[* 1]

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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

STUMPF AG,

Plaintiff,

-against-

DYNEGY INC., 360NETWORKS HOLDINGS (USA2), INC., and CRISSCROSS COMMUNICATIONS, GmbH,

Defendants.

INDEX NO. 603460/2002
MOTION DATE
MOTION SEQ. NO. 005
MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
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 Decision and Order.

Dated: December 2, 2005

KARLA MOSKOWITZ J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

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STUMPF AG,

Plaintiff,

Index No. 603460/2002

-against-

DECISION & ORDER

DYNEGY INC., 360NETWORKS HOLDINGS (USA2), INC., and CRISSCROSS COMMUNICATIONS, GmbH,

Defendants.

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KARLA MOSKOWITZ, J.:

This action is to recover for breach of a lease for office space in Vienna, Austria and to pierce the veils of the tenant's former corporate parents. Plaintiff Stumpf, AG ("Stumpf") moves for partial summary judgment (CPLR 3212[e]) that defendant Crisscross Communications GmbH ("Crisscross") breached various lease agreements and thereby incurred liability to Stumpf in the amount of €24,625,261.25.

Stumpf asserts that by virtue of a judgment in the English High Court of Justice, defendants Dynegy Inc. ("Dynegy Inc.") and 360Networks Holding (USA2), Inc. ("360Networks") cannot contest this judgment under the doctrines of international comity, res judicata, collateral estoppel and judicial estoppel.

FACTS/PROCEDURAL HISTORY

In January 2001, Dynegy Austria Communications, GmbH ("Dynegy Austria") (then known as Extant Telecommunikation Service GmbH) entered into various agreements with Stumpf for the lease and renovation of commercial space in Millennium City, a real estate complex in Vienna, Austria. In January 2002, Stumpf (and two entities that later merged into Stumpf) commenced litigation against Dynegy Austria in Austria for breach of those agreements. In September 2002, Stumpf filed this action against Dynegy Inc., Dynegy Austria and Dynegy Global Communications Inc. ("Dynegy Global"), alleging that Dynegy Austria was the alter ego of the other two defendant corporations.

Defendants moved to stay this action in January 2003 on the ground that it was duplicative of the Austrian litigation. In particular, defendants argued that resolution of the

threshold question of whether Dynegy Austria breached the lease agreements "would in large measure predetermine the outcome of the instant action." The court granted a stay by order dated June 10, 2003.

While the stay motion was pending, Dynegy Inc. sold Dynegy Austria to Crisscross Communications Limited that subsequently changed its name to Crisscross Communications GmbH ("Crisscross"). As part of the transaction, Dynegy Inc. agreed to indemnify Crisscross for any losses Dynegy Austria incurred in this action or the Austrian courts. On May 27, 2003, also while the stay motion was pending, Crisscross petitioned to the High Court of Justice, Chancery Division, in London for insolvency administration. The High Court placed Crisscross under the administration of two Licensed Insolvency Practitioners, David Coyne ("Coyne") and John Forsey ("Forsey").

On June 30, 2003, defendants' Austrian counsel moved to adjourn the next scheduled hearing in Vienna on the grounds that the United Kingdom insolvency stayed the Austrian litigation so that any action taken in those proceedings would be a nullity. Shortly thereafter, the parties submitted letters to this court regarding the effect of the developments in the foreign proceedings. On August 4, 2003, in response to a claim that the insolvency disproved defendants' prior assertion that Crisscross had established reserves for potential lease liability, defendants' counsel wrote:

> [D]espite plaintiffs' effort to suggest otherwise, there is nothing contradictory in the establishment of reserves on the books of Dynegy Austria/Crisscross for obligations relating to the leases at issue and the subsequent initiation of insolvency proceedings. We understand that, as in any insolvency or bankruptcy proceeding, the effect of those reserves will be determined in connection in the claim assertion and approval process as administered by the appropriate administrators and overseen by the designated court subject to applicable law. It thus remains to be determined whether and to what degree, Dynegy Austria/Crisscross has sufficient funds to pay the valid claims of its creditors, which, depending on the outcome of the claim-approval process, may include certain of the Stumpf entities' claims.

In September 2003, the insolvency administrators petitioned for a discharge of the administration order and for their appointment as joint liquidators to liquidate Crisscross.

Stumpf, as creditor, objected to the appointment of Mr. Forsey. Stumpf instead sought the designation of another Licensed Insolvency Practitioner, Mr. William Turner. In October 2003, Stumpf offered £10,000 as a contribution towards the costs of the administration if Mr. Forsey would resign and supported the appointment of Mr. Turner.

Also in October 2003, Stumpf's counsel e-mailed Turner requesting that he seek an agreement giving him sole responsibility for reviewing Stumpf's claim against Crisscross and assigning other matters to Mr. Coyne. Although Coyne questioned whether Turner, "being funded by Stumpf, could deal with adjudicating on their claim for the same independence issues raised by Stumpf," the liquidators ultimately entered into an agreement giving Turner sole responsibility for valuing Stumpf's claim. Mr. Forsey stepped down and the High Court thereafter approved Messrs. Coyne and Turner as joint liquidators of Crisscross on November 21, 2003.

On January 5, 2004, Turner advised Stumpf that "there appear to be no realizable assets and therefore, dividend prospects are nil." Turner nevertheless requested that Stumpf complete a proof of debt form. On January 8, 2004, Stumpf returned it with a request for damages equivalent to €23,394,800. Insofar as there was no money in the estate to fund the liquidators' investigation of this claim, Stumpf agreed to pay Turner's and his experts' fees for that effort.

Stumpf played a significant role in the conduct of the investigation, providing strategic advice to Turner regarding the content and timing of his report. On December 9, 2003, prior to submitting the proof of debt, Stumpf forwarded copies of the pleadings from the Austrian and U.S. actions to Dr. Egon Engin-Deniz, a partner in the Austrian law firm of CMS Strommer Reich Rohrwig Karasek Hainz ("CMS"). A month later, Stumpf recommended that Turner retain CMS to serve as his expert on Austrian law in connection with the evaluation of the legal merits of the claims against Crisscross. Turner ultimately retained that firm.

In February 2004, Turner sought Stumpf's advice on contacting Crisscross' former attorneys for information about that company's legal defenses. Stumpf's outside counsel, Mark J. Parkhouse (a former attorney for Dynegy), expressed concern that this contact was "likely to

lead to a report to Dynegy that could delay things" and asked that Turner wait until he consulted with Stumpf insiders. Parkhouse later wrote Turner that "[f]rom Stumpf AG's point of view, no problems in the liquidator contacting the former lawyers of Dynegy . . . [t]he approach is sensible and increases credibility for the report."

Turner also met with Georg Stumpf, the principal of the Stumpf entities, on March 19, 2004. In an e-mail to Parkhouse dated March 22, 2004, under the heading "Dynegy," Turner informed Parkhouse that "you and I are to come up with ideas of areas that we can make life uncomfortable and tactics for doing so . . . Stumpf were of the view that an approach before now would have been premature but in view of the pending adjudication, which will quantify their claim, they feel now is the right time to up the pressure." Turner also recounted that Mr. Stumpf had advised him that his report on the claim against Crisscross was needed for an April 1, 2004 hearing scheduled before this court. Accordingly, he noted, Stumpf found it "unacceptable" that certain expert reports Turner needed to complete the investigation might be delayed. Turner advised Parkhouse that he needed those reports by March 24, 2004 if he were to give them "due consideration."

However, Turner did not receive the expert reports until March 30, 2004. He expressed concern to Dr. Engin-Deniz that he did not have sufficient time to evaluate the documents. Noting that most of the 252 pages were in German, he also questioned whether the 44 pages of English materials constituted a complete translation. However, Parkhouse urged Turner to issue his report immediately, stating that "Stumpf has been advised that there is a risk of its claim in the New York court being dismissed if your decision cannot be put in front of the Judge tomorrow."

By letter dated March 31, 2004, Turner admitted Stumpf's claim in the amount of €24,625,261.25. Turner rejected Stumpf's request, submitted two weeks earlier, to increase the claim to €33,020,139.94. At the April 1, 2004 hearing in this court, Stumpf's counsel submitted Turner's decision as evidence that the liquidator had finally determined Crisscross' liability for breach of contract and the amount of damages. Defendants' counsel questioned the authenticity

and effect of Turner's letter. The court lifted the stay of the action, without prejudice to defendants' right to further examine the liquidator's decision.

Later in April 2004, defendants' counsel moved to withdraw as attorneys for Crisscross in view of the UK insolvency proceedings. In connection with that motion, defendants argued that the court should stay this action against Crisscross under the principle of international comity. However, defendants did not concede that the liquidator's decision was binding against them, objecting, inter alia, to the circumstances surrounding Turner's appointment and the delegation to him of sole authority to evaluate Stumpf's claim. Defendants concluded that "Mr. Turner's decision should not be considered by this Court for any purpose."

By letter dated June 16, 2004, Stumpf's representatives asked Turner for assistance in converting his decision on Crisscross' claim into an English judgment. As is relevant here, the letter stated:

> This decision will be relied upon by Stumpf AG in an action pending before the New York State Court against the former shareholders of the Company. In that action, Stumpf AG claims that those former shareholders are responsible for the debts of the Company. This is an action to "pierce the corporate veil."
>
> Stumpf AG wish to obtain judgment against the Company based on your admission of its proof of debt. This judgment will be shown to the New York State Court at which time Stumpf AG will seek that the State Court endorses your decision on the proof of debt. The importance of the judgment is that it is likely to be more recognizable to the State Court than your decision on the proof of debt.

Stumpf accordingly requested that Turner agree to the lifting of the statutory stay of the English Insolvency Act and consent to the entry of judgment against Crisscross. By letter dated July 2, 2004, the liquidators agreed to do so on condition that Stumpf waive claims to further interest, pay the costs associated with the consent judgment, and agree "that the existence of any judgment gave it no rights of enforcement against [Crisscross]."

Stumpf agreed to these terms and submitted an application to the English High Court of Justice for a consent judgment on July 13, 2004. The application referred to the July 2, 2004 letter containing the liquidators' conditions. In the Witness Statement supporting the application,

Stumpf's solicitor asserted that:

> [Stumpf] wishes to commence legal proceedings in the High Court against [Crisscross], as it believes that a judgment on the admitted debt will assist the Applicant in separate legal proceedings that [Stumpf] has commenced in the Court of the State of New York against [Crisscross'] former shareholders.
>
> We have been informed . . . that there is no automatic process by which the New York State Court can recognise the adjudication of a UK liquidator on a proof of debt and that producing a judgment from the English High Court against the [Crisscross] on the admitted debt will assist the New York State Court in acknowledging the debt due from [Crisscross] to [Stumpf]. This in turn may help the New York Court determine the level of damages, if any, that may be due from the former shareholders of [Crisscross] to [Stumpf].

In completing the application, Stumpf indicated that the parties needing service were "none." The English court entered judgment against Crisscross on July 13, 2004 without opposition.

In opposition to this motion, defendants have submitted affidavits from two experts who conclude that the parties did not conduct the liquidation proceedings in accordance with usual English practice. In particular, they criticize the circumstances of Turner's appointment, including Stumpf's offer of a financial incentive for the resignation of Mr. Forsey; the delegation to Turner of sole responsibility for Stumpf's claim; the payment arrangement between Turner and Stumpf, including that Stumpf was funding the determination of a claim that would result in no recovery out of the liquidation; Turner's seeming acceptance of instructions from Stumpf; Turner's use of an expert Stumpf recommended; Turner's issuance of his decision under pressure to coincide with the April 1, 2004 hearing; and the procurement of a judgment giving Stumpf no additional rights in the English insolvency proceeding. Plaintiff's expert concedes that certain aspects of the liquidation was "atypical," but not unique. There was no request for plaintiff's expert to opine on the propriety of Stumpf's offer of a financial inducement to replace one of the liquidators.

DISCUSSION

The court denies the motion for summary judgment. The doctrines of international comity, collateral estoppel and judicial estoppel have no application to plaintiff's motion.

The principle of international comity is codified in CPLR Article 53, the Uniform Foreign Money-Judgments Recognition Act. Under CPLR § 5302, the statute "applies to any foreign country judgment which is final, conclusive and enforceable where rendered." Section 5303 provides that "[e]xcept as provided in section 5304,a foreign country judgment meeting the requirements of section 5302 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money . . . [s]uch a foreign judgment is enforceable by an action on the judgment, a motion for summary judgment in lieu of complaint, or in a pending action by counterclaim, cross-claim or affirmative defense."

The statute was enacted "to codify and clarify existing case law on the subject and, more importantly, to promote the efficient enforcement of New York judgments abroad by assuring foreign jurisdictions that their judgments would receive streamlined enforcement here" (CIBC Mellon Trust v Mora Hotel Corp. NV, 100 NY2d 215, 221 [2003]). Accordingly, "New York has traditionally been a generous forum in which to enforce judgments for money damages rendered by foreign courts" (Id.). There is no requirement that the foreign jurisdiction's procedures "exactly match" those of New York; it is enough that they are "compatible with the requirements of due process of law" (Id. at 222, quoting Guinness PLC v Ward, 955 F2d 875 [4th Cir 1992]). English judgments are generally immune to challenge insofar as the overall fairness of that country's legal system is "beyond dispute" (CIBC, supra at 222).

Nevertheless, "[i]n proceeding under article 53, the judgment creditor does not seek any new relief against the judgment debtor, but instead merely asks the court to perform its ministerial function of recognizing the foreign country money judgment and converting it into a New York judgment" (Lenchyshyn v Pelko Elec. Inc., 218 AD2d 42, 49 [4th Dept 2001]). Plaintiff's partial summary judgment motion does not seek such pro forma relief. For a variety of reasons, the application does not fall within the ambit of the statute.

First, plaintiff is not seeking entry or conversion of the English judgment into a New York money judgment. Rather, plaintiff is seeking a declaration regarding the veracity of certain facts and legal conclusions allegedly underlying the judgment, i.e., that Crisscross actually breached the lease agreements and that Stumpf actually sustained damages in the amount of the English judgment. But plaintiff does not seek to enforce that judgment for the "recovery of a sum of money" as against Crisscross or any party.

Second, the statute specifies that the foreign judgment is conclusive only "between the parties." Neither Dynegy nor 360Networks were parties to the liquidation proceeding. Nor, as noted, is plaintiff attempting to enter a judgment directly against either of them.

Finally, section 5302 limits the statute's application to judgments that are "enforceable where rendered." The English judgment was not enforceable against Crisscross in the United Kingdom, insofar as the liquidators specifically stipulated as part of their application before the High Court that the judgment would give rise to "no rights of enforcement against [Crisscross]." Nor was the judgment enforceable in England against Dynegy or 360Networks because, as noted, they were neither parties to the liquidation nor did the judgment name them.

The ground for plaintiff's motion more closely approximates collateral estoppel; but that doctrine, too, is inapplicable here. "The doctrine of collateral estoppel precludes a party from relitigating an issue which has previously been decided against him in a proceeding in which he had a fair opportunity to fully litigate the point" (Kaufman v Eli Lilly & Co., 65 NY2d 449, 455 [1985][internal quotations and citations omitted]). For the doctrine to apply, two requirements must be satisfied: "first, the identical issue necessarily must have been decided in the prior action and be decisive in the present action, and second, the party to be precluded must have had a full and fair opportunity to contest the prior determination" (In Re Abady, 22 AD3d 71, 81 [1st Dept 2005]). Plaintiff has satisfied neither test.

As is relevant here, "[a]n issue is not actually litigated if, for example, there has been a default, a confession of liability . . . or even because of a stipulation" (Kaufman, supra at 456-57; see Zimmerman Tower Ins. Co., 13 AD2d 137 [1st Dept 2004]). In this case, the parties did not

litigate the merits of plaintiff's claims in the High Court. Rather, the liquidators stipulated to a judgment that, as noted above, was not even enforceable against the debtor. Moreover, the parties informed the High Court that the purpose of the judgment was merely to "assist" the New York courts in acknowledging the alleged debt and determining the level of damages, "if any" defendants owed. Under the circumstances, one cannot infer that the parties intended the English judgment to have a final and conclusive, collateral estoppel effect as to the issue of Crisscross' liability and damages.

Further, as the liquidators acknowledged in their application for judgment, their own determination on the proof of claim was not an adjudication that New York courts would immediately recognize. Apart from the fact that the determination was not in judgment form, the irregularities defendants identified preclude this court from according preclusive effect. The proceedings in liquidation were not in any sense adversarial. As the undisputed record makes clear, Stumpf coordinated or cleared everything from the selection of the liquidators and experts, to the drafting of the report and the timing of its release. Thus, even if the liquidators' determination was actually a judgment within the scope of Article 53, the apparent level of collusion was such that the court should exercise its discretion to deny recognition under the exception in CPLR 5304[b][3].

The second test for collateral estoppel is absent because defendants, who were not parties to the liquidation, did not have a full and fair opportunity to participate in that process. Plaintiff's contention that defendants were in privity with Crisscross is without merit. As our Court of Appeals noted in Bucchel v Bain, 97 NY2d 295 [2001],

> In addressing privity, courts must carefully analyze whether the party sought to be bound and the party against whom the litigated issue was decided have a relationship that would justify preclusion, and whether preclusion, with its severe consequences, would be fair under the particular circumstances. Doubts should be resolved against imposing preclusion to ensure that the party to be bound can be considered to have had a full and fair opportunity to litigate.

Id. at 304-05. As a preliminary matter, it is noteworthy that plaintiff does not assert that it is

entitled to summary judgment on its claims to pierce the corporate veil against defendants -- an issue that would require an inquiry substantially similar to that involved in determining whether the relationship between defendants and Crisscross placed them in privity. Moreover, as discussed above, preclusion in this case would not be fair given the admittedly "atypical" conduct of the liquidation investigation.

Finally, judicial estoppel does not preclude defendants from challenging the English judgment. That doctrine "precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed" (Gale P. Elston, P.C. v Dubois, 18 AD3d 301 [1st Dept 2005][internal citations and quotations omitted]). The record does not reflect that defendants ever assumed an inconsistent position regarding the legal effect of the liquidation proceedings. Although in connection with the stay application in 2003 defendants opined that the proceedings in Austria might well determine Crisscross' liability, they did not then address the effect of the UK liquidation proceedings. Nor did they unconditionally agree to bind themselves to the outcome of those proceedings in their August 4, 2003 letter or at the hearing in April 2004. Rather, defendants specifically questioned the effect of the liquidators' determination at the hearing and, at most, acknowledged in their letter that the liquidators might direct a distribution of Crisscross' assets to Stumpf. However, defendants never conceded that Dynegy and 360Networks could not contest findings of breach or valuation of the claim.

Accordingly, it is

ORDERED, that the court denies the motion of plaintiff Stumpf, AG for partial summary judgment.

Dated: December 7, 2005

ENTER:

J.S.C.