| **ITAU Unibanco S.A. v Schahin** |
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| 2017 NY Slip Op 31636(U) |
| August 3, 2017 |
| Supreme Court, New York County |
| Docket Number: 651648/15 |
| Judge: Barry Ostrager |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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ITAU UNIBANCO S.A., et al.,

Index No. 651648/15

Plaintiffs,

-against-

Mot. Seq. 006

MILTON TAUFIC SCHAHIN, SALIM TAUFIC SCHAHIN, and DEEP BLACK DRILLING LLC,

Defendants.

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OSTRAGER, J.:

Before the Court is a motion by plaintiffs for partial summary judgment against defendants Milton Taufic Schahin and Salim Taufic Schahin on the First and Fourth Causes of Action and a cross-motion by defendants for a stay. For the following reasons, plaintiffs' motion is granted and defendants' cross-motion is denied.

Background Facts

The following facts are undisputed, unless otherwise indicated.[1] On April 9, 2013, plaintiffs and another lender and their agents (the "Lenders") entered into a Second Amended and Restated Credit Agreement with defendant Deep Black Drilling LLC ("Deep Black" or "the Borrower") pursuant to which the Lenders agreed to refinance certain loans that had previously been made to Deep Black (the "Credit Agreement", Doc. No. 173). The Credit Agreement included an unconditional promise by Deep Black to pay, stating that:

> The Borrower unconditionally promises to pay, or cause to be paid, to the ... account of the relevant Lenders, the outstanding principal amount of the Loans in monthly installments as set forth in Schedule 1 hereto ...[2]

[1] See Plaintiffs' Statement of Material Facts as to Which There Is No Genuine Dispute and admissions in Individual Defendants' Response (NYSCEF Doc. Nos. 182, 188). All future NYSCEF documents shall hereafter be referred to as "Doc. No. ___".

[2] Underlined terms are as in the original to indicate a definition elsewhere in the Credit Agreement.

Schedule 1 provided for the payment of principal and interest on set dates, concluding with a final balloon payment of $343,185,076.85 on August 1, 2014. In connection with the Credit Agreement, and on the same day as its execution, Deep Black also signed a promissory note for $353,341,351.72 wherein the Borrower confirmed that it "unconditionally promises to pay" the amounts due pursuant to the Credit Agreement (Doc. No. 174).

As particularly significant here, the Credit Agreement includes at §13.1 a Guaranty provision, which states that:

> Each Guarantor hereby absolutely, unconditionally and irrevocably, jointly and severally, guarantees as primary obligor the full and punctual payment when due (whether at stated maturity, upon acceleration or otherwise) of each amount payable by the Borrower under this Agreement and the other Financing Documents for all purposes ...

The two individual defendants Milton Taufic Schahin and Salim Taufic Schahin, who are moving herein, are expressly defined in the Credit Agreement as Guarantors (see Appendix 1-7, 1-12 and 1-13).

When the Borrowers and the Guarantors failed to pay the monies due, the Lenders sent all parties a default letter dated April 7, 2015, pursuant to the Credit Agreement (Doc. No. 177). When the monies were not received, plaintiffs commenced this action on May 12, 2015 asserting four causes of action: First for breach of the Credit Agreement for nonpayment; Second seeking specific performance relating to the provision of required documents; Third seeking specific performance relating to the provision of books and records; and Fourth for indemnification (Doc. No. 1). The indemnification claim was based on Section 9.1 of the Credit Agreement, which broadly states that:

> Each Guarantor and the Borrower hereby agrees to indemnify ... each Indemnitee against ... claims, actions, judgments, suits, costs, expenses, disbursements, causes of action or other legal proceedings of any nature, and reasonable and documented accounting and legal fees and expenses related

> thereto ... imposed on, suffered by, incurred or required to be paid by or asserted against such Indemnitee ... in any way relating to or arising out of ... the Overall Transaction or (A) any breach by any Loan Party of any of its obligations under any of the Transaction Documents, or (B) the occurrence of a Default or Event of Default .... or any action taken as a result thereof; ...

The term "Indemnitee" is defined in Appendix 1 of the Credit Agreement to include all Secured Parties, which is further defined to expressly include the Lenders.

After an appearance by Deep Black and some motion practice, a Judgment was entered on August 15, 2016 in this action in favor of plaintiffs against Deep Black in the sum of $401,363,612.85 plus interest at the contractual rate of 10.6% annually from January 29, 2016, for a total of $424,559,131.63 on the First Cause of Action. The Judgment also included some specific performance provisions based on the Second and Third Causes of Action. Thereafter, on October 5, 2016, the parties consented to a Supplemental Judgment in the amount of $250,000.00 based on the Fourth Cause of Action for indemnification (Doc. No. 116).

Due to the residence of the individual defendants in Brazil, service on the Guarantors was delayed, and the Guarantors first appeared and answered on March 28, 2017 (Doc. No. 163). Plaintiffs filed the instant motion shortly thereafter.

Analysis

"On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty ..." *City of New York v Clarose Cinema Corp.*, 256 AD2d 69,71 71 (1st Dep't 1998) (citations omitted). Based on the above undisputed facts, the clear and unequivocal terms of the Credit Agreement and unconditional Guarantee, and the Judgment entered against Deep Black, plaintiffs have satisfied their *prima facie* burden for summary judgment in their favor on the First Cause of Action for

nonpayment, entitling them to a judgment in their favor against the Guarantors, jointly and severally with Deep Black, in the amount of $401,363,612.85, plus interest at the contractual rate of 10.6% annually from January 29, 2016 to the date of judgment. In the same way, plaintiffs have also established their right to a judgment in their favor on liability based on the Fourth Cause of Action for indemnification, with an assessment of damages required to ascertain the amount. In addition to coming forward with the requisite proof, plaintiffs in their Memorandum of Law have addressed each and every one of the Affirmative Defenses asserted by the Guarantors, establishing that most are boilerplate assertions devoid of merit. The burden then shifts to the Guarantors to rebut plaintiffs' showing. *See Alvarez v Prospect Hospital,* 68 NY2d 320, 325 (1986).

In opposition to plaintiffs' motion for summary judgment, the Guarantors claim that their performance under the Guaranty is excused based on impossibility in that their assets have been frozen by the Tax Enforcement Court of Sao Paolo (Doc. No. 186). The opposition fails as a matter of law. As the Court of Appeals makes clear in a case cited by both parties, "impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract ..." *Kel Kim Corp v Central Mkts.,* 70 NY2d 900, 902 (1987) (citations omitted). The Guarantors do not, and reasonably cannot, make any such assertion that the temporary freezing of their assets due to tax litigation is an event that could not have been foreseen. As explained more fully by the Court of Appeals in *407 E. 61st Garage v Savoy Fifth ave. Corp.*, 23 NY2d 275, 281-82 (1968) (citations omitted):

> Generally, however, the excuse of performance is limited to the destruction of the means of performance by an act of God, *vis major,* or by law ... Thus, where impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused ...

As plaintiffs also correctly note, the asset freeze did not go into effect until September 28, 2015, more than a year after the August 1, 2014 breach and many months after the April 7, 2015 default letter, yet the Guarantors did not make the payments before the freeze. Thus, the impossibility defense is further barred by the fact that the condition allegedly hindering performance arose well *after* the breach. For these reasons, the Guarantors have failed to rebut plaintiffs' showing of their entitlement to summary judgment.

The Guarantors also cross-move for a stay pursuant to CPLR 327, entitled "inconvenient forum", which authorizes the dismissal or stay of an action when "the court finds that in the interest of substantial justice the action should be heard in another forum." The Guarantors apparently reside in Brazil, and their visas have been canceled, thus preventing them from returning to the United States to litigate this matter (Doc. No. 185). Defendantas further argue that litigation here would impose an undue burden on this Court, as plaintiffs are all Brazilian banks, with the exception of one Columbian bank, and many of the documents and trial testimony would need to be in Portuguese or Spanish. Additionally, the Guarantors note that the parties to this action are also parties to a Brazilian judicial reorganization action, creating the risk of inconsistent judicial determinations should this case proceed.

The request for a stay is denied. First and foremost, in exchange for the vacatur of their default in answering the complaint, the Guarantors expressly stipulated to "waive any objection or defense based upon inadequate service of process, lack of personal jurisdiction, improper venue, or forum non conveniens." (Doc. No. 181). What is more, any such stay is barred by CPLR 327(b) which prohibits a stay where "the parties to the contract have agreed that the law of this state shall govern their rights or duties in whole or in part." In §16.10 of

the Credit Agreement, the parties expressly agreed to the application of the laws of New York State. In §16.15(a) the parties agreed that any dispute would be resolved in a New York forum, and they consented to the jurisdiction of New York courts. As the Appellate Division reiterated last month, "where a party to a contract has agreed to submit to the jurisdiction of a court, that party is precluded from attacking the court's jurisdiction on forum non conveniens grounds." *Honeywell International Inc. v Arc Energy Services, Inc.* 2017 Slip Op. 05686 (1st Dep't July 13, 2017), *quoting Sterling Natl. Bank v Eastern Shipping Worldwide, Inc.*, 35 AD3d 222, 223 (1st Dep't 2006). That holding directly applies here to mandate the denial of defendants' cross-motion for a stay.

Accordingly, it is hereby

ORDERED that plaintiffs' motion for summary judgment is granted, and the Clerk is directed to enter a judgment in favor of plaintiffs ITAU UNIBANCO S.A., NASSAU BRANCH, BANCO VOTORANTIM S.A., NASSAU BRANCH, HSBC BANK BRASIL S.A. - BANCO MULTIPLO, GRAND CAYMAN BRANCH, BANCO ABC BRASIL S.A., CAYMAN ISLANDS BRANCH, BANCO INDUSTRIAL E COMMERCIAL S.A., BANCO BONSUCESSO S.A., BANCO BRADESCO S.A., GRAND CAYMAN BRANCH, BANCO FIBRA S.A., GRAND CAYMAN BRANCH, BANCO PINE S.A., BANCO SANTANDER (BRASIL) S.A., GRAND CAYMAN BRANCH, BANCO TRICURY S.A. and BANCOLOMBIA S.A., against defendants MILTON TAUFIC SCHAHIN and SALIM TAUFIC SCHAHIN, jointly and severally between themselves and with respect to co-defendant DEEP BLACK DRILLING LLC, on the First Cause of Action in the sum of $401,363,612.85, plus interest at the contractual rate of 10.6% annually from January 29, 2016 to the date of judgment; and it is further

ORDERED that plaintiffs are also awarded summary judgment in their favor against defendants MILTON TAUFIC SCHAHIN and SALIM TAUFIC SCHAHIN on liability only on the Fourth Cause of Action, which shall proceed to an assessment of damages; and it is further

ORDERED that defendants' cross-motion for a stay is denied; and it is further

ORDERED that all parties or their counsel shall appear in Room 232 at 60 Centre Street, New York, NY on October 10, 2017 at 9:30 a.m. to select a date for the assessment of damages and to pursue any appropriate remedies relating to the Second and Third Causes of Action.

Dated: August 3, 2017

J.S.C.

BARRY R. OSTRAGER
JSC