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| <b>Liberty Seguros S.A. v Fagioli</b>  |
| 2017 NY Slip Op 30745(U)   |
| April 17, 2017   |
| Supreme Court, New York County   |
| Docket Number: 154502/2014   |
| Judge: Gerald Lebovits   |
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: PART 7**

LIBERTY SEGUROS S.A. a/s/o  
GENERAL ELECTRIC COMPANY,

Plaintiff,

Index No. 154502/2014  
**DECISION/ORDER**

-against-

FAGIOLI S.p.A. and  
TRANSDATA TRANSPORTES LTDA,

Defendants.

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing plaintiff's motion to stay this action, defendant's cross-motion to vacate the temporary stay of this action and to enjoin further litigation in Brazil, and plaintiff's motion to reargue the issue of the application of the forum-selection and choice-of-law provisions in the Master Service Agreement between General Electric and Defendant Fagioli.

| <b>Papers</b>  | <b>Numbered</b> |
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| Plaintiff's Notice of Motion.....  | 1               |
| Plaintiff's Memorandum of Law in Support of Motion for Leave Renew and Reargue.....  | 2               |
| Defendant's Notice of Cross-Motion to Vacate Stay and to Enjoin Any Further Litigation in Brazil.....  | 3               |
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*Clyde and Co. US, LLP* (John R Keough and Casey D. Burlage of counsel), for defendant Fagioli.

Gerald Lebovits, J.

Motion Sequences 001, 002, 003, and 004 are consolidated for disposition.

This court's September 15, 2016 interim order temporarily stayed this action and granted a preliminary injunction enjoining Plaintiff Liberty Seguros (Liberty) from further prosecuting

its Brazilian action against Defendants Fagioli and Transdata. Upon reargument, Liberty seeks to continue to stay this action pending resolution of Liberty's appeal in Brazil and to deny Fagioli's cross-motion seeking an injunction barring Liberty from further prosecution of the Brazilian action.

Fagioli cross-moves to vacate the temporary stay order and for the injunctive relief, barring Liberty from continuing to prosecute its suit in Brazil against Fagioli, that they previously sought in Motion Sequence #001 (see below).

For the reasons set forth below, the stay order is renewed, Liberty's motion to reargue is denied, and Fagioli's motion to enjoin the prosecution of the suit in Brazil is denied. Moreover, as explained below, in continuing the stay, the court grants Liberty's motion to quash subpoenas (Motion Sequence #002) and denies Liberty's motion for default judgment against Transdata (Motion Sequence #003).

### **Background**

In 2009, Fagioli entered into a Master Servicing Agreement (MSA) with General Electric, agreeing to provide General Electric with transportation services as later described in either a Company Purchase Order or a Statement of Work. The MSA contained both a choice-of-law provision specifying that New York law would apply to any disputes and a forum-selection clause, again designating New York. The parties issued a Statement of Work on June 29, 2011, under which General Electric hired Fagioli to transport a generator to a Brazilian customer, Ute Paranaiba. Fagioli, in turn, hired its Brazilian agent, Transdata, to transport the generator from Port Itaquí, Brazil, first to a temporary storage site designated "Pedreira" and later to its final destination in Santo Antonio dos Lopes.

A mishap occurring during the course of Transdata's shipment of the generator caused extensive damage to the generator. Pursuant to an insurance contract, General Electric recovered \$7,000,000 from its insurer, Liberty Seguros.

Liberty seeks to recover from defendants based on subrogation rights conveyed in its insurance policy with General Electric. The policy contains a "Waiver of the Right of Recourse (DDR) Clause" (Waiver Clause) limiting Liberty's subrogation rights.<sup>1</sup> Under the Waiver Clause, Liberty reserves subrogation rights for claims falling within certain exceptions. The central, underlying issue in this litigation is whether this claim falls within an enumerated exception.

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<sup>1</sup> Liberty Seguros Policy (English Translation), Exhibit 9 to plaintiff's Affirmation in Support of Motion for Leave to Renew and Reargue, at \*47. The Waiver Clause specifies that the waiver applies to damage occasioned "on stretches of highway prior to the principal voyage." The parties evidently assume that the incident in question occurred "prior to the principal voyage" inasmuch as the cargo was, at the time of the incident, en route to a temporary storage site rather than its final destination.

In December 2013, Liberty sued Fagioli and Transdata in Brazil, alleging negligence in the transport of the generator and seeking recovery for damages to the generator. In its answer, Fagioli contested the Brazilian court's jurisdiction based on the MSA's forum-selection clause. In May 2014, while Fagioli's challenge to the Brazilian court's jurisdiction was pending, Liberty commenced this action in New York. Although both Fagioli and Transdata were named as defendants, Transdata has yet to appear in the New York action. Liberty moved to stay the New York action pending the outcome of the Brazilian action. Fagioli cross-moved to enjoin Liberty from prosecuting the suit in Brazil. (Sequence #001) Having moved to stay, Liberty moved to quash Fagioli's subpoenas in the New York action. (Sequence #002) Liberty further moved for default judgment against Transdata. (Sequence #003)

This court's September 15, 2016, interim order issued an anti-suit injunction barring Liberty from continuing its prosecution of the suit in Brazil, conditioned upon Transdata's appearing in the New York suit within 60 days of the order. The order also granted a 60-day stay of the New York action on the condition that if Transdata did not appear, Liberty's motion to stay the action would be granted in full. As noted above, now, months later, Transdata has still not appeared.

On October 17, 2016, the Brazilian trial court decided on the merits in defendants' favor. That court determined that the Waiver Clause contained in the insurance policy barred Liberty's subrogation remedies, holding the Waiver Clause's enumerated exceptions inapplicable. Liberty appealed to a Brazilian appellate court.

## **Discussion**

### **A. Fagioli's Motion to Enjoin Suit**

As noted in the interim order, a movant for injunctive relief must demonstrate (1) a likelihood of success on the merits, (2) danger of irreparable harm absent injunctive relief, and (3) a favorable balance of the equities. (Interim Order at \*4, citing *Platinum Equity Advisors, LLC v. SDI, Inc.*, 132 AD3d 420, 420-421 [1st Dept 2015] & *Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005].)

#### *Likelihood of Success on the Merits*

In its interim order, this court held that Fagioli satisfied the first prong. Noting the validity of the relevant provisions of the MSA and New York precedent limiting a subrogee's remedies to those available to the subrogor, this court concluded that Fagioli will likely succeed in its pending attempt to convince the Brazilian court to decline to hear the case on the merits. Interim Order at \*6. As Liberty notes, this conclusion is undermined because the Brazilian court has now decided the merits.

But the court's earlier analysis of Fagioli's likelihood of success is irrelevant for a more basic reason. Fagioli seeks to enjoin Liberty's Brazilian appeal. Accordingly, Fagioli's likelihood of success now is its likelihood of successfully defending the appeal.

The Brazilian trial court rested its decision on a narrow construction of several exceptions in the Waiver Clause. That court’s reasoning, as argued in Liberty’s Brazilian appellate papers, is plausibly assailable.

The Brazilian trial court first construed the exception as not requiring that the deficient state of the vehicle causing the harm (“[I]t matters little how and for what reason the generator fell to the ground”), only to state in the ensuing paragraph that the exception did not apply because the defects did not cause the damage (“[T]hey are not shown to be determining [sic] for the occurrence of the accident/claim.”). (Brazilian Trial Court Decision (English Translation), Exhibit B to Plaintiff’s Affirmation in Support of Motion for Leave to Renew and Reargue, at \*10.) The Brazilian trial court also found that the exception arising when the “carrier vehicles compatible and suitable for the weight and size of the cargo are not used” did not apply inasmuch as the transporting truck was suited to bear the weight of the generator if configured with four transverse beams rather than two beams, as actually occurred. (*Id.* at 12.)

Although this court is reluctant to challenge a foreign court’s interpretation of its own jurisdiction’s law, the Brazilian court’s construction of the Waiver Clause rests entirely on the court’s own logic and proffers little support from Brazilian primary or secondary authority. It appears that an appellate court may reasonably differ with the trial court, concluding that an improperly configured vehicle is not “compatible and suitable.”

These possible flaws in the trial court’s reasoning call into question the likelihood that Fagioli will ultimately succeed in defending the appeal. Because Fagioli cannot demonstrate likelihood of success on the merits, the motion to enjoin the appeal must be denied.

*Danger of Irreparable Harm and Balance of Equities*

Fagioli’s failure to demonstrate a likelihood of success on the merits requires this court to deny the motion. But this court notes that Fagioli would similarly have difficulty satisfying the remaining two prongs. The interim order acknowledged the hardship that would result to Fagioli in forcing it to defend a suit abroad,<sup>2</sup> a contingency that concerned Fagioli sufficiently to include a forum-selection clause in the MSA. (Interim Order at 5-6.) Upon dismissing the suit, however, the Brazilian Trial Court awarded costs and attorney fees to Fagioli. (Defendant’s Memorandum of Law at \*5; Plaintiff’s Affirmation in Support of Motion at \*4.) This mitigates Fagioli’s claim to irreparable harm absent an injunction.

Moreover, the interim order recognized that absent Transdata’s appearance in the New York action, Liberty was justified in seeking redress against both defendants abroad. (Interim Order, at \*7.) As Transdata has yet to appear in the New York action, it would remain inequitable to enjoin Liberty from proceeding in Brazil. This is an additional reason to deny Fagioli’s motion: the equities do not balance in Fagioli’s favor.

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<sup>2</sup> A scrivener’s error appears on page 6 of the Interim Order. The Order states that “[s]econd, Fagioli will not suffer irreparable injury if it is forced to litigate in Brazil.” It is evident from the context that the sentence should read “Fagioli will suffer irreparable injury. . . .”

### B. Liberty's Motion to Stay Action

The interim order found that the “most important factor” favoring staying this action and allowing the proceedings in Brazil to progress was Transdata’s refusal to appear in New York. (Interim Order, at \*7.) Indeed, the order granted a stay in the event that Transdata would not appear within 60 days of the order. (*Id.* at \*8.)

CPLR 5306 provides a court with discretion to stay an action to enforce a foreign court’s judgment pending appeal.<sup>3</sup> Given Transdata’s continued failure to submit to this court’s jurisdiction, the issues of Brazilian law that predominate, and the lawsuit’s extensive contacts with Brazil (*see* Interim Order, at \*7), this court exercises its discretion to allow Liberty to prosecute the lawsuit in Brazil through at least one appeal. Therefore, Liberty’s motion to stay this New York action is granted.

### C. Liberty's Motion to Reargue

The parties understood the interim order as having decided the issue of the application of the MSA’s forum-selection and choice-of-law clauses in Defendants’ favor. (*See* Memorandum of Law in Support of Plaintiff’s Motion to Renew and Reargue, at \*10; Defendant’s Cross-Motion to Vacate Stay and to Enjoin and Any Further Litigation in Brazil, at \*10-11.) On this understanding, Liberty argues that the order is inconsistent because after acknowledging that the insurance contract is governed by Brazilian law, the order proceeds to apply New York law. (*See* Memorandum of Law in Support of Plaintiff’s Motion to Renew and Reargue, at \*10.)

The interim order did not, however, invoke New York caselaw to decide the issue. The pertinent section of the order, in assessing Fagioli’s likelihood of prevailing on the issue of the clauses’ application, presented New York precedent as persuasive authority to bolster its prediction that the Brazilian court would, in applying its own jurisdiction’s law, bind a subrogee to the terms of the subrogor’s contract with defendants. Indeed, the interim order concluded that the issue at hand is a question of Brazilian, not New York, law, and that defendants’ argument to the contrary “lacks merit.” (Interim Order, at \*7.)

Because this court has not ruled that the applicable MSA provisions is enforceable against Liberty, and because the court has and will continue to stay this action to allow the Brazilian appeal to proceed, there is no need to reargue the issue of the application of the MSA to Liberty. Liberty’s motion to reargue is therefore denied.

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<sup>3</sup> “If the defendant satisfies the court either that an appeal is pending or that he is entitled and intends to appeal from the foreign country judgment, the court may stay the proceedings until the appeal has been determined.” (CPLR 5306). As explained in Richard C. Reilly’s *Practice Commentaries*, C5306:1 Stay in Case of Appeal, “defendant” here means the “party opposing recognition” of the lower foreign court’s judgment. Liberty seeks to prevent this court from recognizing the Brazilian trial court’s decision. (*See* Memorandum of Law In Support of Plaintiff’s Motion to Renew and Reargue at \*8 (“It would be inequitable for this [c]ourt to recognize and enforce the Brazilian decision.”)) Therefore, although it is a plaintiff in this action, Liberty is a defendant under CPLR 5306.

In Motion Sequence #002, Liberty moved to quash Fagioli's subpoenas because of Liberty's then-pending motion to stay the action. Because this action is now stayed, Liberty's motion to quash subpoenas is granted.

Liberty's motion for default judgment against Transdata is denied without prejudice. As Liberty notes, the purpose of staying an action when a foreign action exists between the same parties regarding the same events is to avoid inconsistent results between jurisdictions. (Plaintiff's Memorandum of Law in Support of Motion for Leave Renew and Reargue at \*6-7) Because this stay enables the Brazilian courts to decide the merits in the dispute between Liberty and Transdata, this court will not disturb the Brazilian courts' adjudication.

Accordingly, it is hereby ORDERED that Plaintiff Liberty Seguros's motion to stay this action pending its pending appeal in Brazil (Motion Sequence #001, 004) is granted; and it is further

ORDERED that Defendant Fagioli's cross-motion to enjoin further litigation in Brazil (Sequence #001, 004) is denied; and it is further

ORDERED that Plaintiff Liberty Seguros's motion for leave to reargue (Sequence #004) is denied; and it is further

ORDERED that Plaintiff Liberty Seguros's motion to quash subpoenas (Sequence #002) is granted; and it is further

ORDERED that Plaintiff Liberty Seguros's motion for default judgment against Defendant Transdata (Sequence #003) is denied.

Plaintiff is directed to serve a copy of this order with notice of entry on all parties.

This opinion is the court's decision and order.

Dated: April 17, 2017



**HON. GERALD LBOVITS**  
J.S.C.