SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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MARGARET LESLEY MARSHALL and KIM NEIL MARSHALL

Plaintiffs,

Index No. 651067/13

-against-

FRANCIS G. FLEMING, MARC S. MOLLER, STEVEN R. POUNIAN, JAMES P. KREINDLER, DAVID C. COOK, DAVID BEEKMAN, BIANCA RODRIGUEZ, NOAH H. KUSHLEFFSKY, ROBERT J. SPRAGG, BRIAN J. ALEXANDER, and JUSTIN T. GREEN,

Defendants.

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JOAN A. MADDEN, J.:

Plaintiffs Margaret Leslie Marshall ("Margaret") and Kim Neil Marshall ("Kim") (collectively, "the Marshalls") move, pursuant to CPLR 3213, for summary judgment in lieu of complaint, on the ground that a foreign country money judgment secured in Australia, in the amount of AU $150,343.12 (US $153,154.54), is conclusive and entitled to recognition in the courts of New York State, in accordance with CPLR Article 53. Defendants, eleven individual attorneys at the law firm Kreindler & Kreindler LLP (collectively defendants or "Kreindler"), oppose the motion, and cross-move to dismiss and alternatively, to stay enforcement of the Australian judgment.[1]

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[1]Defendants also cross-moved for summary judgment on their counterclaim for declaratory relief, but subsequently agreed to withdraw that portion of the cross-motion and to discontinue their counterclaim without prejudice.

The following facts are not disputed unless otherwise noted. Kreindler & Kreindler LLP, a New York law firm, devotes much of its practice to representing plaintiffs in aviation death and injury litigation. In 2002, Australian lawyers David Greenwell ("Greenwell") and Michael Prescott ("Prescott") contacted the Kreindler firm about potential U.S. lawsuits arising from the deaths of various passengers killed in a Whyalla Airlines crash off the coast of Australia on May 31, 2000. Kreindler emailed a draft retainer form to Greenwell and Prescott setting forth the terms. Greenwell and Prescott shared the draft retainer with other Australian attorneys, including Terrence Goldberg ("Goldberg") of the Turner Freeman firm in Australia.

Plaintiffs Margaret and Kim, were the wife and son, respectively, of Neil Marshall ("Neil"), who was killed in the plane crash. On May 16, 2002, Margaret, as the executor and personal representative of the estate of Neil, retained the Kreindler firm to bring a wrongful death action against the airline, in federal court in Pennsylvania. The retainer provided for a contingent fee of 22.2%, and that Kreindler would advance costs, to be reimbursed at the conclusion of the case.

Neil and Margaret were married, but legally separated in June 1995, at which time Neil commenced a de facto spousal relationship with Linda Carruthers ("Linda") in Australia. Under Australian law, at the time of his death, Neil and Linda were

deemed de facto husband and wife. Margaret remained in Neil's will as the named estate executor. Linda, however, as a financially dependent de facto spouse, was a proper wrongful death beneficiary under Australian law, as was Kim.

Kreindler asked the Australian attorneys to provide damages information, and received, among other things, a document prepared by Linda confirming that she had resided with Neil for five years and suffered damages as a result of his death. She was paid a lump sum death award of AU $200,000 as Neil's spouse by the Australian governmental authorities, and received a condolence letter from the Australian government.

On behalf of the Marshalls, Kreindler commenced a wrongful death action against the aircraft manufacturers, in U.S. District Court Middle District of Pennsylvania. In February 2003, the Marshalls reached a settlement for a total sum of $481,250.00. On April 8, 2003, Goldberg, on behalf of Turner Freeman, wrote to Kreindler and demanded that the net proceeds of the settlement, after payment of Kreindler's fees and expenses, be paid to the Marshalls. On April 13, 2003, Australian counsel informed Kreindler via email that Linda was making a formal claim to a share of the settlement proceeds.

During April and May 2003, Kreindler communicated with Turner Freeman informing it that, given the competing claims to the settlement funds and the unresolved question of which

jurisdiction's law would govern the dispute, the dispute should be resolved through agreement, mediation or arbitration; or Margaret, as the estate representative, should secure a court order as to the proper distribution. Kreindler opined that the Pennsylvania federal court would apply Pennsylvania choice of law rules, and that under those rules, the court was likely to apply the law of Australia, which would permit Linda to recover a share of the settlement proceeds. Kreindler suggested that Turner Freeman could obtain a second legal opinion regarding the applicable law, and offered to have its Pennsylvania co-counsel, Cliff Rieders (Rieders) provide an opinion. Rieders agreed with Kreindler that a Pennsylvania court would likely apply the law of Australia and determine that Linda was entitled to a portion of the settlement proceeds. Rieders told Turner Freeman that Margaret should determine whether she needed to obtain another opinion from an attorney who was not involved in the Pennsylvania proceedings.

On June 12, 2003, the federal court issued an order stating the action had settled, directing the parties to reduce the settlement to writing within 10 days, and dismissing the action without costs, subject to reinstatement "upon good cause," if the settlement was not consummated within six months. Goldberg, acting on behalf of the Marshalls, agreed to hold the entire net settlement recovery in the firm's escrow account and to file an

application with a competent court in Australia, on notice to Linda, to fix the proper distribution of the settlement funds. Margaret later provided authority for the settlement to be paid into Kreindler's escrow account. On or about July 14, 2003, Kreindler transferred $364,662.82 in net settlement funds to the Turner Freeman escrow account. Kreindler received $116,588 in attorney fees and expenses.

Represented by Turner Freeman, the Marshalls litigated the distribution issue with Linda in Australia, and commenced an action against Linda's solicitor. Applying Pennsylvania law, the Australian court determined that Linda was not entitled to any portion of the settlement proceeds from the Pennsylvania federal court action.

In February 2009, the Marshalls filed an action for legal malpractice in Australia against eleven current and former members of the Kreindler firm. They alleged that Kreindler committed legal malpractice by requiring Margaret to obtain a court order on the distribution of the settlement funds, and that Kreindler thereby breached its fiduciary duty to Margaret and Kim, and was guilty of conspiracy to deprive them of the settlement proceeds. As damages, the Marshalls sought reimbursement for the legal fees charged by Turner Freeman to obtain the distribution order in Australia (AU $343,835.88), and the legal fees charged by Turner Freeman in the separate

litigation against Linda's Australian counsel (AU $254,838.72).

Defendants assert that they initially considered challenging whether the Australian court had personal jurisdiction over them, but their Australian counsel advised that Australian law had no "specific test" for personal jurisdiction, as that concept is understood in the U.S., and that the only option available to contest personal jurisdiction was a forum non conveniens motion. In May 2009, Kreindler filed a forum non conveniens motion, along with a limited appearance challenging the jurisdiction of the Australian court. In February 2010, the trial court denied Kreindler's motion, and Kreindler appealed. In April 2011, the Australian Court of Appeal affirmed the trial court, but took the provisional view that the Marshalls' claims were governed by New York's statute of limitations and were time-barred. Nonetheless, the Australian court ordered Kreindler to pay the Marshalls' costs for the motion, and on December 8, 2011 entered a judgment in the sum of AUS $150,434.12 in favor of the Marshalls and against defendants. That is the judgment for costs the Marshalls are now seeking to enforce via the instant action/motion for summary judgment in lieu of complaint.

The Australian court subsequently gave the Marshalls leave to amend their claim. The amendment, filed on January 13, 2012, abandoned all the original claims and substituted a single claim for indemnity, alleging that Kreindler was liable under New York

common law to indemnify the Marshalls for the legal fees they incurred to obtain the order Kreindler required regarding the distribution of the settlement proceeds, and for the legal fees incurred for the separate proceeding against Linda's Australian counsel.

Kreindler sought to dismiss the amended claim for indemnity, arguing that under New York law the claim was not viable and constituted an improper attempt to avoid the three-year statute of limitations applicable for attorney malpractice. Kreindler requested the Australian court to refer the issue to a member of the New York Panel of Referees, as per a 2009 "Memorandum of Understanding" between the Chief Justice of New South Wales and the Chief Judge of the State of New York. The request was granted on May 17, 2013, and the Marshalls appealed. A hearing on the appeal was held on July 29, 2013. To date, this court has not been informed of a decision on the appeal.[2]

Meanwhile, in March 2013, the Marshalls commenced the instant action/motion to convert the Australian judgment for costs against Kreindler to a New York judgment pursuant to CPLR Article 53. In support of the motion, the Marshalls maintain that they obtained a final judgment against defendants for costs from the Australian court, which is conclusive and enforceable in that

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[2]The parties have not advised the court of any such decision and no further papers have been e-filed since the oral argument date of the motion.

country, and as such the judgment is entitled to recognition in the courts of New York pursuant to CPLR Article 53.

As the Court of Appeals explains, "New York has traditionally been a generous forum in which to enforce judgments for money damages rendered by foreign courts." CIBC Mellon Trust Co v. Mora Hotel Corp N.V., 100 NY2d 215, 221, cert den 540 US 948 (2003). In 1960, the New York legislature adopted the Uniform Money-Judgments Recognition Act as CPLR Article 53, which was "designed 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." Id. The Court of Appeals further explains that a judgment creditor proceeding under Article 53 "does not seek any new relief against the judgment debtor, but merely asks the court to perform its ministerial function of recognizing the foreign country money judgment and converting it into a New York judgment." Id at 222 (quoting Lenchyshyn v. Pelko Electric, Inc, 281 AD2d 42, 49 [4th Dept 2001]).

By its terms, Article 53 applies to "any foreign country judgment which is final, conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal." CPLR 5302. For the purposes of the statute, a foreign country judgment is considered "conclusive between the

parties to the extent that it grants or denies recovery of a sum of money," and 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." CPLR 5303. Generally, a foreign country money judgment is to be recognized in New York under CPLR Article 53 unless a ground for non-recognition under section 5304 is applicable. See Galliano, S.A. v. Stallion, Inc, 15 NY3d 75, cert den 131 S.Ct. 288 (2010).

Here, the Marshalls have chosen the streamlined procedure of a motion for summary judgment in lieu of complaint pursuant to CPLR 3213. Based on the undisputed record, plaintiffs have sustained their burden on the motion.

In opposition, defendants rely on the CPLR 5304 grounds for non-recognition, and argue the Marshalls are not entitled to enforce their Australian judgment in New York for the following reasons: 1) the Australian court did not have personal jurisdiction over defendants; 2)the Marshalls obtained the judgment by fraud; 3) the cause of action on which the judgment is based "is repugnant to the public policy of this state"; and 4) the judgment conflicts with the "final and conclusive judgment" of the Pennsylvania federal court. See CPLR 5304.

First as to personal jurisdiction, defendants argue that they did not have any contact with Australia that would support jurisdiction, as it is undisputed that all of Kreindler's work

was performed in New York and Pennsylvania, Kreindler did not enter Australia regarding this matter, and Kreindler has never practiced law in Australia. In reply, the Marshalls assert that defendants waived any objection they might have had to the Australian court's jurisdiction over them, by litigating the underlying merits of the action in Australia. The Marshalls are correct.

CPLR 5304(a)(2) states that a "foreign country judgment is not conclusive if . . . the foreign court did not have personal jurisdiction over the defendant." The issue of personal jurisdiction is specifically addressed in Section 5305 which states, in relevant part, that the "foreign country judgment shall *not* be refused recognition for lack of personal jurisdiction if . . . the defendant *voluntarily appeared in the proceedings, other than for the purpose . . . of contesting the jurisdiction of the court over him*" (emphasis added).

It is undisputed that defendants challenged the Marshalls' ability to litigate their claims in Australia, and entered a limited appearance for that purpose. When that motion was unsuccessful, defendants continued to litigate the merits of the action, so they did more than was necessary to preserve their jurisdictional objection and "voluntarily appeared" in the foreign proceeding within the meaning of CPLR 5305(a)(2). See CIBC Mellon Trust Co v. Mora Hotel Corp N.V., supra at 222-224.

Thus, pursuant to CPLR 5305(a)(2), the "foreign country judgment shall *not* be refused recognition for lack of personal jurisdiction."

Second, defendants' argument that the judgment was obtained as a result of the Marshalls perpetrating a fraud on the court, is not supported by the record. While defendants assert that Marshalls' "re-labeling" of their time-barred legal malpractice claim as an indemnity claim constitutes a "transparent fraud" to avoid the three-year statute of limitations for legal malpractice, the Marshalls' Australian judgment is not for legal malpractice, but for the costs associated with defendants' unsuccessful challenge to jurisdiction. Moreover, since the Marshalls did not add the indemnity claim until after they secured the judgment for costs, the judgment could not have been "obtained by" any alleged fraud in connection with the indemnity claim, within the meaning of CPLR 5304(b)(3).

Third, defendants' argument that the judgment is repugnant to the public policy of this state since it is based on a time-barred action for legal malpractice, is without merit. Even if statutes of limitations express a "societal interest or public policy of giving repose to human affairs," John J. Kassner & Co. v City of New York, 46 NY2d 544, 550-551 (1979), as determined above, the Australian judgment is not for legal malpractice, but for the costs associated with defendants' unsuccessful challenge

to jurisdiction.

Finally, defendants argue that the Australian judgment conflicts with the judgment of the federal court in Pennsylvania judgment, since the federal court dismissed the action without costs. CPLR 5304(b)(5), which provides for non-recognition of foreign country judgment that "conflicts with another final and conclusive judgment," is inapplicable. Clearly, the federal court did not issue a "final and conclusive judgment," but simply dismissed the action based on the parties' settlement agreement. Moreover, the actions are between different parties.

The court has considered defendants' remaining arguments and finds that they are likewise lacking in merit.

Based on the foregoing, the court concludes that defendants have failed to raise an issue of material fact as to a bona fide defense, and as such plaintiffs' motion is granted. In view of this conclusion, defendants' cross-motion to dismiss is denied as moot. The portion of defendants' cross-motion for a stay of the enforcement of the judgment is denied.

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment in lieu of complaint is granted; and it is further

ORDERED that defendants' cross-motion is denied in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment in

favor of plaintiffs MARGARET LESLEY MARSHALL and KIM NEIL MARSHALL and against defendants FRANCIS G. FLEMING, MARC S. MOLLER, STEVEN R. POUNIAN, JAMES P. KREINDLER, DAVID C. COOK, DAVID BEEKMAN, BIANCA RODRIGUEZ, NOAH H. KUSHLEFFSKY, ROBERT J. SPRAGG, BRIAN J. ALEXANDER, and JUSTIN T. GREEN, in the amount of $153,154.54 U.S. dollars, together with costs and disbursements as taxed by the Clerk pursuant to an appropriate bill of costs.

Dated: May 7, 2014

ENTER:

HON. JOAN A. MADDEN
J.S.C.