

Koblence v Modern Pawn Brokers, Inc.

2023 NY Slip Op 30777(U)

March 14, 2023

Supreme Court, New York County

Docket Number: Index No. 653282/2017

Judge: Sabrina Kraus

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**SUPREME COURT OF THE STATE OF NEW YORK
 NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

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RAFAEL KOBLENCE,

Plaintiff,

- v -

MODERN PAWN BROKERS, INC., AUCTION HOUSE 43,
 INC.

Defendant.

-----X

INDEX NO. 653282/2017

MOTION DATE 3/14/2023

MOTION SEQ. NO. 012

**DECISION + ORDER ON
 MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 012) 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 257, 258, 259, 260, 261

were read on this motion to/for DISCOVERY.

BACKGROUND

The underlying action centers on a dispute regarding ownership of a rare sapphire. On March 2, 2023, defendants moved for an order for the issuance of letters of request for evidence in Switzerland pursuant to the Hague Convention.

The motion was fully briefed and on March 14, 2023, the court heard oral argument and reserved decision.

For the reasons stated below, the motion is granted.

DISCUSSION

The Requested Discovery

The Gubelin Letter of Request

Gubelin is a Swiss gemological institute domiciled in Switzerland and registered in the Swiss Canton of Lucerne. Gubelin’s headquarters is located at Maihofstrasse 102, 6006

Lucerne, Switzerland. Gübelin is in the business of testing and analyzing, and issuing gemological reports for, rare gemstones.

In 1988, 1990, and 1995, Gübelin tested and analyzed the Stolen Sapphire and, each time, issued gemological reports (the Gübelin Pre-Theft Reports). Defendants asserts that as part of Gübelin's work related to one or more of the Gübelin Pre-Theft Reports, Gübelin personnel, along with Totah, created or prepared "microphotographs" of the Stolen Sapphire (the "Stolen Sapphire Microphotographs").

According to Brokers' expert witness in this matter, C.R. Beesley (Beesley), a gemologist, microphotographs are images taken of rare gemstones by microscope which permit gemologists to ascertain inclusions. Beesley was provided with what defendants assert are the Stolen Sapphire Microphotographs. Based on these Microphotographs, among other things, Beesley concluded that the Pawned Sapphire is the Stolen Sapphire. Beesley compared the Stolen Sapphire Microphotographs provided to him and microphotographs taken by him of the Pawned Sapphire, finding that both sets of microphotographs depicted identical inclusions.

However, Koblence & Boulmarouf question the authenticity of Stolen Sapphire Microphotographs provided to Beesley. Defendants assert that the Stolen Sapphire Microphotographs are in Gübelin's possession, custody, or control and that Gübelin personnel may be able to authenticate them as Gübelin business records.

Accordingly, to avoid Beesley's opinion being precluded, defendants may need to authenticate the purported Stolen Sapphire Microphotographs.

Despite requests by defendants, Gübelin has not agreed to voluntarily participate in this matter.

The Totah Letter of Request

Totah assisted in the creation or preparation of the Stolen Sapphire Microphotographs. and defendants therefore assert that Totah can authenticate the Stolen Sapphire Microphotographs. Defendants assert that Totah has possession, custody, or control of the Stolen Sapphire Microphotographs and that Totah has other personal knowledge relevant to this matter. Specifically, defendants assert that Totah can connect the Stolen Sapphire with SSEF Report Number 21212 (defined below) from 1989 because Totah was the owner of the Stolen Sapphire at that time.

Despite requests by defendants, Totah has not agreed to voluntarily participate in this matter. Totah resides in Switzerland and is the President and founding partner of H & T, a Swiss gemological entity. As Totah and H & T are domiciled in Switzerland, they are not subject to the Court's jurisdiction, including a direct judicial subpoena.

The SSEF Letter of Request

SSEF is a Swiss gemological institute domiciled in Switzerland and registered in the Swiss Canton of Basel. SSEF's headquarters is located at Aeschengraben 26, CH-4051 Basel, Switzerland. SSEF is in the business of testing and analyzing, and issuing gemological reports for, rare gemstones.

In 1989, prior to the theft, SSEF tested and analyzed a Kashmir sapphire and issued a gemological report (SSEF Report Number 21212). In 2015, after the theft, SSEF tested and analyzed the Pawned Sapphire and issued a gemological report (SSEF Report Number 83043). SSEF, therefore, is a fact witness to SSEF Report Number 21212 and SSEF Report Number 83043.

In September 2022, SSEF again tested and analyzed the Pawned Sapphire. On or about September 26, 2022, SSEF issued SSEF Report Number 124631.

SSEF compared the Pawned Sapphire to the Pawned Sapphire it inspected in 2015 (SSEF Report Number 83043) and the Kashmir sapphire it inspected in 1989 (SSEF Report Number 21212). SSEF determined that all three gems were the same. Defendants assert Totah has personal knowledge that the Kashmir sapphire SSEF inspected in 1989 (SSEF Report Number 21212) was the Stolen Sapphire prior to its theft in 1996.

Despite requests by defendants, SSEF, like Gübelin and Totah, has not agreed to voluntarily participate in this matter. As such defendants request that the Court issue a Letter of Request for SSEF Report Number 21212, SSEF Report Number 83043, and SSEF Report Number 124631, testimony to authenticate same, and testimony concerning SSEF's determination in SSEF Report Number 124631 that the sapphires SSEF tested and analyzed in 1989, 2015, and 2022 are all the same.

The Applicable Standards

The United States is party to the Hague Convention. *See* 23 U.S.T. 2555, T.I.A.S. No. 7444; *Sardanis v. Sumitomo Corp.*, 279 A.D.2d 225, 227–28 (1st Dep't 2001); *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 524 (1987)

The Swiss Confederation a/k/a Switzerland is also party to the Hague Convention. *See Voelker v. Bodum USA, Inc.*, 149 A.D.3d 587, 587 (1st Dep't 2017).

Pursuant to Article 1 of the Hague Convention, a court of a nation party to the Hague Convention can request that a court of another nation party to the Hague Convention “obtain evidence” or “perform some other judicial act” for “use in judicial proceedings.” U.S.T. 2555, T.I.A.S. No. 7444 at Article 1.

Pursuant to Article 2 of the Hague Convention, such a request is accomplished by sending a Letter of Request to the receiving nation's Central Authority that, if deeming the Letter of Request appropriate, sends the Letter of Request to the judicial authority "competent to execute" the Letter of Request. *See id.* at Article 2.

For purposes of receiving and transmitting Letters of Request, Switzerland has established a Central Authority. *See Voelker*, 149 A.D.3d at 587. The technical requirements of a Letter of Request are outlined in Article 3 of the Hague Convention. *See U.S.T. 2555, T.I.A.S. No. 7444 at Article 3.*

"The party seeking to pursue discovery through the Hague Evidence Convention bears the burden of demonstrating that proceeding in that manner is 'necessary and appropriate.'" *Metso Mins. Inc. v. Powerscreen Int'l Distribution Ltd.*, 2007 WL 1875560, at *2 (E.D.N.Y. 2007) (*quoting In re Baycol Prod. Litig.*, 348 F. Supp. 2d 1058, 1059 (D. Minn. 2004)).

"That burden is not great, however, since the Convention procedures are available 'whenever they will facilitate the gathering of evidence by the means authorized in the Convention.'" *Metso Mins. Inc.*, 2007 WL 1875560, at *2 (*quoting Societe Nationale Industrielle Aerospatiale*, 482 U.S. at 541).

"[I]n determining whether to employ Hague Convention means . . . a court must look to such factors as considerations of comity, the relative interests of the parties including the interest in avoiding abusive discovery, and the ease and efficiency of alternative formats for discovery." *Madanes v. Madanes*, 199 F.R.D. 135, 141 (S.D.N.Y. 2001) (*citing Societe Nationale Industrielle Aerospatiale*, 482 U.S. at 545–46).

Where the sought evidence is relevant, the evidence's possessors reside outside the United States, are unwilling to volunteer the sought evidence, and not subject to the jurisdiction

of the forum court, and other means of procuring the sought evidence are either difficult or unavailable, a court should grant a party's request to issue a Letter of Request pursuant to the Hague Convention. *See Metso Mins. Inc.*, 2007 WL 1875560, at *2; *In re Baycol Prod. Litig.*, 348 F. Supp. 2d at 1060; *Tulip Computers Int'l B.V. v. Dell Computer Corp.*, 254 F. Supp. 2d 469, 474 (D. Del. 2003).

Plaintiff argues in opposition that defendants' motion should be denied because it deprives them of the opportunity to conduct live-cross-examinations of the witnesses.

Plaintiff's reliance upon *Oscar Gruss & Son v. Lumbermans Mut. Casualty Co.*, 41 F.R.D. 279, 282 (S.D.N.Y. 1966) is misplaced. *Oscar Gruss & Son* does not concern the Hague Convention at all and, perhaps even more significant, predates the Hague Convention altogether. "The United States ratified the [Hague Convention] in 1972," *Murphy v. Reifenhauser KG Maschinenfabrik*, 101 F.R.D. 360 at n.1 (D. Vt. 1984), six years after *Oscar Gruss & Son*.

Moreover, *Oscar Gruss & Son* stands for the following proposition: that under Rules 26 and 28 of the Federal Rules of Civil Procedure, a party should not be permitted to take the deposition of a foreign witness upon written questions without live cross-examination if the witness is under the requesting party's control/influence, self-interested in the matter's outcome, and hostile towards the requesting party's adversary. The court does not find that these witnesses are either hostile to plaintiff or under defendants' control and influence. In fact, it is quite the contrary, it is because the Swiss witnesses have not cooperated with defendants, that defendants seek to invoke the Hague Convention.

The Form of the Letters of Request

The parties disagree as to the appropriate form for the letters. The court finds that the forms submitted by defendants are the forms to be used. The court however directs defendants

to make two changes to said forms. The first is to eliminate any reference to a time deadline of March 30th set by this court. The Court does not find it appropriate to constrict the Swiss Court with such a short time frame given the complexities of the procedure. If the information is obtained past March 30, 2023, the court will still permit the testimony to be used at trial.

The second is to include a request to the Swiss Court for the plaintiff, to be permitted to submit written cross-examination questions. The parties disagree as to whether this will be allowed by the Swiss Court, and in the event the procedure is not allowed, defendants will still be able to use the testimony obtained.

Based on the foregoing the motion is granted.

WHEREFORE it is hereby:

ORDERED that a Letter of Request be issued to the Swiss Confederation pursuant to the Hague Evidence Convention of 18 March 1970 on the taking of evidence abroad in civil or commercial matters (the “Hague Convention”) in the form directed above, to be served on Gübelin AG, a Swiss gemological entity and Gübelin AG’s subsidiary, Gübelin Gem Lab Ltd. (collectively “Gübelin”), for: (1) “microphotographs” of the sapphire believed to be in Gübelin’s possession, custody, or control and (2) testimony from certain Gübelin personnel to authenticate the “microphotographs” as Gübelin business records; and it is further

ORDERED that issuing a Letter of Request be issued to the Swiss Confederation pursuant to the Hague Convention in the form directed above, to be served on Ronny Totah (“Mr. Totah”) of Horovitz & Totah SA, a Swiss gemological entity, for: (1) “microphotographs” of the sapphire believed to be in Mr. Totah’s possession, custody, or control; (2) testimony from Mr. Totah to authenticate the “microphotographs” based on his personal knowledge; and (3)

testimony from Mr. Totah to connect the Stolen Sapphire to SSEF Report Number 21212; and it is further


ORDERED that a Letter of Request be issued to the Swiss Confederation pursuant to the Hague Convention in the form indicated above, to be served on Swiss Gemmological Institute (“SSEF”), a Swiss gemological entity, for: (1) SSEF Report Number 21212, SSEF Report Number 83043, and SSEF Report Number 124631 believed to be in SSEF’s possession, custody, or control; (2) testimony from certain SSEF personnel to authenticate SSEF Report Number 21212, SSEF Report Number 83043, and SSEF Report Number 124631 based on personal knowledge and/or as SSEF business records; and (3) testimony from certain SSEF personnel regarding SSEF’s determination in Report Number 124631 that the sapphires tested and analyzed by SSEF in Report Number 21212, SSEF Report Number 83043, and SSEF Report Number 124631 are the same sapphire; and it is further

ORDERED that, within 20 days from entry of this order, defendants shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

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3/14/2023
DATE

SABRINA KRAUS, 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