

**Publications Intl., Ltd. v Phoenix Intl. Publs., Inc.**

2017 NY Slip Op 32014(U)

September 25, 2017

Supreme Court, New York County

Docket Number: 651334/2016

Judge: Barry Ostrager

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 61

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Plaintiff,  
PUBLICATIONS INTERNATIONAL, LTD.,

INDEX NO. 651334/2016

-against-

DECISION & ORDER

PHOENIX INTERNATIONAL PUBLICATIONS, INC.,  
and JIANGSU PHOENIX EDUCATION  
PUBLISHING CO. LTD.,

MOTION SEQ. NO. 007

Defendants.  
\_\_\_\_\_ X

PHOENIX INTERNATIONAL PUBLICATIONS, INC.,  
Defendant/Counterclaim-  
Plaintiff,

-against-

PUBLICATIONS INTERNATIONAL, LTD.,  
Plaintiff/Counterclaim-  
Defendant,

and

JRS DISTRIBUTION CO., and LOUIS WEBER,

Additional  
Counterclaim-Defendants.  
\_\_\_\_\_ X

OSTRAGER, J:

Plaintiff/Counterclaim-Defendant, Publications International, Ltd. (“PIL”) and Additional Counterclaim Defendants JRS Distribution Co. (“JRS”) and Louis Weber (“Weber,” collectively with PIL, the “PIL Parties”), move for an order dismissing the Counterclaims in the Third Amended Answer of Defendant/Counterclaim-Plaintiff, Phoenix International Publications, Inc.

("PIP"), pursuant to CPLR 3211(a)(1), 3211(a)(7), and 3019. The motion to dismiss is granted as to PIP's First and Second Counterclaims as they relate to the Mexican Taxes Claim.

Plaintiff PIL is a book publication company with subsidiaries in Mexico. Defendant PIP is a publisher of children's books. In Spring 2014, PIL agreed to sell its children's books publishing business to PIP for \$80 million. As part of the transaction, PIP acquired all the shares in PIL's Mexican subsidiaries ("PIL Mexico"). The parties agreed that \$2.2 million of the total purchase price was allocated to the sale of shares in the Mexican subsidiaries.

The parties executed an asset purchase agreement dated May 12, 2014 (the "APA"). Pertinently, as part of the transaction, the PIL Parties agreed to indemnify PIP for certain potential post-closing liabilities. Under Section 8.3(a) of the APA, the PIL Parties agreed to indemnify PIP "from and against all Damages imposed upon or incurred by Purchaser ... arising out of, in connection with or resulting from: (i) any breach of any representation or warrant... ; (iii) any Excluded Liabilities...." The parties set aside \$5 million of the purchase price in escrow as security for post-closing claims that fell within the scope of the post-closing indemnification obligations. Under the escrow agreement, the parties agreed that escrow funds would be released in three tranches over the course of the two years following closing. The PIL Parties brought this action, arguing that despite all three of the escrow release dates having now passed, PIP has failed to release the escrow funds. PIP makes several counterclaims against the escrow funds, including an indemnification claim against the PIL Parties alleging that the PIL Parties incurred income tax liability of approximately \$540,000 in Mexico as a result of the transaction (the "Mexican Taxes Claim") and, that under the APA, the PIL Parties are responsible for paying this tax liability.

The PIL Parties moved to dismiss, among other claims, the Mexican Taxes Claim contained in PIP's Second Amended Counterclaims. In a decision dated February 1, 2017, Justice Singh granted the PIL Parties' motion as to that claim, finding that "the counterclaim fails to allege that the Mexican government ever assessed any taxes or presented a bill for taxes to any party. In the complete absence of such a bill or assessment, any potential tax liability would remain inchoate and speculative." (Decision and Order, dated Feb. 1, 2017 [NYSCEF Doc. #109] ("Decision and Order"), at 7). Justice Singh granted the PIL Parties' motion to dismiss the Mexican Tax Claim *without prejudice*. If, as and when the Mexican government assesses any taxes, PIP may have a remedy.

On March 6, 2017, PIP filed its Third Amended Counterclaims. Instead of seeking indemnification for a tax liability that does not yet exist, PIP now alleges a breach of Section 2.7 of the APA and requests relief in the form of specific performance and declaratory relief. PIP asserts that Section 2.7 of the APA compels the PIL Parties to file a tax return that reports the proceeds from the sale of PIL Mexico as set out in the Allocation Schedule of the APA (Counterclaims, ¶ 59-61 [NYSCEF Doc. #115] ("Counterclaims")). Section 2.7 states, in relevant part, that "[t]he Parties agree that they shall report the Purchase Price (and Assumed Liabilities, capitalized costs, and other items required to be included for federal income Tax purposes) in a manner entirely consistent with the final Allocation Schedule ... in all Tax Returns and forms and in the course of any Tax audit, Tax review, or Tax Proceeding relating hereto, unless otherwise required by applicable Law ...." (Lagemann Aff. Ex. A. [NYSCEF Doc. #133]).

It is undisputed by the parties that the Allocation Schedule shows a sale price of \$2,165,315 for PIL Mexico (*see* Lagemann Aff. Ex. B. [NYSCEF Doc. #134]). It is also

undisputed that the PIL Parties filed a tax return with the Mexican government claiming \$0 in tax due with regard to this transaction (Huttenlocher Aff. Ex. C. [NYSCEF Doc. #124]). For the purposes of this motion to dismiss, however, such documentary evidence is immaterial.

Justice Singh’s February 1, 2017 Decision and Order remains controlling as to the Mexican Taxes Claim. PIP’s request for specific performance and declaratory relief seeking an order compelling the PIL Parties to file a tax return in accordance with the Allocation Schedule of the APA is, for all intents and purposes, an attempt to circumvent the law of this case.

Having had their original Mexican Taxes Claim dismissed by Justice Singh, PIP’s Third Amended Counterclaims now seek to obtain the same monetary relief originally requested but under the guise of specific performance. While the legal theory PIP asserts in its new Mexican Taxes Claim may be different, the goal of obtaining the identical monetary relief sought in its original Mexican Taxes Claim remains the same. Justice Singh issued a broad ruling, holding that “the counterclaim predicated upon Mexican tax liability must be stricken.” (Decision and Order at 7). The Court will not let the defendant make an end run around a prior decision in this case.

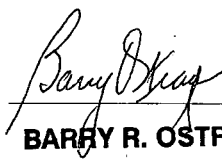
Finally, PIP already had the opportunity to assert a claim for specific performance of Section 2.7 in its Second Amended Counterclaims.<sup>1</sup> Having had their claim for monetary relief dismissed on a prior motion, the Court will not allow PIP another bite at the apple by asserting a pretextual claim seeking “specific performance.”

Accordingly, it is hereby

<sup>1</sup> Notably, in his Decision and Order, Justice Singh specifically granted leave to replead as to PIP’s manipulated returns claim, but did not do so regarding the Mexican Tax Counterclaim. (Decision and Order at 9-10).

ORDERED that the Plaintiff/Counterclaim-Defendant's motion to dismiss Defendant/Counterclaim-Plaintiff's First and Second Counterclaims, as they relate to the Mexican Taxes Claim, be granted with prejudice.

Dated: September 25, 2017

  
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**BARRY R. OSTRAGER** J.S.C.  
JSC