UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

ARNOLD CHASE FAMILY, LLC; CHASE ENTERPRISES HOLDINGS, LLC; CHERYL CHASE FAMILY, LLC; DTC FAMILY INVESTMENTS, LLC; THE CHERYL ANNE CHASE GRANTOR TRUST, AND THE DARLAND TRUST	:	CIVIL ACTION NO. 3:08-cv-00581 (MRK)
Plaintiffs,	:	
V.	:	
UBS AG; UBS SECURITIES, LLC; AND UBS FINANCIAL SERVICES, INC.	:	JUNE 17, 2008
Defendants.		

MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS

The plaintiffs in the above-entitled matter hereby oppose the Motion to Dismiss dated June 10, 2008, that has been filed on behalf of defendants UBS Securities, LLC and UBS Financial Services, Inc. (hereinafter referred to collectively as the "defendants").

Presently, the parties are engaged in arbitration proceedings before the Financial Industry Regulatory Authority ("FINRA"), which matter is ultimately expected to be heard in Hartford, Connecticut pursuant to FINRA Rule 12213. This action concerns an application for attachment in aid of arbitration. The defendants contend that the Court cannot grant such relief under the circumstances of this case. However, for the reasons that follow, the defendants' arguments should be rejected.

ARGUMENT

A. This Proceeding Is Not Barred By FINRA Rule 12209

The first argument presented by the defendants in support of their motion to dismiss is the claim that the parties' arbitration agreement, and more particularly the FINRA rules allegedly incorporated therein, must be interpreted to bar either party from resorting to the courts for any and all relief that pertains to a pending arbitration, *even a judicial proceeding like the present one that is for the limited purpose of protecting the integrity of the very arbitration process established by that agreement.* However, such an attempt by the defendants to stretch the words on which they rely past their breaking point should be rejected for the following reasons.

Essentially, the defendants' argument is that the parties have agreed that any and all resort to the courts that in any way "concerns" the pending arbitration is barred by FINRA Rule 12209, which is deemed to be part of the parties' arbitration agreement. FINRA Rule 12209 provides that "[d]uring an arbitration, no party may bring any suit, legal action, or proceeding against any other party that concerns or that would resolve any of the matters raised in the arbitration." (Emphasis added.) The defendants cite no case that reads that provision so broadly as to prevent judicial action intended to protect a party's right to a fair and meaningful arbitration. To the contrary, Rule 12209 on which the

defendants rely merely restates a generally recognized and basic tenet of arbitration law, namely, that where the parties have agreed to submit their disputes to arbitration, the courts will not interfere with such an agreement. However, that widely recognized policy has not barred limited judicial relief of the kind at issue here.

It cannot be disputed that "[a]rbitration is essentially contractual and its basic tenet is that of avoiding courts and resolving the dispute at issue." 4 Am.Jur.2d Alternative Dispute Resolution § 2, pp. 68-69 (2007). Consequently, in light of the "strong federal policy" favoring arbitration; see Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 233, 107 S.Ct. 2332, 2341, 96 L.Ed2d 185 (1987); Scherk v. Alberto-Culver Co., 417 U.S. 506, 510-11, 94 S.Ct. 2449, 2452-53, 41 L.Ed.2d 270 (1974); it is generally the case that arbitrable disputes will be speedily removed from the courts. See Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218, 105 S.Ct. 1238, 1241, 84 L.Ed.2d 158 (1985); Moses H. Cone Memorial Hosp. v. Mercury Construction Corp., 460 U.S. 1, 22, 103 S.Ct. 927, 940, 74 L.Ed.2d 765 (1983); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404, 87 S.Ct. 1801, 1806, 18 L.Ed.2d 1270 (1967).

However, notwithstanding that the courts have repeatedly relied on that well established doctrine to bar judicial involvement in a dispute that the parties have agreed to submit to arbitration, our courts have also recognized that parties to an ongoing arbitration

proceeding may go to court to seek judicial orders, such as injunctive relief or prejudgment attachment, that is intended to protect the integrity of the process of arbitration. See generally Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, 910 F.2d 1049, 1052-53 (2d Cir. 1990) (collecting cases); see also Bahrain Telecommunications Co. v. Discoverytel, Inc., 476 F.Supp.2d 176, 180 (D. Conn. 2007) ("the short answer to the Defendants is that the Second Circuit has held that federal courts have both the jurisdiction and authority to grant injunctions and provisional remedies in the context of pending arbitrations"). Those cases endorse the view that "the pro-arbitration policies reflected in the foregoing Supreme Court decisions are furthered, not weakened, by a rule permitting a district court to preserve the meaningfulness of the arbitration through a preliminary injunction. Arbitration can become a 'hollow formality' if parties are able to alter irreversibly the status quo before the arbitrators are able to render a decision in the dispute. . . . A district court must ensure that the parties get what they bargained for – a meaningful arbitration of the dispute. . . . The issuance of an injunction to preserve the status quo pending arbitration fulfills the court's obligation under the [Federal Arbitration Act] to enforce a valid agreement to arbitrate." Blumenthal, 910 F.2d at 1053-54 (citations omitted); see also Bahrain Telecommunications, 476 F.Supp.2d at 181 (discussing Judge Learned Hand's decision in Murray Oil Products Co. v. Mitsui & Co., 146 F.2d 381, 384

(2d Cir. 1944), where the court permitted a district court to continue a prejudgment attachment pending completion of arbitration, noting that the desire for prompt decisions in arbitration reflected in federal law and policy is nonetheless "entirely consistent with a desire to make as effective as possible recovery upon awards, after they have been made, which is what provisional remedies do").

In the instant case, the plaintiffs seek an attachment of the defendants' assets in an amount sufficient to satisfy any award that the arbitrators might eventually render. Such an attachment pending arbitration is expressly authorized under the law of Connecticut[1], and even the law of New York.[2] Consistent with the cases cited above, the courts have recognized that, rather than being barred by the fact that a dispute has been submitted to arbitration, judicial relief by way of an attachment pending the conclusion of the arbitration proceeding is available under Conn. Gen. Stat. § 52-422 in order to preserve the

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[1] Section 52-422 of the Connecticut General Statutes provides, in pertinent part: "At any time before an award is rendered pursuant to an arbitration under this chapter, the [court] . . . upon application of any party to the arbitration, may make forthwith such order or decree . . . as may be necessary to protect the rights of the parties pending the rendering of the award and to secure the satisfaction thereof when rendered and confirmed."

[2] Section 7502(c) of the New York Civil Practice Law and Rules (CPLR) provides, in pertinent part, a court "may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration that is pending or that is to be commenced inside or outside this state . . . upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief."

meaningfulness and integrity of the very arbitration to which the parties have agreed.

In the case of Insurity, Inc. v. Mutual Group Ltd., 260 F.Supp.2d 486 (D. Conn. 2003), the court concluded that an order of attachment under § 52-422 does not impair or in any way affect the arbitration of a dispute because "[i]ts focus is not upon litigation in the courts, but on arbitration. It provides an incentive to arbitrate by allowing a party to a pending arbitration to apply to the court for a discrete type of judicial relief: relief that is necessary to protect the rights of the parties pending the [arbitration] award and satisfaction thereof. . . . Conn. Gen. Stat. § 52-422 . . . is designed to vest the court with broad power to provide parties in arbitration some protection against the dissipation of assets while the proceedings are pending." Id. at 489.

Similarly, in Bahrain Telecommunications, this Court observed that "[l]ike a preliminary injunction, a prejudgment remedy also is designed to maintain the *status quo* – namely, the parties' financial *status quo* pending issuance of final judgment. . . . A prejudgment remedy does not interfere with the arbitral process but merely ensures that there will be assets available to satisfy any judgment the arbitrators themselves may render. Moreover, consideration of a motion for a prejudgment remedy normally will require a court to delve less deeply into the merits of the parties' disputes (and thus intrude less deeply into the domain of the arbitrators) than a motion for a preliminary injunction,

since the standard for granting a prejudgment remedy – at least in Connecticut – is only probable cause and does not require a showing of likelihood of success on the merits and irreparable harm." Bahrain Telecommunications, 476 F.Supp.2d at 182.

Finally, in Metal Management, Inc. v. Schiavone, 514 F.Supp.2d 227 (D. Conn. 2007), Judge Bryant recognized that "[t]he rights protected by § [52-]422 are those available to parties to an arbitral proceeding, namely fair adjudication of a dispute, redress of injuries found to have been suffered and satisfaction of awards rendered in the party's favor." Id. at 233. Moreover, in the Metal Management case, Judge Bryant also recognized that a prejudgment attachment of a defendant's assets is, generally speaking, "necessary to protect the rights of the parties" to the arbitration within the meaning of § 52-422 because "[s]uch a protection of the plaintiffs' rights is necessary as defined by *New England Pipe* [*Corp. v. Northeast Corridor Foundation*, 271 Conn. 329, 857 A.2d 348 (2004)] in that their ability to collect on a potential award may very well be 'lost irretrievably' and would certainly be jeopardized absent a prejudgment remedy. Metal Management,

514 F.Supp.2d at 235.[3]

Based on the foregoing cases, then, it can be seen that the authority of this Court to issue an attachment to protect the plaintiffs' ability to collect on a potential arbitration award against the defendants is not inconsistent with long-standing judicial policy that bars interference with the arbitration process. Since, as noted above, "[a]rbitration can become a 'hollow formality' if parties are able to alter irreversibly the status quo before the arbitrators are able to render a decision in the dispute," and since "[a] district court must

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[3] The Metal Management court further articulated the importance and necessity of granting prejudgment attachment under § 52-422 with respect to a pending arbitration where the plaintiff has demonstrated the requisite probable cause, as follows:

> A strong argument can be made that a prejudgment remedy may indeed be necessary. In the ordinary course of business, as an ongoing concern companies routinely incur actual and contingent liabilities that can impair or otherwise affect its creditors ability to recover a debt owed. A prejudgment remedy simply enables a creditor to get in line at the time its contingent claim arises. If its claim never ripens the lien is of no practical effect; however, if the claim ripens, the priority of that creditor's right of recovery is preserved.
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> * * *
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> Should [the plaintiffs] be forced to wait for a final arbitral award and possible subsequent enforcement action before asserting their claim, any creditors getting in the collection line before the plaintiffs would have priority over their claims. In that event, the plaintiffs' right to collect could likewise be lost irretrievably.

Metal Management, 514 F.Supp.2d at 235-36.

ensure that the parties get what they bargained for – a meaningful arbitration of the dispute"; Blumenthal, 910 F.2d at 1053; and since attachment of a defendant's assets pending the outcome of an arbitration proceeding is necessary to protect a plaintiff's arbitration rights; Metal Management, 514 F.Supp.2d at 235-36; the defendants' argument that FINRA Rule 12209 bars the plaintiffs from seeking such relief must fail. Under the defendants' view, the parties have somehow agreed that, while their arbitration is pending, they cannot seek judicial intervention to ensure that the arbitration that they bargained for is not rendered meaningless or otherwise becomes a "hollow formality" in the absence of the granting of limited provisional remedies recognized by law. Yet, that interpretation of the contract (and the FINRA rules referenced therein) must be rejected because it requires the Court to conclude that the parties' arbitration agreement (and the arbitration rules alleged to be incorporated therein) should be interpreted in a way that will undermine the effectiveness of the very legal right (arbitration) that the agreement is intended to promote. No rule of law supports the view that a contract should be interpreted to undermine its effectiveness and to frustrate its purpose.[4]

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[4] It should be noted that the plaintiffs' position here serves to protect the integrity of the arbitration process for all parties, regardless of whether it is the plaintiffs or the defendants who seek to invoke the authority of the Court to grant provisional relief that is necessary to do so. See, e.g., New England Pipe Corp. v. Northeast Corridor Foundation, 271 Conn. 329, 337 (2004) (recognizing that § 52-422 will permit, *inter alia*,

Accordingly, the Court should reject the defendants' claim that the parties' agreement has somehow deprived the Court of the authority to grant provisional remedies, such as those authorized by Conn. Gen. Stat. § 52-422 or CPLR § 7502(c), which limited judicial remedies are merely intended to protect the integrity of the arbitration process and to ensure that the arbitration process is meaningful.

II. The Choice of Law Provision Does Not Bar the Plaintiffs' Claim for Relief

Next, the defendants claim that New York law controls, barring the plaintiffs from seeking the relief of attachment in aid of a pending arbitration. However, a New York choice-of-law provision in the parties' contract will not bar the plaintiffs from availing themselves of a well established procedural device that is not only authorized under Connecticut law, but under New York law as well.

As the defendants acknowledge (on page 9 of their Brief), if the remedy of attachment under Conn. Gen. Stat. § 52-422 is procedural, then the New York choice-of-law provision is not implicated, and this Court is authorized to consider the plaintiffs' claim under § 52-422. However, the defendant's claim that § 52-422 is substantive, and not procedural, cannot withstand any reasoned analysis.

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any party to a pending arbitration "to obtain interlocutory judicial review of an unfavorable ruling by an arbitration panel [if such arbitration ruling] would seriously undermine the essential purpose of arbitration").

First, the defendants' argument is based on a faulty premise, namely, that the plaintiffs are seeking to invoke Connecticut's prejudgment remedy statute, Conn. Gen. Stat. § 52-278a et seq. That is not the case. Instead, the remedy of attachment which the plaintiffs seek is authorized under a different Connecticut statute, Conn. Gen. Stat. § 52-422, which recognizes that provisional remedies like injunctions and attachments can be granted by a court to maintain the status quo and protect the integrity of the arbitration process to settle disputes under contract. In Insurity, Inc. v. Mutual Group, Ltd, supra, Magistrate Judge Smith explained that the two statutory schemes are separate and distinct, and that the statutes governing prejudgment remedies (§ 52-278a et seq.) are not the subject of a claim for judicial relief in aid of arbitration under § 52-422:

> [T]he plaintiff is not proceeding before this court under Conn. Gen. Stat. § 52-278a *et seq*. Rather, the court is proceeding here under Conn. Gen. Stat. § 52-422, an entirely different statute which applies when there is a pending arbitration, and a party to that arbitration comes before the court asking for relief that is allegedly necessary to protect that party's rights. This distinction is not a minor one.
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> Conn. Gen. Stat. § 52-278a deals with prejudgment remedies in civil actions. Most of these actions are resolved by litigation in the courts. This is where judgments are entered and where it makes sense to speak of pre-judgment remedies, and to use other nomenclature associated with litigation in the courts. . . .
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> Conn. Gen. Stat. § 52-422, on the other hand, envisions completely different circumstances. Its focus is not upon litigation in the courts, but on arbitration. It provides an incentive to arbitrate by allowing a party to a

> pending arbitration to apply to the court for a discrete type of judicial relief: relief that is necessary to protect the rights of the parties pending the award and satisfaction thereof. Conn. Gen. Stat. § 52-422 neither mentions prejudgment remedies nor refers to Conn. Gen. Stat. § 52-278a *et seq.* It is also silent with respect to orders for disclosure of assets and probable cause determinations . . . . Conn. Gen. Stat. § 52-422 is distinct from Conn. Gen. Stat. § 52-278, and is designed to vest the court with broad power to provide parties in arbitration some protection against the dissipation of assets while the proceedings are pending. . . .
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> * * *
>
> [T]he language of Conn. Gen. Stat. § 52-422 vests the court with broad power and discretion, and envisions proceedings separate and distinct from those under Conn. Gen. Stat. § 52-278a *et seq.*, though some coincidental similarity in nomenclature is inevitable.

Insurity, Inc., 260 F.Supp.2d at 489, 491.[5] Therefore, the case law cited by the defendants suggesting that an application for a prejudgment remedy is "substantive" in nature is wholly inapposite.

Second, contrary to the misplaced argument of the defendants, the type of relief pending arbitration that is authorized under § 52-422 – including attachment pending

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[5] For the reasons articulated by Magistrate Judge Smith in the Insurity case, the defendants' reliance on Macrolease Int'l Corp. v. Nemeth, 2000 WL 804652 (Conn. Super. 6/9/2000), is misplaced. (The Macrolease decision is discussed on pages 8-9 of the defendants' Brief.) Macrolease did not involve a pending arbitration proceeding or an application under Conn. Gen. Stat. § 52-422; rather, Macrolease involved an application for prejudgment remedies pursuant to the Connecticut prejudgment remedies statute (Conn. Gen. Stat. § 52-278a et seq.), and it examines the issues in the context of the prejudgment remedies statutes alone.

arbitration – has been specifically recognized as procedural in nature. In Atlas Chartering Services, Inc. v. World Trade Group, Inc., 453 F.Supp. 861, 863 (S.D.N.Y. 1978), the court addressed the propriety of a judicial grant of the provisional remedy of attachment in the context of a pending arbitration concluding that such attachment "serves only as a security device in aid of the arbitration." Recently, in Phoenix Aktiengesellschaft v. Ecoplas, Inc., 391 F.3d 433 (2d Cir. 2004), the Second Circuit discussed that conclusion in the Atlas Chartering decision and referred to attachment pending arbitration as a "procedural device." Id., 438.

The conclusion § 52-422 is procedural in nature is further confirmed by the nature of what is authorized under the statute. "Section 52-422 confers on the trial court broad jurisdiction to enter orders and decrees pending an arbitration 'as may be necessary to protect the rights of the parties pending the rendering of the award and to secure the satisfaction thereof when rendered and confirmed.'" Goodson v. State, 228 Conn. 107, 112 (1993). As such, the statute does not address substantive rights; instead, under the statute, only basic and limited equitable relief (whether by way of injunction or attachment) is available to the court where circumstances are presented that make such judicial relief necessary to protect the integrity of the arbitration process and the rights to an arbitration that is meaningful, for which they presumably contracted. "Orders pursuant to § 52-422

are limited in nature. The purpose of § 52-422 is to protect the rights of the parties pending the resolution of a dispute in another forum." Id. at 116. As such, the statute simply recognizes a court's ability to enter injunctive and other similar provisional relief to protect the contractual (arbitral) rights of the parties. Nothing about the statute, then, confers the kind of substantive rights upon which the defendants rely to make their choice-of-law argument.

Finally, even if the defendant is correct that New York law applies to this proceeding, that determination will not lead to the conclusion that the plaintiffs' complaint (an application for attachment in aid of arbitration) "fail[s] to state a claim upon which relief can be granted" under Rule 12(b)(6) because New York law authorizes a court to grant the relief sought by the plaintiffs in this action. Specifically, CPLR § 7502(c) provides, in pertinent part, that a court "may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration that is pending . . . upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief." That is precisely what the instant proceeding is all about. Consequently, even if New York law is deemed to be the controlling law in this proceeding (which the plaintiffs dispute for the reasons set forth above), it is still the case that the plaintiffs' claim for relief is available under New York law. Furthermore, an application

seeking attachment in aid of arbitration under the New York statute appears to be very similar to and governed by the same standards as a proceeding for attachment under Conn. Gen. Stat. § 52-422. Compare SiVault Systems, Inc. v. WonderNet, Ltd, 2005 WL 681457 at *3 - *5 (S.D.N.Y. 3/25/05) (copy attached) (granting attachment in aid of arbitration under CPLR § 7502(c) where plaintiff demonstrates the existence of a cause of action; that the attachment is necessary to prevent any eventual arbitration award from becoming ineffectual; and that the amount of the attachment exceeds all counterclaims known to the plaintiff; and specifically holding that applicant need not establish any likelihood of success on the merits in the underlying arbitration), with Metal Management, 514 F.Supp.2d at 234-37, 241 (attachment is authorized under Conn. Gen. Stat. § 52-422 where plaintiff demonstrates that such relief "may be necessary" to protect the plaintiff's right to collect on an eventual arbitration award, which involves a demonstration of probable cause that an award in the amount of the attachment sought will be rendered it favor of the plaintiff). Accordingly, for this additional reason, the choice-of-law provision on which the defendants rely is not a proper basis to conclude that this Court cannot grant the plaintiffs the relief that they seek in this proceeding.[6]

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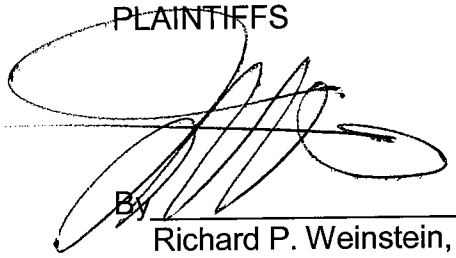
[6] The plaintiffs acknowledge that their initial Application for Prejudgment Remedy In Aid of Arbitration specifically references only Conn. Gen. Stat. § 52-422. In order to move these proceedings along and allow the Court to address the plaintiffs'

CONCLUSION

For all of the foregoing reasons, the arguments raised by the defendants in support of their motion to dismiss are without merit. Clearly, the plaintiffs' Application for Prejudgment Remedy In Aid of Arbitration (and/or plaintiffs' Amended Application for Prejudgment Remedy In Aid of Arbitration) sets forth a claim upon which this Court may grant relief. Accordingly, the defendants' Motion to Dismiss should be denied.

PLAINTIFFS



By _____

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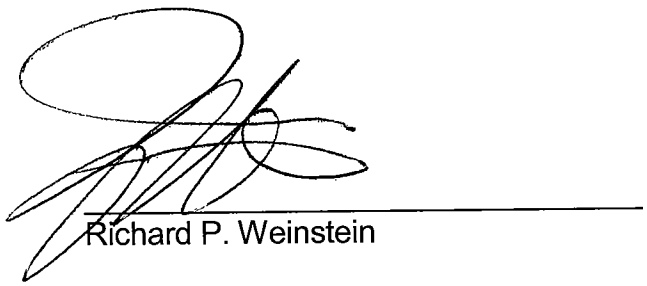
claim for relief by way of an attachment in aid of arbitration on its merits as expeditiously as possible, the plaintiffs are filing an Amended Application for Prejudgment Remedy In Aid of Arbitration pursuant to Rule 15(a)(1)(A) simultaneously herewith in order to include citations to CPLR § 7502(c) as an alternative basis for the relief being sought in this proceeding.

CERTIFICATION

I hereby certify that on this 17th day of June, 2008, a copy of the foregoing was filed electronically and served by mail upon anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.



Richard P. Weinstein

UNREPORTED DECISION

CITED IN

MEMORANDUM OF LAW

Westlaw.
Not Reported in F.Supp.2d
Not Reported in F.Supp.2d, 2005 WL 681457 (S.D.N.Y.)
(Cite as: Not Reported in F.Supp.2d, 2005 WL 681457 (S.D.N.Y.))

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Sivault Systems, Inc. v. Wondernet, Ltd.
S.D.N.Y.,2005.
Only the Westlaw citation is currently available.
United States District Court,S.D. New York.
SIVAULT SYSTEMS, INC., Petitioner,
v.
WONDERNET, LTD., Respondent.
No. 05 Civ.0890(RWS).

March 25, 2005.

Thomas G. Amon, New York, NY, for Petitioner.
Herrick, Feinstein, New York, NY, By: Barry Werbin, for Respondent, of counsel.
Kirton & McConkie, Princeton, NJ, By: Kevin F. Cunningham, for Respondent, of counsel.

OPINION

SWEET, J.
***1** By a petition filed on January 26, 2005 the petitioner SiVault Systems, Inc. ("SiVault") has moved pursuant to Rule 64 of the Federal Rules of Civil Procedure and Section 7502(c) of the New York Civil Practice Law and Rules for an order of attachment directing the Sheriff of the City of New York or the Sheriff of any county of the State of New York, to levy within the Sheriff's jurisdiction upon certain shares of stock in SiVault held by the respondent WonderNet, Ltd. ("WonderNet") evidenced by a certificate bearing the number 3281. For the reasons set forth below, SiVault's petition for attachment is granted, secured by a mandatory undertaking in the form of a $100,000.00 bond.

The Parties

According to the petition, SiVault is a corporation organized under the laws of the State of Nevada with its principal place of business in New York, New York. SiVault was formerly known as Security Biometrics, Inc.

WonderNet is alleged to be a corporation organized under the laws of the country of Israel. Shai Waisel, the Chief Executive Officer of WonderNet ("Waisel"), has testified by affidavit that WonderNet's principal place of business is in Kibbutz Givat Hashlosha, Israel. Wayne Taylor, Chief Financial Officer of SiVault ("Taylor"), has testified by affidavit that WonderNet is not qualified to conduct business in New York.

Background and Prior Proceedings

According to the petition, on January 13, 2005, SiVault filed a demand for arbitration against WonderNet with the American Arbitration Association (the "AAA") in New York, New York. The arbitration relates to a dispute concerning a contract entered into by SiVault and WonderNet on August 15, 2003 (the "2003 agreement").

It is alleged that, by the 2003 agreement, WonderNet licensed SiVault, under its former name "Security Biometrics, Inc.", to exploit certain technology and proprietary property related to a software product that enables computers to analyze handwritten signatures, enabling such signatures to be captured and crypto-graphically bound to an electronic document, capable of authentication. According to the petition, SiVault delivered 2,500,000 shares of SiVault's restricted stock (pre-reverse split) to WonderNet along with certain cash payments in connection with the 2003 agreement.

According to SiVault's demand for arbitration, after entering into the 2003 agreement, SiVault discovered that WonderNet did not have the right to the technology within the relevant territory because the technology at issue infringed existing patents and the technology was otherwise without value. Through the arbitration, SiVault seeks rescission of its agreement with WonderNet and the return of the money and the restricted stock. Taylor has testified that SiVault's claim for damages in the arbitration

exceeds $350,000.

Waisel has testified that the money and stock placed at issue in SiVault's petition and demand for arbitration were not, contrary to SiVault's representations, the subject of the 2003 agreement but, instead, were addressed in a prior agreement entered into in April 2002 (the "2002 agreement") by the parties. In a supplemental affidavit, Igor J. Schmidt, Chief Strategic Officer of SiVault ("Schmidt"), has acknowledged that the shares in question were issued in consideration of the rights granted by the 2002 agreement. Under the 2002 agreement, any controversy or claim arising under the agreement is to be settled by arbitration to be held in the courts of arbitration in London.

***2** Following the parties' entry into the 2002 agreement and prior to the formation of the 2003 agreement, SiVault received notice from Communication Intelligence Corporation ("CIC") that SiVault was developing and marketing various applications alleged to fall within CIC's intellectual property rights, including CIC's patents.

According to Waisel, between December 2003 and March 2004, SiVault conducted extensive due diligence investigations of WonderNet in furtherance of an acquisition agreement entered into by the parties in December 2003, by which SiVault was to acquire WonderNet. On March 23, 2004, SiVault, under its former name, informed WonderNet that it would not be proceeding with the acquisition.

On September 21, 2004, SiVault informed WonderNet that it was revoking a portion of the 2003 agreement, and on September 23, 2004 SiVault informed WonderNet that the 2003 agreement was being cancelled. On November 21, 2004, WonderNet advised SiVault that unless a sum of $575,000-including, *interalia,* $200,000 in fees under the aborted acquisition agreement as well as two quarterly payments under the 2003 agreement of $120,000 each-was paid no later than December 31, 2004, WonderNet would be pursuing legal options related to SiVault's alleged breach of the 2003 agreement. Schmidt has testified that after SiVault "terminated" the 2003 agreement, SiVault entered into a license agreement with CIC. (Supplemental Affidavit of Igor J. Schmidt, sworn to February 23, 2005 ("Schmidt Aff."), at ¶ 16.)

According to Waisel, on December 21, 2004, WonderNet began to take steps to remove the restrictive legend on its SiVault shares so that it could, at an appropriate time, sell the stock. On January 4, 2005, SiVault filed a form SB-2 registration statement with the Securities and Exchange Commission (the "SEC") to authorize the issuance of over 21 million new shares of common stock. SiVault commenced the present proceeding three weeks later with the filing of its petition.

In connection with the order to show cause issued by this Court and dated January 26, 2005, Bear, Stearns Securities Corp. and Interwest Transfer Co., Inc., *interalia,* were temporarily enjoined and restrained from removing any restrictive legends from the certificate at issue and from otherwise taking any action to allow the shares to be sold or otherwise transferred to WonderNet. SiVault posted an undertaking in connection with the order to show cause and temporary restraining order in the amount of $15,000. The temporary restraint was continued by agreement of the parties and further extended by this Court by order dated February 16, 2005. Waisel has testified that the value of SiVault's shares has decreased substantially, falling from the closing price of $2.77 identified in the petition as of January 14, 2005 to $1.90 as of March 8, 2005, which difference amounts to a loss of some $92,000 in the value of the 106,250 shares at issue.

Following an adjournment at the request of the parties, a hearing on SiVault's petition was held on February 16, 2005, after which the return date for the petition was adjourned to permit further briefing. The petition was deemed fully submitted on March 9, 2005.

Applicable Legal Standards

*3 Pursuant to Rule 64, Fed.R.Civ.P.,

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purposes of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought....

Fed.R.Civ.P. 64. SiVault's petition for an order of attachment is, accordingly, governed by New York law.

Under New York law,

The supreme court in the county in which an arbitration is pending ... may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. The provisions of articles 62 and 63 of this chapter shall apply to the application, including those relating to undertakings and to the time for commencement of an action (arbitration shall be deemed an action for this purpose) if the application is made before commencement, except that the sole ground for the granting of the remedy shall be as stated above....

N.Y. C.P.L.R. § 7502(c). Articles 62 and 63, rendered applicable to petitions brought under Section 7502(c) by the terms of that section, set forth the rules pertaining to prejudgment attachments and preliminary injunctions, respectively. *See*N.Y. C.P.L.R. § 6201*etseq.*;N.Y. C.P.L.R. § 6301*etseq.*

Article 62 provides, in pertinent part, that a party seeking to obtain an order of attachment must show,

by affidavit and such other written evidence as may be submitted, that there is a cause of action, that it is probable that the plaintiff will succeed on the merits, that one or more grounds for attachment provided in section 6201 exist, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff.

N.Y. C.P.L.R. § 6212(a); *cf.SG Cowen Secs. Corp. v. Messih,* 224 F.3d 79, 83-84 (2d Cir.2000) (noting disagreement among New York state courts but concluding that Article 63 criteria must be applied in considering motions for preliminary injunctions brought under Section 7502(c)). Thus, pursuant to Section 7502(c), the standard articulated in Section 6212(a) applies to SiVault's application for an order of attachment, except insofar as Section 6212(a) requires the party seeking an attachment to demonstrate the existence of "one or more grounds for attachment" identified in N.Y. C.P.L.R. § 6201.[FN1]The sole ground relevant to an application for an order of attachment brought under Section 7502(c) is "that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief."N.Y. C.P.L.R. § 7502(c).

FN1. The grounds for attachment set forth in Section 6201 are, by the express terms of Section 7205(c), inapplicable to petitions for orders of attachment brought pursuant to that latter section. *See*N.Y. C.P.L.R. § 7502(c) ("The provisions of articles 62 and 63 of this chapter shall apply to the application *...except that the sole ground for the granting of the remedy shall be as stated above."*) (emphasis supplied); *seealsoCounty Natwest Secs. Corp. USA v. Jesup, Josephthal & Co., Inc.,* 180 A.D.2d 468, 469, 579 N.Y.S.2d 376, 377 (N.Y.App.Div. 1st Dept.1992) (observing that "the standards generally applicable to attachments pursuant to [N.Y. C.P.L.R. §] 6201(3), such as sinister maneuvers or fraudulent conduct, are not required to be shown in an application pursuant to [N.Y. C.P.L.R. §] 7502(c)") (citing *Drexel Burnham Lambert Inc. v. Ruebsamen,* 139 A.D.2d 323, 531 N.Y.S.2d 547

> (N.Y.App.Div. 1st Dept.1988)); *Erickson v. Kidder Peabody & Co.*, 166 Misc.2d 1, 4, 630 N.Y.S.2d 861, 862 (N.Y.Sup.Ct.N.Y.Cty.1995) ("By its terms, [section] 7502(c) replaces only the 'grounds' which must be established for a grant of an attachment or injunctive relief, which are set forth in sections 6201 and 6301 respectively. The remainder of these articles still apply. Therefore, a party seeking provisional relief under [section] 7502(c) must still establish, among other things, the existence of a valid cause of action and grounds for relief.") (citing N.Y. C.P.L.R. §§ 6212(a), 6312(a)).

"[E]ven if the plaintiff satisfies all of the statutory requirements for an order of attachment, the issuance of relief remains in the discretion of the Court, because attachment is recognized to be a harsh and extraordinary remedy."*JSC Foreign Economic Ass'n Technostroyexport v. Int'l Dev. & Trade Servs., Inc.*, 306 F.Supp.2d 482, 485 (S.D.N.Y.2004) (citing *Bank of China v. NBM L.L.C.*, 192 F.Supp.2d 183, 186 (S.D.N.Y.2002); *Buy This, Inc. v. MCI Worldcom Communications, Inc.*, 178 F.Supp.2d 380, 383, 384 n. 8 (S.D.N.Y.2001))."Attachment is considered a harsh remedy and the statute is strictly construed in favor of those against whom it may be employed."*Glazer & Gottlieb v. Nachman*, 234 A.D.2d 105, 105, 650 N.Y.S.2d 717, 717 (N.Y.App.Div. 1st Dept.1996) (internal citations omitted).

Discussion

***4** Turning to the first condition set forth in Section 6212(a), SiVault has demonstrated by documentary evidence and affidavits the existence of a cause of action pertaining to the alleged falsity of certain representations made by WonderNet in connection with the 2003 Agreement, representations concerning WonderNet's ownership of intellectual property rights in the underlying technology. SiVault has offered testimony from which an inference may be drawn that these allegedly false representations were knowingly made and that SiVault relied upon the representations to its detriment. Contrary to WonderNet's suggestion, SiVault's knowledge of CIC's allegations of infringement prior to entry into the 2003 agreement does not preclude SiVault from asserting the instant claim, whatever the ultimate effect of that knowledge on the determination of SiVault's arbitration claim may be.

There is relatively little in the record to demonstrate the likelihood that SiVault will succeed on the merits of its claim against WonderNet,[FN2] the second condition set by Section 6212(a). Notwithstanding the sparsity of the record, however, the Court is mindful that,

> FN2. There is no indication in the record that CIC pursued its initial allegations of infringement after its initial notice sent to SiVault in September 2002. There are also no allegations suggesting, much less facts demonstrating, how WonderNet's technology infringes CIC's patents, only Schmidt's testimony that SiVault's management, through its own due diligence, is "of the opinion that the marketing and sale of WonderNet's technology and products would significantly expose the company to a lawsuit from CIC for such an offering."(Schmidt Aff. at ¶ 20.) Although SiVault has offered documentary evidence attesting to a poor performance evaluation for WonderNet's technology, there is nothing in the record to suggest that the technology is, as SiVault has asserted in its demand for arbitration, without value.

[A]rbitration is frequently marked by great flexibility in procedure, choice of law, legal and equitable analysis, evidence, and remedy. Success on the merits in arbitration therefore cannot be predicted with the confidence a court would have in predicting the merits of a dispute awaiting litigation in court, and it can be expected that when the merits are in the hands of an arbitrator, this element of the

analysis will naturally have greatly reduced influence.
SG Cowen Secs., 224 F.3d at 84. Accordingly, SiVault's application for an order of attachment will not be denied for failure to establish the likelihood of success on the merits in the underlying arbitration.

With respect to the third condition, the ground for attachment, SiVault has offered testimony to the effect that WonderNet possesses no assets in the United States other than the shares at issue here, that WonderNet had a negative net worth as of the end of 2002, and that WonderNet has borrowed $1,000,000 from a bank in Israel, a loan secured by all of WonderNet's assets. On this record which suggests WonderNet's potential insolvency, SiVault has established that a ground for an attachment exists insofar as the award to which SiVault may be entitled may be rendered ineffectual without the attachment sought. *See*N.Y. C.P.L.R. § 7502(c). WonderNet's assertions that SiVault's claims, if found to be meritorious, would be fully compensable in money damages rather than in the form of shares and that arbitration awards rendered in the United States are fully enforceable in Israel under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, do not undermine this conclusion.

With respect to the fourth and final condition for an order of attachment, the record demonstrates that WonderNet informed SiVault of certain demands against SiVault in November 2004, including demands in the amount of $240,000 arising out of the 2003 agreement as well as an additional $200,000 pursuant to the aborted acquisition agreement between the parties. In its papers submitted in opposition to SiVault's petition, WonderNet has asserted that these demands "will be filed in the underlying arbitration," (Resp. Opp. Mem. at 5), thereby demonstrating that the informal demands have yet to take shape as formal counterclaims in the underlying arbitration. In view of this acknowledgment that no counterclaims have yet been filed in the underlying arbitration, the record establishes that "the amount demanded from the defendant exceeds all counterclaims known to the plaintiff."N.Y. C.P.L.R. § 6212(a).[FN3]

> FN3. Insofar as SiVault has argued in its supplemental papers that it will suffer irreparable harm if an attachment is not granted and that the balance of equities tips in its favors, these factors are relevant only where an application for injunctive relief has been brought, as demonstrated by the authorities SiVault has cited. SiVault has sought no injunctive relief here apart from the temporary injunctive relief requested pending a hearing on the application for an attachment, which request has been gran- ted.

***5** In an exercise of the Court's discretion, SiVault's application for an order of attachment is, accordingly, granted, provided that SiVault posts an undertaking in the amount of $100,000.00 within five (5) days of entry of this opinion and order.

SiVault consistently has consented to securing the sought after attachment with a bond, first suggesting a bond in the amount of $15,000.00, five percent of the approximate $300,000.00 value of WonderNet's shares (Order To Show Cause, Jan. 19, 2005, at ¶ 10), and then subsequently increasing the suggested bond amount to $50,000.00, to "protect WonderNet from any diminution of the share price during the arbitration" (Supplemental Affidavit of Wayne Taylor, sworn to Feb. 23, 2005, at ¶ 12). Given the need to secure WonderNet's shares from substantial loss in value pending arbitra-tion, a premise which SiVault does not contest, an undertaking in the amount of $100.000.00 adequately protects WonderNet from market volatility and any possible dilution.[FN4]

> FN4. At the end of closing on March 11, 2005, SiVault stock was trading at $1.85 per share, down from $2.77 per share at

> which SiVault stock was trading when the TRO first was issued. Currently, according to SiVault's most recent amended 10-K filed with the SEC, dated October 28, 2004, SiVault has 14,011,693 outstanding shares of common stock. The authorization process for the issuance of an additional 20 million shares has been commenced.

The grant of SiVault's petition should not be construed to limit or otherwise express any view as to the facts that may be found in the arbitration between the parties or the ultimate disposition of the parties' arguments by the arbitration panel.

It is so ordered.

S.D.N.Y.,2005.
Sivault Systems, Inc. v. Wondernet, Ltd.
Not Reported in F.Supp.2d, 2005 WL 681457 (S.D.N.Y.)

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