Warner Bros. International Television Distribution v. Golden Channels & Co.

United States District Court, C.D. California. | March 14, 2005 | Slip Copy | 2005 WL 8162980

Document Details

standard Citation:	Warner Bros. Int'l Television Distribution v. Golden Channels & Co., No. CV0209326MMMSHSX, 2005 WL 8162980 (C.D. Cal. Mar. 14, 2005)
All Citations:	Slip Copy, 2005 WL 8162980

Search Details

Search Query:	adv: "A Letter shall not #be used #to obtain evidence #which is not intended #for use #in judicial proceedings, commenced #or contemplated."
Jurisdiction:	California

Delivery Details

Date:	January 26, 2020 at 1:56 AM
Delivered By:	
Client ID:	NOCLIENTID

Outline

2005 WL 8162980
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

WARNER BROS. INTERNATIONAL TELEVISION DISTRIBUTION, a division of Time Warner Entertainment Company, L.P., Plaintiff,
v.
GOLDEN CHANNELS & CO., and Does 1-10, inclusive, Defendants.

Case No. CV 02 - 09326 MMM (SHSx)
|
Signed 03/14/2005
|
Entered 03/23/2005

Attorneys and Law Firms

William H. Forman, Heller Ehrman LLP, Andrew Benjamin Grossman, Paul Hastings LLP, Emily Churg, Wilmer Cutlert Pickering Hale and Dorr LLP, Los Angeles, CA, for Plaintiff.

Oriet Cohen-Supple, Edward S. Zusman, Markun Zusman and Compton LLP, San Francisco, CA, for Defendants.

ORDER DENYING DEFENDANT'S *EX PARTE* APPLICATION TO SET ASIDE JUDGE SEGAL'S ORDER AND DENYING PLAINTIFF'S REQUEST FOR SANCTIONS

MARGARET M. MORROW, UNITED STATES DISTRICT JUDGE

***1** Plaintiff Warner Bros. International Television Distribution, a division of Time Warner Entertainment Company, L.P., is one of the largest distributors of entertainment programing in the international market. Defendant Golden Channels & Co., an Israeli partnership, is a cable television provider that has broadcast cable television programming in Israel since 1990. On July 13, 1999, Warner and Golden executed a written License Agreement, pursuant to which Warner licensed certain programming to Golden for a fee. Warner charged that Golden breached its obligations under the licensing agreement, terminated the contract on December 9, 2002, and filed this action the same day. Thereafter, Golden also purported to terminate the contract. On February 14, 2003, it filed an answer and counterclaims against Warner. The action was tried to the court from January 13 to January 23, 2004. On September 29, 2004, the court entered judgment for Warner on its breach of contract claim. [1] On November 17, 2004, the court denied Golden's motion for a new trial.

On December 9, 2004, Warner filed an *ex parte* application requesting issuance of letters rogatory pursuant to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, March 18, 1970, T.I.A.S. No. 7444, codified at 28 U.S.C. §§ 1781 et seq. ("Hague Evidence Convention"), and Rule 69(a) of the Federal Rules of Civil Procedure. Warner seeks post-judgment discovery from third parties in Israel, namely, Israel Cable Programming Ltd. ("ICP"), Matav-Cable Systems Media Ltd., Tevel Israel International Communications Ltd., and Bank Leumi Le Israel B.M. On December 15, 2004, Magistrate Judge Suzanne H. Segal granted Warner's application. On January 28, 2005, Golden filed a motion to set aside Judge Segal's order pursuant to Rule 72(a) of the Federal Rules of Civil Procedure. [2] Golden contends that the Hague Evidence Convention does not authorize the issuance of letters rogatory to obtain evidence in aid of enforcement or execution of judgment. Golden also argues that Warner failed to show good cause for issuance of the letters rogatory on an *ex parte* basis. Warner opposes Golden's motion, asserts that it is frivolous, and requests that the court impose sanctions pursuant to 28 U.S.C. § 1927 and the court's inherent authority to impose sanctions for bad faith litigation conduct.

I. DISCUSSION

A. Legal Standard For Review Of Magistrate Judge's Order

***2** Under Local Rule 69-1, magistrate judges are authorized to preside over motions for post-judgment discovery. See CA CD L.R. 65-9(1) ("A motion concerning execution of a judgment shall be made to the assigned District Court, unless the motion relates to ... post-judgment discovery, in which case the motion shall be made to the assigned Magistrate Judge"). A magistrate judge's order can be reversed by the district court only if it is "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A). The clearly erroneous standard applies to the magistrate judge's factual determinations and discretionary decisions. *Computer Economics, Inc. v. Gartner Group, Inc.*, 50 F.Supp.2d 980, 983 (S.D. Cal. 1999). Under this standard, the district court should overturn the ruling only when it is "left with the definite and firm conviction that a mistake has been

committed." *Concrete Pipe & Prods. of Cal., Inc. v. Constrs. Laborers Pension Trust,* 508 U.S. 602, 622 (1993).

In contrast, "[t]he 'contrary to law' standard ... permits independent review of purely legal determinations by the magistrate judge." *F.D.I.C. v. Fidelity & Deposit Co. of Maryland,* 196 F.R.D. 375, 378 (S.D. Cal. 2000); see also *Haines v. Liggett Group, Inc.,* 975 F.2d 81, 91 (3d Cir. 1992) ("[T]he phrase 'contrary to law' indicates plenary review as to matters of law"); *Medical Imaging Centers of America, Inc. v. Lichtenstein,* 917 F.Supp. 717, 719 (S.D. Cal. 1996) ("Section 636(b)(1) ... has been interpreted to provide for *de novo* review by the district court on issues of law"); *Gandee v. Glaser,* 785 F.Supp. 684, 686 (S.D. Ohio 1992) ("[T]his Court must exercise its independent judgment with respect to a Magistrate Judge's legal conclusions"); *Jernryd v. Nilsson,* 117 F.R.D. 416, 417 (N.D. Ill. 1987) ("Because Magistrate Weisberg's order is based upon legal conclusions and not on his findings of fact, the clearly erroneous standard does not apply and the scope of our review on this motion is plenary"); *Adolph Coors Co. v. Wallace,* 570 F.Supp. 202, 205 (N.D. Cal. 1983) ("[W]hile we may review magistral findings of fact, subject only to the 'clearly erroneous' standard, we may overturn any conclusions of law which contradict or ignore applicable precepts of law, as found in the Constitution, statutes or case precedent"). [3]

B. Under The Federal Rules Of Civil Procedure, Warner Is Entitled To Obtain Post-Judgment Discovery From Third Parties

Rule 69(a) of the Federal Rules of Civil Procedure provides, in relevant part, that "[i]n aid of the judgment or execution, the judgment creditor ... may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held." FED.R.CIV.PROC. 69(a). "The purpose of post-judgment discovery is to learn information relevant to the existence or transfer of the judgment debtor's assets." *British International Ins. Co., Ltd. v. Seguros La Republica, S.A.,* 200 F.R.D. 586, 589 (W.D. Tex. 2000). Accordingly, "[t]he scope of post-judgment discovery is broad, enabling judgment creditors to seek discovery of both current assets and past financial transactions that could lead to the existence of fraudulently concealed or fraudulently conveyed assets." *First Fidelity, N.A. v. Nissenbaum,* Civ. A. No. 89-2248, 1991 WL 46456, * 1 (E.D. Pa. Mar. 28, 1991); see *Caisson Corp. v. County West Bldg. Corp.,* 62 F.R.D. 331, 334 (E.D. Pa. 1974) ("All agree that [under Rule 69] the judgment creditor must be given the freedom to make a broad inquiry to discover hidden or concealed assets of the judgment debtor").

***3** "Rule 69(a) authorizes a judgment creditor to obtain discovery from 'any person,' not merely the judgement debtor." See *British International Ins. Co., supra,* 200 F.R.D. at 589. Post-judgment discovery sought from third parties, however, "must be kept pertinent to the goal of discovering concealed assets of the judgment debtor and not be allowed to become a means of harassment of the debtor to third persons." *Caisson Corp., supra*, 62 F.R.D. at 334. "The scope of discovery against third parties is therefore generally limited to 'the financial affairs of the judgment debtor.' " *Matthias Jans & Associates, Ltd. v. Dropic*, No. 01-MC-26, 2001 WL 1661473, * 2 (W.D. Mich. April 9, 2001).

C. The Hague Evidence Convention Does Not Prohibit The Issuance Of Letters Rogatory Requesting Post-Judgment Discovery

Golden does not dispute Warner's right to obtain post-judgment discovery under Rule 69(a). Rather, it asserts that the Hague Evidence Convention does not authorize the issuance of letters rogatory to obtain evidence in aid of the enforcement or execution of a judgment. The Hague Evidence Convention, to which the United States and Israel are signatories, is a multilateral treaty that "prescribes certain procedures by which the judicial authority in one contracting state may request evidence located in another contracting state." *Societe Nationale Industrielle Aerospatiale*, 482 U.S. 522, 524 (1987). In so doing, it attempts to "bridge the wide disparity between discovery techniques practiced in common law countries and in civil law countries." *In re Anschuetz & Co., GmbH*, 838 F.2d 1362, 1363 (5th Cir.1988); see *Boreri v. Fiat S.p.A.,* 763 F.2d 17, 19 (1st Cir. 1985) ("The Hague Convention represented an attempt to bridge this gap between the American and civil law methods of obtaining discovery"). [4]

The Hague Evidence Convention outlines three methods of securing evidence: (1) letters of request (Articles 1-14); (2) taking of evidence by diplomatic officers of the forum state (Articles 15-16); and; (3) taking of evidence by duly appointed commissioners (Article 17). See Hague Convention, 28 U.S.C. § 1781; *Boreri, supra*, 763 F.2d at 19. A letter of request, also known as a letter rogatory, is a direct communication from the court of one country to the court of another. See *Blaxland v. Commonwealth Director of Public*

Prosecutions, 323 F.3d 1198, 1206 (9th Cir. 2003). Article 1 of the Hague Evidence Convention provides:

> ***4** "In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act. A Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated. The expression 'other judicial act' does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures. Hague Evidence Convention, Art. 1, 28 U.S.C. § 1781.

Although Article I clearly authorizes issuance of letters of request to obtain evidence, Golden argues that Warner's discovery request is more properly characterized as a request for (1) "the service of judicial documents," (2) "the issuance of ... [the] process by which judgments or orders are executed or enforced," or (3) an order for "provisional or protective measures." Letters rogatory may not be used for these purposes. Hague Evidence Convention, Art. 1, 28 U.S.C. § 1781. Golden's argument is unpersuasive. Although there appear to be no published opinions addressing the scope of the judicial acts excluded by Article 1, an Explanatory Report prepared by Philip W. Amram, the rapporteur for the committee that drafted the Convention, provides some guidance. Amram states:

> "Article 1(3) was added after an extended discussion of the content of the phrase 'other judicial act' and illustrations given in the Report to the draft Convention.... There was unanimous agreement that the broad and all-inclusive term 'other judicial act' must be restricted. Service of documents should be excluded, since this is the subject of the separate Convention prepared by the Tenth Session. Enforcement of judgments should be excluded since this is the subject of the separate Convention on the Recognition and Enforcement of Foreign Judgments and the Supplementary Protocol which were considered at the Eleventh Session.... Provisional and protective measures should be excluded, such as injunction, restraining orders, forced sales, receiverships, mandamus, since these involve the discretion of the court having jurisdiction over the persons and the property that are subject to the domestic statutes and procedures. They are not subject to the mandatory order of a foreign judge (who in these cases cannot compel action merely be issuing a Letter of Request)." Phillip W. Amram, *Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters,* Section II A (1969) (original emphasis deleted). [5]

As the Explanatory Report makes clear, "service of judicial documents" is excluded from the definition of "other judicial act" because service of documents is the subject of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638 ("Hague Service Convention"). The purpose of the Hague Service Convention was to create an "appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time." Hague Service Convention, Preamble, T.I.A.S. No. 6638; see *Volkswagenwerk Aktiengesellschaft v. Schlunk,* 486 U.S. 694, 698 (1988) (stating that the purpose of the Hague Service Convention was to "provide a simpler way to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad"). A letter rogatory requesting that an Israeli court, by its "usual and proper process," cause a third party to appear for deposition and produce documents, is not a request for a service of a judicial document abroad. [6]

***5** Moreover, letters rogatory are not requests for the issuance of "process by which judgments or orders are executed or enforced." The Explanatory Report indicates that the drafters of the Hague Evidence Convention excluded enforcement of judgments from the definition of "other judicial act" because judgment enforcement is the subject of the Hague Convention on the Recognition and Enforcement of Foreign Judgments and Supplementary Protocol ("Hague Judgment Convention"). [7] See Amram, *Explanatory Report* at II A. A request to obtain information regarding the existence or transfer of a judgment debtor's assets is not equivalent to the issuance of process by which a judgment is enforced or executed. Rather, it is a request for evidence in anticipation of efforts to enforce or collect a judgment. The fact, moreover, that the Hague Judgment Convention contains no independent discovery provisions undercuts any suggestion that the drafters of the Hague Evidence Convention intended to exclude post-judgment discovery from its ambit.

The letters rogatory also do not constitute requests for provisional or protective measures. This phrase includes such discretionary measures as injunctions, restraining orders,

forced sales, receiverships, and mandamus. See Amram, *Explanatory Report* at II A. Clearly, a discovery request does not constitute an order for a provisional or protective measure, and Golden offers no explanation as to why it should be construed as such. Accordingly, Warner's request is precisely the type of request authorized by Article I.

Golden next argues that, so long as Warner's judgment is not enforceable in Israel, post-judgment discovery in that country is premature and an affront to Israel's sovereignty. The court disagrees. A judgment creditor's right to conduct post-judgment discovery under Rule 69(a) is not conditioned on the judgment being immediately enforceable. See *Minpeco, S.A. v. Hunt,* No. 81 CIV. 7619, 1989 WL 57704, *2 (S.D.N.Y. May 24, 1989) ("[E]ven if Minpeco could not execute the judgment at this time, it would still be entitled to conduct discovery in aid of execution"); cf. *Miami Int'l Realty Co. v. Paynter,* 807 F.2d 871, 872-73 (10th Cir. 1986) (noting that the district court stayed execution of judgment pending appeal on the condition that some security was posted and that defendant comply with post-judgment discovery pursuant to Rule 69). Golden, moreover, cites no authority for the proposition that requesting post-judgment discovery is an affront to Israel sovereignty so long as the judgment is not enforceable there. There is no apparent reason why an Israeli court would considr a discovery request authorized by the Hague Evidence Convention improper.[8] Even assuming it would, however, the appropriate remedy would be for the Israeli court to refuse to enforce the letters rogatory rather than for this court to decline to issue them in the first instance.

***6** In sum, the letters rogatory requesting post-judgment discovery do not constitute requests for the service of judicial documents; requests for the issuance of process by which judgments or orders are executed or enforced; or requests for an order for provisional or protective measures. Nor does Warner's request for post-judgment discovery pursuant to the Hague Evidence Convention constitute an affront to Israel's sovereignty. Because Golden has failed to demonstrate that Judge Segal's order granting Warner's application for the issuance of letters rogatory was contrary to law, there is no basis to set aside the order.

D. Golden Has Had A Full Opportunity To Address Any International Comity Issues That Are Implicated By Judge Segal's Order

Golden contends that Judge Segal's order should be set aside because Warner failed to demonstrate good cause for the issuance of letters rogatory on an *ex parte* basis. "To obtain *ex parte* relief, the moving party must show (a) that the moving party's cause will be irreparably prejudiced if relief is not granted, and (b) that the moving party is without fault in creating the crisis that requires *ex parte* relief, or that the crisis occurred as a result of excusable neglect." *Benton v. Allstate Ins. Co.,* No. CV-00-00499, 2001 WL 210685, * 10 (C.D. Cal. Feb. 26, 2001); see *Yokohama Tire Corp. v. Dealers Tire Supply, Inc.,* 202 F.R.D. 612, 613 (D. Ariz. 2001); *Mission Power Engineering Co. v. Continental Cas. Co.,* 883 F.Supp. 488, 492 (C.D. Cal. 1995). Golden contends Warner failed to show that it would be irreparably harmed if its application was not granted, or that it was without fault in creating the situation that gave rise to the request for *ex parte* relief. Whatever the merits of Golden's argument initially, Golden has now had a full opportunity, pursuant to a regular briefing schedule, to address any and all issues implicated by Judge Segal's order. Even assuming Warner failed to demonstrate good cause for the issuance of letters rogatory on an *ex parte* basis, therefore, there is no reason to set aside Judge Segal's order at this time, and the court declines to do so.

E. Sanctions Are Not Warranted

In its opposition to Golden's motion, Warner requests that the court sanction Golden pursuant to 28 U.S.C. § 1927 and the court's inherent authority to impose sanctions for bad faith conduct. Section 1927 provides that "[a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. An award of sanctions under § 1927 "must be supported by a finding of subjective bad faith." *New Alaska Development Corp. v. Guetschow,* 869 F.2d 1298, 1306 (9th Cir. 1989). " 'Bad faith is present when an attorney knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent.' " *In re Keegan Management Co., Securities Litigation*, 78 F.3d 431, 436 (9th Cir. 1996) (quoting *Estate of Blas v. Winkler*, 792 F.2d 858, 860 (9th Cir. 1986)). In addition to their sanctioning authority under § 1927, federal courts have inherent power to impose sanctions when a party "has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Chambers v. NASCO, Inc.,* 501 U.S. 32, 33 (1991).

Although the court finds Golden's arguments unpersuasive, it cannot say that they are frivolous, in that they turn on

language in Article 1 of the Hague Evidence Convention that has yet to be construed in a published opinion. Moreover, Warner has made no showing that Golden acted in bad faith or for oppressive reasons in filing this motion. Accordingly, Warner's request for sanctions must be denied.

II. CONCLUSION

***7** For the reasons stated, Golden's motion to set aside Judge Segal's order is denied. Warner's request for sanctions is also denied.

All Citations

Slip Copy, 2005 WL 8162980

Footnotes

1 The court originally entered judgment for Warner in the amount of $19,315,960. It subsequently granted Golden's motion to amend the judgment to deduct $586,046 in tax certificate damages, and Warner's motion to add $647,673.56 in prejudgment interest. Following amendment, the judgment awarded Warner damages of $19,377,587, $194,069.45 in costs, and $2,165,606.49 in attorneys' fees, for a total judgment amount of $21,737,262.94.

2 Rule 72(a) provides that "[w]ithin 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made." FED.R.CIV.PROC. 72(a). Golden contends that it was not served with Judge Segal's order until January 13, 2005, a fact Warner does not dispute. (See Declaration Of Oriet Cohen-Supple In Support Of Golden Channels & Co.'s Motion To Review Order Granting *Ex Parte* Application For Issuance Of Letters Rogtory ("Cohen-Supple Decl."), ¶ 5). Under Rule 6(a) of the Federal Rules of Civil Procedure, when the period of time prescribed or allowed by the rules is less than 11 days, intermediate Saturdays, Sundays, and legal holidays are excluded in the computation. FED.R.CIV. PROC. 6(a). Golden's motion was therefore timely filed on January 28, 2005.

3 At least two courts have suggested that the "contrary to law standard" is more deferential than *de novo* review. See *Merritt v. Int'l Broth. of Boilermakers,* 649 F.2d 1013, 1017 (5th Cir. 1981) ("Pretrial orders of a magistrate under § 636(b)(1)(A) are reviewable under the 'clearly erroneous and contrary to law' standard; they are not subject to a *de novo* determination as are a magistrate's proposed findings and recommendations under § 636(b)(1)(B)"); *Gallagher v. Weiner*, No. 92-1303, 1993 WL 460101, *5 (D.N.J. Oct. 29, 1993) (citing *Merritt, supra,* 649 F.2d at 1017); see also *Computer Economics, Inc., supra*, 50 F.Supp.2d at 983, n. 2 (noting the split of authority, and concluding that the contrary to law standard is "[a]t a minimum .... less deferential than the 'clearly erroneous' standard"). As these cases are contrary to the majority view, and neither offers any persuasive explanation for applying a more deferential standard, the court reviews questions of law *de novo.*

4 The Hague Convention is not the exclusive means of obtaining evidence abroad, nor must American litigants invoke Hague Convention procedures before initiating discovery under the Federal Rules of Civil Procedure. *Societe Nationale Industrielle Aerospatiale, supra,* 482 U.S. at 534-42; see also *First American Corp. v. Price Waterhouse LLP,* 154 F.3d 16, 21 (2d Cir. 1998). Rather, courts must determine on a case-by-case basis whether it is more appropriate to seek discovery in a foreign country pursuant to the Hague Convention or the Federal Rules of Civil Procedure. *Societe Nationale Industrielle Aerospatiale, supra,* 522 U.S. at 544-46. "In determining which methods of discovery to use, courts should consider: (1) the intrusiveness of the discovery requests given the facts of the particular case, (2) the Sovereign interests involved and, (3) the likelihood that resort to the Convention would be an effective discovery device." *In re Aircrash Disaster Near Roselawn, Ind. Oct. 31, 1994,* 172 F.R.D. 295, 309 (N.D. Ill. 1997).

5 See Cohen-Supple Decl., Exh. C (Reply Of Warner Brothers International Television Inc. To Golden Channel And Co.'s Opposition Re *Ex Parte* Application For Issuance Of Letters Rogatory, Exh. A).

6 Golden apparently contends that because the Israeli court will have to issue subpoenas to obtain the evidence Warner seeks, the letters rogatory constitute requests for the "service of judicial documents." This argument is without merit. The Hague Evidence Convention prohibits the use of letters rogatory to serve judicial documents issued in the requesting state, not judicial documents issued by the court in the recipient state. The fact that the Israeli court may issue subpoenas to obtain the evidence Warner seeks does not mean that the letters constitute requests for service of judicial documents abroad.

7 The Hague Judgment Convention has been ratified by just four countries: Cyprus, Kuwait, Netherlands, and Portugal. See Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters and Supplementary Protocol, Feb. 1, 1971, available at http://www.hcch.net (last visited March 5, 2005).

8 In this regard, Warner's discovery request is distinguishable from that at issue in *Intercontinental Credit Corp v. Roth,* 595 N.Y.S.2d 602 (1991). There, Bank Leumi brought a motion seeking relief from a discovery order that required it to disclose a judgment creditor's assets located in its Israeli branches. In granting Bank Leumi's motion, the court relied on two decisions of the Appellate Division of the New York Supreme Court, which had held that application of the Hague Convention is mandatory when discovery is sought from a non-party in a foreign jurisdiction. *Id.* at 603. Because the letters rogatory in this case were issued pursuant to the Hague Convention, *Intercontinental Credit Corp.* is inapposite. Moreover, the *Intercontinental Credit Corp.* court nowhere suggested that post-judgment discovery of third parties in Israel is improper if the underlying judgment is unenforceable there. To the contrary, it specifically noted that the judgment creditor could seek relief under the Hague Convention. *Id.*

End of Document