SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

HCT GROUP HOLDINGS LIMITED, et al.,

Plaintiffs,

vs.

NICHOLAS GARDNER, et al.,

Defendants.

Case No.: BC645615

ORDER GRANTING, IN PART, THE APPLICATION FOR A WRIT OF ATTACHMENT

Hearing Date: February 7, 2018
Dept.: 86

NICHOLAS GARDNER, et al.,

Cross-Complainants,

vs.

HCT PACKAGING, INC., et al.,

Cross-Defendants.

Plaintiffs HCT Group Holdings Limited, HCT Packaging, Inc., HCT Asia Limited, and HCT Europe Limited (collectively "Plaintiffs" or "HCT") seek writs of attachment against

Defendants Nicholas Gardner, Cognisant LLC, Cognisant Real Estate LLC, and Cognisant Limited (collectively "Defendants") in the amount of $9,517,550.70. Defendants oppose.

Because Plaintiffs demonstrated they are likely to prevail on some of their claims, the Court GRANTS the applications for writs of attachment as against defendant Nicholas Gardner, in part.

I. Motion to Seal

HCT seeks to seal various exhibits submitted by HCT and Defendants in connection with this motion. In order to issue a sealing order, a court must make express findings that: (1) there exists an overriding interest that overcomes the right of public access to the record; (2) the overriding interest supports sealing the record; (3) a substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) the proposed sealing is narrowly tailored; and (5) no less restrictive means exist to achieve the overriding interest. (CRC § 2.550(d)(1)-(5), (e); *McGuan v. Endovascular Technologies, Inc.* (2010) 182 Cal.App.4th 974, 988.)

HCT contends that these exhibits must be sealed in order to keep confidential the identities of customers and suppliers involved in relevant transactions. HCT fails to demonstrate that the proposed sealing is narrowly tailored because HCT seeks to seal entire exhibits rather than redact the names of customers and suppliers in those exhibits. In any event, the Court did not rely on the sealed exhibits in reaching its decision on this motion. Accordingly, the Court DENIES the motion to seal.

Under Cal. Rules of Court Rule 2.551(b)(6), "[i]f the court denies the motion or application to seal, the moving party may notify the court that the lodged record is to be filed unsealed. . . . If the moving party does not notify the court within 10 days of the order, the clerk must **(1) return the lodged record to the moving party if it is in paper form** or (2) permanently delete the lodged record if it is in electronic form." (emphasis added.) In this case, the parties' exhibits were conditionally lodged with the Court in paper form. Thus, unless HCT notifies the Court that the

documents are to be lodged unsealed, the Court will return all sealed documents to the parties pursuant to Rule 2.551(b)(6) and orders the parties to retrieve them.

II. Statement of the Case

A. Plaintiffs' Evidence

HCT designs and manufactures componentry, finished goods, and turnkey solutions for the cosmetics, skincare, and beauty industry. (Hsu Decl. ¶ 10.) On May 12, 2004, HCT hired Defendant Nicholas Gardner ("Gardner") as its Vice President of Sales. (*Id.* ¶ 17.) On or about April 2009, Gardner became Executive Vice President of Sales at HCT. (*Ibid.*) Jenny Hsu, Chief Strategy Officer for HCT, declares HCT "has had in place policies prohibiting most outside employment, including employment that would conflict in any way with responsibilities held at HCT and any employment for competitors" and any "outside work while on corporate time." (*Id.*, ¶ 14.) The 2016 employee handbook cited in support of that statement asks employees to "notify your supervisor" if "you are planning to accept an outside position" explaining employees' outside work may not "conflict in any way with your responsibilities within our corporation," involve "work for competitors" or "an ownership position with a competitor." (*Id.*) That handbook's "conflict of interest/code of ethics" provision advises employees they "must never use their positions with the corporation, or any of its customers, for private financial gain, to advance personal financial interests, to obtain favors or benefits for themselves" or compete with the company. (*Id.*) Hsu attaches Gardner's 2010 acknowledgement of receipt of an employee handbook. (Id., Exh. 2.) She does not, however, offer into evidence a copy of the 2010 handbook or admissible evidence of its content.

According to Aaron Read, Plaintiffs discovered a ledger in the form of a spreadsheet entitled "Special Items" on company computers maintained by Gardner and Derrick Chang ("Chang"), HCT Packaging's former Senior Director of Development and Manufacturing. (Read Decl. ¶ 17.) According to Hsu, the spreadsheet demonstrates that Gardner and Chang began

submitting inflated purchase orders to Fortune Plastic Packaging Co. Ltd. ("Fortune), a factory in China operated by Michael Shi ("Shi"). (*Id.* ¶¶ 21, 29.) Gardner, who had final approval for such orders, submitted these orders without obtaining cross-quotes from two separate factories as required by HCT policy. (*Id.* ¶¶ 26, 29.) Shi then provided Gardner and Chang "kickbacks" in the form of unauthorized "commissions" on the purchase orders. (*Id.* ¶ 29.) Hsu declares that Gardner and Chang kept track of the "kickbacks" they received in a spreadsheet titled, "Special Items" (the "Special Items Ledger"). (Hsu Decl. ¶ 24, Exhs. 7-8, Garcia Decl. ¶ 12, Exh. 9.) By comparing the Special Items Ledger with Gardner's HSBC HK Bank Statements, HCT determined that Gardner received at least **$2,399,059.35** in alleged kickbacks from purchase orders. (Garcia Decl. ¶¶ 12-13, Exhs. 5, 9, 38-42, 44, 46, 48-52, 54, 56-75.)

While employed by HCT, Gardner created the Cognisant entities (collectively "Cognisant") without disclosing those entities to HCT. (Garcia Decl. ¶ 8, Exh. 3.) Between July 2015 and March 2016, Gardner issued (13) invoices through Cognisant to Fortune for services HSU contends were within his job description with HCT and received payments for such invoices into his HSBC HK Account. (Hsu Decl. ¶¶ 38-41; Garcia Decl. ¶¶ 15-19, Exhs. 11-13, 16-25.) By comparing the invoices with deposits made in Gardner's bank statements, HCT determined that Gardner received a total of **$1,278,518.05** from those invoices. (Garcia Decl. ¶ 21, Exhs. 88-91, 93.)

Hsu declares that in 2012, Gardner and Chang engaged in a similar scheme in which they diverted business to JC Packaging and away from HCT-owned or controlled companies in return for kickbacks. (Hsu Decl. ¶ 42; Garcia Decl. ¶¶ 23-24, Exhs. 152-153.) HCT submits evidence that JC Packaging wired unauthorized "commissions" totaling **$399,964.00** into Gardner's account. (*Ibid.*)

HCT also submits a list of deposits made into Gardner's HSBC HK Account between October 2010 and January 2017 totaling **$5,021,141.01**, which are not tied to the Special Items Ledger, Cognisant Invoices, or alleged JC Packaging kickbacks. (Garcia Decl. ¶ 25, Exh. 6.) HCT contends that this amount constitutes monies received for kickbacks or work done in breach of Gardner's duty of loyalty. (*Ibid.*)

HCT also submits evidence that Fortune made wire transfers to Cognisant Limited in the amount of **$377,821.00**. (Hsu Decl. ¶ 46-48; Garcia Decl., ¶¶ 27-34, Exhs. 106-123.)

Finally, HCT submits evidence that between 2013 and 2015, HCT supplier GCU improperly paid Gardner at least **$41,047.29** in alleged kickbacks through Gardner's Citibank Accounts for work done for HCT customers. (Hsu Decl. ¶¶ 46-48; Garcia Decl. ¶¶ 27-34 (Exhs. 106-123.)

On June 26, 2017, HCT filed its Second Amended Complaint in this action. HCT now seeks a writ of attachment against Defendants in the amount of $9,517,550.70.

B. Defendants' Evidence

In opposition, Gardner declares that when he joined HCT in 2004, it was a small, private company that made plastic packaging of the cosmetics industry. (Gardner Decl. ¶ 4.) Gardner was hired by Chris Thorpe, the co-Founder and President of HCT, who was later succeeded by his son, Tim Thorpe. (*Id.* ¶ 8.) From its inception, HCT permitted its employees to engage in outside businesses. For example, during Gardner's first business trip to Hong Kong, Chris Thorpe told Gardner that he personally received a commission from HCT supplied, Hsing Chung Packaging ("HCP"), on all MAC Cosmetics packaging manufactured by HCP. (*Id.* ¶ 38.) Also, Gardner and Tim Thorpe co-invested in an outside company known as Retress, LLC ("Retress") which developed, marketed, and distributed a hair re-growth product line to HCT and its customers. (*Id.* ¶ 40.) Neither Tim Thorpe nor anyone else at HCT every informed Gardner that he was barred from pursuing any outside business activities. (*Id.* ¶ 41.)

Gardner declares that he used the suppliers Fortune and JC Packaging with HCT's knowledge and approval because they were best able to meet the needs of the customers and provide quality products timely and efficiently. (*Id.* ¶ 14.) On the other hand, HCT's partially-owned factories in China, HCT-Kent and HCT-Yilai, were not able to deliver quality products as reliably, promptly, or efficiently. (*Id.* ¶ 18.)

Gardner declares that he did not submit any inflated invoices from Fortune (or any other supplier) to HCT. (*Id.* ¶ 45.) In fact, invoices were typically submitted directly by the supplier to HCT's account department. (*Ibid.*) To the extent that Gardner was paid consulting fees by any supplier, he avers that the fees were paid solely out of the profits of the supplier. (*Id.* ¶ 45.)

Gardner declares that he has not signed an acknowledgment for HCT's handbook since approximately 2010. (*Id.* ¶ 46.) On multiple occasions, Gardner informed HCT's HR Director that he could not sign the employee handbook acknowledgment because it purported to forbid outside business interests, which Gardner was engaged in including Gardner's business with Tim Thorpe. (*Id.* ¶ 46.)

III. Summary of Applicable Law

"Upon the filing of the complaint or at any time thereafter, the plaintiff may apply pursuant to this article for a right to attach order and a writ of attachment by filing an application for the order and writ with the court in which the action is brought." (Code Civ. Proc., § 484.010.)

The application shall be executed under oath and must include:

(1) a statement showing that the attachment is sought to secure the recovery on a claim upon which an attachment may be issued;
(2) a statement of the amount to be secured by the attachment;
(3) a statement that the attachment is not sought for a purpose other than the recovery on the claim upon which the attachment is based;
(4) a statement that the applicant has no information or belief that the claim is discharged or that the prosecution of the action is stayed in a proceeding under the Bankruptcy Act (11 U.S.C. section 101 et seq.); and
(5) a description of the property to be attached under the writ of attachment and a statement that the plaintiff is informed and believes that such property is subject to attachment.

(Code Civ. Proc., § 484.020.) "Where the defendant is a partnership or other unincorporated association, a reference to 'all property of the partnership or other unincorporated association which is subject to attachment pursuant to subdivision (b) of Code of Civil Procedure Section

487.010' satisfies the requirements of this subdivision. Where the defendant is a natural person, the description of the property shall be reasonably adequate to permit the defendant to identify the specific property sought to be attached." (Code Civ. Proc., § 484.020, subd. (e).)

"The application [for a writ of attachment] shall be supported by an affidavit showing that the plaintiff on the facts presented would be entitled to a judgment on the claim upon which the attachment is based." (Code Civ. Proc., § 484.030.) Statutory attachment procedures are purely creations of the legislature and as such "are subject to 'strict construction.'" (*Hobbs v. Weiss* (1999) 73 Cal.App.4th 76, 79 [citing *Vershbow v. Reiner* (1991) 231 Cal.App.3d 879, 882]; see also *Nakasone v. Randall* (1982) 129 Cal.App.3d 757, 761.) A judge does not have authority to order any attachment that is not provided for by the attachment statutes. (*Jordan-Lyon Productions, Ltd. v. Cineplex Odeon Corp.* (1994) 29 Cal.App.4th 1459, 1466.) "The declarations in the moving papers must contain evidentiary facts, stated 'with particularity,' and based on actual personal knowledge with all documentary evidence properly identified and authenticated." (*Hobbs*, *supra*, 73 Cal.App.4th at p. 79–80 [citing Code Civ. Proc., § 482.040].) "In contested applications, the court must consider the relative merits of the positions of the respective parties and make a determination of the probable outcome of the litigation." (*Hobbs*, *supra*, 73 Cal.App.4th at p. 80 [ellipses and quotation marks omitted].)

The Court shall issue a right to attach order if the Court finds all of the following:

(1) The claim upon which the attachment is based is one upon which an attachment may be issued.
(2) The plaintiff has established the probable validity of the claim upon which the attachment is based.
(3) The attachment is not sought for a purpose other than the recovery on the claim upon which the attachment is based.
(4) The amount to be secured by the attachment is greater than zero.

(Code Civ. Proc. § 484.090.) "A claim has 'probable validity' where it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim." (Code Civ. Proc., § 481.190.) A claim of exemption must describe the property to be exempted and specify the statute

section supporting the claim. (Code Civ. Proc., § 484.070, subd. (c).) The plaintiff has the burden of opposing the Defendant's claim of exemption, and if the Plaintiff fails to oppose a claim of exemption, "no right to attach order or writ of attachment shall be issued as to the property claimed to be exempted." (Code Civ. Proc., § 484.070, subd. (f).)

"In the discretion of the court, the amount to be secured by the attachment may include an estimated amount for costs and allowable attorney's fees." (Code Civ. Proc., § 482.110, subd. (b).)

IV. Analysis

The Court shall issue a right to attach order if the claim upon which the attachment is based is one upon which an attachment may be issued. (Code Civ. Proc. § 484.090.) "[A]n attachment may be issued only in an action on a claim or claims for money, each of which is based upon a contract, express or implied, where the total amount of the claim or claims is a fixed or readily ascertainable amount not less than five hundred dollars ($500) exclusive of costs, interest, and attorney's fees." (*Id.* at § 483.010(a).) "If the action is against a defendant who is a natural person, an attachment may be issued only on a claim which arises out of the conduct by the defendant of a trade, business, or profession." (*Id.* at § 483.010(c).) The party seeking an attachment must also persuade the court that its claim has "probable validity," i.e., it is more likely than not the plaintiff will recover on the claim. (Id., at § 481.190.) To resolve that issue, the court must weigh the relative merits of the parties' respective positions. (*Kemp Bros. Construction, Inc. v. Titan Electric Corp.* (2007) 146 Cal.App.4th 1474, 1484.

In this case, the facts are so highly contested that the Court cannot, at this stage in the proceedings, conclude Plaintiffs are more likely than not to recover on their claims. Although Gardner acknowledged receipt of a 2010 employee handbook, there is evidence the 2010 handbook was superseded in 2013, 2014 and 2016 and that Gardner repeatedly refused to sign the later handbooks, informing the company he could not sign them because he had outside business interests. Gardner denies that he ever presented inflated invoices. He also presents evidence the

company's founder, Chris Thorpe, and another employee, Tim Thorpe, had similar business arrangements with suppliers.

Plaintiffs refer the court to *Arcturus Mfg. Co. v. Rork* (1961) 198 Cal.App.2d 201 (*Rork*). In *Rork*, the court declined to reverse the trial court's denial of a motion to dissolve an attachment under former Code of Civil Procedure Section 537, subd. 1, which allowed an attachment in an action "upon a contract, express or implied, for the direct payment of money." The employer sued Rork for fraud and breach of fiduciary duty based on evidence Rork received kickbacks from metal inspectors he hired on behalf of his employers. The issue on appeal was whether the employer's cause of action for money had and received was, for purposes of issuing an attachment under the former statute, sufficiently based upon a contract.

As in the case before this Court, the employer accused Rork of recovering "kickbacks" in breach of his duty of loyalty. The court held an attachment was proper finding the employer's cause of action sounded in quasi-contract, based on a promise implied by law, relying on Section 388 of the Restatement, Second of Agency: "Unless otherwise agreed, an agent who makes a profit in connection with transactions conducted by him on behalf of the principal is under a duty to give such profit to the principal." (Id. at 210). The court also cited section 304 of the Restatement indicating the principal "has a cause of action either for a breach of contract or for a tort as a remedy for damage caused by the violation of any duty of loyalty." (Id.) See also, *Oil Well Core Drilling Co. v. Barnhart* (1937) 20 Cal.App.2d 67 (affirming the trial court's denial of a motion to dissolve an attachment on the grounds that an agent's power of attorney is a contractual relationship with the principal sufficient to support an attachment based on allegations the agent kept, for himself, monies collected on behalf of the principal.)

This Court has no quarrel with the holdings in *Rork* and *Oil Well Core Drilling Co.* and no quarrel with the notion that an implied in law agreement can support a writ of attachment. However, on the merits, the facts in *Rork* are distinguishable, at least with respect to Gardner's alleged receipt of consulting fees. As described by the court of appeal, the payments to Rork were pure kickbacks, i.e., payments in consideration of Rork's performance of his ordinary job duties

(the task of selecting metal inspectors). Rork plainly received "profit[s] in connection with transactions conducted by [Rork] on behalf of the principal." (Restatement, supra, section 388.)

With respect to the alleged consulting services (e.g., Cognisant invoices of $1,278,518.05 for services, Hsu Decl. ¶ 38), the facts are not so straightforward. Gardner has introduced evidence his employment arrangement allowed him to pursue outside business. While he admits he received payments from suppliers, he avers the suppliers paid him for consulting services and that his services enhanced the suppliers' ability to produce high quality products for his employer without compromising his employer's profits. It is possible a jury will disbelieve Gardner. It is also possible a jury will decide he did not provide any bona fide consulting services, and that his "compensation" was a kickback paid at the expense of his employer. However, it is also possible a jury will conclude Gardner deserved to be paid for services to the suppliers, that his services enhanced, rather than detracted from, Plaintiffs' profits, and that his only breach of duty was the failure to disclose which caused no harm to his employer.

With respect to the purchase orders to Fortune, Plaintiffs have a more persuasive case because they have offered strong circumstantial evidence tying payments into Gardner's bank account to specific HCT transactions (purchase orders) recorded in the Special Items ledger[1] discovered on Gardner's computer. (Hsu Decl., ¶ 33 - 37.) Gardner does not deny receiving the payments, does not declare that he provided consulting services in exchange for these payments and does not assert that the payments benefited his employer. Gardner also does not claim he disclosed, to his employer, the arrangement that generated these payments. (See, Restatement (Third) Agency § 8.03, comment b; and 8.06 (2006) (an agent has duty to disclose, to the principal, all material facts that may affect the principal's determination whether to consent to conduct that would otherwise breach the duty of loyalty.) The Court does not regard Gardner's testimony that others in the company engaged in similar conduct as a sufficient manifestation of his employer's consent to overcome the presumed duty of loyalty. The Court is therefore satisfied Plaintiffs are

[1] Defendant argues the Special Items ledger is inadmissible hearsay. The Court admits the ledger as an admission, an adoptive admission and/or as non-hearsay circumstantial evidence explaining the amounts deposited into his bank account.

likely to succeed with respect in proving breach of an implied in law contract with respect to these transactions and that the $2,399,059.35 in restitution is a sufficiently ascertainable sum to support an attachment.

Although Plaintiffs' additional evidence raises serious questions, it is not strong enough to persuade the Court Plaintiffs' are likely to prevail with respect to their remaining claims for "commissions" and other items not tied to the Special Items register found on Gardner's computer.

V. Conclusion

Based on the controverted evidence in this record, this Court cannot conclude Plaintiffs are likely to prevail on all of their claims. The Court is persuaded Plaintiffs are likely to prevail with respect to the $2,399,059.35 referenced above and GRANTS the attachment in that amount only. In all other respects, the Court DENIES Plaintiffs' application for a writ of attachment. The Court orders Plaintiffs to post a $10,000 bond.

Dated: FEB 0 8 2018

AMY D. HOGUE, JUDGE

JUDGE OF THE SUPERIOR COURT