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Bankruptcy Court Exercises Jurisdiction Over Foreign Defendant Based on Consent to Jurisdiction Clauses in Loan Agreement and DIP Order.

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June 8, 2017 - The United States Bankruptcy Court for the Southern District of New York recently held that it had personal jurisdiction over a foreign defendant that was paid funds pursuant to the Court's order approving the debtors' post-petition financing (the "DIP order"), denying defendant Immigon's[1] motion to dismiss an adversary proceeding commenced by the Motors Liquidation Company Avoidance Action Trust seeking to clawback the funds.[2]

In 2006, General Motors entered into a \$1.5 billion Term Loan Agreement under which JP Morgan Chase Bank, N.A. and several other large financial institutions committed to provide funding and had the right to sell interests in the loan in the secondary market. In 2008, in connection with terminating a completely separate transaction, JP Morgan mistakenly authorized the termination of the security interest in the General Motors' assets securing the loan.

Under the debtors' DIP order, the Court authorized the debtors' to pay in full all of General Motors' obligations under the Term Loan Agreement, subject to the Official Committee of Unsecured Creditors' right to investigate and challenge the perfection of the liens securing the loan. Following entry of the order, GM paid approximately \$1.4 billion to its lenders under the Term Loan Agreement, including approximately \$9.8 million to defendant Immigon on account of its \$10 million interest in the loan purchased on the secondary market from JP Morgan.

In denying Immigon's motion to dismiss, including on the grounds that the Court lacked personal jurisdiction over Immigon, the Court found that under the Term Loan Agreement, Immigon had expressly consented to personal jurisdiction in New York and waived the right to object to any New York State or Federal Court as the

forum for any disputes arising out of the Agreement. Moreover, the Court found that the consent to jurisdiction and forum selections clauses should be enforced because Immigon “enjoyed the benefits and protection of New York law” in connection with the Agreement.

As a separate basis for exercising jurisdiction, the Court also held that Immigon consented to jurisdiction under the DIP order, which provided that any party receiving funds under the order consented to the jurisdiction of the Bankruptcy Court. Relying on evidence showing that an employee of Immigon had actually received and viewed the DIP order before receiving payment, the Court found that Immigon had knowingly consented to the jurisdiction provision in the DIP order by accepting payment of the funds.

As a third distinct basis for exercising jurisdiction over Immigon, the Court held that even if Immigon had not consented to the Court’s jurisdiction, sufficient minimum contacts existed between the litigation, New York and Immigon for the Court to exercise specific personal jurisdiction over Immigon. Specifically, the Court noted that “the lending relationship under the Term Loan Agreement was centered in New York, governed by New York law, and allowed all of the parties, including [Immigon], to enjoy the benefits of the U.S. banking system and New York’s status as a financial capital.” Immigon selected Bank of New York Mellon for its correspondent bank account and JP Morgan made the disputed payment to Immigon’s New York bank account. The Court found these contacts, among others, sufficient to show that Immigon had purposefully availed itself of the privilege of doing business in New York.

Finally, the Court found that subjecting Immigon to personal jurisdiction on any of these three grounds would not offend due process because the Court has a strong interest in adjudicating claims that arise under the Bankruptcy Code and the Trust has a strong interest in obtaining convenient and effective relief in the Bankruptcy Court. Moreover, the Court found that Immigon’s burden in having to litigate in New York is mitigated by the convenience of modern communication and transportation.

Practical Implications

The outcome of this case suggests the need for parties to carefully review proposed Bankruptcy Court orders affecting their rights. Here, in finding that Immigon had knowingly consented to the Bankruptcy Court’s jurisdiction in the DIP order, the Bankruptcy Court relied on evidence showing that an employee of Immigon had received and viewed the DIP order, despite the fact that the consent to jurisdiction provision was on page 26 of the 30-page order. The case also suggests the need for caution by parties purchasing interests in transactions governed by agreements with consent to jurisdiction clauses.

Footnotes

[1]. Immigon, or Immigon Portfolioabbau AG, is a wind-down company operating under Austrian law, and is the successor in interest to OEVAG, or Osterreichische Volksbanken Aktiengesellschaft, which was the central institute of the Austrian co-operative of banks named Volksbanken.

[2]. *Motors Liquidation Co. Avoidance Action Trust v. J.P. Morgan Chase Bank, N.A. (In re Motors Liquidation Co.)*, (Bankr. S.D.N.Y. 2017).

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