

SUPREME COURT OF THE STATE OF NEW YORK

NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD

PART 35

Justice

Can West Global

INDEX NO.

600245/05

MOTION DATE

1/26/05

MOTION SEQ. NO.

002

-v-
Mirkaei Tikshoret

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion / Order to Show Cause - Affidavits - Exhibits ...

Answering Affidavits - Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

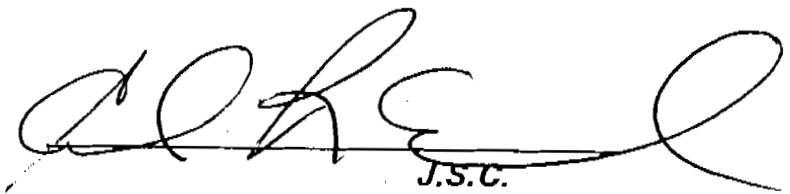
In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that petitioner's Order to Show Cause (sequence 001), dated January 21, 2005, as amended, is returnable to July 19, 2005, 11:00 a.m., Part 35 and the temporary stay issued on January 21, 2005 is lifted; and it is further

ORDERED that respondent's Order to Show Cause (sequence 002) to dismiss the action for lack of personal jurisdiction resulting from improper service is granted solely to the extent that service of Order to Show Cause (sequence 001) and the underlying and supporting papers shall be served upon respondent in accordance with Hague Convention and the CPLR.

This constitutes the interim order of the court.

Dated: 2/9/05


J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FILED
FEB 14 2005
NEW YORK COUNTY CLERK'S OFFICE

ALL INFORMATION REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
CANWEST GLOBAL COMMUNICATIONS CORP.

Index No. 600245-05

Petitioner,

DECISION/ORDER

-against-

MIRKAEI TIKSHORET LIMITED d/b/a MIRKAEI
TIKSHORET GROUP,

Respondent.

-----X

MEMORANDUM DECISION

CanWest Global Communications Corp. (“CanWest”) petitions the Court, by Order to Show Cause (“Motion Sequence 001”), for a temporary restraining order and preliminary injunction to enjoin respondent, Mirkaei Tikshoret Limited d/b/a Mirkaei Tikshoret Group (“MTG”) from taking certain actions with respect to The Jerusalem Post Limited, The Jerusalem Report Limited, The Jerusalem Post newspaper, the Jerusalem Report magazine and their respective assets, publications, internet web sites and online properties (collectively “JPost Group”). In response, MTG moves by Order to Show Cause (“Motion Sequence 002”) to dismiss the petition on the grounds that MTG has not been served in conformity with CPLR §403(c) and the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (“Hague Convention”).¹

¹ CanWest’s order to show cause bears sequence #001. MTG’s order to show cause bears sequence #002. These orders to show cause are addressed herein and sequence 002 is decided herein.

Background²

This dispute arises from an agreement between CanWest and MTG, as amended by a November 10, 2004 Letter Agreement (“Agreement”), to jointly acquire assets of the JPost Group from Hollinger International Inc. The Agreement provides for the acquisition of these assets in two steps: (1) through a bid developed with CanWest, MTG was to acquire the shares of Palestine Post Limited (“PPL”), which operates the JPost Group’s businesses, followed by (2) transfer of the acquired assets to a newly formed entity owned jointly by CanWest and MTG on a 50/50 basis. According to CanWest, the Agreement provides that CanWest has the right to appoint four of the seven members of the new entity’s Board of Directors and to establish editorial policy in consultation with MTG.

CanWest claims that after successfully bidding for the shares of PPL, MTG breached the Agreement by, *inter alia*, refusing to transfer the assets to an entity jointly owned with CanWest on a 50/50 basis, frustrating CanWest’s right to control the Board and establish editorial policy, and refusing to include CanWest in major decisions.

During the course of dealings between the parties after MTG purchased JPost Group’s assets, CanWest attempted to obtain assurances from MTG of MTG’s willingness to proceed with the Agreement. On January 14, 2005, CanWest received a letter from the law firm Skadden, Arps, Slate, Meagher & Flom LLP (“Skadden, Arps”), which (1) advised CanWest that they represented MTG and were responding on its behalf, and (2) indicated that MTG refused to

² The facts recited in this section are alleged in CanWest’s order to show cause.

give CanWest the requested assurances. Consequently, and pursuant to the Agreement,³ on January 20, 2005, CanWest initiated arbitration proceedings with the American Arbitration Association in New York seeking specific performance of the Agreement. MTG's instant order to show cause to maintain the *status quo* until the arbitration is concluded ensued.

Motion Sequence 001

CanWest argues that a temporary restraining order and preliminary injunction to preserve the *status quo* are necessary to, *inter alia*, prevent transfer, disposal or encumbering of JPost Group's assets before the arbitration is concluded, to prevent actions that would render the parties' joint business plan impossible to pursue, and to preserve CanWest's contractual right to make certain Board appointments.

CanWest argues that since MTG remains in sole control of the businesses and assets of JPost Group, a temporary restraining order is required to prevent MTG from disposing of assets and from taking other action that could irreparably harm the business and potentially render the arbitration meaningless. CanWest alleges that MTG has already taken actions which would require the approval of a 50% co-owner or the Board of Directors of the entity, in the following respects: MTG fired senior management executives at the Jerusalem Post, hired new a Chief Executive Officer and Chief Financial Officer (or their Israeli equivalents) for the JPost Group, appointed a new executive to manage the North American components of the JPost Group's business, amended material agreements instrumental to the continued operation and success of

³ According to CanWest, the Agreement provides for binding arbitration in New York, New York. The Agreement further permits either party to apply to any court in the State of New York to seek injunctive relief to maintain the *status quo* until the arbitration award is rendered or the controversy is otherwise settled. CanWest requested an expedited arbitration.

the publication, and has closed down the JPost Group's printing operation in England. CanWest also contends that MTG plans to sell other JPost Group assets valued at more than US\$4.0 million.

CanWest also argues that the likelihood of CanWest's success on the merits is established, given that MTG's correspondence and statements demonstrate MTG's refusal to transfer the JPost Group's asset to a new entity or to negotiate in good faith as required by the express terms of the Agreement. Further, the balance of equities favors CanWest, in that CanWest will continue to suffer irreparable injury in the absence of an injunction, while any inconvenience suffered by MTG as a result of such an injunction would be minimal, in light of the expeditious nature of the arbitration.

In signing the Order to Show Cause, the Court ordered that pending the hearing on CanWest's order to show cause, MTG was prohibited from engaging in various activities⁴ that would alter the *status quo*. Pursuant to CanWest's submissions, the Court ordered that service by

⁴ Specifically, CanWest seeks an Order prohibiting MTG from:

- (i) entering into any merger, consolidation, business combination, joint venture or other material corporate transaction, including acquisitions or adopt or effect any reorganization of any kind, including a dissolution or liquidation involving any of the entities comprising the JPost Group;
- (ii) taking any steps to wind-up, dissolve or terminate the corporate existence of any entity comprising the JPost Group, including without limitation the Palestine Post Limited, Jerusalem Post Publications Limited, Jerusalem Report Publications Limited or any subsidiary thereof;
- (iii) selling, transferring assigning, mortgaging or otherwise encumbering any of the shares, intercompany receivables, other securities, or JPost Group assets acquired by MTG;
- (iv) repaying to MTG or its affiliates, any indebtedness including any capital notes and intercompany receivables acquired by MTG from Hollinger or making any payment in respect of interest on such indebtedness or committing to make or the making of such payments;
- (v) hiring, firing, transferring or otherwise changing the employment status of any officers, directors or other executives of any entity comprising the JPost Group;
- (vi) terminating any existing contracts, commitments, agreements or business relationships; and
- (vii) entering into any new contracts, commitments, agreements or business relationships, except as required in the ordinary course of business.

hand of a copy of the order to show cause and temporary restraining order, together with all supporting papers upon Skadden, Arps, attorneys for MTG, on or before January 24, 2005 be deemed good and sufficient service. CanWest served such papers pursuant to this provision.

Motion Sequence 002

In response, MTG moves to dismiss the petition, arguing that the Court lacks personal jurisdiction over MTG to issue preliminary relief since MTG has not been served in conformity with CPLR 403(c) and the Hague Convention.

MTG asserts that it is an Israeli corporation with headquarters in Israel, and that it does not have a place of business anywhere in the United States. MTG further contends that Israel (and the United States) are signatories to the Hague Convention. Therefore, the procedures of the Hague Convention govern service of originating process in the instant case and pre-empt the ordinary civil practice rules relating to service. Since the Hague Convention procedures apply to any process that initiates a lawsuit and secures jurisdiction over an adverse party, such procedures extend not only to the petition herein, but also to the order to show cause to the extent such order serves as a basis for establishing jurisdiction. Further, in acceding to the Hague Convention, the State of Israel specifically objected, in Article 10 therein, to any mode of service other than through official Israeli judicial channels (*infra* at page 8).

MTG states that Skadden, Arps has not been appointed as MTG's agent for the receipt of process. Therefore, MTG argues, CanWest's attempt to serve process on MTG's local attorneys, Skadden, Arps, represents an improper attempt to circumvent the Hague Convention. In moving for injunctive relief, CanWest failed to establish whether Skadden, Arps should be treated as MTG's agent for service of judicial process. And, mere letter-writing by a local attorney is

insufficient to warrant a finding that the attorney was authorized to accept service on the foreign client's behalf. Further, Skadden, Arp's representation of MTG in the arbitration (where the Hague Convention does not apply) does not constitute authority to accept service in any judicial proceedings.

MTG further argues that CanWest cannot rely on CPLR 403(d), which authorizes the court to grant an order to show cause to be served in lieu of a notice of petition "at a time and in a manner specified therein." CPLR 403(d) is inapplicable where the respondent resides overseas. In any event, CPLR 403(d) cannot dispense with the strict requirements of the Hague Convention.

MTG further contends that its receipt of Motion Sequence 001 does not invest the Court with jurisdiction or cure the underlying legal defects in service.

Oral Argument

During oral argument, CanWest argued that service upon MTG's counsel Skadden, Arps, was sufficient to confer personal jurisdiction over MTG because (1) the Hague Convention does not apply; (2) alternate service under CPLR 311(b) applies, since service pursuant to the Hague Convention would be impracticable; and (3) MTG is estopped from arguing that Skadden, Arps is not its agent for service of process, given that (a) Skadden, Arps has appeared in the arbitration seeking relief from the arbitration organization and the instant injunction relates directly to such arbitration and (b) Skadden, Arps's letter indicated that it represented MTG.

In response, MTG argued, *inter alia*, that alternate service under CPLR 311(b) is permitted where service upon a foreign corporation within 120 days is impracticable, and only three days has elapsed since the commencement of this proceeding.

Analysis

“[I]n light of the U.S. Supreme Court’s reading of “service” in the Hague Convention as a term of art, referring specifically to the process that initiates a lawsuit and secures jurisdiction over an adversary party” (*Sardanis v Sumitomo Corp.*, 279 AD2d 225, 229 [1st Dept 2001]), to effectuate service on a party in another country which is a signatory to the Hague Convention, the serving party must comply with the provisions of the Convention when documents must be transmitted abroad to effectuate service (20 U.S. Treaties 361, TIAS No. 6638, Art. 1 [1969]; *see* 2 NY Prac §17:1; *Marcus v Five J Jewelers Precious Metals Industry Ltd.*, 2002 WL 1610576 [Supreme Court, New York County 2002]).

At one point in the not too distant past, the First Department held that service upon a corporation in accordance with section 307 of the Business Corporation Law was effectuated in compliance with Article 10 (a) of the Hague Convention where the Secretary of (New York) State sent notice of such service and a copy of process by registered mail, to defendant in Japan (*Philip v Monarch Knitting Machinery Corp.*, 169 AD2d 603 [1st Dept 1991], overruled by *Sardanis v Sumitomo Corp.*, 279 AD2d 225, *supra*). In so holding, the First Department observed that, in adopting the Convention, Japan interposed objections only to paragraphs (b) and (c) of Article 10, not paragraph (a) and further, placed no limitations or modifications upon Article 10(a) (*Zwerling v Zwerling*, 167 Misc 2d 782 [Supreme Court New York County 1995]). Upon this basis, the First Department found that service of process, effected by registered mail upon defendant, at its principal office in Japan, conformed with Article 10(a) of the Hague Convention (*Zwerling, supra*). However, such service has since been determined as ineffective (*see Sardanis v Sumitomo Corp.*, 279 AD2d 225 [1st Dept 2001]). The First Department in

Sardanis (supra) found that service of process effected on the defendant, a Japanese corporation, which had no business address or designated agent in New York, by service on the New York Secretary of State under Business Corporation Law § 307, was insufficient to effect personal jurisdiction over the defendant.

Accordingly, since both the United States and Israel are signatories to the Hague Convention, CanWest must serve MTG in accordance with the procedures set forth therein. Service upon parties located within signatory nations must be made through a Central Authority designated by that signatory nation (20 U.S.T. 361, Art 2-3). Article 10 of the Hague Convention provides a limited exception:

Provided the State of destination does not object, the present Convention shall not interfere with

the freedom to send judicial documents, by postal channels, directly to persons abroad, the freedom of judicial officers, officials or other competent person of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent person of the State of destination, the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

(*id.* at Art. 10).

However, Israel signed the treaty with the following declarations:

b) the State of Israel, in its quality as State of destination, will, in what concerns Article 10, paragraphs b) and c), of the Convention, effect service of judicial documents *only through the Directorate of the Courts, and only where an application for such service emanates from a judicial authority or from the diplomatic or consular representation of a Contracting State.* (Emphasis added).

Thus, under the Hague Convention as adopted by Israel, the only method available to CanWest to properly effectuate service on MTG is through the Israeli Central Authority, in this case, the Directorate of the Courts.

To circumvent the mandatory provisions of the Hague Convention, parties can contractually agree to an alternative method of service (2 NY Prac §17:1). Although, the parties herein expressly agreed to permit application to any court in the State of New York to seek injunctive relief to maintain the *status quo* pending the resolution of any dispute before the arbitrator (*see* Agreement ¶9), the Agreement is devoid of any indication that the parties agreed to circumvent the service requirements under the Hague Convention. Thus, such terms of the Agreement do not obviate the need for service to comport with the guidelines of the Hague Convention. Failure to present evidence that MTG agreed to an alternative method of service is fatal to CanWest's attempt to find an exception to the Hague Convention.

With respect to service pursuant to the CPLR, a Notice of a Petition made by way of an Order to Show Cause "shall be served in the same manner as a summons in an action" (CPLR §403(c)). Service of a summons upon a corporation is governed by CPLR § 311(a)(1), which requires that service of process be delivered "upon any domestic or foreign corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service."

CanWest argues that by representing MTG in the arbitration and motions related thereto, Skadden, Arps is estopped from arguing that it is not MTG's agent for receipt service of process. However, an attorney is not automatically considered the agent of his or her client for the purposes of the service of process (*Broman v Stern*, 172 AD2d 475 [2d Dept 1991] *citing Pergament Distribs. v Net Realty Holding Trust*, 120 AD2d 578). There must be evidence that MTG designated Skadden, Arps as its agent for service of process (*see Broman v Stern*, 172 AD2d 475, 476 [2d Dept 1991] [service upon attorney is insufficient to support personal

jurisdiction absent proof that defendant designated attorney for service of process]; *Fagelson v McGowan*, 301 AD2d 652 [2d Dept 2003] [service upon attorney who represented necessary parties to the action at a public hearing insufficient where attorney was not specifically designated to receive service]; *Charles H. Greenthal & Co. v 301 East 21st Street Tenants' Assn.*, 91 AD2d 934 [1st Dept 1983] [requiring evidence that the defendants appointed their attorney to act as their agent for the purpose of service]). The issue before the Court is not whether the rules of the arbitration apply, but rather, whether MTG may be enjoined from future actions relating to JPost Group's assets until the arbitration is concluded. Thus, the mere representation of MTG in the arbitration proceeding, in and of itself, is insufficient to support CanWest's claim that Skadden, Arps is MTG's agent for receipt of service of process. Therefore, this Court must conclude that Skadden, Arps lacked authority to accept service on behalf of MTG.⁵

Additionally, CPLR 311(b) is inapplicable, since CanWest failed to establish, at this juncture, that service pursuant to the Hague Convention would be impracticable.

Accordingly, it is hereby

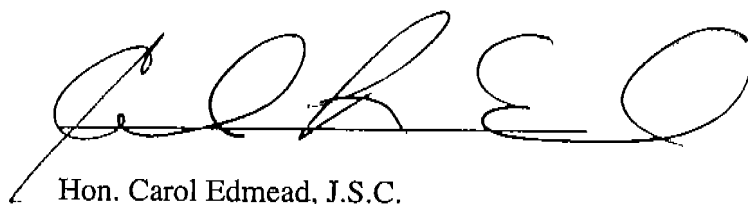
ORDERED that respondent's Order to Show Cause to dismiss the action for lack of personal jurisdiction resulting from improper service is granted solely to the extent that service of service of Order to Show Cause (sequence 001) and the underlying and supporting papers shall be served upon respondent in accordance with Hague Convention and the CPLR; and it is further

⁵ Further, to the extent that provisions of the Hague Convention are inconsistent with the service provisions of the CPLR, the supremacy clause of the United States Constitution dictates that the terms of the treaty supersede state law (U.S. Const., Art. VI, 2).

ORDERED that petitioner's Order to Show Cause (Sequence 001) dated January 21, 2005, as amended, is returnable on July 19, 2005, 11:00 a.m., Part 35 and the temporary stay issued on January 21, 2005 is lifted.

This constitutes the interim order of the court.

Dated: February 9, 2005



Hon. Carol Edmead, J.S.C.

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