Albaniabeg Ambient Sh.p.k. v Enel S.p.A
2014 NY Slip Op 32735(U)
October 15, 2014
Supreme Court, New York County
Docket Number: 152679/14
Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

ALBANIABEG AMBIENT SH.P.K.,

INDEX NO. 152679/14

Plaintiff,

-against- MOTION SEQ. NO. 003

ENEL S.P.A and ENELPOWER S.P.A.,

Defendants.

The following papers were read on this motion by defendants to dismiss the complaint.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ☐ Yes ■ No

Plaintiff Albaniabeg Ambient Sh.p.k. (ABA) commenced this action on March 24, 2014 seeking this Court's recognition and enforcement of a judgment rendered by the District Court of Tirana in Albania in the amount of € 433,091,870 (Albanian Judgment), plus interest and costs of collection, against defendants Enel S.p.A (Enel) and Enelpower S.p.A (Enelpower) (collectively, defendants). By Order to Show Cause (OSC) dated March 25, 2014 (motion sequence number 001), ABA moved for: an order of attachment and expedited discovery; and, pending a hearing on the motion, a temporary restraining order (TRO) prohibiting defendants and their subsidiaries, affiliates, agents and garnishees from disposing of property in which defendants and/or their alter egos have an interest. The Court granted the TRO "to the extent of $597,493,543.85" (Document number 43).

On April 22, 2014, defendants moved, by OSC (in motion sequence number 003) to: (1) dismiss the action, pursuant to CPLR 3211 and BCL § 1314, for lack of personal and subject matter jurisdiction; (2) adjourn plaintiff's motions, and defendants' deadlines for opposing them, pending a decision on defendants' motion to dismiss; and (3) vacate the TRO. The Court granted the motion to the extent of vacating the TRO and adjourning defendants' deadline to oppose ABA's motions, pending the hearing of defendants' motion to dismiss. Defendants' motion to dismiss is now before the Court.

BACKGROUND

On this motion, the relevant facts are few and undisputed. ABA is an Albanian entity, created and owned by the Bechetti Energy Group (BEG), an Italian holding company that obtained a concession to develop a hydroelectric plant in Albania. Enel is Italy's largest power company, and Enelpower is Enel's Italian subsidiary. On February 2, 2000, Enelpower and BEG entered into a cooperation agreement, which was governed by Italian law and provided for disputes to be resolved by arbitration in Italy. The agreement related to the construction and operation of a hydroelectric plant in Albania.[1] ABA was established to serve as the concession company, as required by Albanian law. The parties' relations broke down and, in 2004, ABA commenced an action against Enel and Enelpower in the Tirana District Court, seeking damages for tort and unfair competition.[2]

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[1] The parties differ as to the import of this agreement. Plaintiff states that it was a final agreement to construct and operate the plant. Defendants state that it was an agreement to explore the feasibility of the project. The parties' differing views concerning the agreement are irrelevant on the instant motion, which pertains to jurisdiction only.

[2] Before ABA brought suit in Albania, BEG commenced arbitration proceedings in Italy against Enelpower, seeking damages for breach of contract. On November 25, 2002, the arbitration panel rejected BEG's claims. The Presiding Judge of the Ordinary Court of Rome, the Court of Appeals of Rome and the Supreme Court of Cassation upheld the arbitral award. The arbitral award is not relevant on the instant motion.

On March 24, 2009, the Tirana District Court issued its final decision, awarding € 25,188,500 in damages for the year of 2004. The Tirana District Court also awarded damages for 2005-2011, which it could not calculate at the time of the decision, "because other factors influence the price of electricity sale, which [could not] be predicted at [that] moment," but provided that "the calculations for the amount of revenue from electricity sale for the other years [would] be made annually [as the prices were verified in the market] according to the formula given by the experts" and included in the decision[3] (Cheng affirmation, exhibit 1 at 23). The Tirana Court of Appeals affirmed the district court's decision (*id.*, exhibit 2). The Supreme Court of Albania refused to accept the appeal of that decision (*id.*, exhibit 3).

Applying the Tirana District Court's formula, together with the award for 2004, ABA arrived at the figure of € 433,091,870 and now seeks to enforce the Albanian Judgment in New York. It alleges that Enel plans "to raise billions of dollars of funding, whether directly or indirectly through its subsidiaries . . . by issuing capital securities that are governed by New York law to investors located in New York" (Plaintiff's brief at 5; Cheng affirmation, exhibits 26, 27 and 28). In addition, ABA alleges that "Enel operates at least 21 power plants in New York through its wholly-owned subsidiary Enel Green Power America" (Plaintiff's brief at 5; Cheng affirmation, exhibit 29). ABA alleges that Enel's other contacts with the state include: (1) a director that maintains an office in New York; (2) participation in the 2013 Leaders Summit in New York as a member of the United Nations Global Compact; and (3) maintaining the

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[3] Damages for 2005-2011 were to be based on the experts' formula, as follows:

> "Vn = (Q x Pn) + (Q x Pcn), where (n) is the corresponding year, V is the total revenue collections from the sale of electricity, Q = the amount of energy that could be exported in 2005-2006-2007-2008-2009-2010-2011, which is equal to 371,000,000KHh/year, P is the price of electricity sale according to the market, Pc is the price of Green Certificates for the following years according to the definitions of MSE (Italian Electric System Operator) S.p.A." (Cheng affirmation, exhibit 1 at 23).

company's shares on the New York Stock exchange from November 1999 through December 2007.

DISCUSSION

Defendants argue that plaintiff's action must be dismissed because: (1) the court lacks personal jurisdiction over defendants; (2) the court lacks subject matter jurisdiction over the dispute, which is between foreign entities and based on events that occurred in Albania; and (3) plaintiff has failed to demonstrate sufficiency of service. Plaintiff counters that personal jurisdiction is not necessary for the ministerial act of recognizing a foreign judgment and that service of the notice of motion in lieu of complaint was effective, as evidenced by the affidavits of service. It also contends that BCL § 1314(b) provides subject matter jurisdiction, as the action to recognize the judgment arose in New York and, once recognized, the judgment will be the subject of the enforcement action in New York. In addition, plaintiff argues that Article 53 itself confers subject matter jurisdiction.

Until recently, the only New York State appellate court to decide whether *in personam* jurisdiction is required for the recognition of a foreign country money judgment was the Fourth Department in *Lenchyshyn v Pelko Elec.* (281 AD2d 42 [4th Dept 2001]). In *Lenchyshyn*, the Fourth Department held

> "that the judgment debtor need not be subject to personal jurisdiction in New York before the judgment creditor may obtain recognition and enforcement of the foreign country money judgment, as neither the Due Process Clause of the United States Constitution nor New York law requires that the New York court have a jurisdictional basis for proceeding against the judgment debtor" (*id.* at 43).

Earlier this year, the First Department adopted the reasoning of *Lenchyshyn* in *Abu Dhabi Commercial Bank PJSC v Saad Trading, Contr. & Fin. Servs. Co.* (117 AD3d 609 [1st

Dept 2014]).[4] In *Abu Dhabi Commercial Bank PJSC*, the plaintiff was incorporated under the laws of the United Arab Emirates and sought to domesticate and enforce an English judgment against a defendant entity formed under the laws of the Kingdom of Saudi Arabia (117 AD3d at 609). The defendant moved to dismiss for lack of personal jurisdiction, since neither the parties nor the underlying transactions had any connection to New York (*id.* at 610). The defendant argued that:

> "as opposed to actions seeking recognition of a sister-state judgment under CPLR article 54, where a plaintiff need only register a judgment with a county clerk and personal jurisdiction need not be established, actions pursuant to CPLR 5303 for enforcement of foreign country money judgments are not exempted from the due process requirements of personal jurisdiction" (*id.*).

The court rejected the defendant's argument, reasoning that Article 53 was adopted in accordance with New York's tradition of "'be[ing] a generous forum in which to enforce judgments for money damages rendered by foreign courts'" and "'to promote the efficient enforcement of New York judgments abroad by assuring foreign jurisdictions that their judgments would receive streamlined enforcement here'" (*id.* at 610-611, quoting *CIBC Mellon Trust Co. v Mora Hotel Corp.*, 100 NY2d 215, 221 [2003], *cert denied* 540 US 948 [2003]). The court found of particular significance that, "'[i]n proceeding under article 53, the judgment creditor does not seek any new relief against the judgment debtor, but instead 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 611, quoting *CIBC Mellon Trust Co.*, 100 NY2d at 222). The court found that, where the defendant had actual notice and did not argue any grounds for non-recognition of the foreign money judgment,

> "'a party seeking recognition in New York of a foreign money judgment (whether of a sister state or a foreign country) need not

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[4] Affirming 36 Misc 3d 389 [Sup Ct, NY County 2012].

> establish a basis for the exercise of personal jurisdiction over the judgment debtor by the New York courts,' because '[n]o such requirement can be found in the CPLR, and none inheres in the Due Process Clause of the United States Constitution, from which jurisdictional basis requirements derive.'
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> . . .
>
> "Nor does the CPLR require the judgment debtor to maintain property in New York for New York to recognize a foreign money judgment. . . . Thus, 'even if defendant[ ] do[es] not presently have assets in New York, plaintiff[ ] nevertheless should be granted recognition of the foreign country money judgment pursuant to CPLR article 53, and thereby should have the opportunity to pursue all such enforcement steps in futuro, whenever it might appear that defendant[ ] [is] maintaining assets in New York, including at any time during the initial life of the domesticated [foreign country] money judgment or any subsequent renewal period'" (*id.*, quoting *Lenchyshyn*, 281 AD2d at 47, 50).

Here, defendants urge the court to ignore precedent stating that an action to recognize and enforce a foreign judgment does not require personal jurisdiction because of the recent Supreme Court decision in *Daimler AG v Bauman* (134 S Ct 746 [2014]). Defendants contend that *Daimler* limits a court's ability to hear disputes between foreign entities, which do not arise within a court's forum, to instances where the entity is either organized or headquartered in the forum. Because defendants are Italian entities and the underlying dispute involves a transaction in Albania and a contract enforceable under Italian laws, defendants contend that subjecting them to suit in New York violates due process. Defendants' argument is unpersuasive.

Daimler addressed "whether Daimler's affiliations with California [were] sufficient to subject it to the general (all-purpose) personal jurisdiction of that State's courts" (*Daimler*, 134 S Ct at 758). *Daimler* did not address the factual scenario raised in the instant action, where personal jurisdiction is not a pre-requisite to the court's performance of "its ministerial function of recognizing the foreign country money judgment" (*Abu Dhabi Commercial Bank PJSC*, 117

AD3d at 611). Accordingly, *Daimler* is distinguishable on its facts.

The Court notes defendants' reliance on *Gliklad v Bank Hapoalim B.M.* (Sup Ct, NY County, Aug. 4, 2014, Schweitzer, J., index No. 155195/2014), which applied *Daimler* to grant the defendant bank's motion to dismiss for lack of personal jurisdiction. Unlike the instant Article 53 action, *Gliklad* was a special proceeding to compel the bank to turn over the judgment-debtor's assets pursuant to article 52 of the CPLR. This distinction is vital, as "the key to the reach of [a] turnover order is personal jurisdiction over a particular defendant" (*Koehler v Bank of Bermuda Ltd.*, 12 NY3d 533, 540 [2009]). As such, *Gliklad* is distinguishable from the instant action, which merely asks this Court to perform its ministerial function of recognizing the foreign country money judgment and converting it into a New York judgment.

Nor do defendants identify any due process violation. As the Appellate Division, First Department, explained in *Abu Dhabi Commercial Bank PJSC,* analyzing *Shaffer v Heitner* (433 US 186 [1977]):

> "*Shaffer* requires minimum contacts between the defendant and the forum in the action that determines the defendant's liability to the plaintiff and CPLR article 53 satisfies this due process requirement by providing that New York courts, in performing their ministerial function, will only recognize foreign judgments where the defendant had minimum contacts with the judgment forum (*see* CPLR 5304, 5305 [a]; *Sung Hwan Co.*, 7 NY3d at 82–83). In other words, since CPLR article 53 and the [foreign] court are already protecting the defendant's due process rights, including personal jurisdiction, the court charged with recognition and enforcement should not be required to grant further protection during a ministerial enforcement action (*see Lenchyshyn,* 281 AD2d at 49). There is no unfairness to the defendant if the plaintiff obtains an order in New York recognizing the foreign judgment, which can then be enforced if the defendant is found to have, or later brings, property into the State (*Lenchyshyn* at 50)" (*id.* at 613).

Before the Court can entertain plaintiff's motion to recognize and enforce the Albanian Judgment, it must ascertain whether plaintiff has effected service in compliance with the

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (20 UST 361, TIAS No. 6638 [1969]) (Hague Convention) (*see Morgenthau v Avion Resources Ltd.*, 11 NY3d 383, 390 [2008] ["[w]here there exists a treaty requiring a specific form of service of process such as the [Hague Convention], that treaty, of course, is the supreme law of the land and its service requirements are mandatory"]). As "[b]oth Italy and the United States are signatories to the Hague Convention," the treaty governs "the service requirements of this dispute" (*M.B.S. Moda, Inc. v Fuzzi S.p.A.*, 38 Misc 3d 1208[A], 2013 NY Slip Op 50026[U], *3 [Sup Ct, NY County 2013]; *see also* Hague Convention, 20 UST 361, TIAS No. 6638 [1969]). The Hague Convention requires each nation to create a central authority to receive service from other nations (20 UST 361, ch 1, art 2-3). The central authority then serves the documents on the defendants and provides to plaintiff a certificate indicating that service was completed (20 UST 361, ch 1, art 4, 6).

Here, defendants contend that plaintiff failed to demonstrate sufficiency of service and that ABA's service attempts were not in compliance with the Hague Convention. Defendants state that, while "Enel received some documents through a bailiff on April 17, 2014—the sufficiency of which it is still evaluating—Enelpower has not been served in any manner recognized by the Hague Convention" (Defendants' brief at 11). However, according to the "Affidavit of John Pierceall Regarding Service by the Central Authority on Enel S.p.A and Enelpower S.p.A" (Pierceall aff), on March 31, 2014, plaintiff delivered to the central authority, established by the government of Italy, both English and certified Italian translations of the documents filed in connection with ABA's motion for summary judgment in lieu of complaint (Pierceall aff, ¶ 6). ABA also submits the delivery confirmation evidencing receipt of the documents by the central authority (*id.*, exhibit 2).

While Enelpower may not have received papers at the time it made the motion to dismiss, this is not proof of noncompliance. As explained in Pierceall's affidavit, service under

the Hague Convention may take as long as 16 weeks (*id.* ¶ 5). Moreover, the Hague convention provides for up to six months to effect service (20 UST 361, ch 1, art 15). As of the time it submitted the papers on the instant motion, plaintiff had not yet received the certificates of service from the Italian central authority and anticipated that the proof of service would be returned no earlier than July 1, 2014 (Piercell aff, ¶ 7). In addition, ABA submits proof of service under Article 10 of the Hague Convention, which allows service by alternate means to which Italy does not object, including service by mail and personal service on defendants' in-house counsel, who acknowledged that they were authorized to receive service on behalf of defendants (Cheng affirmation, exhibit 38; 20 UST 361, ch 1, art 10; Pierceall aff regarding service of process by international mail on Enel S.p.A, ¶¶ 4-5; Pierceall aff regarding service of process by international mail on Enelpower S.p.A, ¶¶ 4-5; Villani aff, ¶ 3; Cappiello aff, ¶¶ 3-4). While the First Department has interpreted Article 10(a) of the Hague Convention as allowing service by post of informational documents, rather than documents for jurisdictional purposes (*Sardanis v Sumitomo Corp.*, 279 AD2d 225, 228-229 [1st Dept 2001]), the personal service, if in compliance with Italian law, is an acceptable alternative method of plaintiff's motion papers (*see Interlink Metals & Chems. v Kazdan*, 222 AD2d 55, 60 [1st Dept 1996] ["absent any provision of [British Virgin Islands] law to the contrary, personal service by a New York attorney on the registered representative of the [British Virgin Islands] corporate defendants might be considered even more certain to achieve its purpose than that contemplated by the Hague Convention and was clearly sufficient for New York courts to exercise personal jurisdiction over them"]). For the foregoing reasons, defendants' motion to dismiss plaintiff's action, based upon lack of personal jurisdiction and insufficient service, is denied.

Defendants' argument that this Court lacks subject matter jurisdiction is also unavailing. BCL § 1314(b) provides that "[a]n action or special proceeding against a foreign corporation may be maintained by another foreign corporation of any type or kind" under a limited number

of circumstances, including "[w]here the subject matter of the litigation is situated within this state" or "[w]here the cause of action arose within this state" (BCL §§ 1314[b][2] and [3]).

> "Contrary to defendant[s'] apparent contention, the litigation at issue—plaintiff's CPLR 3213 motion—has as its subject matter the judgment, not [the] underlying claim . . . Moreover, as the locality of a judgment is the situs of the court where it is entered, upon recognition and conversion of the [foreign] judgment to a New York judgment, the subject matter of the litigation will be located in New York State" (*Byblos Bank Europe, S.A. v Sekerbank Turk Anonym Syrketi*, 12 Misc 3d 792, 794-795 [Sup Ct, NY County 2006] [internal citation omitted], *affd as mod* 40AD3d 497 [1st Dept 2007], *affd* 10 NY3d 243 [2008]; *see also Milan Indus. Ltd., v Wilson Worldwide Proprietary Ltd.*, 2011 WL 11071743, *7, 2011 NY Misc LEXIS 6842, *19 [Sup Ct, NY County, June 1, 2011, Index No. 101242/2010] [stating that "[s]urely this court is competent to hear a case seeking to enforce a New York statute," in response to a motion to dismiss an Article 53 action for lack of subject matter jurisdiction]).

In addition, "maintenance of the action [for the recognition of the foreign country judgment] should not be barred under BCL 1314 (b), given that [the] claims [for recognition and enforcement of a foreign country judgment] are necessarily intertwined and that New York adheres to a liberal policy in favor of enforcement of foreign country judgments" (*Byblos*, 12 Misc 3d at 795, citing *CIBC Mellon Trust Co.*, 100 NY2d at 221). Therefore, defendants' motion to dismiss for lack of subject matter jurisdiction is denied.

In a footnote of their memorandum of law, defendants urge the court to exercise its discretion to dismiss this action on forum non conveniens grounds (Defendants' brief, at 13 n 120. The First Department has stated that dismissal of an action for the recognition and enforcement of a foreign judgment "under the doctrine of forum non conveniens [is] properly denied, because inconvenience is not one of the grounds for non-recognition specified in CPLR 5304" (*Abu Dhabi Commercial Bank PJSC*, 117 AD3d at 613). "[D]efendant bears no

hardship, since there is nothing to defend. The merits were decided [in the foreign court], and plaintiff seeks no new relief" (*id.*).

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss is denied; and it is further,

ORDERED that, consistent with the parties' most recent stipulation, dated October 7, 2014, the return date for plaintiff's motion for summary judgment in lieu of complaint is December 8, 2014; and it is further,

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon the defendants.

This constitutes the Decision and Order of the Court.

Dated: 10-15-14

PAUL WOOTEN J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**