

**Castleton Commodities Merchant Trading L.P. v
Casado**

2020 NY Slip Op 30452(U)

February 18, 2020

Supreme Court, New York County

Docket Number: 655774/2019

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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CASTLETON COMMODITIES MERCHANT TRADING
L.P.

Plaintiff,

- v -

FRANCISCO D'AGOSTINO CASADO,

Defendant.

INDEX NO. 655774/2019

MOTION DATE 11/04/2019

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 12, 13, 14
were read on this motion for SUMMARY JUDGMENT IN LIEU OF COMPLAINT.

Plaintiff Castleton Commodities Merchant Trading L.P. (“CCMT”) seeks an award of
Summary Judgment in Lieu of Complaint, under CPLR 3213 and CPLR 5303, against Defendant
Francisco Javier D’Agostino Casado (“D’Agostino”), to enforce a judgment obtained against
D’Agostino in the courts of Curaçao. D’Agostino has not filed opposition to the motion. For the
reasons set forth below, CCMT’s motion is Granted.

BACKGROUND

CCMT is a Delaware limited partnership headquartered in Stamford, Connecticut that
operates in the commodities trading sector. CCMT Mot. for S.J. in Lieu of Compl. (“SJLC”), at
2. D’Agostino, along with another individual, Alessandro Bazzoni, were CCMT’s primary
business contacts at a Curaçaoan energy firm called Elemento PF. *Id.*

The Curaçao Judgment

In December 2017, D’Agostino and Bazzoni purportedly pledged to CCMT a first-
priority interest in shares in another entity as security for a payment obligation to CCMT. *Id.*

The pledge was documented in an agreement, the “Deed of Pledge”, between CCMT’s predecessor-in-interest and Elemento PF, dated December 20, 2017. *See* Affidavit of Roderik Van Hees (“Van Hees Aff.”), Ex. B (NYSCEF Doc. No. 5).

CCMT alleges that D’Agostino and Bazzoni had already pledged the shares contemplated in the Deed of Pledge to another party, leaving CCMT with only a subordinate interest in those shares. SJLC, at 2. When CCMT learned this, it sought legal remedies. The Deed of Pledge stipulated that “[t]he Court of First Instance of Curaçao . . . shall have exclusive jurisdiction to settle any dispute arising out of or in connection with this Pledge Agreement . . . and, for such purposes, each of the parties hereto irrevocably submits to the exclusive jurisdiction of such court.” Van Hees Aff., Ex. B, §18.2. D’Agostino and Bazzoni both signed the Deed of Pledge, as Elemento PF’s Chairman and Director, respectively. Van Hees Aff., Ex. B.

In November 2018, pursuant to the terms of the Deed of Pledge, CCMT filed a petition in the Court of First Instance of Curaçao against D’Agostino, Bazzoni, and Elemento PF (the “Curaçao Defendants”) seeking to recover damages resulting from the alleged fraud and breach of the Deed. Van Hees Aff., ¶3. As relevant here, CCMT sought joint and several payment by D’Agostino, Bazzoni, and Elemento PF of \$8,699,708.84, plus interest at the statutory rate, in the Curacao proceedings (the “Curaçao Proceedings”). *Id.*

But first, CCMT had to serve the petition on the Curaçao Defendants. According to CCMT’s Curaçao counsel, Roderik Van Hees, Elemento PF did not have an official address listed in the Curaçao Trade Register at the time the petition was to be served, and CCMT did not know where Bazzoni and D’Agostino resided for purposes of official service. Van Hees Aff., ¶5. Therefore, in accordance with the Curaçao Code of Civil Procedure, for all Curaçao Defendants, (1) CCMT’s petition was served on the Office of the Public Prosecutor of Curaçao,

(2) a notice was placed in a local newspaper, and (3) a notice was placed in the National Gazette of Curaçao. *Id.* Van Hees avers that “[t]his is the way in which defendants with unknown addresses are called into proceedings in Curaçao.” *Id.* Ultimately, none of the Curaçao Defendants entered an appearance in the Curaçao Proceedings, nor did they “respond to the petition in any way.” *Id.*, ¶6.

On July 1, 2019, the Court of First Instance entered a default judgment against the Curaçao Defendants, jointly and severally, in the amount of \$8,699,708.84, plus interest, costs, and fees (the “Judgment”). *See* Van Hees Aff., Ex. A. In the Judgment (as translated), the Court noted that Elemento PF was “domiciled in Curaçao,” while D’Agostino and Bazzoni “ha[d] no known address or actual residence in this country and elsewhere,” and that these defendants “have not appeared in court.” *Id.* The Court determined that the Curaçao Defendants, “although properly summoned, have not appeared,” and therefore “declare[d] [them] to be in default of appearance.” *Id.*

CCMT then set out to serve notice of the Judgment on the defaulted Curaçao Defendants. In Curaçao, this was done once again in accordance with the Curaçao Code of Civil Procedure, by (1) serving the original Judgment on the Office of the Public Prosecutor, (2) placing a notice in a local newspaper, and (3) placing a notice in “the National Gazette.” *Id.*, ¶8. In this country, CCMT served the original Judgment on D’Agostino in person. *Id.* On August 8, 2019, a process server “handed [D’Agostino] the documents” at his summer home in Southampton, New York. *Id.*; Van Hees Aff., Ex. C.¹

¹ The process server avers that he approached D’Agostino as he was getting out of a car and said to him “Francisco D’Agostino,” “at which time the recipient nodded his head and [the process server] handed him the documents.” Van Hees Aff., Ex. C.

On August 16, the Court of First Instance issued an Amended Judgment to correct certain typographical and other errors in the original Judgment, at CCMT's request. (For example, the Court had erroneously identified CCMT's attorney as "R. Hees" instead of "R.B. van Hees.") *See Van Hees Aff., Ex. A.* The Amended Judgment "declared the [Curaçao Defendants] to be in default of appearance," and did not purport to change the amount they owed, jointly and severally, to CCMT. *Id.*

Under Curaçao law, a defendant against whom a default judgment is rendered because of nonappearance cannot appeal such judgment, but has 14 days from service of the judgment to file opposition proceedings to reopen the case. *Van Hees Aff., ¶¶12-13; SJLC, at 7.* That deadline has passed, with no attempt on the part of any of the Curaçao Defendants to challenge the Judgment. *Van Hees Aff., ¶15.* Generally, any opposition filed after the deadline is inadmissible in the Curaçao courts. *Id., ¶14.*

The Instant Action

CCMT filed this Summary Judgment in Lieu of Complaint on October 3, 2019, in order to enforce the Judgment against D'Agostino in New York. *See NYSCEF Doc. Nos. 1-9.* D'Agostino did not file any opposition to CCMT's motion. *NYSCEF Doc. Nos. 15-16 (CCMT's letters to the Court noting no opposition).*

CCMT's counsel stated that "[m]ultiple attempts at service of the Summons, Motion, and related documents took place over a number of weeks in October at two residences in New York State known to be D'Agostino's usual dwellings and places of abode, one on East End Avenue in Manhattan and one in Southampton." *NYSCEF Doc. No. 15.* Following unsuccessful attempts at service under CPLR 308(1) and CPLR 308(2), CCMT represents that it completed service pursuant to CPLR 308(4) by affixing true copies of the relevant papers to the door of the

Southampton house, and then mailing these documents the next day. *Id.*; see Affidavit of Service (NYSCEF Doc. No. 11). To date, D'Agostino has not entered an appearance in this action.

DISCUSSION

CPLR 3213 provides that “[w]hen an action is based 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.” This includes money judgments obtained in foreign courts. “New York has traditionally been a generous forum in which to enforce judgments for money damages rendered by foreign courts.” *CIBC Mellon Tr. Co. v. Mora Hotel Corp. N.V.*, 100 N.Y.2d 215, 221 (2003). The mechanism for enforcing such judgments is CPLR article 53, which adopts the Uniform Foreign Country Money-Judgments Act and “was designed to . . . promote the efficient enforcement of New York judgments abroad by assuring foreign jurisdictions that their judgments would receive streamlined enforcement here.” *Id.*

“[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 222. “Article 53 ‘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’, and ‘a foreign country judgment is considered ‘conclusive between the parties to the extent that it grants or denies recovery of a sum of money.’” *John Galliano, S.A. v. Stallion, Inc.*, 15 N.Y.3d 75, 80 (2010) (quoting CPLR 5302 and 5303, respectively). Moreover, foreign judgments entered on default can be “final, conclusive and enforceable” if the other requirements under CPLR article 53 and CPLR 3213 are met. *See id.* (enforcing money

judgment obtained on default in French proceedings); *Shipcraft v Arms Corp. of the Philippines, Inc.*, No. 150651/2012, 2013 WL 649415 (Sup. Ct. N.Y. Cty. Feb. 19, 2013).

“Generally, a foreign money judgment is to be recognized in New York under article 53 unless a ground for nonrecognition under CPLR 5304 is applicable.” *Galliano*, 15 N.Y.3d at 80. Section 5304 provides both mandatory and discretionary grounds for nonrecognition. “CPLR 5304(a) provides that ‘[a] foreign country judgment is not conclusive if . . . the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law’ (para [1]) or ‘the foreign court did not have personal jurisdiction over the defendant’ (para [2]).” *Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting & Fin. Servs. Co.*, 117 A.D.3d 609, 611 (1st Dep’t 2014). CPLR 5304(b), meanwhile, “permits nonrecognition on eight other grounds,” including lack of notice to the defendant, (para [2]), and obtaining the judgment by fraud, (para [3]). *Id.* “CPLR 5304’s grounds for nonrecognition of foreign money judgments must be read together with CPLR 5305 . . . which 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]).” *Galliano*, 15 N.Y.3d at 80.

Here, the Judgment is a “final, conclusive and enforceable” foreign country judgment under CPLR article 53. CCMT “does not seek any new relief against [D’Agostino], 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 Tr. Co.*, 100 N.Y.2d at 222. The Court of First Instance of Curaçao adjudged D’Agostino, jointly and severally with the other Curaçao Defendants, to be liable in the amount of \$8,699,708.84, plus

interest, costs, and fees. *Van Hees Aff., Ex. A*; see *Galliano*, 15 N.Y.3d at 80. The Court also expressly stated in the Judgment that D’Agostino was “properly summoned,” *id.*, and none of the Curaçao Defendants timely challenged the entry of default judgment. *Van Hees Aff.*, ¶¶12-15. As the Judgment is “final, conclusive and enforceable,” it can be converted into a New York judgment.

None of the grounds for non-recognition under CPLR article 53 apply here. *First*, the Judgment was not “rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law.” CPLR 5304(a)(1). See *Kapiteyn, B.V. v. Kurt Weiss Greenhouses Inc.*, Index No. 38461/2012, 2014 WL 5469940, at *4 (Sup. Ct. Suffolk Cty. Oct. 16, 2014) (“It is undisputed that the Dutch courts are courts of competent jurisdiction and that the Dutch legal system comports with the due process requirements and the public policy of New York.”). In this particular legal proceeding, the Curaçaoan court recognized that D’Agostino was “properly summoned,” in accordance with Curaçao’s rules of civil procedure, but failed to appear. *Van Hees Aff., Ex. A*.

Second, there is no reason to question, on this record, that the Court of First Instance had personal jurisdiction over D’Agostino. As the Court of Appeals has held repeatedly, “so long as the exercise of jurisdiction by the foreign court does not offend due process, the judgment should be enforced without ‘microscopic analysis’ of the underlying proceedings.” *Landauer Ltd. v. Joe Monani Fish Co.*, 22 N.Y.3d 1129, 1131 (2014) (citing *Galliano*, 15 N.Y.3d at 81). The Court of First Instance had jurisdiction over Elemento PF through the forum selection clause in the Deed of Pledge. *Van Hees Aff., Ex. B* § 18.2-18.4. And it is CCMT’s position – not contradicted by the Judgment, and not opposed by D’Agostino – that personal jurisdiction over D’Agostino and Bazzoni was proper under multiple different provisions in the Curaçao Code of Civil Procedure:

(1) under Section 103, because the claims against them were sufficiently close to the claim against Elemento PF to justify a joint hearing of the claims before the same Court; (2) under Section 98, because the allegedly wrongful act took place in Curaçao; and (3) under Section 767, because CCMT had previously levied attachments on D’Agostino and Bazzoni’s assets in Curaçao, also creating jurisdiction under Curaçao law. Van Hees Aff., ¶4.

Third, and finally, none of the discretionary grounds under CPLR 5304(b), in the Court’s view, compel non-recognition of the Judgment.

* * * *

Accordingly, it is

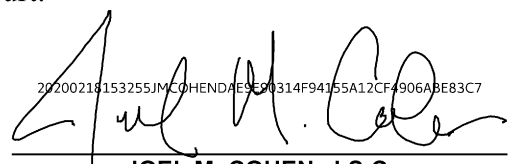
ORDERED that CCMT’s unopposed Motion for Summary Judgment in Lieu of Complaint is GRANTED; it is further

ORDERED that the Court clerk is directed to enter judgment against D’Agostino in the amount of \$8,699,708.84, plus interest, costs, and fees; and it is further

ORDERED that CCMT shall serve this Order with Notice of Entry on D’Agostino within 5 days of the date of this Order.

This constitutes the Decision and Order of the Court.

2/18/2020
DATE


JOEL M. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE