SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Melissa A Crane **PART** 15
Justice

ANIBAL MONTENEGRO DIAZ

-v-

GALOPY CORPORATION INTERNATIONAL, N.V.

INDEX NO. 656721/2016

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. 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

In this action, plaintiff Anibal Montenegro Diaz seeks, by way of summary judgment in lieu of complaint, recognition of a foreign country money judgment that a Venezuelan court rendered in his favor against defendant Galopy Corporation International, N.V. in the amount of one billion, one hundred and thirty-four million, four hundred and sixty-three thousand and five hundred and fifty-one and 97/100 bolívars (Bs. 1,134,463,551.97). Plaintiff requests this court to enter judgment in an equivalent amount of US dollars. The main challenge for the court is how to calculate that equivalent amount given the volatile situation in Venezuela that has engendered certain economic realities, such as rampant inflation, devalued currency, and a black market exchange.

Background

Defendant does not dispute the following facts that led the court in Venezuela to enter the money judgment against it. Plaintiff is a citizen of Venezuela and an attorney licensed to practice law

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

in that country. On May 8, 2014, plaintiff commenced an action against defendant in the Third Court of First Instance in Civil, Commercial, Transit and Banking Matters of the Judicial District of the Metropolitan Area of Caracas (the "Venezuelan Court"), seeking to recover professional fees that defendant owed.

On June 18, 2014, the Venezuelan Court directed plaintiff to serve a summons on defendant by service on its director, also a citizen of Venezuela, to answer the complaint. On March 31, 2015, defendant voluntarily appeared before the Venezuelan Court and acknowledged receipt of the summons and complaint. Thereafter, defendant answered the complaint. On October 27, 2015, the Venezuelan Court entered judgment in plaintiff's favor on the issue of liability and referred the matter to a "revaluation" court for an assessment (the "Liability Judgment").

On November 4, 2015, pursuant to the Venezuelan Court's October 27, 2015 ruling, plaintiff filed a petition requesting that the court set the indexation of the amount resulting from the Liability Judgment against Galopy. Plaintiff states that 'indexation' is the "technique to adjust an amount by means of a price index, in order to maintain the purchasing power of the said amount after inflation" (Affirmation of Anibal Montenegro Diaz, dated November 30, 2016, ¶ 10). On December 4, 2015, defendant voluntarily appeared before the Venezuelan Court and acknowledged receipt of the Liability Judgment.

On March 9, 2016, the Venezuelan Court granted the petition, awarded plaintiff his professional fees, and ordered a revaluation and adjustment for inflation (the "First Fee Judgment"). On March 14, 2016, defendant voluntarily appeared before the Venezuelan Court and acknowledged receipt of the First Fee Judgment. Defendant did not appeal the Venezuelan Court's rulings or request an extension of the deadlines to appeal. Therefore, the Liability Judgment and the First Fee Judgment has become final and non-appealable.

On April 6, 2016, based on the finality of the Liability Judgment and the First Fee Judgment, the Venezuelan Court ordered the appointment of "Revaluation Judges." On April 14, 2016, both parties voluntarily participated in the appointment of the Revaluation Judges and each designated one Revaluation Judge. On June 29, 2016, the Revaluation Court (comprising the Third (3rd) Judge of First Instance in Civil, Commercial, Transit and Banking Matters of the Judicial District of the Metropolitan Area of Caracas, along with the two Revaluation Judges who the parties had designated) awarded plaintiff the adjusted amount of professional fees against defendant in the sum of one hundred sixty-nine million, six hundred and eighty thousand bolívars (Bs. 169,680,000.00) (the "Second Fee Judgment"). The Revaluation Court also ordered a revaluation and adjustment for inflation, in accordance with the First Fee Judgment, dated March 9, 2016. Defendant did not appeal the Second Fee Judgment or request an extension of the deadline to appeal. Therefore, the Second Fee Judgment also became final and non-appealable.

On August 9, 2016, the Venezuelan Court appointed Isabel Monedero, a Venezuelan accountant, to act as the accounting expert for the purposes of adjusting the Second Fee Judgment for inflation. On October 21, 2016, Ms. Monedero submitted her expert report to the Venezuelan Court, finding that the amount of the Second Fee Judgment required adjustment to one billion, one hundred and thirty-four million, four hundred and sixty-three thousand and five hundred and fifty-one and 97/100 bolívars (Bs. 1,134,463,551.97) (the "Adjusted Fee Judgment" or the "Venezuelan Judgment"). Again, defendant did not appeal the Adjusted Fee Judgment and the time to appeal or extend time to appeal has elapsed.

Defendant has not paid the Venezuelan Judgment. On December 23, 2016, plaintiff commenced this action by filing a summons with notice and moved by summary judgment in lieu of complaint to enforce the Venezuelan Judgment. Defendant opposed and moved to dismiss for lack of

personal jurisdiction. Defendant also cross moved pursuant to CPLR §§§§ 3211(a)(1) and 3211(a)(7), 3211 (c), and 3212 or 3213 to dismiss this action on the same ground insofar as plaintiff sought a judgment in U.S. currency: (a) as of the date the foreign country judgment was entered or (b) based on the official exchange rate, rather than the true market rate.

Discussion

Summary judgment in lieu of complaint, together with Article 53 of the CPLR, is an appropriate vehicle when a party seeks enforcement, or recognition, of an out of country money judgment (CPLR § 5303 ["Such a foreign judgment is enforceable by an action on the judgment [or] a motion for summary judgment in lieu of complaint"]). CPLR § 3213 provides, in pertinent part, that "[w]hen an action is based upon an instrument for the payment of money only or upon any *judgment*, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint" (emphasis added). Article 53 of the CPLR applies to "any foreign country judgment which is final, conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal" (CPLR § 5302).

CPLR § 5304 sets forth grounds for non-recognition of a foreign judgment:

(a) No recognition. A foreign country judgment is not conclusive if:
1. the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
2. the foreign court did not have personal jurisdiction over the defendant.

(b) Other grounds for non-recognition. A foreign country judgment need not be recognized if:
1. the foreign court did not have jurisdiction over the subject matter;
2. the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;
3. the judgment was obtained by fraud;
4. the cause of action on which the judgment is based is repugnant to the public policy of this state;
5. the judgment conflicts with another final and conclusive judgment;

6. the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court;
7. in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action; or
8. the cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless the court before which the matter is brought sitting in this state first determines that the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by both the United States and New York constitutions.

Further, CPLR § 5305(a) sets forth the bases of jurisdiction and provides that a foreign country judgment shall not be refused recognition for lack of personal jurisdiction if:

1. the defendant was served personally in the foreign state;
2. the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him;
3. the defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved;
4. the defendant was domiciled in the foreign state when the proceedings were instituted, or, being a body corporate had its principal place of business, was incorporated, or had otherwise acquired corporate status, in the foreign state;
5. the defendant had a business office in the foreign state and the proceedings in the foreign court involved a cause of action arising out of business done by the defendant through that office in the foreign state; or
6. the defendant operated a motor vehicle or airplane in the foreign state and the proceedings involved a cause of action arising out of such operation.

Defendant's Cross-Motion to Dismiss

In its cross-motion, defendant seeks dismissal of this action on the ground that this court lacks personal jurisdiction, because defendant lacks minimum contacts with New York. Defendant's argument is without merit. Only when a judgment debtor opposing recognition of a foreign country judgment asserts substantive statutory grounds for denying recognition, must there be either *in*

personam or *in rem* jurisdiction in New York (*see Albaniabeg Ambient Sh.p.k., v. Enel S.P.A., et al.*, 160 A.D.3d 93, 73 N.Y.S.3d 1 [1st Dept. 2018]). Otherwise, this court's personal jurisdiction over a defendant is not required for recognition of a foreign money judgment (*see Abu Dhabi Commercial Bank PJSC v Saad Trading, Contr. and Fin. Services Co.*, 117 AD3d 609, 611 [1st Dept 2014]; *see also Lenchyshyn v Pelko Elec., Inc.*, 281 AD2d 42, 47 [4th Dept 2001]).

The First Department, in *Abu Dhabi*, held that:

> a party seeking recognition in New York of a foreign money judgment (whether of a sister state or a foreign country) need not establish a basis for the exercise of personal jurisdiction over the judgment debtor by the New York courts, because no such requirement can be found in the CPLR, and none inheres in the Due Process Clause of the United States Constitution, from which jurisdiction basis requirements derive

(117 AD3d at 611, internal quotation marks omitted).

Here, defendants fail to raise any CPLR §§ 5304 or 5305 statutory defenses to the recognition or enforcement of the Venezuelan judgment. It is undisputed that the Venezuelan Court had personal jurisdiction over defendant. Indeed, as detailed above, throughout the Venezuelan Court proceedings, defendant voluntarily appeared, by counsel. At each court appearance, defendant acknowledged receipt of service of the various orders that the court issued and the court documents that plaintiff served upon him. Accordingly, the court denies defendant's cross-motion to dismiss for lack of personal jurisdiction.

Plaintiff's Motion

Plaintiff's motion presents the interesting question of what exchange rate the court should apply to the Venezuelan judgment. Plaintiff seeks recognition of the Venezuelan Judgment in US dollars, in the amount of one million, seven hundred nineteen thousand, five hundred sixty-one dollars and fifty-seven cents (US $1,719,561.57). Plaintiff argues that this sum is the equivalent amount of the Venezuelan Judgment expressed in US dollars at the rate of exchange prevailing on October 21,

2016, the date of entry of the Venezuelan Judgment. Plaintiff takes the position that the applicable rate of exchange is the "official" exchange rate that the government of Venezuela sets.

Since the decline in oil prices six years ago, Venezuela has faced constant economic turmoil and political discord. Some sources estimate that, during this time, the inflation rate of the Venezuelan bolívar has exceeded 6,000 percent per annum.[i] Despite years of economic and political uncertainty, Venezuela still retains large oil reserves.[ii] In 2017, the country ceased making interest payments on nearly $50 billion in government bonds.[iii]

In 2003, in response to a previous economic crisis, the Venezuelan government created a currency control system. The system was designed to bolster Venezuela's diminishing foreign reserves, cut prices on essential goods, and provide a fixed exchange rate for locals to purchase the government's dollar-denominated bonds.[iv] However, these governmental controls failed to prevent the hyperinflation of Venezuelan currency because the state continues to print money to satisfy its liabilities.[v]

The parties agree that the Venezuelan government officially promotes two official exchange rates: the DIPRO rate of 10 bolívars to the U.S. dollar and the DICOM rate, set at auction. DICOM is a floating market rate and, as of February 2018, stands at 3,345 bolívars. However, the government restricts most Venezuelans from accessing the DIPRO and DICOM exchange rates. The parties agree that the DIRPO rate applies only to humanitarian needs such as food, medicine and raw materials. Therefore, it is inapplicable to this case.

The weak bolívar has led to local demand for foreign currencies, that are preferable given their stability.[vi] Accordingly, many Venezuelan businesses reject domestic currency in favor of the U.S. dollar or the Euro. Average Venezuelans are left to choose between waiting on long lines to buy basic

supplies with bolívars at government-regulated establishments, with the knowledge they may leave empty-handed, and black market traders who typically only accept expensive foreign currencies in exchange for basic necessities.[vii] Further, the depressed bolívar has reduced the incentive for foreign companies to sell goods or do business in Venezuela, given that they would have to do so at a loss after converting bolívars to their local currencies.[viii]

Defendant argues that should the court convert the Venezuelan Judgment into US dollars, the court should convert at the true market rate, rather than the so called "official" rates. Defendant contends that the "official rates" do not represent true rates of exchange because they are used for limited purposes and are inaccessible to the Venezuelan public generally. Defendant's experts describe Venezuela's "official" exchange rate as "blocked." A blocked currency is "a currency that cannot freely be converted to other currencies on the foreign exchange market as a result of exchange controls. It is mainly used for domestic transactions and does not freely trade on a forex market, usually due to government restrictions."[ix] Both of defendant's experts describe the realities of the legal and black market exchanges in Venezuela. They discuss how the DICOM exchange rate is effectively "blocked" because it is a rigged exchange rate set by a government they describe as corrupt. In reply, plaintiff argues that the court must look to Venezuela's "official" rate of exchange because alternative rates of exchange that defendant proposes are illegal, other "black market" exchange rates are illegal, and would subject plaintiff to criminal charges.

Judiciary Law § 27 requires that: "(a) Except as provided in subdivision (b) of this section, judgments and accounts must be computed in dollars and cents." In turn, subsection (b) states:

> In any case in which the cause of action is based upon an obligation denominated in a currency other than currency of the United States, a court shall render or enter a judgment or decree in the foreign currency of the underlying obligation. Such judgment or decree shall be converted into

> currency of the United States at the rate of exchange prevailing on the date of entry of the judgment or decree.

"Because recovery can be rendered only in the currency of the forum, courts are required to ascertain a figure in that currency representing the equivalent value of the amount of foreign funds in question" (*Vishipco Line v Chase Manhattan Bank, N.A.*, 754 F2d 452, 455 [2d Cir 1985], citing *Sokoloff v National City Bank*, 250 NY 69, 82 [1928]).

Occasionally, determining the rate of exchange representing that equivalent value becomes problematic due to the political climate in the original jurisdiction. "Where local currency restrictions would prevent a party from converting its money into dollars, New York courts have been disinclined to employ "official" exchange rates, seeking instead to appraise realistically the relative values of the currencies" (*Vishipco Line et al.*, 754 F2d at 452, [2d Cir. 1985]; citing *Hughes Tool Co., v United Artists Corp.*, 279 AD 417, 421 [1st Dept 1952]; *aff'd*, 304 NY 942).

Like this case, *Hughes* involved a "blocked" currency (*Hughes Tool Co., v United Artists Corp.*, 279 AD 417, 421, 110 N.Y.S.2d 383 [1st Dept 1952]; *aff'd*, 304 NY 942). Refusing to apply certain official exchange rates, the Hughes court reasoned that:

> [i]t will not do to sacrifice justice to the easy way of resorting, as a substitute for a free market, to an official rate of exchange that has been established for other purposes and does not apply to transactions in controversy

(279 AD 417, 421) The *Hughes* court noted that it was plaintiff's burden to:

> "establish the application [sic] rates of exchange as much as it is to prove the other necessary elements of damage. Proof of the so called [sic] 'official' rate of exchange does not sustain the burden, where it also appears that the foreign currency is blocked for the purpose in suit"

(279 AD 417, 420). Thus, the *Hughes* court ignored the official rate of exchange and remanded the case for a trial for plaintiff to demonstrate "other methods of ascertaining the values here of these blocked foreign currencies." (*Id.* at 423; see also *Vishipco Line v Chase Manhattan Bank, N.A.*, 754

F2d 452, 456 (2d Cir 1985) [case remanded for a determination of the true value of South Vietnam's currency on the date of breach]).

Here, plaintiff has not met its burden to establish the applicable rate of exchange under *Hughes* merely by describing the "official" rates or by decrying unofficial rates as "illegal" in Venezuela. Defendant raises an issue of fact in opposition to plaintiff's motion by its experts who describe the realities of the exchange markets in Venezuela. Indeed, defendant's experts have made a *prima facie* showing that the Venezuelan currency is blocked, that plaintiff has failed to refute. Plaintiff's expert does not dispute that the exchange rate defendant propounds reflects more accurately the true market rate for exchanging bolívars to dollars. Plaintiff also does not contest defendant's showing that ordinary people cannot exchange bolívars for dollars at the DICOM rate.

Finally, the exchange rate in effect on the date of the New York judgment's entry is the applicable rate. Section 27(b) states that "a court shall render or enter a judgment or decree in the foreign currency of the underlying obligation." The statute then immediately follows with the words "Such judgment or decree shall be converted into currency of the United States at the rate of exchange prevailing on the date of entry of judgment or decree." Given its placement, the term "Such judgment" refers back to the judgment in the immediately preceding sentence, (i.e. the New York judgment) (*see Dynamic Cassette Intern Ltd, v Mike Lopez & Assoc.*, Inc. 923 F Supp 8, 12 [EDNY 1996]; *Capital Law v Viar*, 338 FSupp2d 891, 894 [WD Tenn. 2004] [comparing New York law and stating "the State of Tennessee does not have a statute which instructs courts on how to convert foreign judgments into United States' dollars']).

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment in lieu of complaint against defendant is granted only to the extent of recognizing the Venezuelan Judgment, and is otherwise denied without prejudice to bringing a new motion under the correct applicable exchange rate; and it is further

ORDERED that defendant's cross-motion to dismiss for lack of personal jurisdiction is denied; and it is further

ORDERED that the parties are to appear for a conference on June 25, 2018 at 10am in the courtroom at 71 Thomas Street, Room 304, New York, NY.

Dated: 5/25/2018

HON. MELISSA A. CRANE *J.S.C.*
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

[i] https://www.bloomberg.com/news/articles/2018-04-04/venezuela-s-currency-is-doing-even-worse-than-previously-thought. Hyperinflation of the Venezuelan bolívar is expected to continue, as the IMF projects 13,000% inflation for 2018. http://www.imf.org/en/Countries/VEN.
[ii] http://www.opec.org/opec_web/en/data_graphs/330.htm
[iii] https://www.reuters.com/article/us-venezuela-debt-bondholders/the-silent-creditor-group-in-venezuelas-debt-crisis-venezuelans-idUSKBN1E20K9
[iv] https://www.nytimes.com/2003/02/06/business/worldbusiness/venezuela-imposes-currency-controls-to-shore-up.html
[v] https://www.washingtonpost.com/news/monkey-cage/wp/2018/05/17/will-sundays-elections-bring-economic-relief-and-reform-to-venezuela/?utm_term=.20e4513a7709
[vi] https://www.washingtonpost.com/news/monkey-cage/wp/2018/05/17/will-sundays-elections-bring-economic-relief-and-reform-to-venezuela/?utm_term=.ca54ab2c7bc6
[vii] https://www.theguardian.com/global/2016/may/18/venezuelans-on-food-shortages-economic-crisis-blighting-daily-lives-maduro
[viii] https://www.washingtonpost.com/news/wonk/wp/2018/05/18/oil-was-the-only-thing-keeping-venezuela-afloat-now-the-government-is-too-dysfunctional-to-even-pump-it/?utm_term=.e716beeed511
[ix] https://www.investopedia.com/terms/b/blockedcurrency.asp