

United States District Court
Northern District of California

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

YVES SICRE DE FONTBRUNE,)	Case No. 13-cv-05957-SC
)	
Plaintiff,)	ORDER GRANTING IN PART AND
)	DENYING IN PART MOTION TO
)	<u>DISMISS</u>
v.)	
)	
ALAN WOFSY, ALAN WOFSY &)	
ASSOCIATES, and DOES 1 through)	
100, inclusive,)	
)	
Defendants.)	
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I. INTRODUCTION

Plaintiff Yves Sicre De Fotbrune ("Plaintiff") brings this action under the California Uniform Foreign-Country Money Judgments Recognition Act (the "Act"), Cal. Civ. Proc. Code 1713 et seq., to enforce judgments issued by French courts. ECF No. 1 Ex. A ("Compl."). Defendants Alan Wofsy and Alan Wofsy & Associates (collectively, "Defendants") now move to dismiss. ECF No. 9 ("Mot."). The Motion is fully briefed, ECF Nos. 18 ("Opp'n"), 19 ("Reply"), and suitable for determination without oral argument per Civil Local Rule 7-1(b). For the reasons set forth below, the Motion is GRANTED in part and DENIED in part.

1 **II. BACKGROUND**

2 The following facts are taken from Plaintiff's Complaint along
3 with the exhibits attached thereto. The instant action arises out
4 of a copyright suit Plaintiff filed against Defendants in the
5 French courts in 1996. Compl. Ex. 2 ("Sep. 2001 Judgment"
6 (translation)) at 1. In the French action, Plaintiff claimed to
7 have artistic and literary property rights to a catalog of the
8 works of Pablo Picasso created by Christian Zervos. Plaintiff
9 asserted claims for copyright infringement and unfair competition
10 against Defendants based on their alleged reproduction of Zervos's
11 photographs in two catalogs of Picasso artwork. Id.

12 The trial court held Mr. Wofsy harmless in the action and
13 declared Plaintiff's claims "inadmissible[] due to his lack of
14 proof of his locus standi." Id. at 2. On September 26, 2001, the
15 Paris Court of Appeals reversed. Id. at 12. The court held
16 Defendants liable for copyright infringement, prohibited Defendants
17 from using Zervos's photographs under penalty of "astreinte"¹ of
18 10,000 Francs per discovered breach, ordered the destruction of the
19 infringing materials, and awarded Plaintiff 800,000 Francs in
20 pecuniary damages and 50,000 Francs in costs. Id. at 12-13.
21 Defendants appealed this judgment, but their appeal was dismissed.
22 Compl. ¶ 9.

23 In or around 2011, Plaintiff brought a case against Defendants
24 before a French enforcement judge concerning the September 2001
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27 ¹ As discussed below, the parties disagree on the precise
28 translation of astreinte in this context. Plaintiff claims it
means damages, while Defendants claim it means penalty.

1 judgment of the Paris Court of Appeals.² Compl. Ex. 6 ("Jan. 2012
2 Judgment" (translation)) at 3. On January 10, 2012, the court
3 rendered a judgment in the action. The court's description of the
4 underlying facts and claims is vague, at least in the translation
5 provided by Plaintiff, and Plaintiff's pleading does nothing to
6 clarify the matter. However, it appears that the court found that
7 Defendants had violated the terms of the September 2001 Judgment.
8 The court awarded Plaintiff 2,000,000 Euros in "liquide
9 l'astreinte" and 1,000 Euros for costs. Compl. Exs. 5, 6 at 3-4.

10 In September 2011, Plaintiff and Éditions Cahiers D'art filed
11 another suit against Defendants concerning "works dedicated to the
12 works of Picasso" before the Tribunal de Grande Instance de Paris.
13 Compl. Ex. 16 ("Jan. 2013 Judgment" (translation)) at 2.
14 Defendants did not engage an attorney for the proceeding. Id. at
15 3. On January 13, 2013, the tribunal found that Plaintiff lacked
16 locus standi to bring his claims for copyright infringement
17 because, on December 20, 2001, he transferred his intellectual
18 property rights in the works to Cahier D'art Holding. Id. at 4.
19 The tribunal concluded that Plaintiff's claims against Defendant
20 were "inadmissible" and ordered Plaintiff to pay the costs of the
21 proceedings. Id.

22 Plaintiff filed the instant action in California state court
23 on November 14, 2013. Defendant subsequently removed on diversity
24 grounds. Pursuant to the Act, Plaintiff demands that "the judgment
25 of the Paris Court of Appeals be recognized as [a] valid judgment
26 for Plaintiff and be entered as a California judgment." Id. pg. 6.

27 ² There appears to be a typo in the French Judgment, which is
28 repeated in the translation, setting the date of the underlying
judgment at September 26, 2011, rather than September 26, 2001.

1 Plaintiff seeks a total sum of \$2,688,101.03, which is allegedly
2 the United States dollar equivalent of the 2,001,000 Euros awarded
3 in the January 2012 Judgment. Id. There is no indication that
4 Plaintiff is seeking a California judgment in connection with the
5 September 2001 Judgment.

6
7 **III. LEGAL STANDARD**

8 A motion to dismiss under Federal Rule of Civil Procedure
9 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.
10 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based
11 on the lack of a cognizable legal theory or the absence of
12 sufficient facts alleged under a cognizable legal theory."
13 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
14 1988). "When there are well-pleaded factual allegations, a court
15 should assume their veracity and then determine whether they
16 plausibly give rise to an entitlement to relief." Ashcroft v.
17 Iqbal, 556 U.S. 662, 679 (2009). However, "the tenet that a court
18 must accept as true all of the allegations contained in a complaint
19 is inapplicable to legal conclusions. Threadbare recitals of the
20 elements of a cause of action, supported by mere conclusory
21 statements, do not suffice." Id. (citing Bell Atl. Corp. v.
22 Twombly, 550 U.S. 544, 555 (2007)).

23
24 **IV. DISCUSSION**

25 Defendants argue that the enforcement of the September 2001
26 Judgment is barred by the statute limitations. Defendants also
27 argue that the Court cannot enforce the January 2012 Judgment
28 because: (1) Plaintiff cannot use the Act to enforce a fine or a

1 penalty, and (2) the January 2013 Judgment shows that Plaintiff
2 lacks standing to enforce the January 2012 Judgment. The Court
3 addresses each of these arguments, but first reviews the
4 evidentiary and procedural issues raised by the parties.

5 **A. Procedural Matters**

6 Plaintiff attached the September 2001, January 2012, and
7 January 2013 judgments to his Complaint, along with English
8 translations of those judgments. Defendants object to the
9 translations as inaccurate, and have offered purportedly accurate
10 translations of their own.³ ECF No. 12 ("Obj.") at 3.
11 Specifically, Defendants contend that the correct translation of
12 the French word astreinte is "penalty," and that Plaintiff
13 incorrectly translated the word as "damages." Defendants contend
14 that the translation has legal significance because Plaintiff
15 cannot recover penalties under the Act. Id. In support of their
16 motion to dismiss, Defendants have also submitted the declaration
17 of Vonnick le Guillou, an attorney licensed to practice in France,
18 who explains the legal effect of the French judgments cited in
19 Plaintiff's pleading. ECF No. 9-2 ("Guillou Decl.").

20 Plaintiff argues that the Court should strike these materials
21 because Defendants may not submit evidence outside of the pleadings
22 in support of a motion to dismiss. Opp'n at 5. Plaintiff further
23 argues that the Court should not convert Defendants' motion to
24 dismiss to a motion for summary judgment because Plaintiff has not

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26 ³ The documents were translated by Jessica Crockett. Defendants
27 initially neglected to file a declaration by Ms. Crockett
28 explaining her qualifications as a translator, and instead
submitted a declaration by her supervisor. Defendants later
corrected their mistake by filing a supplemental declaration from
Crockett. ECF No. 20.

1 had a sufficient opportunity to prepare for such a motion. Id. at
2 14. Defendants respond that the Court need not convert the instant
3 motion to a motion for summary judgment to consider its evidence.
4 Reply at 1-2. Defendants argue that, on a Rule 12(b)(6) motion, a
5 court may properly consider documents referred to in the pleadings,
6 and that their translations of the French judgments are just that.
7 Id. at 3. Defendants also argue that the Court may properly
8 consider the Guillou Declaration under Federal Rule of Civil
9 Procedure 44.1.

10 Even if the Court could consider Defendants' competing
11 translation of the French Judgments on a Rule 12(b)(6) motion to
12 dismiss, it is unclear how it could resolve factual disputes about
13 the accuracy of that translation at this stage of the litigation.
14 In any event, it appears that the only reason that Defendants have
15 offered a competing translation is that they disagree with
16 Plaintiff's translation of the French word astreinte. Defendants
17 contend that the French court used the term to mean "penalty,"
18 while Plaintiff claims that, in this context, it means "damages."
19 This is primarily a legal issue, not an issue of translation. See
20 Java Oil Ltd. v. Sullivan, 168 Cal. App. 4th 1178, 1187 (Cal. Ct.
21 App. 2008) ("The test is not by what name the statute is called by
22 the legislature or the courts of the State in which it was passed,
23 but whether it appears to the tribunal . . . a punishment of an
24 offence against the public, or a grant of a civil right to a
25 private person."). Thus, the translators' opinions are of limited
26 value.

27 As to the Guillou Declaration, Rule 44.1 does not support
28 Defendants' position. The rule provides that the Court may

1 consider "any relevant material or source" in determining foreign
2 law, and that such a determination must be treated as a ruling on a
3 question of law. Fed. R. Civ. P. 44.1. However, Rule 44.1 does
4 not expressly allow the Court to consider evidence outside the
5 pleadings on a Rule 12(b)(6) motion to dismiss. Moreover, the case
6 law holds that consideration of such evidence is inappropriate at
7 the pleadings stage. A party relying on foreign law has the burden
8 of pleading the law and proving it as a fact. See Cuba R. Co. v.
9 Crosby, 222 U.S. 473, 479 (1912). Thus, it is well settled that
10 federal courts do not take judicial notice of foreign laws. Philp
11 v. Macri, 261 F.2d 945, 947 (9th Cir. 1958) (citing Dainese v.
12 Hale, 91 U.S. 13, 14 (1875)). Accordingly, the Court declines to
13 take judicial notice of Guillou's explanation of French law.
14 Defendants may submit this declaration at summary judgment, but it
15 is premature at the pleading stage.

16 In sum, the Court declines to convert Defendant's Rule
17 12(b)(6) motion to dismiss to a Rule 56 motion for summary judgment
18 and limits its analysis to Plaintiff's Complaint and the exhibits
19 attached thereto.

20 **B. The September 2001 Judgment**

21 Defendants argue that recognition of the September 2001
22 Judgment is barred by the Act's ten-year statute of limitations.
23 Mot. at 5 (citing Cal. Code Civ. Proc. § 1721). Plaintiff does not
24 respond to this argument, though it appears that he is not seeking
25 to enforce the September 2001 Judgment. The Complaint's prayer
26 seeks only \$2,688,101.03, the U.S. dollar equivalent of the January
27 2012 Judgment. In sum, it appears that Defendants are moving to
28 dismiss a claim that Plaintiff has not made. In any event, to

1 avoid uncertainty, the Court DISMISSES Plaintiff's claim to the
2 extent that he seeks enforcement of the September 2001 Judgment.

3 **C. The January 2012 Judgment**

4 Defendants contend that the Court should dismiss Plaintiff's
5 complaint to the extent that it is based on the January 2012
6 Judgment because: (1) Plaintiff cannot enforce fines and other
7 penalties through the Act; and (2) Plaintiff lacks standing to
8 enforce the judgment. The Court finds both arguments unavailing.

9 As to Defendants' first argument, the Act applies to a
10 foreign-country judgment to the extent that the judgment: (1)
11 "[g]rants or denies recovery of a sum of money" and (2) "under the
12 law of the foreign country where rendered, is final, conclusive and
13 enforceable." Cal. Code Civ. Proc. 1715(a)(1)-(2). The Act "does
14 not apply to a foreign-country judgment, even if the judgment
15 grants or denies recovery of a sum of money," to the extent that
16 the judgment is "[a] fine or other penalty." Id. § 1715(b),
17 (b)(2). Defendants argue that the January 2012 Judgment is a "fine
18 or other penalty" because it was awarded to punish Defendants for
19 failure to comply with the September 2001 Judgment. MTD at 8.
20 Defendants further argue that the French court's use of the term
21 "astreinte" proves that it meant to impose a penalty. Id.

22 Whether the 2,001,000 Euros awarded by the January 2012
23 Judgment is a fine, a penalty, damages, or something else
24 necessarily requires an analysis of French law. As discussed in
25 Section IV.A supra, such an analysis is premature at pleadings
26 stage. Moreover, the court documents attached to Plaintiff's
27 pleading are too vague to support Defendants' position. It is
28 unclear exactly what issues were before the French court or why it

1 awarded Plaintiff 2,001,000 Euros. At this point, it is sufficient
2 that Plaintiff has alleged that the January 2012 Judgment
3 constitutes an award of damages. Defendants may contest this
4 assertion on a motion for summary judgment.⁴

5 Defendants' second argument fails for similar reasons.
6 Defendants argue that Plaintiff lacks standing not in this case,
7 but in the underlying French action. MTD at 10-11. Defendants
8 point to the January 2013 Judgment, where the Tribunal de Grande
9 Instance de Paris declared that Plaintiff lacked locus standi
10 because he had transferred his rights to the Zervos photographs to
11 a third party in 2001. Id. Based on the January 2013 Judgment,
12 Defendants argue that the January 2012 Judgment awarding Plaintiff
13 2,001,000 Euros was in error and subject to revision under French
14 law. Id. Once again, Defendants are asking the Court to look
15 beyond the pleadings on a Rule 12(b)(6) motion to dismiss. The
16 Court declines to do so. Whether or not the January 2012 Judgment
17 is final and enforceable requires evidence of French law and, thus,
18 should be addressed at summary judgment.

19 Accordingly, the Court DENIES Defendant's motion to extent
20 that it seeks dismissal of Plaintiff's claim for the 2,001,000
21 Euros awarded by the January 2012 Judgment. The Court finds that
22 Defendants' arguments in favor of dismissal of this claim are
23 premature.

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27 ⁴ Significantly, the only Ninth Circuit authority cited by
28 Defendants on this point, Yahoo! Inc. v. La Ligue Contre Le Racisme
Et L'Antisemitisme, 433 F.3d 1199 (9th Cir. 2006), involved a
motion for summary judgment.

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V. CONCLUSION

For the reasons set forth above, the Court GRANTS Defendants Alan Wofsy and Alan Wofsy & Associates' Motion to Dismiss to the extent that it seeks dismissal of Plaintiff's claim for the 850,000 Francs awarded by the September 2001 judgment. The Motion is DENIED in all other respects. The hearing set for March 21, 2014 is hereby VACATED.

IT IS SO ORDERED.

March 12, 2014



UNITED STATES DISTRICT JUDGE