UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
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BETHLEHEM STEEL CORP., et al.,
Debtors. **Ch. 11 No. 01-15288**

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BETHLEHEM STEEL CORP., et al.,
Plaintiffs,

v.

Adv. Proc. 03-9665 (brl)

LUSCAR, LTD.
Defendant.
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EXTRACT OF BENCH RULING GRANTING
MOTION TO DISMISS FOR LACK OF JURISDICTION

Luscar Ltd. (the "Luscar" or "Defendant") moves to dismiss Bethlehem Steel Corporation's complaint for lack of personal jurisdiction and to set aside any and all defaults, technical or otherwise for plaintiff's failure to effectuate proper service.

According to Luscar, service was not properly effectuated upon it pursuant to the Hague Convention, Rule 4 of the Federal Rules of Civil Procedure, as incorporated in Rule 7004 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), or otherwise and thus, this Court lacks jurisdiction over the Defendant. Luscar further contends that the Plaintiff should be precluded from re-serving the Defendant, as the statute of limitations for bringing a preference action under section 547 of the Bankruptcy Code has run pursuant to section 546(a) of the

Bankruptcy Code, and Plaintiff has not demonstrated "good cause" for the almost four year delay since the filing of the complaint. Plaintiff is not in a position to contradict those assertions, and so conceded in argument.

On September 18, 2006, Luscar received a Clerk's Entry of Default in this adversary proceeding. Luscar contends that this was the first notice received by it that there had been a Complaint filed against it by Plaintiff on September 30, 2003. The Complaint was served by regular first class mail in January 2004.

Rule 4(h)(2) of the Federal Rules of Civil Procedure, as incorporated by Bankruptcy Rule 7004(a) allows service to be effectuated upon a foreign corporation "in any manner prescribed for individuals" pursuant to Rule 4(f) of the Federal Rules of Civil Procedure, "except personal delivery. . . . " Rule 4(f) provides for such service:

(1) by any *internationally agreed means* reasonably calculated to give notice, *such as* those means authorized by the Hague Convention . . . ; or
(2) if . . . *the applicable international agreement allows other means of service,* provided that service is *reasonably calculated to give notice:*
(A) in the *manner prescribed by the law of the foreign country;* or
(B) as *directed by the foreign authority* in response to a letter rogatory or letter of request; or
(C)(ii) any form of mail requiring a *signed receipt,* to be *addressed* and *dispatched by the clerk of the court* . . . ; or
(3) by other means not prohibited by international agreement as may be *directed by the court.*

Additionally, Bankruptcy Rule 7004 specifically states that service by first class mail postage prepaid can only be "made within the United States." Under both the Federal Rules of Civil Procedure, and the Bankruptcy Rules, service may be made by any internationally agreed upon means, such as the Hague convention; *or if the international agreement allows other methods of service,* then provided it is reasonably calculated to give notice, service may be made by: 1) any manner proscribed by Canadian law; 2) as directed by a foreign authority pursuant to a

letter rogatory; or 3) by a form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court. No language exists authorizing service by way of first class mail to a Canadian corporation.

Since the United States and Canada are signatories to the Hague Convention, service of process may be made pursuant to the provisions of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents.[1] Under the Hague Convention, documents to be served in a foreign country *shall be attached to a formal request form and shall be sent, in duplicate, to the central authority of the country where service is sought.* [2] While service of process may be effected by "postal channels," postal channels does not mean "first class mail." The law which governs in the Second Circuit, requires that the service be made, at a minimum, by *registered mail. See Ackerman v. Levine,* 788 F.2d 830, 838 (2d. Cir. 1986) (holding service by registered mail permitted by Hague Convention). New York courts have consistently required that service pursuant to the Hague Convention be by registered mail. *See eg., Anderson v. Canarail, Irzc.,* 2005 WL 2454072 (S.D.N.Y. 2005) (holding service of process by *registered mail* upon a Canadian company was a proper means of service.). Accordingly, Plaintiff has failed to comply with the Hague Convention.

If an international agreement permits additional methods of service, service of process may be effected pursuant to the laws of the country where service is sought. Fed. R. Civ. P. 4(f)(2)(a). Failure to abide by the rules of the foreign country, will invalidate service of process

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[1] *See* Art 1, *et seq.,* 20 U.S.T. 361, T.I.A.S. 6638,658 U.N.T.S. 163.

[2]Hague Convention, *Art.* 3,20 U.S.T. 361, T.I.A.S. 6638, 658 U.N.T.S. 163.

on a defendant in that country. *See Hunt's Pier Assoc 's v. Conklin* (*In re Hunt's Pier Assoc 's),* 156 B.R. 464,470-73 (Bankr. E.D. Pa. 1993) (leaving copy of summons and complaint with secretary at defendant's place of business insufficient because it did not comply with applicable Canadian law); *see also Perfuiner's Workshop, Ltd. v. Roure Bertrand du Pont, Inc.*, 737 F. Supp. 785, 789-790 (S.D.N.Y. 1990). Pursuant to Alberta Rules of Court 22(1), "service of any document may be made upon the party or other person for whom it is intended, by double registered mail," if it is intended to be produced as an exhibit to an affidavit of service, ..." [3] Here, Plaintiff served the complaint via U.S. First Class Mail not via double registered mail.

While the 120 day time limit for service pursuant to Rule 4(m) of the Federal Rules of Civil Procedure does not apply to service in a foreign country, the time limit is not meant to extend forever. "The mere fact that Congress exempted foreign service from the 120 day requirement, does not give litigants an unlimited time in which to complete service." *Crysen/Montenay Energy Co. v. E & C Trading Ltd.* (*In re Crysen/Montenay Energy Co.*), 166 B.R. 546, 553 (Bankr. S.D.N.Y. 1994). Although the 120 day deadline for service of process does not apply to foreign countries, the rationale, the prompt movement of civil actions in the federal courts, is still applicable. *Id.* Thus, courts will dismiss actions where there is substantial delay between the filing of the complaint and service of the summons. *Id.*

Here, it is almost six years from the date of the alleged transfer, and almost four years from the filing of the complaint. Plaintiff did not even seek the entry of default until February 2006. Prejudice to a defendant may be presumed from such a lengthy delay even though no

[3]Alta. Reg. 390168, s. 2

actual prejudice was demonstrated. *In re United Merchants and Mfrs., Inc.*, 86 B.R. 764, 767 (S.D.N.Y. 1988); *see also Jenkins v. City of N. Y.*, 176 F.R.D. 127, 130 (S.D.N.Y. 1997) ("Courts have presumed prejudice to defendants where plaintiffs have caused delays as long as three years and as short as eighteen months.").

For the reasons stated above, the Defendant's motion to dismiss the complaint is granted, and likewise the clerk's entry of default is set aside.

IT IS SO ORDERED.

Dated: New York, New York
April 25, 2007

/s/ Burton R. Lifland
United States Bankruptcy Judge