

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

KINGSLAND HOLDINGS INC.,)
)
Plaintiff,)
)
v.) Civil Action No. 14817
)
FULVIO BRACCO and BRACCO SpA)
f.k.a. BRACCO INDUSTRIA CHIMICA)
SpA, a company existing under)
the laws of Italy,)
)
Defendants.)

MEMORANDUM OPINION

Date Submitted: July 18, 1996
Date Decided: July 22, 1996

Grover C. Brown, Esquire, P. Clarkson Collins, Jr., Esquire, and Neal C. Belgam, Esquire, of MORRIS, JAMES, HITCHENS & WILLIAMS, Wilmington, Delaware, Attorneys for Plaintiff.

Josy W. Ingersoll, Esquire, Matthew P. Denn, Esquire, and Martin S. Lessner, Esquire, of YOUNG, CONAWAY, STARGATT & TAYLOR, Wilmington, Delaware; OF COUNSEL: Dennis J. Block, Esquire, and Irwin H. Warren, Esquire, of WEIL, GOTSHAL & MANGES, New York, New York, Attorneys for Garnishees.

CHANDLER, Vice Chancellor

On January 18, 1988, the High Court of the State of Saint Vincent and the Grenadines¹ awarded Owens Bank, a company registered in Saint Vincent, a money judgment against defendants Bracco, SpA, an Italian corporation, and Fulvio Bracco (collectively "Bracco") in the amount of nine million Swiss francs, plus interest and costs. Plaintiff Kingsland Holdings, Inc. ("Kingsland") is Owens Bank's successor in interest. On previous occasions, Kingsland unsuccessfully attempted to satisfy this judgment in, among other locales, England and Italy.

In early 1996, Kingsland commenced this Delaware action, asking the Court of Chancery to recognize and to enforce the foreign money judgment rendered against Bracco. At that time, Kingsland alleged that its judgment against Bracco had grown in value to approximately \$20 million, including interest and costs. Bracco, SpA itself is not incorporated in Delaware. In its verified complaint, Kingsland alleged that Bracco owns, directly or indirectly, the stock of the three Delaware corporations which make up the Bracco Delaware Group. To compel Bracco as a nonresident defendant to appear, this Court sequestered the stock of the Bracco Delaware Group pursuant to 10 Del. C. § 366. Thus, the three companies which make up the Bracco Delaware Group are the garnishees in this action.

During the sequestration proceedings, Bracco denied that it directly owns the Bracco Delaware Group stock and contended that

¹Saint Vincent, a Caribbean state, is a member of the Commonwealth of Great Britain.

its subsidiary in the Netherlands, Bracco Holdings B.V., actually owns the stock. As a result, Kingsland initiated a prejudgment attachment based on the same Saint Vincent judgment in the Netherlands on May 1, 1996. On May 2, 1996, the District Court in Amsterdam granted Kingsland's petition for prejudgment garnishment against Bracco Holdings B.V. and, subsequently, Kingsland filed a writ of summons with respect to the debt claim. Although Kingsland represented to the Dutch Court that its claim against Bracco is now more than \$37 million, the Dutch Court provisionally assessed the claim at only \$11.8 million.

On June 14, 1996, garnishees filed a motion to stay the Delaware proceedings in favor of the Netherlands action. Kingsland opposes a stay and wishes to pursue the satisfaction of its judgment concurrently in Delaware and the Netherlands. I heard argument on the motion to stay on July 18, 1996 and my decision follows.

I. ARGUMENTS AND ANALYSIS

Garnishees offer the following contentions in support of their argument that the Court should stay this action pending the resolution of the Netherlands action. First, the cause of action and judgment Kingsland pursues against Bracco in the Netherlands are the same as in the present case. Additionally, the Netherlands Court has provisionally garnished the stock of Bracco Holdings, B.V. to ensure that Kingsland will be able to satisfy its judgment against Bracco. Although Kingsland claims that its judgment is now worth \$37 million and the Netherlands tribunal garnished only \$11.8

million worth of assets, garnishees insist that the attached assets are sufficient to satisfy the judgment.

Second, garnishees note that since Bracco denies direct ownership of the garnishees' stock, the Delaware Court must determine, as a threshold issue, whether it has jurisdiction to hear the action. This determination will involve additional discovery on the question whether the Court should pierce the corporate veil and attribute the ownership of the Bracco Delaware Group stock to Bracco. In contrast, garnishees assert the Netherlands action should be less difficult to resolve. They emphasize that Bracco directly owns the stock of Bracco Holdings, B.V. Thus, the Netherlands tribunal will not have to address ownership as a threshold issue and can proceed directly to the merits of the case. Garnishees believe that the Court should conserve its resources, as well as the resources of the parties, by staying the Delaware action. Garnishees argue that the Court granted a stay in favor of an arbitration proceeding on similar grounds in Phillips Petroleum Co. v. ARCO Alaska, Inc., Del. Ch., C.A. No. 7177, Brown, C. (Aug. 3, 1983), and suggest that this Court should apply a similar analysis in the present case.

Garnishees also insist that the delay in the Delaware proceedings will not unduly prejudice Kingsland because the Netherlands action may provide full satisfaction of the judgment. If the Netherlands action proceeds too slowly or does not provide full relief, then Kingsland may ask this Court to vacate its stay order. Relying on Life Assurance Co. v. Associate Investors Int'l

Corp., Del. Ch., 312 A.2d 337 (1973), garnishees stress that where, as in the present action, a party seeks a stay, rather than a dismissal of the action, the moving party is subject to a lesser burden of proof.

Garnishees suggest that allowing Kingsland to proceed here will subject all involved to wasteful duplication of time, effort, and expense so that the Court should stay this action in the interest of justice. Moreover, garnishees emphasize that Kingsland, itself, filed the second action. Relying on Sumner Sport Inc. v. Remington Arms Co., Del. Ch., C.A. No. 22842, Chandler, V.C. (March 4, 1993), and Hurst v. General Dynamics Corp., Del. Ch., 583 A.2d 1334, n.9 (1990), garnishees ask the Court to refuse to give respect to plaintiff's choice of forum.

A. Standing

As an initial matter, Kingsland answers by challenging garnishees' standing to seek a stay of these proceedings. Kingsland insists that the Court should not permit garnishees to seek a stay of these proceedings since, in Kingsland's view, the Court can address garnishees complaints regarding the burden of responding to discovery in this action via the discovery procedures provided in the Chancery Court Rules. Because they lack standing, Kingsland suggests that garnishees' only recourse is to seek a protective order rather than a stay of the proceedings.

Garnishees, in contrast, contend that they have standing to seek a stay of this action because of their rights and interests in the ownership and control of the Bracco Delaware Group stock, as

well as in protecting themselves from the burdens of unnecessary discovery. Moreover, garnishees correctly point out that this Court may stay actions sua sponte. Council of South Bethany Beach v. Sandpiper Development Co., Del. Ch., C.A. No. 935, Brown, V.C. (Oct. 14, 1981), Let. Op. at 5. Thus, garnishees argue that Kingsland is simply "splitting hairs" by challenging garnishees' standing.

Whether one has standing to seek certain relief is a threshold question, so I do not consider Kingsland's argument to be one of "splitting hairs." See Mills v. Trans Caribbean Airways, Inc., Del. Supr., 272 A.2d 702, 704 (1970). Nonetheless, the Supreme Court in Mills clearly held that a garnishee may have standing to challenge a statute if it shows that its rights or interests are affected by an application of a statute.

On the present record, garnishees appear to have standing to challenge the sequestration of their capital stock pursuant to Delaware's sequestration statute because that sequestration affects their rights and interests significantly. First, garnishees have a significant interest in the ownership and control of their own capital stock. Second, the record demonstrates that this action will involve significant cost to, and burden on, garnishees. This burden of litigation ultimately may be unnecessary.

B. Status: Judgment Creditor or Litigant

Next, Kingsland asserts that the Court should deny the motion to stay because, as a judgment creditor, it is entitled to pursue satisfaction of its judgment in multiple fora. Kingsland relies on

the "one satisfaction" rule, which means that although a plaintiff may pursue numerous avenues of relief simultaneously, that litigant is entitled to only one satisfaction of the claim. This rule, Kingsland argues, protects debtors and allows creditors to attempt to collect in different locales simultaneously.

Kingsland also argues that the Court should not apply the traditional test for determining whether to stay this action. Kingsland notes that while courts generally apply a *forum non conveniens* analysis in determining whether to stay an action, courts do not apply such an analysis in the case of a post-judgment creditor attempting to collect in several jurisdictions. Thus, Kingsland asserts that it is merely a judgment creditor, attempting to satisfy a judgment, so that the Court should not apply a *forum non conveniens* analysis in its evaluation of the stay motion.

Garnishees see things differently, asserting that Kingsland is not merely attempting to satisfy a judgment. They note that Kingsland's petition asks the Court to recognize the judgment under principles of international comity. To make its decision, the Court will hold an adversarial hearing to determine whether Kingsland procured the judgment in a fair proceeding. If the Court decides to recognize the judgment after that hearing, then Kingsland may execute on the judgment against the sequestered stock. Thus, garnishees assert that in evaluating the motion to stay, the Court must consider traditional *forum non conveniens* factors with emphasis on the practical considerations involved.

Kingsland's argument has great logical appeal, and I agree with its general proposition that creditors may attempt to execute on judgments in more than one jurisdiction concurrently. However, in the present case, Kingsland must first convince the Court that it procured its judgment in a fair proceeding before this Court will recognize the foreign judgment. de la Mata v. American Life Ins. Co., 771 F. Supp. 1375 (D.Del. 1991), aff'd, 961 F.2d 208 (3d Cir. 1992). If it prevails in that regard, the Court will recognize Kingsland as a judgment creditor and allow Kingsland to proceed against Bracco's assets in Delaware. Thus as a technical matter, Kingsland has not yet attained the status of a judgment creditor in Delaware. Kingsland is not simply a judgment creditor attempting to satisfy a judgment in Delaware. It is a party seeking recognition of a judgment by a Delaware court via adversarial proceedings so that Delaware will recognize it as a judgment creditor. Consequently, I conclude that the Court must use the factors established in General Foods Corp. v. Crvo-Maid, Inc., Del. Supr., 198 A.2d 681 (1964), as refined by later Supreme Court decisions, in determining whether to stay these proceedings in favor of later filed proceedings.

C. Standards for Determining Whether to Stay a Proceeding

When similar actions between the same parties involving the same issues are proceeding in multiple jurisdictions, either court, in its discretion, may hold that action in abeyance pending the outcome of the other action. Every court maintains the inherent power to stay proceedings as part of its power to manage its

docket. General Foods Corp. v. Cryo-Maid, Inc., Del. Supr., 198 A.2d 681, 682-83 (1964). Generally if the action before it is the first filed action, the court will not stay its hand to permit the subsequent action to go forward. Id. However, according to the facts and circumstances of the case, if the court is convinced that the second-filed proceedings may afford plaintiff prompt and complete justice, a court may choose to stay the first filed action in favor of the subsequent action. Id. See also McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co., Del. Supr., 263 A.2d 281, 283 (1970).

In Cryo-Maid, the Supreme Court stated that motions to stay are similar, conceptually, to *forum non conveniens* motions. Thus, in determining whether to stay an action, Delaware courts will consider factors developed in traditional *forum non conveniens* analysis. Cryo-Maid. Del. Supr., 198 A.2d at 683-84. See also McWane, Del. Supr., 263 A.2d at 284 (reaffirming that, in evaluating motions to stay, Delaware courts should apply established rules of *forum non conveniens* even when a party filed the other action after the Delaware action).

More recently, the Supreme Court reaffirmed that to prevail on a *forum non conveniens* motion, a defendant must establish with particularity that one of the following Cryo-Maid factors will cause defendants significant undue hardship and inconvenience if they are required to litigate in Delaware and the overwhelming weight of those factors warrant a stay:

- (1) The pendency of similar actions in other jurisdictions;

- (2) Whether the controversy is dependent upon the application of Delaware law;
- (3) The relative ease of access to proof;
- (4) The availability of compulsory process for witnesses;
- (5) Practical considerations that would make the case easy, expeditious and inexpensive.²

See Chrysler First Business Credit Corp. v. 1500 Locust Ltd. Partnership, Del. Supr., 669 A.2d 104, 106-07 (1995).

In motions to stay situations, usually the plaintiff files the first action and then the defendant files the subsequent action in a different forum. To discourage forum shopping, Delaware courts prefer not to allow defendants to defeat the plaintiff's choice of forum. Id. at 105. However, in cases where the plaintiff filed both actions, the court may decide that under the circumstances, it should give the plaintiffs initial choice of forum less weight. Sumner Sports Inc. v. Remington Arms Co., Del. Ch., C.A. No. 11841, Chandler, V.C. (March 4, 1993), Mem. Op. at 18.

D. Argument on and Analysis of Cryo-Maid Factors

Although arguing that the Court should not apply the Cryo-Maid *forum non conveniences* factors in this case, Kingsland contends that even under such an analysis, the Court should not stay the Delaware proceedings. Kingsland insists that the Court, in weighing the Cryo-Maid factors, should conclude that those factors do not favor staying this action. In contrast, garnishees assert that practical considerations involved in the present action weigh in favor of this Court staying the present proceedings.

²In addition, where relevant, the Court should consider the possibility of viewing the premises.

1. Pendency of Other Proceedings

With respect to the pendency of other proceedings, Kingsland argues, the Netherlands action does not involve the same issues as the Delaware action so that this Court should not stay these proceedings. Kingsland underscores the fact that the Netherlands, unlike Delaware, is a civil code jurisdiction. Citing to Weems, Enforcement of Money Judgments Abroad, Vol. I NET - 3 to 5 (Matt. Bender 1994) ("Weems"), Kingsland notes that Dutch courts begin their analysis in determining whether to recognize a foreign judgment by referring to bilateral or multilateral treaties which the Netherlands adopted for enforcement of foreign judgments. If a treaty governs the treatment of the parties, then a Dutch court will recognize the foreign judgment without question. However, as in this case where no treaty applies, Netherlands courts do not, as a rule, recognize the foreign judgment unless the plaintiff prevails in an adversarial proceeding with respect to that judgment. Thus, Kingsland contends that the issues that the Dutch Court would consider are quite different from the issues that a Delaware Court would consider in a recognition hearing.

Garnishees dispute Kingsland's contention that the issues a Netherlands tribunal will visit will be quite different from those a Delaware Court will consider. Garnishees stress that Netherlands courts generally recognize foreign judgments even where no treaty applies if the forum that issued the judgment was convenient and protected the defendants' procedural rights. Thus, garnishees conclude that the Dutch approach is parallel to Delaware's.

After reviewing Weems and other authorities, I conclude that Dutch courts appear to approach the question whether to recognize a foreign judgment by considering issues similar to those that Delaware courts address. Stated simply, Delaware, based on principles of comity, will recognize foreign judgments if it concludes that a foreign court with jurisdiction rendered the judgment after a full and fair trial. de la Mata, 771 F. Supp. at 1381. Similarly, Dutch courts are concerned with the procedural fairness of foreign proceedings and will only recognize foreign judgments from non-treaty countries after making an inquiry into that procedure. Thus, one would expect that Kingsland and Bracco will make similar offers of proof in either locale. Consequently, this factor does not weigh in favor of either jurisdiction and does not support garnishees' motion to stay the Delaware proceedings.

Kingsland argues that the fact that it initiated the Delaware proceeding first is determinative of the issue. However, as I previously noted, where the plaintiff filed both actions, the court may decide that under the circumstances, it should give the plaintiff's initial choice less weight. Sumner Sports Inc. v. Remington Arms Co., Del. Ch., C.A. No. 11841, Chandler, V.C. (March 4, 1993), Mem. Op. at 18.

2. Applicable law

As a general principle, if a case depends on the application of Delaware law, then a Delaware court should decide that issue of law rather than allowing another jurisdiction to interpret Delaware law. Cryo-Maid, Del. Supr., 198 A.2d at 683. The Saint Vincent

tribunal which awarded the underlying judgment applied its local laws in rendering its decision, and Delaware law was not at issue. Thus, the underlying award that Kingsland asks this Court to recognize and enforce has no nexus with the state of Delaware.

Although this Court will apply Delaware law in evaluating the fairness of the Saint Vincent judgment, in reality Delaware law is important here only secondarily and only because Kingsland wishes to execute its judgment here. Thus, this case is not inextricably bound in Delaware law. Similarly, the underlying judgment is not closely tied to Dutch law. Since Dutch law is not implicated to a greater degree than Delaware law, I conclude that this factor does not weigh in favor of staying the action.

3. Access to Proof

Proof of the underlying debt and the validity of the Saint Vincent judgment is located in the Caribbean. In the Delaware action only, Kingsland must convince the Court to pierce Bracco's corporate veil and attribute the assets of the Bracco Delaware Group directly to Bracco. To that end, Kingsland has sought evidence on this threshold jurisdictional issue from the Bracco Delaware Group and other companies located in Delaware and New Jersey. Since the garnishees have not produced the requested documents, the Court does not know whether these requests will bear fruit. However, since the Netherlands Court will not need to grapple with this issue, the parties will not need access to this information to proceed there.

Since the documentation concerning the underlying judgment is located neither in Delaware nor in the Netherlands, the parties will not find it easier to access that proof in either jurisdiction. Accordingly, garnishees have not demonstrated that this factor weighs in favor of their position that the Netherlands action, rather than the Delaware action, should go forward.

4. Compulsory Process for Witnesses

Since Bracco directly owns the stock of Bracco Holdings, B.V., Kingsland may serve process on Bracco in the Netherlands. In contrast, in Delaware, Kingsland must prevail in its efforts to seize Bracco's assets to compel Bracco's appearance. Notably, in the Delaware action, Bracco and garnishees have moved to quash the sequestration of the Bracco Delaware Group Stock on the grounds that Bracco does not directly own that stock. Thus, the parties in the Delaware action must first complete discovery on the issue whether the Court should attribute the Bracco Delaware Group's assets to Bracco on the basis of fraud or the like. If this Court determines that Bracco does not directly or equitably own the garnished assets, then it must vacate its sequestration order and will not have the authority to compel Bracco to appear and submit to jurisdiction.

In contrast, the effectiveness of the service of process in the Netherlands is more certain since Bracco directly owns the stock of Bracco Holdings, B.V. Because the Dutch Court will not have to determine, as a preliminary issue, whether Bracco indeed

owns the garnished assets, one would expect that action to proceed more efficiently.

It appears on this record that the Netherlands action will involve a more simplified and efficient procedure than the Delaware action because it will not require that Court to address the complex jurisdiction issue that this Court will face. Accordingly, the Dutch Court's exercise of jurisdiction and Kingsland's ability to serve process on Bracco appears more firmly established and less subject to challenge in the Netherlands. Because it appears that compulsory service of process in the Netherlands is more certain there, this factor weighs in favor of staying the proceedings here so that the Netherlands action can proceed more quickly.

5. Other Practical Considerations

Kingsland asserts that the Court should not deny it the opportunity to proceed as expeditiously as possible on all possible fronts until it satisfies its judgment. Since the outcome of the Netherlands action is not yet known, and since it might not result in a complete satisfaction of the judgment, a stay may delay Kingsland's enforcement efforts without benefit. Kingsland also notes that a delay will cause it to face additional and intervening risk of the assets' value decreasing or other creditors achieving a greater priority over such assets.

In reply, garnishees note that Kingsland can always apply to this Court to vacate its stay order should the Netherlands action move at a slow pace. Since Bracco, apparently, has sufficient assets in the Netherlands to satisfy the judgment, I agree with

garnishees. Bracco has not attempted to move any assets since Kingsland instituted the Delaware litigation and Kingsland has not argued that Bracco plans to shuffle assets so as to thwart Kingsland's attempt to satisfy its judgment.

Kingsland also expresses concern that because the Dutch Court provisionally assessed the claim at \$11,850,000, the Dutch action is under-secured. Kingsland asserts that the judgment has grown in value and is currently worth \$37 million. Garnishees dispute the accuracy of Kingsland's calculations. They note that the underlying judgment calls for a six percent interest rate. Garnishees insist that it is mathematically impossible for the judgment to have grown to \$37 million unless Kingsland calculated the interest at an annual rate of 20 percent. Garnishees also note that other non-attached assets might be available to satisfy a Netherlands judgment.

Regardless of the dispute over the value of the judgment, it is clear that Bracco's holdings in Netherlands exceed the value of the judgment even if that judgment is worth \$37 million. Since Kingsland is not limited to collecting the amount provisionally assessed, this factor is not determinative of the issue. I am convinced that the Netherlands Court is able to effectuate complete justice in this case.

Garnishees' main argument in support of their motion to stay is a practical one: They contend that the threshold issue of jurisdiction via stock ownership involves costly and burdensome discovery and motion practice. Garnishees note that in attempting

to gain evidence of fraud or the like, Kingsland has served on garnishees subpoenas for production of at least 16 categories of documents that will require garnishees to produce virtually every document in any way referring to a sale of assets from Bristol-Myers Squibb to garnishees. The Netherlands action may proceed without this additional cumbersome step.

In considering these practical factors, on the one hand, I recognize that Kingsland has a strong interest in satisfying this judgment, especially after pursuing it for so many years. If the Netherlands Court refuses to recognize the judgment or if the assets do not satisfy the judgment then a stay may, in the end, have been a waste of time. And if the delay causes Kingsland a hardship in developing evidence to support its theory of ownership, or if Bracco moves assets, then the delay will have prejudiced Kingsland.

On the other hand, garnishees have demonstrated that litigating this matter in Delaware is particularly burdensome as it involves additional expenses and efforts that will not be required in the Netherlands case at all. Specifically, garnishees need not be involved in the Netherlands litigation at all. In addition, Bracco must defend itself on both continents simultaneously.

Since the Netherlands Court appears able to provide Kingsland complete and prompt relief, this case is very similar to Phillips Petroleum, which also involved simultaneous litigation of the basic controversy with many of the same witnesses on two continents at the same time. Phillips Petroleum Co. v. ARCO Alaska, Inc., supra.

Notably the Phillips Court granted a stay on factors which are present in this case -- extensive extra document production and discovery, numerous rulings required on issues not related to the merits of the action, and no delay in a final resolution to the case.

The garnishees' burden of demonstrating that they will suffer undue hardship if the Court requires them to proceed in Delaware is not as stringent in an action where, as here, the moving party seeks a stay rather than a dismissal of the action. Life Assurance Co. v. Associate Investors Int'l Inc., Del. Ch., 312 A.2d 337 (1973). Nonetheless, garnishees have demonstrated that proceeding in Delaware, while simultaneously proceeding in the Netherlands, will cause them undue hardship. I base this finding upon the fact that the Delaware action will involve a more costly and cumbersome procedure than the Netherlands action because in Delaware, Kingsland must establish that Delaware has jurisdiction over Bracco. Establishing jurisdiction will involve additional discovery, motions practice and possible appeal. Moreover, this additional burden will only advance the Delaware proceeding to the point that the Court will decide whether or not Bracco equitably owns the sequestered stock. Only after this issue is decided will the Delaware action be at the procedural point that the Netherlands action is currently. This burden upon garnishees is unnecessary because Kingsland may get full satisfaction in the Netherlands following a more direct and efficient route. Additionally, because it appears that compulsory service of process in Delaware is less

certain than in the Netherlands, this factor weighs in favor of staying the proceedings so that the Netherlands action can proceed without this action hindering the smooth progression of those proceedings.

III. CONCLUSION

Garnishees have established with particularity that proceeding in Delaware will cause them significant undue hardship and inconvenience with reference to two Cryo-Maid factors: compulsory process and practical considerations. The record does not offer any counterweight to these factors. In weighing all those factors I conclude that they warrant a stay of the Delaware action. Accordingly, this Court will stay the present action in favor of the Netherlands action. However, if the Netherlands action does not proceed in a timely fashion because, among other possible occurrences, the Netherlands Court determines that it lacks jurisdiction over Bracco, then Kingsland may move to dissolve the stay and reactivate its Delaware action. See Life Assurance Co. v. Associate Investors Int'l Inc., Del. Ch., 312 A.2d at 342.

IT IS SO ORDERED.³

³This decision also effectively disposes of Kingland's pending motion to compel discovery.