VTB Bank (PJSC) v Mavlyanov
2018 NY Slip Op 30166(U)
January 30, 2018
Supreme Court, New York County
Docket Number: 650245/2017
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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VTB BANK (PJSC) (f/k/a JSC VTB BANK and OJSC VTB BANK),

Plaintiff,

-against-

IGOR MAVLYANOV,

Defendant.

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DECISION AND ORDER
Index No. 650245/2017

Motion Sequence No.: 001

O. PETER SHERWOOD, J.:

Plaintiff VTB Bank (PJSC) (f/k/a JSC VTB Bank and OJSC VTB Bank) (Bank) moves, pursuant to CPLR 3213 and 5303, for an order granting summary judgment in lieu of complaint to enforce foreign judgments.

The Bank seeks to domesticate and enforce two foreign country money judgments entered in its favor against defendant Igor Mavlyanov (Mavlyanov) by the Meshchansky District Court of Moscow (Moscow Court) (both, the Russian judgments), awarding the Bank the total sum of RUB 2,245,899,146.78, or, approximately $37,000,000, in January 2017. The Bank also seeks court costs, together with interest from April 7, 2016 until entry of a judgment in this action, and thereafter at the statutory rate per annum, pursuant to CPLR 5004, together with costs and expenses of this motion

The Bank, a Russian bank, loaned nonparty Torgovo-proizvodstvennaya Kompaniya YASHMA (Yashma), an open joint-stock company, the sum of RUB 1,070,000,000, pursuant to a loan facility agreement dated July 19, 2013, and supplemented on August 12, 2014 and June 30, 2015 (together, July facility agreement). On July 19, 2013, Mavlyanov, a Russian citizen residing in Russia and Yashma's sole shareholder, executed a personal guarantee (July guarantee) of Yashma's obligations to pay principal and interest arising under the July facility agreement, as supplemented from time to time.

The Bank and Yashma executed a second loan facility agreement on October 31, 2013, and supplemented that agreement on August 12, 2014 and June 30, 2015 (together, October facility agreement). Pursuant to that agreement, the Bank loaned Yashma the sum of RUB 930,000,000. On October 31, 2013, Mavlyanov executed a guarantee (October guarantee) of Yashma's principal and interest payment obligations arising under the October facility agreement, as supplemented from time to time.

The Bank alleges that, in 2015, Yashma defaulted on its payment obligations under the July and October facility agreements. By notices dated October 26, 2015, the Bank demanded that Yashma make the payments due under the July and October facility agreements. By notices dated November 23, 2015, the Bank demanded that Mavlyanov make Yashma's payments, in accordance with the terms of the July and October guarantees.

On January 13, 2016 and January 25, 2016, the Bank initiated separate proceedings against Mavlyanov before the Moscow Court to recover amounts allegedly due and owing under the terms of the July and October guarantees (*see VTB Bank Public Joint-Stock Co. v Igor Rakhimovich Mavlyanov*, Meshchansky District Court of Moscow, case No. 2-1459/2016; *VTB Bank Public Joint-Stock Co. v Igor Rakhimovich Mavlyanov*, Meshchansky District Court of Moscow, case No. 2-1555/2016 [both, Moscow Court actions]). Each personal guarantee provides that "[d]isputes or differences arising out of this Agreement . . . shall be considered in accordance with the current legislation of the Russian Federation in the Meshchansky District Court of Moscow" (July guarantee, § 5.10; October guarantee, § 5.10).

Through legal counsel, Mavlyanov actively participated in those actions, challenged the enforceability of each guarantee and objected to the Bank's calculation of the alleged debt.

On April 7, 2016, the Moscow Court issued judgments detailing the evidence against Mavlyanov and in favor of the Bank on the July and October guarantees. In those judgments, the Moscow Court awarded the Bank the sum of RUB 1,207,210,564.98, together with court costs in the amount of RUB 60,000.00, under the July guarantee, and RUB 1,038,568,581.80, together with court costs in the amount of RUB 60,000.00, under the October guarantee.

On June 14, 2016, Mavlyanov appealed those judgments to the Moscow City Court. On November 30, 2016, the Moscow City Court dismissed the appeals and upheld the Moscow Court judgments.

On February 28, 2017 and April 17, 2017, Mavlyanov filed appeals of the Russian judgments to the Russian cassation court, requesting revocation of the Moscow Court and Moscow City Court decisions. By orders dated March 9, 2017 and April 24, 2017, the cassation court denied those appeals.

Meanwhile, on March 17, 2016, Mavlyanov's private creditors filed an application for Mavlyanov's involuntary bankruptcy before a Russian insolvency court (*see In re Mavlyanov, debtor*, Commercial Court of Voronezh Oblast, case No. A14-2843/2016). By decision dated February 2, 2017, that court declared Mavlyanov insolvent and appointed a financial manager.

Subsequently, the Bank commenced fraudulent conveyance actions against Mavlyanov and certain of his family members and acquaintances before the courts of this State and California (*see JSC VTB BANK f/k/a OPJSC VTB BANK v Mavlyanov*, Sup Ct, NY County, index No. 652516/2016; *JSC VTB Bank v Mavlyanov*, Superior Court, Los Angeles County, Calif., case No. BC624195).

The Bank also commenced the instant action against Mavlyanov to enforce the Russian judgments awarded on the July and October guarantees.

The Bank now seeks summary judgment in lieu of complaint to enforce the Russian judgments on the grounds that those judgments are final, conclusive, and enforceable.

In opposition, Mavlyanov contends that there exist genuine triable issues of material fact sufficient to preclude summary judgment; the motion is premature; the Bank has waived its rights to enforce the guarantees; and the Bank's motion is merely an attempt to bypass the Russian insolvency procedure.

> "CPLR 3213, which allows actions based upon an instrument for the payment of money only to be commenced with a motion for summary judgment rather than a complaint, provide[s] speedy and effective means for resolving presumptively meritorious claims. A party utilizing this accelerated judgment procedure prevails if, upon all the papers and proof submitted, the cause of action . . . shall be established sufficiently to warrant the court as a matter of law in directing judgment for the plaintiff. A defendant can defeat

> a CPLR 3213 motion by offering evidentiary proof sufficient to raise a triable issue of fact"

(*Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 383 [2004] [internal quotation marks and citations omitted]).

Article 53 of the CPLR (Recognition Act) provides that a foreign country judgment may be enforced by a motion for summary judgment in lieu of complaint (*see* CPLR 5303).

"New York has traditionally been a generous forum in which to enforce judgments for money damages rendered by foreign courts" (*Abu Dhabi Commercial Bank PJSC v Saad Trading, Contr. & Fin. Servs. Co.*, 117 AD3d 609, 610 [1st Dept 2014] [internal quotation marks and citation omitted]; *see CIBC Mellon Trust Co. v Mora Hotel Corp.*, 100 NY2d 215, 221 [2003], *cert denied* 540 US 948 [2003]). "'Historically, New York courts have accorded recognition to the judgments rendered in a foreign country under the doctrine of [international] comity . . . [a]bsent some showing of fraud in the procurement of the foreign country judgment or that recognition of the judgment would do violence to some strong public policy of this State'" (*Abu Dhabi Commercial Bank PJSC v Saad Trading, Contr. & Fin. Servs. Co.*, 117 AD3d at 610, quoting *Sung Hwan Co., Ltd. v Rite Aid Corp.*, 7 NY3d 78, 82 [2006]).

A judgment creditor proceeding under the Recognition Act "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" (*CIBC Mellon Trust Co. v Mora Hotel Corp.*, 100 NY2d at 222 [internal quotation marks and citation omitted]).

Article 53 of the CPLR also provides that a foreign country judgment will be recognized in New York, "unless a ground for nonrecognition under CPLR 5304 is applicable" (*John Galliano, S.A. v Stallion, Inc.*, 15 NY3d 75, 80 [2010], *cert denied* 562 US 893 [2010]). Pursuant to that statute, a foreign country judgment is not conclusive if it was rendered under a system that does not provide for impartial tribunals or due process procedures, or if the foreign court did not have personal jurisdiction over the defendants (*see* CPLR 5304 [a] [1], [a] [2]).

The parties dispute whether the Russian judgments meet the statutory requirements.

CPLR 5302 provides that it "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; *see John Galliano, S.A. v Stallion, Inc.*, 15 NY3d at 80). In considering whether the foreign country judgment is final, conclusive and enforceable, courts may properly take judicial notice of the law of the foreign country where the judgment was rendered (*see* CPLR 4511 [b]).

The Russian judgments are money judgments that are final, conclusive and enforceable under Russian law. Pursuant to the Russian Code of Civil Procedure (Russian Code), a Russian court judgment becomes enforceable upon expiration of the time within which an appeal may be filed, if no appeal was filed (*see* Russian Code article 209 [1]). If an appeal is filed, and the judgment is upheld, the judgment becomes final and enforceable immediately upon issuance of the ruling (*see id.*).

Here, there is no dispute that Mavlyanov's appeals to the Moscow City Court were resolved in favor of the Bank on November 30, 2016, and that Mavlyanov's appeals to the cassation court were resolved in favor of the Bank on March 9, 2016 and April 17, 2016. There is no dispute that any further appeal is pending, or that a stay of the execution of the Russian judgments was demanded or issued. Mavlyanov himself concedes that the Russian judgments "may be technically deemed final" (Defendant's amended memorandum of law in opposition at 12).

For those reasons, the Russian judgments are now final, conclusive, and enforceable, pursuant to Russian law.

Mavlyanov contends that the Russian judgments should not be recognized because they were not the product of fair proceedings and, therefore, violate the public policy of New York.

If neither of the two grounds for non-recognition under CPLR 5304 (a) exist, "and enforcement of the foreign judgment is not otherwise repugnant to our notion of fairness, the foreign judgment should be enforced in New York under well-settled comity principles without microscopic analysis of the underlying proceeding" (*Sung Hwan Co., Ltd. v Rite Aid Corp.*, 7 NY3d at 83).

Neither ground for mandatory non-recognition exists here. With regard to the second ground, the court notes that Mavlyanov does not contend that the Moscow Court lacked jurisdiction over his person. Nor could he, given that he expressly consented to such jurisdiction under the terms of the guarantees, was domiciled in Russia when the Moscow Court actions were commenced, and appeared and participated through legal counsel in those actions.

With regard to the other ground mandating non-recognition, the record conclusively demonstrates that the Moscow Court system accorded Mavlyanov due process of law. Federal courts sitting in New York have found that the Russian legal system provides a fair and adequate forum for litigants and that judgments from Russia should be afforded full faith and credit (*see e.g. Base Metal Trading SA v Russian Aluminum*, 253 F Supp 2d 681, 708-709 [SD NY 2003], *affd sub nom. Base Metal Trading Ltd. v Russian Aluminum*, 98 F Appx 47 [2d Cir 2004]; *Parex Bank v Russian Sav. Bank*, 116 F Supp 2d 415, 425 [SD NY 2000]). "The Court of Appeals has 'repeatedly emphasized that it is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation'" (*Base Metal Trading SA v Russian Aluminum*, 253 F Supp 2d at 709, quoting *Blanco v Banco Indus. de Venezuela, S.A.*, 997 F2d 974, 982 [2d Cir 1993]).

Here, Mavlyanov does not dispute that he was provided with notice of the proceedings before the Moscow Court; appeared, answered, and participated in those proceedings through legal counsel; filed motions, objections, and counterclaims; and attended hearings. Mavlyanov raised objections to the Bank's debt calculation, and filed a counterclaim in which he alleged that the guarantees were invalid. Mavlyanov also exercised his legal rights to appeal the Russian judgments to the Moscow City Court and then to the cassation court. Instead, Mavlyanov merely contends, in general terms, that all proceedings against him before any Russian court were unfair.

Mavlyanov's contentions that the proceedings before the Moscow Court differed in certain respects from similar proceedings held before the courts of New York are unavailing. Section 5304 (a) (1) "does not demand that the foreign tribunal's procedures exactly match those of New York. Rather, the statute is satisfied is the foreign tribunal's procedures are compatible

with the requirements of due process of law" (*CIBC Mellon Trust Co. v Mora Hotel Corp.*, 100 NY2d at 222 [internal quotation marks and citation omitted]).

Where, as here, a defendant is afforded notice and an opportunity to be heard in the underlying litigation, the basic requirements of due process are met (*see Society of Lloyd's v Grace*, 278 AD2d 169, 169 [1st Dept 2000]).

Moreover, section 5305 (a) (3) of the CPLR provides that a "foreign country judgment shall not be refused recognition for lack of personal jurisdiction if . . . the defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved" (CPLR 5305 [a] [3]; *see John Galliano, S.A. v Stallion, Inc.*, 15 NY3d at 80). In the guarantees, Mavlyanov agreed to an exclusive forum selection clause providing that all disputes under each guarantee shall be considered by the Meshchansky District Court of Moscow (*see* July guarantee, § 5.10; October guarantee, § 5.10).

In addition, as discussed above, Mavlyanov voluntarily appeared and actively participated in the actions before the Moscow Court. It is well settled that any appearance in a foreign action for a purpose other than preserving a jurisdictional objection qualifies as a voluntary appearance in the foreign proceeding within the meaning of CPLR 5305 (a) (2) (*CIBC Mellon Trust Co. v Mora Hotel Corp. N.V.*, 100 NY2d at 225-226).

Mavlyanov maintained a domicile in Russia at the time that the Moscow Court actions were commenced. Maintaining a domicile in the foreign country when the proceedings were instituted provides another independent basis for personal jurisdiction (*see* CPLR 5305 [a] [4]).

Mavlyanov has failed to demonstrate triable issues regarding the applicability of any of the eight discretionary exceptions to the recognition of a foreign judgment set forth in CPLR 5304 (b). Mavlyanov relies primarily on one of those grounds, CPLR 5304 (b) (4). That section provides that a foreign country judgment "need not be recognized if . . . the cause of action on which the judgment is based is repugnant to the public policy of this state" (CPLR 5304 [b] [4]).

Mavlyanov does not contend that the Russian judgments are based on invalid claims arising out of the July and October guarantees that he admittedly executed. Instead, he contends that enforcing the Russian judgments could conflict with New York's public policy of

deferring to foreign insolvency proceedings. Contrary to Mavlyanov's contention, the existence of the Russian insolvency proceedings pending against him does not provide a basis with which to deny, or delay, recognition of those judgments.

Similarly, Mavlyanov's stated intention to assert counterclaims based on theories of fraud, fraudulent inducement, unclean hands, unjust enrichment, and defamation does not provide a basis upon which to deny the motion. Mavlyanov has not discussed any specific facts that he believes give rise to such claims. Counterclaims in an action for summary judgment in lieu of complaint must constitute an actual defense to the claim, or summary judgment will be granted (*see Mitsubishi Trust & Banking Corp. v Housing Servs. Assoc.*, 227 AD2d 305, 306 [1st Dept 1996] [affirming summary judgment in lieu of complaint where defendant's allegations "are unsubstantiated, are irrelevant to the subject notes, or create issues which are separate and severable from plaintiff's claim under the notes and do not serve to defeat" summary judgment]; *Harris v Miller*, 136 AD2d 603, 603 [2d Dept 1988]).

Mavlyanov's request for an order staying this action is denied. Mavlyanov requests a stay on the grounds that the existence of the Russian insolvency proceedings and the fraudulent conveyance actions pending before this court and in California may result in inconsistent judgments.

CPLR 5306 provides that:

> "[i]f the defendant satisfies the court either 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"

(CPLR 5306).

A stay pending resolution of the Russian insolvency action, as requested by Mavlyanov, is not appropriate in this case. The Russian insolvency financial manager has not initiated a proceeding pursuant to 11 USC § 1515 for recognition of the Russian insolvency proceeding. "A foreign proceeding can only be recognized when the debtor's foreign representative petitions a U.S. court" for recognition of the proceeding (*Orchard Enter. NY, Inc. v Magabop Records Ltd.*,

2011 WL 832881, *3 [SD NY 2011]; *United States v J.A. Jones Constr. Group*, 333 BR 637, 638-639 [ED NY 2005]; *see* 11 USC § 1515 [a]).

Further, Mavlyanov does not contend that any court, either in Russia or in the United States, has issued an order staying the Bank from seeking recognition of the Russian judgments.

In any event, it does not appear that inconsistent judgments will occur. On March 23, 2017, the Bank filed an application for inclusion of its claims against Mavlyanov in the Register of Creditors' Claims in the Russian insolvency action. The Bank represents that, once its claims are entered, it will inform the insolvency financial manager of its fraudulent conveyance actions filed against Mavlyanov in New York and California (*see* Stanislav A. Krivopusko Apr. 28, 2017 aff, ¶ 9).

Similarly, the pendency of the fraudulent conveyance actions here and in California provide no basis for a stay of this action. Those actions relate only to certain United States real property transfers by Mavlyanov, while the action at bar concerns the recognition of two foreign country judgments. Nothing in this action, or in the judgments, may be construed as determining whether those real property transfers were fraudulent and should be reversed.

While Mavlyanov contends, in general terms, that recent political concerns between the United States and Russia require the denial of the motion, he fails to articulate any objective reason why those concerns require this court to deny recognition of judgments issued by a Russian court against a Russian citizen, who agreed to litigate in Russia in accordance with Russian law, which arose out of guarantees executed in Russia.

Contrary to Mavlyanov's contention, whether the Bank waived its rights to assert claims rising out of the July and October guarantees against him is irrelevant to this discussion. Mavlyanov relies on an October 17, 2014 letter by the Bank, written in response to a request for information by the Meschansky District Court in Mavlyanov's divorce action (*see Stella Mavlyanova v I. R. Mavlyanov* (Meschansky District Court, City of Moscow, case No. 2-17/2015). In that letter, the Bank stated that there were "no loan agreements, guarantee agreement, security agreements or bank account agreements" between the Bank and Mavlyanov during the period from 2011 to 2013, although the July and October loan facility agreements and guarantees were in effect during that period. Mavlyanov contends that, having denied the

existence of the guarantees before a foreign legal tribunal, the Bank has waived its rights to enforce those agreements.

While, Mavlyanov's waiver defense goes to the merits of the issues raised in the Moscow Court actions, and might have constituted a defense to the enforcement of the guarantees there, Mavlyanov failed to raise it. To do so now is not appropriate. A defendant may not oppose the recognition of a foreign country judgment by raising an issue that goes towards the merits of the underlying judgment (*Greschler v Greschler*, 51 NY2d 368, 376 [1980]).

Mavlyanov's contention that the motion must be denied because it is supported only by affidavits by attorneys without personal knowledge of the underlying facts is unavailing here. Certainly, an affidavit by an attorney without first hand knowledge has no evidentiary value (*see Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]; *Bendik by Dybowski*, 227 AD2d 228, 229 [1st Dept 1996]). Here, however, the attorney affidavits focus on Russian law, legal system, and procedural rules, and serve to submit translated documentary evidence to the court. Therefore, the affidavits and their exhibits may be considered by the court.

For the foregoing reasons, summary judgment in lieu of complaint is granted.

That branch of the motion to render the Russian judgments in Russian rubles, and then to convert the judgments to United States dollars at the rate of the exchange prevailing on the date that the New York judgment is entered, is granted without opposition.

> "In any case in which the cause of action is based upon an obligation denominated in a currency other than currency of the United States, a court shall render or enter a judgment or decree in the foreign currency of the underlying obligation. Such judgment or decree shall be converted into currency of the United States at the rate of exchange prevailing on the date of entry of the judgment or decree"

(Judiciary Law § 27 [b]).

That branch of the motion for postjudgment interest to be applied to the Russian judgments at the statutory rate set forth in CPLR 5004, or, 9% per annum (*see* CPLR 5003), is granted without opposition.

The court has considered Mavlyanov's remaining arguments, and finds them to be without merit.

Accordingly, it is

ORDERED that the motion for summary judgment in lieu of complaint is granted in its entirety; and it is further

ORDERED that the two foreign country money judgments entered in favor of plaintiff VTB Bank (PJSC) (Bank) against defendant Igor Mavlyanov by the Meshchansky District Court of Moscow, awarding the Bank the total sum of RUB 2,245,899,146.78 in January 2017, are hereby recognized by this court, pursuant to CPLR article 53; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the amount of RUB 2,245,899,146.78 (to be converted into United States dollars at the rate of exchange prevailing on the date of entry of the Russian judgments), together with statutory postjudgment interest at the rate of 9% per annum, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

This constitutes the decision and order of the court.

DATED: **January 30, 2018**

E N T E R,

O. PETER SHERWOOD J.S.C.