UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DENNIS C. VACCO and JOSEPH E. BERNSTEIN, individually in their capacities as Litigation Trustees of the CATSKILL LITIGATION TRUST,

Plaintiffs,

v.

07-CV-0663 (TJM/DEP)

HARRAH'S OPERATING COMPANY, INC., and CLIVE CUMMIS,

Defendants.

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT HEREIN PURSUANT TO RULE 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Date: September 19, 2007

BOIES, SCHILLER & FLEXNER LLP
George F. Carpinello (103750)
Teresa A. Monroe
10 North Pearl Street, 4th Floor
Albany, New York 12207
Phone: (518) 434-0600

Attorneys for Defendants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

State Statutes

Federal Rules

I. The Joint Alliance Agreement Is Violative of New York Judiciary Law § 489.

A. This Court is Not Bound By A Mohawk Tribal Court's Approval of the Assignment.

Plaintiffs first argue that this Court is barred from finding that the assignment of the Arquette Parties' claims to the Catskill Litigation Trust is champertous because the assignment was approved by a Mohawk court. This argument is wrong for four reasons. First, the Mohawk Court did not have before it the issue of whether the agreement violated Judiciary Law § 489. Indeed, it was not addressed either in the June 21, 2007 decision of "interim Chief Judge" Wes Williams, Jr. (see Exhibit D to Vacco Declaration) nor, upon information and belief, was it set forth in any of the papers in support of the motion to approve the assignment.

Second, Defendants herein were neither given notice of the motion to approve the assignment, nor did they appear on that motion. Thus, even if a Mohawk court now exists that would have the power to approve this assignment, any such decision would not be binding on Defendants herein.

Third, even if Defendants have given notice, no Mohawk court would have personal jurisdiction over Defendants in any proceeding to approve an assignment between the Arquette Parties and the Catskill Litigation Trust. Defendants are complete strangers to the contractual agreement between the Arquette Parties and the Catskill Litigation Trust and, therefore, there is no jurisdictional basis on which to bind Defendants with regard to any purported determination of a Mohawk court as to the validity of the assignment.[1] Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645, 650, 121 S.Ct. 1825, 1830 (2001) (Indian jurisdiction is "sharply circumscribed" to Indian lands and tribal members).

---

[1] Nor can a Mohawk court bootstrap its jurisdiction by purporting to approve of the assignment as a motion within the old Arquette tribal court action. See Exhibit G to Carpinello Reply Decl.

Finally, as is more fully set forth below (see pages 2-3, *infra*), enforcement of a champertous agreement is contrary to New York public policy, and New York courts, including federal courts within the state of New York, need not give comity to judgments or decisions contrary to New York public policy. N.Y. CPLR § 5304(b)(4); Wilson v. Marchington, 127 F.3d 805, 807-10 (9th Cir. 1997) (Indian court judgments are not entitled to full faith and credit but only entitled to comity and federal court need not give comity where Indian judgment violates forum's public policy). The burden of establishing that a foreign judgment meets the tests for comity is on the party seeking to enforce the judgment. Kim v. Co-operative Centrale Raiffeisen-Boerenleenbank B.A., 364 F. Supp. 2d 346, 352 (S.D.N.Y. 2005) (*citing* CPLR 5304(b)).

B. New York Law Governs.

Plaintiffs also claim that Mohawk law, not New York law, governs whether or not the agreement is champertous. A fundamental principle of choice of law is that the law of the forum governs unless the parties present the court with a *prima facie* showing that the law of another state may apply and that law is different from the law of the forum. In re Air Crash Near Nantucket Island, Massachusetts on Oct. 31, 1999, 392 F. Supp. 2d 461, 477 (E.D.N.Y. 2005) ("the party relying on foreign law bears the burden of providing such law") *quoting* Alfadda v. Fenn, 149 F.R.D. 28, 34 (S.D.N.Y. 1993).

Plaintiffs have failed to meet this burden. They have failed to present any evidence of Mohawk law either by citation to case authority or statute or by affidavit of foreign law. See Torah Soft Ltd. v. Drosnin, 224 F. Supp. 2d 704, 712 (S.D.N.Y. 2002); In re Bennett Funding Group, Inc. Securities Litigation, 270 B.R. 126, 129 n.4 (S.D.N.Y. 2001) (applying New York instead of Bermuda law where "none of the parties have proven foreign law through the

submission of affidavits, statutory authority, case authority, sworn testimony or other similar evidence"). Plaintiffs here have also failed to file a notice of intent to apply foreign law pursuant to Fed. R. Civ. Pro. 44.1. Instead, Plaintiffs' simply assert, *ipse dixit*, that Mohawk law has no rule similar to Judiciary Law § 489. As they failed to make any showing of what Mohawk law would be on the subject, the Court is free to apply New York law.[2] In re Bennett, 270 B.R. at 129 n.4; Torah Soft, 224 F. Supp. 2d at 712.

Moreover, it is clear that New York law applies because New York has the greatest contacts with the parties and with the attempted enforcement of the assignment and the greatest interest in both protecting the courts of New York from champertous relationships and in regulating the conduct of New York attorneys. All of the actions that have been pursued or are intended to be pursued by the Catskill Litigation Trust are in New York state and federal courts (see September 19, 2007 Declaration of George F. Carpinello (hereinafter "Carpinello Reply Decl."), at ¶¶ 17 to 19 and Exhibits I, J and K) and Plaintiff Vacco, his law firm (co-counsel here) and Orrick, Herrington & Sutcliffe, LLP, lead counsel, are all located in New York.

Finally, even if a choice of law analysis were to point to Mohawk law, and even if Mohawk law allowed the assignment, it is clear that this Court should not apply such law since it clearly violates the stated public policy of New York. See American Optical Co. v. Curtis, 56 F.R.D. 26, 29-30 (S.D.N.Y. 1971) (champertous assignment violates New York public policy); TransBell Inv. Co. v. Roth, 36 F. Supp. 396, 397-98 (S.D.N.Y. 1940) (same).

C. New York Law Bars This Assignment.

Plaintiffs make two arguments in an attempt to deflect the application of Judiciary Law § 489. First, Plaintiffs state – inaccurately – that an action is not champertous if the assignee is

[2] It should be noted that the purported default judgment that Plaintiffs herein seek to enforce itself states, citing a Mohawk procedural code, that generally New York law applies to Mohawk tribal court cases. See Exhibit A to September 10, 2007 Declaration of Barbara Lazore, at pp. 2-5.

not a stranger to the underlying dispute. (Pls.' Mem. at 6). In fact, this very limited exception applies only when the assignee is not a stranger to the underlying *litigation*. Ehrlich v. Rebco Ins. Exchange, Ltd., 225 A.D.2d 75, 77, 649 N.Y.S.2d 672, 674 (1st Dep't 1996) ("A champertous agreement is 'one in which a person *without interest in another's litigation* undertakes to carry on the litigation at his own expense, in whole or in part, in consideration of receiving, in the event of success, a part of the proceeds of the litigation'") (emphasis added), *quoting* United States of America for the Use and Benefit of Balboa Ins. Co., v. Algernon Blair, Inc., 795 F.2d 404, 409 (5th Cir. 1986), *citing* Restatement of Contracts § 540(2), *accord* American Optical, 56 F.R.D. at 31 n.8; Welch v. Coro, Inc., 97 F. Supp. 185, 186 (S.D.N.Y. 1951).

Indeed, the three cases cited by Plaintiffs confirm that assignees must either have a connection with the underlying litigation or be related entities, such as interrelated corporations, in order to fall outside the provisions of Judiciary Law § 489. In Coopers & Lybrand v. Levitt, for instance, both the assignee and the assignor had been parties to the underlying action prior to the assignment. 52 A.D.2d 493, 497, 384 N.Y.S.2d 804, 807 (1st Dep't 1976). "The fact that [the assignor and assignee later] agreed to proceed by one party asserting two separate claims does not make the assignment champertous." Id.

American Hemisphere Marine Agencies, Inc. v. Kreis, unlike the instant action, involved two "interrelated corporations" that chose to proceed with litigation with one corporation assigning its claims to the other. 40 Misc.2d 1090, 1091, 244 N.Y.S.2d 602, 603 (N.Y. Co. Sup. Ct. 1963). Finally, in the last case cited by Plaintiffs, Richbell Information Services, Inc. v. Jupiter Partners, L.P., the court found there were questions of fact concerning whether an agreement with an entity created to fund litigation was champertous where the entity's investors

were also investors in the corporation that assigned its claims. 280 A.D.2d 208, 219, 723 N.Y.S.2d 134 (1st Dep't 2001).

Here, the Catskill Litigation Trust is a stranger to the Arquette Parties' claims. The Arquette actions were, and have always been, separate actions from the Catskill Litigation Trust claims brought in the Southern District for injuries allegedly suffered by the Catskill Group as a result of Park Place's agreement with the Mohawk Tribe and from the claims in the Catskill Group's Sullivan County Supreme Court action against other third parties.

Plaintiffs next argue that the agreement is not champertous because it was an assignment of a judgment which, they claim, is outside the ambit of Judiciary Law § 489. This argument is wrong for four reasons. First, judgments are not outside the ambit of Judiciary Law § 489. Concord Landscapers, Inc. v. Pincus, 41 A.D.2d 759, 341 N.Y.S. 2d 538, 539-40 (1st Dep't 1973) ("It has been consistently held that section 489 prohibits the purchase of a judgment by one engaged in the business of collection and adjustment of claims if the purpose thereof is to commence an action or special proceeding thereon."); Roslyn Savings Bank v. Jones, 69 Misc.2d 733, 740-41, 330 N.Y.S. 2d 954, 961 (Nass. Co. Sup. Ct. 1972); People v. Berlin, 65 Misc.2d 245, 248-49, 317 N.Y.S.2d 191, 192-193 (Nass. Co. Sup. Ct. 1971).

Clearly, judgments were intended to be covered by § 489 because that section expressly exempts from its coverage the assignment of various types of claims, including judgments, but only if they are purchased out of bankruptcy or from an estate.[3] The exemption for judgments bought out of bankruptcy or from an estate would not be necessary if judgments were not within the scope of § 489.

[3] Section 489(1) provides, in part, as follows: "provided however that bills receivable, notes receivable, bills of exchange, *judgments*, or other things in action may be solicited, bought or assignment taken thereof, from any executor, administrator, assignee for the benefit of creditors, trustee or receiver in bankruptcy, or any other person or persons in charge of the administration, settlement or compromise of any estate, through court actions, proceedings or otherwise" (emphasis added).

Second, the Joint Alliance Agreement, by its very terms, provides for an assignment of more than judgments. The Agreement expressly provides by its terms that the Arquette Parties are assigning "all asserted and unasserted claims." See Exhibit X to August 13, 2007 Declaration of George F. Carpinello (hereinafter "Carpinello Decl."), at page 2 (defining "tribal claims").

Third, the Agreement is champertous because there is not only an assignment from the Arquette Parties to the Catskill Litigation Trust, but also an assignment of claims from the Catskill Litigation Trust back to the Tribe and the Arquette Parties, whereby the Catskill Litigation Trust gave the latter a 50% interest in any recovery that the Catskill Litigation Trust may obtain against Harrah's in its separate actions in the Southern District of New York and against third parties in Sullivan County Supreme Court. Exhibit X to Carpinello Decl. at § 5. Those actions clearly have not been reduced to a judgment in the Trust's favor.

Finally, the issue under § 489 is not whether the claim is embodied in a judgment, a debt instrument or is merely inchoate. The issue is the intention of the parties. If the primary intent of the parties is to commence litigation, then the agreement is champertous. Elliott Assocs., L.P. v. Banco de la Naçion, 194 F.3d 363, 371 (2d Cir. 1999).

Here, the parties' intent is unequivocal and is expressly stated throughout the assignment agreement itself, *i.e.*, to pursue litigation against Harrah's and divide the proceeds. See Exhibit X to Carpinello Decl. at § 3; see also Carpinello Reply Decl. at ¶¶ 17-19 and Exhibits I, J, K thereto. Thus, the very purpose of the Joint Alliance Agreement is to commence litigation. See Refac Int'l Ltd. v. Lotus Development Corp., 131 F.R.D. 56, 58 (S.D.N.Y. 1990) ("the primary purpose for the assignment here was to enable REFAC to commence actions as FRS's surrogate plaintiff") and American Optical Co., 56 F.R.D. at 30-31 ("the assignment Agreement between

University and A.O. provided for and required A.O. to bring a law suit … and the proposed suit was the very purpose and substance of the agreement").

II. The Arquette Actions Were Settled.

Plaintiffs do not dispute any of the case law set forth in Defendants' moving memorandum which set out the test for determining whether an action has been settled. In particular, Plaintiffs do not challenge the Winston test set forth at pages 15 to 16 of Defendant's Brief, nor do they challenge the material facts demonstrating that an enforceable settlement was entered into: specifically, that the attorneys for all the parties met with Judge Peebles on March 31, 2003 and agreed to settle the action on the terms then agreed to,[4] and that they expressly advised the Court of the settlement; that there was no reservation not to be bound until the agreement was signed by all parties; that there was partial performance by Park Place in giving up the summary judgment motion; that the Court gave the parties until September 1, 2003 to reopen the action if settlement were not complete, and the Arquette Parties never moved to reopen; and that all but one or two of the Arquette Parties actually signed the settlement agreement, but that their counsel refused to turn over those signed agreements to Park Place's counsel.

Strikingly, although Plaintiffs present the Affidavit of Attorney Michael Rhodes-Devey, who was present at the March 31, 2003 conference, Mr. Rhodes-Devey does not dispute any of

[4] Plaintiffs make a half-hearted attempt to challenge this material fact by suggesting, without any evidentiary support and, in particular, not a single declaration of anyone present at the March 31, 2003 court conference, that what was presented at the conference before Magistrate Peebles was "then just an *outline*" (Pls.' Mem. at 14 (emphasis in original)). There is no factual support for this statement, and the statement is incorrect. The terms of the settlement that were related to Judge Peebles are set forth in ¶ 19 of the Carpinello Decl. and were embodied in a draft agreement that was exchanged between Henry Greenberg and George Carpinello prior to the March 31, 2003 conference (Carpinello Decl. at ¶ 21). Attached as Exhibit I to the Carpinello Decl. is the email sent by Mr. Greenberg to Mr. Carpinello on April 7, 2003 asking Mr. Carpinello to make three very technical changes to the Agreement. Those were made, and the final copies were distributed on April 11, 2007. See Carpinello Reply Decl. at ¶¶ 20-24 and Exhibit L thereto.

the material facts relating to that court conference as set forth in the Declaration of George F. Carpinello.

Plaintiffs instead make four arguments: (1) the settlement was effectuated by the "shocking activities by the Defendants" and was "fundamentally unfair" (Pls.' Mem. at 10); (2) the settlement agreement had to be signed by all the parties to be effective, and not all signatures were obtained; (3) both the filing of the Arquette II action and the settlement agreement were undertaken by persons who were not authorized to do so by the purported tribal court; and (4) this Court must defer to the purported tribal court in determining whether the actions before this Court were in fact settled.

A. The Fairness of the Settlement.

Plaintiffs' first argument is easily disposed of. Having brought an action in this Court to enforce a $1.787 billion purported default judgment from a "court" the Tribe itself maintained did not exist, the Arquette Parties themselves sought settlement when faced with (1) this Court's order reflecting the fact that the Bureau of Indian Affairs did not recognize the "court" and that the Tribe rejected the validity of the court by an overwhelming margin (Exhibit D to Carpinello Decl.); and (2) a motion for summary judgment seeking a declaration there was no such court.

The Arquette Parties were represented by competent and conscientious counsel (hired and paid for by the Catskill Group) when they expressly agreed to enter into such a settlement in a conference before Magistrate Peebles. The purported "shocking activities by the Defendants" which allegedly led to the settlement of the initial action are nowhere detailed in Plaintiffs' Memorandum of Law. Instead, the Court is referred to the so-called Vacco Report, a "report" which was written by Dennis Vacco, a Plaintiff herein, and the attorney for the Catskill Litigation Trust. The report was also paid for by the Catskill Litigation Trust. Carpinello Reply

Decl. at ¶¶ 3-7 at Exhibit A thereto. Obviously, that report is nothing more than an advocacy piece, which is refuted, point-by-point, in Exhibit B to the Carpinello Reply Decl.

B. The Settlement Agreement Did Not Have to Be Signed For the Settlement to Be Effective.

There is no question that the parties intended that they would sign the settlement agreement. But the case law is clear, and stands completely unrebutted by Plaintiffs, that an intent to memorialize a settlement agreement in writing is not inconsistent with a finding that the settlement is nonetheless enforceable even though one or more parties refuses to sign the agreement. Defs.' Mem. at 16-17. For this reason, the refusal of one or two of the Arquette Parties to sign the agreement is of no relevance.

Moreover, the fact that Park Place's counsel stated in correspondence to Judge Demarest in the Franklin County action and to this Court that the settlement agreement had to be signed and the purported tribal court judgment had to be vacated before final releases and stipulations of discontinuance were filed, is not an admission that a settlement agreement had not been reached; it is merely a reservation of rights and statement that the Arquette Parties had not yet fulfilled their obligations under the settlement agreement.

C. The Arquette Parties' Authority Was Never Challenged in Arquette I or Arquette II.

Plaintiffs' third argument smacks of bad faith. In this argument, Plaintiffs contend that the settlement of Arquette I and Arquette II should be ignored by this Court because the Arquette Parties, including named parties Barbara Lazore and Philip Tarbell, both of whom signed the Joint Alliance Agreement with Catskill Litigation Trust (see Exhibit X to Carpinello Decl.), did not have express approval from the purported tribal court to seek enforcement of the purported tribal court judgment or settle that action. Clearly, the Arquette Parties themselves and their

assignees, Plaintiffs herein, should be estopped from making that argument in this Court. Having commenced Arquette II to enforce the purported tribal judgment on behalf of the purported class and having represented to this Court that the Arquette cases were settled, they cannot now say that they themselves had no authority to bring the action or to settle.

Moreover, even if a tribal court existed at the time, and even if the Arquette Parties had failed to get approval from that court to settle Arquette II, Plaintiffs cite no authority for the proposition that a court rendering a class action judgment must expressly approve efforts by the class representatives to enforce that judgment in another jurisdiction. The fact that the *Arquette Parties* breached the settlement agreement by failing to obtain vacatur of the default judgment does not mean that Defendants cannot enforce the settlement agreement.

D. This Court Should Not Defer to a Tribal Court to Determine Whether an Action Before This Court Was Settled.

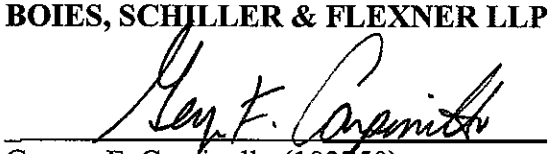
Finally, Plaintiffs assert that Defendants' arguments made herein must be addressed to the tribal court. Pls.' Mem. at 19. Plaintiffs cite absolutely no authority for this proposition and there is none. The law is the opposite: a *defendant* in an action in federal court brought to enforce a tribal decision is free to raise any defenses and is not required to raise those defenses in the tribal court. MacArthur v. San Juan County, __ F.3d __, 2007 WL 2045456, at *5, 6 (10 Cir. July 18, 2007). Further, the question of whether a previous action *pending in this Court* was in fact settled is obviously an issue within the jurisdiction of this Court. Further, if the Arquette actions were settled, then the Arquette Parties and their assignees are precluded from bringing an enforcement action again in this Court.

CONCLUSION

For all the foregoing reasons, Defendants respectfully request that their motion to dismiss be granted.

Dated: Albany, New York
September 19, 2007

BOIES, SCHILLER & FLEXNER LLP

By: 

George F. Carpinello (103750)
Teresa A. Monroe
10 North Pearl Street, 4th Floor
Albany, New York 12207
(518) 434-0600
Attorneys for Defendants

S:\wpdata\1133003\VACCO V. HARRAHS\Reply MOL.doc