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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

HERMES BETEILIGUNGSVERWALTUNGS GMBH, Plaintiff and Appellant, v. SIEMENS SHARED SERVICES, LLC et al., Defendants and Respondents.	B270417 (Los Angeles County Super. Ct. No. BC420322)

APPEAL from the judgment of the Superior Court of Los Angeles County, Richard Fruin, Judge. Appeal dismissed as moot.

Hill, Farrer & Burrill and Dean E. Dennis for Plaintiff and Appellant.

Reed Smith and Kasey J. Curtis for Defendants and Respondents.

INTRODUCTION

This is the second appeal in an action arising out of a contract, executed in Austria and written in German. Plaintiff Hermes Beteiligungsverwaltungs GmbH as the assignee of the claims of Financial Soft Computing (plaintiff), an Austrian company, sued Siemens AG Osterreich, an Austrian company and its affiliate in California, Siemens Shared Services, LLC (together, defendants) on the contract. The trial court concluded that the contract's forum selection clause mandated that the action be brought in Vienna, Austria. In the first appeal, we affirmed the court's order staying the California action pending its successful transfer to the Austrian court.

Four months after our remittitur issued, plaintiff filed a declaratory relief action in Vienna seeking a determination that the forum selection clause was not mandatory and permitted pursuit of plaintiff's action in California. Defendants moved the trial court here to dismiss the California action on the ground that plaintiff was dilatory and acted in bad faith in failing to bring its substantive lawsuit in Austria. The trial court granted the motion and plaintiff appeals. While this appeal was pending, plaintiff filed its complaint in Austria. Therefore we conclude, irrespective of whether plaintiff has been diligent, that the appeal is moot and dismiss it.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The previous appeal*

We draw the preliminary facts from our previous opinion in this matter (*Hermes Beteiligungsverwaltungs GmbH v. Siemens Shared Services, LLC, et al. (*Apr. 15, 2014, B241673) [nonpub. opn.] (*Hermes I*).)

In April 2012, the trial court issued its order staying the action in California. Plaintiff timely appealed in June 2012. We applied California law to conclude that the forum selection clause was mandatory and designated Vienna, Austria as the proper venue. We noted that under California law, "[a] mandatory forum selection clause 'will ordinarily be given effect without any analysis of convenience; the only question is whether enforcement of the clause would be unreasonable.' " (*Hermes I*, *supra*, B241673, at p. *4.) Thus, we affirmed the order "staying the California action pending successful transfer of this case to Vienna, Austria." (*Id*. at p. *7.) We considered plaintiff's contention that enforcement of the forum selection clause was unreasonable because, although Siemens Shared Services conceded jurisdiction of the Austrian courts, and although defendants agreed to waive the statute of limitations there, they had not done so. The court in 2012 was aware that plaintiff's claims might be time-barred under Austrian law. We explained it was because of these obstacles to Austrian jurisdiction, plus FSC's Austrian bankruptcy – in which there was some indication that the bankruptcy court might view plaintiff's claims as more properly brought in the United States –that the trial court decided to stay the California action pending resolution of the jurisdictional hurdles, rather than to dismiss the action immediately. We quoted from the trial court that it was staying the California action to " 'supervise what may or might transpire before the Austrian courts.' Continuing, the court stated to plaintiff: '[y]ou also have the bankruptcy matter and you have *this issue of the statute of limitations*, and there's one more that I think you had in your papers. . . . [¶] There's definitely an intent not to dismiss this case, to stay it, and if somehow you get kicked

out or don't get in to the courts [in Austria], you have a home here.' " (*Id*. at pp. *2 & *7, italics added.) Our remittitur issued in June 2014.

2. *Events giving rise to the instant appeal*

a. *plaintiff's activity in Vienna*

Four months later, in October 2014, plaintiff applied to the Provisional Court of Vienna "for a declaratory judgment" whether the contract's forum selection clause was permissive under Austrian law. According to an official translation, plaintiff asked whether the clause "did not have any exclusive effect" and that "[t]his choice of form [*sic*] agreement still admits any action brought before any other court in Austria or abroad, in particular any action brought before the Superior Court of Los Angeles County (USA)." Plaintiff explained, "[o]nly after it has been decided upon that the choice of forum clause of the Agreement . . . does not prevent the Superior Court of Los Angeles County having jurisdiction over the case, the proceedings in the United States may be continued."

b. *defendants' motion to dismiss the California action*

Pursuant to its stay, the trial court here under the auspices of a different judge, kept tabs on the progress of the proceedings, issuing several orders to show cause concerning the status of the case in Austria. Plaintiff informed the court of its progress in Austria and requested that "a further status conference be scheduled to ensure continued supervision over this action." The trial court lifted its stay as of July 1, 2015, or upon the filing by defendants of a motion to dismiss the California action.

Defendants brought their ensuing motion to dismiss pursuant to Code of Civil Procedure section 583.410[1] arguing that plaintiff had failed diligently and in good faith to prosecute the action in Austria. Defendants characterized plaintiff's Austrian declaratory relief action as a collateral attack on the conclusions of both the trial court and this court that the forum selection clause was enforceable. Defendants provided a version in German of Siemens Shared Services' submission to the Viennese court's jurisdiction and "represented on several occasions," that they "will provide a written waiver of the statute of limitations to the Austrian court."

In opposition, plaintiff argued that when this court determined that the Austrian contract's forum selection clause was mandatory, we were applying California law and "did not have the benefit of an Austrian court's interpretation of Austrian law on the subject." Plaintiff reiterated that the fee to file the action in that country was prohibitively high: approximately $3 million. Plaintiff argued that the hearing in Austria was scheduled for August 27, 2015 and defendants had purposely set the motion to dismiss prematurely for August 25, 2015. Nonetheless, plaintiff acknowledged that the case "must proceed on the merits in Vienna," if the Viennese court found it had exclusive jurisdiction.

At oral argument below, plaintiff contended that the word "transfer" did not mean that it must file a complaint in Austria immediately; and that our opinion's use of the word "transfer" allowed for plaintiff to file its declaratory relief action in that

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[1] All further statutory references are to the Code of Civil Procedure, unless otherwise specified.

country. In response to the trial court's inquiry, plaintiff explained that the Viennese court was likely to rule in October 2015, and resolution of any appeal was estimated to take a year. The trial court took the issue under submission pending the Viennese court's ruling. The court scheduled an order to show cause re: status of the Austrian court's decision when it would set a date for the dismissal of the California action, unless plaintiff filed a substantive action in Austria. The court stated: "I'm not going to dismiss it then, but I might set a date to dismiss it and I'd like to have a status report filed five days before."

The Vienna court dismissed plaintiff's declaratory relief action on October 20, 2015, without addressing the question of the exclusivity of the forum selection clause. The Viennese court held that the procedural issue whether a declaratory judgment was an appropriate vehicle for determining the question was a matter of first impression. Plaintiff appealed from that order on November 11, 2015 and its Austrian counsel estimated that it would be six to eight months before the appellate court rendered its decision.

Plaintiff requested that the stay of the California action remain in effect during its Austrian appeal. The trial court responded that "[e]veryone's assumption was that it was going to be an action on the merits." Plaintiff argued that when the trial court stayed the action, it was "anticipating the possible return to California, as was the Court of Appeal." Plaintiff listed the reasons why proceeding on the merits was difficult. The court responded: "No. No. No. They were anticipating that you would file the action in Austria and that would permit the dismissal of the action in California."

The trial court granted defendants' motion to dismiss in December 2015. Relying on *Van Keulen v. Cathay Pacific Airways, Ltd*. (2008) 162 Cal.App.4th 122, 130, the court listed three reasons why it declined to continue the stay. First, the court ruled that the forum selection clause was to be enforced and that plaintiff was causing a delay by failing to bring its substantive action in Austria. Second, the court concluded that the purpose of the stay was to permit plaintiff to initiate a *substantive* action in Vienna, but that plaintiff had instead filed a declaratory relief action to challenge the determination here that the forum selection clause was mandatory. Third, the court concluded that plaintiff's delay was costing defendants. Plaintiff filed its timely appeal.

DISCUSSION

In its appeal, plaintiff asks us to decide whether the trial court abused its discretion in dismissing this action for plaintiff's delay in bringing its substantive lawsuit in Austria. However, on March 13, 2017, plaintiff filed its complaint in the commercial court in Vienna, Austria and that court ordered defendants to reply within four weeks. As this appeal was pending by then, we ordered the parties to file supplemental briefs addressing why the appeal should not be dismissed as moot.[2]

" 'A case is considered moot when "the question addressed was at one time a live issue in the case," but has been deprived of life "because of events occurring after the judicial process was initiated." [Citation.] . . . The pivotal question in determining if

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[2] We grant the parties' various requests to take judicial notice. (Evid. Code, §§ 450; 452, subd. (h); *In re Marriage of Taschen* (2005) 134 Cal.App.4th 681, 688, fn. 3.)

a case is moot is therefore whether the court can grant the plaintiff any effectual relief. [Citations.] If events have made such relief impracticable, the controversy has become "overripe" and is therefore moot. [Citations.]' [Citation.]" (*Cuenca v. Cohen* (2017) 8 Cal.App.5th 200, 216–217.)

Austrian jurisdiction is no longer a reason to maintain the California stay. In their supplemental brief, defendants cite Section 104 JN(3) of the Austrian Jurisdiktionsnorm (Austrian Judicial Jurisdiction Act) to explain that they have waived their right to contest jurisdiction in Austria by responding to the complaint without raising a jurisdictional objection.[3] Plaintiff recognizes that "any jurisdictional objection has been waived. This issue has been definitively settled."

Plaintiff acknowledges in its supplemental brief that "filing an action in Vienna, Austria is what this Court contemplated when it reached its decision in the first appeal. . . . [¶] . . . [¶] . . . Proceeding with this case in Vienna, as evidenced by the attached document, is compliance with the prior orders of both the trial court and this Court and is what the defendants have been demanding . . . since at least July 2015."

Notwithstanding it has filed its substantive lawsuit in Austria, plaintiff believes that this appeal is not moot because the statute of limitations remains an "outstanding issue." The California trial court understood that plaintiff believed "its

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[3] Translated, section 104 JN reads: "(3) A court that in and of itself lacks domestic jurisdiction, subject matter jurisdiction, or territorial jurisdiction shall acquire jurisdiction by virtue of the fact that the defendant makes arguments on the merits . . . provided that the defendant is represented by an attorney . . . ."

claims are time barred under Austrian law." "[T]o be timely plaintiff would have been required to file in Austria no later than August 23, 2009," i.e., two days after it filed its California complaint. Plaintiff's supplemental brief quotes from its Austrian counsel that its complaint in Vienna is "clearly blocked by the statute of limitations, which provides for a three years limit for claiming damages, starting at the moment where the harmed party acquires knowledge of the damage." Counsel explains further that under Austrian law a court may only dismiss a claim on the basis of the statute of limitations if the defendant raises it, and the defendant may raise that defense at any time in the litigation. Plaintiff is concerned that defendant is waiting until after the California action is dismissed to raise the defense of the statute of limitations in Austria so that the lawsuit cannot be returned to California. Plaintiff argued that we can provide relief by reversing the dismissal to prevent defendants from raising the statute of limitations in Austria.

Our first opinion recognized that defendants offered "to toll the statute of limitations for the period since the [California] action was filed." (*Hermes I*, *supra*, B241673, at p. *3, italics omitted.) Defendants' supplemental brief quotes from an answer to plaintiff's Austrian complaint explaining that "Defendants have only agreed to a toll [*sic*] the statute of limitations in the dispute about jurisdiction in California and only for the event, legal action is brought before an Austrian court. The court in California enabled Plaintiff thereby to file suit for performance before an Austrian court without exposing Plaintiff to the risk that the claims would expire during the proceeding in the U.S." Continuing, the answer quoted from an exhibit that defense counsel had " 'been authorized by our clients Siemens AG and

Siemens LLC to represent that they will agree to toll the statute of limitations for the claims asserted by Hermes against them in the Complaint **for the time period since this action was filed, i.e., from August 21, 2009**, as a condition to the grant of their respective motions to dismiss or stay this action pursuant to CCP § 410.30.' [Citation.]" (Italics omitted.)

Based on the foregoing, we conclude that this appeal is moot. We accept defendants' stipulation that they will take the position in the Austrian court that the statute of limitations was tolled from the time that plaintiff filed its complaint in California until our remittitur issues in this appeal. Thus, even after the stay is lifted, plaintiff will not be exposed to an Austrian dismissal if the statute expired during the years that the California lawsuit was pending. Alternatively however, if the Austrian statute had already elapsed by August 21, 2009 when plaintiff filed its California complaint, plaintiff would not be protected by the stay. The parties' contract provided that any dispute between them would be " 'governed by and construed in accordance with Austrian law.' " (*Hermes I*, *supra*, B241673, at p. *1.) The Austrian statute of limitations defense, if successful in Austria, would likewise apply here. Therefore, under neither alternative are we able to provide plaintiff with any effectual relief, with the result that the appeal is moot.

In any event, plaintiff asked the trial court in California to maintain the stay until resolution of its appeal of the Austrian declaratory relief ruling, which Austrian counsel estimated would take six to eight months from November 11, 2015. Two and one-half years have passed since plaintiff made that request. Thus, plaintiff had more than the amount of time it asked for to file its substantive action.

DISPOSITION

The appeal is dismissed as moot.

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KALRA, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.