SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2004-002321 03/22/2004

HON. THOMAS DUNEVANT, III

CLERK OF THE COURT
K. Ballard
Deputy

FILED: 03/24/2004

CYPRUS CLIMAX METALS COMPANY ROBERT J POHLMAN

v.

EQUATORIAL MINING LIMITED STEPHEN M DICHTER

FINANCIAL SERVICES-CCC

RULING

Plaintiff's Application for Provisional Remedy of Prejudgment Garnishment has been under advisement. The Court finds and rules as follows:

Elements Required For Issuance Of A Writ Of Prejudgment Garnishment

On February 5, 2004, Cyprus sought the provisional remedy of a prejudgment garnishment pursuant to A.R.S. § 12-1572 against the following: (1) Equatorial Mining North America, Inc. ("Equatorial Mining"); (2) Equatorial Tonopah, Inc. ("Equatorial Tonopah"); and (3) Kvaerner U.S. Inc. and Kvaerner A.S.A. (collectively, "Kvaerner").

By statute, A.R.S. § 12-2411(C)(1), the hearing is limited to the following issues: (1) the probable validity, that is the probability of Cyprus's success at trial and any defenses or claims of personal property exemptions of Equatorial, and (2) the statutory requirements for the issuance of a prejudgment writ of garnishment. *See* A.R.S. § 12-2410(C)(1)-(2). If the Court finds "probable cause" to believe that Cyprus's claim is valid and the statutory requirement for the issuance of a provisional remedy are met, then the provisional remedy should issue.

I. Jurisdiction

There are three things a court must have to hear and decide this controversy: (1) personal jurisdiction over the parties; (2) jurisdiction over the subject matter; and (3) power to "render the

particular kind of judgment," which the parties seek. *See Collins v Superior Court*, 48 Ariz. 381, 393, 62 P.2d 131, 137 (1937).

Here, Plaintiff Cyprus Climax Metals Company ("Cyprus") seeks to garnish an indebtedness owed by Kvaerner U.S. Inc. ("Kvaerner") to Defendant Equatorial Mining Limited ("Equatorial").

A. Intangible Debt

A debt or indebtedness is an intangible thing, or obligation, which can be properly garnished pursuant to Arizona law. *See* A.R.S. § 12-1572 (2)(a).

Under Arizona law, one may garnish an intangible obligation, such as a debt owed and jurisdiction is proper where the court may validly exercise personal jurisdiction over both the garnishee and over the underlying obligation, the *res*, pursuant to statute. 6AM. JUR. 2D *Attachment and Garnishment* §§ 32-33; *see also Weitzel v. Weitzel*, 27 Ariz. 117, 119, 230 P. 1106, 1106 (1924); *G.T. Helicopters, Inc. v Helicopters Ltd.,* 135 Ariz. 380, 661 P.2d 230 (App. Ct. 1983); and *Knox v. Knox*, 137 Ariz. 494, 495, 671 P.2d 935, 936 (Ct. App. 1983). Here, subject matter jurisdiction is proper in this court over both the garnishment proceedings and the underlying claim. *See* Ariz. Const. Art. 6 § 14; A.R.S § 12-123; *Ruby v. United Sugar Cos.,* 56 Ariz. 535, 540, 109 P.2d 845, 847 (1941). The indebtedness owed to Equatorial by Kvaerner is an intangible property right specifically subject to garnishment by Arizona statute. *See* § 12-1570.01. The situs of the indebtedness or *res* is where the debtor, Kvaerner, can be found and sued. Kvaerner has subjected itself to the jurisdiction of Arizona courts. Thus, this Court may properly garnish Kvaerner's indebtedness to Equatorial. This Court has jurisdiction to garnish the underlying debt because the garnishee could have been sued by Equatorial in Arizona on the debt. *See Weitzel*, at 27 Ariz. at 119-20, 230 P. at 1106.

Furthermore, the legislature chose to set out separate statutory sections to specifically address the garnishment of funds in certain accounts. *See, e.g.,* A.R.S. § 12-1577. If one could not garnish an "indebtedness" without tying that garnishment to specific funds or accounts, there would have been no need for the legislature to separately provide for garnishment of "indebtedness." *See Airport Properties v. Maricopa County*, 195 Ariz. 89, 96, 985 P.2d 574, 581 (Ct. App. 1999).

Equatorial's reliance on *Desert Wide Cabling & Installation v. Wells Fargo & Co.,* 191 Ariz. 516, 958 P.2d 457 (1998) and A.R.S. § 12-1577 is misplaced because it applies to writs served on banks with reference to garnishment of specific and tangible funds. *See also The Nat'l Fire Insur. Co. v. Ming*, 7 Ariz. 6, 60 P. 720 (1900).

B. The Court Has Personal Jurisdiction Over The Garnishee

Personal jurisdiction is proper over Kvaerner, the garnishee, because Kvaerner is authorized to do and has been continuously doing business in the State of Arizona.

C. Cyprus's Application For Provisional Remedy Is Not Premature

Under Arizona law, "whether a claim is liquidated is a question of fact." *Able Distrib. Co. v. Lampe*, 160 Ariz. 399, 406, 773 P.2d 504, 511 (Ct. App. 1989). A claim is considered to be liquidated "if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness without reliance on opinion or discretion." *Id.*

Here, the terms of the POA contract provide that Equatorial is to pay Cyprus a total sum of $15 million, either in stock, cash, or some combination of the two. Cyprus has provided evidence of the amount of the debt. The dispute is about how it should be paid and what portion of that debt has already been paid.

Equatorial's arguments that the debt is not liquidated because Equatorial disputes the debt and claims an offset does not make the debt unliquidated. Under Arizona law the "mere fact that parties dispute a claim does not make the claim unliquidated." *Id.* at 406, 511. Further, even if Equatorial's claims are to be characterized as an "unliquidated" offset, the debt asserted by Cyprus is ascertainable. "Where there is a liquated claim and an unliquidated offset, the offset does not render the entire claim unliquidated." *Id.*

D. Garnishee Kvaerner's Debt To Equatorial Is Non-Contingent

The debt was fully adjudicated, is not subject to appeal, has been reduced to judgment, and Kvaerner has already begun paying the debt, having paid $89 million dollars with the remaining $12 million to be paid.

E. Equatorial's Debt To Cyprus Is Not Contingent

Equatorial's debt to Cyprus is not contingent on any event or occurrence. *See Triple E. Produce Corp. v. Valencia*, 170 Ariz. 375, 378-79, 824 P.2d 771, 774-75 (1962). Equatorial's argument that the debt is contingent based on the contractual provisions regarding appraisal is incorrect. A contingent debt is defined as a debt "which the debtor will be called upon to pay only upon the occurrence or happening of an extrinsic event which will trigger the liability of the debtor to the alleged creditor." *In re Fostvedt*, 823 F. 2d 305, 306 (9th Cir. 1987). Here, the Court concludes that the appraisal provision does not give rise to liability. Rather, it serves to establish how much additional cash must be provided on the $15 million dollar purchase price. This provision goes to the valuation of the stock in Cyprus's hand and not to whether the total $15 million dollar debt exists.

The Purchase Option Agreement

On April 30, 1997, Cyprus entered into a Purchase Option Agreement [the "contract"] with Equatorial. The contract stated that, in exchange for a payment of $200,000, Cyprus would grant Equatorial the sole and exclusive option to purchase all the shares of Cyprus Mineral Park Corporation and the Copper Ore Body owned by Cyprus Tonopah located near Tonopah, Nevada [the "Tonopah Mine"]. The option remained in effect until August 31, 1997. On August 28, 1997, Equatorial exercised its option to purchase the Tonopah Mine.

The contract provided that if Equatorial elected to exercise the option, at closing it would be required to pay an equivalent of $15,200,000 as follows:

1. The $200,000 payment for the option would be credited against the total amount leaving the equivalent of $15,000,000 due;

2. Equatorial would issue and deliver 4.5% of all the issued and outstanding shares of Equatorial common stock (the "shares");

3. In the event that the market value of the shares was not equal or greater than $15,000,000 as of December 31, 2001, Equatorial was, at its option to, either pay Cyprus cash in an amount equal to the difference between the market value and $15,000,000 or issue such additional shares sufficient to make up the difference.

At closing, Equatorial issued and delivered 4.5% of its shares to Cyprus and was required to make a post-closing payment to Cyprus for the difference between the market value of those shares on December 31, 2001 and $15 million.

Between the closing date and December 31, 2001, in March 2001, when the post closing payment was due, Equatorial filed a lawsuit against Kvaerner for fraud, breach of contract, bad faith, negligent misrepresentation, gross negligence, and professional negligence in performing the feasibility study which Equatorial relied on in deciding to exercise its option to purchase the Tonopah Mine. Among the $136 million dollar in damages Equatorial sought to recover was the post-closing "payment of $15 million due [to Cyprus] in December 2001."

Because Equatorial stated that it lacked sufficient resources and desired to continue its litigation against Kvaerner, Equatorial requested that Cyprus grant it an extension on its post-closing payment. On December 31, 2001, Cyprus and Equatorial entered into Amendment Number One to the Purchase Option Agreement. This Amendment extended the payment date to June 30, 2002. Subsequently, Cyprus and Equatorial entered into another four Amendments to the Purchase Option Agreement extending the payment date to April 30, 2003. The parties did not thereafter extend the payment date. Pursuant to the Fifth Amendment, on April 30, 2003, Equatorial was required to pay Cyprus the difference between the market value of the shares on that date and $15 million dollars. To date, Equatorial has not paid the post-closing payment.

On July 17, 2003, in the litigation by Equatorial against Kvaerner, a jury awarded Equatorial and its subsidiaries $136.9 million dollars which included a total of $15 million to Equatorial for the purchase of the Tonopah Mine. On January 2004, Equatorial and its subsidiaries settled the claim against Kvaerner. Kvaerner still owes Equatorial the sum of $12 million.

Cyprus filed its Complaint against Equatorial for breach of contract. Equatorial filed a counterclaim against Cyprus.

Whether Equatorial Has Any Valid Counterclaims/Defenses To Cyprus's Breach Of Contract Claim Is Premature To Determine

At present, whether one or more of the counterclaims/defenses asserted by Equatorial are valid cannot be determined. Discovery is ongoing and whether certain doctrines (e.g. judicial/collateral estoppel) apply, or whether the statute of limitations would bar any counterclaim is not yet ripe for determination.

For the foregoing reasons,

IT IS ORDERED:

1) Granting the Application for Provisional Remedy (prejudgment garnishment).

2) Cyprus shall post a bond in the amount of $14,500,000.00.

3) Cyprus shall submit a form of judgment/order to the Court.