

**IRB-Brasil Resseguros S.A. v Portobello
Intl. Ltd.**

2009 NY Slip Op 30319(U)

January 28, 2009

Supreme Court, New York County

Docket Number: 604449/06

Judge: Herman Cahn

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

PRESENT: Hon. Herman Cahn
Justice

PART 49

IRB-BRASIL RESSEGUROS S.A.

INDEX NO.

604449/06
~~60449/06~~

MOTION DATE _____

- v -

MOTION SEQ. NO. 002

PORTOBELLO INTERNATIONAL LIMITED,
REFINADORA CATARINESE S.A., MARIA
HELENA RAMOS GOMES and CESAR BASTOS
GOMES

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED
PAPERS NUMBERED
FEB 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE**

Dated: January 28, 2009

Herman Cahn
J.H.O.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE
DATED: _____ J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

-----X
IRB-BRASIL RESSEGUROS S.A.,

Plaintiff,

-against-

Index No. 604449/06

PORTOBELLO INTERNATIONAL LIMITED,
REFINADORA CATARINENSE S.A., MARIA
HELENA RAMOS GOMES and CESAR BASTOS
GOMES,

FILED

FEB 13 2009

Defendants

COUNTY CLERK'S OFFICE
NEW YORK

-----X
CAHN, J.:

Plaintiff IRB-Brasil Resseguros S.A. (IRB) commenced this action to recover amounts allegedly due to it, as the holder of certain notes issued by defendant Portobello International Limited (Portobello), and guaranteed by defendants Refinadora Catarinense S.A., Maria Helena Ramos Gomes and Cesar Bastos Gomes (together, the Guarantors).

The Guarantors, all Brazilian nationals, move to dismiss the complaint for lack of personal jurisdiction, CPLR 3211 (a) (8). Although not asserted in their Order to Show Cause, the Guarantors also seek dismissal of the complaint on the ground of forum non conveniens, CPLR 327.

BACKGROUND

According to the complaint, in January of 1997, Portobello commenced a US \$50,000,000.00 Guaranteed Euro Medium-Term Note Program (the Note Program), under which it agreed to issue medium-term notes to investors. On January 24, 1997 and January 27, 1997, Portobello allegedly issued fixed rate medium-term notes payable in U.S. dollars, bearing ISIN Code XS 0073239138, and Common Code: 7323913 (the Notes), in the principal amount of

\$16,000,000.00. The Notes allegedly were acquired by Lehman Brothers and Smith Barney on behalf of IRB, and currently are held on IRB's behalf in BB Securities Limited's (BB Securities) safe custody account at Euroclear Bank, N.A. (Euroclear).¹

IRB alleges that, under the Terms and Conditions of the Notes and an accompanying Pricing Supplement, Portobello promised to pay to the holder of the Notes the principal sum of the Notes on January 24, 2002. Portobello also allegedly agreed to pay a 10.75% fixed rate of interest on the Notes on specified interest payment dates. On February 4, 2002, IRB allegedly agreed to extend the date that the principal sum was due to January 24, 2005 (Principal Maturity Date).

Pursuant to a Guarantee dated as of January 22, 1997 (the Guarantee), each of the Guarantors "jointly and severally, unconditionally and irrevocably guarantee[d]" to the holders of the Notes "the due and punctual payment of principal and interest (if any)" (*see* Hellmann Aff, Exh C). The Guarantors also waived any right to require that the holders first proceed against Portobello, and covenanted that the Guarantee "shall not be discharged except by complete performance of the obligations contained in the Notes and this Guarantee" (*id.*).

Defendants allegedly failed to make the interest payments due on July 24, 2003, January 26, 2004, and July 26, 2004, in an amount totaling \$2,580,000.00. Defendants also allegedly failed to pay the principal amount due of \$16,000,000.00 on the Principal Maturity Date. On March 5, 2004, IRB sent notice to Portobello with respect to its missed payments of interest, and

¹ According to the complaint, Euroclear is the operator of the Euroclear common depository and the clearing agent designated by defendants under the Note Program.

demanded payment. Neither Portobello nor the Guarantors have paid the interest or principal due.

On December 29, 2006, IRB commenced the instant action. In the complaint, IRB alleges that it is the holder of the Notes and is entitled to the payments of interest and principal. The complaint asserts a first cause of action against Portobello for breach of the Notes, the Terms and Conditions of the Notes, and the accompanying Pricing Supplement; and a second cause of action against each of the Guarantors for breach of their Guarantee.

The complaint alleges that this Court has jurisdiction pursuant to General Obligations Law § 5-1402. Specifically, that under the Terms and Conditions of the Notes, “each of Defendants expressly agreed to personal and subject matter jurisdiction before this Court ‘in respect of any legal suit, action or proceeding arising out of or in connection with’ the Notes” (Compl. ¶ 8).

The Guarantors now move to dismiss the cause of action asserted against them. They argue that dismissal for lack of personal jurisdiction is warranted, because IRB has failed to establish the existence of any basis for the exercise of personal jurisdiction over them.² The Guarantors contend that they are all foreign citizens with no contact to New York, and that this litigation has no connection to New York. They argue that IRB’s alleged reliance on the Terms and Conditions of the Notes to establish that they consented to jurisdiction is misplaced, as this document was subject to change and amendment, or was inconsistent with the terms of the

² The Court notes that, as their initial basis for dismissal, the Guarantors had argued that the Court had no personal jurisdiction over them because they were never served with the summons and complaint. However, in letters dated November 9, 2008 and November 20, 2008, the parties have indicated that service of the summons and complaint on the Guarantors has since been effected. Accordingly, this ground for the motion to dismiss will be deemed withdrawn.

Notes. The Guarantors contend that, as it is the Notes alone that control the parties' debtor relationship, only the actual and final Notes could be the source of an enforceable forum selection clause; thus, absent production of the final bearer notes, IRB cannot establish that the Guarantors consented to jurisdiction, or that New York law should govern this dispute.

The Guarantors additionally argue that, to the extent IRB suggests that the Guarantee, by virtue of its terms, provides a basis for jurisdiction, the assertion also must fail. They note that the Guarantee applies only to particular notes, and argues that, "[i]n the absence of those notes, the terms of the Guarantee cannot control" (Def Br at 16).

Finally, the Guarantors argue that IRB, by failing to produce the Notes, also failed to prove that the Guarantors agreed to waive their arguments that this action was brought in an inconvenient forum. Therefore, dismissal of the complaint on the ground of forum non conveniens is warranted.

DISCUSSION

For the reasons that follow, the Guarantors' motion to dismiss is denied in its entirety.

It is undisputed that, absent the Guarantors' consent to jurisdiction, there is no basis of jurisdiction in this Court. Although IRB bears the ultimate burden of establishing personal jurisdiction, on a pre-answer motion, "[t]hat burden ... does not entail making a prima facie showing of personal jurisdiction; rather, the plaintiff] need only demonstrate that facts "may exist" to exercise personal jurisdiction over the defendant[s]" (*Brinkmann v Adrian Carriers, Inc.*, 29 AD3d 615, 616 [2d Dept 2006], quoting *Ying Jun Chen v Lei Shi*, 19 AD3d 407, 407-08 [2d Dept 2005]). To that end, IRB has proffered, inter alia, a copy of the Guarantee executed by each of the Guarantors in connection with Portobello's "Guaranteed Euro Medium-Term Note

Program” and, upon which, IRB bases its claim against the Guarantors (Hellman Aff, Exh C).

The Guarantee, which IRB alleges it obtained from defendants during discovery, provides that

[e]ach Guarantor irrevocably submits to the non-exclusive jurisdiction of the courts of the State of New York and of the United States of America sitting in New York City, the Borough of Manhattan, in respect of any legal suit, action or proceeding arising out of or in connection with this Guarantee (a “Proceeding”). Each Guarantor irrevocably waives, to the fullest extent permitted by applicable law, any objection which it might now or hereafter have to the laying of venue of any Proceeding in the courts of the State of New York or of the United States of America sitting in New York City, the Borough of Manhattan, and any claim that any Proceeding brought in any such court has been brought in an inconvenient forum

(*id.*, ¶ 8). The Guarantee further provides that it “is governed by, and shall be construed in accordance with, the laws of the State of New York” (*id.*).

General Obligations Law § 5-1402 expressly provides for the enforcement of forum selection clauses found in contracts worth over \$1 million, even among foreign parties, if the parties submit to jurisdiction in New York (*Freeford Ltd. v Pendleton*, 53 AD3d 32 [1st Dept 2008]). Specifically, GOL § 5-1402 (1) provides that

any person may maintain an action or proceeding against a foreign corporation, non-resident, or foreign state where the action or proceeding arises out of or relates to any contract, agreement or undertaking for which a choice of New York law has been made in whole or in part pursuant to section 5-1401 and which (a) is a contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate, not less than one million dollars, and (b) which contains a provision or provisions whereby

such foreign corporation or non-resident agrees to submit to the jurisdiction of the courts of this state

(*id.*).³

Nonetheless, the Guarantors argue that, because their Guarantee applies only to particular bearer notes, only a forum selection clause contained in those particular notes would be enforceable; therefore, absent those notes, IRB cannot establish jurisdiction. The Guarantors further contend that, even if this Court finds that the forum selection clause in the Guarantee is enforceable, IRB has not established that *it* is entitled to enforce the terms of the Guarantee. The Guarantors note that the Guarantee, by its terms, was made in favor only of certain “account holders” at Euroclear, or holders of Portobello “Definitive Notes,” and contend that IRB has not shown that it meets either of these criteria, or otherwise proven that it is the owner or holder of those notes.

First, the Court notes that, under New York law, a guarantee is presumed to be a separate obligation (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Robert Christopher Assocs.*, 257 AD2d 1 [1st Dept 1999]).

Ordinarily, a guaranty, even if contemporaneously executed, is considered a distinct obligation. “A guarantee is an agreement to pay

³ GOL § 5-1401 (1) provides, in pertinent part, that

[t]he parties to any contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate not less than two hundred fifty thousand dollars, including a transaction otherwise covered by subsection one of section 1-105 of the uniform commercial code, may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not such contract, agreement or undertaking bears a reasonable relation to this state

(*id.*).

a debt owed by another which creates a secondary liability and thus is collateral to the contractual obligation” (*Brewster Transit Mix Corp. v McLean*, 169 AD2d 1036, 1037 [3rd Dept 1991], quoting *Shire Realty Corp. v Schorr*, 55 AD2d 356, 359-360 [2d Dept 1977]). Therefore, the guaranty is not read together with the contract it indemnifies, “unless the history and subject matter shows them to be unified” (see *Ripley v Intl. Rys. of Cent. Am.*, 8 NY2d 430, 438 [1960])

(*Bank of Tokyo-Mitsubishi, Ltd., New York Branch v Kvaerner a.s.*, 243 AD2d 1, 6 [1st Dept 1998]). Here, the Guarantors have not demonstrated that the Guarantee and the underlying Notes must be read together, or that the forum selection clause contained in their executed Guarantee should be disregarded in favor of one that might be contained in the Notes (see *National Union Fire Ins. Co. of Pittsburgh, Pa. v Williams*, 223 AD2d 395 [1st Dept 1996]). Indeed, under the terms of their Guarantee, the Guarantors expressly agreed that

their obligations hereunder shall be unconditional and irrevocable, irrespective of the validity, regularity, or enforceability of the Notes, any change in or amendment to the Notes, the absence of any action to enforce the same, any assumption by any corporation or any other person of any obligations under the Notes, the recovery of any judgment against the Issuer or any action to enforce the same, or any other circumstance which might otherwise constitute a legal or equitable discharge or defense of a guarantor

(Hellman Aff, Exh C, ¶ 1).

The fact that IRB has not produced the actual bearer Notes at issue does not compel dismissal of the complaint at this stage of the litigation. On a CPLR 3211 (a) (8) motion made against a complaint, “the court must construe the pleadings and other evidentiary materials in the light most favorable to the plaintiff and resolve all doubts in favor of jurisdiction” (*DDJ Capital Management, LLC v Rhone Group L.L.C.*, 19 Misc 3d 1124(A), 2008 NY Slip Op 50839 *9(U) [Sup Ct, NY County 2008], citing *Brandt v Toraby*, 273 AD2d 429 [2d Dept 2000]).

The complaint alleges that IRB is the holder of certain and specific Notes issued under the “Guaranteed Euro Medium-Term Note Program,” the very Note Program for which the Guarantors executed their Guarantee, as stated on the face of that Guarantee. In response to defendants’ motion, IRB also has proffered the affidavit of Eduardo Cesar Do Nascimento, the managing director of BB Securities, who avers that “[a]t all times, IRB remains legal and equitable holder of” the Notes issued by Portobello, and currently held in its account at Euroclear (Nascimento Aff, ¶¶ 11-12). These allegations and averments regarding IRB’s status with respect to the Notes and Guarantee are sufficient to sustain the complaint against a pre-answer motion to dismiss.

Additionally, the Court notes that, although the Guarantee was made in favor of “Relevant Account Holders” and “Relevant Note Holders” as defined in the Guarantee, the Guarantee also expressly recognizes that the Notes at issue could be transferred or credited to other holders. Thus, the Guarantee expressly provides that the obligations contained therein are owed not only to certain account holders and note holders, but “to every Relevant Account Holder and Relevant Note Holder and their respective heirs, successors and assigns” (Hellmann Aff, Exh C, ¶ 5).

As IRB has established that facts may exist to exercise personal jurisdiction over the Guarantors, the motion to dismiss for lack of personal jurisdiction is denied. Additionally, as the Court finds that GOL § 5-1402 (1) applies to the Guarantee, the motion to dismiss based on forum non conveniens must also be denied. CPLR 327(b) provides that

[n]otwithstanding the provisions of subdivision (a) of this rule, the court shall not stay or dismiss any action on the ground of inconvenient forum, where the action arises out of or relates to a contract, agreement or undertaking to which section 5-1402 of the

general obligations law applies, and the parties to the contract have agreed that the law of this state shall govern their rights or duties in whole or in part

(*id.*). Since the Guarantee expressly includes a choice of New York law and the Guarantors' submission to the jurisdiction of New York courts, and relates to an obligation of more than one million dollars, New York is a convenient forum for this action as a matter of law (*see National Union Fire Ins. Co. of Pittsburgh, Pa. v Worley*, 257 AD2d 228, 230-31 [1st Dept 1999]).

Accordingly, it is

ORDERED that the motion by defendants Refinadora Catarinense S.A., Maria Helena Ramos Gomes and Cesar Bastos Gomes, to dismiss the complaint for lack of jurisdiction and/or for forum non conveniens is denied, and it is further

ORDERED that these defendants are directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry upon their attorneys.

Dated: January 28, 2009

ENTER:

[Handwritten Signature]

J.H.O.

FILED

FEB 13 2009

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NEW YORK