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**ANATOLIA DENIZCILIK SANAYI VE TICARET LTD. STI., Plaintiff, - v -
COWANSVILLE HOLDING LIMITED, Defendant.**

09 Civ. 1739 (NRB)

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
NEW YORK**

2010 U.S. Dist. LEXIS 3878

**January 13, 2010, Decided
January 14, 2010, Filed**

COUNSEL: [*1] For Anatolia Denizcilik Sanayi Ve Ticaret LTD. STI., Plaintiff: George Michael Chalos, LEAD ATTORNEY, Chalos & Co., P.C., Oyster Bay, NY.

JUDGES: NAOMI REICE BUCHWALD, UNITED STATES DISTRICT JUDGE.

OPINION BY: NAOMI REICE BUCHWALD

OPINION

MEMORANDUM and ORDER

NAOMI REICE BUCHWALD

UNITED STATES DISTRICT JUDGE

Plaintiff in this maritime action obtained an order from this Court on February 25, 2009, directing the Clerk of the Court to issue a Process of Maritime Attachment and Garnishment against, *inter alia*, funds and property belonging to, due or being transferred to, from or for the benefit of defendant in the amount of \$ 681,742.97 pursuant to *Rule B of the Supplemental Rules for Admiralty and Maritime Claims* and Asset Forfeiture Actions of the Federal Rules of Civil Procedure. On March 23, 2009 plaintiff filed a declaration indicating

that an electronic funds transfer ("EFT") in the amount of \$ 253,444 had been attached. On April 22, 2009, plaintiff notified the Court by letter that arbitration had commenced in the underlying dispute. Thereafter, the parties signed, and on May 22, 2009 this Court so-ordered, a stipulation (the "Stipulated Order") providing that the restrained funds would be deposited in escrow pending [*2] the outcome of the arbitration, and further providing for the cessation of all other attachments.

Pursuant to a provision of the May 22 Stipulated Order providing that this Court retained authority to order release of the funds upon the application of either party, defendant now seeks the release of the escrowed funds in light of the Second Circuit's holdings that EFTs are not attachable property, *The Shipping Corp. of India v. Jaldhi*, 585 F.3d 58, 71 (2d Cir. 2009), and that the rule is retroactive, *Hawknet, Ltd. v. Overseas Shipping Agencies*, No. 09-2128-cv, 590 F.3d 87, 2009 U.S. App. LEXIS 28599, 2009 WL 4911944, *1 (2d Cir. Dec. 22, 2009) (amended opinion). Plaintiff objects to defendant's application by arguing, in essence, that defendant's voluntary and negotiated agreement to transfer the attached funds into an escrow account removes this matter from the scope of both *Jaldhi* and *Hawknet*. We find plaintiff's arguments unpersuasive, and grant defendant's requested release and turnover of the attached and escrowed funds.

In support of its position, plaintiff cites an endorsed letter in another maritime case where Judge Marrero indicated that no further response to his Order to Show Cause was necessary in light of the [*3] fact that the funds at issue had been placed into the court registry by stipulation. *Transfield ER Cape Ltd. v. Crownland Int'l Co., Ltd.*, No. 08 Civ. 8602 (VM) (S.D.N.Y. Oct. 28, 2009) (Order). Plaintiff also cites *Navinord S.A. v. Eastborne Maritime Ltd.*, No. 09 Civ. 3761(LAK) (S.D.N.Y. Nov. 19, 2009) (Order), in which Judge Kaplan agreed with the plaintiff in that case that defendant's consent to transferring the attached funds to an escrow account in London placed those funds beyond the reach of *Jaldhi*. Notably, Judge Kaplan still vacated the process of maritime attachment. *Navinord*, No. 09 Civ. 3761 (LAK), at *1. While the circumstances of the agreements in *Transfield* and *Navinord* are not entirely clear, other courts have distinguished those cases in light of the apparent lack of jurisdictional objection from the defendants involved. See *HC Trading Int'l Inc. v. Crossbow Cement, SA*, No. 08 Civ. 11237 (JGK), 2009 U.S. Dist. LEXIS 111889, 2009 WL 4337628, at *1 (S.D.N.Y. Dec. 2, 2009).

In any event, the Second Circuit made it clear in *Hawknet* that, because *Jaldhi* overruled *Winter Storm Shipping Ltd. v. TPI*, 310 F.3d 263 (2d Cir. 2002), defendants cannot be faulted for failing to raise, pre-*Jaldhi*, a jurisdictional [*4] defense that would have been contrary to then-controlling law in this Circuit. See *Hawknet*, 2009 U.S. App. LEXIS 28599, 2009 WL 4911944, at *2 P[T]he doctrine of waiver demands conscientiousness, not clairvoyance, from parties."). For similar reasons, plaintiff's emphasis on the parties' pre-*Jaldhi* negotiated agreement ultimately proves unavailing under the circumstances here.

We recognize that the parties in this case may have engaged in a greater degree of negotiation prior to the escrow deposit than in other maritime cases -- namely, that plaintiff did agree to cease serving further process of attachment and garnishment following the deposit of the restrained funds. Plaintiff argues that this negotiated agreement amounted to defendant's consent to this court's jurisdiction. However, the subject matter of that bargained-for exchange (i.e., further attachment of EFTs) has been rendered a nullity by the subsequent *Jaldhi-Hawknet* line of cases in this Circuit. Considered in this context, this case is indistinguishable from the

other cases in which our colleagues have held that consenting to the deposit of funds in an escrow account or the Registry of the Court does *not* amount to consent to jurisdiction where the [*5] initial basis for attachment was infirm: "No alchemy by the parties transformed EFTs that do not provide personal jurisdiction over the defendant under Rule B into a basis for this Court's jurisdiction over the defendant." *HC Trading*, 2009 U.S. Dist. LEXIS 111889, 2009 WL 4337628, at *1.

Plaintiff has not shown any valid alternative basis for this Court's jurisdiction over the defendant or its property. Insofar as plaintiff argues that this Court should exercise equitable discretion to maintain the attachment, this argument fails in light of controlling Second Circuit precedent. See, e.g., *Global Maritime Investors v. Companhia Siderurgica Nacional*, No. 08 Civ. 11199(SAS), 2009 U.S. Dist. LEXIS 115218, 2009 WL 4730196, at *2 (S.D.N.Y. Dec. 9, 2009) ("[T]he Court is not swayed that equity considerations require that the funds remain attached, particularly where the initial attachment was infirm and this Court lacks jurisdiction over [the defendant].").

For the foregoing reasons, defendant's application is granted. Plaintiff's counsel shall turnover the attached funds pursuant to written instructions provided by letter from counsel for defendant. It is further ordered that these funds shall not be subject to any further attachment in the Southern [*6] District of New York following their release and transmission to defendant pursuant to those instructions. In addition, since plaintiff has not demonstrated any valid alternative basis for this Court to assert jurisdiction over the defendant or its property, the case is dismissed.

SO ORDERED.

Dated: New York, New York

January 13, 2010

/s/ Naomi Reice Buchwald

NAOMI REICE BUCHWALD

UNITED STATES DISTRICT JUDGE