v EKL Realty Sales Corp.*, 160 AD2d 423, 424 [1st Dept 1990]), or a defendant's stated or indicated intent to dispose of assets (*see County Natwest Sec. Corp., USA v Jesup, Josephthal & Co.*, 180 AD2d 468, 469 [1st Dept 1992])

109 AD3d 49, 60 [1st Dept 2013].

Ultimately, the decision whether to grant a motion for an order of attachment or to confirm or vacate such an order rests within the sound discretion of the court (*Krineia Enterprises Co. Ltd. v*

Lavidas, 48 Misc 3d 1219(A) [Sup Ct 2015] *citing Cargill Financial Servs. Intl., Inc. v Bank Fin. and Credit, Ltd.*, 70 AD3d 456 [1st Dept. 2010], *lv app dism* 14 NY3d 853 [2010]).

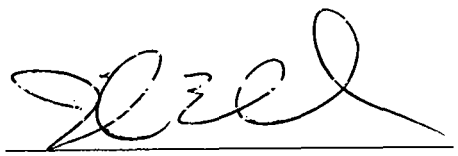
Pursuant to CPLR 6212 to obtain attachment a plaintiff shall show, "that there is a cause of action, that it is probable that the plaintiff will succeed on the merits, that one or more grounds for attachment provided in section 6201 exist, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff" (CPLR 6212). As the cause of action is based on a judgment which qualifies for recognition under the provisions of article 53, the grounds under CPLR 6201 are met.

Here plaintiff fails to make the requisite showing of an identifiable necessity for the attachment, such as the risk that the defendant will not be able to satisfy the judgment. The sole basis is the affidavit of plaintiff's counsel that states that Mr Tony Park, the agent in charge of filling vacancies in the Property, allegedly suggested to counsel that defendant could be made judgment proof by encumbering or selling the Property and transferring the assets out of the country. Beyond that obvious theoretical possibility, there is nothing to even suggest, let alone establish, that this is contemplated by defendant, nothing in the record that shows that plaintiff has any intention of encumbering or selling the Property, and nothing that indicates that defendant has a history of attempting to do anything nefarious. In his supplemental affidavit, plaintiff's counsel restates with certainty that Mr. Park discussed the possibility of making plaintiff judgment proof but fails to demonstrate that this was anything more than a speculative, theoretical discussion. Mere speculation and fear does not meet the high threshold set forth in CPLR 6212 and the motion for pre-judgment attachment is denied.

Plaintiff's motion to vacate the stay is denied. However, because the Property is the sole asset of defendant, this Court is conditioning the continuation of the stay on defendant's providing notice to plaintiff of any potential sale or encumbrance of the Property. Defendant must notify plaintiff 30 days in advance of any agreement regarding the Property that may impact upon plaintiff's ability to collect the judgment entered by the intermediate court in South Korea. Specifically, defendant must notify plaintiff 30 days prior to the entry of any agreement to transfer, sell or encumber the Property or of any plan to list or offer the Property or any portion of the Property for sale or to seek financing of any kind for the Property, in any way, whether in the future or in the present. This duty to notify shall not extend to the usual day-to-day agreements entered into for the everyday maintenance, upkeep and repairs to the Property, nor shall it apply to rental agreements entered into for vacancies in the Property that do not exceed 2 years for residential units and 5 years for commercial units and are negotiated at arm's length and provide for rent at fair market value.

This constitutes the decision and order of the Court.

Dated: June 8, 2016
New York, NY



Hon. David B. Cohen, A.J.S.C