SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ELLEN M. COIN J.S.C. PART 67
Justice

Index Number : 651826/2012
HARVARDSKY PRUMYSLOVY
vs
KOZENY, VIKTOR
Sequence Number : 002
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

This constitutes the decision and order of the Court.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/10/13

Ellen M. Coin
_____, J.S.C.
ELLEN M. COIN
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

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HARVARDSKY PRUMYSLOVY HOLDING, AS.-
V LIKVIDACI,

Plaintiff,

Index Number.: 651826/2012
Submission Date: 12/19/2012
Motion Sequence: 001, 002

-against-

VIKTOR KOŽENY and LANDLOCKED SHIPPING COMPANY,

Defendants.

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For Plaintiff:
Milbank, Tweed, Hadley & Mccloy, LLP
By Edward George Baldwin, Esq.
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For Defendant Landlocked:
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Papers considered in review of this motion to dismiss :

	Numbered
Notice of Motion and Affidavits Annexed.....	1
Memorandum of Law in Support.....	2
Affirmation in Opposition.....	3
Memorandum of Law in Opposition.....	4
Reply Memoranda.....	5

ELLEN M. COIN, J.:

This is an action to domesticate a foreign judgment issued against defendant Viktor Koženy in the Czech Republic ("the Czech Judgment") and to attach the proceeds from the sale of the property owned by defendant Landlocked Shipping Company ("Landlocked") to collect on the Czech Judgment. The Court will not recite an extensive set of factual allegations regarding a number ofinvestment improprieties that Koženy allegedly

committed both in the United States and in countries of Eastern Europe. In brief, a court in the Czech Republic tried Kozeny in absentia, found him guilty, sentenced him to a prison term and ordered him to pay compensation to the investors of Harvardsky Prumyslovy Holding.

Plaintiff alleges that Kozeny is a "shadow" owner of Landlocked, a company whose shares he does not openly hold, but whose decision-making he allegedly directs through *pro forma* third-parties. Landlocked purchased certain real property in Aspen, Colorado ("the House") in June 1997 and registered it in its name. The purchase was ratified through corporate resolution.

In motion sequence 001, plaintiff moves pursuant to CPLR §6201 *et seq.* to attach the proceeds from the sale of Landlocked's property pending the determination of this action to domesticate the Czech Judgment.[1] In motion sequence 002, Landlocked moves to dismiss the complaint, arguing that the Czech Judgment was issued in a criminal proceeding held in absentia and is thus not entitled to comity under Article 53 of the CPLR. Both motions are consolidated herein for joint determination.

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[1]Following issuance of a preliminary injunction in an unrelated action in federal court in Colorado prohibiting the sale, disposition or other transfer of ownership of the House (*Nat. Union Fire Ins. Co. of Pittsburgh, PA v Kozeny*, 115 F Supp 2d 1210 [D Colo 2000], *aff'd* 19 Fed Appx 815 [10th Cir 2001]), that court permitted the sale of the House with the proceeds to be deposited into accounts at Wells Fargo Bank in Landlocked's name. (*United States of America v Any and All Funds on Deposit in Account No. 12671905 et al.*, 2010 US Dist Lexis 81151 [SDNY 2010][Baer, J.]).

Discussion

Attachment is a statutory provisional remedy, and because of its harsh nature, the statute is strictly construed in favor of the defendant against whom it may be employed. (*Glazer & Gottlieb v Nachman*, 234 AD2d 105,105 [1st Dept 1996]; *Elton Leather Corp. v First General Resources Co.*, 138 AD2d 132, 135[1st Dept 1988]). CPLR 6212(a) sets forth the required showing for an attachment order. It provides that the plaintiff bears the burden to demonstrate: (1) the existence of one or more grounds of attachment under CPLR 6201; (2) that there is a cause of action; (3) that it is probable that the plaintiff will succeed on the merits of its claim; and (4) that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff. (CPLR 6212[a]; *see Ford Motor Credit Co. v Hickey Ford Sales, Inc.*, 62 NY2d 291, 301-02[1984]; *Considar, Inc. v Redi Corp. Establishment*, 238 AD2d 111[1st Dept 1997]).

Plaintiff's application for an attachment is based on at least two qualifying grounds under CPLR § 6201: that Koženy is a nondomiciliary residing outside of New York and Landlocked is a foreign corporation not qualified to do business in this state (CPLR § 6201(1)); and that plaintiff's cause of action is based on a foreign country judgment that may qualify for recognition under Article 53 of the CPLR (CPLR § 6201(5)). Accordingly, the first and second elements for grant of an attachment are

satisfied.

The third element, however, has not been met. To show probability of success on the merits, plaintiff must show more than a prima facie case that could satisfy the claim as a pleading. (*See Zenith Bathing Pavilion, Inc. v Fair Oaks S.S. Corp.*, 240 NY 307, 312 [1925]; Siegel, New York Prac §317 at 504-05 [4th ed. 2005]). Even if plaintiff satisfies the requirements of CPLR Article 62, the provisional remedy of attachment is a discretionary one. (*See Asdourian v Konstantin*, 50 F Supp 2d 152, 159 [EDNY 1999]).

Here, for an attachment to issue, Harvardsky must show that it is probable that the Czech Judgment will be granted recognition pursuant to Article 53 of the CPLR. (*See Byblos Bank Europe, S.A. v Sekerbank Turk Anonym Syrketi*, 40 AD3d 497, 498 [1st Dept 2007]). New York has traditionally been a generous forum in which to enforce judgments for money damages by foreign courts, and, in accordance with that tradition, the state adopted the Uniform Foreign Money-Judgments Recognition Act as CPLR Article 53. "Article 53 was designed to codify and clarify existing case law on the subject and, more importantly, to promote the efficient enforcement of New York judgments abroad by assuring foreign jurisdictions that their judgments would receive streamlined enforcement here." (*CIBC Mellon Trust Co. v Mora Hotel Corp.*,100 NY2d 215, 221 [2003] [citation omitted]).

Article 53 of the CLPR supports the enforcement of a foreign money judgment that is "final, conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal." (CPLR §§5302 and 5303). However, CPLR §5301(b) excludes from the definition of "foreign country judgment" a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters."

If a foreign country money judgment meets the requirements of CPLR §5303, the New York court performs the ministerial duty of entering judgment. This process, informally called "domestication," is not predicated on a showing of CPLR §§301 or 302 personal or in rem jurisdiction over the judgment debtor in New York. (*See Lenchyshyn v Pelko Electric, Inc.*, 281 AD2d 42, 49 [4th Dept 2001]; *see also Abu Dhabi Commercial Bank PJSC v Saad Trading*, 36 Misc 3d 389, 392-93 [Sup Ct, New York County 2012]).

There are ten exceptions to domestication of the foreign judgment, two of which mandate non-recognition and eight which leave the question of non-recognition to the court's discretion. CPLR §5304(a)(1) bars recognition of a foreign country judgment if the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law. That section does not demand that the foreign tribunal's procedures exactly match those of New York. (*CIBC Mellon Trust Co.*,100 NY2d at 222). If a defendant is

afforded notice and an opportunity to be heard in the underlying litigation, the basic requisites of due process are met. (*See* CPLR § 5304(b)(2); *see also Society of Lloyd's v Grace*, 278 AD2d 169 [1st Dept 2000]).

A second mandatory ground for non-recognition is the foreign court's lack of personal jurisdiction over defendant. (CPLR §5304(a)(2)). A New York court has an independent obligation to review the issue of personal jurisdiction, and "'even if the rendering court had jurisdiction under the laws of its own state, a court . . . should scrutinize the basis for asserting jurisdiction in the light of international concepts of jurisdiction to adjudicate . . .' (*CIBC Mellon Trust Co. v Mora Hotel Corp. N.V.*, 296 AD2d 81, 93 [1st Dept 2002][citation omitted]). "'The inquiry turns on whether exercise of jurisdiction by the foreign court comports with New York's concept of personal jurisdiction, and if so, whether that foreign jurisdiction shares our notions of procedure and due process of law.' (*John Galliano, S.A. v Stallion, Inc.*, 15 NY3d 75, 81 [2010] [citation omitted]).

A corollary to CPLR §5304(a)(2) is lack of fair notice under CPLR §5304(b)(2), one of the eight discretionary grounds for non-recognition. CPLR §5304(b)(2) provides that a foreign country judgment need not be recognized if "the defendant in the proceedings in the foreign court did not receive notice of the

proceedings in sufficient time to enable him to defend." The "notice" inquiry calls on the court to determine "'[w]hether a reasonable method of notification [was] employed and reasonable opportunity to be heard [was] afforded to the person affected.'" (*Gondre v Silberstein*, 744 F Supp 429, 434 [EDNY 1990][citation omitted]).

In this case there are genuine questions as to whether the Czech Judgment is penal in nature; whether Koženy's trial in absentia violated fundamental due process principles and is thus irreconcilable with our basic jurisprudential canons; whether Koženy received proper notice of the Czech proceeding; and whether the Czech Judgment may gain recognition under any additional theory pursuant to CPLR §5307. The Court, however, need not address these issues, as Landlocked does not have standing to oppose entry of the Czech Judgment as against Koženy. Landlocked was not a party to the Czech proceeding: the Czech judgment was issued only against Koženy. Accordingly, Landlocked may not be deemed an aggrieved party for the purposes of challenging the judgment, but instead is at most a holder of fraudulently transferred property. (*See Grace v Bank Leumi Trust Co.*, 443 F3d 180, 189 [2nd Cir 2006], *cert denied* 549 US 1114[2007]).

Plaintiff's attempt to domesticate the Czech Judgment as against Landlocked in the second cause of action does not confer

standing upon Landlocked either, because this cause of action lacks merit and must be dismissed. As Landlocked was not involved in the Czech proceedings, it is not a proper party for purposes of the Article 53 action. Plaintiff has no direct claim against Landlocked: it is only against Landlocked's assets that plaintiff seeks to levy. Therefore, Landlocked's involvement in this matter is limited to the status of a non-party garnishee or obligor in the enforcement and collection proceedings pursuant to Article 52 of the CPLR, provided that the Czech Judgment is first converted properly.[2]

The Court, however, is not persuaded that plaintiff has established the probability of successful conversion of the Czech Judgment which would entitle it to an order of attachment. Although a foreign country judgment creditor need not establish *in personam* or *in rem* jurisdictional basis over a judgment debtor in New York, as a threshold to invoking New York court's jurisdiction over defendant (*See Lenchyshyn v Pelko Electric, Inc.*, 281 AD2d 42, 47 [4th Dept 2001]), plaintiff must effect personal service in compliance with Article 3 of the CPLR or any other pertinent international treaty. Absent requisite proof of proper service of process on Koženy made within 120 days of filing the summons and complaint, this Court does not have

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[2] While a gratuitous transferee may be named a defendant, plaintiff has not pled a cause of action to set aside a fraudulent conveyance under the New York Debtor and Creditor Law.

jurisdiction over him, and would be required to dismiss this action upon motion, unless an extension were properly sought and granted.[3] (*See Daniels v King Chicken & Stuff, Inc.*, 35 AD3d 345, 345-46 [2nd Dept 2006]; *see also Estate of Jervis v Teachers Ins. & Annuity Assn.*, 279 AD2d 367, 367-68 [1st Dept 2001]; *Arbeeny v Kennedy Executive Search, Inc.*, 31 Misc 3d 494, 501-02 [Sup Ct, New York County 2011]; CPLR §306-b).

The only proof of service filed with the Court is an affidavit of service of plaintiff's order to show cause on Koženy by overnight mail to an address in the Bahamas. (Docket No.12). The record is otherwise lacking any indication that service of the summons and complaint was effected upon Koženy, nor is the court aware of any authority that the requirement of service of the summons and complaint is satisfied by service of a separate motion. (*See Al-Dohan v Kouyoumjian*, 93 AD2d 714, 715 [1st Dept 1983], *appeal dismissed* 59 NY2d 967 [1983]). Since this defect would render the summons and complaint a nullity as against Koženy and effectively doom the possibility of domesticating the

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[3] An attachment may be granted ex parte, without notice, prior to the service of the summons and complaint. (CPLR § 6211(a)). In that event, plaintiff must serve the summons and complaint within 60 days of the grant of the attachment for the attachment not to be deemed void ab initio. The 60-day service rule operates independently of the 120-day rule under CPLR 306-b, and does not extend the 120-day period within which process must be served for the court's jurisdiction to attach. To the contrary, the purpose of the 60-day rule is to expedite litigation in the event an attachment is granted *ex parte* and not to delay it. (Siegel, NY Prac § 319 [5th ed 2011]). In any event, plaintiff did not seek issuance of its Order to Show Cause without notice, but provided for notice application (although not the initiatory pleadings) in its proposed order.

Czech Judgment on default pursuant to CPLR §3215,[4] this Court's analysis as to whether Landlocked's property is subject to attachment in satisfaction of Koženy's debt is academic. (*See Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 101 [2001][discussing effect of failure to serve process timely and the criteria to extend the time for service]; *Ambrosio v Simonovsky*, 62 AD3d 634, 634 [2nd Dept 2009]; *cf. Interlink Metals and Chemicals, Inc. v Kazdan*, 222 AD2d 55 [1st Dept 1996]).

In accordance with the foregoing, it is hereby

ORDERED that the motion of plaintiff for an order of attachment against defendants' property, including any property within the possession or control of garnishee Wells Fargo Bank, N.A., accounts bearing numbers 12671905 and 0578010886, motion sequence 001, is denied; and it is further

ORDERED that the temporary restraining order entered on June 4, 2012 is vacated; and it is further

ORDERED that the motion of defendant Landlocked Shipping Company to dismiss the summons and complaint, motion sequence 002, is granted to the extent of dismissing the second cause of

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[4]In opposition to plaintiff's order to show cause, Landlocked noted plaintiff's ineffective attempt at service of the summons and complaint by mail, but waived any objections to service of process and entered appearance voluntarily. (Memorandum of Law in Opposition by James E. Nesland, dated September 4, 2012, p.1, Docket No. 21). Landlocked's voluntary appearance, however, cannot be imputed to Koženy.

action, and is otherwise denied.

This constitutes the decision and order of the court.

Date: June 7, 2013
New York, New York

ENTER:

Ellen M. Coin, A.J.S.C.