

<b>Spicer v Gardaworld Consulting (UK) Ltd.</b>
2022 NY Slip Op 31278(U)
April 14, 2022
Supreme Court, New York County
Docket Number: Index No. 655352/2017
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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TIMOTHY SPICER, JEFFREY DAY, MARK BULLOUGH,  
DOMINIC MCCAUSLAND ARMSTRONG, LORD PETER  
INGE, JOHN BIRCH, JAMES ELLERY

Plaintiff,

- v -

GARDAWORLD CONSULTING (UK) LIMITED,

Defendant.

INDEX NO. 655352/2017

MOTION DATE 03/29/2022

MOTION SEQ. NO. 010

**DECISION + ORDER ON  
MOTION**

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 010) 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 476, 477, 478, 479, 480

were read on this motion to/for ORDER OF ATTACHMENT.

Upon the foregoing documents, Gardaworld Consulting (UK) Limited’s (**Garda**) motion for a temporary restraining order and an order of attachment pursuant to CPLR § 6210 is denied in its entirety. Simply put, Garda owes \$70 million (the **Earnout Payment**) pursuant to the Stipulation (hereinafter defined) entered into after the assertion of counterclaims in this action in which they voluntarily agreed that the plaintiffs could designate to which accounts the Earnout Payment would be sent and did not negotiate that such funds would remain in the United States subject to prevailing on any counterclaims that they had asserted. Additionally, Garda failed to demonstrate a likelihood of success on the merits of its counterclaims or that Messrs. Spicer, Day and Bullough would be unable to satisfy any potential judgment against them on Garda’s counterclaims (*VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 59-60 [1<sup>st</sup> Dept 2013]; *Epiphany Community Nursery School v Levey*, 171 AD3d 1, 8 [1<sup>st</sup> Dept

2019)). For these reasons, Garda is not entitled to attachment or a temporary restraining order of the money it is undeniably obligated to pay.

By Stipulation, dated November 12, 2018 (the **Stipulation**; NYSCEF Doc. No. 450) the parties agreed that if the plaintiffs obtained a “final determination” in their favor, meaning an order or judgment no longer subject to appeal, Garda would promptly pay:

the \$70 million payment pursuant to Paragraph 2(f) hereof shall not be subject to any hold back, offset or reduction notwithstanding any term providing to the contrary in the PSA and such payment shall be made by GardaWorld to the Sellers' Representative by means of wire transfer of United States currency in immediately available funds ***to such bank account(s) as the Sellers' Representative shall designate by notice to GardaWorld.***

(NYSCEF Doc. No. 450, ¶¶ 2[g] [emphasis added]).

By decision and order dated June 3, 2021 (NYSCEF Doc. No. 363), this court granted the plaintiffs' motion to sever their declaratory judgment claim from Garda's counterclaims and directed the plaintiffs to submit judgment on notice. The Judgment was entered by the Clerk of the Court on June 29, 2021 (NYSCEF Doc. No. 386; *Spicer v Gardaworld Consulting (UK) Limited*, 198 AD3d 522 [1<sup>st</sup> Dept 2021]; *cert. denied*, 2022 NY Slip Op 63385; NYSCEF Doc. No. 439; NYSCEF Doc. No. 449, at 9). On March 24, 2022, Mr. Day issued a letter to Garda demanding that payment be made to Bank J. Safra Sarasin AG in Switzerland pursuant to the Stipulation (NYSCEF Doc. No. 451). On April 1, 2022, the Court signed the instant Order to Show Cause, but declined to grant a temporary restraining order pending a determination of the Order.

CPLR § 6210 provides that a court may grant a temporary restraining order for attachment to prohibit the transfer of assets by a garnishee. In order to show entitlement to an attachment, “the

plaintiff must show a viable cause of action and the probability that it will succeed on the merits, that one or more grounds exist for attachment as set for in CPLR 6201, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff” (*VisionChina*, 109 AD3d at 59). The court may grant an order of attachment pursuant to CPLR § 6201(1) where “the defendant is a non-domiciliary residing without the state” and pursuant to CPLR § 6201(3) where “the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff’s favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts.” Where a party seeks attachment pursuant to CPLR § 6201(1), they must “demonstrate an identifiable risk that the defendant will not be able to satisfy the judgment” (*VisionChina*, 109 AD3d at 60). “Whether to grant a motion for an order of attachment rests within the discretion of the court” (*Id.* at 59 citing *Morgenthau v Avion Resources Ltd.*, 11 NY3d 383, 387 [2008]).

Garda’s motion for a temporary restraining order and an order of attachment fails. The Stipulation specifically allows the plaintiffs to designate the bank account in which the funds would be deposited and does not require that the account be within the United States. Garda entered into the Stipulation *after* it asserted its counterclaims against Messrs. Spicer, Day and Bullough and cannot now further obfuscate its obligations because it does not like the terms it negotiated at a time when the prospect of recovering a potential money judgment was clear and imminent.

Garda has also failed to demonstrate irreparable harm or that Messrs. Spicer, Day and Bullough would be unable to satisfy any potential judgment issued against them as a result of the

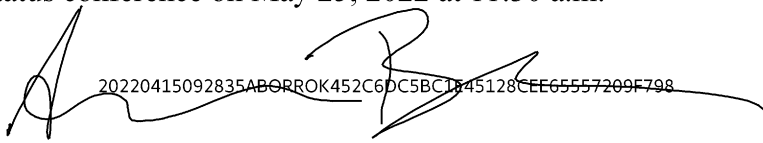
counterclaims. Although Messrs. Spicer, Day and Bullough appear to reside outside of the U.S., Garda makes no allegation that they lack sufficient assets to satisfy any money judgment that may be issued against them as a result of Garda’s counterclaims (*VisionChina*, 109 AD3d at 60).

Finally, Garda has failed to prove a likelihood of success on the merits of its counterclaims for fraud because the plaintiffs’ failure to disclose certain liabilities to Garda prior to the closing of the sale of Hestia B.V. does not clearly establish that Messrs. Spicer, Day and Bullough intended to induce reliance by Garda, or that any such reliance by Garda would have been justified (*Epiphany Community Nursery School v Levey*, 171 AD3d 1, 8 [1<sup>st</sup> Dept 2019]).

Accordingly, it is

ORDERED that Garda’s motion seeking a temporary restraining order and an order of attachment is denied; and it is further

ORDERED that the parties shall appear for a status conference on May 25, 2022 at 11:30 a.m.

  
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4/14/2022  
DATE

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ANDREW BORROK, J.S.C.

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