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

PRESENT: MELVIN L SCHWEITZER J.S.C. Justice Supplemental Decision/Order PART 45

ALEXANDER GLIKLAD

INDEX NO. 602335/09

MOTION DATE

- v -

MICHAEL CHERNOI

MOTION SEQ. NO. 010

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion by plaintiff for an anti-suit injunction pursuant to CPLR 6301 is GRANTED, per the attached Decision and Order.

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

Dated: July 14, 2011

MELVIN L SCHWEITZER J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

ALEXANDER GLIKLAD,	:	
Plaintiffs,	:	Index No. 602335/09
-against-	:	DECISION AND ORDER
MICHAEL CHERNOI,	:	Sequence No. 010
Defendant.	:	

MELVIN L. SCHWEITZER, J.:

This matter involves a promissory note for $270 million executed in 2003 by a prominent Russian businessman. The note has not been paid and both parties in this litigation claim that they are entitled to the amount owed under the note. Plaintiff filed suit in this court in 2009. Defendant commenced a parallel suit in Israel in 2011. Plaintiff has filed this motion for an anti-suit injunction to enjoin defendant from prosecuting the case in Israel.

Background

In 2009, plaintiff Alexander Gliklad (Mr. Gliklad) filed a Motion for Summary Judgment in Lieu of Complaint pursuant to CPLR 3213 to enforce a $270 million promissory note (Note) signed by defendant Michael Chernoi (Mr. Chernoi) in 2003. It is uncontested that defendant's New York attorney prepared the Note. Plaintiff claims that the Note was consideration for his transferring all of his interest in the Russian coal company KuzbassRazrezUgol (Kuzbass) in which he held a 26.37% equity interest. Defendant replies to plaintiff's allegations with his own account of the facts. Mr. Chernoi claims that he mistakenly signed his name under the term "borrower" on the note because he was drunk, indicating that he and Mr. Gliklad shared a meal with plentiful amounts of alcohol before signing the Note in Vienna.

Mr. Chernoi filed a counterclaim stating that in fact Mr. Gliklad owes *him* the $270 million for a loan that Mr. Chernoi made to Mr. Gliklad in 1997 or 1998 to finance the construction and development of a new railway system in Russia in conjunction with the Russian Ministry of Transportation. Allegedly, this loan was made by a company under Mr. Chernoi's control, Nash Investments Ltd., to two companies in which Mr. Gliklad had an interest, Vitapoint Ltd. and Otava. Mr. Gliklad has produced evidentiary support showing that the Vitapoint/Nash loan was repaid in full and was not the subject of the Note.

Mr. Gliklad had previously sought a declaratory judgment on the Note in Israel in May of 2005. At that time, Mr. Chernoi did not make any counterclaims and did not attempt to argue the merits of the case. The 2009 counterclaim in this court marks the first time that Mr. Chernoi alleged that, in fact, Mr. Gliklad owes *him* $270 million.

In 2011, after one and a half years of litigation in New York, Mr. Chernoi filed essentially the same lawsuit in Israel pertaining to the Note. The distinction between the two lawsuits is that, in Israel, Mr. Chernoi is only seeking equitable remedies whereas in the New York litigation he is seeking money damages as well. Both the parties and the court have expended substantial time and resources on this litigation. The parties have participated in numerous conferences, submitted correspondence to the court, filed several motions, taken depositions and otherwise actively engaged in discovery. This court has grown familiar with the issues involved in this dispute and has handed down two decisions, devoting it's scarce resources to the resolution of the issues put before it.

The defendant initiated proceedings in Israel while the case was pending in New York. Defendant obtained a default judgment in Israel which was withdrawn by agreement of the parties on April 1, 2011. On May 23, 2011, this court issued a decision stating that defendant is

subject to personal jurisdiction in New York. The plaintiff thus has now filed a motion for an anti-suit injunction barring defendant from prosecuting the case in Israel.

Discussion

In order to prevail on a motion for an anti-suit injunction pursuant to CPLR 6301, the plaintiff must show (1) a likelihood of success on the merits, (2) risk of irreparable harm to the plaintiff if an injunction is not granted, and (3) the equities favor granting it. *Aetna Ins. Co. v Capasso,* 75 NY2d 860 (1990).

Likelihood of success on the merits

To prevail on a motion for summary judgment in lieu of complaint based on a promissory note, the plaintiff is required to present evidence that defendant executed the note and defaulted thereon. *Craven v Rigas,* 71 AD3d 1220 (3rd Dept 2010). Plaintiff has made a prima facie case. He has presented a valid promissory note, admittedly signed by the defendant and demonstrated that payment has not been made. *Seaman-Andwall Corp. v Wright Machine Corp.,* 31 AD2d 136 (1st Dept. 1968).

The Note meets all of the requirements of a valid promissory note pursuant to NY UCC 3-104: (a) the signature of the maker or drawer, (b) an unconditional promise or order to pay a sum certain in money, (c) it is payable on demand or at a definite time, and (d) it is payable to the order of the bearer. Plaintiff has submitted the Note and it is undisputed that defendant is in default. Once plaintiff establishes a prima facie case, the "burden shift[s] to defendant to raise a triable issue of fact regarding a bona fide defense to liability on the note." *Craven,* 71 AD3d at 1223.

Mr. Chernoi contends he has a valid defense. However, Mr. Chernoi's defense is highly improbable. Mr. Chernoi claims that Mr. Gliklad actually is the borrower on the Note for

monies owed on the Vitapoint-Nash loan. Mr. Chernoi claims that he unwittingly signed the Note as the borrower because he was drunk. In order for intoxication to be a defense to a contract, mere evidence of defendant's intoxication at the time of the promise is not sufficient. An intoxicated person may be able to make a contract, depending on the effect of the intoxication on his understanding and mental capacity. *McKeon v Van Slyck,* 223 NY 392 (1918). Intoxication renders an individual incompetent (for purposes of entering into a contract) "upon proof that at the time of the act challenged his understanding was clouded or his reason dethroned by actual intoxication." *Van Wyck v Brasher,* 81 NY 260, 262 (1880).

The burden is on the defendant to "come forward with evidentiary proof sufficient to raise an issue as to the defenses." *Seaman-Andwall* 31 AD2d at 137-38. Mr. Chernoi has not presented any evidence of incompetence due to actual intoxication, he has just made conclusory statements with respect thereto. Given that the standard for proving intoxication is high (mere evidence of intoxication is not sufficient, one must demonstrate that intoxication affected their mental state, rendering them incompetent), it is not probable that Mr. Chernoi will succeed on this defense.

It is uncontested that Mr. Chernoi's own attorneys prepared the Note. Both Mr. Chernoi and Mr. Gliklad are prominent businessmen who have dealt with many promissory notes in the past. Mr. Chernoi's attorney, as preparer of the Note, was doubtlessly available to Mr. Chernoi for a consultation with respect to the execution of the Note. The fact that this was an arms-length transaction between sophisticated, counseled parties suggests there was no error. *Berlind v Heinfling,* 174 AD2d 452, 452 (1st Dept. 1991).

Significantly, there is no evidence that defendant ever asked Mr. Gliklad for the $270 million that Mr. Gliklad allegedly owed him until the defendant filed a counterclaim in

2009 in this court. Meanwhile, Mr. Gliklad has filed several claims against Mr. Chernoi with respect to the Note. Notably, Mr. Gliklad filed a claim for declaratory judgment on the Note in Israel in 2005.

Plaintiff has alleged that he paid the Vitapoint-Nash Loan that defendant claims was the subject of the Note. In fact, plaintiff has submitted evidence that every payment fulfilling the Vitapoint-Nash loan obligation was validated and audited by PriceWaterhouseCoopers (PWC). An audit by PWC established that the loan was paid off in its entirety by December 31, 1999. Plaintiff has provided evidence that the loan was repaid and defendant has provided no documentary evidence to the contrary. Furthermore, defendant has resisted discovery into the accounts that conclusively would prove whether or not the loan was repaid.

Defendant also argues that even if Mr. Gliklad's account of the facts were correct, the Note was not supported by valid consideration. Mr. Chernoi argues that an equity interest in a company is not sufficient consideration for a promissory note. New York law, however, is to the contrary. *See Craven,* 71 AD3d at 1221 (A 25% equity interest in a corporation as consideration for a promissory note).

Mr. Gliklad also relies on a purported forum selection clause in the Note as another basis for granting the anti-suit injunction and deciding that New York is the appropriate forum to litigate this case. Mr. Gliklad points to New York's longstanding policy of enforcing valid forum selection clauses. "Enforcement of forum selection clauses provide [sic] certainty and predictability in resolving disputes, particularly those involving international business agreements." *Premium Risk Group, Inc. v Legion Ins. Co.,* 294 AD2d 345, 346 (2d Dept 2002).

Mr. Chernoi argues that the clause contained in the note is a *choice of law* clause, not a forum selection clause. The dispute is over the proper translation of the Russian word

"jurisdiction" in the Note which can mean either 'jurisdiction' or 'law.' Mr. Chernoi argues that, in the context, it must be interpreted to mean 'law' since the phrase "without taking into consideration the rules concerning the conflict of laws of the state of New York" is only found in choice of law clauses.

Mr. Chernoi contends that in substantially all the cases that plaintiff relies on, where injunctions have been granted, there was a clear *forum selection clause*. Mr. Chernoi argues that the clause contained in this case is a choice of law clause and therefore the cases Mr. Gliklad cited in support of his position are inapplicable. Although expert testimony has yet to be heard on this point, the court is of the opinion that the language of the clause is susceptible to the reasonable interpretation that it embodies *both* a forum selection clause and a choice of law clause.

Accordingly, taking into account each of the points discussed above, the court is of the opinion that Mr. Gliklad has established a likelihood of success on the merits.

Risk of irreparable harm

Mr. Gliklad has alleged that he risks losing his refugee status in Canada if he travels to Israel to defend the lawsuit. He has demonstrated in his submissions that the reason he has given for seeking asylum in Canada is that his safety has been compromised in Israel. Mr. Gliklad's submissions clearly show that his Canadian papers are not valid for travel to Russia and Israel. He also points to the Canadian Immigration and Refugee Protection Act 108(1)(a) which provides that his refugee status may be revoked if he is deemed to have "voluntarily reavailed [himself] of the protection of the laws of [his] country of nationality." It is not unreasonable to infer that traveling to Israel for the purposes of participating in a litigation there may be interpreted as availing oneself of the protection of the laws of Israel and may

jeopardize Mr. Gliklad's refugee status in Canada. Mr. Gliklad should not be made to suffer such undue hardship to litigate this matter.

Importantly, Mr. Gliklad's safety might be compromised if he travels to Israel. As noted, he has presented evidence to the effect that he sought refugee status in Canada precisely because he received violent threats in Israel. The Canadian Refugee board found that Mr. Gliklad had provided "clear and convincing evidence" to substantiate his claims and ruled that Mr. Gliklad is a person in need of protection. This court is of the opinion that to allow Mr. Chernoi to now prosecute an action on the Note in Israel would potentially compel Mr. Gliklad to expose himself to serious risk in order to actively defend his interests there.

In addition, Mr. Gliklad also would be disadvantaged if he did not to appear before the court in Israel. Mr. Gliklad has made an unrebutted argument that he needs to be present for questioning and cross-examination in Israel in order to submit an affidavit supporting his claims. ("Israel requires an affidavit in support of his claims, and the author of the affidavit must submit to cross-examination in Israel").

In sum, it is possible that Mr. Gliklad will lose his refugee status in Canada if he travels to Israel and also, he has raised legitimate concerns regarding his safety. Finally, he may not be able to fully litigate his case in Israel without appearing before the court there. Accordingly, Mr. Gliklad has made a clear and convincing case that there is a risk of irreparable harm if the injunction is not granted.

Equities favor injunction

The equities clearly favor granting the motion for an anti-suit injunction. The amount of time, money and effort that both parties and the court already have invested in this case is considerable. These resources may be wasted if the case is now litigated in Israel. Furthermore,

a decision in the Israeli court will potentially interfere with this court's ability to resolve the issues before it. *See Interested Underwriters*, 213 AD2d 246, 246 (1st Dept 1995).

As noted, the court has already overseen the parties' considerable discovery efforts, heard extensive argument on motions filed by the parties and handed down two decisions in this case. This court even has expended scarce resources preparing a decision with respect to a summary judgment motion made by defendant that later was withdrawn prior to its issuance. Accordingly, allowing the foreign litigation to proceed would result in a serious waste of judicial resources, unnecessary legal expenses and might lead to conflicting results. *See Jay Franco v G Studios, LLC,* 34 AD3d 297 (1st Dept 2006) (finding that the court did not improvidently exercise its discretion by invoking its equity power to enjoin defendant from prosecuting a foreign action where the action was duplicative, might lead to conflicting results, a waste of judicial resources and unnecessary legal expenses).

Furthermore, there is adequate reason to find that defendant is acting in bad faith. *See IRB Brasil v Portobello Intern. Ltd.,* 59 AD3d 366 (waiting 1 ½ years to file a claim held to be evidence of bad faith). The timing of the Israeli claim is all the more questionable as it occurred *after* this court indicated that it's pending decision on the issue of personal jurisdiction would be adverse to defendant. Defendant appears to be forum shopping. Plaintiff put forth a plausible argument that the defendant sought to litigate in Israel, which he viewed as a friendlier forum, only after he believed he would lose the personal jurisdiction battle here in this court. New York law is clear that "an injunction may be issued where it can be shown that the suit sought to be restrained is not brought in good faith, or that it was brought for the purpose of vexing, annoying, and harassing the party seeking the injunction." *IRB Brasil,* 59 AD3d at 366-67

quoting *Paramount Pictures Inc. v Blumenthal*, 256 App Div 756, 759 (1939), appeal dismissed 281 NY 682 (1939).

Allowing Mr. Chernoi to prosecute in Israel would result in a serious waste of this court's scarce resources and time. Mr. Chernoi has proceeded in a way that is not conducive to the timely resolution of this case. A parallel lawsuit in Israel would result in duplicative litigation and may interfere with the court's adequately enforcing this jurisdiction's policies and resolving the issues before it. New York law makes clear that it is within this court's discretion to enjoin a foreign suit it deems inequitable. *See Indosuez Intern. Finance v National Reserve Bank,* 304 AD2d 429 (1st Dept 2003) (supporting a grant of permanent injunction against defendant's pursuit of foreign litigation).

Accordingly, plaintiff's motion for an anti-suit injunction is granted because the plaintiff has established a likelihood of success on the merits a risk of irreparable harm if the injunction is not granted and because the equities favor it. Additionally, defendant has provided no evidentiary support for his affirmative defense of intoxication.

Accordingly, it is

ORDERED that plaintiff's motion for an anti-suit injunction pursuant to CPLR 6301 is granted.

Dated: July 14, 2011

ENTER:

J.S.C.

MELVIN L. SCHWEITZER