

Barclays Bank PLC v Essar Global Fund Ltd.
2017 NY Slip Op 31092(U)
May 17, 2017
Supreme Court, New York County
Docket Number: 157086/2016
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33-----X
BARCLAYS BANK PLC, CREDIT SUISSE LOAN FUNDING LLC,
MIDTOWN ACQUISITIONS L.P., SPECIAL SITUATIONS
INVESTING GROUP, INC,INDEX NO. 157086/2016

Plaintiff,

MOTION DATE _____

- v -

MOTION SEQ. NO. _____

ESSAR GLOBAL FUND LIMITED,

Defendant.

DECISION AND ORDER-----X
HON. MARGARET A. CHAN:

This matter stems from a confession of judgment with the supporting affirmation that plaintiff Midtown Acquisitions L.P. (Midtown) filed with the Clerk of this Court on August 24, 2016. The Clerk of the Court entered judgment against defendant Essar Global Fund Limited the next day. Defendant now moves to vacate the judgment pursuant to CPLR 5015 (a) based on fraud, misrepresentation and/or other misconduct on Midtown's part. Before this court are a number of motions and a cross-motion. Motion sequences (MS) 1, 6 and 7 concern subpoenas duces tecum served by Midtown on non-parties financial and banking institutions, and defendant's cross-motion in MS 6 for a protective order; and MS 2 and 5 are defendant's duplicate motions to vacate the judgment.

MS 2 and 5, defendant's motions to vacate the judgment pursuant to CPLR 5015 (a) will be addressed first. MS 5 is dismissed as duplicative of MS 2. The confession of judgment is a result of defendant's default on its admitted debt in the amount of about \$200 million. The fraud/misrepresentation/misconduct alleged is that the "Term Sheet" was wrongfully omitted in the confession of judgment when Midtown filed it with the Clerk of Court. The essential issue is defendant's claim that the Term Sheet set forth the conditions that would trigger a default permitting Midtown to file the confession of judgment as opposed to Midtown's claim that the confession of judgment is not conditioned on any default, and in any event, defendant had defaulted.

Pursuant to the Term Sheet, the payment plan required payments of \$10 million on or before each of the following dates in 2016: March 24, March 31, April 30, May 31, June 30, and August 31. The Term Sheet provided an “Early Settlement Payment” incentive which allowed full payment at a reduced amount to be paid by September. Three payments were made in accordance to the Term Sheet. Thus, aside from the issue of whether the confession of judgment is hinged on any condition, there is a dispute as to defendant’s claim that it repaid \$50 million rather than Midtown’s claim of \$40 million (Deft’s Memo of Law at 2; Plt’s Aff, exh B – Finestone Aff at ¶¶ 6 and 8).

It has been held that where there is a contested issue concerning the confession of judgment, such dispute should be resolved by a plenary action rather than by motion (*see Scheckter v Ryan*, 161 AD2d 344, 345 [1st Dept 1990]). Defendant’s claim here is that Midtown’s misconduct, fraud or misrepresentation caused the confession of judgment to be wrongfully entered without the Term Sheet. Defendant’s motion seeking to vacate the judgment on this ground is more aptly resolved in a plenary action rather than by motion. Thus, defendant’s motion is denied. The motion also merits denial as it was not supported by an affidavit in admissible form, rendering the motion wholly unsupported by evidence.

The motions dealing with the subpoenas served upon non-parties are: (MS 1) the Moving Non-Debtors’ motion to quash the subpoenas duces tecum served by Midtown; (MS 6) Midtown’s motion to compel compliance with its judgment enforcement subpoena and defendant’s cross-motion to stay plaintiffs’ enforcement of the judgment, or, in the alternative, to quash the subpoena served upon it by Midtown; and (MS 7) defendant’s motion to quash Midtown’s subpoena served on non-parties Lloyds Bank USA and Standard Chartered Bank. The arguments in MS 1, 6 and 7 are interchangeable, and thus, these motions are addressed together.

After the confession of judgment was filed and entered, Midtown served subpoenas on defendant and eighteen financial and banking institutions on October 3, 2016. The subpoenas to these eighteen institutions included a search of over 300 debtor-related entities or individuals using the Society for Worldwide Interbank Financial Telecommunication (SWIFT) message system. The subpoenas required the eighteen financial and banking institutions, through SWIFT, to use keywords to identify transfers of funds involving these debtor-related entities and individuals through their institutions from January 1, 2011 to date (MS 1, Jacob aff at ¶ 3, and exh 2). Thus, for Essar Global Fund Limited, the keywords are *essar* or *egfl* or “*e g f l*” (*id.*, exh 2 at 9).

The Non-Debtor movants in MS 1, through the affirmation of their attorney, Thomas Arena, Esq., list the eighteen financial institutions under Midtown’s subpoenas. They are: Barclays Capital Inc.; BNP Paribas; Citibank; Comerica Bank; Credit Suisse AG; Deutsche Bank AG; Deutsche Bank Trust Company Americas;

HSBC; ING Capital Markets LLC; JP Morgan; Natixis; Societe Generale; State Street Bank and Trust Company, NA; TD Bank NA; The Bank of New York Mellon; UBS; and Wells Fargo Bank, NA. They argue that none of these financial institutions have any agreements or financial relationship with Midtown or owe Midtown any debt. Therefore, they claim that the subpoenas for documents and statements for accounts associated with EGFL or Essar in its name, and documents of wire transfers for over 300 non-debtors, from January 1, 2011 to date, “are unprecedented and unwarranted in scope” (MS 1, Memo of Law at p 4). It mentions that Midtown is essentially attempting to pierce the corporate veil without going through the requisite showing in court.

Midtown submits an affidavit by its Manager, Avram Z. Friedman, to explain the relationship between defendant and the 300-plus debtor-related entities. According to Friedman, who had been paying close attention to defendant’s business due to its loan, described defendant as a holding company for five very wealthy individuals by the surname of Ruia¹. Defendant’s “primary function is to allocate capital (*i.e.*, cash) among and between its many, many subsidiaries.” (MS 1, Friedman Aff in Opp at ¶¶ 3, 20). Friedman avers that:

Essar Global Fund Limited (“Essar”) is the primary holding company for all of the portfolio companies and other investments of Shashi Ruia, Ravi Ruia, Prashant Ruia, and Rewant Ruia (collectively, the “Ruias”). Through Essar, the Ruias own a global conglomerate (with dozens of companies doing business under the “Essar” name) that operates steel plants, oil and gas fields, refineries, gas stations, power plants, deep water ports, a fleet of cargo ships, and a telecom network”

(*id.* at ¶ 3).

Midtown’s reason for discovery into the 300-plus debtor-related entities is due to the Essar Group’s questionable transfers that allow defendant and its affiliates and subsidiaries to escape paying its debt. For one, the Essar Group has avoided paying its debt by filing for bankruptcy. Midtown points to defendant’s affiliate, Essar Steel Minnesota LLC (ESML), which after entering into a guaranty with another creditor, defaulted. And after amassing a debt of over \$1 billion, filed for bankruptcy in Delaware (*id.* at ¶¶ 12-14). Another subsidiary, Essar Steel Algoma Inc., also defaulted with over \$1 billion in debt and commenced restructuring proceedings in Canada. Pending the restructuring proceeding, it filed for bankruptcy in Delaware (*id.* at ¶¶ 15-17). Another of defendant’s subsidiary, Trinity Coal Corp., owing about \$104.3 million to creditors, also found itself in bankruptcy court in Kentucky. (*id.* at ¶ 18). The bankruptcy filings are not disputed.

¹ The five Ruias are Shashi Ruia, Ravi Ruia, Prashant Ruia, Anshuman Ruia, and Revant Ruia. The Ruias are India’s 100 Richest People (#16 Shashi and Ravi Ruia), FORBES, available at <http://www.forbes.com/profile/shashi-ravi-ruia/> (Midtown’s Memo of Law, p 2 and fn 2).

Midtown is also wary of the “red flags indicating a high likelihood of fraudulent or preferential transfers among Essar and its affiliates” (*id.*, header paragraph at p 5). It offers as an example, Essar Oil Ltd, which increased its lending to other affiliates in the past year, to wit, \$500 million to Essar Power in March 2015 as compared to a fraction of the amount in the prior year (*id.* at ¶ 21). Yet another example is Essar Oil’s loan of \$312 million to the insolvent Essar Steel Limited in 2015 (*id.* at ¶ 23).

Midtown sees such transfers as tactics used by defendant and the Essar Group to move assets beyond their creditors’ reach to benefit the Ruias’ personal gain (*id.* at ¶ 22). Indeed, another Essar wholly-owned subsidiary, Essar Global Assets Limited, has subsidiaries, Rosegem Enterprise Ltd, which owns a \$150 million yacht with a helicopter; and Star Flight Express Ltd and White Spring Holdings Ltd, each owning a Boeing 737 aircraft. According to Midtown, these subsidiaries and their assets have been moved outside this court’s jurisdiction. White Springs Holdings Ltd was moved from Delaware to London just before Midtown filed its motion to enjoin defendant from moving these assets (*id.* at ¶¶ 24-26).

Defendant opposes Midtown’s motion to compel compliance with the subpoenas in MS 6 arguing that even if the non-debtors under subpoena are its corporate subsidiaries or affiliates, their financial information would not be relevant to satisfy the judgment. In its cross-motion to Midtown’s motion, defendant seeks to quash the subpoena served on it, or in the alternative, to stay discovery. The cross-motion, submitted without evidence in admissible form, is denied.

“An application to quash a subpoena should be granted ‘[o]nly where the futility of the process to uncover anything legitimate is inevitable or obvious’ ... or where the information sought is ‘utterly irrelevant to any proper inquiry’” (*Kapon v Koch*, 23 NY3d 32, 38 [2014] quoting *Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327, 331-332 [1988]). Disclosure under CPLR 5223 permits inquiry into “all matter relevant to the satisfaction of the judgment,” and permits also “a generous standard which permits the creditor a broad range of inquiry through either the judgment debtor or any third person with knowledge of the debtor’s property” (*Gryphon Domestic VI, LLC v GBR Information Svcs., Inc.*, 29 AD3d 392, 394 [1st Dept 2006] quoting *ICD Group v Israel Foreign Trade Co. [USA]*, 224 AD2d 293 [1st Dept 1996]). Thus, “[b]road post-judgment discovery in aid of execution is the norm in federal and New York state courts” which includes using the SWIFT program (*EM Ltd. v Republic of Argentina*, 695 F.3d 201, 207 [2d Cir 2012]).

Midtown has presented an affidavit by someone with knowledge of defendant’s holdings and cases involving defendant’s affiliates or subsidiaries where executing a judgment was hampered by their bankruptcy filings, removing assets from this court’s jurisdiction, and the diversion of funds to other subsidiaries.

Midtown has also presented an affirmation whereby the search of defendant's affiliates can be facilitated by the SWIFT program. While the Moving non-debtors are many, so are defendant's debtor-related affiliates.

Defendant does not challenge the discovery in terms of the time period requested, but its argument that the subpoenas are overbroad may have merit, as its argument that 53 of the Non-Debtor Third-Parties are individuals. However, no individuals are listed in the list of 133 debtor-related entities (MS 1 - Arena aff, exh A). Thus, the time parameter and the individual non-debtors are not issues.

Similarly, defendant's motion to quash the subpoenas served on the two non-party banks, Lloyds Bank USA and Standard Chartered Bank in MS 7, is denied. "[T]he burden of establishing that the requested documents and records are utterly irrelevant is on the person being subpoenaed" (*Velez v Hunts Point Multi-Service Center, Inc.* 29 AD3d 104, 112 [1st Dept 2006] quoting *Gertz v Richards*, 233 AD2d 366 [2d Dept 1996]). Neither bank challenged the subpoena served on it.

In any event, it is noted that counsel for the Moving Non-Debtors and Midtown's co-counsel were undergoing discussions to limit the scope of the subpoenas. Those discussions were curtailed. Nonetheless, there is indication that the scope of discovery using SWIFT can be narrowed (MS 1 - Jacobs aff at ¶¶ 12, 14-16). Hence, the parties are directed to appear for a conference to narrow the scope of discovery as to the SWIFT program keywords so that Midtown may amend the subpoenas. Also for this conference, the parties are advised to be prepared to discuss a Confidentiality Stipulation. As such, the Moving Non-Debtors' motion to quash the subpoenas in MS 1 is granted only to the extent that a conference will be held to address narrowing the scope of the subpoenas. Consequently, Midtown's motion to compel compliance with the subpoenas in MS 6 is denied.

Accordingly, it is

ORDERED that defendant's motion to vacate the judgment pursuant to CPLR 5015 (a) in Motion Sequence 2 is denied; it is further

ORDERED that defendant's motion in Motion Sequence 5 for the same relief as in Motion Sequence 2 is denied as duplicative; it is further

ORDERED that the Moving Non-Debtors' motion to quash subpoenas duces tecum in Motion Sequence 1 is granted only to the extent that a conference on narrowing the scope of discovery is to be held on June 7, 2017, in the courthouse at 71 Thomas Street, Room 103, New York, NY at 9:30 a.m.; it is further

ORDERED that plaintiff Midtown Acquisitions L.P.'s motion to compel compliance with the Judgment Enforcement Subpoena in Motion Sequence 6 is denied; it is further

ORDERED that the parties shall be prepared to discuss a Confidentiality Stipulation at the June 7, 2017 conference; it is further

ORDERED that defendant's cross-motion in Motion Sequence 6 is denied; and it is further

ORDERED that defendant's motion in Motion Sequence 7 to quash the subpoenas on two non-party banks is denied.

This constitutes the decision and order of the court.

Dated: May 17, 2017



Margaret A. Chan, *J.S.C.*