

**Mortimer Offshore Servs. Ltd. v Manufacturas Orga
Ltda**

2019 NY Slip Op 30720(U)

March 13, 2019

Supreme Court, New York County

Docket Number: 654433/2018

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42
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MORTIMER OFFSHORE SERVICES LIMITED,

Plaintiff,

Index No. 654433/2018

v

MANUFACTURAS ORGA LTDA,

Defendant.

DECISION AND ORDER

MOT SEQ 002, 003

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NANCY M. BANNON, J.:

I. INTRODUCTION

The plaintiff moves pursuant to CPLR 3213 and 5303 for summary judgment in lieu of complaint to domesticate a judgment in excess of US\$7 billion entered against the defendant in the High Court of Justice, Queen's Bench Division, Commercial Court (the English Commercial Court) in England, in an action for breach of a contract to purchase gold bonds (SEQ 002). The plaintiff seeks to withdraw a second motion to authorize alternative service by publication upon the defendant (SEQ 003). The motion for summary judgment in lieu of complaint is granted, and the motion to authorize service by publication is permitted to be withdrawn.

II. DISCUSSION

CPLR 3213 provides, in relevant part, that "[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint." See HSBC Bank USA v Community Parking Inc., 108 AD3d 487 (1st Dept. 2013). The purpose of the statute "is to provide an accelerated procedure where liability for a certain sum is clearly established by the instrument itself." G.O.V. Jewelry, Inc. v United Parcel Serv., 181 AD2d 517, 517 (1st Dept. 1992). Thus, pursuant to CPLR 3213, a plaintiff may move for leave to enter an accelerated judgment in a New York court if he or she seeks to enforce any pre-existing judgment, including one from a foreign or sister-state jurisdiction. See CPLR 3213; Sea Trade Maritime Corp. v Coutsodontis, 111 AD3d 483 (1st Dept. 2013).

As a general rule, to establish its prima facie entitlement to judgment as a matter of law in an action upon a judgment, a plaintiff must produce an authenticated or exemplified copy of a judgment entered in its favor and against the defendant, and make a showing that the judgment has not been satisfied in whole or in part. See generally Madjar v Rosa, 83 AD3d 1011 (2nd Dept. 2011). The plaintiff must also show that the defendant was properly served with the summons and motion papers in the instant

action. See TCA Global Credit Master Fund, L.P. v Puresafe Water Systems, Inc., 151 AD3d 1098 (2nd Dept. 2017).

With respect to service of process, use of the procedures provided in the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Convention) (20 UST 361, TIAS 6638 [1969]), when available, is mandatory if documents must be transmitted abroad to effect service of process. See Volkswagenwerk Aktiengesellschaft v Schlunk, 486 US 694 (1988). Article 10(a) of the Hague Convention allows signatories to serve persons abroad directly through the mail, provided that the state of destination does not object. Both the United States and the United Kingdom are signatories to the Hague Convention, and neither country has objected to direct service through postal channels. See Aristocrat Leisure Ltd. v Deutsche Bank Trust Co. Americas, 262 FRD 293 (SDNY 2009).

The plaintiff submits an affidavit of service with respect to service of the summons and motion papers in the instant action. In the affidavit, the deponent avers that she mailed a copy of such documents via the United States Postal System to an agent of the defendant at the London address contractually agreed upon by the parties as the address at which service upon the defendant could be made. The plaintiff also submits a letter from the United States Postal Service confirming that the

documents were delivered by the postal service of Great Britain and Northern Ireland on October 19, 2018, and were signed for by a Mr. J. Olivas. The court notes that the affidavit of service was executed in Illinois, but does not include a certificate of conformity. This defect does not warrant denial of the plaintiff's motion, and may be cured by the submission of the proper certificate nunc pro tunc within 10 days of the plaintiff's receipt of this order. See Bank of New York v Singh, 139 AD3d 486, 487 (1st Dept 2016).

The plaintiff has also submitted, among other items, a certified copy of the default judgment entered in the English Commercial Court, an affidavit of Jason Daniel McCue, an English attorney with knowledge of the procedural history of the English action, affidavits and witness statements submitted to the English Commercial Court in the English action, the contract underlying the English judgment, a letter pertaining to the calculation of the damages sought in the English action, certificates of service in the English action, and certified copies of related orders and judgments entered by the English Commercial Court in the English action.

The documentation establishes that the plaintiff entered into an agreement (the contract) with the defendant in which the defendant agreed to buy from the plaintiff 1,654 German Provincial and Communal Banks Consolidated Agricultural Loan

Secured Sinking Fund Gold Bearer Bonds, Series A (the gold bonds), at 90% of their value in the event that the plaintiff failed to encash those gold bonds by January 1, 2014. The plaintiff failed to encash the gold bonds by that date, triggering the sale to the defendant. Accordingly, the plaintiff delivered the gold bonds to the designated custodian, as required by the contract, on January 8, 2014. The contract provided that the designated custodian was to value the gold bonds according to a pre-established formula that corresponded to the international standards applicable for bond valuation. Pursuant to that formula, the gold bonds were valued at US\$7,006,697,116.58 on January 14, 2014, the date the sale was to take place. That amount was due to the plaintiff by February 25, 2014, but the defendant failed to pay.

The plaintiff's documentation further demonstrates that the plaintiff, a company organized under the laws of the Republic of Cyprus, commenced an action in the English Commercial Court against the defendant, a Colombian company that maintained a business address in London, England, pursuant to a governing law provision in the contract expressly providing the courts of the United Kingdom with exclusive jurisdiction over disputes arising from the contract. The plaintiff shows that it served the defendant with notice of the action by mail to the defendant's London address, in accordance with English law and the provisions

of the contract. The plaintiff also establishes that judgment was entered against the defendant in England upon its default in appearing in the English action, and that the English Commercial Court entered judgment against the defendant in the sum of US\$7,085,018,552.90, on May 9, 2014.

On August 14, 2014, the English Commercial Court granted the plaintiff's subsequent application for a freezing injunction prohibiting the defendant from removing from England or Wales or otherwise disposing or diminishing the value of its assets anywhere in the world up to the value of £4,237,196,417.57, and issued an order permitting alternative service of the default judgment by publication in Colombian and English newspapers. Service by publication was made on August 26, 2014, and August 30, 2014. On November 28, 2014, the English Commercial Court entered a second judgment, wherein the court noted its satisfaction that the defendant had been properly served with both the notice of claim commencing the action and the default judgment, and that the default judgment entered on May 9, 2014, was valid for all purposes under English law and procedure. The English Commercial Court ordered that the default judgment remained in effect and issued a certificate under Article 54 and Annex V of the Lugano Convention, giving worldwide effect to the freezing injunction entered on August 14, 2014. The plaintiff avers that, to date, the defendant has not appealed the English

Commercial Court's judgments, and has not satisfied any portion of the default judgment.

Where a plaintiff seeks to domesticate a default judgment entered in a foreign country, and a defendant challenges that court's exercise of personal jurisdiction over it, the plaintiff bears the burden of establishing that the foreign court properly exercised personal jurisdiction over the defendant. See Cadle Co. v Tri-Angle Assoc., 18 AD3d 100 (1st Dept. 2005); Wimmer Can. v Abele Tractor & Equip. Co., 299 AD2d 47 (3rd Dept. 2002).

Since the defendant defaulted in appearing in the instant action, however, it has not asserted a challenge to the English court's exercise of jurisdiction over it in the underlying English action, and the plaintiff thus need not make a showing in that regard. See Abu Dhabi Commercial Bank PJSC v. Saad Trading, 117 AD3d 609 (1st Dept. 2014). In any event, in light of the factual recitation set forth in the English judgment dated November 28, 2014, the English court properly exercised personal jurisdiction over the defendant in the English action.

The plaintiff further seeks an award of post-judgment interest at the New York statutory rate from the date of the English default judgment, which is May 9, 2014. As post-judgment interest is a procedural matter governed by the law of the forum, an award of statutory interest from the date of the English default judgment is proper here. See Abu Dhabi Commercial Bank

PJSC v Saad Trading, Contracting and Financial Services Co., 117 AD3d 609 (1st Dept. 2014).

IV. CONCLUSION

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment in lieu of complaint is granted, without opposition; and it is further,


ORDERED that the plaintiff's motion to authorize alternative service by publication upon the defendant is permitted to be withdrawn pursuant to the plaintiff's notice of withdrawal dated and filed with this court on December 17, 2018; and it is further,

ORDERED that the plaintiff shall file a certificate of conformity as discussed herein with respect to the affidavit of service executed in Illinois within 10 days of its receipt of this order; and it is further,

ORDERED that, upon proof of the plaintiff's compliance with the foregoing provision, the Clerk of the court is directed to enter judgment in favor of the plaintiff, Mortimer Offshore Services Limited, and against the defendant, Manufacturas Orga Ltda, in the principal sum of US\$7,085,018,552.90, with statutory interest from May 9, 2014.

This constitutes the Decision and Order of the Court.

Dated: March 13, 2019

ENTER: 
J.S.C.

HON. NANCY M. BANNON