

Strabag, SPA v Alto Maipo SPA

2023 NY Slip Op 34302(U)

December 8, 2023

Supreme Court, New York County

Docket Number: Index No. 655653/2023

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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STRABAG, SPA,		INDEX NO. <u>655653/2023</u>
Plaintiff,		MOTION DATE _____
- v -		MOTION SEQ. NO. <u>001</u>
ALTO MAIPO SPA and ITAU CORPBANCA,		
Defendants.		DECISION + ORDER ON MOTION

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

Upon the foregoing documents, it is

Petitioner Strabag, SPA (Strabag) moves, pursuant to CPLR 7502, (1) for an order granting “an attachment against any and all funds withdrawn from the Letter of Credit issued by non-party Crédit Agricole CIB (LC 813738025 / KDEAM02999)” (Letter of Credit) and (2) “enjoining and restraining respondents Alto Maipo and Itaú and their respective agents, servants, employees and all others acting in concert with or on their behalf and all others having notice of this application, from: (a) depositing the funds withdrawn against the Letter of Credit from non-party Crédit Agricole CIB into any account other than the Insurance Proceeds and Compensation Account; and (b) disbursing, transferring, liquidating, encumbering, depleting, or otherwise causing the disbursement, transfer, liquidation, encumbrance, or depletion of, the funds drawn against the Letter of Credit during the pendency of the underlying arbitration between

Strabag and Alto Maipo and Strabag's appeal of the First Department Appellate Division's order dated November 9, 2023 [Case No. 2023-02383] before the New York Court of Appeals."¹ (NYSCEF 2, Proposed OSC [mot. seq. no. 001].)

The court's prior decision in the initial action (650865/2023) provides a detailed account of the dispute, which will be supplemented as necessary for this motion.² (NYSCEF 13, April 8, 2023 Decision in Index No. 650865/2023.)

On February 17, 2023, this court issued a TRO restraining Credit Agricole from honoring Alto Maipo's draw on the Letter of Credit. On April 8, 2023, this court issued a preliminary injunction, under Section 15.3.4 of the Amended & Restated Contract, which provides that Alto Maipo may only draw on the Letter of Credit "(a) to pay any Late Critical Milestone Payments owed and unpaid by Contractor or (b) in case of any Contractor Event of Default in an aggregate amount not to exceed the amount that Owner reasonably believes would be payable to it in respect of all of its remedies hereunder," restraining Alto Maipo's draw on the letter of credit. (*Id.* at 7-8.) This court concluded "that Strabag successfully demonstrated a likelihood of success on the merits with respect to its 'fraud in the transaction' claim" . . . because "[w]hen a contract provision is crystal clear, as Amendment 2 is here, but a party effectively denies that provision's applicability based on something that has yet to happen, this basic contract dispute becomes fraud." (*Id.* at 18-19.)

¹ The requested relief in paragraph 2(b) would be redundant if the attachment were granted. Plaintiff seeks both, not alternatively.

² The court presumes familiarity with the case and adopts all capitalized terms as used in the court's prior decision.

On November 9, 2023, the Appellate Division, First Department vacated the preliminary injunction. (NYSCEF 15, *Strabag, Spa v Credit Agricole CIB*, 2023 NY Slip Op 05671 [1st Dept Nov. 9, 2023].)

On November 13, 2023, Credit Agricole processed Alto Maipo's withdrawal request and transferred \$90 million to Alto Maipo.³ (NYSCEF 83, Hageman⁴ aff ¶7.) The funds were deposited at Itau' Corpbanca in the Project's Disbursement account (*id.*), not its insurance proceeds and compensation account as Strabag insists.

On November 14, 2023, the Court of Appeals issued an interim stay of the Appellate Division's decision, effectively re-instituting this court's preliminary injunction. (NYSCEF 15, Court of Appeals Order.)

The Arbitrations

On February 15, 2023, Alto Maipo filed a Request for Arbitration with the ICC alleging breach of contract for Strabag's failures to perform in accordance with the contracts (ICC Case No. 27592/PDP). (NYSCEF 16, Alto Maipo's Answer and Counterclaim ¶29 [ICC Arbitration].)

Strabag filed a Request for Arbitration on March 1, 2023, which is not before the court. Rather, all the court knows about this request is that the relief requested is stated in paragraphs 125 and 126 of Strabag's Request. (NYSCEF 16, Strabag's Reply to Alto Maipo's Answer and Counterclaim ¶72[i].) Alto Maipo counterclaimed for breach of contract, and specifically, failure to achieve substantial completion. (NYSCEF 16, Alto

³ As of November 21, 2023, no funds had been dispersed. (NYSCEF 83, Hageman aff ¶13.)

⁴ James David Hageman is Head of Itau' Agency. (*Id.* ¶1.)

Maipo's Answer and Counterclaim ¶¶96-97.)⁵ Accordingly, it is impossible for the court to assess likelihood of success on the merits of Strabag's claims in arbitration.⁶

Not a Collateral Attack

The court rejects Alto Maipo's contention that the provisional relief sought here is improper or barred by collateral estoppel or res judicata. This is a different case, at a different time, with a different procedural posture. The 650865/2023 action was marked disposed because the requested relief was resolved and there was nothing left to the case –the merits would be decided in arbitration. While the Appellate Division vacated the preliminary injunction, the Court of Appeals reinstated it. Under these circumstances, it is appropriate for Strabag to seek to maintain the status quo until the Court of Appeals resolves the appeal. The requested relief is consistent with the Court of Appeals' order, and without such relief, the issue could be moot if the funds are dissipated before the Court of Appeals has time to consider the matter. Alto Maipo's objection completely ignores the Court of Appeals.

⁵ Oddly, the only information concerning the ICC arbitration in the file is from Alto Maipo's Answer and Counterclaim and Strabag's Reply to Alto Maipo's Answer and Counterclaim. (See NYSCEF 16.) Because Strabag insisted on proceeding ex parte, the court expedited briefing to turn the OSC around in 5 days, leaving Strabag with no opportunity to reply.

⁶ Since the filing of the 650865/2023 action, much has changed. When Strabag initiated the 650865/2023 action, Alto Maipo had filed its arbitration the day before. Strabag had yet to file its arbitration request. There were two issues before the court: (1) who breached the construction contract first, Strabag by failing to timely achieve substantial completion or Alto Maipo for failing to acknowledge Strabag's substantial completion (with Alto Maipo's arbitration request, this issue would be determined in arbitration), and (2) whether Alto Maipo improperly drew on the letter of credit which Strabag would presumably bring to arbitration as another breach of contract. Currently, there is no evidence before the court as to what Strabag's claims are in arbitration.

Attachment

In aid of arbitration, Strabag seeks to attach the \$90 million that Alto Maipo drew down on the letter of credit. Strabag fears that Alto Maipo will disperse the funds rendering the arbitration ineffectual or moot. There is no evidence before the court that Alto Maipo will use the funds for anything other than the Project. The Offshore Accounts Agreement governs withdrawals and provides: “no amount . . . shall be paid or released to or for the account of, or withdrawn by or for the account of, the Borrower or any other Person from any Offshore Collateral Account except at the direction of the Offshore Collateral Agent.” (NYSCEF 17, Offshore Accounts Agreement §3.02[iii].) “Any funds drawn by Alto Maipo under the Letter of Credit as permitted under the parties’ Contract are required under the applicable financing agreements to be – and have been – deposited into a specific, controlled account exclusively for Project costs. This account is called the ‘Disbursement Account.’ Funds in that account cannot be distributed to pay debt or dividends, or for any purpose other than Project costs, until the Project comes back into operation and Strabag achieves Substantial Completion.” (NYSCEF 58, Corredor⁷ aff ¶135.) While threat of rendering an arbitration award ineffectual may give Strabag standing to seek interim relief here, it is not sufficient. Rather, “the criteria for provisional relief set forth in CPLR articles 62 and 63 are not relaxed when such relief is sought in aid of arbitration pursuant to CPLR 7502 (c).” (*Erber v Catalyst Trading, LLC.*, 303 AD2d 165 [1st Dept 2003] [citations omitted].) Strabag fails to otherwise address these requirements.

⁷ Norberto Corredor is General Manager of Alto Maipo. (NYSCEF 58, Corredor aff ¶1.)
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Motion No. 001

Preliminary injunction

For injunctive relief under CPLR 6301, the movant must establish likelihood of success on the merits of the action; the danger of irreparable harm in the absence of a preliminary injunction; and a balance of equities in favor of the moving party. (*Gliklad v Cherney*, 97 AD3d 401, 402 [1st Dept 2012] [citations omitted].) “A preliminary injunction should not be granted unless the right thereto is plain from the undisputed facts and there is a clear showing of necessity and justification.” (*O’Hara v Corporate Audit Co.*, 161 AD2d 309, 310 [1st Dept 1990] [citations omitted].) The court is compelled to deny Strabag’s request because it cannot establish likelihood of success.

Strabag’s request for a preliminary injunction is denied because resolution of this issue turns on whether Strabag breached the contract by failing to achieve substantial completion -- an issue before the ICC arbitrator. Alto Maipo relies on Section 4.01 of the Offshore Accounts Agreement which provides that: “Borrower shall cause the following amounts to be paid into the Disbursement Account to the extent received by the Borrower prior to the Project Completion Date: . . . (iv) all Delay Liquidated Damages received by the Borrower” (NYSCEF 17, Offshore Accounts Agreement at 30.) “Delay Liquidated Damages” is defined in the Offshore Accounts Agreement to mean “any liquidated damages that are required to be paid by a Construction Contractor or any other Project Party for or on account of any delay.” (*Id.*, §1.01 [b]). Meanwhile, Strabag relies on Article XII. First, §12.01 provides:

“[t]he Borrower [Alto Maipo] shall cause all . . . and (iii) any draw on a letter of credit issued by Strabag under the Strabag Tunneling Contract, in each case to be paid or transferred directly into the Insurance Proceeds and Compensations Account.”

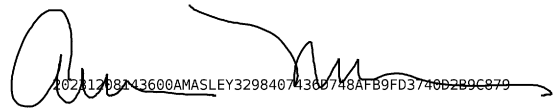
(*Id.* at 45.) Section 12.02(c) provides:

“In the event that any draw on a letter of credit issued by Strabag under the Strabag Tunneling Contract is held to be wrongful by a final and binding decision rendered in accordance with Section 18.1 of the Strabag Tunneling Contract, amounts remaining in the Insurance Proceeds and Compensation Account up to the amount of such draw shall be promptly returned to Strabag, without prejudice to any other rights or remedies of Strabag under the Strabag Tunneling Contract.”

(*Id.* at 50.)

Whether the draw on the Letter of Credit constitutes delay damages, as Alto Maipo asserts, is an issue to be resolved by the arbitrator. Where facts are in sharp dispute, a preliminary injunction should not be granted. (*O’Neill v Poitras*, 158 AD2d 928, 928-929 [4th Dept 1990].) Rather, unlike the prior action, this is a contract dispute, not fraud.

Accordingly, Strabag’s motion is denied.



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12/8/2023
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

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<input type="checkbox"/>	GRANTED		

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
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<input type="checkbox"/>	SUBMIT ORDER
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CHECK IF APPROPRIATE:

<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN
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<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
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