

**New York Wheel Owner LLC v Mammoet Holding
B.V.**

2023 NY Slip Op 32882(U)

August 15, 2023

Supreme Court, New York County

Docket Number: Index No. 656661/2020

Judge: Margaret A. Chan

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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: COMMERCIAL DIVISION PART 49M

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NEW YORK WHEEL OWNER LLC,

INDEX NO. 656661/2020

Plaintiff,

MOTION DATE 05/05/2023

- v -

MAMMOET HOLDING B.V.,

MOTION SEQ. NO. 007

Defendant.

**DECISION + ORDER ON
MOTION**

-----X
HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 83, 84, 85, 86, 87, 88

were read on this motion to/for

MISCELLANEOUS

Plaintiff New York Wheel Owner LLC (NYW) brings this action against Mammoet Holding B.V. (MBV) arising out of a failed project to construct a giant observation wheel (the Wheel or the Project). Presently before the court is NYW's motion for issuance of a Letter of Request (the proposed LOR) for International Judicial Assistance pursuant to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, T.I.A.S. No. 7444 (NYSCEF # 83). MBV opposes the motion.

Background

The court assumes the parties' familiarity with the factual background of this matter, which was detailed in this court's Decision and Order, dated January 14, 2022 (NYSCEF # 41). In short, this action's genesis arises from a March 5, 2014, design-build agreement (DBA) between Mammoet-Starneth LLC, known as the Design Build Team (DBT), and NYW, the developer of the Project (NYSCEF # 9 ¶¶ 1-3). Pursuant to the DBA, DBT was to design and build the Wheel, which would be located at the Staten Island waterfront (*id.* ¶ 1). Eventually, the Project ran into difficulties, and in 2017 NYW commenced suit in the United States District Court for the Southern District of New York against DBT, its two members, and various companies associated with DBT (*New York Wheel Owner LLC v Mammoet Holding B.V.*, 17-CV-4026 [SD NY 2017]).

On September 1, 2020, after the federal action was dismissed for lack of subject matter jurisdiction, NYW commenced the present action against MBV, who is DBT's parent company, under an alter ego theory of liability, alleging that DBT

did not follow corporate formalities and co-mingled assets with various related entities, that MBV exercised complete control over DBT, and that DBT was deliberately undercapitalized by MBV (NYSCEF # 9 ¶¶ 101-137). NYW further alleges that the DBT deliberately misled NYW as to the risk of cost overruns (*id.* ¶¶ 140-41), submitted false invoices (*id.* ¶¶ 49-63), and siphoned money to its parent entities, including MBV, before declaring bankruptcy (*id.* ¶¶ 97-100). On January 28, 2021, MBV moved to dismiss the complaint (NYSCEF # 6), which the court denied on January 14, 2022 (NYSCEF # 41). Discovery in this matter, as well as in a related action captioned *Mammoet USA North v New York Wheel Owner LLC*, Index No. 656224/2020, is ongoing (*see e.g.* NYSCEF # 113).

Through this present motion, NYW seeks an order from this court issuing the proposed LOR to the Central Authority for The Netherlands, the District Court in the Hague, to execute for the purpose of obtaining the deposition testimony of non-party Gerard Bastiaansen, a resident of the Netherlands (NYSCEF # 87 – the proposed LOR). NYW argues Bastiaansen is a former employee of MBV with extensive knowledge about key facts at issue in the case (NYSCEF # 84 at 2). Specifically, NYW contends that Bastiaansen can provide unique knowledge, unavailable from any other sources, about MBV's actions under the DBA, its attempts to renegotiate the price of the DBA, and its internal discussions and projections about the cost to complete the Wheel (*id.* at 2-3). NYW states that it has contacted Bastiaansen to voluntarily appear for a deposition, but he has indicated that he is unwilling to do so (*id.* at 3).

MBV opposes the motion. Although MBV does not dispute that Bastiaansen may have information that is relevant to this litigation, it nevertheless takes issue with the contents of the proposed LOR, arguing that NYW's motion and proposed order improperly represent disputed facts concerning the issue of alter ego as if they were undisputed (NYSCEF # 88 at 1). MBV asserts, for example, that the language at Page 4 of the proposed LOR incorrectly states that MBV, rather than the DBT, breached the DBA, and that MBV, rather than the DBT, agreed to build the Wheel (*id.* at 2). MBV also takes issue with language at Page 5 of the proposed LOR, which MBV contends incorrectly asserts that Bastiaansen worked for MBV, acted on behalf of MBV in his capacity as Project Director for the Project (rather than the DBT), and had direct involvement in activities relating to the Project (*id.* at 3). MBV notes that, although questions regarding Bastiaansen's corporate affiliation would be appropriate during his deposition, Bastiaansen was "not an employee of MBV, but was employed by Mammoet Global Solutions B.V." (*id.*).

Discussion

The Hague Convention "prescribes certain procedures by which a judicial authority in one contracting state may request evidence located in another contracting state" (*Société Nationale Industrielle Aérospatiale v United States Dist. Court for Southern Dist. of Iowa*, 482 US 522, 524 [1987]). Pursuant to Article 1 of

the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (the Hague Convention), a court of a nation party to the Hague Convention can request that a court of another nation party to the Hague Convention “obtain evidence” or “perform some other judicial act” for “use in judicial proceedings” (23 UST 2555, TIAS No 7444 at Art 1). Article 2, in turn, provides that such a request shall be accomplished by sending a Letter of Request to the receiving nation’s Central Authority that will then “transmit [the request] to the authority competent to execute them” (*id.* at Art 2; *see also IRB-Brasil Resseguros S.A. v Portobello Intern. Ltd.*, 2009 WL 423802, at *1 [Sup Ct, NY County, Feb. 9, 2009] [“A Letter of Request is issued by an American court to a foreign court, requesting that the foreign court take evidence from a specific person or entity within its jurisdiction.”]).

The party seeking to pursue discovery through the Hague Convention “bears the burden of demonstrating that proceeding in that manner is ‘necessary and appropriate’” (*Koblence v Modern Pawn Brokers, Inc.*, 2023 WL 2500639, at *3 [Sup Ct, NY County, Mar. 14, 2023]). But this “burden is not great” (*see id.*), particularly where a nonparty is outside the subpoena power of this court (*see Orlich v Helm Bros., Inc.*, 160 AD2d 135, 143 [1st Dept 1990] [“When discovery is sought from a non-party in a foreign jurisdiction, application of the Hague Convention, which encompasses principles of international comity, is virtually compulsory”]). An application for the issuance of a Letter of Request should be granted “[w]here the sought evidence is relevant, the evidence’s possessors reside outside the United States, are unwilling to volunteer the sought evidence, and not subject to the jurisdiction of the forum court, and other means of procuring the sought evidence are either difficult or unavailable” (*Koblence*, 2023 WL 2500639, at *3, citing *Metso Mins. Inc. v Powerscreen Int’l Distrib. Ltd.*, 2007 WL 1875560, at * [ED NY June 25, 2007, No. CV 06-1446(ADS)(ETB)]).

Here, NYW has demonstrated that issuance of a Letter of Request to the Central Authority for The Netherlands in order to obtain Bastiaansen’s deposition is “necessary and appropriate.” As detailed in NYW’s moving papers, Bastiaansen is a resident of the Netherlands and is not otherwise subject to this court’s jurisdiction (NYSCEF # 84 at 3). And although Bastiaansen has been asked to voluntarily appear for a deposition, he has ultimately indicated his unwillingness to do so (*id.*) NYW further avers, and MBV does not meaningfully dispute, that Bastiaansen has relevant information concerning various issues stemming from this litigation that is unavailable from other sources (*see* NYSCEF # 84 at 2; NYSCEF # 88 at 1). Accordingly, the court agrees that current records support a conclusion that a Letter of Request should be issued to the Central Authority for The Netherlands.

The primary dispute concerning NYW’s motion, however, is not about the propriety of issuing a Letter of Request in this action. Rather, as explained above, it is about the proposed LOR’s framing of certain disputed issues in this litigation. Based on this court’s review of the proposed LOR, the court will, as explained below,

deny NYW's application as to the current form and substance of the proposed LOR, with leave to submit to the court a revised Letter of Request consistent with this order (either by motion or joint stipulation).

The first issue with the proposed LOR concerns NYW's "Summary of complaint" at Page 4 (NYSCEF # 88 at 2). The court agrees with MBV that NYW's summary can be slightly revised to more closely adhere to the allegations set forth in the complaint. Specifically, NYW's summary should at least identify DBT's alleged role in the events articulated in the complaint, as well as MBV's alleged relationship with the DBT (*compare e.g.* NYSCEF # 87 at 4 ["The Complaint alleges that Defendant Mammoet B.V. breached a contract to design and build an observation wheel in New York], *and id.* ["Defendant realized early on that Defendant had vastly underestimated the total cost of completing the Wheel"], *with* NYSCEF # 1 ¶¶ 17-85 [alleging the "DBT's intentional breaches, including how the DBT abused the contractual payment process to manufacture an excuse to walk away from the fixed-price deal"], *and id.* ¶¶ 23, 90 [alleging that "DBT underestimated its own costs" and "DBT anticipated, or reasonably should have anticipated, a risk that it had underestimated the cost of fabricating the Wheel components"])). To be sure, NYW does note, in summarizing MBV's defenses, that MBV disputes its liability on the basis that the DBA was "signed by a separate entity, not by Mammoet B.V." Nevertheless, out of an abundance of caution, NYW should adopt the above-noted revisions to the proposed LOR to alleviate any concerns over the framing of disputed factual issues (*cf. Koblence*, 2023 WL 2500639 at *3-4 [revising Letter of Request to address the parties' dispute over the "appropriate form for the letters"])).

The second issue raised by MBV is the description at Page 5 of the proposed LOR concerning Bastiaansen's relationship to MBV and his role in the Project (NYSCEF # 88 at 3). MBV contends that NYW again presents disputed factual allegations as undisputed facts (*id.*). To address this concern, the court directs NYW to slightly revise the descriptive paragraph contained in the section titled "Questions to be put to the persons to be examined or statement of the subject-matter about which they are to be examined (Article 3, f)" (NYSCEF # 87 at 5). Specifically, NYW should slightly revise this description of Bastiaansen's corporate affiliation to comport with the Complaint's allegation that Bastiaansen was a "Mammoet entity employee[]" (*see* NYSCEF # 1 ¶ 124 ["Mr. Kleijn, and Mammoet BV, dominated the DBT by removing other key personnel responsible for the negotiation of that third amendment to the Agreement . . . and replacing them with *other Mammoet entity employees like Gerard Bastiaansen . . .*"] [emphasis added])).

CONCLUSION

For the forgoing reasons, it is

ORDERED that plaintiff's motion for issuance of a Letter of Request is denied without prejudice and with leave to submit to the court a revised Letter of Request comporting with the directives of this Decision and Order.

08/15/2023

DATE



MARGARET A. CHAN, J.S.C.

CHECK ONE:

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CASE DISPOSED

☐

GRANTED

☒

DENIED

☐

SETTLE ORDER

☐

INCLUDES TRANSFER/REASSIGN

☒

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

OTHER

☐

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: