

OUTSIDE COUNSEL

Expert Analysis

Court Dismisses Claim Against Chinese Firm Due to Lack of Personal Jurisdiction

In *Lantau Holdings v. Orient Equal International Grp.*, No. 653920/2016, 2017 BL 77469 (Sup. Ct. March 6, 2017), Judge Anil C. Singh of the New York County Commercial Division dismissed several claims by the plaintiff, Tarrytown-based lender Lantau Holdings, against defendant Haitong International Securities Company Limited (Haitong), a member of the Haitong Group, one of China's largest securities businesses.

The case sprang from a securities repurchase lending agreement gone bad. In a nutshell, Lantau alleged that several defendant-borrowers pledged shares of equity as collateral that, unbeknownst to Lantau, were subject to a lock-up period. As a result, according to Lantau, it could not trade them during the loan period as it had already committed to do. Lantau alleged that Haitong knew the shares were subject to the lock-up period, but never told this to Lantau, despite Haitong's active assistance in

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resuscitating the transaction when it hit a snag.

Judge Singh ruled that the court lacked personal jurisdiction over Haitong, notwithstanding that the Haitong Group has a New York-based subsidiary. The court also found that even if it had personal jurisdiction, Lantau's misrepresentation claims could not stand.

Factual Background

Lantau is a securities repurchase lender. It lends funds to borrowers, who in turn provide Lantau with securities as collateral for their loans. Lantau's loan terms generally grant it the status of beneficial owner of the shares, which allows Lantau to engage in transactions involving the collateral during the loan term. When the loan term expires, the borrower repurchases the securities that were given as collateral for the loan.

In March 2015, Rex Global Entertainment Holdings Limited announced that Haitong, a major securities firm in China, would act as its placing agent for 25 billion newly issued Rex shares, which would be subject to a "lock-up period" that would temporarily prevent the securities' sale for 24 months. In May 2016, Lantau issued a limited recourse repurchase loan to the borrower-defendants, which required them to provide Rex stock that they owned as collateral for the loan from Lantau. The loan agreement contained

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a choice-of-venue provision, which stated that each party "consents to the exclusive jurisdiction of the courts sitting in New York." It also required the Rex stock to be freely tradeable.

Lantau requested that the borrower-defendants show that they owned the Rex shares that would be pledged as collateral. Haitong provided the

borrower-defendants with account statements, which showed that they owned the shares. However, these statements did not explicitly indicate that the shares were subject to any restrictions (though, as explained below, the court found that the account statements do appear to have indirectly indicated such restrictions). OEI and Dongpo then pledged 417 million and 500 million shares each of Rex to Lantau.

Following the execution of the loan agreement, Lantau learned that the borrower-defendants owed substantial sums of money to Haitong, resulting in Haitong placing a lien on the Rex shares serving as collateral. Haitong refused to transfer the shares without receiving payments to satisfy its lien. The borrower-defendants, Haitong, and Lantau reached an agreement under which Lantau paid Haitong the balance of the lien and Haitong released the shares. But Haitong never directly communicated to Lantau that the shares were subject to the lock-up period.

When Lantau entered into a series of transactions to sell the Rex shares, Rex obtained an injunction against their sale from a court in Hong Kong. After allegedly suffering significant losses, Lantau sued the Haitong, the borrower-defendants, and certain individuals for breach of contract, fraudulent misrepresentation, and negligent misrepresentation. Haitong moved to dismiss the claims against it based upon documentary evidence and failure to state a claim, for lack of personal jurisdiction, and under the doctrine of forum non-conveniens.

(Haitong also filed a motion for sanctions, which the court denied. *Lantau Holdings v. Orient Equal Int'l Grp.*, No. 653920/2016, 2017 BL 77469, at *1, *11-12 (Sup. Ct. March 6, 2017)).

Personal Jurisdiction

The court granted Haitong's motion to dismiss for lack of personal jurisdiction. First, the court ruled that Lantau had failed to establish personal jurisdiction over Haitong under CPLR 301 and the Supreme Court's decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). According to the court, under *Daimler* the only type of local activity by a corporation that will ordinarily qualify for general jurisdiction is incorporation in the state or maintenance of its principal place of business in the state.

Lantau argued that personal jurisdiction over Haitong was proper because Haitong maintains full-time personnel and conducts a substantial amount of business in New York through its wholly owned subsidiary, Haitong International Securities Group (USA) (Haitong USA). The court rejected this argument on the basis of documentary evidence showing that Haitong USA was a subsidiary of non-party Haitong International Securities Group Limited, not Haitong, and that Haitong did not, in fact, have any ownership interest in Haitong USA. *Lantau Holdings*, 2017 BL 77469, at *4.

Next, the court considered whether it had personal jurisdiction under CPLR 302(a)(2), pursuant to which the court can exercise long-arm jurisdiction against a "non-domiciliary ... who in person or through an agent ...

commits a tortious act within the state." Lantau alleged that Haitong made tortious statements via emails and telephone calls to Lantau in New York. The court rejected this argument, noting that most New York courts have consistently refused to apply CPLR 302(a)(2) to claims based on tortious statements that made their way to New York only by mail or telephone. *Id.* at *4-6.

The court then considered whether it had personal jurisdiction over Haitong under CPLR 302(a)(3), which requires the plaintiff to prove that the defendant regularly does or solicits business or derives substantial revenue in the state, or expects or reasonably should expect its act to have consequences in the state and derives substantial revenue from interstate or international commerce. The court concluded that personal jurisdiction under CPLR 302(a)(3) was improper for the same reasons that it was improper under CPLR 301 and CPLR 302(a)(2). *Id.* at *6.

Lastly, the court considered whether the forum-selection provisions of the repurchase agreement between Lantau and the borrower-defendants were binding on Haitong, and concluded that they were not. *Id.* at *6-8.

Judge Singh explained that, generally, if a party is not in privity of contract, the contract can only be enforced against it if it is a third-party beneficiary of the agreement, or if it is considered "closely related" to one of the signatories and the enforcement of the contract against it is foreseeable.

Lantau argued that Haitong was closely related to the borrower-defendants and

thus could anticipate enforcement of the forum-selection clause against it. Lantau contended that the borrower-defendants could not engage in transactions with the collateral without the knowledge, authorization, and participation of Haitong. The court rejected this argument, noting that Haitong did not own any of the borrower-defendants; that none of the borrower-defendants served as directors of Haitong; and that Haitong was not alleged to have been actively engaged in the negotiation or preparation of the loan agreement or any other document relating to the deal. The court also rejected Lantau's alternative alter-ego argument because it was undisputed that Haitong was not an owner of the borrower-defendants.

For these reasons, the court found, Lantau failed to establish that the court had personal jurisdiction over Haitong. Thus, all of Lantau's claims against Haitong were dismissed. (The court also denied Lantau's request for jurisdictional discovery. *Id.* at *9).

Misrepresentation Claims

Judge Singh went on to explain that even if Lantau established that Haitong is subject to personal jurisdiction, Haitong's motion to dismiss Lantau's fraud-related claims under CPLR 3211(a)(7) would nevertheless be granted.

First, as to Lantau's negligent misrepresentation claim, the court noted that liability for negligent misrepresentation can be imposed only on those persons who possess some special duty of care to the plaintiff. Lantau argued that the special

relationship requirement was met because Haitong revived the deal between Lantau and the borrower-defendants by promising them that it would deliver the collateral upon payment of the lien, and because it was reasonable for Lantau to believe that Haitong would only deliver the collateral if it was not subject to any restrictions.

The court rejected this argument on the grounds that Lantau and Haitong

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were sophisticated parties involved in the buying and selling of collateral, and thus no special duty from Haitong to Lantau was possible. The court found that Lantau had failed to plead that Haitong possessed any unique or specialized expertise giving rise to a special duty of care. According to the court, superior knowledge of the wrongdoing itself was irrelevant—and in any event, Lantau could not allege that Haitong had such superior knowledge, because the account statements provided by Haitong specifically stated that the Rex shares were not of "sellable quantity" and did not indicate a last transferred price, thereby establishing that the shares were, in fact, restricted. The court found that "the relationship between Haitong and the plaintiff was that of a business relationship, which has consistently

been held not to constitute a special relationship." *Id.* at *10-11.

Judge Singh then quickly dispatched of Lantau's fraudulent misrepresentation claim against Haitong on the grounds that Lantau had failed to allege that Haitong intended to deceive Lantau. *Id.* at *11.

Takeaways

There are several important takeaways from *Lantau Holdings*. In this case, ownership structures within an international corporate group effectively shielded a foreign corporation from liability by depriving the court of personal jurisdiction over the foreign corporation. Under the court's reasoning, it did not matter that Haitong was just one of several entities in a large international corporate group, and that another company in the group did substantial business in New York. The court held personal jurisdiction was lacking because the defendant company itself had no significant ties to New York and since it was not a party to the contract at issue. Moreover, the court held that allegedly tortious statements that make their way to New York only by mail and telephone are insufficient on their own to establish specific personal jurisdiction over a defendant.