

IRB-Brasil Resseguros S.A. v Eldorado Trading Corp. Ltd

2009 NY Slip Op 30398(U)

February 11, 2009

Supreme Court, New York County

Docket Number: 604013/06

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. 604013/06

MOTION DATE _____

MOTION SEQ. NO. 3

MOTION CAL. NO. _____

- v -

ELDORADO TRADING CORPORATION LTD.,
ELDORADO S.A. (formerly ELDORADO S.A.
COERCIO, INDUSTRIA E IMPORTACAO), and
VERPAR S.A. (formerly VERPAR COMERCIO
E PARTICIPACOES S.A.)

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

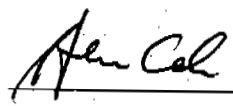
	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

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

J.S.C.

Dated: February 11, 2009



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE
DATED:

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. 604013/06

ELDORADO TRADING CORPORATION LTD.,
ELDORADO S.A. (formerly ELDORADO S.A.
COMERCIO, INDUSTRIA E IMPORTACAO), and
VERPAR S.A. (formerly VERPAR COMERCIO E
PARTICIPACOES S.A.),

Defendants.

-----X
CAHN, J.:

Plaintiff IRB-Brasil Resseguros S.A. (IRB) moves for leave to renew its motion for summary judgment on its two causes of action for breach of contract, CPLR 2221 (e).

BACKGROUND

The essential facts in this case were set forth in the October 1, 2008 decision of the Court, familiarity with which is presumed.

Briefly, IRB commenced this action to recover amounts claimed to be due to it as the owner of a Permanent Global Note (the Global Note) that was issued by defendant Eldorado Trading Corporation Ltd. (Eldorado) under a US \$50,000,000.00 Guaranteed Euro Medium-Term Note Program. The Global Note, in the principal face amount of \$15,000,000 and bearing ISIN number XS0071594989, and common code number 007159498, was executed by Eldorado on November 22, 1996. It was guaranteed by defendants Eldorado S.A. and Verpar S.A. (the Guarantors), pursuant to a Guarantee dated as of November 8, 1996. A Pricing Supplement that was executed in connection with the Global Note provided that periodic interest payments would be made by Eldorado at 11% per annum on the 22nd of each May and November, and that the

principal would be due on the maturity date of November 22, 2001. Upon execution, the Global Note was duly authenticated by Eldorado's Fiscal Agent, and deposited in a common depository account at Euroclear, as provided by the Terms and Conditions of the Notes.

As the Court noted in its prior decision, it is undisputed that Eldorado executed the Global Note, and that the Guarantors guaranteed payment thereof pursuant to their Guarantee. It is also undisputed that Eldorado defaulted under the Terms and Conditions of the Notes by making late payments of interest, by failing to make three payments of interest, and by failing to pay the principal amount due on the maturity date. Rather, as defendants acknowledged at oral argument on the motion for summary judgment, the only issue is whether IRB had proven that it was the owner and/or holder of the Global Note (*see Yardeni Aff.*, Exh. 2 at 3-4).¹

In the October 1, 2008 decision, the Court denied IRB's motion for summary judgment. First, the Court found that IRB had failed to submit sufficient evidentiary proof to establish that it was the beneficial owner or holder of the Global Note. The Court noted that the documents produced by IRB indicated that BB Securities Limited (BB Securities), part of the Banco do Brasil group, was listed as the holder of the Global Note in the records of Euroclear;² however, IRB had proffered no affidavit from BB Securities to prove IRB's status with respect thereto. Second, and although not directly raised by defendants in opposing IRB's motion, the Court noted that it was not clear from those provisions of the agreements upon which IRB had relied in

¹ Although defendants originally had argued that they were fraudulently induced to execute the Global Note, they have since abandoned that defense.

² The Court found that under the terms of the Global Note, the records of Euroclear were deemed, in the absence of manifest error, to be "conclusive evidence of the identity of the Holders of Notes and of the principal amount of Notes . . . represented by this Permanent Global Note credited to the securities accounts of such Holders" (*see Yardeni Aff.*, Exh. 1 at 6).

commencing this action, that a beneficial owner was entitled to institute a proceeding directly against the Issuer of the Global Note. Instead, the Global Note appeared to grant such right to the Holder of the Global Note “or its successors or assigns,” as reflected in the records of Euroclear.

IRB now seeks leave to renew its motion, to offer new evidence to prove that it is the sole legal and equitable owner/holder of the Global Notes, and thus the only entity entitled to sue thereon. IRB argues that, although its submissions on the original motion were sufficient to establish that it is the sole legal entity entitled to sue on the Global Note, the new evidence should address the Court’s concern regarding IRB’s status.

First, IRB offers a newly obtained affidavit from Eduardo Cesar do Nascimento, the Managing Director of BB Securities, to establish that BB Securities is merely the custodian of the Global Note and that IRB is its sole legal and equitable owner/holder. Second, IRB submits, through a second affidavit by Nascimento, a disavowal of rights and assignment agreement that was executed between BB Securities and IRB on October 16, 2008 (Assignment) (*see* Nascimento 10/16/08 Aff., Exh. A), to address the issue raised with respect to IRB’s status. IRB argues that, although the evidence that it is the sole legal and equitable owner/holder of the Global Note should be sufficient to warrant summary judgment, should the Court conclude that BB Securities was the “Holder” of the Note entitled to sue thereon, the Assignment now indisputably makes IRB the assignee of such holder, with the right to maintain this action. IRB argues that the only issue in this case concerns IRB’s status with respect to the Global Note, the proffered evidence eliminates any possible issue in connection therewith and, therefore, the Court should exercise its discretion to grant the motion to renew and grant IRB’s motion for summary judgment.

Defendants oppose the motion, arguing on the technical ground that, because IRB has offered no new facts that were beyond its knowledge on the prior motion nor any “reasonable justification” for its failure to offer this evidence, the motion is nothing more than a second summary judgment motion.

In any event, defendants argue that, even if the Court grants the motion for leave to renew, the motion for summary judgment should be denied, as the documents attached to the Nascimento affidavits are inadmissible hearsay and, to the extent Nascimento’s two affidavits rely on those documents, they too are hearsay. Defendants additionally argue that the affidavits are inadmissible on the further ground that they were each executed outside New York, but lack the certification required by CPLR 2309 (c).

DISCUSSION

Pursuant to CPLR 2221(e)(2) and (3), a motion to renew “shall be based upon new facts not offered on the prior motion that would change the prior determination . . . and shall contain reasonable justification for the failure to present such facts on the prior motion.” While, generally, renewal motions are intended to be based on newly discovered facts that could not have been previously offered, the rule is not inflexible. “[E]ven if the rigorous requirements for renewal are not satisfied, such relief may still be granted so as not to defeat substantive fairness” (*Rancho Santa Fe Assn. v Dolan-King*, 36 AD3d 460, 461 [1st Dept 2007]; citing *Garner v Latimer*, 306 AD2d 209 [1st Dept 2003]). Thus, a court may, in the interest of justice, exercise its discretion to grant a motion to renew upon facts that were known to the movant at the time of the original motion, notwithstanding the absence of an excuse (*see Trinidad v Lantigua*, 2 AD3d 163 [1st Dept 2003]; *Mejia v Nanni*, 307 AD2d 870 [1st Dept 2003]; *Daniels v City of New York*,

291 AD2d 260 [1st Dept 2002]), or where the excuse for not submitting such evidence was merely an attorney's belief that it had submitted sufficient evidence to procure the relief requested (*see J.D. Structures, Inc. v Waldbaum*, 282 AD2d 434 [2d Dept 2001]).

Under the facts and circumstances of this case, and in the interest of justice, the Court will exercise its discretion and grant plaintiff's motion for leave to renew. Although defendants did challenge the sufficiency and admissibility of the evidence proffered by IRB in its motion for summary judgment, the issue as to whether IRB is the appropriate party to bring the action was raised by the Court in rendering its decision. Thus, IRB should be given an opportunity to address this issue.

Upon renewal, the Court finds that the new evidence submitted by plaintiff is sufficient to prove, as a matter of law, that IRB is the sole entity entitled to maintain this action against defendants on the Global Note. Specifically, through the affidavit of Nascimento, IRB has established that BB Securities holds the Global Note, on behalf of IRB, in a segregated account at Euroclear pursuant to a Custody Agreement with IRB (*see Nascimento 10/8/08 Aff., Exh. A*). Nascimento avers that, although the industry practice is for the client account at Euroclear to be held in the name of the custodian on the client's behalf,

[a]s custodian, BB [Securities] does not retain any ownership interest, whether legal or equitable, in the securities held on behalf of IRB, nor is it entitled to any of the underlying benefits represented by those securities. At all times, IRB remains legal and equitable holder of, and thus entitled to all such securities

(Nascimento Aff., ¶ 11). Nascimento further

confirm[s] that BB [Securities] is currently holding, on behalf of IRB, notes with a face value of US \$15,000,000 bearing ISIN Code: XS0071594989, Common Code: 007159498 (the "Notes") issued by

Eldorado Trading Corp in a securities clearance account number 97497 (the "Account") at Euroclear

(Nascimento Aff., ¶ 12).

Nascimento additionally avers that, upon BB Securities' request, Euroclear issued a statement of account to BB Securities on July 25, 2002, in which it confirmed the holding in its account, and that the account had been "blocked" by Euroclear as of that date. Nascimento attaches a copy of that notarized "Statement of Account for the Purpose of Filing A Claim in the Brazilian Courts" (Statement of Account), in which Euroclear certifies that \$15,000,000 of Eldorado Notes, bearing ISIN XS0071594989, and common code 007159498, were held in BB Securities' Euroclear Securities Clearance Account # 97497, and that the holding was blocked as of July 25, 2002 (*id.*, Exh. B).³ Nascimento also attaches a second notarized letter to BB Securities, dated October 12, 2007, in which Euroclear

certif[ies] that on 25 July 2002, Euroclear Bank S.A./N.V. ("Euroclear") issued to you a statement of account with respect to USD 15,000,000 of Eldorado Trading Corp Limited 11% due 22nd November 2001 ISIN XS0071594989 (the "Notes"). Upon the issuance of such statement of account, it is Euroclear's procedure to block the holding in the BB Securities Limited Securities Clearance Account. The effect of blocking is that the securities cannot be transferred out of the account. We confirm that the holding in your account has been blocked as from 25 July 2002

(*id.*, Exh. C).

³ In the Statement of Account, Euroclear also noted that although BB Securities had informed Euroclear "that the above holding is allocated on your books to IRB Brasil Resseguros S.A., [i]n accordance with normal procedures, such information is not reflected on our books and therefore is not reviewed independently by us" (*id.*).

Defendants do not dispute the accuracy of the information contained in the Nascimento affidavits. Nor have defendants suggested that any entity other than BB Securities could be the holder of the Global Note. Instead, defendants argue that the Nascimento affidavits do not provide a sufficient foundation for the admission of the custodial agreement and letters from Euroclear. They contend that these documents are therefore merely hearsay, without which Nascimento cannot establish that BB acts as custodian of IRB's accounts with Euroclear or that Euroclear is holding the Note on BB's behalf as custodian of IRB.

The custodian agreement, which was executed by BB Securities and IRB, is properly admitted through the affidavit of Nascimento, the Managing Director of one of the signatories thereto. Although the notarized Statement of Account from Euroclear was executed by a third-party, the Global Note expressly provides that

[a]ny statement issued by Euroclear . . . to any holder relating to a specified Note or Notes credited to the securities account of such Holder and stating the principal amount of such Note or Notes and certified by Euroclear . . . to be a true record of such securities account shall, in the absence of manifest error, be conclusive evidence of the records of Euroclear . . . for the purposes of . . . fil[ing] any claim, tak[ing] any action or institut[ing] any proceeding to enforce, directly against the Issuer, the obligation of the Issuer hereunder to pay any amount due in respect of each Note represented by this Permanent Global Note which is credited to such person's securities account with Euroclear . . . without the production of this Permanent Global Note, *provided* that the bearer hereof shall not theretofore have filed a claim, taken action or instituted proceedings to enforce the same in respect of such Note

(*id.*). As the notarized Statement of Account provided to BB Securities by Euroclear fulfills these requirements, it is sufficient to establish that BB Securities is the holder of the Global Note in the records of Euroclear.

Through the affidavit of Nascimento, IRB has established that BB Securities is holding the Global Note in its Euroclear account as a custodian on behalf of IRB and that IRB is the legal and equitable owner/holder of the Global Note. To further address the issue of IRB's right to maintain this action, IRB also has proffered a copy of the Assignment, pursuant to which BB Securities assigned to IRB any rights to bring this action that BB Securities might have as the holder of record on the account at Euroclear. The Assignment was properly proffered through the affidavit of Nascimento, the individual who executed it on BB Securities' behalf.

As the new evidence proffered by IRB indisputably establishes that IRB is not only the beneficial owner of the Global Note, but the sole entity now entitled to maintain this action, the grant of summary judgment upon renewal is warranted. However, as defendants also assert an objection to the form of the Nascimento affidavits, for failing to comply with CPLR 2309 (c), simultancously with the submission of a proposed judgment, plaintiff will submit another copy of the Nascimento affidavits accompanied by the requisite certificate of conformity, in compliance with CPLR 2309 (c) (*see Sparaco v Sparaco*, 309 AD2d 1029 [3rd Dept 2003], *lv denied* 2 NY3d 702 [2004])[failure to comply with CPLR 2309 (c) not necessarily a fatal defect]; *see also Nandy v Albany Med. Ctr. Hosp.*, 155 AD2d 833 [3rd Dept 1989] [failure to comply with CPLR 2309 (c) can be corrected nunc pro tunc]).

Accordingly, it is

ORDERED that plaintiff's motion for leave to renew is granted, and upon renewal, it is ORDERED that plaintiff's motion for summary judgment is granted, and it is further

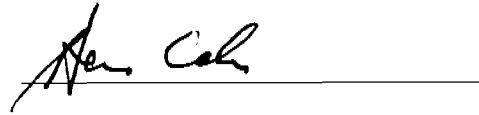
ORDERED that the judgment to be settled herein shall be accompanied by the two

affidavits of Eduardo Cesar Do Nascimento accompanied by the requisite certificate of conformity needed to comply with CPLR 2309 (c), as well as recommendations for the computation of interest due to the date of the judgment.

Settle Judgment.

Dated: February 11, 2009

ENTER:

A handwritten signature in cursive script, appearing to read "J.H.O.", is written over a solid horizontal line.

J.H.O.