

**Bandeira de Gusmao de Mello v Banco Bradesco  
S.A.**

2010 NY Slip Op 30491(U)

March 8, 2010

Supreme Court, New York County

Docket Number: 600043/06

Judge: Shirley Werner Kornreich

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

PRESENT: ~~JUSTICE SHIRLEY WERNER KORNREICH~~ PART 49  
*Justice*

Guilherme Bandeira

INDEX NO. 600043/06

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 01

Barco Bradesco

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 ...

PAPERS NUMBERED

1-4

Answering Affidavits — Exhibits \_\_\_\_\_

5-9

Replying Affidavits \_\_\_\_\_

10-12, 13-14

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with annexed decision/order/judgment

**FILED**

MAR 11 2010

NEW YORK COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3/8/10

[Signature]  
JUSTICE SHIRLEY WERNER KORNREICH  
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 54

-----X  
GUILHERME BANDEIRA DE GUSMÃO  
DE MELLO,

Plaintiff,

-against-

BANCO BRADESCO S.A.,

Defendant.

-----X  
KORNREICH, SHIRLEY WERNER, J.:

Index No.: 600043/06

DECISION & ORDER

**FILED**  
MAR 11 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

This action involves the validity of Brazilian judgments entered against defendant, Banco Bradesco S.A. (Bradesco). Plaintiff, Guilherme Bandeira de Gusmão de Mello, moves for summary judgment in lieu of complaint (CPLR §3213) pursuant to Article 53 of the CPLR, seeking to enforce: a) the October 20, 1995, decision of the 4th Civil Court in Rio de Janeiro (4th Civil Court), which, *inter alia*, found Bradesco liable for damages in the amount of R\$4,505.30 Brazilian Reais (\$2,550 U.S. dollars)<sup>1</sup>, as modified and affirmed by the 2nd Civil Chamber of the Rio de Janeiro State Court of Appeals; and b) the December 20 2005, order issued by the 4th Civil Court calculating the damages against defendant to have increased to R\$4,606,687,802.50 (\$2.6 Billion U.S. dollars). Plaintiff contends that under Brazilian law these judgments are final and binding. Bradesco opposes and cross-moves for summary judgment dismissing this action, contending that due to several ancillary court rulings, the December 20, 2005 judgment is not

<sup>1</sup>The court notes that the current exchange rate for the Brazilian Real is as follows: \$1 = R\$1.76683. U.S. dollar amounts noted in this decision are the approximate equivalent amounts of the Brazilian awards.

final under Brazilian law.

*I. Background*

The action is brought to recover on a judgment obtained by plaintiff's father, Walter, against defendant, Walter's bank. The genesis of the judgment is as follows. While withdrawing cash from defendant's ATM, a man purporting to be a bank employee stole Walter's ATM card and subsequently withdrew \$R4,505.30 from his account over a two day period. The account, however, had a R\$200 daily withdrawal limit. Walter filed suit in the 4th Civil Court and obtained the October 20, 1995 judgment for \$R4,505.30, plus interest computed at the rate defendant would have charged a customer on an overdrawn account, costs, attorneys' fees and "pain and suffering." As outlined by both parties, further proceedings and appeals followed. Plaintiff's Brazilian attorney has averred that Walter assigned the judgment to plaintiff. The parties, through Brazilian counsel, disagree on the law and finality of the judgments.

*A. Affidavit of Eduardo de Souza Gouvêa in Support of Plaintiff's Motion for Summary Judgment*

In support of his motion, plaintiff offers the affidavit of Eduardo de Souza Gouvêa who currently serves as plaintiff's attorney in Brazil. Attached to Mr. Gouvêa's affidavit are Portugese-English translations of fifteen, separate Brazilian court decisions and petitions.<sup>2</sup> According to Mr. Gouvêa, the October 1995 decision became final and binding as a result of an August 18, 1997 docket entry, a copy of which is annexed as Exhibit E. Mr. Gouvêa contends that, pursuant to Brazilian law, Mr. de Mello presented a petition to the 4th Civil Court to calculate his damages, which resulted in a March 8, 1999 order awarding Mr. de Mello

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<sup>2</sup>All references to quotes from the Brazilian actions and petitions herein have been derived from the translations submitted by the parties.

[\* 4]

RS\$834,519.72 (\$472,325.98 U.S. dollars). *Id.* at Exhibit F. Bradesco then challenged the award through a “Debtor’s Defense” petition, which was rejected. *Id.* at Exhibits H and I. Bradesco’s further appeal was dismissed on December 23, 2003 (*Id.* at Exhibit J) and “executed” by the 4th Civil Court on March 4, 2005. *Id.* at Exhibit K.

On December 19, 2005, plaintiff filed a petition with the 4th Civil Court seeking an updated calculation of his damages. *Id.* at Exhibit L. As part of this petition, plaintiff submitted his own proposed damage calculation. *Id.* The Court Accountant updated the damage calculation to RS\$4,606,687,802.50 (\$2.6 Billion U.S. dollars) (*Id.* at Exhibit M), and on December 27, 2005, the 4th Civil Court granted plaintiff’s petition for an award of damages based upon the Court Accountant’s report. *Id.* at Exhibit O.

*B. Defendant’s Affirmation in Opposition to Plaintiff’s Motion for Summary Judgment & In Support of its Cross-Motion for Summary Judgment*

*1. Affirmation of Sergio Bermudes*

Both in opposition to plaintiff’s motion and in support of its cross-motion, Bradesco offers the affidavit of Sergio Bermudes. Mr. Bermudes, an attorney admitted to practice in Brazil, currently represents Bradesco in Brazil. Attached to his affidavit are copies and Portugese-English translations of nine, separate Brazilian court decisions. Mr. Bermudes avers that the interest calculation of the judgment remains at issue in Brazil.

Mr. Bermudes, *inter alia*, states that on February 26, 1999, plaintiff commenced a “foreclosure proceeding” to enforce its judgment. Interest continued to compound monthly, and the 4th Civil Court directed Bradesco to, within 24 hours of receiving notice of the March 1999 decision, to either pay the full amount or put up assets for attachment if it sought to challenge the

decision. Bradesco received notice of the decision on April 19, 1999 and tendered Treasury Bonds in the amount of R\$834,519.72 to the court. In accord with further court orders and proceedings, Bradesco substituted the Treasury Bonds with cash and added more funds for attorneys' fees, bringing the total amount attached up to R\$1,024,998.62 (\$580,134.26 U.S. dollars). Bradesco then paid plaintiff R\$58,759.16 (\$33,256.83 U.S. dollars) from the attached funds, representing Bradesco's calculation of the principal and interest due him from the original judgment. The remaining funds continue to be held in escrow by the 4th Civil Court.

On October 26, 2000, Bradesco filed a "Recissory Action" before the Special Chamber of the Court of Appeals of Rio de Janeiro to rescind the judgment, and the following day, the justice rapporteur of the Special Chamber entered an interim order enjoining enforcement of the judgment. Affidavit of Sergio Bermudes at Exhibit E. Notice of the stay was sent to the 4th Civil Court. However, due to a "point of procedure," the stay was lifted, but Bradesco obtained leave to appeal the lifting of the stay to the *Superior Tribunal de Justica*, which granted an injunction suspending enforcement of the judgment pending a further order of the court on March 9, 2004. *Id.* at Exhibit F. The trial court then issued an order suspending enforcement of the judgment. *Id.* at Exhibit G. On May 11, 2004, a full panel of the *Superior Tribunal de Justica* issued an order unanimously endorsing the justice rapporteur's decision (May 2004 Injunction). *Id.* at Exhibit A. Mr. Bermudes avers that the May 11, 2004, injunction has yet to be lifted.

Mr. Bermudes further avers that despite the presence of the October 2001 Order and May 2004 Injunction, plaintiff, without any notice to Bradesco, filed the December 19, 2005 petition with the 4th Civil Court, which resulted in a December 27, 2005 *ex parte* "Notification Order"

directing “the Officer of the Court” to notify Bradesco that it was liable to plaintiff for R\$4,606,687,802.05 in damages. Mr. Bermudes states that he has “never seen such an order in all of his time working in the field of civil procedure, and it is certainly not a money judgment under the Brazilian Civil Procedure Code.” *Id.* at ¶ 39. He further argues that given the appellate court orders and injunctions which were in place, the 4th Civil Court did not have the power to do anything with the Court Accountant’s assessment other than inform Bradesco of the calculation. This is why, according to Mr. Bermudes, the 4th Civil Court judge titled his directive as a “Notification Order.” Indeed, on January 17, 2006, Appellate Justice Conceição A. Mousnier issued an order staying the December 27, 2005 “Notification Order” (January 2006 Stay). *Id.* at Exhibit B. In his order, Justice Mousnier noted the “decision challenged involves an extremely high amount and doubt exists regarding its enforceability.” *Id.*

C. *Reply Affidavit of Eduardo de Souza Gouvêa in Support of Plaintiff’s Motion for Summary Judgment & in Opposition to Defendant’s Cross-Motion*

In reply, Mr. Gouvêa, *inter alia*, states that under Brazilian law, the October 1995 Decision and August 1996 Appeal, in fact, are final and binding. Mr. Gouvêa contends that following service, the defendant can challenge the damage calculation by filing a Debtor’s Defense petition under CPC Article 741. The defendant is required to raise any and all defenses it has to the judgment during this petition or be forever barred from asserting them. Mr. Gouvêa argues that since Bradesco lost its Debtor’s Defense petition, it is now barred from challenging its obligation to pay the judgment calculated in the March 1999 Accounting.

In addressing the May 2004 Injunction, Mr. Gouvêa questions the validity of what he terms the “Interim Injunction” or “temporary stay” issued on March 9, 2004 by the justice

[\*7]

rapporteur of the *Superior Tribunal de Justica* (which predated the May 2004 Injunction issued by a full panel of justices on May 11, 2004). In addition, he states that the dismissal of Bradesco's Debtor's Defense petition and subsequent March 4, 2005 execution order issued by the 4th Civil Court trump the injunction.

Mr. Gouvêa does not address the *ex parte* nature of the December 27, 2005 "Notification Order." Rather, he asserts that after Bradesco was served with the "Notification Order," it went to the 2d Civil Court of Appeals, on an *ex parte* basis, to seek revocation of the order. According to Mr. Gouvêa, since the language of the January 2006 stay did not modify or reverse the damages assessed by the Court Accountant in the "Notification Order," the stay does not prevent plaintiff from seeking execution of the damages assessed.

*D. Reply Affidavit of Sergio Bermudes*

Pursuant to this court's August 18, 2009 order, Mr. Bermudes submitted an affidavit to update the court on certain decisions issued in Brazil surrounding the proceedings at issue.

*1. Superior Tribunal de Justica Proceedings*

On March 9, 2006, the *Superior Tribunal de Justica* (STJ) issued an order (March 2006 STJ Order) mandating that the Special Chamber of the Rio de Janeiro Court of Appeals consider Bradesco's claim, as set forth in its Recissory Action, that interest should not be compounded monthly as against plaintiff's original loss of R\$4,505.30. This order further enjoined plaintiff from enforcing any money judgment against Bradesco pending resolution of the issue. In pertinent part, a translation of the order states:

In the substantive proceedings the bank was ordered to reimburse the amount of "R\$4,505.30...plus interest payable at the same rate the bank would charge on an overdrawn account, this being the market rate charged by banks....." As can be seen, there

was no express reference to compound interest, particularly the monthly compound interest required by the order confirming the calculations.

It is therefore undeniable that the order confirming the calculations touched upon issues of merit by permitting the inclusion of compound interest not expressly provided for in the order on the merits, and thus not being entirely consistent with the *res judicata*.

Furthermore, it is clear that financial institutions are not legally authorized to charge compound interest on a monthly basis in credit agreements. The case law from the Superior Court of Justice...is unanimous on this point

I cannot fail to register that, according to the calculations set out...the amount owed today is over R\$4,600,000,000..., that is, over two billion dollars, arising from an amount which, in 1994, was R\$4,500....The sum is therefore clearly disproportional, and undoubtedly represents potential unjust enrichment, with which courts cannot collaborate. It is also not possible to "wash one's hands" on the basis of the sterile argument that the charging of compound interest is a common practice amongst banks, given that, even if it does occur, it is illegal and, as has already been stated, is repeatedly rejected by the Court in relation to banking agreements entered into prior to the issuing of Provisional Measure n 1.963-17, of 30th March 2000.

I[n] these circumstances, I take the view that the pre-requisites to exercising the right to file the action are met, and that an application to rescind is therefore legally possible.

I grant leave for the special appeal to be heard and I further grant said appeal, thus requiring that the State Court of Rio examine the merits of the application to rescind.

In May 2006, plaintiff sought leave to appeal the March 2006 STJ Order, which was denied on March 21, 2007. Reply Affidavit of Sergio Bermudes at Exhibit A. Plaintiff then had its appeal reheard before another STJ section, which, in a decision dated February 13, 2008, once again denied the appeal. *Id.* at Exhibit B. Plaintiff sought leave from the STJ to file an Extraordinary Appeal to the Federal Supreme Court (Brazil's Constitutional Court) claiming that the STJ's denial raised issues under Brazil's Federal constitution, but this request was denied on December 3, 2008. *Id.* at Exhibit C. Despite the denial, plaintiff subsequently filed an appeal directly with the Federal Supreme Court alleging that there are conflicting STJ precedents on the

issue which raise constitutional concerns. To date, no decision has been rendered.

## 2. *Brazilian Trial and Appellate Court Proceedings*

Further, on May 8, 2006, plaintiff filed a petition with the 4th Civil Court seeking to reduce his damage award to R\$304,953,312.37 (\$172,599,125.20 U.S. dollars), as well as revocation of the prior order mandating that Bradesco pay R\$4,606,687,802.05. On July 11 and August 14, 2006, Bradesco filed petitions consenting to the revocation but opposing any award of damages. In two orders dated August 31, 2006 and November 1, 2006, the 4th Civil Court confirmed plaintiff's reduction in damages and ordered revocation of the R\$4,606,687,802.05 damage assessment against Bradesco. *Id.* at Exhibit D (2006 Damage Reduction).

On October 2, 2006, plaintiff filed a petition with the 4th Civil Court seeking enforcement of his demand for R\$304,953,312.37 in damages. Bradesco opposed the petition. On February 23, 2007, the 4th Civil Court issued an order staying the enforcement proceeding (*Id.* at Exhibit E), which stay was upheld by the 2d Civil Court of Appeals. *Id.* at Exhibit F. In an order dated July 11, 2007, the 4th Civil Court continued the stay. *Id.* at Exhibit G.

## II. *Conclusions of Law*

A foreign judgment is enforceable by way of summary judgment in lieu of complaint. CPLR 3213; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3213:1, at 406; CPLR 5303. Pursuant to CPLR 3213, if the court denies summary judgment in lieu of complaint, "the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise." The Court of Appeals has deemed this language to permit dismissal on a CPLR 3213 motion seeking enforcement of a foreign judgment. *Schulz v Barrows*, 94 NY2d 624 (2000).

CPLR Article 53<sup>3</sup> governs the recognition of foreign judgments. CPLR 5302 provides for recognition of a foreign judgment if it “is final, conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal.” *See Banco Nacional De Mexico, S.A v Societe Generale*, 34 AD3d 124, 131 (1st Dept 2006)(comity normally not extended to non-final, non-merit orders). A foreign judgment will not be given any greater preclusive effect in New York than it would in the country where it was rendered. *Watts v Swiss Bk Corp.*, 27 NY2d 270, 275 (1970); *Kirch v Liberty Media Corp.*, 2006 US Dist LEXIS 82175, n 14 (SDNY Nov. 8, 2006); *Nippon Emo-Trans Co. v Emo-Trans, Inc.*, 744 F Supp 1215, 1227 (EDNY 1990). The party seeking to enforce the judgment has the burden of proving the judgment conclusive. *Watts, id.*

CPLR § 5306, however, provides that “[i]f the defendant satisfies the court that an appeal is pending or that he is entitled and intends to appeal from the foreign country judgment, the court may stay the proceedings until the appeal has been determined or until the expiration of a period of time sufficient to enable the defendant to prosecute the appeal.” Under this provision, the court is permitted to stay the proceedings, or any portion thereof, and hold recognition of the judgment in abeyance pending the resolution of the foreign proceedings. *See* CPLR 5306; Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C5306:1, at

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<sup>3</sup> Article 53 recognizes certain foreign country judgments as a matter of international comity. *Lenchyshyn v. Pelko Elec., Inc.*, 281 AD2d 42, 45-46 (4th Dept 2001). When the requirements of jurisdiction and due process are met, fraud and unfairness are absent, the judgment does not offend New York’s public policy (CPLR 5303, 5304, 5305), and the judgment is conclusive (CPLR 5302), it will be recognized. *Id.*

558. In this way, the court avoids recognizing a foreign judgment which may later be overturned.

11 Weinstein- Korn-Miller, NY Civ Prac P 5306.01.

*A. Plaintiff's Motion for Summary Judgment*

Here, plaintiff has not met its burden of demonstrating the finality of either the October 1995 Decision or December 2005 "Notification Order." Bradesco has proffered sufficient documentary evidence in the form of subsequent court proceedings and decisions in this 15 year-old case, to show that unresolved issues remain in Brazil surrounding the measure and calculation of interest arising from the original 1995 judgment. The May 2004 Injunction issued by the STJ suspended enforcement of the R\$654,465.64 judgment issued in 1998 by the 4th Civil Court. This injunction remains in place to this day. Moreover, the January 2006 Stay enjoined plaintiff from enforcing the December 2005 "Notification Order." Plaintiff does not refute the existence of the May 2004 Injunction and January 2006 Stay. Rather, plaintiff makes certain procedural arguments and alleges some factual discrepancies surrounding Bradesco's application of each order. Regardless, the court need not address these arguments as a result of the March 2006 STJ Order, where Brazil's highest, state-level court enjoined plaintiff from enforcing any money judgment against Bradesco until a resolution is reached as to the proper interest to be charged. Consequently, since further proceedings are ongoing in Brazil and the judgment apparently, is not enforceable in Brazil,<sup>4</sup> CPLR 3213 relief at this stage is not warranted. *Cecuk v MacAdoo*, 284 AD2d 188 (1st Dept 2001) (CPLR 3213 and CPLR Article 53 held inapplicable to Chilean judgment modified by Chilean Supreme Court such that further proceedings were

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<sup>4</sup> Although plaintiff is a Brazilian resident and defendant a Brazilian Bank, plaintiff has come to New York to seek enforcement of this judgment.

necessary to determine amount of plaintiff's damages); see, e.g., *Ladup, Ltd. v Jamil*, 131 AD2d 382 (1st Dept 1987). Given the age of the case, the amount of time that has passed since the injunctions and stays were invoked, and the ability of the parties to enforce the judgment in Brazil once it becomes conclusive, the court dismisses the motion rather than convert the action or hold it in abeyance. See *Schulz v Barrows, id.*

*B. Defendant's Cross-Motion for Summary Judgment*

The court need not reach the cross-motion since it has dismissed the action. However, it notes that Bradesco has met its burden with regard to plaintiff's claim for R\$4,606,687,802.50. Plaintiff is no longer seeking R\$4,606,687,802.50 in damages. The 4th Civil Court in Brazil, via the 2006 Damage Reduction, granted plaintiff's petition for a reduction in damages and ordered revocation of the R\$4,606,687,802.50 award. Although the reduction was subsequently stayed and Bradesco continues to challenge its validity, the record contains no issue of fact surrounding the 4th Civil Court's revocation of the R\$4,606,687,802.50 award. Plaintiff has not proffered any documentary evidence to refute this revocation. Accordingly, it is

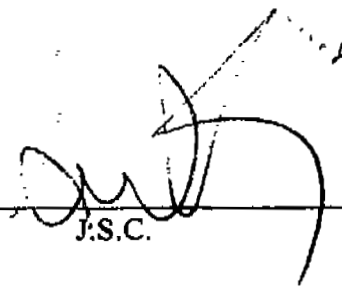
ORDERED that plaintiff's motion for summary judgment in lieu of complaint is denied and the action is dismissed without prejudice; and it is further

ORDERED that defendant's cross-motion is denied as moot; and it is further

ORDERED that the Clerk is to enter judgment accordingly.

DATED: March 8, 2010

ENTER:

  
\_\_\_\_\_  
J.S.C.

**FILED**  
MAR 11 2010  
NEW YORK  
CLERK'S OFFICE