

Harvardsky Prumyslovy Holdings, A.S.-V Likvidaci v Kozeny
2017 NY Slip Op 30227(U)
February 2, 2017
Supreme Court, New York County
Docket Number: 651826/2012
Judge: Ellen M. Coin
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: I.A.S. PART 63

-----X
 HARVARDSKY PRUMYSLOVY
 HOLDINGS, A.S. – V LIKVIDACI,

Plaintiff,

- against -

VIKTOR KOZENY and
 LANDLOCKED SHIPPING COMPANY,

Defendants.
 -----X

Index No. 651826/2012
DECISION & ORDER
 (Motion Seq. 008)

HON. ELLEN M. COIN

Recitation (CPLR 2219 [a]) of papers considered on this motion:

PAPERS	EXHIBITS	NYSCEF DOC. NO.
Notice of Motion		225
Carey Affirmation in Support	1-3	226-229
Kozeny Affidavit in Support		230 & 236
Zac Affidavit in Support	1-2	231-233
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In this action, plaintiff Harvardsky Prumyslovy Holdings, A.S. – V Likvidaci (HPH) seeks recognition and enforcement of a judgment from the Czech Republic against defendant Viktor Kozeny (Kozeny) pursuant to New York's Recognition of Foreign Country Money

Judgments Act, CPLR 5301 et seq. Defendant Kozeny now moves, pursuant to CPLR 3211 (a) (1), (7) and (8), to dismiss the amended complaint.

FACTUAL ALLEGATIONS

Kozeny was born in Prague, Czech Republic. Amended complaint, ¶ 13. He left the Czech Republic in January 1994, and emigrated to the Commonwealth of the Bahamas, where he currently resides. *Id.*, ¶ 50; Kozeny aff, ¶ 30. He became an Irish naturalized citizen in 1995. Kozeny aff, ¶ 30. In 2001 and 2002, the Czech police and authorities allegedly gave notice to Kozeny that they were conducting a criminal fraud investigation and commencing prosecution of him in Prague concerning a series of fraudulent transactions arising out of the Czech Privatization Program. Amended complaint, ¶¶ 52-53. Kozeny allegedly induced Czech citizens, who had coupons to purchase shares of newly-privatized companies, to transfer their coupons to six investment funds he created using the name “Harvard” (HIF), so that he could invest them, purportedly on their behalf. *Id.*, ¶¶ 1, 2, 27. Instead, Kozeny was accused of stripping HIF, together with the Czech glass company Sklo Union, a.s. (collectively, the Harvard Companies), of their assets and transferring them to offshore entities he created and controlled. *Id.*, ¶¶ 1, 3. HPH contends that is the legal successor of the Harvard Companies, all of which were merged into HPH. *Id.*, ¶ 1. Kozeny is alleged to have read and understood the notices and received legal counsel concerning them, but chose not to respond because he knew he was guilty of the crimes charges. *Id.*, ¶¶ 52-54. Kozeny, through legal counsel, filed two separate petitions in 2004 in the Czech Constitutional Court to stop the criminal proceeding without his physical presence in court, but both petitions were denied. *Id.*, ¶¶ 62.

On June 15, 2006, the High Prosecuting Attorney’s Office in Prague indicted Kozeny and Boris Vostry (Vostry), the former director of HPH, for criminal fraud (Indictment). Amended

complaint, ¶ 55. HPH alleges that Kozeny received notice of the indictment almost immediately after it was issued, and asked his legal counsel to publish the indictment on the Internet. *Id.*, ¶ 56; *see also* Belohlavek 9/5/12 aff, Annex 1. HPH, with approximately 250,000 shareholders, joined in the Czech proceeding as an injured party.

Kozeny was prosecuted and tried in absentia after the Bahamian government refused extradition. Amended complaint, ¶¶ 13, 37, 54, 61, 69. On July 9, 2010, after a lengthy trial on the charges in the indictment, the Municipal Court in Prague found Kozeny and Vostry guilty of criminal fraud. *Id.*, ¶¶ 37-38. During the trial, Kozeny was represented by court-appointed legal counsel, and he allegedly communicated with such legal counsel and participated in all aspects of the Czech Municipal Court proceeding. *Id.*, ¶ 60. Kozeny was sentenced to 10 years' imprisonment, and HPH was awarded CZK 8,289,933,074.05 (approximately U.S. \$410 million) (Original Czech Judgment), which the court denominated as "compensation for damage to the victim." *Id.*, ¶¶ 37-40. In reaching its judgment, the Municipal Court examined more than 60,000 pages of documentary evidence, and heard testimony from over a dozen witnesses. *Id.*, ¶ 41.

Through counsel, Kozeny appealed the Original Czech Judgment to the High Court in Prague (the High Court), challenging both the factual findings and legal conclusions of the Municipal Court. Amended complaint, ¶ 43. On October 17, 2012, the High Court rejected Kozeny's arguments, proceeding to correct minor computational errors by the Municipal Court in calculating certain categories of damages. For procedural reasons peculiar to Czech law, the High Court revoked the Original Czech Judgment, and rendered it again, awarding HPH CZK 8,288,990,584 plus statutory interest against Kozeny (the Czech Judgment). *Id.*, ¶ 43. With respect to the absence of the two defendants from the proceeding, the High Court stated:

“The court of appeal also did not find it erroneous that from the beginning of the criminal prosecution, a proceeding against both defendants as fugitives from justice was being conducted pursuant to Chapter XX, Part II (Section 302 et seq.) of the Code of Criminal Procedure, according to which a proceeding may be conducted against a person who avoids being prosecuted by dwelling abroad or by hiding. A person may be qualified as avoiding criminal proceedings by dwelling abroad, if he or she leaves the territory of the Czech Republic with this intent and it is impossible under international treaties to ask a foreign country to assume the criminal prosecution of that particular person who dwells abroad in order to avoid criminal prosecution for a crime committed in the Czech Republic, or if there are no grounds for handing the case over to a foreign court (Section 448 of the Code of Criminal Procedure) and if it is also out of question [sic] to request extradition from abroad (Section 383 et seq. of the Code of Criminal Procedure) or to request that the case be handed over from one EU member state to the Czech Republic (cf. Section 405 et seq. of the Code of Criminal Procedure). In the case at hand, both defendants left the Czech Republic, and, although they communicate with the authorities involved in the criminal proceedings, they refused to comply with the acts of the criminal proceeding, and this is why all attempts of the authorities involved in the criminal proceedings to attain their extradition for criminal prosecution have failed. There is therefore no doubt that all conditions for a proceeding against a fugitive from justice pursuant to Section 302 et seq. of the Code of Criminal Procedure have been fulfilled in respect of both defendants”

Czech Judgment, sheet 36.

HPH commenced this action on May 25, 2012, seeking enforcement of the compensation award of the Czech Judgment against Kozeny. This action also seeks recognition and enforcement of the Czech Judgment against the assets of defendant Landlocked Shipping Company (Landlocked) as Kozeny’s alter ego, including approximately \$22 million in cash held in Landlocked’s name in bank accounts at Wells Fargo Bank. Amended complaint, ¶ 4. These funds are the proceeds (plus accrued interest) of the 2001 sale of Kozeny’s luxury home in Aspen, Colorado (known as the Peak House). *Id.*, ¶ 5. HPD alleges that Kozeny bought the Peak House in 1997 with money that he embezzled from HPH in 1995 and 1996. *Id.* Due to successive restraining orders issued by two separate federal courts and in the instant action, the proceeds of the Peak House sale have been frozen continually since they were first deposited, in Landlocked’s name, with Wells Fargo in 2001. *Id.*, ¶ 6. By decision and order dated April 1,

2014, the Appellate Division, First Department granted HPH's motion to attach and restrain the proceeds for the pendency of the instant action. *Harvardsky Prumyslovy Holdings, A.S.-V Likvidaci v Kozeny*, 117 AD3d 77 (1st Dept 2014).

DISCUSSION

Kozeny argues that he is entitled to pre-answer dismissal of the amended complaint based on the two "non-recognition" provisions of Article 53: (1) the judgment was rendered under a legal system which does not provide impartial tribunals or procedures compatible with due process (CPLR § 5304 [a] [1]); and (2) the foreign court had no personal jurisdiction over the defendant (CPLR § 5304 [a] [2]). Kozeny further appears to argue that he did not receive sufficient notice of the Czech proceeding to enable him to mount a defense.

CPLR § 5404 (b) (2). Finally, Kozeny contends that the Czech Judgment is not "final" within the meaning of CPLR § 5302.

HPH opposes, arguing that the Appellate Division has already ruled that the Original Czech Judgment is entitled to recognition and enforcement under Article 53, and that this holding is binding against Kozeny. HPH further argues that dismissal based on documentary evidence is unwarranted; that the amended complaint properly states a claim for enforcement and recognition of the Czech Judgment; that because Kozeny appeared in the Czech proceeding and argued the merits of his defense, he is barred from claiming non-recognition for lack of personal jurisdiction in the Czech courts; and finally, that the amended complaint sufficiently alleges personal jurisdiction over him pursuant to CPLR §§301 and 302 and the issue cannot be decided without conducting some jurisdictional discovery.

The Prior Appeal

The Appellate Division's decision and order does not resolve the issues on this motion. Kozeny was not served with process in this action until well after the Appellate Division's ruling and did not participate in that appeal. The only issue addressed by the Appellate Division was whether the Original Czech Judgment is unenforceable under CPLR Article 53, because it was rendered by a criminal court, and thus should be considered a "fine or other penalty" within the exclusionary language of CPLR § 5301 (b). *See Harvardsky Prumyslovy Holdings, A.S.-V Likvidaci v Kozeny*, 117 AD3d at 80-83. The court offered that a judgment in restitution may also serve a penal purpose without violation of Article 53.

Impartial Tribunal and Procedures to Ensure Due Process

Kozeny contends that the Czech Judgment was not the product of a fair and impartial tribunal. In support of his motion to dismiss, his counsel cites extracts taken from country-specific reports created by the United States Department of State, Bureau of Democracy, Human Rights and Labor (DRL Reports). These extracts state that there was "widespread corruption at all levels of the government" in the Czech Republic, including "allegations of judicial corruption," between the years 2005 and 2013. *See* Kozeny's Memorandum of law at 12-14. Kozeny argues that these reports¹ are admissible pursuant to CPLR 4511 and Federal Rules of Evidence rule 803 (8). Kozeny also alleges that he has been a victim of Czech government political attacks both before and after his emigration. *See* Kozeny aff, ¶¶ 20-28. HPH, in opposition, argues that no admissible evidence has been offered to support non-recognition of the Czech Judgment pursuant to CPLR § 5304 (a) (1).

¹ The full reports were submitted with Kozeny's reply papers.

In *Bank Melli Iran v Pahlavi* (58 F3d 1406, 1411–1412 [9th Cir], *cert denied* 516 US 989 [1995]), evidence was submitted on summary judgment that Iranian trials were highly politicized, that the government did not believe in an independent judiciary, that the judiciary was biased, and that the defendant, sister of the deposed Shah, could not possibly have gotten a fair trial in Iran. In *Bridgeway Corp. v Citibank* (45 F Supp 2d 276, 287 [SD NY 1999], *affd* 201 F3d 134 [2d Cir 2000]), on summary judgment the court considered evidence that the Liberian Constitution had been suspended; that corruption and incompetence in handling of legal cases was prevalent; and that litigants' due process rights were frequently ignored. Notably, in both of these cases, the district court accepted, as admissible evidence, DRL reports for the countries in question. In *Bridgeway* the issue of their admissibility was raised on appeal, and the Second Circuit ruled that, although hearsay, the DRL reports were admissible as “factual findings resulting from an investigation made pursuant to authority granted by law” pursuant to FRCP 803 (8). *Bridgeway Corp.*, 201 F2d at 143-144; *cf. Gryphon Domestic VI, LLC v APP Intl. Fin. Co., B.V.*, 41 AD3d 25, 38 (1st Dept 2007) (DRL report considered in proceeding for turnover of assets located in Indonesia). Indeed, a judgment debtor must establish that it is the foreign country's judicial system that does not provide impartial tribunals or procedures compatible with due process, rather than the legal processes followed in a particular litigation. *See CIBC Mellon Trust Co. v Mora Hotel Corp.*, 296 AD2d 81, 89 (1st Dept 2002), *affd* 100 NY2d 215, *cert denied*, 540 US 948 (2003). Without resort to government reports such as these DRL reports, a judgment debtor may be hard-pressed to prove this defense.

The court is not, however, addressing a summary judgment motion. Rather, this is a pre-answer motion to dismiss pursuant to CPLR 3211 (a) (1) and (7). Although the court rules that the DRL Reports herein [not the extracts] are admissible evidence, they clearly do not meet the

standard for dismissal of the amended complaint based on documentary evidence (*see Goshen v Mutual Life Ins. Co.*, 98 NY2d 314, 326 [2002] [evidence must utterly refute the plaintiff's allegations, conclusively establishing a defense as a matter of law]), particularly since they were submitted on reply. *Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 381 (1st Dept 2006). A review of the full text of the DRL Reports reveals that the judicial system in the Czech Republic is not deemed as unfair as Kozeny's extracts would lead us to believe. *See* Carey reply affirmation, exhibit 11: 2011 DRL at 3 ("The laws provides for the right to a fair trial, and the independent judiciary generally enforced this right.") It is also well established that affidavits do not qualify as documentary evidence which will support a motion to dismiss under CPLR 3211 (a) (1). *See Williamson, Picket, Gross, Inc. v Hirschfeld*, 92 AD2d 289, 290 (1st Dept 1983); *see also Summer v Severance*, 85 AD3d 1011 (2d Dept 2011). For these reasons, Kozeny has not established a basis for dismissal of the amended complaint pursuant to CPLR § 5304 (a) (1).

Personal Jurisdiction

CPLR § 5305 expressly limits the scope and meaning of the personal jurisdiction requirement of CPLR § 5304 (a) (2). *John Galliano, S.A. v Stallion, Inc.*, 15 NY3d 75, 80, *cert denied* 562 US 893 (2010). CPLR § 5305 (a)(2) provides that a foreign country judgment shall not be refused recognition for lack of personal jurisdiction if the defendant voluntarily appeared in the proceedings (CPLR § 5305 [a] [2]).

New York courts liberally construe Article 53 in favor of recognition and enforcement of foreign-country money judgments. *CIBC Mellon Trust Co. v Mora Hotel Corp. N.V.*, 100 NY2d at 221; *Abu Dhabi Commercial Bank PJSC v Saad Trading, Contr. & Fin. Servs. Co.*, 117 AD3d 609, 610 (1st Dept 2014). Thus, CPLR § 5305 (a) (2) "foreclose[s] a defendant from contesting a

foreign judgment for lack of personal jurisdiction once the defendant has done anything more than it had to do [before the foreign court] to preserve its jurisdictional objection.” *CIBC Mellon Trust*, 100 NY2d at 223, citing *S.C. Chimexim S.A. v. Velco Enters. Ltd.*, 36 F Supp 2d 206, 215 (SD NY 1999), and *Nippon Emo-Trans Co., Ltd. v. Emo-Trans, Inc.*, 744 F Supp 1215, 1222-1226 (ED NY 1990). Moreover, *CIBC Mellon Trust* specifically held that even a defendant’s “skeletal argument” to a foreign court concerning the merits of an underlying foreign judgment constitutes a voluntary appearance under CPLR 5305 (a) (2), even if such argument is made post-judgment and on appeal. *Id.* at 224-226, citing Restatement (Second) of Conflict of Laws § 33, Comment b.

HPH contends that it is undisputed that Kozeny, through counsel, extensively argued the merits of his defense to the Czech High Court, arguments meticulously addressed by the High Court, as reflected in the Czech Judgment at sheets 30 through 33. HPH thus contends that non-recognition of the Czech Judgment on the basis of lack of personal jurisdiction is barred as a matter of law. HPH further contends that even if the Czech court did not have personal jurisdiction over Kozeny, the amended complaint adequately alleges personal jurisdiction by this court over Kozeny pursuant to CPLR 301 and 302.

The only claim being asserted against Kozeny in the amended complaint is recognition and enforcement of the Czech Judgment. Thus, the issue is not whether this court has personal jurisdiction over the defendant in New York in accordance with CPLR Article 3, but whether the foreign court had personal jurisdiction over the judgment debtor within the meaning of CPLR §§ 5304 and 5305. *Abu Dhabi Commercial Bank PJSC v Saad Trading, Contr. & Fin. Servs. Co.*, 117 AD3d at 611; *Lenchyshyn v Pelko Elec., Inc.*, 281 AD2d 42, 47 (4th Dept 2001) (issue of whether there was any basis for the exercise of personal jurisdiction over a judgment debtor in

New York “immaterial”). Accordingly, Kozeny’s motion to dismiss for lack of personal jurisdiction pursuant to CPLR § 3211(a)(8) is denied.

It is undisputed that Kozeny was tried *in absentia*, having left the Czech Republic in January 1994, and having emigrated to the Commonwealth of the Bahamas. Kozeny argues that on January 31, 2002, the Czech Republic delivered a request to the Bahamas to serve a notice on him. Kozeny aff, ¶ 38. However, the content of the documents allegedly was not disclosed to Kozeny or his counsel and, according to the affidavits of his expert witnesses, the Czech Republic allegedly did not follow the proper procedure for service on him. Zak aff, ¶¶ 75-76; Moree aff., ¶¶ 3-7. Kozeny also avers that he was denied re-entry into the country shortly after July 7, 2004, about two years before the indictment, that this was his last communication with Czech authorities, and that he was denied the opportunity to collect physical evidence. Kozeny aff, ¶¶ 46-47. According to the moving affidavit of Rostislav Zak, Kozeny’s expert, under Czech law a fugitive is any person who avoids criminal proceedings by staying abroad, citing section 302 of the Code of Criminal Procedure (Czech Crim. Proc. Code). Zak further notes that no documents must be served on a fugitive as a prerequisite to prosecution even when the person’s address abroad is known, and, pursuant to Czech Crim. Proc. Code sections 302 and 305, all documents are normally served on court-appointed counsel. Zak aff, ¶¶ 10, 11 & 14.

Kozeny argues that in order for this court to recognize the Czech Judgment, HPH was required to establish that the Czech Republic personally served Kozeny with the Indictment, and that service on his court-appointed counsel was insufficient as a matter of law. Here the amended complaint alleges that Kozeny was represented by legal counsel in the Prague action, communicated with counsel and participated in all aspects of the Prague action (¶ 60). In addition, Kozeny sought to stop the Prague action via two petitions in the Czech Constitutional

Court and appealed from the Czech judgment (§§ 62, 63). These allegations sufficiently set forth voluntary appearances in the Czech proceedings within the meaning of CPLR § 5305(a)(2).

CIBC Mellon Trust Co. v Mora Hotel Corp. n.v., 100 NY2d at 225. Accepting as true the facts alleged in the amended complaint, and affording plaintiff every favorable inference (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), the motion to dismiss for failure to state a cause of action must be denied.

Not a Final Judgment

Finally, Kozeny maintains that the Czech Judgment is not “final, conclusive or enforceable” within the meaning of CPLR § 5302. He contends that Czech law guarantees a “fugitive” the right to demand a retrial, ab initio, upon submitting to the jurisdiction of the Czech court, citing section 306a of the Czech Crim. Proc. Code. *See Zak aff.*, at 27-28. However, as HPH’s own expert points out, “a new trial is possible only if the sentenced person ceases to be a fugitive – for example, by personally returning to the Czech Republic, and formally requesting a new trial. [Kozeny] has never done so.” *Belohlavek 3/23/16 aff.*, ¶ 4. Kozeny submits two affidavits in support of this motion, but in neither affidavit does he indicate that he has any plans to return to the Czech Republic to demand a new trial. To the contrary, he describes himself as a “permanent resident of the Bahamas.” *Kozeny reply aff.*, ¶ 17. Since the possibility of an appeal does not render a judgment non-final within the meaning of CPLR § 5303, the remote possibility of Kozeny demanding a retrial is also not an impediment to this court’s recognition of the judgment. Thus, the Czech Judgment is final, conclusive and enforceable within the meaning of CPLR § 5302.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion of defendant Viktor Kozeny to dismiss the amended complaint is denied; and it is further

ORDERED that defendant Viktor Kozeny is directed to file an answer to the amended complaint within thirty (30) days of service of a copy of this order with notice of entry.

Dated: February 2, 2017

ENTER:



ELLEN M. COIN, A.J.S.C.