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GE Oil & Gas, Inc. v Turbine Generation Servs., L.L.C.
2016 NY Slip Op 50825(U)
Decided on May 27, 2016
Supreme Court, New York County
Kornreich, J.
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Decided on May 27, 2016

Supreme Court, New York County

GE Oil & Gas, Inc., Plaintiff,

against

Turbine Generation Services, L.L.C., and Michael B. Moreno, Defendants.

Turbine Generation Services, L.L.C., and Michael B. Moreno Third-Party Plaintiffs,

against

General Electric Company, Third-Party Defendant.

652296/2015

Reed Smith LLP, for plaintiff.

Mintz & Gold LLP, for defendants.

Shirley Werner Kornreich, J.

Motion sequence numbers 004 and 005 are consolidated for disposition.

Plaintiff GE Oil & Gas, Inc. (GEOG) moves by order to show cause: (1) for an injunction prohibiting defendants/third-party plaintiffs, Turbine Generation Services, L.L.C. (TGS) and Michael B. Moreno, its principal (collectively, the TGS Parties), from continuing to litigate a parallel action in a Louisiana state court (*Turbine Generation Servs., L.L.C. v GE Oil & Gas, Inc.*, No. 2015-2642-J) (the Louisiana State Court Action) that violates the parties' contractual forum selection clause and which seeks to undermine a judgment and rulings entered in this action [FN1] (Seq. 004); and (2) to hold the TGS Parties in contempt and sanction them for violating a March 30, 2016 order of this court (Seq. 005). The TGS Parties oppose both motions. The court [*2]issued an anti-suit injunction at oral argument as to the Louisiana State Court Action and reserved on the contempt motion. *See* Dkt. 254 (order) & Dkt. 255 (5/18/16 Tr.).[FN2] Below, the court explains the reasons for issuing the anti-suit injunction and conditionally holds the TGS Parties in contempt.

I. Background

The court assumes familiarity with the procedural history of this action and the prior action in federal court, the underlying facts, and the governing contracts, all of which are extensively set forth in the court's March 4, 2016 decision granting GEOG's motion (Seq. 002) for summary judgment. *See* Dkt. 159 (the SJ Decision).[FN3] In short, TGS defaulted on a $25 million loan memorialized by a Note, which was personally and unconditionally guaranteed by Moreno. The Note and Guarantee are governed by New York law and place venue in New York. Attached to the Note and Guarantee is a Term Sheet between GEOG and TGS, which set forth the proposed

terms of a contemplated power generation business. *See* SJ Decision at 3-4.

GEOG originally commenced an action against the TGS Parties in the United States District Court for the Western District of Louisiana on April 7, 2014. On February 11, 2015, that court, among other things, determined that the Term Sheet was an agreement to negotiate in good faith. On August 18, 2015, before the federal court resolved the action, it dismissed it for lack of diversity jurisdiction. Prior to dismissal of the federal action, the TGS Parties commenced the Louisiana State Court Action and GEOG commenced this action.

On July 30, 2015, the TGS Parties moved (Seq. 001) to dismiss this action in favor of the Louisiana State Court Action or, alternatively, to stay this action. On August 13, 2015, GEOG moved for partial summary judgment on the Note and Guarantee. The court denied the motion to dismiss and stay this action on December 8, 2015, and subsequently, in the SJ Decision, granted summary judgment to GEOG on the Note and Guarantee. In making its determinations, the court repeatedly explained that "[t]he Term Sheet ... makes clear that the parties did not have a binding joint venture agreement but merely an agreement to agree." *See* SJ Decision at 4; *see also id.* at 3 ("the Guaranty states that the parties do not have any fiduciary duties to each other and that **their relation is solely that of debtor and creditor**.'") (emphasis added), quoting Dkt. 8 at 7. The court reached the issue because the TGS Parties argued the $25 million was an investment in a joint venture created either prior to the Note, Guarantee and Term Sheet or was a joint venture created by the Term Sheet. The court initially stayed the entry of judgment on the Note and Guarantee since the TGS Parties were given leave to assert counterclaims and third-party claims for failure to negotiate in good faith and fraudulent inducement and, possibly, would have an off-set against the judgment. *See id.* at 10-11. The stay was issued as a matter of discretion, which, in hindsight, was misguided.

While the summary judgment motion was *sub judice*, GEOG moved by order to show cause (Seq. 003) to enjoin the Louisiana State Court Action. *See* Dkt. 137. As the court has explained on numerous occasions, there is no question that by filing the Louisiana State Court Action, the TGS Parties willfully breached the subject

documents' forum selection clause, which permits GEOG to file suit against the TGS Parties outside of New York, but requires any suit [*3]brought by the TGS Parties arising out of or relating to the Note, the Guaranty, or the Term Sheet to be filed in New York. *See* Dkt. 2 at 8. Hence, GEOG was permitted to file suit in Louisiana federal court, as it did. The dismissal of that action for lack of diversity jurisdiction did not, in any way, preclude GEOG from filing a new action in this court. The TGS Parties, however, violated the forum selection clause by filing the Louisiana State Court Action. Even if the TGS Parties' joint venture claim has merit (which it does not), and even if Louisiana law might apply to the TGS Parties' tort claims (an issue this court need not reach at this juncture), the alleged joint venture relates to the transaction set forth in the Term Sheet and, thus, is subject to the Note's forum selection clause and New York law.[FN4] By filing the Louisiana State Court Action, the TGS Parties breached the forum selection clause.

Nonetheless, the court initially declined to enjoin the entirety of the Louisiana State Court Action based on the assumption that the TGS Parties would not seek to collaterally attack this court's rulings. By order dated March 30, 2016, the court: (1) only enjoined the TGS Parties from "applying for an injunction in Louisiana enjoining [GEOG] from prosecuting this action before this court"; (2) amended the SJ Decision to direct the entry of judgment on the Note and Guaranty, but stayed enforcement pending the remainder of this action; and (3) struck the TGS Parties' amended third-party complaint (Dkt. 167), which ignored ordering language in the court's summary judgment decision granting them leave "to amend their answer, counterclaims, and third-party claims to conform to the instant decision finding that the Term Sheet is an agreement to agree" (*see* SJ Decision at 11). *See* Dkt. 171 (the March 30 Order); *see also* Dkt. 177 (3/30/16 Tr.). The TGS Parties simply refiled their original joint venture claims, thereby violated the SJ Decision. Nonetheless, the court once more granted the TGS parties leave to file amended counterclaims in conformity with the SJ Decision. On April 6, 2016, the TGS Parties filed a second amended third-party complaint (Dkt. 182), which is the subject of a motion to dismiss that is currently being briefed (Seq. 006). *See* Dkt. 223.

On April 26, 2016, GEOG, for a second time, moved by order to show cause (Seq.

004) to enjoin the Louisiana State Court Action because, despite the issuance of the March 30 Order, the TGS Parties continued to assert in the Louisiana State Court Action and in another action in the United States Bankruptcy Court for the District of Delaware (*In re Green Field Energy Servs., Inc.*, No. 13-12783, *Halperin v Moreno*, Adv. Pro. No. 15-50262 (Bankr D Del)), their joint venture claims and that the $25 million was not a loan but an investment in the joint venture (*see* Dkt. 201). Oral argument on GEOG's motion was scheduled for May 18, 2016. The week after GEOG filed its motion, on May 5, 2016, the TGS Parties filed a petition (*see* Dkt. 220) in the Louisiana State Court Action to enjoin this action and the May 18 argument. The TGS Parties are taking the position in the Louisiana State Court Action that this court's rulings and its judgment on the Note and Guaranty should not be given *res judicata* effect.

On May 9, 2016, GEOG moved by order to show cause (Seq. 005) to hold the TGS Parties in contempt and to sanction them for violating the March 30 Order, which expressly prohibited the TGS Parties from seeking the injunctive relief sought in their May 5 petition. GEOG requested that this motion also be scheduled for argument on May 18, and the court did [*4]so. The TGS Parties then sought an adjournment of both motions from May 18 to a date after the Louisiana State Court rules on their petition (a hearing is scheduled for May 31, 2016). The court denied this request, and the TGS Parties filed their opposition papers on May 13, 2016. On May 18, 2016, the court held extensive oral argument on both motions. *See* Dkt. 255 (5/18/16 Tr.). As noted above, the court granted GEOG's requested anti-suit injunction and reserved on the contempt motion.

II. Legal Standard

Courts in New York have long recognized the propriety and importance of issuing anti-suit injunctions where a parallel action in a foreign court is being prosecuted in contravention of a New York forum selection clause and where such parallel action undermines the integrity of the court's judgments. *See Indosuez Int'l Fin., B.V. v Nat'l Reserve Bank*, 304 AD2d 429 (1st Dept 2003); *MasterCard Int'l Inc. v Fed'n Internationale de Football Ass'n*, 2007 WL 631312, at *6 (SDNY 2007) (Preska, J.),

citing *Paramedics Electromedicina Comercial, Ltda v GE Med. Sys. Info. Techs., Inc.*, 369 F3d 645, 652 (2d Cir 2004). In the First Department, "the use of injunctive relief to enforce a forum selection clause has been upheld as a proper exercise of discretion." *Babcock & Wilcox Co. v Control Components, Inc.*, 161 Misc 2d 636, 645 (Sup Ct, NY County 1993) (Mazzarelli, J.), citing *Personal Sportswear, Inc. v Silverstein*, 1982 WL 11247 (Sup Ct, NY County), *aff'd* 91 AD2d 507 (1st Dept 1982) ("grant of the preliminary injunction on the basis of the forum selection clause contained in the agreement between the parties was an appropriate exercise of discretion").

In *Indosuez*, 304 AD2d at 430, the First Department held that the issuance of an anti-suit injunction was proper "[i]n the face of the mandatory choice of law and forum selection clauses." (citations omitted). The Court explained that "comity was not implicated because there was no possibility of treading on the legitimate prerogatives of the foreign jurisdictions to which defendant had repeatedly turned," and that the "injunction was consonant with our policy of enforcing choice of law and forum election clauses." *See id.* Moreover, the Court held that where, as here, "once there [is] a New York judgment on the merits, the courts of this State [are] entitled to protect it" by issuing an anti-suit injunction to prohibit "defendant's harassing and bad faith foreign litigation." *See id.* at 430-31; *see also Sebastian Holdings, Inc. v Deutsche Bank AG*, 78 AD3d 446, 453 (1st Dept 2010), citing *Chayes v Chayes*, 180 AD2d 566 (1st Dept 1992) ("The rule of comity forbids our courts from enjoining an action in a sister state unless it is clearly shown that the suit sought to be enjoined was brought in bad faith, motivated by fraud or an intent to harass the party seeking an injunction, or if its purpose was to evade the law of the domicile of the parties'"), quoting *George Hyman Const. Co. v Precision Walls, Inc. of Raleigh*, 132 AD2d 523, 526 (2d Dept 1987).

It should be noted that New York federal courts employ a slightly different standard, albeit one that recognizes similar policy concerns as those articulated by the First Department. Judge Preska explained:

> [I]t is beyond question that a federal court may enjoin a party before it from pursuing litigation in a foreign forum, but principles of comity counsel that injunctions restraining foreign litigation be used sparingly and granted only with care and great restraint. The [Second Circuit] recently reiterated that due

> regard for principles of international comity and reciprocity require a delicate touch when considering anti-suit injunctions. However, **where a foreign court is not merely proceeding in parallel but is attempting to carve out exclusive jurisdiction over the action, an injunction may ... be necessary to [*5]protect the enjoining court's jurisdiction**. While parallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as res judicata in the other, **there is less justification for permitting a second action ... after a prior court has reached a judgment on the same issues**. In such a situation, [a]n anti-suit injunction may be needed to protect the court's jurisdiction once a judgment has been rendered, because while [t]he doctrine of res judicata ... may obviate injunctive relief against re-litigation in a second forum[,] ... a foreign court might not give res judicata effect to a United States judgment. Thus, where, as here, one court has already reached a judgment-on the same issues, involving the same parties-considerations of comity have diminished force. The Court of Appeals continues to employ the test announced in *China Trade* to evaluate when an anti-suit injunction against parallel litigation may be imposed. Pursuant to the *China Trade* test, the threshold requirements for an anti-suit injunction are: (1) the parties must be the same in both matters, and (2) resolution of the case before the enjoining court must be dispositive of the action to be enjoined.

MasterCard, 2007 WL 631312, at *6 (internal citations and quotation marks omitted), accord *China Trade & Dev. Corp. v M.V. Choong Yong*, 837 F2d 33 (2d Cir 1987); *see also Karaha Bodas Co. v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F3d 111, 120 (2d Cir 2007) (discussing the *China Trade* test). After these "threshold requirements" are met, the federal courts then consider five additional factors: "(1) frustration of a policy in the enjoining forum; (2) the foreign action would be vexatious; (3) a threat to the issuing court's in rem or quasi in rem jurisdiction; (4) the proceedings in the other forum prejudice other equitable considerations; or (5) adjudication of the same issues in separate actions would result in delay, inconvenience, expense, inconsistency, or a race to judgment." *See China Trade,* 837 F2d at 35.

III. Discussion

An anti-suit injunction is warranted here. The TGS Parties' commencement and continued maintenance of the Louisiana State Court Action is a clear violation of the

parties' forum selection clause. The issues in both cases are not merely duplicative and a waste of resources, but the risk of inconsistent judgments is very real. This court has considered the merits of the TGS Parties' joint venture claims at length on three separate occasions (i.e., in the SJ Decision, and at the oral arguments on March 30 and May 18) and rejected them (as did Judge Doherty, the Louisiana federal judge). The issue had to be reached in the summary judgment decision because the TGS parties claimed the $25 million loan and guarantee, thoroughly papered by the counselled, sophisticated parties and signed by them, was really an investment in a joint venture. A judgment has been issued. Yet, the TGS Parties are seeking to collaterally challenge this court's judgment in the Louisiana State Court Action by continuing to press the merits of the joint venture claim and by asking that court not to give res judicata or collateral estoppel effect to this court's decision and judgment. Doing so not only violates the parties' forum selection clause, it evinces an utter disregard for this court's authority.

The court cannot allow the integrity of its judgment to be challenged. Litigants, such as the extremely sophisticated parties (aided by extremely sophisticated counsel) in this action, expressly agree to litigate in New York and apply New York law to their complex commercial disputes because this court is seen as capable of providing a level of certainty not found in other jurisdictions. The TGS Parties would see that certainty undermined.

Moreover, the TGS Parties violated the court's March 30 Order by seeking to enjoin this action. Simply put, GEOG demonstrated by clear and convincing evidence that a lawful order of this court, clearly expressing an unequivocal mandate, was in effect; the TGS Parties had full knowledge of its terms and disobeyed it; and GEOG was prejudiced by their actions. *See McCain v Dinkins*, 84 NY2d 216, 226 (1994); *Gottlieb v Gottlieb*, 137 AD3d 614, 618 (1st Dept 2016); *Lundgren v Lundgren*, 127 AD3d 938, 939 (2d Dept 2015); *Matter of Andrew B.*, 128 AD3d 1513, 1514 (4th Dept 2015); *Hugh v Taylor*, 121 AD3d 1363, 1364 (3d Dept 2014). That is contemptuous.

The court will direct an inquest on their contempt if it is not purged. While the question of the damages available for breach of a forum selection clause is somewhat of

an uncertain issue under New York law,[FN5] the court's ability to sanction a party for intentionally violating a court order is not. *See Simens v Darwish*, 104 AD3d 465, 466 (1st Dept 2013), citing *McCormick v Axelrod*, 59 NY2d 574, 582-83 (1983); *see also Gottlieb*, 137 AD3d at 618 ("Legal fees that constitute actual loss or injury as a result of a contempt are routinely awarded as part of the fine. These may include the legal fees incurred in bringing the contempt motion") (internal citations omitted), accord Judiciary Law § 773 (contemnor may be obligated to pay damages or a fine "sufficient to indemnify the aggrieved party").[FN6] The TGS Parties violated the March 30 Order by seeking the very injunctive relief in its May 5 petition in the Louisiana State Court Action that this court clearly and unequivocally prohibited. If the TGS Parties timely submit the proof set forth below, their contempt will be purged. Otherwise, in addition to being enjoined from proceeding in the Louisiana State Court Action, a hearing will be ordered on costs and a monetary sanction. Accordingly, it is

ORDERED that court's May 18, 2016 order (Dkt. 254) granting GEOG's anti-suit injunction is supplemented with the reasoning set forth this decision; and it is further

ORDERED that GEOG's motion to hold the TGS Parties' in contempt is granted, and [*6]unless such contempt is purged by the TGS Parties by e-filing proof of discontinuance of the Louisiana State Court Action within 14 days of the entry of this order on the NYSCEF System, an inquest to determine an appropriate sanction will be referred to a Special Referee to hear and report; and it is further

ORDERED that the parties shall promptly contact the court if the TGS' Parties' contempt is not purged.

Dated: May 27, 2016

ENTER:

Shirley Werner Kornreich

J.S.C.

Footnotes

Footnote 1:GEOG also moved to enjoin defendants from asserting claims in derogation of this court's rulings in the United States Bankruptcy Court for the District of Delaware. The court declined to issue such an injunction.

Footnote 2: References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

Footnote 3: All capitalized terms not defined herein have the same meaning as in the SJ Decision.

Footnote 4: In the Louisiana federal action, the TGS Parties took the position that New York law applies. *See* Dkt. 25 at 14. It should be noted that Judge Doherty held, among other things, that the TGS Parties failed to plead the existence of "an oral joint venture/partnership which preexisted the Term Sheet." *See id.* at 11.

Footnote 5: Compare *Indosuez*, 304 AD2d at 431 ("Contrary to defendant's contention, damages may be obtained for breach of a forum selection clause [and] an award of such damages does not contravene the American rule that deems attorneys' fees a mere incident of litigation") (relying on federal case law), with *Brown Rudnick, LLP v Surgical Orthomedics, Inc.*, 2014 WL 3439620, at *13 (SDNY 2014) (Furman, J.) and *Versatile Housewares & Gardening Sys., Inc. v Thill Logistics, Inc.,* 819 FSupp2d 230, 239-47 (SDNY 2011) (Karas, J.) (declining to follow *Indosuez*'s holding that New York law permits recovery of attorneys' fees as damages for breach of forum selection clause). This court has no occasion to opine on the matter since it is bound by clear First Department holdings. *See Vasquez v Nat'l Secs. Corp.*, 48 Misc 3d 597 (Sup Ct, NY County 2015), *aff'd* 2016 WL 2746185 (1st Dept May 12, 2016).

Footnote 6: Judiciary Law § 487 also prohibits attorneys from making knowingly false statements to deceive the court. As discussed at the May 18 oral argument, the TGS Parties' claim in this court and in the Louisiana State Court Action that this court *sua*

sponte dismissed their joint venture claim is false. The dismissal on March 30 was not a *sua sponte* dismissal without consideration of the merits or the allowance of an opportunity to brief the issues. Rather, the March 30 Order was issued because the joint venture claims were previously argued and ruled on, after extensive briefing, in connection with the summary judgment motion, and the claim was expressly rejected in the SJ Decision. Dismissal of the amended counterclaims in the March 30 Order was due to violation of an order contained in the SJ Decision.

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