08-3477-cv(L), 08-3758-cv(XAP)

United States Court of Appeals

for the

Second Circuit

THE SHIPPING CORPORATION OF INDIA LTD.,

Plaintiff-Counter-Defendant-Appellant-Cross-Appellee,

– v. –

JALDHI OVERSEAS PTE LTD.,

Defendant-Counter-Claimant-Appellee-Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFF-COUNTER-CLAIMANT-APPELLANT-CROSS-APPELLEE

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PRELIMINARY STATEMENT

Plaintiff-Appellant-Cross-Appellee The Shipping Corporation of India Ltd. ("SCI"), submits through its attorneys, Blank Rome LLP, this combined reply memorandum of law and opposition to Jaldhi's[1] cross-appeal from the Vacatur Order's denial of Jaldhi's request for counter-security in the sum of $8,505,844 pursuant to Supplemental Rule E of the Supplemental Rules for Certain Admiralty and Maritime and Civil Forfeiture Claims of the Federal Rules of Civil Procedure ("Supplemental Rules").

While the Vacatur Order's denial of attachment over "beneficiary EFTs" is directly contrary to the controlling law in this circuit that attachment of EFTs, whether to or from a Rule B defendant, is permissible, it correctly recognized the distinction in the Foreign Sovereign Immunities Act. 28 U.S.C. § 1602-1611 ("FSIA"), between waiver of immunity from counterclaims under section 1607 and the continuing immunity from pre-judgment attachment provided in section 1609 for "counter-security" for counterclaims. Section 1609 makes reference to exceptions "as provided in sections 1610 and 1611". Neither of those sections refer either to section 1607 or to an exception to immunity from pre-judgment attachment for counterclaims. The Lower Court correctly held that under the FSIA

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[1] Definitions are taken from SCI's opening brief unless otherwise stated.

there is a difference between waiving immunity for counterclaims and not for counter-security by way of pre-judgment attachment and that SCI had not made an "explicit" or "unmistakable" waiver of its immunity to pre-judgment attachment. (JA-87-88). The cross-appeal should be denied and the appeal granted.

JURISDICTIONAL STATEMENT AS TO THE CROSS-APPEAL

Jaldhi incorrectly asserts that the Court has appellate jurisdiction under 28 U.S.C. § 1291 "because this appeal is not from a final judgment." Jaldhi Brief at 1. That statutory section is in respect of "final decisions". Jaldhi cites Result Shipping Co. Ltd. v. Ferruzzi Trading USA Inc., 56 F.3d 394, 399 (2d Cir. 1995) without explanation that:

> The instant appeal presents issues concerning the interplay of the Arbitration Act, on the one hand, and the Supplemental Rules governing the availability of security and countersecurity, on the other. Because our Circuit has not previously had occasion to consider this relatively unexplored region of the law, the resolution of these issues will provide necessary guidance to trial courts in this potentially recurring context. Since the other requirements of the Cohen doctrine are clearly satisfied, we will decide the appeal on the merits.

Jaldhi does not invoke, let alone attempt to justify, the three conditions for an appeal under the collateral order doctrine of Cohen v. Beneficial Loan Corp., 337 U.S. 541, 545-547 (1949). The Court has appellate jurisdiction over the cross-appeal pursuant to 28 U.S.C. § 1292(b) because it has such jurisdiction over the

entire certified order. See Consub Delaware LLC v. Schahin Engenharia Ltda., 543 F.3d 104, 108 (2d Cir. 2008), citing United States v. Stanley, 483 U.S. 669, 676-77 (1987).

STATEMENT OF THE ISSUES AS TO THE CROSS-APPEAL

1. Did the Lower Court err in deciding SCI, as a sovereign entity, is immune from pre-judgment attachment under 28 U.S.C. § 1609?

2. Did the Lower Court err in deciding that waiver of immunity to counterclaims under 28 U.S.C. § 1607 does not mean that a sovereign is subject to pre-judgment attachment unless expressly provided for in 28 U.S.C. §§ 1610 and 1611?

3. Did the Lower Court err in holding that SCI had not explicitly or unmistakably waived its sovereign immunity from pre-judgment attachment?

4. Did the Lower Court abuse its discretion in denying Jaldhi counter-security?

STANDARD OF REVIEW OF CROSS-APPEAL

Jaldhi fails to state the standard of review for its cross-appeal. Supplemental Rule E(7) expressly permits the court to deny counter-security for "cause shown". Accordingly, the standard of review of an order denying counter-security is for abuse of discretion. See, Result Shipping Co. v. Ferruzzi Trading USA Inc., 56 F.3d 394, 399 (2d Cir. 1995) ("broad discretion in deciding whether to order

counter-security" when the Rule's requirements are met); Titan Navigation Inc. v. Timsco, Inc. et al., 808 F.2d 400, 405 (5th Cir. 1987) (trial court did not abuse its discretion in ordering counter-security); Greenwich Marine Inc. v. S.S. Alexandra, 339 F.2d 901, 905 (2d Cir. 1965) ("the inherent power to adapt an admiralty rule ... is entrusted to the sound discretion of the district judge".); Spriggs v. Hoffstat, 240 F.2d 76 (4th Cir. 1957) (no abuse of discretion in denying counter-security).

Jaldhi is required to show "clear abuse" of discretion by the Lower Court in its denial of its claim for counter-security. See Result Shipping, 56 F.3d at 401.

RESTATEMENT OF THE FACTS

A. SCI IS A SOVEREIGN ENTITY

SCI argued, without rebuttal from Jaldhi, "that it is an instrumentality of the Government of India [citation omitted]." Vacatur Order. (JA-86). Jaldhi raises for the first time on appeal a factual argument, in a footnote of its brief, that SCI, despite being majority owned by the Government of India, could still be "declared insolvent and bankrupt...". Jaldhi Brief at 3.n.1. The assertion is improper, irrelevant and unsupported by any evidence.

SUMMARY OF THE ARGUMENT

As recognized by the Court in Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd., 460 F.3d 434, 436 (2d Cir. 2006):

> Under the law of this Circuit, EFTs to or from a party are attachable by a court as they pass through banks located

in that court's jurisdiction. See Winter Storm Shipping, Ltd. v. TPI, 310 F.3rd 263 (2d Cir. 2002).

(footnote omitted, emphasis added).

That is the Winter Storm "rule." See, Consub Delaware LLC, 543 F.3d at 109.

In respect of the cross-appeal, as stated above, SCI is indisputably a sovereign entity immune from pre-judgment attachment under 28 U.S.C. § 1609 except as provided for in §§ 1610 and 1611. Neither of those sections refer to an exception to immunity from pre-judgment attachment so as to require posting of counter-security under Supplemental Rule E for permissible counterclaims under Section 1607. The doctrine of "expression unius est exclusio alterius" clearly applies.

REPLY ARGUMENT

POINT I

THE PMAG WAS PROPERLY ISSUED AND, PURSUANT TO THE WINTER STORM "RULE," PROPERLY ATTACHED EFTS OF WHICH JALDHI WAS THE BENEFICIARY

The Winter Storm "rule" is that attachment of electronic funds transfers "to or from" a defendant is permissible. 310 F. 3d 263 (2d Cir. 2002) [emphasis added]. The Lower Court impermissibly ignored the rule.

POINT II

THE LOWER COURT'S EARLIER DECISION PROVIDED NO VALID BASIS FOR IT TO QUESTION THE WINTER STORM "RULE"

The Lower Court's decision in Seamar Shipping Corp. v. Kremikovtzi Trade Ltd., 461 F.Supp. 2d 222 (S.D.N.Y. 2006) stated that the Aqua Stoli footnote, 460 F.3d at 446 n. 6 "raises a serious question of whether Winter Storm's implicit holding that EFTs may be considered to be a defendant's property while in transit remains good law." 461 F. Supp.2d at 224.

Jaldhi's discussion of Seamar as "interpretative case law" or the "guiding case",[2] while ignoring the numerous decisions that have had no difficulty in recognizing and following the Winter Storm rule,[3] deliberately misses the point.

While Consub Delaware's footnote, 543 F.3d at 109, n. 1, leaves open the issue on this appeal, it also unequivocally puts to rest the existence of any "doubt" over the Winter Storm rule.

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2 Jaldhi Brief at 5 and 11.

3 Cited in SCI's Opening Brief at 6-8.

OPPOSITION TO CROSS-APPEAL

POINT I

THE FSIA CLEARLY PROHIBITS ATTACHMENT IN RESPECT OF PERMISSIBLE COUNTER-CLAIMS EXCEPT AS PROVIDED IN SECTIONS 1610 AND 1611 WHICH MAKE NO EXCEPTION FOR SUPPLEMENTAL RULE E

As the Vacatur Order notes, "SCI admits that by bringing this action, it has waived its immunity from counterclaims ...". (JA-87). That statutory waiver is set out in section 1607. That section makes no reference to waiver of immunity from pre-judgment attachment for such counterclaims provided in Section 1609. SCI argued, and the Lower Court agreed, that the FSIA immunity from counterclaims is not the same as waiver of immunity for attachment and security for counterclaims and that only sections 1610 and 1611 provide exceptions to immunity.

28 U.S.C. § 1609 states:

> **§ 1609. Immunity from attachment and execution of property of a foreign state.**
>
> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment, arrest and execution except as provided in sections 1610 and 1611 of this chapter.

(emphasis added).

Neither Section 1610 nor Section 1611 make any reference to permitting pre-judgment attachment under Supplemental Rule E. As the Vacatur Order held:

> The Second Circuit, however, treats pre-judgment security for claims against a sovereign as a form of "attachment." See, e.g., British Int'l Ins. Co. v. Seguros La Republica, S.A., 212 F.3d 138, 141-42 (2d Cir. 2000); Stephens v. Nat'l Distillers & Chem. Corp., 69 F.3d 1226, 1229-30 (2d Cir. 1995). 28 U.S.C. § 1609 grants immunity from attachment to a sovereign instrumentality, subject only to the exceptions set forth in 28 U.S.C. §§ 1610 and 1611. But the only such exception to pre-judgment attachment predicated on waiver requires that such waiver be made "explicitly." § 1610(d)(1). Unlike a waiver of a foreign state's immunity from attachment in aid of execution, which can be waived implicitly, "the immunity from prejudgment attachment [under § 1610(d)] can be waived only by unmistakable and plain language." S&S Mach. Co. v. Masinexportimport, 706 F.2d 411, 416 (2d Cir. 1983) (second emphasis added). "[A] waiver of immunity from prejudgment attachment must be explicit in the common sense meaning of that word: 'the asserted waiver must demonstrate unambiguously the foreign state's intention to waive its immunity from prejudgment attachment in this country.'" Banco de Seguros del Estado v. Mut Marine Office, Inc., 344 F.3d 255, 261 (2d Cir. 2003) (quoting S&S Mach., 706 F.3d at 416); see also Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A., 676 F.2d 47, 49 (2d Cir. 1982). Neither SCI's susceptibility to counterclaims under § 1607 nor SCI's attachment of Jaldhi's funds amounts to an "unmistakable," "clear and unambiguous" waiver of SCI's immunity to pre-judgment attachment, and hence Jaldhi's motion for counter-security must be denied.

J.A.-87.

That reasoning is correct.

POINT II

SCI'S NEW ARGUMENT THAT COUNTER-SECURITY UNDER SUPPLEMENTAL RULE E IS NOT AN "ATTACHMENT" PROHIBITED BY THE FSIA IS WRONG

Jaldhi claims that the "reasoning" of Willamette Transport, Inc. v. CIA Anonima Venezolana de Navegacion, 491 F.Supp. 422 (E.D.La. 1980), a case that it did not cite below, "should govern this matter." Jaldhi Brief at 14.

Jaldhi entirely ignores British International, the first Second Circuit authority case cited by the Lower Court, supra. It calls the second cited decision, Stephens, supra, "instructive"[4] but, presumably, considers that the Lower Court's reliance on it rather than on the "learned explanation" in Willamette is reversible error. Id. at 13. Jaldhi's cross-appeal simply ignores the precedent set by this Court in favor of a case from the Louisiana District Court that has been cited in decisions of this Court that have rejected it. The argument is unpersuasive.

A. The Lower Court Correctly Followed This Court's Precedent

In British International an insurance company, Seguros La Republica, claimed that the security requirement of New York Insurance Law § 1213 violated its due process rights on the grounds that the requirement was "equivalent to a prejudgment attachment of its property". 212 F.3d at 141. The Court held "that

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[4] Jaldhi Brief at 14.

the security requirement of 1213 is the functional equivalent of an attachment, but that it satisfies the due process requirements...". Id.

In Stephens the Court also considered a decision exempting foreign sovereign retrocessionaires from posting "pre-answer security" under New York Insurance Law § 1213(c)(1).[5] 69 F.3d 1228. The Lower Court's decision holding that the requirement was the equivalent of an attachment had relied "heavily" on S&S Machinery Co. v. Masinexportimport, 706 F.2d 411, 418 (2d Cir. 1983) cert. denied, 464 U.S. 850 (1983). The Court stated:

> In S&S Machinery we explained that the "FSIA would become meaningless if courts could eviscerate its protections merely by denominating their restraints as injunctions against the negotiation or use of property rather than as attachments of that property," and we indicated that the FSIA's ban on pre-judgment attachment of assets should preclude "any other means to effect the same result." Id.; see also Caribbean Trading & Fidelity Corp., 948 F.2d at 116 (Mahoney, J., concurring).

69 F.3d at 1229.

The Court stated that it was "not persuaded" by the cases cited by the Appellant Liquidator including the Louisiana District Court decision, Willamette, that Jaldhi claims this Court should follow while eschewing its prior rulings. The

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[5] The Court noted that the District Court, in affirming the Magistrate Judge, had considered that Kentucky's insurance law should apply. Based, however, on the parties' repeated reference to New York law, the Court's decision was based on the New York law. Id.

Court rejected a purported distinction between an attachment of a piece of property "regardless of the relationship" of it to the litigation and pre-judgment attachment, stating:

> Neither Sperry nor the FSIA, however, makes this distinction. Rather, the FSIA forbids any "attachment[,] arrest or execution " of a foreign sovereign's property subject only to the exceptions set forth in §§ 1610-1611. And we are not at liberty to create other exceptions, not in the statute. We ought not, moreover, readily ignore our conclusion in S&S Machinery – which postdated Sperry – that the principle behind the prohibition against attachments should apply broadly. For, as we noted in that case, "such a measure could only ... result[ ] in the disingenuous flouting of the FSIA ban on prejudgment attachment of assets." S&S Machinery, 706 F.2d at 418.

69 F.3d at 1230 (emphasis added)

Moreover the Court's statement in Caribbean Trading and Fidelity Cargo v. Nigerian National Petroleum Corp., 948 F.2d 111, 114 (2d Cir. 1991) that "[a]ssuming that an order requiring the posting of security is an 'attachment' of a foreign sovereign's property within the meaning of the FSIA – a matter about which doubt exists" [citations omitted] was premised upon its citations to Sperry Int'l Trade Inc. v. Government of Israel, 689 F.2d 301, 305 n. 17 (2d Cir. 1982) and Willamette. The later Stephens decision, rejecting both cases as unpersuasive and endorsing the "conclusion in S&S Machinery – which postdated Sperry – that the principle behind the [FSIA] prohibition against attachments should apply broadly", clearly removes any such "doubt." Jaldhi's suggestion that Stephens

"should be limited to the specific facts before it" misdirects the Court from the "broad" application that both Stephens and S&S Machinery have made clear applies to the Section 1609 prohibition of pre-judgment attachments of sovereigns' assets.

B. Jaldhi's Reliance On Willamette Is Mistaken

In Willamette a Venezuelan government owned shipowner, CAVN, was the defendant and counterclaimant and third-party plaintiff against the plaintiff's ship, in rem. 491 F.Supp. at 443. The plaintiff posted a bond and sought Supplemental Rule E counter-security. The Louisiana District Court recognized that a sovereign owned vessel could not be "arrested to enforce a maritime lien" under 28 U.S.C. § 1605(b) but claimed that counter-security "serves to create an 'equality of security' between the litigants [citing] Geotas Compania de Vapores, S.A. v. S.S. Arie H., 237 F.Supp. 908, 910 (E.D. Pa. 1964)". Id. at 443.

The Court also relied on The "Gloria", 267 F. 929, 931 (S.D.N.Y. 1919) where the United States' claim was stayed until it posted security. The Court concluded:

> Because CAVN is not entitled to immunity under section 1605 of the Act, and because a private individual would be required to post counter-security, CAVN must post security...

Id. at 444.

Jaldhi argues that the "facts are analogous", notwithstanding that the Willamette ratio decidendi was that CAVN was "not entitled to immunity" under an unspecified exception in 28 U.S.C. § 1605. It ignores the limitation on creating "other exceptions not in the statute." Stephens, supra. Neither Geotas nor "Gloria" are FSIA cases.

C. Other Cases Cited Requiring Counter-Security Do Not Address The FSIA Immunity Exceptions

Jaldhi string cites: Titan Nav., Inc. v. Timsco, Inc., 808 F.2d 400 (5th Cir. 1987); Sea Transport Contractors, Ltd. v. Industries Chemiques du Senegal, 411 F.Supp.2d 386 (S.D.N.Y. 2006); Ocean Line Holdings Ltd. v. China Natl. Chartering Corp., -- F.Supp --, 2008 WL 4369262 (S.D.N.Y. Sept. 26, 2008); Result Shipping Co., Ltd. v. Ferruzzi Trading USA Inc., *supra*, 56 F.3d 394; Rosemary v. Jaldhi Overseas Pte Ltd., 531 F.Supp.2d 586 (S.D.N.Y. 2008); Voyager Shipholding Corp. v. Hanjin Shipping Co., Ltd., 539 F.Supp.2d 688 (S.D.N.Y. 2008); and Dougbu Exp. Co., Ltd. v. Navios Corp., 944 F. Supp. 235 (S.D.N.Y. 1996).

Only two of the cited cases involve the FSIA. In Sea Transport the defendant failed to make a "prima facie case that it is an agency or instrumentality of a foreign sovereign state under section 1603(2), and thus its claim to immunity under the FSIA fails." 411 F. Spp.2d at 392. In Ocean Line, the Rule B defendant, Sinochart, was found to be "not immune from attachment under the FSIA because

it is not an instrumentality of the PRC." Id. at *4. The argument that Rule E counter-security is a permissible pre-judgment exception, albeit unstated in sections 1610 and 1611, is unsupported by and contrary to the precedent of this Court requiring "broad" application of the Section 1609 pre-judgment immunity granted foreign sovereigns from attachment of their assets.

CONCLUSION

Appellant SCI respectfully requests that this Court grant its appeal and vacate, in part, the District Court's order dated June 27, 2008 with instructions that the Beneficiary EFTs remain attached and that it deny the cross-appeal and grant Appellant such other and further relief as it deems appropriate.

Dated: New York, New York
December 1, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH FED. R. APP. P. 32(A)(7)

JEREMY J.O. HARWOOD declares:

I am a member of Blank Rome LLP, attorneys for Plaintiff-Appellant, The Shipping Corporation of India, Ltd.

In order to determine the number of words, excluding the corporate disclosure statement, the table of contents, and the table of authorities in Plaintiff-Appellant's brief, I used the word-count feature of Microsoft Word 2003, the word-processing program used to prepare the brief. The word count so determined was 2,858. I therefore certify that the brief complies with Federal Rules of Appellate Procedure 32(a)(7)(B).

Dated: New York, New York
December 1, 2008

Jeremy Harwood.
JEREMY J.O. HARWOOD