UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THULE AB,

Plaintiff,

-against-

ADVANCED ACCESSORY HOLDINGS COPORATION, AAS ACQUISITIONS, LLC, CHAAS ACQUISITIONS, LLC, VALLEY INDUSTRIES, LLC,

Defendants.

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09 Civ. 00091 (PKC)

MEMORANDUM AND ORDER

P. KEVIN CASTEL, District Judge:

Plaintiff Thule AB ("Thule") moves for reconsideration of this Court's Memorandum and Order of May 4, 2010, in which the Court denied both a motion to dismiss the Second Amended Complaint filed by defendant CHAAS Acquisitions, LLC ("CHAAS") and the plaintiff's motion for summary judgment in its favor.[1] See Thule AB v. Advanced Accessory Holdings Corp., 2010 WL 1838894 (S.D.N.Y. May 4, 2010) ("Thule II"). Familiarity with that Memorandum and Order and the facts of this case are assumed.

In denying the plaintiff's motion for summary judgment, this Court, consistent with its obligations under Rule 56, Fed. R. Civ. P., reviewed the record submitted by the parties, and concluded that the plaintiff had failed to satisfy its burden of establishing all material elements necessary to entitle it to judgment as a matter of law. See generally Vermont Teddy Bear Co. v. 1-800 Beargram Co., 373 F.3d 241, 244 (2d Cir. 2004). Specifically, the Escrow Agreement that the plaintiff claims was breached conditions payment

[1] Due to an automatic bankruptcy stay on the other defendants, 11 U.S.C. § 362(a), CHAAS is the sole remaining defendant in this case. See Thule II, 2010 WL 1838894, at *1.

on, among other things, "a determination by a final, nonappealable order of a court of competent jurisdiction" that an amount is "payable" to Thule. Thule II, 2010 WL 1838894, at *10-11. Thule argued that a prior Memorandum and Order of this Court, which confirmed an arbitration award to the plaintiff of $4,122,100, constituted "a final, nonappealable order" sufficient to require payment from defendant CHAAS Acquisitions, LLC. See Thule AB v. Advanced Accessory Holdings Corp., 2009 WL 928307 (S.D.N.Y. Apr. 2, 2009) ("Thule I"). In Thule II, this Court reasoned that because Thule I had not been reduced to final judgment, there was no final, non-appealable order that triggered CHAAS's obligation to pay under the Escrow Agreement. Thule II, 2010 WL 1838894, at *11-12. Thule II described the relevant procedural history and its implications as follows:

> On April 14, 2009, the Clerk entered judgment in this action. Less than one month later, and upon Thule's own motion, judgment was vacated. (Docket # 37; Docket Minute Entry 5/8/09.) Thule's Local Rule 56.1 Statement does not assert that a final, non-appealable order has been entered. Elsewhere, Thule strongly implies, but stops short of explicitly asserting, that this Court's decision affirming the arbitration award constituted a final, nonappealable order that required CHAAS to execute the certificate of payment under the Escrow Agreement. (S.J. Mem. at 2 (arguing that CHAAS is "obligated to sign the Certificate of Payment if the dispute over the amount owed is resolved."), 8 & n. 2 (discussing the since-vacated judgment of April 14, 2009).)
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> A judicial decision followed by a subsequently vacated judgment is not a final, nonappealable order. Entry of final judgment is necessary for a party to file a notice of appeal. See Rule 4(a) (1)(A), Fed. R. App. P.; Mohawk Indus., Inc. v. Carpenter, 130 S.Ct. 599 (2009) (discussing federal final judgment rule). Alternatively, no certificate has been issued pursuant to 28 U.S.C. § 1292(b), nor partial summary judgment entered under Rule 54(b), Fed. R. Civ. P, either of which might have resulted in a final, nonappealable order. Just as the parties agreed to a broad definition of "Losses" and an informal procedure for asserting entitlement to indemnification, so too did they negotiate and agree that drawdown on the escrow account was conditioned upon agreement between the parties or a final, nonappealable order by a court of competent jurisdiction. (Escrow Agreement §§ 6(c)(i) & (ii).)

Id.

Thule now moves for reconsideration, contending that under the Federal Arbitration Act, 9 U.S.C. § 1, et seq. (the "FAA"), the Court's Memorandum and Order in Thule I constitutes a final, non-appealable order that establishes its entitlement to relief under the parties' Escrow Agreement. The FAA, at 9 U.S.C. § 16(a)(1)(D), provides that "[a]n appeal may be taken from . . . an order . . . confirming or denying confirmation of an award or partial award . . . ." The text of the FAA does not require that an order be reduced to final judgment to be appealable. See also Hewlett-Packard Co. v. Berg, 61 F.3d 101, 104 (1st Cir. 1995) ("Congress has designated as immediately appealable an order confirming an arbitration award," and entry of final judgment is not a necessary condition for appeal); Ottley v. Schwartzberg, 819 F.2d 373, 375-76 (2d Cir. 1987) ("[T]he arbitrator has made his determination and a final award has been rendered; all issues properly within the arbitrator's province have been resolved. Accordingly, the district court order denying confirmation is a final, appealable order."). The Memorandum and Order of Thule I issued on April 2. Pursuant to the FAA, the order was appealable. The plaintiff's time to appeal began to run on that date, and expired on May 2, 2009. Rule 4(a)(1), Fed. R. App. P. (setting 30-day deadline for appeal from district court judgment).

In opposition to the motion for reconsideration, CHAAS argues that Thule I was directed only toward the underlying arbitration award, not any entitlement to payment under the parties' Escrow Agreement. But the text of the Escrow Agreement conditions payment on a "final, nonappealable order . . . that the Owed Amount . . . is payable to [Thule]." (Escrow Agrmt. § 6(c).) Thule I concluded that, "[w]ith the confirmation of the arbitration award, the sum will now be due and owing." 2009 WL 928307, at *5. As discussed in Thule II, the broad language of the Escrow Agreement and the Purchase

Agreement provided indemnification for the post-closing adjustments disputed here. 2010 WL 1838894, at *6-8. Section 6(c) of the Escrow Agreement was not drafted as narrowly as CHAAS now asserts.

In moving for reconsideration, the plaintiff has satisfied its burden of directing the Court to authority that it previously overlooked. Local Rule 6.3; Kermanshah v. Kermanshah, 2010 WL 1904135 (S.D.N.Y. May 11, 2010). As a result, the plaintiff has established that Thule I constituted a final, non-appealable order, which, pursuant to Rule 56, establishes the plaintiff's entitlement to judgment as a matter of law on its breach of contract claim.

The plaintiff's motion for reconsideration of Thule II is granted, and summary judgment is granted to the plaintiff. The plaintiff should confer with CHAAS and submit to the Court a proposed judgment within 10 days of the date of this Memorandum and Order.

SO ORDERED.

P. Kevin Castel
United States District Judge

Dated: New York, New York
June 1, 2010