

**Rusoro Mining LTD v Bolivarian Republic of
Venezuela**

2021 NY Slip Op 32294(U)

November 12, 2021

Supreme Court, New York County

Docket Number: Index No. 654261/2019

Judge: Andrea Masley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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|-----------------------------------|---------------------------|--------------------|
| RUSORO MINING LTD, | INDEX NO. | <u>654261/2019</u> |
| Plaintiff, | MOTION DATE | _____ |
| - v - | MOTION SEQ. NO. | <u>003</u> |
| BOLIVARIAN REPUBLIC OF VENEZUELA, | AMENDED DECISION + | |
| Defendant. | ORDER ON MOTION | |

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

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

In motion sequence number 003, plaintiff Rusoro Mining Ltd. moves, pursuant to CPLR 3215, for a default judgment against defendant Bolivarian Republic of Venezuela. There is no opposition to this motion.

Background

On July 26, 2019, plaintiff commenced this action for breach of a settlement agreement entered into by the parties arising out of plaintiff's attempts to confirm an award by an international arbitral tribunal which awarded plaintiff significant compensation for defendant's unlawful seizure of plaintiff's gold mines. (NYSCEF Doc. No. [NYSCEF] 2, Complaint.) Pursuant to the settlement agreement, defendant was to make certain payments to plaintiff in accordance with a specified payment schedule; the initial payment was due on November 15, 2018. (*Id.* ¶¶ 30-35.) Plaintiff alleges that defendant notified plaintiff of an issue with plaintiff's bank and requested new bank account information, which plaintiff provided; however, to date, defendant has failed to make the initial payment owed. (*Id.* ¶¶ 38-40.)

“On a motion for a default judgment under CPLR 3215 based upon a failure to answer the complaint, a Plaintiff demonstrates entitlement to a default judgment against a defendant by submitting: (1) proof of service of the summons and complaint; (2) proof of the facts constituting its claim; and (3) proof of the defendant's default in answering or appearing.” (*Medina v Sheng Hui Realty LLC*, 2018 WL 2136441, *6-7 [Sup Ct, NY County 2018] [citations omitted].)

Proof of Service

As defendant is a foreign sovereign, plaintiff is required to satisfy the requirements of the Foreign Sovereign Immunities Act (FSIA). (28 USC § 1608.) The FSIA provides four methods of service:

“(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or (2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or (3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or (4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.”

(28 USC § 1608 [a] [1]-[4].) Plaintiff asserts that it could not effectuate service under the first method because it does not have a special arrangement with defendant. Plaintiff then attempted to serve defendant in accordance with the Hague Service Convention, which the United States and Venezuela are both signatories to, but that

attempt was unsuccessful. Plaintiff received confirmation that the required documents were served upon defendant's Central Authority (NYSCEF 34, Delivery Confirmation), but to date, the Central Authority has yet to provide a certificate reflecting acceptance of service as required by Article 6 of the Hague Service Convention. (See NYSCEF 33, Harkness aff ¶18.) Plaintiff could not serve pursuant to the third enumerated method because defendant objected to service by mail pursuant to Article 10(a) of the Hague Service Convention. (Hague Conference, <https://www.hcch.net/en/states/authorities/details3/?aid=280> [last accessed September 23, 2021].)

Plaintiff has provided sufficient proof that it has complied with the fourth enumerated method by sending two copies of the summons and complaint, a notice of suit, and a translation in defendant's official language, in addition to other documents, which were addressed and dispatched by the New York County Clerk to the Secretary of State in Washington, District of Columbia, Director of Special Consular Services. (NYSCEF 21, Batts aff. [NY County Clerk Court Clerk].) On February 3, 2020, the United States Department of State, Legal Affairs, wrote to the New York County Clerk to inform him that the documents were delivered on January 31, 2020 to the Embassy of the Bolivarian Republic of Venezuela in Washington, D.C. under cover of U.S. Department of State diplomatic note, as United States Embassy operations in Venezuela were suspended. (NYSCEF 35, U.S. State Department Letter.)

Proof of Facts

"CPLR 3215 (f) requires that an applicant for a default judgment file proof by affidavit made by the [moving] party of the facts constituting the claim." (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70 [2003].) Here, plaintiff submits the affidavit of Andre Agapov, plaintiff's

Chief Executive Officer. (NYSCEF 44, Agapov aff.) Specifically, plaintiff seeks a default judgment on its cause of action for breach of contract. Plaintiff has met its burden of proof.

The elements of a breach of contract claim are: (1) existence of a contract, (2) plaintiff's performance pursuant to the contract, (3) defendant's breach of contractual obligations, and (4) resulting damages. (*Harris v Seward Park Housing Corp.*, 79 AD3d 425, 426 [1st Dept 2010] [citation omitted].)

Plaintiff has submitted sufficient proof of the existence of a settlement agreement between the parties. (NYSCEF 45, Settlement Agreement.) Section 1.1 of the settlement agreement provides that, upon the initial payment by defendants, plaintiff would stay its enforcement actions and agreed not to commence any new actions. (*Id.* § 1.1[a].) The initial payment was due on November 15, 2018. (*Id.* § 2.1.) However, the settlement agreement permitted defendant to continue to pursue an action in France to set aside the tribunal's award (Set Aside Proceedings). (*Id.* § 1.2[a].) Pursuant to the settlement agreement, if the French court annulled the award, in full or in part, the parties had ninety days to agree to "the quantum of compensation that must be paid to [plaintiff] for the termination of its mining rights and the surrender of its Mining Data, without prejudice to the rights of [plaintiff] to exercise any of the rights available to it in the Set Aside Proceedings." (*Id.* § 1.3[a].) The settlement agreement provides, that, in such circumstance, plaintiff had the right to retain sums already paid under the payment schedule, which would be applied to the agreed quantum of compensation, until the balance is fully paid, and defendant would not subsequently be able to claim its return. (*Id.*) The agreement then states, "[f]or the avoidance of doubt, [defendant] must make the payments

owing but not yet completed in accordance with Annex II¹, at the date any favorable decision is issued for [defendant] during the Set Aside Proceedings.” (*Id.*)

In January 2019, the French court upheld the tribunal’s finding of liability but set aside the damages portion of the award. However, pursuant to section 1.2(b) of the agreement, “[t]he schedule of payments set out in Section 2 and Annex II shall apply until any decision is reached in the Set Aside Proceedings which may affect the validity or quantum of the Award. The terms and conditions set out in Section 1.3 shall apply, as appropriate, once any such decision has been made in the Set Aside Proceedings.”

Thus, when defendant failed to pay the initial payment on November 15, 2018, it breached the agreement, because pursuant to the settlement agreement, section 2 applied until the French court made a determination, which required payment on November 15, 2018, even though the Set Aside Proceedings were pending. Plaintiff has presented sufficient proof that it was willing to perform, but defendant breached the settlement agreement by failing to make the initial payment in November 2018. (NYSCEF 44, *Agapov aff ¶¶ 24-31*; *NYSCEF 45, Settlement Agreement §§ 1.1, 1.2, 1.3.*) Finally, plaintiff has submitted sufficient proof of damages. Plaintiff seeks the initial payment amount of \$100,000,000 owed pursuant to the settlement agreement. (NYSCEF 45, *Settlement Agreement § 2.1.*)

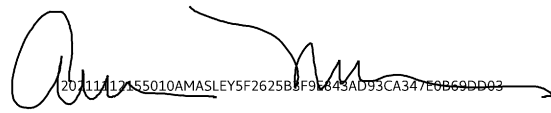
Proof of Default

Plaintiff has submitted sufficient proof that defendant has not answered or otherwise appeared in this action. (NYSCEF 33, *Harkness aff ¶¶ 17-22.*)

Accordingly, it is

¹ Annex II also provides that the initial payment of \$100,000,000 was due on November 15, 2018. (NYSCEF 45, *Settlement Agreement at 94.*)

ORDERED that the plaintiff's motion for a default judgment is granted, and the Clerk of the Court is directed to enter judgment in favor of Plaintiff Rusoro Mining Ltd., Suite 3123-595 Burrard Street, Vancouver, British Columbia, Canada, shall have judgment and recover from Defendant Bolivarian Republic of Venezuela the sum of \$100,000,000 plus interest accruing at the contractual rate of 0.016% per day from the date of November 16, 2018 until the date of judgment, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs. Thereafter, plaintiff shall have interest at the statutory rate until collection on the judgment.



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November 12, 2021
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

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| <input checked="" type="checkbox"/> | CASE DISPOSED | | |
| <input checked="" type="checkbox"/> | GRANTED | <input type="checkbox"/> | DENIED |
| <input type="checkbox"/> | SETTLE ORDER | | |
| <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | | |

APPLICATION:

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| <input type="checkbox"/> | NON-FINAL DISPOSITION | | |
| <input type="checkbox"/> | GRANTED IN PART | <input type="checkbox"/> | OTHER |
| <input type="checkbox"/> | SUBMIT ORDER | | |
| <input type="checkbox"/> | FIDUCIARY APPOINTMENT | <input type="checkbox"/> | REFERENCE |

CHECK IF APPROPRIATE: