

Carestream Health (Near E.) Ltd. v Lindustry (Offshore) S.A.L.
2017 NY Slip Op 32521(U)
November 27, 2017
Supreme Court, New York County
Docket Number: 655491/2016
Judge: Marcy Friedman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

CARESTREAM HEALTH (NEAR EAST) LTD.,
Plaintiff,

Index No.: 655491/2016

– against –

LINDUSTRY (OFFSHORE) S.A.L.,
Defendant.

DECISION/ORDER

This is an action for declaratory and injunctive relief and for damages for breach of contract. Plaintiff Carestream Health (Near East) Ltd. (Carestream) moves for a preliminary injunction enjoining defendant Lindustry (Offshore) S.A.L (Lindustry) from initiating or continuing to prosecute any lawsuit against Carestream in any court outside the State of New York, including the lawsuit initiated by Lindustry currently pending in Lebanon, Lindustry (Off-Shore) S.A.L. v Kodak (Near East), Inc. and Carestream Health (Near East) Ltd. (the Lebanese Action). Carestream also seeks to enjoin Lindustry from enforcing an order issued by the Executory Bureau of the Baabda District, Lebanon, entered May 23, 2016 (the Freeze Order), directing Carestream's customers to withhold payment on "all what is due" to Carestream. (Aff. of Emile Kanaan [plaintiff's Lebanese counsel], Ex. 4 [Kanaan Aff.].) By separate motion, Carestream moves for a judgment by default against Lindustry on all of the claims in the amended complaint (complaint).

By order dated November 23, 2016, this Court (Sherwood, J.) directed that service of the summons and complaint in this action be made by mail, with a copy to defendant's Lebanese counsel. This directive was made based on the Court's finding that Lindustry is a Lebanese corporation and that Lebanon is a non-signatory to the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. (Nov. 23, 2016 Order to

Show Cause [Aff. of Rebecca Brazzano (Pl.'s Atty), Ex. A] [Brazzano Aff.].) The affidavit of service demonstrates that service was made on November 23, 2016 pursuant to the Court's order. (Aff. of Service, sworn to on Nov. 23, 2016 [Brazzano Aff., Ex. B].) Service was followed up by delivery of the summons and complaint by DHL express mail to defendant and its Lebanese counsel. (Aff. of Service, sworn to on Dec. 5, 2016 [Brazzano Aff., Ex. D].) The motion for a default judgment was served by DHL express mail on February 21, 2017. (Aff. of Service, sworn to on March 15, 2017 [NYSCEF Doc No 91].) In the passage of time since service was made, Lindustry has failed to appear in the action or to oppose the motions, although it has had ample opportunity to do so.

The facts relevant to the determination of plaintiff's motions are as follows: By Distributor Agreement dated January 1, 2005, between plaintiff's predecessor-in-interest Kodak (Near East) Inc. (Kodak) and Lindustry, Lindustry agreed "to act as a non-exclusive distributor" of Kodak for x-ray film and film printers in Iraq. (Compl., ¶ 4; Distributor Agreement, §§ 1.1, 1.3 [Compl., Ex. A].) The Distributor Agreement was effective for a minimum term of one year and would continue "on a year by year basis unless either party terminat[ed] th[e] Agreement by written notice to the other on three months written notice. . . ." (Id., § 13.1.) Under the Agreement, Kodak was not "liable in any manner whatsoever on account of termination of th[e] Agreement even though thereafter Kodak or another distributor or any other may complete any transaction commenced by the Distributor [Lindustry]." (Id., § 13.6.) Schedule B Part 2 of the Agreement, entitled "General Terms of Business for Export," governed the terms for "shipment and insurance of the Products and passing of title and risk in the Products." (Id., § 8.3.) The "Warranty and Limitation of Liability" section of the Schedule stated: "The customer shall on no account have a claim for compensation of damage that does not affect the Products as such, as

for instance loss of production, loss of use, lost orders, profit loss or any other direct or consequential damage. This exclusion of liability shall not apply insofar as mandatory law provides otherwise.” (Id., Schedule B Part 2.) The Distributor Agreement further provided that the Agreement is “governed by the laws of the State of New York without giving effect to its rules on conflict of law. Except as provided in this clause, the New York courts shall have exclusive jurisdiction in the event of any disputes between the parties hereunder. Kodak shall, however, be entitled to bring action against the Customer before any other competent court.” (Id., § 19.)

Kodak terminated the agreement by letter dated August 27, 2006, effective December 31, 2006. (Aff. of Laith Bazzoui [Carestream’s business manager], Ex. 2 [NYSCEF Doc No 36].) Carestream claims rights under the Distributor Agreement as the successor in interest of Kodak. (See Compl., ¶ 3 n 1; Emergency Aff. of Rebecca Brazzano, ¶ 7 [NYSCEF Doc No 34] [Brazzano Emergency Aff.]; Aff. of Scott H. Rosa [Controller for Carestream Health, Inc. (Carestream’s parent company)], ¶¶ 2-4 [NYSCEF Doc No 38].)

In 2007, Lindustry initiated the Lebanese Action in which it alleged that Lindustry was the exclusive distributor for Kodak and Carestream in Iraq. (Compl., ¶ 10; Petition, dated July 4, 2007 [Aff. of Rania Gamal (translator), Ex. 2 (annexed to Compl., Ex. B) (Gamal Aff.)].) In response, Kodak and Carestream argued that, pursuant to Lebanese law and the choice of law and forum provision of the Distributor Agreement, the courts of Lebanon lacked jurisdiction. (Initial Plea [Gamal Aff., Ex. 4].) By decision issued on May 27, 2009, the Court of First Instance in Baabda, First Chamber, dismissed the case for lack of jurisdiction. (Gamal Aff., Ex. 6.) By Decree issued on February 21, 2012, the Court of Appeal in Jabal Lebanon, Fourth Chamber, affirmed the Court of First Instance’s decision and dismissed the action for lack of

jurisdiction. (Id., Ex. 8.) By Decree issued on January 22, 2015, the Fourth Chamber of the Court of Civil Cassation reversed the lower court decisions. (Id., Ex. 10.) The Court held that the lower courts had misinterpreted Lebanese law and that further investigation is needed to determine whether the Court does in fact have jurisdiction. (Id., ¶ 12.) Further, the Court appears to have directed an investigation of the merits of Lindustry's claims, including its claims for damages. The Court thus "mandate[d] . . . the widening of the investigation to recognise the conditions behind terminating the representation Agreement under dispute, value of compensation money, and the elements of damage claimed." (Id.)

On May 23, 2016, the Executory Bureau of the Baabda District entered the Freeze Order directing four of Carestream's customers to withhold payment of existing accounts receivable and to retain any future payments that may become due to Carestream. (Kanaan Aff., ¶ 31; Freeze Order [Kanaan Aff., Ex. 4] ["[W]e order to precautionary freeze all what is due to the defendant by the third parties: Intermedic S.A.L., Samco Group, Printken, Dynagraph for Printing Industry, in security of the claimant debt estimated in the amount of /1.600.000/ U.S. Dollars, in addition to the connecting costs estimated in the amount of /160.000/ U.S. Dollars, and notify whom is concerned"].)

Subsequently, Carestream moved, in a different chamber of the Court of Civil Cassation, for reconsideration of that Court's January 22, 2015 Decree. (Kanaan Aff., ¶¶ 28-29.) As of the date of the Kanaan affirmation, November 17, 2016, there had not been a determination of this appeal. (Id., ¶ 29.) This court has not to date been informed of any decision of the appeal or of any final judgment in the Lebanese action.

Carestream makes a prima facie showing of the merit of its claim for injunctive relief based on the parties' Distributor Agreement. As discussed above, that Agreement required

Lindustry to litigate any issues regarding its termination as distributor in the courts of New York, under the laws of New York. Moreover, the Agreement precluded Lindustry from seeking damages such as lost profits, upon termination, unless otherwise provided by “mandatory law.” Under New York law, which is the mandatory law pursuant to the choice of law provision of the Agreement, a contractual provision precluding damages upon termination of an at-will contract will be enforced. As also discussed above, however, it appears that the Lebanese appellate court is considering the award of damages such as lost profits. This court accordingly holds that further prosecution of the Lebanese action and enforcement of the Freeze Order should be enjoined.

The principle of international comity does not require a different result. This principle “refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states.” (Morgenthau v Avion Resources Ltd., 11 NY3d 383, 389-390 [2008] [internal quotation marks and citation omitted].) Comity is not offended by an injunction against further prosecution of the Lebanese action, “in light of New York’s long-standing public policy of enforcing forum selection clauses in international agreements.” (Madden Intl. Ltd. v Lew Footwear Holdings Pty Ltd., 143 AD3d 418, 419 [1st Dept 2016] [Madden]; Indosuez Intl. Fin., B.V. v National Reserve Bank, 304 AD2d 429, 430 [1st Dept 2003]; see also GE Oil & Gas, Inc. v Turbine Generation Servs., L.L.C., 150 AD3d 586, 587 [1st Dept 2017] [affirming injunction against sister state litigation, based on forum selection clause].) The parties’ choice of law provision also supports the injunction. (Indosuez Intl. Fin., B.V., 304 AD2d at 430.) Absent an injunction, the parties’ negotiated agreement to apply New York law to their dispute would be vitiated, as it appears that the Lebanese Court will entertain a claim for damages that would be prohibited under New York law.

Finally, although the Lebanese action has been pending for a protracted period, Carestream has challenged the Lebanese Court's jurisdiction throughout that period. As discussed above, the jurisdictional issue was still under appeal as of the time of service of the motions. Under these circumstances, the court does not find that Carestream waived its right to enforce the forum selection clause in the instant action. (See Madden, 2016 NY Slip Op 50061 [U], 2016 WL 237637, * 7 [Sup Ct, NY County 2016], affd on other grounds, 143 AD3d 418, supra.)

The court accordingly holds that plaintiff is entitled to an injunction enjoining Lindustry from further prosecuting the Lebanese Action and from enforcing the Freeze Order issued by the Lebanese Court and any other order issued in connection with the Lebanese Action. To the extent that plaintiff's second cause of action for an injunction seeks additional injunctive relief (Compl., ¶ 58), the court holds that such request is overbroad and should be denied.

The court further holds that plaintiff is entitled to judgment as to liability on its third cause of action for breach of contract. Plaintiff has demonstrated that Lindustry breached the forum selection cause of the Distributor Agreement by bringing the Lebanese Action. Plaintiff has not demonstrated on this record, which lacks affidavits of merit from individuals with personal knowledge of the events, that Lindustry breached obligations under the Agreement by competing with plaintiff and failing to provide product maintenance.

The only damages identified by plaintiff for breach of contract are its attorney's fees for prosecuting the instant action and for defending the Lebanese Action. It is well settled that in fixing attorney's fees, the trial court "has the authority and responsibility to determine that the claim for fees is reasonable." (EVUNP Holdings LLC v Frydman, 154 AD3d 558, 559 [1st Dept 2017] [internal quotation marks omitted]; S.T.A. Parking Corp. v Lancer Ins. Co., 128 AD3d

479, 480 [1st Dept 2015].) Factors to be considered in determining the reasonableness of fees include “time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; the lawyer’s experience, ability and reputation; the amount involved and benefit resulting to the client from the services; the customary fee charged by the Bar for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved.” (Matter of Freeman, 34 NY2d 1, 9 [1974].) Fees should not be awarded for unduly protracted litigation. (See Matter of Bobeck, 196 AD2d 496, 498 [2d Dept 1993].)

As held above, the litigation of the Lebanese Action does not bar the instant action. Plaintiff is not, however, entitled to legal fees for that Action, as plaintiff could have sought an anti-suit injunction in this court at a considerably earlier date, instead of engaging in a protracted defense of the Lebanese Action.

Fees will, however, be awarded for the instant action upon a showing of reasonableness. The court is constrained to award such fees based on the Appellate Division’s holding in Indosuez International Finance, B.V. v National Reserve Bank (304 AD2d at 431), that attorney’s fees are available for breach of a forum selection clause. It is noted that this holding has been repeatedly questioned in light of the American Rule, under which attorney’s fees are ordinarily available only if provided for by contract or statute. (See e.g. Brown Rudnick, LLP v Surgical Orthomedics, Inc., 2014 WL 3439620, * 13-14 [SD NY, No. 13-CV-4348 (JMF), July 15, 2014]; Versatile Housewares & Gardening Sys., Inc. v Thill Logistics, Inc., 819 F Supp 2d 230, 242-244 [SD NY 2011]; GE Oil & Gas, Inc., 2016 NY Slip Op 50825 [U], 2016 WL 3043808, * 5 n 5 [Sup Ct, NY County 2016], aff’d on other grounds, 150 AD3d 586, supra.)

Finally, the court holds that plaintiff is not entitled to judgment on its first cause of action for a judgment declaring, among other things, that the forum selection clause in the Distributor Agreement is enforceable and that plaintiff is not liable to Lindustry for termination of that Agreement. (Compl., ¶ 50.) A declaratory judgment requires “a genuine, concrete dispute between adverse parties, not merely the possibility of hypothetical, contingent, or remote prejudice to the plaintiff.” (Premier Restorations of New York Corp. v New York State Dept. of Motor Vehs., 127 AD3d 1049, 1049 [2d Dept 2015].) Moreover, a declaratory judgment claim “is unnecessary and inappropriate” where the plaintiff has “an adequate, alternative remedy in another form of action, such as breach of contract.” (NMC Residual Ownership L.L.C. v U.S. Bank Natl. Assn., 153 AD3d 284, 290 [1st Dept 2017], quoting Apple Records, Inc. v Capitol Records, Inc., 137 AD2d 50, 54 [1st Dept 1988].) Here, the declaratory judgment cause of action is not maintainable given the availability of the breach of contract cause of action.

It is accordingly hereby ORDERED that the motion of plaintiff Carestream Health (Near East) Ltd. (Carestream) for a default judgment on all causes of action pleaded in the amended complaint (Motion Seq. No. 003) is hereby determined as follows:

1. It is ORDERED, ADJUDGED, and DECLARED that plaintiff Carestream’s first cause of action for a declaratory judgment is dismissed; and it is further
2. ORDERED that plaintiff Carestream’s second cause of action is granted to the following extent: Defendant Lindustry (Offshore) S.A.L (Lindustry), its agents, and any persons acting on its behalf or in concert with it are enjoined (1) from continuing to prosecute the lawsuit initiated by Lindustry currently pending in Lebanon, Lindustry (Off-Shore) S.A.L. v Kodak (Near East), Inc. and Carestream Health (Near East) Ltd. (the Lebanese Action); (2) from enforcing an order issued by the Executory Bureau of

the Baabda District, Lebanon, entered May 23, 2016 (the Freeze Order); and (3) from enforcing any other order issued in connection with the Lebanese Action; and it is further

3. ORDERED that plaintiff Carestream is granted judgment as to liability on its third cause of action for breach of contract to the extent that this cause of action is based on defendant Lindustry's violation of the forum selection clause of a Distributor Agreement dated January 1, 2005, between Lindustry and plaintiff's predecessor-in-interest Kodak (Near East), Inc., by commencing the Lebanese Action; and it is further
4. ORDERED that the issue of the amount of plaintiff Carestream's reasonable attorney's fees is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties (in the event Lindustry appears), as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further
5. ORDERED that, within 15 days from the date of entry of this order, plaintiff Carestream shall serve a copy of this order with notice of entry, a note of issue and statement of readiness upon defendant by first class international mail and by international courier, addressed to: Lindustry (Offshore) S.A.L., Choueifat, Tiro Street, Rassamny Youness Building, Beirut, Lebanon, with a copy to be served by first class international mail and by international courier service to Lindustry's designated Lebanese counsel in the Lebanese Action, addressed to: Uthman Arakji & Partners, Ibeza Building, Fradan Street, P.O. Box 113-5631, Beirut, Lebanon, attention: Uthman Arakji; and it is further

6. ORDERED that, within 30 days of the date of entry of this order, plaintiff Carestream shall serve a copy of this order with notice of entry on the Clerk of the Special Referee's Office (Room 119) to arrange a date for the reference to a Special Referee; and it is further
7. ORDERED that plaintiff Carestream shall give notice to defendant Lindustry of the date of the hearing before the Special Referee by serving such notice upon Lindustry at least 30 days before the hearing by first class international mail and international courier service at the address set forth above, with a copy to Lindustry's Lebanese counsel as set forth above; and it is further
8. ORDERED that a motion to confirm or reject the report of the Special Referee shall be made within 15 days of the filing of the report; and it is further

ORDERED that plaintiff's motion for a preliminary injunction (Motion Seq. No. 001) is denied as moot.

This constitutes the decision and order of the court.

Dated: New York, New York
November 27, 2017


MARCY FRIEDMAN, J.S.C.