SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
Part 57

----------x

Batbrothers LLC,

Plaintiff(s) **Index no. 150122/2015**

-against-

Sergey Viktorovich Paushok,

Defendant(s)

----------x

Recitation, as required by CPLR § 2219(a), of the papers considered on the review of this motion for dismissal of the defendants's counter-claims:

PAPERS	NUMBERED
Notice of Motion and Affidavits and Exhibits Annexed	
Answering Affidavits and Exhibits Annexed	
Replying Affidavits and Exhibits Annexed	
Sur-Reply Affidavits	

Upon the foregoing cited papers, the Decision/Order on this motion to dismiss the defendant's counterclaims is as follows:

Borrok, J.:

Batbrothers LLC (the **Plaintiff**)'s motion to dismiss the counterclaims of Sergey Viktorovich Paushok, a citizen of the Russian Federation (the **Defendant**) is granted for the reasons set forth below.

THE RELEVANT FACTS AND CIRCUMSTANCES

Pursuant to (x) a Facility Agreement no. 33/06-B (the **Facility Agreement**), dated February 9, 2006, by and between Gazprombank OJSC (**Gazprombank**), as lender, and Golden East Mongolia (Limited Liability Company), a company organized under the laws of Mongolia (**GEM**), of which the Defendant is the beneficial owner, GEM borrowed $30,000,000 from Gazprombank and (y) a

Guaranty Agreement no. 33/06-B-II (the **Guaranty**), dated of even date therewith, by the Defendant in favor of Gazprombank, the Defendant guaranteed the obligation of GEM to repay the principal and interest payments within the loan period specified in the Facility Agreement.

Pursuant to an Assignment Agreement, dated June 16, 2015, Gazprombank assigned its rights under, among other things, (x) the Facility Agreement and (y) a "surety agreement"[1] No. 33/06-B-II, dated February 9, 2006, by the Defendant in favor of Gazprombank to the Plaintiff.

Following the non-repayment of the loan made pursuant to the Facility Agreement, Gazprombank obtained a judgment (the **Russian Judgment**) from the Cheremushki District Court of Moscow, Russian Federation (the **Russian Court**) in the amount of $25,030,650.16 in favor of Gazprombank and against the Defendant. Notably, in entering the Russian Judgment, the Russian Court found that the Defendant was "properly notified of the time and place of the court hearing."[2] In the Russian Court's ruling on the Defendant's cassation appeal, the Russian Court indicated that the Defendant was notified in an appropriate manner, did not attend the court hearing and rejected the Defendant's claim of lack of notice finding that notices and materials were repeatedly sent to the Defendant's address and a telegram was sent to "S.V. Paushok" (which the Defendant did not collect) and that a representative of the Defendant was also notified of the hearing date.[3]

In 2015, Gazprombank commenced this action pursuant to CPLR §§ 5302 and 5303 to enforce the Russian Judgment against the Defendant. In August, 2017, the court granted the Plaintiff's motion to be substituted for Gazprombank as the plaintiff in this action. In the Defendant's January 19, 2018 Answer to this Action, the Defendant asserted six counterclaims – i.e., (1) abuse of process, (2) violation of civil rights, (3) intentional inflection of emotional distress, (4) prima facie tort, (5) failure to preserve the collateral and (6) common law fraud.

---

[1] The translation of the Assignment Agreement refers to a "surety agreement" – i.e., as opposed to the Guaranty, but the document number reference is the same as the Guaranty. It is assumed that the surety agreement and the Guaranty are the same.

[2] *See the decision of the Russian Court attached as Exhibit 1 to the Affirmation of Popelyuk Aleksander Sergeevich in support of the Plaintiff's Motion to Dismiss the Counterclaims.*

[3] *See the decision of the panel of the Russian Court that heard the Cessation Appeal attached as Exhibit 2 to the Affirmation of Popelyuk Aleksander Sergeevich in support of the Plaintiff's Motion to Dismiss the Counterclaims.*

The Plaintiff's motion argues that the counterclaims asserted by the Defendant must be dismissed because (I) the Guaranty contains a forum selection clause which designates the Russian Court as the forum to hear disputes in connection with the Guaranty, (II) under the doctrine of forum non-convenience, New York is not an appropriate forum for the adjudication of the Defendant's counterclaims, (III) counterclaims cannot be interposed in an Article 53 action, and (IV) because the counterclaims fail to state a cause of action.

The controlling issue is whether the grounds set forth in CPLR §5304 for non-enforcement of a foreign judgment is the exclusive list of the grounds for non-recognition of a foreign judgment or whether the defendant can in the context of an action brought pursuant to CPLR §§ 5302 and 5303 to enforce a foreign judgment assert counterclaims? Because we hold that counterclaims asserted by the Defendant can not be asserted in an Article 53 action, the counterclaims are dismissed.

DISCUSSION

I. The Forum Selection Clause

In a forum selection clause (i.e, as distinguished from a choice of law clause pursuant to which the parties designate the laws of which jurisdiction shall apply), the parties to an agreement contractually agree on the appropriate forum for the resolution of any dispute arising under the agreement.

It is well established that forum selection clauses are generally enforceable unless they are shown to be unreasonable by the challenging party because they provide certainty and predictability to the resolution of business disputes, particularly those involving international business agreements. *Brooke Group Ltd. v. JCH Syndicate 488*, 87 N.Y.2d 530 (1996). They are *prima facie* valid. To set aside a forum selection clause, a challenging party must show that the contractual forum would be so inconvenient that the challenging party will "for all practical purposes, be deprived of his or her day in court." *British West Indies Guaranty Trust Co. Ltd. v. Banque Internationale A Luxembourg*, 567 N.Y.S.2d 731 (1st Dept. 1991) *citing The Breman v. Zapata Off-Shore Co., 407 U.S. 1, 12-18 (1972); Rokeby-Johnson v. Kentucky Agric. Energy Corp., 108 A.D.2d 336, 339-341 (1985); Di Ruocco v Flamingo Beach Hotel & Casino, 163 A.D.2d 270 (1990).* It is also beyond dispute that contractual forum selection clauses are applicable to tort claims. *See*

Landmark Ventures, Inc. V. Birger, 147 A.D.3d 497 (2017), 48 N.Y.S.3d 315, 2017 N.Y. Slip Op. 01153 (1st Dept. 2017) *citing Couvertier v. Concourse Rehabilitation and Nursing, Inc.*, 117 A.D.3d 772, 985 N.Y.S.2d 683, 2014 N.Y. Slip Op. 03473 (2nd Dept. 2014); *Erie Ins. Co. of N.Y. v AE Design, Inc., 104 A.D.3d 1319, 1320 [4th Dept 2013], lv denied 21 N.Y.3d 859 (2010].*

The clause in the Guaranty provides (the **Forum Selection Clause**):

> All disputes, arising out of fulfillment of this Agreement, will be settled under the legislation of the Russian Federation ***in Cheremushki District Court of Moscow*** (emphasis added).

The Defendant argues that by bringing this action for recognition of the Russian Judgment in New York, the Plaintiff has waived the forum selection clause and therefore can not now use the forum selection clause as a shield against counterclaims that the Defendant would like to bring. Put another way, the Defendant argues that an action in New York to enforce an already obtained judgment in another jurisdiction involving a contractual forum selection clause designating such other jurisdiction as the forum for dispute resolution waives the foreign selection clause itself. This argument is unavailing and overlooks the plain meaning and intent of the Forum Selection Clause and quite frankly, any forum selection clause and the structure and provisions of Article 53 itself.

The language set forth in the Forum Selection Clause is clear and unambiguous and indicates the parties intent to designate the Russian Federation in Cheremuski District Court as the forum to hear disputes ***arising out of the fulfillment of the Agreement.*** An action to enforce the judgment already obtained in another jurisdiction designated as the contractual forum is not an action to resolve a dispute ***arising out of the fulfillment of that agreement*** (re: the Guaranty). That action already occurred in the Russian Federation in Cheremushki District Court of Moscow and that court entered the Russian Judgment in favor of Gazprombank. This action merely seeks to ***enforce the judgment already obtained.*** Accordingly, the Court holds that the forum selection clause has not been waived by the Plaintiff. To hold otherwise would be to provide a pathway for borrowers/guarantors to avoid a judgment being satisfied by simply relocating assets outside of the designated and agreed upon contractual forum. In addition, the court holds that there simply is no evidence that the contractual forum is so inconvenient as to deprive the Defendant of his day in court. Simply put, the Defendant is a citizen of the Russian Federation who following the entry of the

Russian Judgment, appealed the decision of the Russian Court and his appeal was denied.

II. Forum Non Conveniens

CPLR § 327 Inconvenient Forum incorporates the common law doctrine of forum non-conveniens and provides that a court may stay or dismiss an action notwithstanding that jurisdiction is proper if the court determines in its sound discretion that the dispute would be better adjudicated elsewhere. The burden rests on the challenging party to demonstrate relevant private or public interest factors which weigh against having the litigation adjudicated in New York. *Islamic Republic of Iran v. Mohammed Reza Pahlavi*, 62 N.Y.2d 474 (1984) *citing see Piper Aircraft Co. v Reyno, 454 U.S. 235 (1981); Bader & Bader v Fort, 66 A.D.2d 642 (1979).* The doctrine requires a balancing of factors including the potential hardship to the defendant, the availability of another forum, whether the parties are non-residents and whether the transaction out of which the cause of action arises occurred primarily in another jurisdiction. *Islamic Republic of Iran v. Mohammed Reza Pahlavi*, 62 N.Y.2d 474 (1984) *citing S.p.A. v Artoc Bank & Trust, 62 N.Y.2d 65; Irrigation & Ind. Dev. Corp. v Indag S. A., 37 N.Y.2d 522, 525; Varkonyi v S. A. Empresa De Viacao Airea Rio Grandense [Varig], 22 N.Y.2d 333, 335); Bata v. Bata 304 N.Y. 51 (1952); Silver v Great Amer. Ins. Co., 29 N.Y.2d 356, 361 (1972).* No one factor is controlling. *Islamic Republic of Iran v. Mohammed Reza Pahlavi*, 62 N.Y.2d 474 (1984) *citing Irrigation & Ind. Dev. Corp. v Indag S. A., 37 N.Y.2d 522 (1975); see, also, Piper Aircraft Co. v Reyno, 454 U.S. 235 (1981); Gulf Oil Corp. v Gilbert, 330 U.S. 501 (1947).* The doctrine is flexible. Its applicability rests on the specific facts and circumstances of each case and is based in principles of justice, fairness and convenience. *Islamic Republic of Iran v. Mohammed Reza Pahlavi*, 62 N.Y.2d 474 (1984).

In the case at *nisi prius,* none of the parties to the transaction underlying the already obtained Russian Judgment are residents of New York, none of the potential witnesses are residents of New York and all of the events underlying the judgment itself occurred either in the Russian Federation or Mongolia. In addition, the parties, witnesses and the documents relevant to any of the asserted counterclaims are in those countries. Accordingly, pursuant to CPLR § 327, New York is an inconvenient forum.

III. Counterclaims under Article 53

CPLR Article 53 is the governing statute for the recognition and enforcement of foreign judgments. It is clear from the text and structure of the statute that foreign judgments are to be recognized unless an exception set forth in the statute applies and that the clearly codified intent is to have collateral issues litigated in the forum in which the foreign judgment was originally entered.

According to the Court of Appeals of the State of New York in *CIBC Mellon Trust Co. v. Mora Hotel Corporation N.V.*, 792 N.E.2d 155 (2003), the purpose of Article 53 was to promote efficient enforcement of New York judgments abroad by assuring foreign jurisdictions that their judgments would receive streamlined enforcement here. *CIBC Mellon Trust Co. v. Mora Hotel Corporation N.V.*, 792 N.E.2d 155 (2003) *citing* Judicial Conference Mem in Support, Bill Jacket, L 1970, ch 981, at 4; Kulzer, The Uniform Foreign Money-Judgments Recognition Act, 13th Ann Jud Conf Rep, 194, 195-196, 226 [1968].

CPLR § 5303 Recognition and Enforcement provides:

> Except as provided in section 5304, a foreign country judgment meeting the requirements of section 5302 is ***conclusive*** (emphasis added) between the parties to the extent that it grants or denies recovery of a sum of money. Such a foreign judgment is enforceable by an action on the judgment, a motion for summary judgment in lieu of a complaint or in a pending action by counterclaim, cross-claim or affirmative defense.

In other words, CPLR § 5303 requires recognition and enforcement of a foreign judgment that meets the requirements of CPLR § 5302 unless an exception applies that is set forth in CPLR § 5304. *See John Galliano, S.A. v. Stallion, Inc.*, 930 N.E.2d 756 (2010). For the avoidance of doubt, CPLR § 5302 Applicability confirms that Article 53 applies to "any foreign country judgment which is final, conclusive and enforceable where rendered."[4]

CPLR § 5304 Grounds for non-recognition provides:

(a) No recognition. A foreign country judgment is not conclusive if:

[4] CPLR § 5302.

1. the judgment was rendered under a system which does not provide impartial tribunals or procedure comparable with the requirements of due process of law.
2. The foreign court did not have personal jurisdiction over the defendant.

(b) Other grounds for non-recognition. A foreign monetary judgment need not be recognized if:

1. the foreign court did not have jurisdiction over the subject matter;
2. The defendant in the proceeding in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;
3. The judgment was obtained by fraud;
4. The cause of action on which the judgment is based is repugnant to the public policy of the state;
5. The judgment conflicts with another final conclusive judgment;
6. The proceedings in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court
7. In the case of jurisdiction based on personal service, the foreign court was a seriously inconvenient forum for the trial of the action; or
8. The cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless the court before which the matter is brought sitting in this state first determines that the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case was would be provided by both the United States and New York constitutions.

It is axiomatic that the statute contemplates affirmative defenses to enforcement. The statute however does not contemplate the litigation of counterclaims. In an Article 53 proceeding, the court is asked to exercise the ministerial function of recognizing a foreign judgment and converting it into a New York judgment. *CIBC Mellon Trust Co.*, 792 N.E.2d 155 (2003). Accordingly, the counterclaims must be dismissed.

The court notes that to the extent that the Defendant raises certain affirmative defenses to enforcement in its Answer, including, lack of personal jurisdiction and lack of notice pursuant to CPLR § 5304(a)(2) and (b)(2), CPLR § 5304 needs to be read in connection with CPLR § 5305 as the court noted in *John Galliano, S.A. v. Stallion, Inc.*, 930 N.E.2d 756 (2010)

In *Galiano*, the court in Paris, France entered a money judgment in favor of John Galiano, S.A. and against Stallion, Inc. (**Stallion**). Mr. Galiano brought an action under Article 53 in New York to have the judgment recognized in New York. Stallion had entered into a licensing agreement with Les Jardins D'Avron (**Les Jardins**) concerning the use of the John Galiano trademark for the production and distribution of certain luxury fur items in the United States. Subsequently, Mr. Galiano was substituted for Les Jardins in the agreement. The licensing agreement had both a choice of law and a forum selection clause. To wit, the agreement provided that it was governed by the laws of France and that disputes arising under the agreement would be submitted "to the competent court of the district over which the Paris Court of Appeals has jurisdiction." Disputes arose between Galiano and Stallion over certain royalty payments. Mr. Galiano believed he was entitled to payments in connection with a fashion show and Stallion believed they were owed money for certain goods delivered to Les Jardins. The disputes were not amicably resolved and Mr. Galiano sued Stallion in the Commercial Court in Paris. Stallion did not appear and the Paris Commercial Court entered judgment in favor of Mr. Galiano. Approximately three years later, Mr. Galiano brought the Article 53 proceeding in New York seeking recognition of his Paris judgment. Stallion argued that the judgment should not be recognized because that court lacked personal jurisdiction over Stallion. Stallion argued that because it had been served with papers in French (and without an English translation), service was improper under the Hague Convention and that the Paris judgment should not be recognized under both CPLR § 5304(a)(2) and (b)(2). Chief Judge Littman writing for the *Galiano* court disagreed. Notably, Chief Judge Littman wrote:

> 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]).[5]

Chief Judge Littman concluded that Stallion did exactly that when it entered the license agreement which contained the forum selection clause. In addition, the *Galiano* court noted that the Paris Commercial Court was satisfied that the notice requirements of Article 15 of the Hague convention were met prior to entering the default judgment against Stallion and that accordingly the defendant received notice in accordance with CPLR § 5304(b)(2) and that the judgment should be enforced in accordance with CPLR §5305(a)(3).

[5] *John Galiano v. Stallion, Inc. , 930 N.E.2d 756 (2010).*

The court notes that in this case, like in *Stallion,* the agreement at issue (i.e., the Guaranty) contained a forum selection clause and that therefore the Defendant agreed to submit to the jurisdiction of the Russian Court in accordance with CPLR §5305(a)(3), and the Russian Court in the underlying action in entering the Russian Judgment and the Russian Court in ruling on the Defendant's cessation appeal found that the Defendant had notice. Therefore, the requirements of CPLR § 5304(b)(2) appear to be met and this alleged counter claim/affirmative defense of lack of personal jurisdiction and notice is devoid of merit and was already adjudicated in the contractual forum state.

IV. Failure to state a cause of action

In considering a motion to dismiss for failure to state a cause of action, the court must accept the allegations as true, and accord the non-moving party the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Nonnon v. City of New York*, 9 N.Y.3d 825 (2007) *citing Leon v. Martinez*, 84 N.Y.2d 83 (1994).

(a) Abuse of Process.

There are three elements required to plead a claim for abuse of process: (i) regularly issued process, (ii) an intent to do harm without justification or excuse, and (iii) the use of the process was perverted in some fashion to obtain a collateral objective. *Curiano v. Suozzi*, 63 N.Y.2d 113, 469 N.E.2d 1324, 480 N.Y.S.2d 466 (1984).

The Defendant argues that there has been an abuse of process[6] because (x) without notice the Plaintiff initiated a bankruptcy proceeding action in Moscow Arbitration Court to have the Defendant declared insolvent, seize his assets, bank account and personal property,[7] (y) the Defendant's international travel has been restricted and he has been subject to unsubstantiated criminal complaints, increased enforcement pressures from the Russian Federal Bailiff Services, involuntary bankruptcy proceedings, substantial damage to his reputation, is barred from managerial positions, has suffered a loss of credit and other economic restrictions,[8] and (z) Gazprombank regularly issued civil process against the Defendant in the Russian

[6] Defendant's Answer Paragraphs 61-66.
[7] Defendant's Answer Paragraph 59.
[8] Defendant's Answer Paragraph 60.

enforcement action pursuant to which the Russian Court entered the Russian Judgment, i.e., remarkably the very process which the Defendant claims he never received and which claim the Russian Court rejected. Although the Defendant alleges that Gazprombank took actions "to do harm" to the Defendant and without justification and excuse, taking all of the allegations as true, the Plaintiff appears to have only been trying to collect on its otherwise valid Russian Judgment and the collateral consequences identified by the Defendant, including damage to credit and reputation, appear to be the consequences of failing to honor a $30,000,000 obligation that the Defendant guaranteed in the Guaranty. In other words, taking all the allegations as true, the Defendant has failed to make out a claim for abuse of process. Accordingly, the counterclaim for abuse of process is dismissed.

(b) Violation of Civil Rights

The Defendant alleges that there has been a violation of his civil rights because of the prosecution of the action in the Russian Court that resulted in the Russian Judgment.[9] Defendant however fails to allege how this violated his civil rights under the Russian Civil Code or otherwise. The allegations set forth by the Defendant are general and do not identify with sufficient particularity what about the underlying action violated his civil rights or which civil rights the Plaintiff allegedly violated. Therefore, the Defendant has failed to make out a claim for a violation of civil rights and this counterclaim is dismissed.

(c) Intentional Infliction of Emotional Distress

The claim of intentional infliction of emotional distress (**IIED**) is made out by extreme and outrageous conduct, with an intent to cause, or disregard of a substantial probability of causing, severe emotional distress, causing such severe emotional distress. *Howell v. New York Post Co.*, 81 N.Y.2d 115 (1993). The Defendant alleges that the Plaintiff committed the tort of IIED by attempting to collect the debt. [10] In other words, none of the elements of IIED are properly plead and the counterclaim for IIED is dismissed.

(d) Prima Facie Tort

[9] Defendant's Answer Paragraphs 67-71.
[10] Defendant's Answer Paragraphs 72-76.

There are four elements to a claim for prima facie tort: (i) acts that are otherwise lawful, (ii) done with the intention of infliction of harm, (iii) causing special damages, and (iv) without excuse or justification. *Curiano v. Suozzi, 63 N.Y.2d 113 (1984).*

The Defendant argues that the Plaintiff has committed prima facie tort[11] by committing acts which would otherwise be lawful without justification or excuse. The Defendant however does not explain in any manner how it was done with the intention of inflicting harm, how special damages were caused or how it was done without excuse or justification. To the extent that the allegations relate to the collateral consequences of collection of an otherwise valid judgment, there are no allegations which support the notation that collection proceedings and steps that were taken to enforce the judgment were done with the intention of inflicting harm, causing special damages or done without excuse or justification. Accordingly, the counterclaim for prima facie tort is dismissed.

(e) Failure to Preserve the Collateral

Failure to Preserve the Collateral is not a recognized cause of action in New York and serves, if at all, to offset a claim by a creditor who was in possession of collateral and failed to preserve it.

The Defendant alleges that there was a failure to preserve the collateral when the Mongolian Government seized the assets of GEM and that Gazprombank failed to preserve the collateral in that Gazprombank ignored requests from the Defendant for an additional $6 million dollars of short term lending.[12] The Defendant does not plead that Gazprombank was obligated to provide such additional money to the Defendant or how providing the additional money would have prevented the seizure by the Mongolian Government. Equally significant, there are no allegations that Gazprombank was ever in possession of the physical collateral. Accordingly, the counterclaim for failure to preserve collateral is dismissed.

(f) Common Law Fraud

Common law fraud requires (i) the misrepresentation or a material omission of fact which was false and known to be false, (2) made for the purpose of inducing

[11] Defendant's Answer Paragraphs 77-81.
[12] Defendant's Answer Paragraph 25.

reliance by the other party, (3) justifiable reliance of the other party and (4) damages. *Lama Holding Company v. Smith Barney Inc.*, 88 N.Y.2d 413 (1996).

The Defendant alleged that the Plaintiff committed fraud in connection with the sale of the Defendant's interests in GEM and the assumption of liability for the debt underlying the Russian Judgment to Phoenix Sino Limited (**Phoenix**) which Phoneix subsequently defaulted on. More specifically, the Defendant alleges that Gazprombank deceived the Defendant into transferring his company to Phoenix and misrepresented the amount owing under the Guaranty.[13] It appears although it is not plead that this alleged misrepresentation was made to Phoenix and it is also not alleged how damages to the Defendant resulted from any such alleged misrepresentation. Accordingly, common law fraud is not properly plead and is therefore dismissed.

CONCLUSION

The Plaintiff's Motion to Dismiss the Defendant's Counterclaims is granted in its entirety because (i) of the forum selection clause in the Guaranty, (ii) New York is an inconvenient forum pursuant to CPLR § 327, (iii) counterclaims are not properly raised in Article 53 actions and (iv) the counterclaims fail to state a cause of action.

Dated: June 21, 2018

Hon. Andrew Borrok
J.S.C.

Hon. Andrew Borrok

[13] Defendant's Answer Paragraphs 85-88.