

<b>Transasia Commodities Inv. Ltd. v Zolotas</b>
2020 NY Slip Op 31313(U)
May 8, 2020
Supreme Court, New York County
Docket Number: 150312/2018
Judge: Andrew Borrok
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favor of TransAsia and against respondent Michael Zolotas, in his individual capacity, for a total sum of \$22,193,220.52 in a prior action (the **Prior Action**) captioned *TransAsia Commodities Investment Limited v NewLead JMEG, LLC, NewLead Holdings Limited, NewLead Holdings (US) Corp., Michael Zolotas and Jay Berkowitz*, Index 654414-2013 (Petition, NYSCEF Doc. 86, Ex. A). The First Judgment was subsequently corrected (the **Judgment**) on February 16, 2018 to award damages jointly and severally against Mr. Zolotas and all the Prior Action defendants, including respondent New Lead Holdings Limited (**New Lead**) (NYSCEF Doc. No. 120). The Judgment has not been unsatisfied.

The Verified Amended Petition (the **Petition**) alleges that to frustrate TransAsia's efforts to collect in the Prior Action, Mr. Zolotas purposefully dissipated assets through a scheme of opening and closing dozens of corporate entities, including respondent Aurora Properties, Inc. (**Aurora**). The Petition alleges that Mr. Zolotas is Aurora's sole member (NYSCEF Doc. No. 86, ¶ 28, 33, *id.*, exs. E, I), that Aurora owns respondent Aurora Properties (USA) LLC (**Aurora LLC**), which is the record owner of a condominium located in Manhattan, Block 01279, Lot 1013, Unit 8 (the **Property**) that TransAsia seeks to attach via this special proceeding (NYSCEF Doc. No. 86, ¶ 29; *id.*, ex. F). This Property has allegedly been used as office space, for which Aurora issued payments to Aurora LLC as "administration of the expenses for office space," and Mr. Zolotas also previously testified in 2015, as further discussed below, that the Property is used as a family apartment, including by Chrysanthi Giara (*id.*, ¶ 32, *id.*, ex. H).

Mr. Zolotas now denies that he owns the Property and claims that it is actually owned by Ms. Giara, his former spouse, and that he has no interest in either Aurora or Aurora LLC as of 2010, which TransAsia, in turn, contends is demonstrably false based on, among other things, Mr.

Zolotas's testimony in the Prior Action, certain bank and condominium records, including payments of carrying charges in 2016, an alleged copy of an Action by Written Consent of Sole Member, dated July 2, 2015 of Aurora Properties (USA) LLC, indicating that Ms. Zolotas and Ms. Giara are the managers of the Aurora LLC (NYSCEF Doc. No. 121), and the fact that the documents on which Mr. Zolotas now relies were non-existent at the time of the forensic examination of his computers in the Prior Action. Ms. Giara, by separate motion, claims that the action against her must be dismissed because she and Mr. Zolotas divorced in Greece in 2016 and that she has always resided and continues to reside exclusively in Greece, and, therefore, she has nothing to do with the instant action (NYSCEF Doc. No. 91, ¶¶ 3-5). By her affidavit, however, Ms. Giara indicates (i) that on or about May 28, 2010, her then husband, Mr. Zolotas resigned as the President/Director of Aurora Properties, Inc., and she became the President/Director of the same, and (ii) that she became the sole shareholder of Aurora, the entity that is the sole member of Aurora LLC, which owns the subject Property (*id.*, ¶ 5). Notably, Ms. Giara does not disclaim her right to the Property.

The Petition seeks to attach the Property pursuant to CPLR § 5225, which provides:

Upon a special proceeding commenced by the judgment creditor, against a person in possession or custody of money or other personal property in which the judgment debtor has an interest ... where it is shown that the judgment debtor is entitled to the possession of such property ... the court shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff.

Under CPLR § 5201, “a money judgment may be enforced against any property which could be assigned or transferred.” Further, “any debt or property against which a money judgment may be enforced as provided in section 5201 is subject to attachment” (CPLR § 6202).

TransAsia seeks to attach Mr. Zolotas' interest in Aurora and Aurora LLC as well as in the Property.

## **DISCUSSION**

### **I. CPLR § 3211(a)(1)**

Dismissal under CPLR § 3211(a)(1) is required when documentary evidence establishes the futility of a claim as a matter of law. To prevail on a CPLR § 3211(a)(1) motion to dismiss, the movant must demonstrate that “the relied-upon documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim” (*Fortis Fin. Servs. v Fimat Futures USA, Inc.*, 290 AD2d 383, 383 [1<sup>st</sup> Dept 2002] [quotation omitted]). Such dismissal is not appropriate here as the proffered documents raise more questions than they provide answers and the respondents’ arguments as to who owns what are contradictory. Moreover, with respect to Mr. Zolotas, he raised substantially the same arguments on his prior motion to dismiss in this action (Mtn. Seq. No. 002) before Justice Ramos, and Justice Ramos denied the motion (NYSCEF Doc. No. 24). Mr. Zolotas is effectively asking this court to reverse that decision, which the court will not do. The motions to dismiss based on documentary evidence are denied.

### **II. CPLR § 3211(a)(5)**

Dismissal under CPLR § 3211(a)(5) is required where a respondent can establish *prima facie* that the statute of limitations on a claim has run. The respondents argue that any action is untimely because the transfer of the Property and Mr. Zolotas’s withdrawal from Aurora occurred more than six years before the filing of the Petition. At best, when the transfer occurred would be an issue of fact because, as noted above, the documents in this case are contradictory and unclear, and Mr. Zolotas testified in the Prior Proceeding *on September 30, 2015*, that “his family”

owned the Property and had since 2009 (i.e., his 2015 testimony contradicts his current claims of a prior 2010 transfer) (Epstein Aff., ex. F). Dismissal based on the statute of limitations here would be inappropriate.

### **III. CPLR § 3211(a)(7)**

Under CPLR § 3211(a)(7), the court must accept all the facts alleged in the complaint as true, accord the plaintiffs the benefit of every possible favorable inference and determine only whether the facts fit within any cognizable legal theory. The facts alleged in the Petition plainly state a claim for fraudulent conveyance and sufficiently allege that the respondents disregarded corporate formalities to avoid the Judgment entered against Mr. Zolotas and New Lead and to obfuscate TransAsia's efforts to collect same.

### **IV. CPLR § 3211 (a)(8)**

The court also has jurisdiction over Ms. Giara. Under CPLR 302(a)(4), the Court may exercise personal jurisdiction over any non-domiciliary who "owns, uses or possesses any real property situated within the state." Moreover, under CPLR 302(a)(1), proof of even "one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]). The court has jurisdiction over Ms. Chiara based on her alleged use and ownership of the Property in Manhattan, which use and ownership she does not deny.

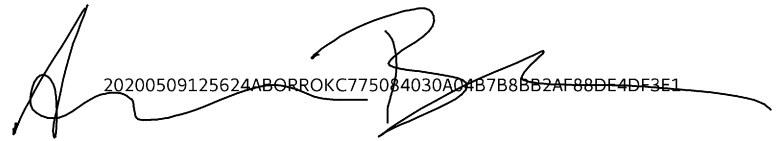
### **V. CPLR § 3215(c)**

Under CPLR § 3215(c), a court shall dismiss an action as abandoned if the plaintiff fails to take any action against a defaulting defendant within a year “*unless sufficient cause is shown why the complaint should not be dismissed*” (CPLR § 3215[c] [emphasis added]). The determination of whether an excuse is reasonable in any given instance is committed to the sound discretion of the trial court (*Maspeth Fed. Sav. & Loan Assn. v Brooklyn Heritage, LLC*, 138 AD3d 793, 794 [2d Dept 2016]). To the extent that the respondents argue that the Petition should be dismissed as to Aurora LLC because it was abandoned as service on this entity was not initially completed within a year of January 22, 2018, when it was filed, this argument is unavailing. TransAsia has shown “sufficient cause” for why the Petition should not be dismissed, i.e, the difficulty created by the respondents in serving the Aurora entities and the efforts TransAsia took to notify Mr. Zolotas and Ms. Chiara, Aurora and Aurora LLC’s alleged alter egos, of the claims alleged in the Petition, as well as that it has a meritorious cause of action against the respondents. This is sufficient to withstand the motion. Contrary to respondents’ argument, and by the plain text of CPLR § 3215(c), dismissal under the circumstances is not mandatory, but discretionary (*Maspeth Fed. Sav. & Loan, supra*). Mindful of the public policy in favor of resolution of cases on the merits, the court declines to dismiss on this basis.

Accordingly, it is

ORDERED that motion seq. nos. 004 and 005 are denied, and it is further

ORDERED that the respondents are directed to serve an answer to the petition within 30 days of this decision and order.



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5/8/2020

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:


CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED


NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: