IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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EL BANCO DE SEGUROS DEL ESTADO,

ORDER

Plaintiff,

01-C-0631-C

v.

EMPLOYERS INSURANCE OF WAUSAU,
A MUTUAL COMPANY,

Defendant.

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This is a civil suit for declaratory and injunctive relief brought originally in the United States District Court for the Southern District of New York. Plaintiff El Banco de Seguros del Estado seeks construction of an arbitration award, a determination of its obligations under the judgment, an order vacating both the transcript of judgment filed by defendant Employers Insurance and all restraining orders and information subpoenae filed under the transcript of judgment and an order enjoining any further enforcement of the judgment until plaintiff's obligations have been fixed by the court and then only to the extent of the liability fixed by the court.

The case is before the court on defendant's motion for summary judgment.

Defendant contends that the suit filed in New York is nothing more than an attempted end run around this court's adverse rulings against plaintiff in an earlier suit brought in this court, Employers Insurance of Wausau v. El Banco de Seguros del Estado, 98-C-0521-C. Defendant is correct: plaintiff is abusing the judicial processes of the United States by ignoring the orders and judgment that have been entered in 98-C-0521-C and trying to relitigate a closed case in another federal court.

Diversity jurisdiction is present. As a wholly owned instrumentality of the government of Uruguay, plaintiff is a foreign state for the purpose of determining diversity jurisdiction. 28 U.S.C. §§ 1332(a)(4), § 1603(a). Defendant Employers is a mutual insurance company, organized under the laws of the state of Wisconsin, with its principal place of business in Wausau, Wisconsin. Far more than $75,000 is in dispute.

From the findings of fact proposed by the parties, I find that the following are undisputed.

UNDISPUTED FACTS

On January 5, 1999, this court issued a decision, order and judgment in Employers Insurance of Wausau v. El Banco de Seguros del Estado, 98-C-0521-C, confirming an arbitration award that had been issued in September 1995 by a panel of arbitrators in favor of Employers Insurance of Wausau against a number of reinsurer respondents, including the

plaintiff in this case, El Banco de Seguros del Estado. The arbitrators ordered all of the respondents including Banco, to pay Wausau $7,783,324. Banco's portion was $181,319. As an incentive for prompt payment, the arbitrators provided that any party that did not pay its share of the award within 45 days would be responsible for (1) interest from the date of the award at a compound rate of 7.5%; (2) attorney fees and costs of $930,730, for which the parties were jointly and severally responsible; and (3) a letter of credit to Wausau in the amount of $9,000,000 in a form acceptable to the Wisconsin Department of Insurance to secure payment of the ultimate liability in this matter.

All of the respondents paid their portions of the arbitration award within the time specified by the award, except Banco. Until March 13, 2002, Banco had made no payment to Wausau in conformance with the arbitrator's award. On March 13, Wausau received a wire transfer from Banco in the amount of $1,528,969. Wausau does not agree that this wire transfer relieves Banco of its obligation to pay Wausau the full amount of the arbitration award (in excess of $1,528,969, according to Wausau) and to post the required letter of credit.

Judgment in favor of Wausau was entered in this court in 98-C-0521-C on January 5, 1999. Banco appealed to the Court of Appeals for the Seventh Circuit, which affirmed the judgment in all respects. Employers Insurance of Wausau v. Banco de Seguros del Estado, 199 F.3d 937 (7th Cir. 1999). Banco petitioned the United States Supreme Court

for a writ of certiorari; its petition was denied on June 5, 2000. Meanwhile, on a number of occasions, Wausau asked for the payment of the award, but Banco refused.

Wausau served discovery requests on Banco, asking for information about its financial position and about any assets it held in this country. Banco objected to many of the requests and answered many interrogatories with the statement, "We have no knowledge of any [such assets or accounts] located in the U.S." On March 19, 2002, Wausau filed a motion for a writ of execution pursuant to 28 U.S.C. § 1610(c) and Fed. R. Civ. P. 69 in this court. When Banco failed to appear or file any response to the motion, the writ issued on March 27, 2001.

On January 10, 2001, Wausau docketed the writ of execution with the United States District Court for the Southern District of New York and followed up by docketing a transcript of the judgment with the Clerk of the County of New York. The clerk of that court prepared a transcript of the judgment. The transcript states that the judgment against Banco was for $8,714,054. Wausau's New York counsel served restraining notices and information subpoenae on a number of entities in New York. Such information subpoenae are designed to gather information about a debtor's financial resources; they do not function as a restraint upon a recipient's ability to transfer funds or assets. Restraining notices have the effect of preventing transfer or alienation of any funds of the judgment debtor that are in the possession of the recipient of the restraining notice. Wausau included in the notices

and subpoenae the erroneous information that the entire arbitration award remained unsatisfied, when in fact Banco was the only party to the arbitration award that had not paid its share of the award. When the error was brought to Wausau's attention, its counsel drafted amended restraining notices and information subpoenae and served them on all entities that should have received them.

Most of the entities served advised Wausau's counsel that they had no assets that were owed to Banco. However, counsel learned that Citibank, N.A. held money owing to Banco in two separate accounts, one of which had a balance of $1,078,073.90 and one of which held $52,960.02.

Wausau has not begun any proceeding seeking the turnover of any funds to satisfy the judgment or issued any execution or directive to any law enforcement officer or judgment enforcement officer in connection with the judgment.

On July 2, 2001, Banco filed an action for declaratory relief in the United States District Court for the Southern District of New York, seeking clarification of this court's January 5, 1999 order. The district court transferred the action to this court on October 30, 2001.

In the meantime, on August 3, 2001, Wausau filed a motion in its original case in this court, 98-C-0521-C, seeking relief in aid of enforcement of judgment and writ of execution and asking for an order imposing sanctions for contempt of court pursuant to Fed. R. Civ.

P. 1, 69 and 70. Banco responded by filing a notice of cross motion and cross motion to stay proceedings and alternatively for an order construing the January 5, 2001 order and fixing Banco's liability. In an order entered on August 27, 2001, the court advised the parties it would consider Banco's cross motion as "opposition" to Wausau's motion.

On September 13, 2001, an opinion and order issued, granting Wausau's motion for relief in aid of enforcement of judgment, denying Banco's motion to stay, specifying Banco's obligations under the award and judgment, ordering Banco to comply with such obligations by September 30, 2001, and instructing Banco to pay Wausau the attorney fees it had incurred in pursuing Banco's compliance since June 5, 2000, the date on which the United States Supreme Court had denied Banco's petition for a writ of certiorari. The order included the warning that if Banco defied the order, it would be in contempt of court and required to pay sanctions to Wausau in the amount of $2,000 a day.

On September 21, 2001, Wausau filed a statement of the attorney fees it had incurred from June 5, 2000 to September 19, 2001, in its attempts to enforce its judgment against Banco. Banco made no objection to the amount sought.

Starting in October 2001, Wausau tried to obtain an order from the court holding Banco in contempt. However, on October 12, 2001, Banco filed a notice of appeal of the September 13, 2001 order. On October 19, 2001, the court issued two orders. In the first, Banco was ordered to pay Wausau $183,244.48 in attorney fees and costs for its post-June

2000 efforts to enforce its judgment; in the second, Wausau's motion for a finding of contempt was denied on the ground that Banco's notice of appeal had divested this court of jurisdiction to decide the matter. On November 8, 2001, Wausau filed an unopposed motion in the court of appeals, asking the court to dismiss the appeal because the order Banco appealed from was not final. The court of appeals has not acted on the motion.

OPINION

Banco has spent almost seven years trying to avoid paying its portion of an arbitration award entered in 1995 against it and a number of other reinsurers. Despite the fact of the arbitration award, this court's order enforcing the award and the court of appeals' affirmance of this court's order, it continues to refuse to comply with the entire order. Knowing that this court had ruled against it, it tried to file a new suit in federal court in New York, in part to challenge what it thought were inaccurate transcripts and associated information subpoenae and writs, but in larger part to obtain another construction of its obligations under the 1995 arbitration award. The New York court did not oblige Banco; it transferred the case to this court.

The law prohibits litigants like Banco from pursuing round after round of challenges to adverse rulings, through the doctrine of res judicata. "'The doctrine of res judicata (claim preclusion) requires litigants to join in a single suit all legal and remedial theories that

concern a single transaction.'" Roboserve, Inc. v. Kato Kagaku Co., Ltd., 121 F.3d 1027, 1034 (7th Cir. 1997) (quoting Perkins v. Board of Trustees of the Univ. of Illinois, 116 F.3d 235, 236 (7th Cir. 1997)). Parties that fail to observe this rule are barred from bringing additional suits to challenge claims that have been resolved or that could have been brought in the original suit. The doctrine protects opposing parties from the expense and vexation of multiple suits, conserves judicial resources and minimizes the possibility of inconsistent decisions.

For res judicata to apply to bar further litigation of a claim, three requirements must be met. First, there must be an identity of the causes of action. Second, there must be an identity of the parties. Third, there must be a final judgment on the merits. All three requirements are met in this case. In both this case and the case brought by Wausau, 98-C-0521-C, the cause of action was the arbitration award and its enforcement. The parties are identical in both cases and there was a final judgment on the merits in the earlier case.

Banco contends that "issues remain that were not decided by the Order of 9/13/01 [entered in 98-C-0521-C]." To the extent this is true, Banco has not explained why it did not move in this court for reconsideration of the September 13 order rather than file a new lawsuit in another federal court.

In any event, only one of the issues was not decided explicitly in the September 13 order. It is true that I did not say whether Wausau would be required to cancel its erroneous

transcript showing a money judgment against Banco for $8 million and substitute a corrected one. It was implicit in the order that this request for relief was denied because judgment was entered for Wausau in all respects. To make it explicit, however, I am not persuaded of any need to require amendment of the transcripts. First, Banco has not shown that the transcript is in error; Wausau filed the arbitration judgment that recites an amount due of $8 million. Second, Wausau's attorneys have corrected all of the information subpoenae and restraining notices, which are the operative documents. There is no reason to believe that the $8 million figure in the transcript would enable Wausau to collect more than the amount to which it is legally entitled. Wausau is not making any effort to do so and no court would permit such an effort.

The other issues that Banco wishes to raise concern the letter of credit the arbitrators required it to post. Banco wants to know whether "Wausau can seek to collect future claims under the arbitration award and judgment where the award states that it is a 'full and final settlement for losses' and the award provides for each reinsurer to receive a full release of claims under the contracts then before the arbitrators." Banco's Br. in Oppos., dkt. #9, at 12. As I have said in previous orders, Banco had three months under the Federal Arbitration Act in which to challenge the arbitration award. 9 U.S.C. § 12. When that time passed, Banco was barred from attacking the award.

Banco wants to know also whether it could dispense with the letter of credit if it

satisfies the award in its entirety. Banco is attacking yet again the need for the letter of credit but the arbitration panel imposed that requirement, not this court. Even if I were to address the question, I would not do so when the matter remains hypothetical. Banco has not satisfied its obligations. It is no position to ask what will happen when it does.

As noted in the facts, Banco sent Employers $1,528,969 in March 2001. The sending of this money does not absolve Banco of its obligations. It is not yet clear whether this amount covers all of Banco's obligations to Employers, which include attorney fees incurred by Employers since June 5, 2000, as well as the arbitration award, interest on the award and $930,730 in attorney fees incurred during the arbitration proceeding. Moreover, Banco has not yet posted the letter of credit required of it under the arbitration award.

It is obvious that this suit was filed for no purpose other than to permit Banco to put off satisfying the obligations it incurred as a result of the arbitration proceedings. Courts take a dim view of frivolous lawsuits; they take a particularly dim view of frivolous efforts to delay compliance with an arbitration award. See, e.g., Flexible Manufacturing Systems v. Super Products Corp., 86 F.3d 96, 101 (7th Cir. 1996) ("'The promise of arbitration is spoiled if parties disappointed by its results can delay the conclusion of the proceeding by groundless litigation in the district court, followed by groundless appeal to [the appellate] court; we have said repeatedly that we would punish such tactics and we mean it.'") (quoting Hill v. Norfolk & Western Ry., 814 F.2d 1192, 1203 (7th Cir. 1997)); Widell v. Wolf, 43

F.3d 1150, 1151 (7th Cir. 1994) ("We have remarked before that awards of attorneys' fees are readily available when one side refuses to accept an arbitrator's award and loses"). This case is frivolous in two respects: it is clearly barred by the doctrine of res judicata and it is an ill-disguised effort to avoid the results of arbitration. Pursuant to Fed. R. Civ. P. 11, I will order Banco to show cause why it should not be found to have violated Rule 11(b)(1) by filing and pursuing this suit.

ORDER

IT IS ORDERED that the motion of defendant Employers Insurance of Wausau for summary judgment is GRANTED. This lawsuit is barred by the doctrine of res judicata. The clerk of court is directed to enter judgment in favor of Employers Insurance against plaintiff El Banco de Seguros del Estado. FURTHER, IT IS ORDERED that plaintiff El Banco de Seguros del Estado is to appear in Courtroom 250 on Friday, May 17, 2002, at 1:00 p.m., to show cause why it should not be sanctioned under Fed. R. Civ. P. 11 for filing this lawsuit. No later than May 15, 2002, defendant Employers Insurance is to file an

itemized statement of the fees and costs it has incurred reasonably in defending this suit.

Entered this 30th day of April, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge