

Bertoli v Zanin

2020 NY Slip Op 33061(U)

September 15, 2020

Supreme Court, New York County

Docket Number: 655046/2018

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM

Justice

-----X

LUIGI BERTOLI,

Plaintiff,

- v -

ANDREA ZANIN,

Defendant.

-----X

LOUIS L. NOCK, J.

INDEX NO. 655046/2018
MOTION DATE 02/06/2020
MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ordered that plaintiff's motion for summary judgment and defendant's cross-motion to dismiss and for sanctions are decided in accord with the following memorandum.

This action was commenced by summons and complaint filed October 10, 2018, under CPLR article 53, to domesticate what is alleged to be an *ex parte* Italian default judgment issued more than seven years earlier, on June 7, 2011, in the principal amount of € 400,000 (Euro). The complaint alleges that such sum, as of the commencement of this action, amounts to \$464,906.74 (USD).

As far as the procedural posture of this action is concerned: plaintiff had moved for a default judgment (motion seq. no. 001) on April 16, 2019. Defendant opposed that motion, and cross-moved to dismiss, on May 15, 2019, on grounds of lack of proper service of process. Defendant sought the alternative remedy of having the court recognize personal jurisdiction in exchange for a thirty-day period to respond to the complaint. By order filed July 15, 2019, the

court, after oral argument, denied plaintiff's motion and granted defendant's cross-motion to the extent of adopting the alternative relief stated above. Consonant therewith, defendant filed an answer on August 12, 2019, which asserted alleged affirmative defenses that included laches,¹ set-off, and, most notably, a defense that "the foreign judgment is not final and/or conclusive" (Answer ¶ 21; *see also, id.*, ¶ 22 ["the foreign judgment does not satisfy the prerequisites for recognition and enforcement pursuant to Article 53 of the CPLR"]).

On September 3, 2019, plaintiff made the instant motion (seq. no. 002) seeking summary judgment of the domestication sought in the complaint. Defendant opposes the motion and cross-moves for summary judgment of dismissal and for sanctions. Both parties submit conflicting expert affirmations which deal with the seminal issue whether the asserted Italian default judgment forming the basis of this action is what plaintiff asserts it to be; to wit, a "final, conclusive, and enforceable" judgment "in Italy" (Complaint ¶ 13). A finding on that issue is critical in this case on account of the CPLR's insistence on a "final, conclusive and enforceable" judgment "where rendered" in order to qualify for domestication status (CPLR 5302). Plaintiff's expert, Professor Michele Angelo Lupoi (Faculty of Law, University of Bologna), opines that it is (*see*, NYSCEF Doc. No. 67). On the other hand, defendant's expert, Andrea Ninni, Esq., an attorney admitted to practice in Italy – particularly within the field of debt collection – opines that the asserted Italian default judgment "is not immediately enforceable in Italy. Nor is it final and conclusive." (NYSCEF Doc. No. 65 ¶ 7.) Mr. Ninni opines that after obtaining the asserted judgment – referred to specifically in this case by both experts as an "Injunctivo" (Ninni Aff. ¶ 8; Lupoi Aff. ¶ 9 ["Ingiuntivo"]) – the judgment creditor must follow up with certain time-limited post judgment procedures, without which the judgment expires (*see*, Ninni Aff., *passim*).

¹ Again – plaintiff waited seven years before attempting to domesticate its asserted foreign country default judgment.

Defendant's position is that plaintiff failed to carry out those post-judgment procedures, rendering the seven-year-old predicate judgment a nullity. Plaintiff's expert, Professor Lupoi, disagrees entirely (*see*, Lupoi Aff., *passim*).

Thus, "a classic conflict between experts' is presented precluding a grant of summary judgment to either" party (*Santiago v Brandeis*, 309 AD2d 621, 622 [1st Dept 2003]; *see also*, *Mike v 91 Payson Owners Corp.*, 114 AD3d 420 [1st Dept 2014]).

The parties' submissions reveal that certain discovery demands have been served in this case regarding the underlying facts forming the substantive basis for plaintiff's contractual claims against defendant, which defendant's counsel characterizes as his client's "business venture with Bertoli" (NYSCEF Doc. No. 58 at 11; *see also*, NYSCEF Doc. No. 66 [plaintiff's counsel's reply memorandum] at 8-9 [acknowledging that discovery demands are extant]). In light of that, as well as the foregoing disposition, the court hereby schedules, and will arrange, a remote preliminary conference for September 30, 2020, at 2:15 p.m.

Defendant's request for sanctions is denied. Plaintiff's efforts in this litigation cannot remotely be described as frivolous in light of his reliance on Professor Lupoi's expert opinion, notwithstanding the conflicting expert opinion of Attorney Ninni.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendant's cross-motion to dismiss and for sanctions is denied; and it is further

ORDERED that a preliminary conference will go forward on September 30, 2020, at 2:15 p.m., by way of remote conferencing to be arranged by the court.

This will constitute the decision and order of the court.

Louis L. Nock

9/15/2020

DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE