SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 54EFM

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SUTTONGATE HOLDINGS, LIMITED,

Plaintiff,

- v -

LACONM MANAGEMENT N.V., SAMIR ANDRAWOS, VIRGINIA IGLESIAS, KASHMIRE INVESTMENTS, LTD., IMMO KASHMIRE DEVELOPMENT INC.,SEDNA GROUP LTD., KUIPER GROUP LTD., OURISTA, N.V., ARIE DAVID, CHARYN POWERS, WAVERLY INVESTMENTS, LTD.,

Defendants.

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INDEX NO. 652393/2015

MOTION DATE _____

MOTION SEQ. NO. 034

DECISION & ORDER ON MOTION

HON. JENNIFER G. SCHECTER:

The following e-filed documents, listed by NYSCEF document number (Motion 034) 1443, 1444, 1445, 1446, 1447, 1448, 1449, 1450, 1451, 1452, 1453, 1455, 1458, 1459, 1460, 1461, 1462, 1463, 1464, 1465, 1539, 1540, 1541, 1542

were read on this motion for ANTI-SUIT INJUNCTION.

Familiarity with this action, which is addressed in the court's post-trial decision, is assumed.[1]

After trials it has been determined that both Iglesias and Andrawos are bound by the Loan Agreement, which contains a broad, exclusive New York County forum selection clause, and in which they agreed that the "RBC Loans . . . assigned to [Suttongate] shall remain in full force and effect until fully repaid with interest in accordance with said RBC

[1] Capitalized terms not defined here have the same meaning as in the post-trial decision.

Loans' terms and conditions [and that the] Agreement and the Loan pursuant thereto shall be in addition to rather than in lieu of the assigned RBC Loans" (Dkt. 1473 §§ 7, 22).[2]

Suttongate commenced an action in St. Maarten against Iglesias and Andrawos to recover the amount its owed under the RBC Loans based on their personal guarantees of that debt.[3] Whether those guarantees that they provided to RBC, which RBC then sold to Suttongate, are themselves enforceable has never been the subject of this litigation. Iglesias and Andrawos are seeking to implead David and Powers in St. Maarten and to assert claims and defenses principally based on allegations of fraud and breach of fiduciary duty that were rejected by the Appellate Division on the merits (*see* Dkts. 1451, 1452).

Suttongate moves for an anti-suit injunction prohibiting Iglesias and Andrawos from "(1) further prosecuting or seeking to prosecute the St. Maarten action against [David and Powers; and] (2) further asserting or seeking to assert in the St. Maarten action, or any other jurisdiction outside of [New York County], any claim against Suttongate, [David, Powers] and/or Waverly relating to the New York Agreements . . . and/or that was raised or could have been raised in this action" (Dkt. 1444 at 5).

Suttongate contends that this bears a striking resemblance to *GE Oil & Gas, Inc. v Turbine Generation Servs., L.L.C.* (51 Misc 3d 1226[A] [Sup Ct, NY County 2016], *affd* 150 AD3d 586 [1st Dept 2017]). It does and Suttongate's motion is granted.

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[2] If the borrower had fully performed under the Loan Agreement, including repayment in full by August 2017 (which did not happen), then repayment of the remainder of the RBC Loans would have been forgiven.

[3] Subsequent to commencement of the St. Maarten action, judgment was entered against Andrawos for the full amount of the indebtedness defendants owe based on a personal guaranty that he signed. In light of that Suttongate is withdrawing its claim against him (Dkt. 1444 at 16 n 2).

In *GE Oil*, the court, which adjudicated the dispute pursuant to the parties' mandatory forum selection clause, issued a judgment in plaintiff's favor on a loan agreement and personal guaranty and rejected a defense based on the alleged existence of a joint venture (51 Misc 3d 1226[A], at *2-3). Attempting to evade these adverse rulings, the defendant sought to relitigate his joint venture defense in another state court and told that court that it is not bound by and should not follow the New York court's judgment (*see id.* at *3). This court issued an anti-suit injunction and--consistent with its longstanding precedents that refuse to permit collateral attacks on the judgments of New York courts when such attacks contravene a forum selection clause--the Appellate Division affirmed (150 AD3d at 587, citing *Indosuez Intl. Fin., B.V. v. National Reserve Bank*, 304 AD2d 429 [1st Dept 2003]; *see* 51 Misc 3d 1226[A], at *4 [collecting cases]; *see also Carestream Health (Near East) Ltd. v Lindustry (Offshore) S.A.L.*, 2017 WL 5903329, at *3 [Sup Ct, NY County Nov. 30, 2017]).[4]

Iglesias and Andrawos have done the same thing. Iglesias wants to retell the whole story surrounding the parties' relationship and the circumstances of the Loan Agreement outside New York (Dkt. 1452 at 10 [arguing this court's judgments "have no binding force"], 12 [arguing this court's "judgment **should not be recognized in St. Maarten**" [emphasis added]). The court did not tolerate this outrageousness in *GE Oil* and will not do so here.

[4] The Appellate Division also affirmed the order holding defendants in contempt for failure to discontinue the other case. The court will not ignore that if Iglesias or Andrawos violate this injunction, it would be the third time that they are held in contempt for violating injunctions in this case.

The argument that the Loan Agreement's forum selection clause does not apply to counterclaims in St. Maarten is baseless. Iglesias can no longer maintain that she is not bound by the Loan Agreement. Its forum selection clause, in section 22, provides in no uncertain terms that "all disputes **relating to** this Agreement" must be litigated in New York (Dkt. 1473 at 13 [emphasis added]). Iglesias's and Andrawos's contentions that the Loan Agreement was procured by David's fraud and that he purportedly committed breaches of fiduciary duty related to his supposed role as their attorney and joint venturer were rejected by the Appellate Division and are plainly related to the Loan Agreement.

The RBC guarantees were executed years before David was involved and, of course, defendants can assert any and all defenses that they have in connection with the RBC transaction. The validity and scope of the RBC guarantees has nothing to do with David's alleged misconduct. What they cannot do, however, outside New York County and in derogation of this court's judgments is undermine the enforcement of the Loan Agreement.

The claims that they attempt to assert are based on David's purported misconduct in connection with Suttongate's buyout of the RBC Loan, which they allege should have resulted in the guarantees being extinguished (*see* Dkt. 1452 at 11). The Loan Agreement is the contract that permitted the RBC payoff and the alleged-but-rejected joint venture to occur, so David's alleged misconduct certainly relates to the Loan Agreement. The parties

could have agreed that the Loan Agreement's forum selection clause is limited to claims "arising from" the agreement – but instead they chose to use the broader term "related."[5]

Since David's alleged misconduct was proffered to rescind the Loan Agreement in this case, it cannot legitimately be argued that it is unrelated to the Loan Agreement. Claims related to the Loan Agreement cannot be revived as defenses to the RBC guarantees in violation of the agreed-upon forum selection clause and when the predicates of such claims were rejected on the merits here. That is exactly what the doctrines of claim and issue preclusion are meant to prevent (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981] ["No other claim may be predicated upon the same incidents"]). Proffering a slightly different theory (*see* Dkt. 1452 at 11) or suing David and Powers cannot be used as an end run around these important doctrines (*Landau v LaRossa, Mitchell & Ross*, 11 NY3d 8, 13 [2008]; *see UBS Secs. LLC v Highland Capital Mgmt., L.P.*, 86 AD3d 469, 474 [1st Dept 2011]).

This is not a case where comity dictates abstention (*see Indosuez*, 304 AD2d at 430). There is no possibility that this injunction will tread on the determination of any issues that are properly before St. Maarten courts. As in *GE Oil*, parties who had their day in court under the terms of their agreement are unabashedly in breach of that agreement, telling a foreign court not to follow this court's judgment.[6] This case, just like *GE Oil*, presents the

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[5] Indeed, the agreement governing the transfer of the RBC Loan to Suttongate employs this narrower language, indicating that the parties were deliberate in how they drafted the scope of their forum selection clauses (*see* Dkt. 1478 at 8).

[6] Suttongate's decision to enforce the RBC guarantees in St. Maarten, which Iglesias and Andrawos do not dispute is a proper venue, does not mean David and Powers may be impleaded on claims that were required to be and were litigated in New York. Suttongate's right to enforce

classic circumstances where an anti-suit injunction must be issued (*see Indosuez*, 304 AD2d at 430-31 ["once there was a New York judgment on the merits, the courts of this State were entitled to protect it"]).

The court will not blue-pencil their claims. They are rife with allegations concerning David's alleged fraud, his role as their attorney and the purported joint venture. (*see* Dkt. 1452 at 1 ["Suttongate suggests in its petition that it concerns a simple case, suing Andrawos and Iglesias based on a personal guarantee. However, **there is a much longer, more complicated story** behind Suttongate's simplified story, in which Andrawos and Iglesias were defrauded by inter alia Suttongate. With this motion Iglesias will begin telling the whole story"] [emphasis added]). There certainly was a long and complicated story. This court and the Appellate Division have already unraveled it and found defendants' narrative without merit. Whatever wasn't already told related to the Loan Agreement, moreover, could have been. Defendants do not get a second shot in St. Maarten. Their debunked story about what occurred in their dealings with David and Powers has no bearing on whether they are liable under the assigned RBC guarantees.[7]

Finally, Suttongate may have a valid claim for attorneys' fees for breach of the Loan Agreement's forum selection clause (*see Carestream*, 2017 WL 5903329, at *3, citing

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the RBC loan guarantees is not dependent on the personal liability of David and Powers so Iglesias and Andrawos are not prejudiced by the inability to implead them, especially since the proposed claims are clearly devoid of merit.

[7] This court has every reason to believe the St. Maarten court would see through defendants' charade but the Loan Agreement mandates intervention so neither the St. Maarten court nor Suttongate spend years reliving what has come to an end here.

Indosuez, 304 AD2d at 431). But *Carestream* and *Indosuez* were plenary actions seeking redress for breach of a forum selection clause, while this is merely a motion for an injunction made in an otherwise concluded litigation. If Suttongate seeks attorneys' fees as damages for breach of section 22 it must file a new plenary action.[8]

Accordingly, it is ORDERED that Suttongate's motion for an anti-suit injunction is granted and, by May 26, 2020, Andrawos and Iglesias shall (1) provide the St. Maarten court with a copy of this order; (2) withdraw with prejudice all claims, defenses and legal arguments asserted in the St. Maarten action that, as discussed herein, are inconsistent with the holdings in this action; and (3) along with the other defendants, shall not further file any such claims in any court and shall not ask the court in St. Maarten or any other court to disregard the rulings and judgments issued in this case; and it is further

ORDERED that the prong of Suttongate's motion seeking attorneys' fees is denied without prejudice to the commencement of a plenary action.

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5/22/2020
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
[X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER

[8] In *GE Oil*, while the court noted that *Indosuez* controls regardless of federal district court cases to the contrary (that are not bound by the Appellate Division and instead may predict how the Court of Appeals would rule), the court did not need to make such an award since duplicative fees were otherwise recoverable on the contempt (*see* 51 Misc 3d 1226[A], at *5). While the prospect of further litigation is not encouraged, that would still be preferable to another instance of contempt. The disregard for court orders in this case is distressing; the court's integrity must be preserved.