

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LIBERTY BELLE CHARTERS, INC., : CIVIL ACTION
d/b/a LIBERTY BELLE CRUISES :
 :
v. :
 :
ON SITE MARINE CONSTRUCTION, :
INC. AND JOHN D. DISMER, :
Individually and d/b/a ON :
SITE CONSTRUCTION, INC. : NO. 97-5500

MEMORANDUM and ORDER

The following appears from the averments in plaintiff's complaint in the above action and the several exhibits appended thereto. Plaintiff is a corporate citizen of Pennsylvania and is engaged in the business of marine vessel charter cruises. The corporate defendant is a citizen of Missouri and is in the business of marine vessel construction. The individual defendant is a citizen of Missouri. He is the president and principal, if not sole, employee of the corporate defendant.

In August of 1996, plaintiff Liberty Belle and defendant On Site Marine entered into a contract by which defendant agreed to provide the labor, equipment and oversight necessary for the construction of a vessel for plaintiff. The contract was executed for On Site Marine by defendant Dismer who proceeded effectively to perform as the construction manager at the construction site in Chester, Pennsylvania. The contract required completion of the vessel by May 1, 1997 and provided that time was of the essence. Plaintiff made payments to defendants under the contract of \$850,000. Defendants have

defaulted in their performance under the contract and construction of the vessel has yet to be completed. Plaintiff has exercised its right under § 19.2 of the contract to take possession of the worksite and defendants' equipment to complete construction of the vessel itself.

Plaintiff has asserted various claims against defendants including claims for fraud, conversion and breach of contract. Plaintiff alleges that defendants diverted monies paid by plaintiff for labor to perform the contract to other impermissible uses and seeks an accounting from defendants. Plaintiff filed an Ex Parte Motion for Writ of Ne Exeat Republica and Additional Injunctive Relief. Plaintiff seeks to enjoin defendants from leaving the jurisdiction of this court or from selling or removing any of their equipment from the construction site until plaintiff has completed construction of its vessel and defendants post a \$400,000 bond or have satisfied any judgment entered against them in this case. Plaintiff also seeks an order directing defendants to make a full accounting of what they have done with the monies advanced to them by plaintiff for the purpose of constructing the vessel.

The court held a hearing on this motion earlier this date. Accepting the averments in plaintiff's sworn complaint and the representations of counsel at the foregoing hearing, the pertinent facts for purposes of this motion appear to be as follow. Plaintiff is likely to prevail on its claims for an amount exceeding the value of the equipment at the construction

site which has an estimated value of \$400,000. This equipment appears to be the only tangible assets available to satisfy any judgment on plaintiff's claims. The equipment is unique and plaintiff's continued access to it is necessary if construction of the vessel for which plaintiff contracted is to be completed without further inordinate delay which has already forced plaintiff to return deposits on bookings in excess of \$1,000,000. If permitted continued possession and use of the equipment as provided by the parties' contract, plaintiff can complete construction of the vessel by September 30, 1997.

The corporate defendant appears to be in a state of dissolution and owns essentially no tangible assets of value other than the equipment used by the individual defendant for vessel construction. The corporate defendant's commercial telephone number has been disconnected. A thorough search of available national data bases has failed to uncover any residential address where the individual defendant can be found and by the nature of his work, he appears to be itinerant. The individual defendant on behalf of the corporate defendant is now in the process of attempting to effect the sale and removal of the construction equipment at the Chester site.

Ne Exeat is "an extraordinary writ which should issue only in exceptional cases." U.S. v. Shaheen, 445 F.2d 6, 10 (7th Cir). See also Thomas v. E.C. Mutter Construction Co., Inc., 178 A.2d 570, 572 (Pa. 1962) (ne exeat "is most extraordinary writ" and should be used "with great caution"). One reason for this is

that a party's freedom of movement and right to travel is a constitutionally protected liberty. Shaheen, supra. Plaintiff has failed to make a convincing showing that restricting Mr. Dimer's movement to this district would effectively secure plaintiff's position or realistically provide any benefit to it beyond that which could be secured by restraining the sale or removal of defendants' equipment presently in this district. The request for such relief will be denied.

Plaintiff, however, has presented a compelling case for restraining the alienation and removal of this equipment until such time as defendants may be heard in opposition if they choose to do so. In the absence of such relief, plaintiff does appear to face immediate irreparable injury in that it may effectively lose forever its ability to complete the vessel and will be deprived of any assets from which it might satisfy a judgment it will likely attain in this action if its averments are true. See Hoxworth v. Blinder, Robinson & Co., Inc., 903 F.2d 186, 195-97 (3d Cir. 1990). Plaintiff has also presented good cause why the initial restraining order should be granted without notice by making a convincing showing that upon receiving prior notice of plaintiff's application, defendant Dimer likely would immediately alienate or remove the assets now in this district.

The only possible harm to defendants from the entry of a TRO would be a loss of an opportunity to sell this equipment in the ordinary course of business after completion by plaintiff of its vessel. In that regard, however, defendant can upon two days

notice to plaintiff move to dissolve or modify the TRO as provided in Fed. R. Civ. P. 65(b). In such an event and upon hearing from all parties, an appropriate modification could be promptly effected, including one that might substitute the proceeds of any such sale for the equipment itself as security for any judgment and require that the equipment remain available to plaintiff through September 1997 for use in completing the vessel as provided in the parties' contract.

Thus, should it later appear that plaintiff's averments are not well founded and that defendants have been wrongfully restrained, the resulting costs to defendants should be quite limited. Consistent with rule 65(c), the court will required plaintiff to post a \$5,000 bond.

The request to compel an immediate accounting will be denied. Plaintiff has not demonstrated how it faces any immediate irreparable harm if it does not receive the requested accounting before defendants can appear and be heard on that issue. Defendants failure or refusal to provide an adequate accounting for the sums they received from plaintiff, however, may be a factor in further assessing the likelihood of plaintiff's success on the merits at an adversarial hearing to continue or dissolve the TRO or for preliminary injunctive relief.

ACCORDINGLY, this day of September, 1997, at 7:45 p.m., upon consideration of plaintiff's Ex Parte Motion for Writ of Ne Exeat Republica and Additional Injunctive Relief,

consistent with Fed. R. Civ. P. 65(b), **IT IS HEREBY ORDERED** that said Motion is **GRANTED** in part in that upon the posting by plaintiff of a \$5,000 bond, defendants are enjoined from selling, alienating, removing, or causing or authorizing the removal of any of their equipment and other tangible assets from their current location in Chester, Pennsylvania prior to September 13, 1997; plaintiff is directed to effect service of process on defendants forthwith along with a copy of this order and a hearing will be held to determine whether this TRO should be extended or a preliminary injunction should be entered on September 12, 1997 at 4 p.m., Courtroom 9-B, Ninth Floor, U.S. Courthouse, 601 Market Street, Philadelphia, without prejudice to defendants, should they wish, to move earlier to dissolve or modify the restraining order upon two days notice to plaintiff; and, said Motion is otherwise **DENIED**.

BY THE COURT:

JAY C. WALDMAN, J.