

Strabag SPA v Credit Agricole CIB

2025 NY Slip Op 30811(U)

March 10, 2025

Supreme Court, New York County

Docket Number: Index No. 650865/2023

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,

Plaintiff,

- v -

CREDIT AGRICOLE CIB and ALTO MAIPO SPA,

Defendants.

INDEX NO. 650865/2023

MOTION DATE --

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156

were read on this motion to/for ATTORNEY - FEES.

Defendant Alto Maipo SPA (AMSPA) moves pursuant to CPLR 6315 to ascertain the amount of damages it sustained because of the temporary restraining order issued on February 17, 2023, and the preliminary injunction issued on April 8, 2023, each of which enjoined AMSPA from drawing funds from Credit Agricole CIB’s standby letter of credit (no. KDEAM02999). AMSPA seeks \$1,697,888.30, including \$714,008.31 in legal fees and costs, applying a 10% discount and interest.

Plaintiff Strabag, SPA (Strabag) and non-party U.S. Specialty Insurance Company, cross-move to discharge the undertaking (Bond No. 1001199615).

This is an action in support of an International Chamber of Commerce (ICC) arbitration involving the construction of a water system in the Andes to provide water for Santiago, Chile. (NYSCEF Doc. No. [NYSCEF] 1, Summons and Complaint ¶¶7, 64, 71; *id.* at 1 [venue is based on place of arbitration].) The background is set forth in this court’s decision, granting a preliminary injunction maintaining the status quo by

enjoining AMSPA from drawing on the letter of credit, and will not be repeated here. (NYSCEF 130, April 8, 2023 Decision and Order at 1-2 [mot. seq. no. 001].) AMSPA appealed on May 11, 2023, and perfected for the September term. (NYSCEF 135, Notice of Appeal.) On November 9, 2023, the Appellate Division reversed finding that this “court abused its discretion in finding that plaintiff had a likelihood of success to establish the material fraud exception here.” (NYSCEF 137, November 9, 2023, Remittitur at 3.) On November 10, 2023, Strabag filed (i) a motion for leave to appeal to the Court of Appeals, and (ii) an emergency application to stay the Appellate Division’s vacatur of the preliminary injunction. (NYSCEF 140, Adam S. Lurie¹ aff ¶10.) On November 14, 2023, the Court of Appeals granted Strabag’s application for an emergency stay pending the Court’s consideration of Strabag’s motion for leave to appeal, and reinstated the preliminary injunction. (Index No. 655653/2023, NYSCEF 15, Order.) However, AMSPA prevented the Court of Appeals from reviewing the case when it withdrew the balance of the letter of credit on November 13, 2023, one day before the Court of Appeals issued the stay. (NYSCEF 140, Lurie aff ¶11 [Credit Agricole transferred \$89 million to AMSPA on November 13, 2023]; NYSCEF 138, Court of Appeals December 14, 2023 Dismissal; Index No. 655653/2023, NYSCEF 72, AMSPA Opp Brief at 20/33.) The Court of Appeals denied Strabag’s motion for leave to appeal, concluding that the application was rendered moot by AMSPA’s withdrawal. (See *Strabag, SpA v Crédit Agricole CIB*, 40 NY3d 1060 [2023].)

CPLR 6312(b) provides:

“prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally

¹ Lurie is attorney to AMSPA. (NYSCEF 140, Lurie aff ¶1.)
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determined that he or she was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction.” (CPLR 6312[b] [emphasis added].)

AMSPA’s motion is denied as premature as it must await a final determination by the ICC. (See *Straisa Realty Corp. v Woodbury Assoc.*, 185 AD2d 96, 100 [2d Dept 1993]; see also *Bonded Concrete, Inc. v Town of Saugerties*, 42 AD3d 852, 855-56 [3d Dept 2007]; *Essa Realty Corp. v J. Thomas Realty Corp.*, 31 Misc 3d 1235[A], 2011 NY Slip Op 51006[U] *8 [Sup Ct, NY County 2011].) The court rejects AMSPA’s contention that whether *Strabag* was entitled to the preliminary injunction was finally determined when the preliminary injunction was vacated. (See *Straisa Realty Corp.*, 185 AD2d at 99-100 [“Our prior order vacating the preliminary injunction did not determine, as a matter of law, that Straisa could not prevail on its claims for equitable relief; we determined only that at that juncture, Straisa had not made the requisite showing of probabilities. Straisa may yet prevail on its equitable claims, in which case the preliminary injunction it obtained would not, in hindsight, have been improvidently granted, notwithstanding our assessment of the deficiencies of Straisa’s showing at that time. Accordingly, for purposes of finally determining the propriety of a preliminary injunction to ascertain whether liability will attach as a consequence of the award thereof, the ‘final determination’ envisioned by CPLR 6312 (b) is the final determination of the merits of the plaintiff’s claim for equitable relief”].) *Strabag* very clearly brought this case in aid of the ICC arbitration to preserve the status quo until the ICC rendered a final determination. None of AMSPA’s cases involve arbitration or are similarly situated. (See e.g. *Gold Coast Enterprises Ltd. v Four Seasons Mktg. Corp.*, 19 Misc 3d 1112[A], 2008 NY Slip Op 50651[U] [Sup Ct, Nassau County 2008] [CPLR 6312(b) damages and

undertaking addressed after arbitration award].) AMSPA’s reliance on *Margolies v Encounter, Inc.*, 42 NY2d 475 (1977), for the proposition that the Appellate Division’s decision to vacate the preliminary injunction is the final determination is misplaced since the Court of Appeals limited *Margolies* to the “particular facts” therein. (*J.A. Preston Corp. v Fabrication Enterprises, Inc.*, 68 NY2d 397, 407 [1986].) Moreover, the Court of Appeals stayed the Appellate Division’s decision, albeit after AMSPA withdrew the balance of the letter of credit, thus mootng the appeal. Rather,

“[a] preliminary injunction, even when issued after an evidentiary hearing, depends upon probabilities, any or all of which may be disproven when the action is tried on the merits, and the affirmance of an order granting a preliminary injunction determines no more than that the discretion exercised in favor of granting the order was not based upon a demonstration of those probabilities so insufficient as to constitute an abuse of discretion.” (*Id.* at 406.)

Accordingly, Strabag’s cross-motion to discharge the undertaking must also be denied. (See *Straisa Realty Corp.*, 185 AD2d at 100; *J.A. Preston Corp.*, 68 NY2d at 405; *Schenectady Chems., Inc. v Flacke*, 113 AD2d 168, 171 [3d Dept 1985].)

Accordingly, it is

ORDERED that the motion is denied without prejudice; and it is further

ORDERED that the cross-motion is denied without prejudice.

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3/10/2025

DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: