

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD  
Justice

PART 49

PHILLIPS AUCTIONEERS LLC,

Plaintiff,

INDEX NO. 652901/17

-against-

MOTION DATE \_\_\_\_\_

ZHANG CHANG,

MOTION SEQ. NO. 001

Defendant.

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for order of attachment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is **ORDERED** that this motion is decided in accordance with the accompanying Order of Attachment.

Dated: June 9, 2017



O. PETER SHERWOOD, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

-----X  
**PHILLIPS AUCTIONEERS LLC,**

**Plaintiff,**

**ORDER OF ATTACHMENT**

**-against-**

**Index No.: 652901/2017**

**Motion Sequence No.: 001**

**ZHANG CHANG,**

**Defendant.**

-----X  
**O. PETER SHERWOOD, J.:**

The facts in this paragraph are supported by documentary evidence. Plaintiff, Phillips Auctioneers, LLC ("Phillips") and defendant, Zhang Chang ("Zhang") entered into a third-party guarantee agreement, dated October 18, 2016, pursuant to which Zhang agreed to guarantee the purchase of a painting by Gerhard Richter at an irrevocable bid price of \$24,000,000 (the "Art"). The guarantee obligated Zhang to purchase the Art for \$24 million if there were no other bids at or above that amount. The auction went forward as scheduled on November 16, 2016 at which Zhang was the highest bidder. As a result, Zhang became obligated to pay a total of \$25,565,000. Invoices for payment were sent to Zhang on December 14, 2016, December 29, 2016, January 13, 2017, February 9, 2017 March 7, 2017 and May 8, 2017 but no payment was made.

This action, commenced on May 30, 2017, contains a single cause of action for breach of contract and seeks damages of \$26,376,932 which amount includes contractual interest of 12% per annum. Plaintiff also seeks a Temporary Restraining Order in order to aid the court's jurisdiction and secure plaintiff's interest while the motion is pending. Zhang is a citizen of the People's Republic of China and resides in Beijing.

In a motion for an Order of Attachment brought on by Order to Show Cause, plaintiff seeks to attach certain personal property of defendant, specifically an artwork painted by Francis Bacon,

entitled Study for Head of Isabel Rawsthorne (Bacon Work”), currently in custody of Gagorian Gallery (or an affiliate) located in New York City.

The motion papers include an affidavit of Eevie Yang, an employee of plaintiff which references and quotes from text messages she exchanged with Zhang where Zhang indicated he might not be able to make payment for the Art (NYSCEF Doc. No. 10, ¶ 8). Later, when the subject of possible litigation was raised, Zhang responded that a lawsuit commenced in the United States was “useless”, that it would require ten years of fighting and that, as a resident of China, he was beyond the reach of the United States (*see id.*, ¶ 13).

Plaintiff presented evidence that the Bacon is currently in New York where it is being offered for sale at the Gagorian Gallery. Plaintiff believes that without an Order of Attachment the Bacon which plaintiff believes is Zhang’s only known asset located in the United States, will be removed.

Under CPLR 6210, a motion on notice for an order of attachment may be accompanied by a request for an *ex parte* TRO to enjoin disposition or removal of defendant’s property while the motion is pending. Generally, such a request must be accompanied by a showing that the movant has made a good faith effort to give notice to the other party. However, in cases such as this, the court may dispense with such notice when the moving party demonstrates that it will suffer “sufficient prejudice” if notice is given (*see* NYCRR § 202.7 [f]). In order to mitigate harm to defendant, this court scheduled a hearing on the motion to be held within 24 hours after the TRO was signed. The court did not require an undertaking (*see* CPLR 62/2 [b]).

On May 30, 2017, counsel for plaintiff appeared and read into the record an email received two hours earlier from a lawyer which email confirmed an earlier oral request for consent to postpone the hearing in order to allow time for counsel, *inter alia*, to complete a retainer arrangement with Zhang, prepare a response to the motion for an order of attachment and allow the parties to

explore a commercial solution to the dispute (*see* Transcript dated May 31, 2017 at p.3). Accordingly, the court adjourned the hearing to July 12, 2017 at 3:00 pm in courtroom 1003, 111 Dr. Martin Luther King Jr. Blvd, White Plains, New York 10601.

CPLR 6201 provides that the provisional remedy of an order of attachment may be granted when “the defendant is a nondomiciliary residing without the state.” Such is the case here and the court has discretion to order attachment. Even so, attachment is a drastic remedy as it deprives the defendant of the free use of his property before a final adjudication of the merits of the case. Accordingly, the court should not exercise its discretion to grant an attachment except in situations that are likely to present genuine security risks or other circumstances in which plaintiff has an important interest worth protecting. Where attachment is ordered, a confirmation hearing must be held shortly thereafter (*see* CPLR 6210 [b]).

Here plaintiff has made out a prima facie showing of an interest of sufficient worth to merit issuance of a restraining order of attachment at least for a short period of time. Specifically, plaintiff has presented prima facie proof that defendant who resides in China is likely to seek to evade the jurisdiction of the court and frustrate efforts to enforce a money judgment should plaintiff be successful in its suit.

Because the attachment shall continue more than a day as originally envisioned, plaintiff will be required to give an undertaking in th amount of \$500 to be deposited within five (5) days of the date of this order. The amount fixed shall be without prejudice to defendant to apply for an order to setting a different sum.

Date: June 9, 2017

  
O. Peter Sherwood, J.S.C