SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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MICHA HERTZANO, MARIANA HERTZANO, ORLY FIDELMAN, M&M VENTURES (2014) LTD., LEMADA LIGHT INDUSTRIES, M&M VENTURES LIMITED

Plaintiffs,

- v -

PRESSMAN TOY CORPORATION,

Defendant.

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INDEX NO. 654488/2023

MOTION DATE 01/29/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

were read on this motion to/for DISMISS.

Defendant's motion to dismiss is denied.

Background

This action involves plaintiffs' effort to recognize a foreign judgment they obtained in Israel against defendant. They insist that they own certain intellectual property rights related to a terrific game called Rummikub. Plaintiffs admit that plaintiffs Micha and Mariana Hertzano entered into a trademark licensing agreement with defendant in 1997 for the exclusive right to manufacture, market, distribute and sell the game in the United States and Canada. They insist that the agreement was terminated by plaintiffs in December 2019.

Thereafter, plaintiffs allege that defendant refused to recognize this termination and so, in accordance with the license agreement, they pursued an action in Israel for declaratory relief that defendant's rights under the agreement were terminated. Plaintiffs argue that defendant

appeared and participated in this action, including at the trial. They contend that an Israeli Court issued a final judgment in June 2023 in plaintiffs' favor.

In this motion, defendant moves to dismiss the complaint. It contends that the Israeli judgment is on appeal and plaintiffs seek broader relief here than what was granted in Israel. Defendant argues that plaintiff's first cause of action for "recognition of a foreign judgment" does not exist under New York law with respect to foreign non-money judgments. It argues that plaintiff's second cause of action for a permanent injunction is also not a cause of action, but a remedy. It also argues that the Israeli judgment is unenforceable, meaning that there is no mechanism in the judgment to ensure compliance.

Defendant points out that the connection to this case of certain plaintiffs (Fidelman, M&M 2014, Lemada and M&M Limited) is unexplained in the complaint and it argues they are not parties to the licensing agreement. In the alternative, defendant argues that this Court should stay this matter until the Israeli appeals process is over.

In opposition, plaintiffs argue that New York court recognize foreign judgments under principles of comity. That is, as long as the foreign judgment is procured under a fair process, New York courts will enforce it. They insist that there is no question that the Israeli Court provided a fair process and so they have stated a cause of action to recognize a foreign judgment.

Plaintiffs also insist that they have stated a cognizable cause of action for a permanent injunction by alleging that defendant continues to violate the Israeli Court's judgment by continuing to import the game into the United States. They argue they all have standing to pursue this case because the Israeli Court issued a judgment in their favors.

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]).

Cognizable Cause of Action

The first issue this Court must consider is whether plaintiffs have stated a cognizable legal theory. To be sure, defendant is absolutely correct that the titles of the causes of action in the complaint (recognition of foreign judgment and a permanent injunction) are not stand alone causes of action. While parties often move to domesticate foreign *money* judgments (usually in the form of a motion for summary judgment in lieu of complaint), that is not the case here and plaintiffs did not cite a case involving a claim for "recognition of a foreign money judgment." And, as defendant pointed out, a permanent injunction is a remedy for an underlying claim, not a separate cause of action (*Talking Capital LLC v Omanoff*, 169 AD3d 423, 424, 94 NYS3d 31 [1st Dept 2019]

However, even where claims are "inartfully pleaded, a claim should not be dismissed when the facts stated are sufficient to make out a cause of action" (*Houtenbos v Fordune Assn., Inc.*, 200 AD3d 662, 160 NYS3d 57 [2d Dept 2021]). Here, the Court's focus is on the alleged facts, not the labels plaintiffs used for their claims. The facts clearly make out a cause of action for declaratory relief—namely that defendant should be barred from manufacturing, marketing,

distributing, or selling Rummikub in the United States and Canada on the ground that an Israeli Court has already made the determination that their right to do so was terminated. That is, under the principle of res judicata, plaintiffs have alleged they are entitled to declaratory relief, including a permanent injunction, that reflects the Israeli judgment.

Comity

The next key issue is this Court's recognition of a foreign non-money judgment. Certainly, defendant emphasizes that Article 53 of the CPLR only applies to foreign money judgments. And it argues that Courts generally do not enforce declaratory judgments issued by courts in foreign countries.

However, the Court finds that plaintiffs satisfied their burden, at least on a motion to dismiss, to allege that this Court should enforce the Israeli judgment. They pointed to cases where foreign non-money judgments were recognized in New York (*e.g., Watts v Swiss Bank Corp.*, 27 NY2d 270, 317 NYS2d 315 [1970] [applying the principle of res judicata to a French declaratory judgment]).

Moreover, the Court finds that the principles of comity compel the Court to deny the motion to dismiss. "The doctrine of comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states. It is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience" (*J-K Apparel Sales Co., Inc. v Jacobs*, 189 AD3d 1011, 138 NYS3d 80 [2d Dept 2020] [internal quotations and citations omitted]).

"[T]he inquiry turns on whether exercise of jurisdiction by the foreign court comports with New York's concept of personal jurisdiction, and if so, whether that foreign jurisdiction shares our notions of procedure and due process of law. If the above criteria are met, 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 78, 83, 817 NYS2d 600 [2006] [discussing comity in an Article 53 setting]).

Here, plaintiffs allege that defendant entered into an agreement regarding Rummikub in the United States and Canada; that agreement had a forum selection clause requiring disputes regarding the agreement to be handled in Israel and to apply Israeli law. Plaintiffs also allege that defendant appeared and participated in the Israeli proceeding.

Defendant did not submit any documentary evidence to show that the subject licensing agreement does not contain these choice of law or forum selection clauses. Nor did it claim that it did not have a chance to meaningfully participate in the Israeli case. The Court declines to grant a motion to dismiss where defendant apparently agreed to litigate (and did actually litigate) the instant dispute in Israel. Of course, the fact that the licensing agreement (according to the complaint) involved the United States and Canada but required a dispute to be handled in Israel invited the instant litigation and raised the recognition of foreign judgments issue. But that seemingly inevitable complication is not a basis to dismiss.

Defendant's arguments that plaintiffs did not "prove" that the Israeli judgment is enforceable under Israeli law or that the Israeli judgment is final are not bases to dismiss. Plaintiffs need not prove anything in opposition to a motion to dismiss. They merely have to allege a cognizable cause of action. And they have done so here. They attached a judgment in

which the Israeli Court found that they "were entitled to terminate the agreement with a termination notice" (NYSCEF Doc. No. 2 at 52).

Other Issues

The Court finds that all plaintiffs all have standing to bring this case as they were all named in the Israeli case (NYSCEF Doc. No. 2 at 1) and the decision did not grant relief to only certain plaintiffs.

To the extent that the parties argue about the scope of the injunctive relief, the Court finds that this dispute is premature. The exact scope of any injunctive relief, should plaintiffs ultimately prevail, can be decided at a later date.

The final issue raised is whether or not this Court should stay this case pending defendant's appeal in Israel. Plaintiffs point out that defendant has not requested that the Israeli Court stay the Israeli judgment pending an appeal even though that relief is available. In reply, defendant argues in a footnote that is has not sought to "stay that judgment because it is declaratory and currently unenforceable" (NYSCEF Doc. No. 31 n 11).

Admittedly, this Court is not an expert in Israeli law nor would it be appropriate for this Court to opine on the issue of the enforceability of the Israeli judgment (that would seem to be a key part of defendant's appeal) at this stage of the case. However, the Court sees no reason to impose a stay as defendant has seemingly made the decision not to seek a stay before the Israeli Court. Defendant does not argue that it is prohibited from seeking a stay; rather, it seems it has made a strategic decision not to do so. Of course, should an Israeli Court grant a stay, this Court will certainly entertain another motion seeking that relief here.

Summary

The transnational nature of the instant dispute raises numerous issues of international law. Both parties included submissions from Israeli lawyers (NYSCEF Doc. Nos. 11, 29). However, the instant decision concerns only a motion to dismiss. This Court makes no conclusive findings about Israeli law; it merely finds that plaintiffs have stated a cognizable cause of action.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss or for a stay is denied and it shall answer pursuant to the CPLR.

Conference: March 28, 2024. By March 21, 2024, the parties are directed to upload 1) a stipulation concerning discovery signed by all parties, 2) a stipulation of partial agreement that identities the areas in dispute or 3) letters explaining why no agreement could be reached. Based on these submissions, the Court will assess whether or not an in-person conference is necessary. The failure to upload anything will result in an adjournment of the conference.

2/7/2024
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE