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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

LUIS VARGAS GARMENDIA, et al,

Plaintiffs,

-against-

BRIAN O'NEILL, et. al

Defendants.

INDEX NO. 117763/2004

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: March 9, 2007

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: IAS PART 3

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LUIS VARGAS GARMENDIA, et al,

Index No. 117763/2004

Plaintiffs,

-against-

DECISION and ORDER

BRIAN O'NEILL, et. al

Defendants.

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Karla Moskowitz, J.:

This is an action for negligence in connection with the demise of Banco Comercial, one of the largest and oldest banks in the Republic of Uruguay. Defendants move, pursuant to CPLR 2221(d), to reargue this court's April 10, 2006 decision and order, that granted defendants' motion to dismiss the complaint on the grounds of forum non conveniens, to the extent that the court conditioned dismissal on defendants' agreement to consent to the full faith and credit of any judgment that plaintiffs obtain and to pay that judgment. Plaintiffs cross-move, pursuant to CPLR 2221, to reargue and renew the decision and order to dismiss the Complaint. For the reasons stated below, the court grants defendants' motion to reargue and, upon reargument, adheres to its original decision and order. The court denies plaintiffs' cross-motion to reargue and grants plaintiffs' cross-motion to renew, and, upon renewal, the court adheres to its original decision and order.

1. Background

This action arises from the collapse of Banco Comercial ("Bank"), the [illegible] bank in Uruguay The corporate defendants in this action are the alleged owners of Banco Comercial. The individual defendants are directors of the bank.

The Amended Complaint alleges that two of the Bank's directors, Carlos Rohm and Jose

Rohm, caused its demise. The Complaint describes a series of fraudulent financial schemes carried out from 1998 to 2002 that drained the bank of its assets and led to its eventual demise. These schemes involved: 1) use of sham hedge agreements; 2) the making of irregular loans; 3) conversion of deposits; and 4) use of subsidiaries to drain the bank of its assets.

The government of Uruguay placed Banco Comercial into liquidation in December of 2002. This event led to numerous civil and criminal proceedings in Uruguay, as well as civil actions in the United States.

Plaintiffs commenced this action in 2004. The Amended Complaint contains a single cause of action for negligence. Plaintiffs assert that, pursuant to the laws of Uruguay, defendants owed plaintiffs a duty of good faith and loyalty, a duty to safeguard the assets of the bank and a duty to implement procedures and safeguards to protect Banco Comercial from the type of fraudulent conduct the Rohms allegedly carried out. Plaintiffs allege that defendants breached the duties the laws of Uruguay imposed upon them by failing to prevent the underlying fraud that led to the collapse of Banco Comercial.

In a decision and order dated April 10, 2006, this court granted defendants' motion to dismiss the Complaint on the grounds of forum non conveniens, finding that Uruguay is a more appropriate forum for this action. The court based its April 10th decision and order on several factors.

First, the alleged fraud underlying this action occurred primarily in Uruguay and to a lesser extent in Argentina. As a result, this action has a strong connection to the Republic of Uruguay, and that country has a significant and compelling interest in adjudicating actions arising from those fraudulent schemes and the demise of Banco Comercial.

Further, it is undisputed that the law of Uruguay will apply here, given that plaintiffs' sole cause of action arises from defendants' breach of that country's law. Although this court can apply the laws of Uruguay, a court in Uruguay is better equipped to apply its own laws.

The court also concluded that Uruguay provides an adequate alternate forum to New York, despite any potential procedural differences between courts in Uruguay and courts in New York.[1] Moreover, plaintiffs failed to demonstrate that adjudicating this action in Uruguay will subject them to significant delay. Indeed, the court found that adjudicating this action in Uruguay would serve judicial economy by preventing the parties' duplication of effort and, significantly, by eliminating the possibility of inconsistent findings and verdicts between courts in New York and Uruguay.

The April 10th order was conditional and required that: 1) defendants accept service of process and consent to the jurisdiction of the courts of Uruguay; 2) defendants waive any statute of limitations defense they did not already have before the commencement of this action; 3) defendants consent to the full faith and credit of any judgment that plaintiffs obtain and pay it; and 4) plaintiffs commence any new action within 90 days from the date of service of defendants' stipulation upon plaintiffs' counsel.

2. Defendants' Motion for Leave to Reargue

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[1] In the underlying decision, this court noted that a federal court had dismissed a similar case involving the demise of Banco Comercial on the basis of forum non conveniens. (See Acosta v JPMorgan Chase & Co, 2006 WL 229196 [SDNY 2006]). The United States Court of Appeals for the Second Circuit recently affirmed the District Court's decision. (See Acosta v JPMorgan Chase & Co, No. 06-0995 [2d Cir March 6, 2007]). Among other things, the Second Circuit noted that a foreign plaintiff's choice of forum is entitled to less deference than that of a plaintiff who sues in his or her home forum. (Id. at 3). The court also rejected the plaintiffs' assertion that Uruguay would not provide an adequate and available alternate forum. (Id.).

Defendants move for leave to reargue the April 10th decision and order to the extent that it required them to consent to the full faith and credit of any judgment that plaintiffs obtain and to pay that judgment. Defendants argue that this requirement is prejudicial and unnecessary in light of the provisions of Article 53 of the CPLR governing recognition and enforcement of foreign money judgments.

Courts have previously applied the condition at issue here in forum non conveniens cases. (See e.g., Crown Cork & Seal Co, Inc v Rheem Mfg Co, Inc, 64 AD2d 545 [1st Dept 1978] [defendants required to consent to full faith and credit for any judgment obtained in South Africa]; Law Offices of Dr Mujahid Al-Sawwaf v Chase Manhattan Bank, NA, 4/13/95 NYLJ 27, col 3 [NY Sup 1995] [defendants required to consent to full faith and credit for any judgment obtained in Saudi Arabia]).

In Bewers v American Home Products Corp, (99 AD2d 949 [1st Dept 1984], affd 64 NY2d 630 [1984]), the Appellate Division, First Department, reversed a denial of the defendants' motion to dismiss for forum non conveniens. The First Department's order, that the Court of Appeals affirmed, was conditional and required the defendants, among other things, to "consent to full faith and credit for any judgment obtained against them in the United Kingdom and to consent to pay the same..." (Bewers, 99 AD2d at 949). The court stated that defendants' failure to comply with these conditions would result in affirmance of the trial court's original order that had denied the motion to dismiss. (Id.).

In light of the foregoing cases, defendants have not demonstrated that the court overlooked or misapprehended the facts or law or was otherwise mistaken in requiring that defendants consent to the full faith and credit of any judgment that plaintiffs obtain and to pay that

judgment. Therefore, the court adheres to the April 10, 2006 decision and order.

3. Plaintiffs' Cross-motion for Leave to Reargue

Plaintiffs cross-move for leave to reargue the April 10th decision and order on the grounds that the court erred in dismissing the Complaint on the grounds of forum non conveniens. "Motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision." (EW Howell Co, Inc v SAF La Sala Corp, 36 AD3d 653 [2d Dept 2007], quoting Carrillo v PM Realty Group, 16 AD3d 611 [2d Dept 2005]; see also CPLR 2221[d]).

Plaintiffs do not set forth or address the specific elements of a motion for leave to reargue. However, plaintiffs have not, in any event, demonstrated that the court overlooked or misapprehended the facts or law or was otherwise mistaken in its original decision and order dismissing this action on the grounds of forum non conveniens. Therefore, the court denies plaintiffs' motion for leave to reargue.

4. Plaintiffs' Cross-motion for Leave to Renew

Plaintiffs move for leave to renew the April 10th decision and order. "A motion for leave to renew must (1) be based upon new facts not offered on the prior motion that would change the prior determination and (2) set forth a reasonable justification for the failure to present such facts on the prior motion." (Veitsman v G & M Ambulette Service, Inc, 35 AD3d 848 [2d Dept 2006], quoting O'Connell v Post, 27 AD3d 631 [2d Dept 2006]; see also CPLR 2221[e]).

In the April 10th decision and order, the court noted plaintiffs' assertion that at least 15 meetings of the Board of Directors of Banco Comercial took place in the United States, including

some in New York, although plaintiffs failed to specify how many meetings occurred in New York. Plaintiffs also asserted that defendants conducted activities related to Banco Comercial in New York, including the underwriting of plaintiffs' bonds. Despite this, the court found these activities were relatively minimal when compared to the actions that took place abroad, particularly in Uruguay, in connection with the looting of Banco Comercial.

Plaintiffs now seek to offer new evidence about the meetings of the Board of Directors in New York. Specifically, they submit an unnotarized affidavit from Carlos Eduardo Garcia Arocena, who was a member of Banco Comercial's board of directors from 1990 to 2002. Plaintiffs rely on the affidavit to support their assertion that the Board of Directors held meetings in New York once a year. Plaintiffs also seek to introduce a number of documents that purportedly demonstrate that defendants conducted business in New York related to Banco Comercial.

The plaintiffs' evidence does not create a sufficient nexus with New York to demonstrate that the court should not dismiss this action on the grounds of forum non conveniens. As the court noted in the April 10th decision and order, the New York activities plaintiffs cite are relatively minimal in comparison to the activities occurring abroad, particularly in Uruguay. Plaintiffs again have not put forth sufficient new evidence to alter that finding.

Plaintiffs also argue that new evidence exists in the form of a January 24, 2006 decision in a fraud action by the Republic of Uruguay ("RoU") brought against these defendants titled Oriental Republic of Uruguay v Chemical Overseas Holdings, Inc. That action, originally commenced in New York State court in January of 2005, was removed to federal court in July of 2005. The RoU's claim in that action involves defendants' alleged "intentional wrongdoing,

including participating in, aiding and enabling a massive fraud that harmed Plaintiffs and the depositors of Banco Comercial SA ...., intentionally abdicating their duties as directors and controlling shareholders of Banco Comercial and, *inter alia,* intentionally engaging in self-dealing transactions to their benefit and to the financial detriment of Banco Comercial." (Oriental Republic of Uruguay v Chemical Overseas Holdings, Inc, 2006 WL 164967, *3 [SDNY 2006]).

On July 1, 2005, defendants had moved to compel arbitration of the RoU's claim pursuant to a Subscription Agreement the parties had executed in 2002 as part of an effort to maintain the Bank in a sound financial condition.[2] The Subscription Agreement contained a broad arbitration clause that provided for arbitration of all disputes arising out of or in connection with the Subscription Agreement.

In the decision the plaintiffs rely on here, the District Court stayed the RoU's action and compelled the parties to arbitration. (See Oriental Republic of Uruguay v Chemical Overseas Holdings, Inc, 2006 WL 164967, *7 [SDNY 2006]). Plaintiffs had opposed arbitration on the grounds that their claims are beyond the scope of the arbitration provision because they pre-date the Subscription Agreement and because the Release does not cover intentional misconduct. (Id.

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[2] Defendants and the RoU executed the Subscription Agreement on February 26, 2002, shortly after the revelation of the fraud at Banco Comercial. Defendants agreed to infuse the bank with $100 million to attempt to restore its solvency and stability. The RoU agreed to maintain the bank in sound financial condition for eleven years. If the RoU determined that it was impossible to maintain the Bank, defendants could sell their investments back to the RoU for the return of the capital contributions. The parties also executed a Release that discharged the defendants from all losses arising out of or related to any action or inaction on the part of any defendant prior to the date of the Subscription Agreement, excluding intentional misconduct.

In 2002, the RoU ended the Bank's operations but did not subsequently re-purchase each defendant's capital contributions. Defendants commenced an arbitration that resulted in a 2004 award of $100 million, plus interest and costs. (See generally Oriental Republic of Uruguay v Chemical Overseas, 2006 WL 164967, *2 [SDNY 2006]).

at *6). The defendants contended that the Subscription Agreement required that the arbitrators should determine the initial question of whether a claim is subject to arbitration. (Id. at *4). Defendants contended that it was for the arbitrators to then determine whether the Release barred plaintiffs' claims. (Id.).

The court rejected the plaintiffs' arguments and found that threshold issues existed that the arbitrators, rather than the court, had to resolve. (Id. at *1). Specifically, the court stated that "the threshold dispute requiring arbitration is not whether the Release bars Plaintiffs' claims, but whether that question is arbitrable." (Id. at *6). The court then stated that the effect of the Release on plaintiffs' claims also was for arbitration. (Id.). "Indeed, it will be for the arbitrators to determine the scope of the arbitration." (Id.).

The court noted the possibility that the arbitrators could determine that there are no arbitrable issues. (Id. at *7). It also noted that the arbitrators could find that the RoU's claims do not fall within the terms of the Release, i.e., that the Release does not bar the claims that would result in the fraud action returning to the District Court. (Id.).

The District Court rendered its decision two to three months before this court's April 10, 2006 decision and order dismissing the Complaint. However, plaintiffs assert that it constitutes newly available evidence because the court ruled after the briefing and oral argument of the motion to dismiss the Complaint.

It is undisputed that plaintiffs were aware of the RoU action at the time of the motion to dismiss this action, because the plaintiffs referred to it cursorily in their memorandum of law and at oral argument. However, the federal court's January 24, 2006 decision was after the motion to dismiss this action was sub judice. Therefore, the court will treat it as new evidence.

Plaintiffs argue that the defendants' decision to seek arbitration in New York means that defendants have chosen to litigate the RoU's claim on the merits here. Plaintiffs assert that this undermines defendants' argument that New York is an inconvenient forum for this action, that plaintiffs contend asserts a similar claim to the one RoU asserted.

Plaintiffs' argument is unpersuasive. First, as the District Court noted, there are threshold questions about any arbitrable issues in the RoU action. There are also additional questions about the effect of the Release on the RoU's claims, particularly as to defendants' contention that the Release bars plaintiffs from bringing these claims at all. (See Oriental Republic of Uruguay v Chemical Overseas Holdings, Inc, 2006 WL 164967, * 4). Thus, it is not yet clear whether the RoU action will proceed on the merits before the arbitrators as plaintiffs contend. Moreover, it is also possible that the action could return to the District Court, where it might or might not ultimately proceed on the merits. Therefore, the court finds that plaintiffs have not demonstrated that the District Court's decision to compel arbitration in the RoU fraud action supports maintenance of this action in New York. Accordingly, it is

ORDERED that defendants' motion for reargument is granted, and, upon reargument, the court adheres to its original decision and order dated April 10, 2006; and it is further

ORDERED that plaintiffs' cross-motion for reargument is denied; and it is further

ORDERED that plaintiffs' cross-motion for renewal is granted, and, upon renewal, the court adheres to its original decision and order.

Dated: March 9, 2007

ENTER:

J.S.C.