

AKF Inc. v Polonez Parcel Serv., LLC

2023 NY Slip Op 33055(U)

August 21, 2023

Supreme Court, New York County

Docket Number: Index No. 651385/2023

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 41

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 AKF INC. d/b/a FUNDKITE,

Index No. 651385/2023

Petitioner

- against -

DECISION AND ORDER

POLONEZ PARCEL SERVICE, LLC d/b/a
 INTERNATIONAL PACKAGE SHIPPING, ERNEST
 KUSENER JACQUET, FREEDOM CAPITAL-IPS,
 LLC, DOMA INTERNATIONAL TRAVEL, LLC,
 IPS ULTIMATE HOLDINGS, LLC, DOMA
 EXPORT COMPANY, LLC, and IPS UNIVERSAL
 TRUCKING SERVICES, LLC,

Respondents
 -----x

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

On January 13, 2023, petitioner entered a Revenue Purchase Agreement with respondent merchant Polonez Parcel Service, LLC. Respondents Jacquet, Freedom Capital-IPS, LLC, Doma International Travel, LLC, IPS Ultimate Holdings, LLC, Doma Export Company, LLC, and IPS Universal Trucking Services, LLC, guaranteed the agreement. After Polonez Parcel allegedly defaulted, petitioner served Polonez Parcel with a notice of intent to arbitrate pursuant to the agreement. Petitioner now moves for a preliminary injunction in aid of the arbitration to restrain respondents' bank accounts. C.P.L.R. §§ 6301, 6312(a), 7502(c). Petitioner also seeks to compel disclosure in aid of the

arbitration. C.P.L.R. § 3102(c). The court denies petitioner's motion for the reasons explained below.

II. PROVISIONAL RELIEF UNDER C.P.L.R. § 7502(c)

To obtain a preliminary injunction, petitioner must demonstrate: (1) a likelihood of success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) a balancing of the equities in petitioner's favor. C.P.L.R. § 6301; Uber Tech., Inc. v. American Arbitration Assn., Inc., 204 A.D.3d 506, 508 (1st Dep't 2022); Avenue A Assoc. LP v. Board of Mgrs. of the Hearth House Condominium, 190 A.D.3d 473, 473 (1st Dep't 2021); Wilder v. Fresenius Med. Care Holdings, Inc., 175 A.D.3d 406, 408 (1st Dep't 2019). Petitioner insists that a preliminary injunction is necessary to prevent respondents from dissipating their assets. Jacquet maintains that he and the other guarantors are not liable under the guaranty agreement because Polonez Parcel did not breach the agreement.

Petitioner fails to demonstrate a likelihood of success on the merits because petitioner does not show that Polonez Parcel defaulted under the agreement. According to the agreement:

SELLER is selling a portion of Receipts to BUYER at a discount, not borrowing money from BUYER. There is no interest rate or payment schedule and no time period during which the Purchased Amount must be collected by BUYER. BUYER is taking the risk that Receipts may be remitted more slowly than BUYER may have anticipated or projected because SELLER's business has slowed down, or the full Purchased Amount may never be remitted because SELLER's business filed

a Chapter 7 liquidation or otherwise ceased operations in the ordinary course of business.

V. Pet. Ex. A § 1.2. Jacquet, the managing member of Polonez Parcel, attests that Merion Investment Partners III, a senior lender to Polonez Parcel, commenced a foreclosure proceeding and forced sale of Polonez Parcel's assets pursuant to New York Uniform Commercial Code Article 9. Although Jacquet does not present documentary evidence regarding the foreclosure, petitioner does not dispute that it occurred. Nor does petitioner rebut Jacquet's defense that Polonez Parcel "ceased operations in the ordinary course of business" due to the foreclosure and forced sale. V. Pet. Ex. A § 1.2. Petitioner merely insists that Polonez Parcel's nonpayment constitutes a default despite the agreement's exceptions to a default for nonpayment. Since the agreement expressly acknowledges that the "full Purchased Amount may never be remitted," id., petitioner fails to show it will likely succeed in arbitration. Uber Tech., Inc. v. American Arbitration Assn., Inc., 204 A.D.3d at 508; Avenue A Assoc. LP v. Board of Mgrs. of the Hearth House Condominium, 190 A.D.3d at 473; Wilder v. Fresenius Med. Care Holdings, Inc., 175 A.D.3d at 408.

Moreover, because the underlying arbitration is based on Polonez Parcel's alleged nonpayment, petitioner also fails to demonstrate an irreparable injury, as petitioner's damages are compensable through monetary relief. Atlas MF Mezzanine

Borrower, LLC v. Macquarie Tex. Loan Holder LLC, 174 A.D.3d 150, 156 (1st Dep't 2019); Broadway 500 W. Monroe Mezz II LLC v. Transwestern Mezzanine Realty Partners II, LLC, 80 A.D.3d 483, 484 (1st Dep't 2011). Nor does petitioner demonstrate that respondents will be unable to satisfy a judgment against Polonez Parcel without an injunction. Petitioner simply seeks to ensure that an arbitration award in petitioner's favor would be recoverable, which is not an adequate basis for prejudgment equitable relief. Credit Agricole Indosuez v. Rossiyskiy Kredit Bank, 94 N.Y.2d 541, 548 (2000); Buckley v. McAteer, 210 A.D.3d 1044, 1045 (2d Dep't 2022).

Petitioner relies on Owil PBC v. Landow, 180 A.D.3d 593, 593 (1st Dep't 2020), to show that a preliminary injunction is warranted even though the underlying arbitration is for monetary relief. The respondents there, however, discontinued the petitioner's access to their bank account and actually transferred significant funds to other accounts. Owil PBC v. Landow, 180 A.D.3d at 593. Here, petitioner does not even allege, let alone present admissible evidence, that respondents transferred any funds to avoid a judgment. Therefore the court denies petitioner's motion for a preliminary injunction restraining respondents' bank accounts. C.P.L.R. § 7502(c); Credit Agricole Indosuez v. Rossiyskiy Kredit Bank, 94 N.Y.2d at 548; Buckley v. McAteer, 210 A.D.3d at 1045.

Notably, C.P.L.R. § 7502(c) also allows a party to seek an order of attachment in aid of an arbitration, regardless whether the arbitration is for monetary damages, but neither the verified petition nor petitioner's motion seeks an attachment as alternative relief. Even if petitioner's motion may be construed as a motion for an attachment, the verified petition does not specify the location of any bank accounts of respondents, none of which resides, was formed, or maintains its principal place of business in New York, suggesting that their bank accounts are not within this court's jurisdiction. JSC VTB Bank v. Mavlyanov, 154 A.D.3d 560, 561 (1st Dep't 2017); National Union Fire Ins. Co. of Pittsburgh, Pa. v. Advanced Empl. Concepts, Inc., 269 A.D.2d 101, 101 (1st Dep't 2000). Nor does petitioner present admissible evidence that an arbitration award would be rendered ineffective absent an attachment. C.P.L.R. § 7502(c); Mermaid Mar., Ltd. v. Maritime Capital Mgt. Partners, Ltd., 147 A.D.3d 498, 499 (1st Dep't 2017); Sullivan & Worcester LLP v. Takieddine, 73 A.D.3d 442, 442 (1st Dep't 2010). See Owil PBC v. Landow, 180 A.D.3d at 593. Therefore the court also denies petitioner's motion to the extent it seeks an attachment of respondents' bank accounts. C.P.L.R. § 7502(c).

III. PRE-ARBITRATION DISCLOSURE

Last, petitioner asks to compel disclosure in aid of the arbitration, C.P.L.R. § 3102(c), but the order to show cause

petitioner presented bringing its motion does not specify this relief. Ramirez v. Selective Advisors Group, LLC, 202 A.D.3d 608, 608-609 (1st Dep't 2022); Sedina V.L. v. Markis R.C., 198 A.D.3d 599, 599-600 (1st Dep't 2021); Ran v. Weiner, 170 A.D.3d 425, 426 (1st Dep't 2019); Henderson-Jones v. City of New York, 120 A.D.3d 1123, 1124 (1st Dep't 2014). Even were the court to consider petitioner's request, petitioner does not show that respondents are hiding assets. Petitioner's mere speculation does not provide a basis for pre-arbitration disclosure. C.P.L.R. § 3102(c); Mermaid Mar., Ltd. v. Maritime Capital Mgt. Partners, Ltd., 147 A.D.3d at 499; JPMorgan Chase Bank v. Reibestein, 34 A.D.3d 308, 309 (1st Dep't 2006). In the event that petitioner receives a favorable arbitration award, petitioner may conduct post-judgment disclosure pursuant to C.P.L.R. § 5223.

IV. CONCLUSION

For the foregoing reasons, the court denies petitioner's motion for a preliminary injunction and its request for disclosure in aid of arbitration. C.P.L.R. §§ 3102(c), 6301, 6312(a), 7502(c). This decision constitutes the court's order.

DATED: August 21, 2023



LUCY BILLINGS, J.S.C.

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