Majority Opinion >

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

Moquinon, Ltd., Petitioner, against Alexander Gliklad, Respondent.

650366/2017

April 6, 2017, Decided
THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

For Moquinon, Ltd., Petitioner: Mitchell P. Hurley.

For Alexander Gliklad, Respondent: W. Gordon Dobie.

Anil C. Singh, J.

Anil C. Singh

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At issue here is whether petitioner Moquinon, Ltd., ("Moquinon" or "lender") has met its burden to obtain an attachment in aid of arbitration. I hold that Moquinon has satisfied its burden.

This dispute began more than a decade ago when on October 11, 2003, Alexander Gliklad ("Gliklad" or "borrower") and Michael Cherney ("Cherney") executed a promissory note in the amount of $270 million in Russia (the "MC Note").

In August 2009, Gliklad commenced an action in New York Supreme Court against Cherney to enforce the MC Note. Justice Melvin Schweitzer awarded summary judgment in favor of Gliklad and against Cherney in a memorandum opinion dated March 26, 2014 (*Gliklad v. Cherney*, *2014 N.Y. Misc. LEXIS 1692* , [2014 BL 105772], 2014 WL 1398229 (Sup. Ct., NY Cty., March 26, 2014)). The New York County Clerk entered a judgment in favor of Gliklad and against Cherney in the sum of $505,093,442.18 on April 15, 2014. An amended judgment was entered on the MC Note on November 4, 2015, in the amount of $385,469,699.49, reflecting interest through March 4, 2014.

Thereafter, Justice Schweitzer issued an order dated July 28, 2014, stating, "[I]t is ordered that [Gliklad's] motion for an order declaring that he has the right to all debts and obligations due and owing to [Michael Cherney], and the right to receive payment thereof, from Iskander Makmudov and Oleg Deripaska, is granted."

While Gliklad was litigating the MC Note claim, Gliklad communicated with Deripaska in 2011 seeking financial

assistance to pay for the significant legal fees Gliklad was incurring in his protracted lawsuit against Cherney. Deripaska agreed to lend Gliklad $5 million through Moquinon, Ltd., which is alleged to be a shell corporation controlled by Deripaska.

The written loan agreement dated April 12, 2011, (the "loan agreement") between Gliklad, acting as borrower, and Moquinon, acting as lender, provides that Gliklad is borrowing the sum of $5 million as an unsecured loan, with simple interest accruing at the rate of 10% per annum. However, the loan agreement also provides for additional "bonus" interest contingent on the success of Gliklad's lawsuit against Cherney.

The loan agreement states that Gliklad shall pay Moquinon all accrued interest and the principal amount in a lump sum on December 31, 2015, "provided, however, that if any amounts are collected by [Gliklad] arising out of the MC Note, then the principal amount of the loan and all the interest thereto pursuant to this agreement ... shall be payable immediately upon such collection."

Section three of the loan agreement states that Gliklad agreed to pay potential "bonus interest" to Moquinon on "Net Proceeds" collected by Gliklad. The source of such "bonus interest" would be the proceeds of any payment, settlement or compromise from the MC Note, and the amount of such interest **[*2]** was tied to the amount of the net proceeds.

Section 4 of the loan agreement states in part as follows:

> In order to further protect lender's right to receive additional interest, borrower agrees that prior to accepting any settlement or compromise offer on the MC Note, borrower will offer lender the right to match the settlement or compromise offer by paying to borrower an amount in cash equal to (i) the settlement or compromise minus (ii) the loan amount plus accrued interest thereon (the "Matching Payment"). Lender must make payment within 30 days of notice from borrower or will be deemed to have not exercised this matching right and borrower shall be free to accept the settlement or compromise offer. Upon receipt by borrower of the Matching Payment, borrower shall assign over to lender any right, title and interest in, to and under the MC Note, the loan shall be deemed fully paid and lender shall not be entitled to Bonus Interest.

In November 2006, Cherney commenced a lawsuit in a court in London, England, against Oleg Deripaska seeking $3 billion in damages (Aff. of Marina Gliklad, p. 5, para. 16). On September 27, 2012, Cherney and Deripaska executed a settlement agreement (the "English settlement agreement") resolving their dispute in the London court. The English settlement agreement provided that Deripaska would pay Cherney $200 million in installments over a five year period (Aff. of Marina Gliklad, p. 11, para. 34). A dispute has arisen between Deripaska and Cherney regarding the English settlement agreement. Deripaska recently commenced an arbitration in London, contending that the English settlement agreement has been breached.

On July 27, 2015, Gliklad commenced a turnover proceeding in New York against Deripaska seeking to satisfy the New York judgment against Cherney by garnishing payments Deripaska was obligated to make to Cherney under the English settlement agreement. The turnover proceeding is *sub judice*, with Deripaska contesting personal jurisdiction.

In late 2016, Gliklad and Cherney entered into a separate settlement agreement relating to the New York judgment arising from the MC Note. In December 2016, Moquinon commenced an arbitration against Gliklad in New York, alleging breach of the loan agreement and breach of the duty of good faith and fair dealing. Moquinon contends that Gliklad failed to repay the $5 million he borrowed from Moquinon. Further, Moquinon asserts that Gliklad settled his claim with Cherney on December 23, 2016, for a fraction of the then-current value of the New York judgment, without first extending Moquinon its right to match, violating Section 4 of the loan agreement. Moquinon contends that the damages it sustained could even be $450 million — the full amount due on the MC Note — depending on the amount paid by Cherney in settlement. Moquinon allegedly no longer has any connection to Deripaska as it was sold to Bonum Capital Ltd., pursuant to a share purchase agreement dated February 28, 2017 (Sidorov Aff., pp. 7-8, para.

33).

Moquinon seeks, *inter alia*, an order of attachment pursuant **[*3]** to CPLR 7502(c) , because, absent that relief, any award to which Moquinon may be entitled in the arbitration may be rendered ineffectual.1 Moquinon seeks to attach all the proceeds up to its claim of damages in the sum of $450 million.

In opposition, Gliklad asserts that, despite the paper transfer, Deripaska continues to control Moquinon. Further, Moquinon's application for pre-arbitration attachment is nothing but a last-ditch effort by Deripaska to prevent Gliklad and Cherney from settling their protracted litigation. Gliklad maintains that Deripaska is using Gliklad and Cherney as his marionettes in an attempt to receive a massive discount on the $150 million plus interest that he must pay Gliklad as a result of Justice Schweitzer's July 31, 2014 order, which allowed Gliklad to step into the shoes of Cherney and garnish payments due under the English settlement agreement between Cherney and Deripaska.

Gliklad further contends that, during several meetings and discussions in 2016, Gliklad communicated to Deripaska offers from Cherney to settle the case for $60 million, but Deripaska rejected the offers and thereby waived any ability to match.

The affirmation under penalty of perjury of Marina Gliklad, an attorney who is the daughter of Alexander Gliklad, describes in great detail the meetings and discussions with Deripaska and his attorneys. For example, Ms. Gliklad (acting as her father's attorney) states that her father, she, and Gordon Dobie from Winston & Strawn met with Deripaska's in-house attorneys Timu Valiev and Andre Karklin in Montreal in February 2016 (Aff. of Marina Gliklad, pp. 15-16). Ms. Gliklad states specifically that, at the meeting "we explained that Mr. Cherney, through various intermediaries, had made offers to settle the Cherney litigation for $60 million" (Aff. of Marina Gliklad, p. 16, para. 53).

Moquinon does not submit affidavits in reply.

Discussion

Attachment is a harsh remedy, and New York courts have consistently construed the attachment statutes narrowly in favor of the parties against whom the remedy is invoked (*Glazer & Gottlieb v. Nachman*, 234 AD2d 105 , 650 N.Y.S.2d 717 [1st Dept., 1996]; *P.T. Wanderer Associates, Inc. v. Talcott Communications, Corp.*, 111 AD2d 55 , 56 , 489 N.Y.S.2d 179 [1st Dept., 1985]; *Michaels Elec. Supply Corp. v. Trott Elec.*, 231 AD2d 695 , 647 N.Y.S.2d 839 [2d Dept., 1996]).

The possibility that an arbitration award may be rendered ineffectual absent an order of attachment is sufficient to support the provisional relief of attachment in aid of arbitration (*Drexel Burnham Lambert v. Ruebsamen*, 139 AD2d 323 , 328 , 531 N.Y.S.2d 547 [1st Dept., 1988]). The granting of the motion lies in the court's discretion (*J.V.W. Investment Ltd. v. Kelleher*, 41 AD3d 233 , 234 , 837 N.Y.S.2d 650 [1st Dept., 2007]).

Moquinon contends that, while certain aspects of Article 62 are also applicable to applications for attachment under CPLR 7502(c) , Moquinon is not required to demonstrate any of the grounds provided in CPLR 6201 as a basis for obtaining attachment. Moquinon argues that the usual three-prong test for preliminary injunctions need not be established for attachment under CPLR 7502(c) *(See Habitations Ltd. v. BKL Realty Sales Corp.*, 160 AD2d 423 , 554 N.Y.S.2d 117 [1st Dept., 1990]; *Kadish v. First Midwest Sec., Inc. **[*4]***, 115 AD3d 445 , 445-46 , 981 N.Y.S.2d 525 [1st Dept., 2014]). Rather, "the sole ground" required to justify attachment is a showing that the "award to which the applicant may be entitled may be rendered ineffectual absent such provisional relief" (*Kadish*, 115 AD3d at 445-46).

In response, Gliklad argues that, to obtain an order of attachment in aid of arbitration, Moquinon must show that: 1) the arbitration award would be "rendered ineffectual" without it; 2) probability of success on the merits; 3) the damages sought exceed all counterclaims known to it; and 4) the existence of a cause of action for money damages (*See Founders Ins. Co. Ltd. v. Everest Natl. Ins. Co.*, 41 AD3d 350 , 839 N.Y.S.2d 474 [1st Dept., 2007]; *Erber v. Catalyst Trading*, 303 AD2d 165 , 754 N.Y.S.2d 885 [1st Dept., 2003]; *Glazer & Gottlieb v. Nachman*, 234

AD2d 105 , 650 N.Y.S.2d 717 [1st Dept., 1996]). Gliklad maintains that Moquinon cannot satisfy these criteria.

CPLR 7502(c) provides 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 or that is to be commenced ... 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 ... 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), except that the sole ground for the granting of the remedy shall be as stated above.

In the Practice Commentaries to CPLR 7502 , Vincent C. Alexander draws a sharp distinction between an application for a preliminary injunction and an application for an attachment. Alexander writes:

> The procedural details for using each remedy are provided by CPLR Articles 62 (attachment) and 63 (preliminary injunction) with one major exception: the sole ground for obtaining a provisional remedy in the arbitration context is that the award "may be rendered ineffectual without such provisional relief." The grounds specified in CPLR 6201 for an attachment and in CPLR 6301 for an injunction are inapplicable. The other requirements for invocation of these provisional remedies, however, must be satisfied.
>
> With respect to attachments, several cases reinforce the rule in CPLR 7503(c) that the only ground for attachment is to ensure the effectiveness of the arbitration award. Thus, the fact that the respondent is a nonresident or unlicensed foreign corporation (CPLR 6201(1)), standing alone, provides no basis for an attachment. On the other hand, there is no need for a showing of fraudulent transfers of assets or other "sinister maneuvers" by the respondent as is usually required when an attachment is sought pursuant to CPLR 6201(3) . It is sufficient that the respondent's assets are dwindling or are being encumbered or moved about, regardless of the respondent's motives. The petitioning party, however, must show that its claim has a probability of success on the merits, as is required by CPLR 6212 .
>
> Likewise, the party who seeks a preliminary injunction in aid of arbitration must show, in addition to the potential ineffectiveness of the award, the usual three requirements **[*5]** for equitable relief: (1) likelihood of success on the merits of the claim; (2) irreparable injury in the absence of of the injunction, and (3) a balance of equities in favor of the moving party.

(CPLR 7502 , Practice Commentary C7502:6 Attachments and Preliminary Injunctions [2014] (internal citations omitted)).

Consistent with current First Department precedent, the three-part test for a preliminary injunction does not apply where the movant seeks only an order of attachment in aid of arbitration.

In *Matter of Kadish v. First Midwest Sec., Inc.*, 115 AD3d 445 , 981 N.Y.S.2d 525 [1st Dept., 2014], the First Department affirmed the motion court's denial of petitioner's application for an attachment to secure an eventual arbitration award. Pointing out that the respondent was "citing to multiple cases which involve injunctions," *Kadish* explicitly rejected respondent's contention that a petitioner must satisfy both the three-prong test for a preliminary injunction under Article 63 of the CPLR and also demonstrate that a potential arbitral award could be rendered ineffectual to obtain an order of attachment. The Court concluded, "Recent cases of this Court, however, continue to apply the 'rendered ineffectual' standard with regard to a CPLR 7502(c) attachment in aid of arbitration" (*Kadish*, 115 AD3d at 446).

Likewise, the First Department's subsequent decision in *Mermaid Marine, Ltd. v. Maritime Capital Management Partners, Ltd.*, 147 AD3d 498 , 46 N.Y.S.3d 780 [1st Dept., 2017], affirmed the motion court's denial of an application for an order of attachment. It is important to note that the decision does not discuss the three-part test. Rather, citing

Kadish, the Court states:

> Supreme Court providently exercised its discretion in denying the petition for an order of attachment. Petitioner did not meet its burden of demonstrating that the arbitration award sought may be rendered ineffectual without an order of attachment. In particular, petitioner has not shown through admissible evidence that respondent would be financially unable to pay the arbitration award or would undertake deceptive actions to avoid paying it, if one were rendered. Accordingly, an order of attachment for respondent's assets is inappropriate.

(*Mermaid Marine*, 147 AD3d at 498 (internal citations omitted)).

Gliklad's reliance on *Founders Ins. Co. Ltd. v. Everest Natl. Ins. Co.*, 41 AD3d 350 , 839 N.Y.S.2d 474 [1st Dept., 2007], *Erber v. Catalyst Trading*, 303 AD2d 165 , 754 N.Y.S.2d 885 [1st Dept., 2003], and *Glazer & Gottlieb v. Nachman*, 234 AD2d 105 , 650 N.Y.S.2d 717 [1st Dept., 1996], to support its argument that Moquinon cannot satisfy the criteria for a pre-judgment order of attachment is misguided.

Erber is factually distinguishable from the instant matter for the simple reason that the petitioner was seeking an injunction in aid of arbitration, not an attachment (*Erber*, 303 AD2d at 165).

In *Founders*, the petitioner moved to enjoin respondents from drawing down on a trust account pending arbitration, and the respondents moved to attach petitioner's assets. The Court applied the traditional three-prong test only to petitioner's application for injunctive relief (*Founders*, 41 AD3d at 351). As to respondents' motion for attachment, the First Department affirmed **[*6]** the motion court's order denying the motion to attach petitioner's assets, holding that: 1) respondents failed to show that an arbitral award in their favor would be rendered ineffectual without an attachment; and 2) respondents failed to show a probability of success on the merits (*id* .).

Finally, *Glazer* states that attachment is a harsh remedy, and the statute is strictly construed in favor of those against whom it may be employed (*Glazer*, 234 AD2d at 105).

Here, the relief sought by Moquinon is an order of attachment. Injunctive relief has been denied (*see* page 5, *supra*). It is important not to conflate these two distinct forms of provisional relief. As the most recent cases in the First Department clearly reflect, the three-prong test applies to the application for a preliminary injunction, but it does not apply to an application for an order of attachment.

On this record, the Court finds that Moquinon has made a prima facie showing that an arbitration award would be rendered ineffectual absent an order of attachment based on the following undisputed facts: 1) Gliklad is a nondomicilary; 2) the proceeds of the settlement on the MC Note are the sole asset Gliklad has in New York which constitute the only likely source for satisfaction of Moquinon's claim under the loan agreement; and 3) Gliklad intends to dissipate such proceeds to Leonid Rudiak; attorneys who have a 36% contingency fee; and his ex-wife (Aff. of Marina Gliklad, paras. 79-82). In this regard, it is critical to note that Gliklad's counsel conceded at oral argument that Gliklad's only asset in New York is his interest in the judgment (*See* March 30, 2017 Oral Argument Transcript ("Oral Arg. Transcript"), p. 39, lines 15-16).

Having found that Moquinon has met its burden of establishing grounds for an attachment, the Court must next consider the likelihood of success on the merits of the underlying claim in order to fix the amount of the attachment.

It is well settled that attachment is available only upon a specification of damages, and such damages must be shown with reasonable certainty to justify taking the defendant's property in advance of adjudication (30 N.Y.Jur.2d, Creditor's Rights, section 66). Because attachment is a form of seizure of property in a specified amount, damages should be made out in that amount (*Prentiss v. Greene*, 193 A.D.672, 184 N.Y.S. 558 [1st Dept., 1920]; *Barbrick v. Carrero*, 184 A.D. 160 , 171 N.Y.S. 447 [1st Dept., 1918]). While proof of damages need not be as direct and positive as is required at a trial, there must be something more than an assertion of

approximate damages (*Parker v. Robert Wallace & Co., of Belfast*, 206 A.D. 465 , 201 N.Y.S. 416 [1st Dept., 1923]).

For example, in *Burns v. Valenza*, 136 AD2d 483 , 523 N.Y.S.2d 412 [1st Dept., 1988], the First Department held that it was reversible error for the motion court to grant the plaintiff's motion for attachment of $158,211.34, although he was clearly entitled to attachment on the basis of the defendant's strong familial ties to Norway and the likelihood that the attached funds would be transferred there (*Burns*, 136 AD2d at 483). There was a question of the possibility of the plaintiff's success on claims in excess of $49,789, an amount based **[*7]** on specific documentary evidence. Accordingly, the amount of the attachment was reduced to $49,789.

The First Department summarized factors to consider in *VisionChina Media Inc. v. Shareholder Representative Services, LLC*, 109 AD3d 49 , 59 , 967 N.Y.S.2d 338 [1st Dept., 2013], stating that

> the party seeking attachment must demonstrate an identifiable risk that the defendant will not be able to satisfy the judgment. The risk should be real, whether it is a defendant's financial position or past and present conduct. The court may consider the defendant's history of paying creditors, or a defendant's stated or indicated intent to dispose of assets.

(internal quotation marks and citations omitted).

Here, Moquinon is likely to succeed on the merits on its claim that $5 million plus simple interest is due. It is undisputed that Gliklad has failed to repay the sum by December 31, 2015, or upon "any amounts" collected by Gliklad on the MC Note.

However, with respect to the balance of the claim seeking damages up to the sum of $450 million, there are sharply disputed issues of fact.

At oral argument, counsel for Moquinon argued that Gliklad breached the "matching rights" provision at section four of the loan agreement. Moquinon's counsel asserted that nowhere in Gliklad's papers does Gliklad ever say that they provided a matching right to Moquinon, Deripaska or anyone (*see* Oral Arg. Transcript, p. 6, lines 23-26). Moquinon asserts that while the Gliklad/Cherney settlement discussions were taking place in 2015 and 2016, Gliklad never notified Deripaska/Moquinon that Gliklad had a settlement offer; the terms of the offer; the date on which Gliklad supplied the terms to Deripaska/Moquinon; and the date when Deripaska/Moquinon said it did not want to match the offer.

However, section four of the loan agreement does not contain a notice requirement. On its face, the provision does not state that Gliklad was required to provide a matching right in written form. Gliklad's counsel stated that he was present at a meeting on February 3, 2016, at Strikeman Elliot in Montreal, Canada, when Deripaska/Moquinon was told about the $60 million offer (*See* Oral Arg. Transcript, p. 35, lines 10-19).

The affirmation of Marina Gliklad corroborates that Deripaska/Moquinon was told about the $60 million offer in person at meetings. Ms. Gliklad states in her affirmation that "[w]e offered to them that if the money was paid immediately, my father would go as low as $65 million minus $5 million on the 2011 Moquinon loan, with the condition that they would bear the risk of all appeals.... A few days after the meeting in Montreal, Timur Valiev called me to reject our offer...." (Aff. of Marina Gliklad, pp. 16-17, paras. 55-56). This assertion is not disputed by Moquinon.

Further, there is an issue as to whether Deripaska waived any right to pursue Cherney by entering the English settlement agreement with Cherney (*See* Oral Arg. Transcript, p. 33, lines 4-8). Gliklad contends that under the terms of the English settlement agreement, he could never proceed with the "matching right" in paragraph four of the loan agreement in issue. Gliklad asserts **[*8]** that Deripaska/Moquinon breached, waived and repudiated the loan agreement by working against collection, and agreed in the London settlement to never pursue Cherney.

Gliklad contends further that the English settlement between Deripaska and Cherney required Deripaska and his

affiliates, *inter alia*: 1) not to assist Gliklad in the litigation against Cherney in New York; 2) to provide Cherney with thousands of documents relating to Gliklad, Nash Investments, and financial statements; 3) to "assist" Cherney in defense of the Gliklad proceedings, including meeting and communicating with Cherney' representatives; and 4) to block Gliklad's own witnesses and to help Cherney procure evidence in support of his defenses.

On this record, the Court finds that Moquinon has: 1) met its burden of showing that any arbitration award would be rendered ineffectual absent an order of attachment; and 2) made a prima facie showing of likelihood of success on the merits on the underlying claim for breach of the loan agreement in the sum of $5 million with simple accrued interest of $1 million.

Undertaking

An undertaking is required for an order of attachment (*Pensmore Invs., LLC v. Gruppo, Levey & Co.*, 143 AD3d 588 , 38 N.Y.S.3d 903 [1st Dept., 2016]). The amount of the undertaking must be sufficient to pay defendant damages, including attorneys' fees, in the event that plaintiff is found not to be entitled to an attachment (*Mitchell v. Fidelity Borrowing LLC*, 34 AD3d 366 , 366 , 827 N.Y.S.2d 107 [1st Dept., 2006]). A specified part of the undertaking must include a condition that the plaintiff pay to the defendant all costs and damages, including reasonable attorneys' fees, that may be sustained because of the attachment if the defendant recovers a judgment or if it is finally decided that the plaintiff was not entitled to attachment of the defendant's property. The amount of the undertaking must be adequate to protect a defendant's interest during the pendency of the action or proceeding (*see Hume v. 1 Prospect Park ALF, LLC*, 137 A.D.3d 1080 , 1081, 28 N.Y.S.3d 125 [1st Dept., 2016]). The damages against which a party is entitled to protection by an undertaking on an attachment are those that materially and proximately result from the attachment (30 N.Y.Jur.2d, Creditors' Rights, section 83 (citing *Carlos Franco Assoc., Inc. v. Seaboard Drug Co.*, 4 Misc 2d 794 , 162 N.Y.S.2d 380 [Sup. Ct., NY Cty., 1956])).

The undertaking is set at $2 million. This figure is based on the sum the parties estimate as the cost for litigating the arbitration (*see* Oral Arg. Transcript, p. 50, lines 4-6).

Accordingly, it is

ORDERED that the motion for an order of attachment is granted to the extent that Gliklad and his counsel are directed to place $6 million from the proceeds collected to date in an escrow account to be maintained by Winston & Strawn, LLP; and it is further

ORDERED that the $6 million shall remain in the escrow account pending further order of this court; and it is further

ORDERED that Moquinon shall post an undertaking in the sum of $2 million on or before April 7, 2017.

Date: April 6, 2017

New York, New York

Anil C. Singh

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The injunction enjoining Gliklad from signing, consummating or taking any other steps regarding any settlement on the MC Note is denied as the settlement has been consummated. Cherney is making payments to Gliklad pursuant to the terms of the Note.

General Information

Judge(s)	C. Anil Singh
Related Docket(s)	650366/2017 (N.Y. Sup.);
Topic(s)	Alternative Dispute Resolution; Civil Procedure
Court	New York Supreme Court
Parties	Moquinon, Ltd., Petitioner, against Alexander Gliklad, Respondent.