

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

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VICE CHANCELLOR

New Castle County Courthouse
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Re: *Israel Discount Bank of New York v. First State Depository Company, LLC*
Civil Action No. 7237-VCP

Dear Counsel:

On April 16, 2012, Certified Assets Management, Inc. (“CAMI”) and First State Depository Company, LLC (“FSD” or, collectively with CAMI, “Defendants”) moved to dismiss Israel Discount Bank of New York’s (“IDB” or “Plaintiff”) complaint for breach of contract and conversion of property (the “Complaint”) on the grounds that this Court lacked subject matter jurisdiction and that the Complaint failed to state a claim upon which relief can be granted. In a Memorandum Opinion dated September 27, 2012, I denied Defendants’ motion to dismiss (the “Opinion”). On October 8, Defendants filed an application for certification of an interlocutory appeal of the ruling and order set forth

in the Opinion. IDB opposed the application in a memorandum filed on October 18. For the following reasons, I find that the application does not meet the criteria for certification under Delaware Supreme Court Rule 42. Therefore, I deny Defendants' application.

I. PARTIES' CONTENTIONS

In its application, Defendants assert that this Court lacks subject matter jurisdiction because the parties committed to submit to binding arbitration any dispute over the collateral at issue in this case. Specifically, they argue that IDB's rights to the collateral arise from Collateral Custody Account Agreements ("CCAAs") and that these CCAAs contain an arbitration provision that requires the parties to arbitrate this dispute. Defendants further contend that a letter signed by IDB, FSD, and Republic, which sets forth IDB's rights to direct FSD's conduct with regard to the collateral (the "Bailment Agreement"),¹ does not change the parties' obligation to arbitrate this dispute for at least two reasons. First, Defendants emphasize that the Bailment Agreement was dated and executed on the same day as two CCAAs. As a result, they argue that it must be

¹ Defendants style the Bailment Agreement as the "Bailee Letter." The agreement was indeed in letter form. The letter sets forth an agreement between FSD, Republic, and IDB regarding the storage at FSD's depository of assets in which IDB has a security interest. The four-page letter includes four signature fields. It is signed by two representatives of IDB, "Confirmed" by a representative of Republic, and "Acknowledged and Agreed to" by a representative of FSD. The document is, therefore, an executed agreement. Accordingly, this Court referred to it in the Opinion, and refers to it herein, as the "Bailment Agreement" or the "Agreement."

evaluated as but one part of a series of agreements binding the parties to the CCAAs' arbitration provision and to their safe harbor and exculpation provisions. Relatedly, Defendants aver that if the Bailment Agreement is viewed as a freestanding agreement, it would fail for lack of consideration. For these reasons, Defendants ask this Court to certify an interlocutory appeal of the order embodied in the Opinion to allow the Supreme Court to consider these arguments and potentially preserve their claimed right to arbitration.

IDB opposes the application on the ground that the Opinion is not subject to interlocutory review under Delaware Supreme Court Rule 42. Plaintiff also contends that, with trial scheduled to begin in a few weeks on November 19, 2012, Defendants will not be prejudiced if they must wait to seek an appeal until after this Court's post-trial ruling, if an appeal is necessary at that time.

II. ANALYSIS

The standard for certification of an interlocutory appeal to the Supreme Court is set forth in its Rule 42(b). No interlocutory appeal will be certified by the trial court or accepted by the Supreme Court unless the order of the trial court determines a substantial issue, establishes a legal right, and meets one of five additional criteria enumerated in Rule 42.² The Supreme Court only will accept an application for interlocutory appeal in

² Supr. Ct. R. 42(b)(i)–(v).

extraordinary or exceptional circumstances.³ To obtain leave to pursue an interlocutory appeal, a party must apply in the first instance to the trial court and must subsequently apply to the Supreme Court.⁴ The Supreme Court will decide to accept or deny the application in its sole discretion, but it may consider as one factor in exercising this discretion the trial court's decision on whether to certify the appeal.⁵ When considering whether to certify an interlocutory appeal, the trial court must balance the interests of advancing potentially case-dispositive issues against the additional burden of fragmentation and delay that interlocutory review can create.⁶

A. Substantial Issue

An order of the trial court determines a “substantial issue” when it addresses the merits of the case.⁷ As the Supreme Court has explained:

Generally speaking, the substantive element of the appealability of an interlocutory order must relate to the

³ See *Wilm. Sav. Fund Soc'y, FSB v. Covell*, 577 A.2d 756, 1990 WL 84687, at *1 (Del. May 16, 1990) (TABLE); see also Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 14.04, at 14-5 to -6 (2012).

⁴ Supr. Ct. R. 42(c), (d).

⁵ Supr. Ct. R. 42(d)(v).

⁶ See *Castaldo v. Pittsburgh-Des Moines Steel Co.*, 301 A.2d 87, 87 (Del. 1973); see also *In re Pure Res., Inc.*, 2002 WL 31357847, at *1 (Del. Ch. Oct. 9, 2002).

⁷ *Castaldo*, 301 A.2d at 87.

merits of the case This is essential to the limitation of appeals and the avoidance of fragmentation of cases necessary to the efficient operation of our system.⁸

Defendants argue that the Opinion addresses the merits of this case in two ways. First, Defendants assert that the Opinion determined that the CCAAs and the Bailment Agreement can and should be read separately. Second, Defendants argue that the Court’s denial of their motion to dismiss based on the lack of any consideration supporting the Bailment Agreement was misplaced because the Court improperly relied on past consideration to support FSD’s obligations under the Bailment Agreement.

Defendants contend that the CCAAs and the Bailment Agreement should not be read separately because the agreements were executed on the same day, they share as a subject matter collateral pledged to IDB and stored at FSD’s depository, and they have certain parties in common. Specifically, FSD, Republic National Business Credit LLC (“Republic”), and CAMI are parties to the CCAAs; and FSD, Republic, and IDB are parties to the Bailment Agreement. Additionally, through its lending relationship with Republic, IDB is an express third-party beneficiary of the CCAAs. The parties to each of the CCAAs agreed to arbitrate “any controversy or claim arising out of or in connection with this Agreement.”⁹ The CCAAs also contain safe harbor and exculpation provisions

⁸ *Id.*

⁹ Defs.’ Appl. for Certification of Interlocutory Appeal 2.

designed to protect FSD.¹⁰ The parties to the Bailment Agreement, however, did not agree to arbitrate claims arising out of that agreement or to protect FSD with safe harbor and exculpation provisions.

The Supreme Court and this Court repeatedly have found that determinations of arbitrability do not relate to the merits of a claim and, thus, do not establish a substantial issue under Rule 42.¹¹ This is because the parties' rights "will be adjudicated as efficiently, promptly and economically in Delaware courts as they would be in [] arbitration were [Defendants] subject to that process."¹² In this regard, "the issue of whether [plaintiff's] claims should be heard in arbitration or this [C]ourt does not go to the actual merits of those claims."¹³ Accordingly, my determination that IDB's claims are not subject to arbitration is not sufficient to meet the "substantial issue" prong of Rule 42.

¹⁰ *Id.* at 4.

¹¹ *See TowerHill Wealth Mgmt., LLC v. Bander Family P'ship, L.P.*, 2008 WL 4615865, at *2 (Del. Ch. Oct. 9, 2008) (noting that the Supreme Court repeatedly has denied attempts to appeal from unfavorable rulings on arbitrability and collecting cases).

¹² *Fitzgerald v. Prebon Sec. (USA) Inc.*, 1999 WL 135241, at *2 (Del. Ch. Feb. 25, 1999).

¹³ *TowerHill*, 2008 WL 4615865, at *2.

I also find unpersuasive Defendants' argument that the Opinion determined a substantial issue because it erroneously decided that this dispute was not subject to the CCAAs' arbitration provision because the dispute arose under the Bailment Agreement, which does not have an arbitration clause. Specifically, Defendants argue that the Bailment Agreement would fail for lack of consideration if it is construed as a standalone agreement and, therefore, provides no basis for avoiding the arbitration provision in the CCAAs. I concluded, however, that the Bailment Agreement is supported by sufficient consideration. Defendants evidently contend that that decision relates to the merits of this case and, hence, establishes a "substantial issue" under Rule 42. Admittedly, the existence of the Bailment Agreement plays a central role in this dispute. The merits of the underlying claims, however, are based both on Defendants' alleged breach of the Bailment Agreement by unlawfully releasing collateral without IDB's authorization and on their alleged conversion of the collateral. This case, therefore, would proceed beyond Defendants' motion to dismiss even if the Bailment Agreement were not considered independently of the CCAAs. Thus, the Court's ruling that the Bailment Agreement is supported by consideration does not create an extraordinary or exceptional circumstance that would support certification of Defendants' proposed interlocutory appeal.

Furthermore, for this Court to certify Defendants' application, Defendants also must show that the Opinion established a legal right and that one of five additional

criteria specified in Rule 42(b) exists here. For the following reasons, I find that Defendants have not met either of those requirements.

B. Legal Right

An order of the trial court establishes a legal right if it relates to the merits of the action or creates or diminishes the parties' rights with respect to the underlying substantive issues.¹⁴ Defendants argue that the Court established a legal right by ruling that IDB has the right to pursue its claims in court rather than through arbitration and by, according to Defendants, determining that CAMI has no rights or remedies under the CCAAs. As noted above, determinations of arbitrability do not address the merits of a case. Moreover, the Opinion did not create or diminish CAMI's rights under the CCAAs. Indeed, it did not rule on CAMI's rights under the CCAAs. Rather, the Opinion made the narrow finding that certain provisions of the CCAAs, most notably the arbitration provision, do not apply to the separate Bailment Agreement. With regard to CAMI, the only claim IDB asserts is for conversion and the Court ruled in the Opinion that "IDB conceivably can prove a set of facts consistent with the allegations in the Complaint that would support a conversion claim against Defendants FSD and CAMI."¹⁵ By denying

¹⁴ *Monsanto Co. v. Aetna Cas. & Sur. Co.*, 1991 WL 215621, at *1 (Del. Ch. Sept. 25, 1991).

¹⁵ *Israel Discount Bank of N.Y. v. First State Depository Co.*, 2012 WL 4459802, at *13 (Del. Ch. Sept. 27, 2012) (citations omitted).

Defendants' motion to dismiss, the Court postponed a final resolution of the parties' legal rights under the various agreements in this case and of Defendants' potential liability on a conversion theory until the Court has a more fully developed record before it. Therefore, the Court did not establish a legal right under Rule 42.

C. The Five Additional Criteria

Because I conclude that the Opinion does not establish a legal right, whether Defendants' application also meets one of the five additional criteria enumerated in Rule 42 is inconsequential. Nevertheless, I have considered the three additional criteria that Defendants argue support their application and find that none of them warrant certification of an interlocutory appeal in this instance. First, Defendants argue that the Opinion sustained the controverted jurisdiction of the trial court. The Opinion held that this Court, and not an arbitrator, has subject matter jurisdiction over this dispute. The Supreme Court, however, repeatedly has refused to accept interlocutory appeals from unfavorable rulings as to the arbitrability of a dispute.¹⁶ Second, Defendants assert that the Opinion addressed a novel and original legal issue that has yet to be addressed under Delaware law. I disagree. In the Opinion, the Court straightforwardly applied settled Delaware caselaw on motions to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. Lastly, Defendants contend that

¹⁶ See *TowerHill*, 2008 WL 4615865, at *2.

granting the application would serve considerations of justice. To the contrary, trial in this relatively expedited matter is scheduled to begin in approximately three weeks and this Court has expended considerable time and resources steering this dispute to trial. Considerations of justice, therefore, weigh against delaying trial to accommodate an interlocutory appeal. A post-trial decision on the merits appears likely to be available in the relatively near future. At that point, Defendants can pursue an appeal to the Supreme Court if they deem it appropriate.

III. CONCLUSION

For the reasons stated in this Letter Opinion, I find that the requirements to obtain certification of interlocutory appeal to the Supreme Court are not present in this case and that no extraordinary or exceptional circumstances exist to support an immediate appeal from this Court's Opinion denying Defendants' motion to dismiss. Accordingly, I deny Defendants' application for certification of an interlocutory appeal.

IT IS SO ORDERED.

Sincerely,

/s/ Donald F. Parsons, Jr.

Donald F. Parsons, Jr.
Vice Chancellor

DFP/ptp