

Arm Internet Inv. I Ltd. v C Media Ltd.

2022 NY Slip Op 30264(U)

January 26, 2022

Supreme Court, New York County

Docket Number: Index No. 655844/2016

Judge: Sabrina B. Kraus

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS **PART** **57TR**

Justice

-----X

ARM INTERNET INVESTMENT I LIMITED,

Plaintiff,

- v -

C MEDIA LIMITED, SONG XUESONG,

Defendant.

-----X

INDEX NO. 655844/2016

MOTION DATE 01/21/2022

MOTION SEQ. NO. 007

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 007) 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159

were read on this motion to/for CONTEMPT.

BACKGROUND

Plaintiff commenced this action, pursuant to Article 53 of the CPLR, for recognition and enforcement of a final money judgment in the principal amount of \$24.9 million, plus interest and court costs, issued on October 5, 2016 by the High Court of the Hong Kong Special Administrative Region, Court of First Instance, in plaintiff's favor and against defendants C Media and Song Xuesong (Song) in the High Court Action No. 791 of 2016 (the "Hong Kong Judgment").

THE STIPULATION OF SETTLEMENT

On or about September 18, 2018, the parties and non-party Chum Capital Group Limited (Chum) entered into a Stipulation of Settlement in this action, which was so-ordered by the court (Reed, J) on November 1, 2018.

The Stipulation of Settlement provided for a number of transactions pursuant to which defendants and Chum would transfer shares in various companies (Seven Stars Cloud Group, Inc. ["Seven Stars"] and Luokung Technology Corp., Nasdaq: LKCO [formerly known as

Kingtone Wirelessinfo Solution Holding Ltd.] [“KONE”]) to plaintiff or its designee. Such shares could be sold by plaintiff or its designee. Additionally, in the event the sales of these shares were less than \$32,780,682, defendants agreed to the entry of a judgment in this action against them, in the amount of the shortfall between the sales proceeds and \$32,780,682, which amount shall bear interest at the rate of 8% per year from October 1, 2018 until such judgment is paid.

The terms and conditions of the Stipulation of Settlement included provisions for the transfer by defendants of 5,928,285 shares of Seven Stars to plaintiff's designee. 5,928,285 shares of Seven Stars were transferred from defendants and Chum pursuant to Sections 4, 5 and 6 of the Stipulation of Settlement to plaintiff's designee and were sold. The net proceeds of such sales were approximately \$8.8 million.

Section 6 of the Stipulation of Settlement also provided that Chum, a non-party to this action, submits to the jurisdiction of this court for the purposes of this Stipulation of Settlement and effectuating the terms therein.

Section 8 of the Stipulation of Settlement provided that defendants and Chum “shall jointly and severally transfer, or cause to be transferred, free and clear of any lien, pledge or encumbrance,” a total of one million common shares in KONE to plaintiff or its designated entity within twenty (20) days.

Section 9 of the Stipulation of Settlement similarly provided defendants and Chum would shall require C Media and/or its shareholders to pledge a total of 10 million common shares of KONE, together with the original share certificates of KONE and properly executed instruments of transfer and all other necessary documents pursuant to Section 2 of the Settlement, to plaintiff or its designee, and that plaintiff or its designee may sell any part of these 10 million KONE

shares. If the sales proceeds of the shares transferred in Sections 7 and 8 of the Stipulation of Settlement is less than \$32,780,682.

Section 14 of the Stipulation of Settlement provides, *inter alia*, that the action will be discontinued with prejudice "[i]n the event that the sale proceeds from the sale of the shares of Seven Stars and KONE exceed \$32,780,682."

THE COURT ORDERS

After the entry of the Stipulation of Settlement, this court issued three orders dated September 30, 2021 ("September 30, 2021 Order"), April 16, 2021 ("April 16, 2021 Order") and August 16, 2021 ("August 16, 2021 Order").

These orders directed defendants and Chum to "jointly and severally transfer or cause to be transferred, free and clear of any lien, pledge or encumbrance," a total of eleven (11) million shares of the stock of KONE, to plaintiff, together with "properly executed instruments of transfer," so that plaintiff or its designated entity can "immediately sell the" 11 million KONE shares. The "KONE shares" are shares of Luokung Technology Corp. ("Luokung") that are traded on NASDAQ under the symbol LKCO.

It is undisputed that defendants and Chum have taken no action to transfer the 11 million KONE [Luokung] shares, free and clear of any lien, pledge or encumbrance, to plaintiff. Given that the Orders directed that ARM had to be able to "immediately sell" such shares, the KONE [Luokung] shares had to be freely tradeable.

PENDING MOTION

On January 21, 2022, plaintiff moved by Order to Show Cause for an order:

a) holding defendants C Media Limited and Song and non-party Chum in civil contempt pursuant to Judiciary Law § 753 and CPLR § 5104 for failing to comply with the clear and

unambiguous terms of this Court's Decisions and Orders, dated September 30, 2020, April 16, 2021 and August 16, 2021, which directed that defendants C Media and Song and non-party Chum "shall jointly and severally transfer or cause to be transferred, free and clear of any lien, pledge or encumbrance," a total of eleven (11) million shares of the stock of Kingtone Wirelessinfo Solution Holding Ltd. ("KONE"), now Luokung Technology Corp. ("Luokung"), to Plaintiff or its designated entity together with "properly executed instruments of transfer," so that plaintiff or its designated entity can "immediately sell" the 11 million Luokung shares; and

(b) issuing a warrant for the arrest of Song and imposing a fine against defendants and Chum; and

(c) awarding attorneys' fees to plaintiff in connection with this motion.

The motion was briefed, and this court heard oral argument on January 21, 2022 and reserved decision. For the reasons set forth below, the motion is granted to the extent of finding defendants and Chum in civil contempt and issuing a prospective *per diem* fine against them until the contempt is purged.

DISCUSSION

Plaintiff bases the relief sought on the so-ordered Stipulation of Settlement, and the three subsequent orders directing compliance.

As noted above, the Stipulation of Settlement contained various provisions with respect to the transfer of a total of 5,928,285 shares of Seven Stars from defendants and Chum to plaintiff; the transfer of a total of eleven (11) million shares of KONE to plaintiff; and the application of the net proceeds from the sale of the shares to satisfy defendants' stipulated liability of \$32,780,682; and to permit plaintiff to the entry of a judgment in the amount of the

shortfall if plaintiff receives less than \$32,780,682 from the sale of the Seven Stars shares and the eleven million KONE shares.

Share certificates for one million and 10 million KONE shares transferred on or about October 11, 2018 and November 13, 2018, respectively, from defendants to ARM but were marked “Restricted.” The “Restricted” Share Certificates did not transfer the 11 million KONE shares “free and clear of any lien, pledge or encumbrance,” as required by Sections 8 and 9 of the Stipulation of Settlement, and thus plaintiff was not able to “immediately sell” the one million KONE shares.

By the September 30, 2020 Order, this court granted plaintiff’s motion to compel defendants and Chum to comply with the Stipulation of Settlement. The court directed defendants to jointly and severally transfer or cause to be transferred, free and clear of any lien, pledge or encumbrance, ten (10) million shares of KONE to plaintiff ARM Internet Investment 1 Limited or its designated entity, together with properly executed instruments of transfer and all other necessary documents, so that plaintiff or its designated entity could immediately sell the 10 (ten) million KONE shares, within 30 days. The Court held that “what appears clear from the submissions of the parties to the stipulation of settlement is that, by the mandated date certain, defendants and non-party Chum failed to provide shares of the type that could be promptly sold to meet the agreed upon judgment amount, inclusive of fees.”

Pursuant to an order dated April 16, 2021, the court granted plaintiff’s motion for re-argument and ordered that defendants and Chum transfer an additional one million KONE shares, free and clear of any of any lien, pledge or encumbrance, to plaintiff.

On August 16, 2021, the court (Kelly, J) granted another order directing compliance and directing that “within 30 days of the entry of this order, defendants C Media Limited and Song

Xuesong and non-party Chum Capital Group Limited shall jointly and severally transfer or cause to be transferred, free and clear of any lien, pledge or encumbrance, 10 (ten) million shares of KONE to plaintiff ARM Internet Investment 1 Limited or its designated entity, together with properly executed instruments of transfer and all other necessary documents, so that so that plaintiff ARM Internet Investment 1 Limited or its designated entity can immediately sell the 10 (ten) million KONE shares.”

It is undisputed that these orders have not been complied with to date. Collectively these orders, in addition to the so-ordered Stipulation of Settlement require the transfer of 11 million unrestricted KONE shares that can be sold to satisfy the outstanding liability.

Judiciary Law § 753(A)(3) provides that a court has power to punish, by fine and/or imprisonment, a party to an action for disobedience to a lawful mandate of the court.

Civil contempt seeks “the vindication of a private right of a party to litigation and any penalty imposed upon the contemnor is designed to compensate the injured private party for the loss of or interference with that right.” *McCormick v. Axelrod*, 59 N.Y.2d 574,583 (1983). In *El-Dehdan v. El-Dehdan* (26 N.Y.3d 19, 29), the Court of Appeals, citing *McCormick*, held that the elements necessary to establish civil contempt under Judiciary Law § 753(A)(3) are as follows: First, “it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect.” Second, “[i]t must appear, with reasonable certainty, that the order has been disobeyed.” Third, “the party to be held in contempt must have had knowledge of the court’s order” Fourth, “prejudice to the right of a party to the litigation must be demonstrated.”

The movant on a motion for civil contempt must establish defendant’s violation of the court order by clear and convincing evidence. *See El-Dehdan*, 26 N.Y.3d at 29.

Plaintiff has satisfied each of these factors in its motion papers. The terms of the orders are clear and unequivocal, and defendants and Chum do not deny they are aware of the orders. It is undisputed that defendants and Chum have not complied with the orders, as unrestricted shares have not been transferred to date, and plaintiff has clearly been prejudiced by their failure to comply, since the restricted nature of the shares prevents plaintiff from being able to sell the stock and satisfy defendant's stipulated liability of \$32,780,682.00.

Defendants and Chum do not dispute plaintiff's argument that no hearing is required on this issue. Song submits an affidavit in opposition. Song acknowledges the orders of the court have not been complied with. Song states that he hasn't transferred the stock in part because "a large sale of LKCO shares would have a negative influence on LKCO share price" and thus under the Stipulation of Settlement plaintiff will still be entitled to entry of a judgment against him. This is not a basis to disregard the court orders or his obligation under the Stipulation. Song's affidavit consists in large part in proposing new different settlements and complaining that plaintiff does not wish to negotiate new terms. Regarding plaintiff's request that this court issue a warrant for Song's arrest, defendant's counsel states in its memorandum of law in opposition:

Furthermore, as Mr. Song is not planning to travel to the United States in general, or New York in particular, the issuance of a warrant for his arrest would serve as little more than a mollification of Plaintiff's clear anger and distress with the situation. However, it would not do very much, if anything, to further motivate the Defendants.

Finally, Song's argument that he is prevented from complying with his obligations under the Stipulation of Settlement because of Rule 144 of the SEC has been previously raised and rejected by Judge Kelly in the prior order directing compliance. Additionally, as noted by plaintiff, Rule 144 only pertains to "Restricted" stock and defendants can't use Restricted shares to meet their obligation pursuant to the express directives of the Stipulation of Settlement and

prior orders. Moreover, that Song purportedly “is considered an ‘affiliate’ of non-party Chum” is irrelevant to the transfer by C Media, Song and Chum, jointly and severally, of 11 million shares of KONE [Luokung], free and clear of any lien, pledge or encumbrance, to ARM. The “issuer” of the 11 million shares is Luokung (formerly KONE), which is traded on Nasdaq under the symbol LKC.

Based, on the circumstances of this case, the court finds that the most effective way to encourage defendants to comply with the Stipulation of Settlement and this court’s prior orders is to issue a prospective *per diem* fine until the contempt is purged.

Where a fine is involved, it is considered civil and remedial if it either coerces the recalcitrant party into compliance with a court order, or compensates the claimant for some loss (*United Mine Workers of America v. Bagwell*, *supra* at 829, 114 S.Ct. 2552, citing *United States v. United Mine Workers of America*, 330 U.S. 258, 303–304, 67 S.Ct. 677, 91 L.Ed. 884). If a fine is not compensatory, it is civil only if the contemnor is given an opportunity to purge (*id.*).

New York City Transit Auth. v. Transp. Workers Union of Am., AFL-CIO, 35 A.D.3d 73, 86 (2006). A *per diem* fine is analogous to coercive imprisonment, the fine is levied for each day a contemnor does not comply with an affirmative court order. Both penalties are intended to exert a constant coercive pressure on the contemnor to comply and once the court order is honored, the future, indefinite, daily fines are purged [*Id. See also Ruesch v Ruesch* 106 AD3d 976 holding imposition of prospective fine was appropriate for civil contempt; *Pacific Alliance Asia Opportunity Fund L.P. v Wan* 199 AD3d 423 holding prospective daily fine of \$500,000.00 was appropriate for civil contempt and intended to strongly encourage defendant to purge himself of the contempt].

Plaintiff’s request for attorneys’ fees is denied without prejudice to renewal in the event the contempt is not purged as set forth below. Any such application should be supported by a

request for a specific amount of fees incurred, as well as a detailed explanation of the hours, the work done, and the rates billed at.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for an order adjudicating defendants C Media Limited and Song Xuesong and non-party Chum Capital Group Limited in civil contempt is hereby granted; and it is further ordered that

ORDERED that defendants' and Chum's disobedience has defeated, impaired, impeded and prejudiced plaintiff's rights under the Stipulation of Settlement, and subsequent orders and plaintiff has no alternative effective remedies available; and it is further

ORDERED that defendants C Media Limited and Song Xuesong and non-party Chum Capital Group are held in Civil Contempt and are directed within 30 thirty days of this order to purge the contempt by jointly and severally transferring or causing to be transferred, free and clear of any lien, pledge or encumbrance, eleven (11) million shares of the stock of Kingtone Wirelessinfo Solution Holding Ltd., now Luokung Technology Corp. to plaintiff ARM Internet Investment 1 Limited or its designated entity, together with properly executed instruments of transfer and all other necessary documents, so that plaintiff ARM Internet Investment 1 Limited or its designated entity can immediately sell the eleven (11) million Luokung shares; and it is further

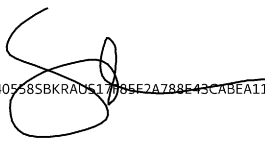
ORDERED in the event defendants and Chum fail to comply with this purge, within 30 days, a *per diem* fine shall be assessed against them jointly and severally in the amount of \$1000.00 per day, from March 7, 2022, forward until such time as they have purged the contempt and complied with the order; and it is further

ORDERED that in the event that the contempt has not been purged by September 1, 2022, plaintiff may renew its application for this court to issue a warrant for the arrest of Song, as well as its application for attorneys’ fees incurred on this motion and any subsequent motion to enforce this order after September 1, 2022, further at said time plaintiff may seek entry of a judgment for the amount of *per diem* fines accrued as of said date; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties and Chum and upon the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).


 202201261409585BKRAUS17705E2A788E43CABEA11D00352E0C19

1/26/2022

 DATE

 SABRINA KRAUS, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
APPLICATION:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>		<input type="checkbox"/>		REFERENCE
			<input type="checkbox"/>	DENIED	OTHER