

<b>Pala Assets Holdings Ltd v Rolta, LLC</b>
2019 NY Slip Op 32031(U)
July 5, 2019
Supreme Court, New York County
Docket Number: 652798/2018
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL PART 48-----X  
PALA ASSETS HOLDINGS LTD,INDEX NO. 652798/2018

Plaintiff,

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

- v -

MOTION SEQ. NO. 003; 005ROLTA, LLC, ROLTA INDIA LTD, ROLTA  
INTERNATIONAL INC., ROLTA UK LTD, ROLTA MIDDLE  
EAST FZ-LLC, ROLTA AMERICAS LLC, and ROLTA  
GOLBAL B.V.,**DECISION AND ORDER**Defendants.  
-----X**MASLEY, J.:**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 64, 65, 66, 67, 68, 73, 77, 78, 91, 92, 93, 94, 95, 96, 97, 99, 100, 101, 102, 103, 104, 105

were read on this motion to/for

ORDER OF ATTACHMENT

The following e-filed documents, listed by NYSCEF document number (Motion 005) 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 176, 179, 180, 181, 182, 183, 184, 185, 186, 187

were read on this motion to/for

ORDER OF ATTACHMENT

In motion sequence number (motion) 003, plaintiff Pala Assets Holdings Ltd.

(Pala) moves, pursuant to CPLR 6212 and 6223, to confirm an order of attachment.

(NYSCEF Doc. No. [NYSCEF] 37). Defendants Rolta, LLC, Rolta India Ltd., Rolta

International, Inc., Rolta U.K. Ltd., Rolta Middle East FZ-LLC, Rolta Americas LLC, and

Rolta Global BV (collectively, Rolta) cross-move, pursuant to CPLR 6223, to vacate the June 7, 2018 order of attachment. (NYSCEF 64).

In motion 005, Pala and nonparties (see n 1; NYSCEF 1 [summons]) Value Partners Fixed Income SPC – Value Partners Credit Opportunities Fund (VP Credit), Value Partners Greater China High Yield Income Fund (VP China and, together with VP

Credit, VP Partners), and Pinpoint MultiStrategy Fund (Pinpoint) move, pursuant to CPLR 6212, against Rolta for an attachment in the amount of \$179,398,411.70. (NYSCEF 145).

On June 6, 2018, Pala commenced this action by filing a summons. (NYSCEF 1). Eventually, Pala filed a motion for summary judgment in lieu of complaint. (NYSCEF 117 [motion 002]). That CPLR 3213 motion was denied and the motion papers were converted to pleadings.<sup>1</sup> (NYSCEF 230 [April 23, 2019 decision and order]). The court presumes familiarity with this action and refers to the April 23, 2019 decision and order, which is incorporated here, for the background of this case; only facts necessary to resolve these motions are discussed below. (See NYSCEF 230).

On June 7, 2018, Pala's application (motion 000) was granted and an ex parte Order of Attachment was entered, pursuant to CPLR 6201, against the property of Rolta in the amount of \$5,216,807.52. (NYSCEF 19). Pala posted the assigned undertaking that same day. (NYSCEF 42).

On June 13, 2018, Pala delivered the Order of Attachment to the Sheriff of the City of New York; on June 14, 2018, the Sheriff served the Order of attachment upon Rolta's appointed agent and levied upon the property of Rolta. (NYSCEF 40 [Starner aff, June 25, 2018], NYSCEF 43 [Sheriff's Levy by Service and Attachment upon Rolta, dated June 14, 2018], NYSCEF 44 [Sheriff's Certificate confirming the same]).

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<sup>1</sup> Adding nonparties to the caption of a CPLR 3213 motion without serving/filing a supplemental summons does not amend the caption. Upon denial of the CPLR 3213 motion by decision dated April 23, 2019, the motion papers were converted to pleadings; however, a supplemental summons including the additional plaintiffs—VP Partners and Pinpoint—was not served within 20 days thereafter.

On June 19, 2018, Pala served its summons (NYSCEF 1) and motion for summary judgment in lieu of complaint with accompanying notice and papers (motion 002), and the executed ex parte application for an order of attachment (motion 000) upon Rolta's appointed agent. (NYSCEF 35 [aff of service]).

The Order of Attachment required each defendant to submit the required CPLR 6219 statements within five days of the June 14, 2019 service (thus, by June 19, 2018); no statement was timely filed. (NYSCEF 19). Pursuant to the Sheriff's levy, Rolta was required to provide a statement identifying their property "forthwith" (NYSCEF 43) and plaintiff's attorney states that the Sheriff's office advised him, on June 25, 2018, that no statement was furnished to the Sheriff. (NYSCEF 40 [Starnier aff]). Though Rolta filed garnishee statements, dated July 7, 2018, stating that they had no assets in New York (NYSCEF 94), Rolta has stated, by Preetha Pulsani, president of one defendant entity with personal knowledge as to all defendant entities, that "[t]he majority of [Rolta's] U.S. assets consist of equity in U.S. and foreign companies." (NYSCEF 66, ¶¶ 1, 21 [Pulusani aff, dated July 2018]).

There are five requirements to confirm an ex parte order of attachment pursuant to CPLR 6211. (CPLR 6212; see CPLR 6201). If each requirement is satisfied, the moving plaintiff is entitled to the attachment remedy. (*Olbi USA v Agapov*, 283 AD2d 227, 227 [1st Dept 2001]).

First, Pala has stated a claim for breach of contract against each defendant based on the nonpayment of money due under the 2018 and 2019 Notes. (*Weissman v Sinorm Deli*, 88 NY2d 437, 443-444 [1996] [prima facie case for breach of contract (a note) established by proof of "an instrument for the payment of money only" and default

in payment and indemnification under that instrument]). Pala asserts that Rolta has breached its contractual obligations under the 2018 Indenture to pay interest and principal on the 2018 Notes beneficially owned by Pala. Similarly, Pala asserts that Rolta has breached its contractual obligations under the 2019 Indenture to pay interest on the 2019 Notes beneficially owned by Pala. Rolta does not deny the defaults. (NYSCEF 66, Pulusani aff, ¶ 16).<sup>2</sup>

Second, Pala is likely to succeed on the merits of its claim. Defendants are in breach of unambiguous contracts to make payments of interest and principal. Indeed, defendants have acknowledged their failure to make the required payments. (*Id.*; see *also* NYSCEF 48).

Third, grounds for an order of attachment exists under CPLR 6201 (1) because each defendant entity is a “nondomiciliary residing without the state.” (See *e.g.* NYSCEF 17, at 129 [2019 Indenture, Schedule I]). Rolta’s objection that three of the seven defendant entities are organized in the United States is without merit as the reference to CPLR 6201’s reference to the term “foreign” refers to incorporation outside of the State of New York. (*E.g. Shepard & Morse Lbr. Co. v Burleigh*, 27 AD 99, 101 [1st Dept 1898]).

Fourth, the amount demanded from Rolta exceeds all counterclaims known to Pala as no Rolta entity has asserted counterclaims against Pala. In its memorandum of law, Rolta refers to counterclaims for intentional interference with the Rolta’s restructuring; however, no such counterclaims have been filed in this action.

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<sup>2</sup> In addition to lacking the date on which the document was signed and notarized (stating only “July 2018”), the affidavit is notarized in Nevada and is not accompanied by a certificate of conformity required under CPLR 2309.

Fifth, there is a continuing need for the levy. Courts have recognized a need for continuing an attachment where there is an “identifiable risk that the defendant will not be able to satisfy the judgment.” (*VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 60 [1st Dept 2013]). Such risk is present where, for example, a defendant has a history of not paying its creditors or is in a poor financial position. (See e.g. *ITC Entertainment, Ltd. v Nelson Film Partners*, 714 F2d 217, 219 [2d Cir 1983] [confirming attachment under New York law]; *Elton Leather Corp. v First Gen. Res. Co.*, 138 AD2d 132 [1st Dept 1988] [confirming attachment in where the defendant was in financial trouble and had failed to make timely payments to secured creditors and unsecured creditors]; *Gem Holdco, LLC v Changing World Tech., L.P.*, 2015 N.Y. Slip Op. 30385[U], 2015 N.Y. Misc. LEXIS 818, at \*3-4 [Sup Ct, NY County 2015] [valid concern that nondomiciliaries and foreign corporations would not be able to satisfy judgment where they lacked liquidity and any right to retain the funds at issue]). Rolta’s consent to jurisdiction and Pulusani’s conclusory assertion that Rolta has sufficient assets to pay a judgment here do not alter this risk. (NYSCEF 66, ¶ 22; see *ITC Entertainment, Ltd. v Nelson Film Partners*, 714 F2d at 221 [stating that the focus is on “whether there is a likelihood that the defendant will have adequate assets within the state to respond to a judgment against” it]).

Rolta argues that attachment is barred by the 2018 and 2019 Indentures’ no-action clauses. Section 6.06 of both Indentures (“Limitation on Suits”) provides that

“[a] Holder may not institute any proceeding, judicial or otherwise, with respect to this Indenture or the Notes, or for the appointment of a receiver or trustee, or for any other remedy under this Indenture or the Notes unless:

(a) the Holder has previously given the Trustee written notice of a continuing Event of Default; (b) the Holders of at least 25% in aggregate principal amount of

outstanding Notes make a written request to the Trustee to pursue the remedy (c) such Holder or Holders offer the Trustee and the Security Agent indemnity reasonably satisfactory to the Trustee and the Security Agent against any costs, liability or expense, to be incurred in compliance with such request; (d) the Trustee does not comply with the request within (x) 60 days after receipt of the written request pursuant to Section 6.06(b) or (y) 60 days after the receipt of the offer of indemnity pursuant to Section 6.06(c), whichever occurs later; and (e) during such 60-day period, the Holders of a majority in aggregate principal amount of the outstanding Notes do not give the Trustee a direction that is inconsistent with the request."

(NYSCEF 148, 155 [Indentures]).

"Barriers to action by individual bondholders serve an important purpose by both preventing expensive lawsuits that do not have the support of a substantial portion of the creditors while also centralizing the prosecution of lawsuits whose benefits should properly accrue to all bondholders." (*Emmet & Co., Inc. v Catholic Health E.*, 37 Misc 3d 854, 860-861 [Sup Ct, NY County 2012]). Indeed, here, Rolta objects to Pala's interference with Rolta's restructuring efforts; however, the plain terms of the Indentures provide Pala the right to seek provisional relief in connection with this lawsuit to enforce its undisputed right to recover on the Notes. Specifically, Section 6.07 of both Indentures provides that, "[n]otwithstanding anything to the contrary in [Section] 6," Pala has a right "to receive payment of the principal of[] . . . or interest on" the Notes and affirms Pala's corresponding right to initiate an action "for the enforcement of any such payment," which cannot be "impaired or affected" (NYSCEF 148, 155). Precluding Pala from seeking provisional remedies, including prejudgment attachment to help secure its ability to recover a judgment, would "impair" or "affect" Pala's right to pursue an action to recover under the Notes in contravention of the Indentures.

Pala also has the right to institute this action under Section 316 of the Trust Indenture Act, which provides that a noteholder's

“right . . . to receive payment of the principal of and interest on such indenture security, on or after the respective due dates expressed in such indenture security, or to institute suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such holder.”

(15 USCA § 77ppp [b]; see *DCF Capital, LLC v US Shale Solutions, LLC*, 2017 NY Slip Op 30258[U], 2017 WL 655768 [Sup Ct, NY County 2017] [preconditions precedent to initiate an action for nonpayment of interest and principal set forth in an indenture are unenforceable under the Trust Indenture Act]; see generally *Marblegate Asset Mgt., LLC v Educ. Mgt. Fin. Corp.*, 846 F3d 1 [2d Cir 2017] [history and analysis of term ‘right to receive payment’ language employed in 15 USC § 77ppp (b)]).

Rolta’s other arguments are equally unpersuasive. The court rejects Rolta’s objection to the absence of assets to attach. While assets may not be present at a particular moment, assets may come into the jurisdiction during the pendency of the action. (See *Hotel 71 Mezz Lender LLC v Falor*, 14 NY3d 303, 311-312 [2010]).

Accordingly, Pala’s attachment (\$5,216,807.52) is confirmed.

In motion 005, Pala seeks an attachment in the amount of \$26,881,759.20, which is the total of its claim for damage (\$32,098,566.72) less the amount of its current attachment (\$5,216,807.52). As stated above, Pala has satisfied the statutory requirements for an attachment.

With regard to motion 005 and the nonparties, identified in the caption as plaintiffs but which have not served a supplemental summons (VP Partners and Pinpoint), orders of attachments in the following amounts are sought: Pinpoint, \$83,243,236.11; VP China, \$60,748,210.83; and VP Credit, \$8,525,205.56. While VP China, VP Credit, and Pinpoint have not formally joined the action, it would be

inequitable at this juncture to deny them any relief when the same analysis that applies to Pala above also applies to the nonparties' beneficial ownership of the Notes and their rights to enforce their interests under the Indentures; accordingly, the court awards nonparties VP Partners and Pinpoint an order of attachment, pursuant to CPLR 6201 and 6212, conditioned as follows:

(1) within ten days of entry of this order on NYSCEF by the court, each nonparty (Pinpoint, VP China, and VP Credit) shall individually post an undertaking in the amount of \$500,000 and shall comply with CPLR 1003 and other applicable law by filing and serving a supplemental summons formally joining each nonparty to the action, and each nonparty shall file proof of compliance with each aspect of this provision prior to the conclusion of the ten-day period;

(2) if, after the ten-day period has ended, a nonparty has failed to timely comport with and file proof of compliance with provision (1), that nonparty's order of attachment shall automatically expire.

Thus, motion 005 is granted as to the nonparties VP China, VP Credit, and Pinpoint subject to each of those nonparty's satisfaction of the above-listed conditions; failure to timely satisfy those obligations will render those nonparties' orders of attachment automatically expired.

Accordingly,

As to Motion 003, it is:

ORDERED that the motion of Plaintiff Pala Assets Holding Ltd. to confirm the previous ex parte attachment (in the amount of \$5,216,807.52) is granted; and it is further

ORDERED that Defendants' cross motion to vacate the ex parte order of attachment is denied; and

As to Motion 005 and Pala Assets Holding Ltd. (Pala), it is

ORDERED that the motion of Plaintiff Pala for an attachment in the amount of \$26,881,759.20 is granted (Pala Attachment); and it is further

ORDERED that the amount to be secured by the Pala Attachment, inclusive of probable interest, costs, and Sheriff's fees and expenses, shall be \$26,881,759.20; and it is further

ORDERED that the undertaking of Pala is fixed in the sum of \$500,000 on the condition that Pala shall pay to the Defendants an amount not exceeding \$450,000 for legal costs and damages, collectively, which may be sustained by reason of the attachment, and up to and not exceeding \$50,000 to the Sheriff for allowable fees, if the Defendants recover judgment or if it is decided that Plaintiff Pala is not entitled to an attachment of the property of the Defendants; and it is further

ORDERED that the Sheriff of the City of New York, or the Sheriff of any County of the State of New York, shall levy within her jurisdiction, at any time before final judgment, upon such real and personal property in which any Defendant has an interest and upon such debts owing to any Defendant as will satisfy \$26,881,759.20, the amount of Plaintiff Pala's demand, together with probable interest, costs, and the Sheriff's fees and expenses, and that the Sheriff proceed herein in the manner and make her return within the time prescribed by law; and

As to Motion 005 and Pinpoint MultiStrategy Fund (Pinpoint), it is

ORDERED that the motion of Pinpoint for an attachment in the amount of \$83,243,236.11 is granted (Pinpoint Attachment) on the condition that Pinpoint serves and files a supplemental summons to formally join this matter as a plaintiff and otherwise complies with CPLR 1003, and files proof of such compliance to NYSCEF, within ten days of entry of this order on NYSCEF by the court; and it is further

ORDERED that the amount to be secured by the Pinpoint Attachment, inclusive of probable interest, costs, and Sheriff's fees and expenses, shall be \$83,243,236.11; and it is further

ORDERED that the undertaking of Pinpoint is fixed in the sum of \$500,000 on the condition that Pinpoint shall pay to the Defendants an amount not exceeding \$450,000 for legal costs and damages, collectively, which may be sustained by reason of the attachment, and up to and not exceeding \$50,000 to the Sheriff for allowable fees, if the Defendants recover judgment or if it is decided that Pinpoint is not entitled to an attachment of the property of the Defendants; and it is further

ORDERED that the Sheriff of the City of New York, or the Sheriff of any County of the State of New York, shall levy within her jurisdiction, at any time before final judgment, upon such real and personal property in which any Defendant has an interest and upon such debts owing to any Defendant as will satisfy \$83,243,236.11, the amount of Pinpoint's demand, together with probable interest, costs, and the Sheriff's fees and expenses, and that the Sheriff proceed herein in the manner and make her return within the time prescribed by law; and it is further

ORDERED that Pinpoint's failure to timely comply with the provisions of this order will result in the automatic expiration of Pinpoint's Attachment;

As to Motion 005 and Value Partners Fixed Income SPC – Value Partners Credit Opportunities Fund (VP Credit), it is

ORDERED that the motion of VP Credit for an attachment in the amount of \$8,525,205.56 is granted (VP Credit Attachment) on the condition that VP Credit serves and files a supplemental summons to formally join this matter as a plaintiff and otherwise complies with CPLR 1003, and files proof of such compliance to NYSCEF, within ten days of entry of this order on NYSCEF by the court; and it is further

ORDERED that the amount to be secured by the VP Credit Attachment, inclusive of probable interest, costs, and Sheriff's fees and expenses, shall be \$8,525,205.56; and it is further

ORDERED that the undertaking of VP Credit is fixed in the sum of \$500,000 on the condition that VP Credit shall pay to the Defendants an amount not exceeding \$450,000 for legal costs and damages, collectively, which may be sustained by reason of the attachment, and up to and not exceeding \$50,000 to the Sheriff for allowable fees, if the Defendants recover judgment or if it is decided that VP Credit is not entitled to an attachment of the property of the Defendants; and it is further

ORDERED that the Sheriff of the City of New York, or the Sheriff of any County of the State of New York, shall levy within her jurisdiction, at any time before final judgment, upon such real and personal property in which any Defendant has an interest and upon such debts owing to any Defendant as will satisfy \$8,525,205.56, the amount of VP Credit's demand, together with probable interest, costs, and the Sheriff's fees and

expenses, and that the Sheriff proceed herein in the manner and make her return within the time prescribed by law; and it is further

ORDERED that VP Credit's failure to timely comply with the provisions of this order will result in the automatic expiration of VP Credit's Attachment; and

As to Motion 005 and Value Partners Greater China High Yield Income Fund (VP China), it is

ORDERED that the motion of VP China for an attachment in the amount of \$60,748,210.83 is granted (VP China Attachment) on the condition that VP China serves and files a supplemental summons to formally join this matter as a plaintiff and otherwise complies with CPLR 1003, and files proof of such compliance to NYSCEF, within ten days of entry of this order on NYSCEF by the court; and it is further

ORDERED that the amount to be secured by the VP China Attachment, inclusive of probable interest, costs, and Sheriff's fees and expenses, shall be \$60,748,210.83; and it is further

ORDERED that the undertaking of VP China is fixed in the sum of \$500,000 on the condition that VP China shall pay to the Defendants an amount not exceeding \$450,000 for legal costs and damages, collectively, which may be sustained by reason of the attachment, and up to and not exceeding \$50,000 to the Sheriff for allowable fees, if the Defendants recover judgment or if it is decided that VP China is not entitled to an attachment of the property of the Defendants; and it is further

ORDERED that the Sheriff of the City of New York, or the Sheriff of any County of the State of New York, shall levy within her jurisdiction, at any time before final judgment, upon such real and personal property in which any Defendant has an interest and upon such debts owing to any Defendant as will satisfy \$60,748,210.83, the amount

of VP China's demand, together with probable interest, costs, and the Sheriff's fees and expenses, and that the Sheriff proceed herein in the manner and make her return within the time prescribed by law; and it is further

ORDERED that VP China's failure to timely comply with the provisions of this order will result in the automatic expiration of VP China's Attachment.

**Motion Seq. No. 003:**

7/5/19  
DATE

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CASE DISPOSED

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GRANTED

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DENIED

APPLICATION:

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SETTLE ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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NON-FINAL DISPOSITION

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GRANTED IN PART

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OTHER

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SUBMIT ORDER

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FIDUCIARY APPOINTMENT

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REFERENCE

  
**HON. ANDREA MASLEY**

ANDREA MASLEY, J.S.C.

**Motion Seq. No. 005:**

7/5/19  
DATE

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CASE DISPOSED

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DENIED

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NON-FINAL DISPOSITION

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OTHER

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SUBMIT ORDER

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FIDUCIARY APPOINTMENT

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REFERENCE

  
**HON. ANDREA MASLEY**

ANDREA MASLEY, J.S.C.