

AIG Prop. Cas. Co. v Permanent Mission of the Republic of the Union of Myanmar to the United Nations, N.Y.
2017 NY Slip Op 32583(U)
December 8, 2017
Supreme Court, New York County
Docket Number: 159278/2016
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED

PART 2

Justice

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AIG PROPERTY CASUALTY COMPANY A/S/O GREGORY
CALLIMANOPULOS

INDEX NO.

159278/2016

Plaintiff,

- v -

PERMANENT MISSION OF THE REPUBLIC OF THE UNION OF
MYANMAR TO THE UNITED NATIONS, NEW YORK,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number 8, 9, 10, 11, 12, 13, 14, 15, 17,
18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion to/or

DISMISSAL

In this subrogation action to recover for water damage to the building located at 12 East
77th Street, New York NY in January 2016, defendant Permanent Mission of the Republic of the
Union of Myanmar to the United Nations, which is alleged to have occupied the abutting
building at 10 East 77th Street, moves, after joinder of issue, to dismiss the complaint on several
CPLR 3211 grounds, namely lack of personal jurisdiction for failure to effectuate proper service
(*see* CPLR 3211 [a] [8]), failure to state a cause of action (*see* CPLR 3211 [a] [7]), lack of
subject matter jurisdiction (*see* 28 USC § 1604; CPLR 3211 [a] [2]), as well as for costs and
attorneys' fees. Plaintiff AIG Property Casualty Company, as subrogee of Gregory
Callimanopoulos, opposes. After oral argument, and upon a review of the papers submitted as
well as the relevant statutes and case law, **the motion is granted, and the complaint is**
dismissed, without prejudice.

Initially, although the Foreign Sovereign Immunities Act of 1976 generally renders foreign governments immune from suit in the courts of the United States and of the States (*see generally* 28 USC § 1604), since plaintiff alleges that defendant caused damage to the subject property through the negligent maintenance of the plumbing in the offices occupied for its official business in this country, this action falls within the exception delineated in 28 USC § 1605 (a) (5) (*see Beato v Pakistan Embassy*, 301 AD2d 459 [1st Dept 2003]; *Foxworth v Permanent Mission of the Republic of Uganda to the United Nations*, 796 F Supp 761, 764 [SDNY 1992]; *Weason v Permanent Mission of Romania to the UN*, 43 Misc 3d 780, 783-784 [Sup Ct, NY County 2013, Billings, J.]). Thus, this Court has subject matter jurisdiction over the instant dispute.

Turning to the issue of proper service, defendant is a foreign State, and not merely an agency or instrumentality of a foreign State, so service upon it must have been effectuated in accordance with 28 USC § 1608 (a) (*see Gray v Permanent Mission of the People's Republic of the Congo to the United Nations*, 443 F Supp 816, 820 [SDNY 1978]; *2 Tudor City Place Assoc. v Libyan Arab Republic Mission*, 121 Misc 2d 945 [Civ Ct, NY County 1983]; *accord USAA Cas. Ins. Co. v Permanent Mission of the Republic of Namibia*, 681 F3d 103, 107 [2d Cir 2012]). Since there is no "special arrangement for service" between "plaintiff and the foreign state" (28 USC § 1608 [a] [1]), and Myanmar is not currently a member of the Hague Convention for the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (*see* 28 USC § 1608 [a] [2]; Status Table, Hague Conference on Private International Law website, <https://www.hcch.net/en/instruments/conventions/status-table/> [last accessed December 8, 2017]; *see also* US Department of State website, Travel, Legal Resources, International Judicial Assistance, Service of Process, <https://travel.state.gov/content/travel/en/legal/travel-legal->

considerations/internl-judicial-asst/Service-of-Process.html [last accessed December 8, 2017]), service must have been effectuated in accordance with subsections 3 or 4 of 28 USC § 1608 (a).

The relevant subsections of the statute provide that service must be effectuated by “sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned” (28 USC § 1608 [a] [3]). “[I]f service cannot be made within 30 days under paragraph (3), [then it must be effectuated] by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services--and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted” (28 USC § 1608 [a] [4]).

The affidavit of service submitted in opposition to this motion states that “the deponent served the within summons and verified complaint with notice of commencement of action subject to mandatory electronic filing on Permanent Mission of the Republic of the Union Of Myanmar to the United Nations, New York . . . by leaving a true copy with Rose Aikiraz, being authorized to accept legal papers stated.” (Doc. No. 21) (case of text changed). There is no indication in the papers as to who Rose Aikiraz is, and whether she is the head of the ministry of foreign affairs for Myanmar, though she presumably is not. In short, plaintiff has utterly failed

to respect the strictures of the Foreign Sovereign Immunities Act and has not effectuated service upon defendant.

The only issue is whether, by asserting counterclaims in its answer, defendant waived any objection to personal jurisdiction. In its answer, defendant includes a counterclaim for fraud. Specifically, defendant alleges that, on January 7, 2016, plaintiff's subrogor "employed architects to do construction in its own building" and "caused damage to its own premises" at that time. (Doc. No. 4.) It further alleges that Anamaria Quijano F. and Angelo Ferraro, as agents of plaintiff's subrogor, represented to an agent of defendant that, despite that construction was underway, the two buildings "do not share a party wall" and that, as a result, the construction "could not damage [defendant's] premises." Broadly construing the allegations in the counterclaim, which seem to concern damage to the two properties occurring in January 2016, it is related enough to plaintiff's claim such that its assertion does not waive an objection to personal jurisdiction (*see Textile Tech. Exch. v Davis*, 81 NY2d 56, 59 [1993]).

Since the alleged loss occurred in January 2016, and this is a negligence action for which the statute of limitations is three years, dismissal without prejudice is the appropriate disposition (*see CPLR 306-b; Matthews v Barrau*, 150 AD3d 836, 838 [2d Dept 2017]; *Swaggard v Dagonese*, 132 AD3d 1395, 1396 [4th Dept 2015]).

Accordingly, it is hereby:

ORDERED that defendant's motion to dismiss the complaint for lack of personal jurisdiction based on improper service is granted, and the complaint is dismissed, without costs, and without prejudice to bring a new action; and it is further

ORDERED that counsel for defendant is directed to serve a copy of this order with notice of entry on plaintiff within 20 days after it is entered.



12/8/2017

DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED
<input checked="" type="checkbox"/>	GRANTED
<input type="checkbox"/>	SETTLE ORDER
<input type="checkbox"/>	DO NOT POST

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

SUBMIT ORDER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: