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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MOHAMED LASHEEN,

Plaintiff,

v.

THE LOOMIS COMPANY, et al.,

Defendants.

NO. CIV. S-01-227 LKK/PAN

O R D E R

This case is before the court on the narrow question of whether defendants the Arab Republic of Egypt, the Embassy of the Arab Republic of Egypt, and the Embassy of Egypt Cultural and Educational Bureau (collectively, the "Egyptian defendants") are immune under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611, from claims brought by the estate of Mohamed E. Lasheen.

I. Background¹

¹ The cursory factual history in this section is provided for background only and does not form the basis of the court's decision. The legally relevant facts relied upon by the court are discussed within the analysis.

1 **A. Lasheen**

2 Lasheen was an Egyptian national who came to the United
3 States as a visiting scholar in March 2000 to study horticulture
4 at the University of California at Davis. Lasheen enrolled in
5 the Embassy of Egypt Health Care Benefits Plan (the "Plan").
6 The Loomis Co., a Pennsylvania-based corporation authorized to
7 do business in California, contracted with the Embassy of Egypt
8 Cultural and Educational Bureau to provide administrative
9 services for the Plan pursuant to a Benefit Services Management
10 Agreement (the "Agreement").

11 Thereafter, Lasheen was allegedly diagnosed with liver
12 cancer. He submitted a claim to Loomis requesting insurance
13 coverage for a liver transplant. Loomis concluded that Lasheen
14 previously suffered from hepatitis C and that his medical
15 problem was therefore a pre-existing condition not covered by
16 the Plan. Lasheen died in December 2000 as a result of his
17 illness. He is survived by his wife and three children.

18 **B. Procedural History**

19 This case has a long procedural history, much of which was
20 summarized in the findings and recommendations filed by
21 Magistrate Judge Brennan on July 22, 2008 and adopted by this
22 court on September 23, 2008. Only those aspects of this history
23 directly relevant to the present issue are repeated here.

24 Lasheen's estate filed suit in February 2001 against, among
25 others, the Egyptian defendants and Loomis. Loomis defended
26 against plaintiff's claims, and through July 2005 the Egyptian

1 defendants indemnified Loomis in connection with this defense.
2 The Egyptian defendants then halted indemnification, leading
3 Loomis to file a cross-claim for breach of contract on November
4 30, 2005. Around that time, on November 7, 2005, the court
5 allowed counsel for the Egyptian defendants to withdraw.

6 The court then set a status conference for December 19,
7 2005. After the Egyptian defendants failed to appear at this
8 conference, the court struck their answer to plaintiff's
9 complaint and directed the Clerk to enter defaults against the
10 Egyptian defendants with respect to both the complaint and the
11 cross claim. Order filed March 2, 2006 (Dkt. No. 221). The
12 court further directed both plaintiff and Loomis to move for
13 default judgment. Id.

14 Plaintiff and Loomis reached a tentative settlement of
15 claims between them in the summer of 2007, conditioned upon
16 these parties' ability to recover from the Egyptian defendants.
17 Plaintiff and Loomis therefore filed a joint motion seeking a
18 determination that the Egyptian defendants were not immune to
19 suit under the FSIA. The court set aside the Egyptian
20 defendants' default for the limited purpose of allowing the
21 Egyptian defendants to assert FSIA immunity in opposition to
22 this motion. Order filed January 3, 2008 (Dkt. No. 261) at 3.²
23 After considering the Egyptian defendants' opposition, the court

24
25 ² The court explained that it "set[] aside default only with
26 respect to the Foreign Sovereign Immunities Act issue; the Egyptian
defendants ha[d] not demonstrated good cause to set aside default
as to any other aspect of the case."

1 granted the joint motion. Order filed Feb. 1, 2008 (Dkt. No.
2 268).

3 In that order, the court held that the Agreement between
4 Loomis and the Egyptian defendants constituted a waiver of
5 sovereign immunity as to claims brought by Loomis, and the court
6 further held that the Egyptian defendants' contract with Loomis
7 constituted "commercial activity" outside the scope of the FSIA.
8 Id. at 6, 10. The court noted that "the moving parties ha[d]
9 only argued that the [exceptions] applie[d] to the Agreement
10 between Loomis and the Egyptian defendants. Accordingly, the
11 court [did] not reach the issue of whether the Egyptian
12 defendants [were] entitled to sovereign immunity against
13 Lasheen." Id. at 10 n.4. Nonetheless, the court granted the
14 joint motion in full.

15 The Egyptian defendants appealed. The Ninth Circuit
16 affirmed this court's determination that the Egyptian defendants
17 were not immune to Loomis's claims because of the commercial
18 activity exceptions to the FSIA. Embassy of the Arab Republic
19 of Egypt v. Lasheen, 603 F.3d 1166, 1169 (9th Cir. 2010). The
20 Ninth Circuit did not reach this court's alternate holding
21 regarding waiver. Id. at 1171-72. The Ninth Circuit remanded
22 to this court for a determination as to "whether either the
23 commercial activities or waiver exception permits Lasheen's
24 claims to proceed." Id. at 1172.

25 **II. Standard**

26 After the remand from the Ninth Circuit, this court

1 the exceptions for waiver and for commercial activity. Because
2 the Egyptian defendants have waived sovereign immunity, the
3 court does not discuss the commercial activities exception.³

4 Under the FSIA,

5 A foreign state shall not be immune . . . in
6 any case . . . in which the foreign state
7 has waived its immunity either explicitly or
8 by implication, notwithstanding any
9 withdrawal of the waiver which the foreign
10 state may purport to effect except in
11 accordance with the terms of the waiver;

12 28 U.S.C. § 1605(a)(1). This court previously explained that
13 “[a]n agreement to adjudicate a dispute . . . in accordance with
14 the laws of a United States jurisdiction constitutes waiver ‘by
15 implication’ under § 1605(a)(1).” Order filed Feb. 1, 2008 at 6
16 (citing Joseph, 830 F.2d at 1022-23).⁴

17 At first glance, the present dispute is an easy case. The
18 benefit plan booklet which explains the benefits owed to
19 *plaintiff* states that the Plan is subject to ERISA and may be
20 enforced in United States courts. The court previously held
21 that a similar choice of law provision in the agreement between
22 Loomis and the Egyptian defendants sufficed to demonstrate

23 ³ If forced to confront the issue, the court would hold that
24 the Egyptian defendants’ provision of health benefits in the United
25 States under an ERISA insurance framework constitutes commercial
26 activity.

⁴ Although the Ninth Circuit declined to address this court’s
waiver analysis, it appears that this analysis remains law of the
case.

1 waiver of FSIA immunity. Id. at 6-7.⁵

2 Specifically, plaintiff has provided a document titled
3 "Group Health Benefits for Embassy of Egypt," which was provided
4 to explain plaintiff's benefits under the Plan. Decl. of Randy
5 M. Andrus, Ex. D. This document explicitly states that the Plan
6 is governed by the Employee Retirement Income Security Act of
7 1974, 29 U.S.C. § 1001 et seq. See Andrus Decl. Ex. D at 51.
8 "As a Covered Person in this Plan, you are entitled to certain
9 rights and protections under [ERISA]." Id. In particular,
10 "[i]f anyone has a claim for benefits which is denied or
11 ignored, in whole or in part, they may file suit in state or
12 federal court." Id.

13 The court acknowledges three wrinkles in this argument.
14 One pertains to whether the above-quoted document constitutes
15 the actual Plan. The document itself states that "[t]his
16 booklet is not a contract. It explains in non-technical language
17

18 ⁵ To clarify, this case presents two distinct documents: (1)
19 the Agreement between the Egyptian defendants and Loomis, and (2)
20 the Plan, which the Egyptian defendants authorized and which was
21 delivered to plaintiffs. The latter was not discussed in the prior
22 orders, but forms the basis for the court's decision here. Because
23 the court relies on the Plan, the court does not address
24 plaintiff's alternative argument that the waiver implicit in the
25 Agreement between Loomis and the Egyptian defendants extends to
26 claims brought by plaintiff because plaintiff was an intended
third-party beneficiary of that agreement. Lasheen, 603 F.3d at
1172; see also Gates v. Victor Fine Foods, 54 F.3d 1457, 1466 (9th
Cir. 1995) ("Just because Alberta Pork may have agreed to submit
to the jurisdiction of United States courts in connection with a
loan collection action by a bank in Washington State, it does not
in any way mean that they also agreed to submit to the jurisdiction
of United States courts in connection with a dispute involving GGFF
employees in California.").

1 the essential features of your Employee benefit Program.” Id.
2 at 52. Nonetheless, the Egyptian defendants support their
3 present motion by re-submitting the declaration of Debbie Hayes
4 filed January 17, 2006, which describes this booklet as “a true
5 and correct copy of the plan.” Thus, the Egyptian defendants
6 have conceded that the booklet accurately represents the Plan’s
7 terms.

8 A second wrinkle is that although the plan explicitly
9 provides a right to sue in this country’s courts, the plan does
10 not explicitly state against whom such suits may be brought.
11 Nonetheless, the Plan suggests that claims will be brought
12 against the plan fiduciaries and the Egyptian defendants have
13 agreed that they were the fiduciaries. Egyptian Defs.’ Answer ¶
14 5 (admitting that the Egyptian Defendants are the fiduciaries
15 without admitting that ERISA applies), see also Andrus Decl. Ex.
16 C (Agreement between Loomis and Egyptian defendants, agreeing
17 the ERISA applies and that the Egyptian defendants are the
18 fiduciaries). Moreover, the plan provides that “The Company is
19 [the] Embassy of Egypt, and any affiliates who have adopted the
20 plan.” See Andrus Decl. Ex. D at 43.⁶

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22 ⁶ Plaintiff argues that various other documents demonstrate
23 further concessions by the Egyptian defendants that the Plan was
24 governed by ERISA, constituting further implicit waivers of FSIA
25 immunity. See, e.g., Andrus Decl. Ex. Q, V. These exhibits do not
26 contain communications by the Egyptian defendants regarding ERISA
applicability; rather, they are assertions by Loomis and others
that ERISA applied. Plaintiff has not demonstrated that the
Egyptian defendants authorized or are otherwise responsible for
these communications, and these exhibits therefore do not appear
to support plaintiff’s case.

1 A third wrinkle is that it is not obvious that the Plan
2 constitutes a contract between the Egyptian defendants and
3 Lasheen. Plaintiff has not argued that the elements necessary
4 to formation of a contract (such as consideration) are present,
5 and the Egyptian defendants have not addressed the Plan at all.
6 Nonetheless, nothing indicates that waiver is only effective if
7 expressed in a formal contract. The Egyptian defendants concede
8 that they approved the "terms contained in the Plan" knowing
9 that these terms would be communicated to Lasheen, Egyptian
10 Defs.' Mem. at 13, and these terms provide a right to sue the
11 Egyptian defendants in state and federal courts.

12 These wrinkles do not appear significant. More
13 importantly, however, it does not fall to the plaintiff to iron
14 them out. Plaintiff has provided evidence that (1) the
15 referenced booklet accurately described the Plan's terms, (2)
16 the Egyptian defendants were party to this Plan and approved
17 these terms, (3) the Plan was offered to the plaintiff as a
18 statement of plaintiff's rights against, inter alia, the
19 Egyptian defendants, and (4) the Plan's terms provided that
20 United States law would govern the Plan. Under the burden
21 shifting framework articulated by the Ninth Circuit in this
22 case, this satisfies plaintiff's initial burden of providing
23 evidence to indicate waiver of FSIA immunity with respect to
24 plaintiff's claims here. Lasheen, 603 F.3d at 1170. The burden
25 therefore shifts to the Egyptian defendants to "prov[e] by a
26 preponderance of the evidence that the exception does not

1 apply." Id. (quoting Joseph, 830 F.2d at 1021). The Egyptian
2 defendants have not even attempted to meet that burden, ignoring
3 the Plan and instead arguing solely that the Agreement between
4 Loomis and the Egyptian defendants does not waive FSIA immunity
5 as to plaintiff's claims.

6 The closest that Egyptian defendants come to opposing this
7 argument is to argue, without reference to the plan booklet,
8 that the Plan is not the type of plan that falls within ERISA's
9 scope. Specifically, the Egyptian defendants argue that the
10 plan is "maintained outside the United States primarily for the
11 benefit of persons substantially all of whom are nonresident
12 aliens." 29 U.S.C. § 1003. The question of whether ERISA would
13 apply by its own terms is distinct from the question of whether
14 the Egyptian defendants have manifested an intent to be governed
15 by the laws of the United States and thus to be subject to
16 jurisdiction of United States courts. The Egyptian defendants'
17 present litigation position may be seen as an attempted
18 withdrawal of the earlier agreement that United States law
19 applies and thus an attempted withdrawal of the prior implicit
20 waiver of FSIA immunity. Because the Egyptian defendants have
21 not identified any provision of the Plan authorizing such a
22 withdrawal, such a withdrawal is ineffective. 28 U.S.C. §
23 1605(a)(1).

24 Insofar as the Egyptian defendants instead contend that
25 plaintiff's ERISA claim fails on the merits, rather than for
26 lack of FSIA immunity, the Egyptian defendants have defaulted on


1 this argument. See Order filed Feb. 1, 2008, at 11 (refusing to
2 consider a statute of limitations argument because court set had
3 aside default solely as to the FSIA issue).

4 **IV. Conclusion**

5 For the reasons stated above, the Egyptian defendants'
6 motion to dismiss or for summary judgment (Dkt. No. 307) is
7 DENIED, and plaintiff and Loomis' joint motion for a
8 determination on FSIA immunity (Dkt. No. 239) is again GRANTED.

9 IT IS SO ORDERED.

10 DATED: August 31, 2010.

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13 LAWRENCE K. KARLTON
14 SENIOR JUDGE
15 UNITED STATES DISTRICT COURT
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