

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROSALIE SIMON, et al.,

Plaintiffs,

v.

REPUBLIC OF HUNGARY, et al.,

Defendants.

Civil Action No. 10-01770 (BAH)

Judge Beryl A. Howell

**DECLARATION OF DR. MAXIMILIAN KINDLER
IN SUPPORT OF THE MOTION OF
DEFENDANT RAIL CARGO HUNGARIA ZRT. ("RCH")
TO SET ASIDE THE ENTRY OF DEFAULT
AND TO DISMISS THE COMPLAINT AGAINST RCH**

Dr. Maximilian Kindler hereby declares, pursuant to 28 U.S.C. § 1746:

1. I am (and since December 2008 have been) the general counsel of Rail Cargo Austria AG ("RCA"), a corporation incorporated in Austria, with its principal place of business in Vienna, Austria. The Republic of Austria is the indirect owner of 100% of the shares of RCA. RCA in turn owns 99.99% of the shares of defendant Rail Cargo Hungaria Zrt. ("RCH"), a corporation incorporated in Hungary, with its principal place of business in Budapest, Hungary. A simplified organization chart is attached hereto as Exhibit A.

2. I submit this declaration in support of RCH's motion to set aside the entry of default against RCH and to dismiss the complaint against RCH in this action. I have personal knowledge of the statements set forth in this declaration. I am fluent in German (my native language) and proficient in English.

The default resulted from my misunderstanding of American law

3. Service of process was made on RCH in Hungary on December 31, 2010. The pleadings were forwarded to me to review and I erroneously informed RCH that it had no obligation to respond. The basis for my advice was that:

(a) I knew that RCH could have had no involvement in or responsibility for the acts and events that the complaint pled took place in Hungary in the early 1940s, since I was aware that (i) RCH was incorporated by co-defendant Magyar Allamvasutak Zrt ("MAV") in 2005, some 60 years later, (ii) RCA purchased 95% of RCH shares in 2008 and now owns 99.99% of RCH's shares, and (iii) RCH did not assume any Holocaust or World War II liabilities as part of these transactions; and

(b) I was aware that RCH did not do any business in the United States.

4. I therefore concluded that, even in the absence of a response to the pleading, an American court lacked jurisdiction to adjudicate the plaintiffs' claims against RCH and that any judgment that an American court might render in these circumstances would not be recognized in Hungary or Austria.

5. What I did not understand, until after the entry of default occurred and I consulted outside Austrian counsel who is familiar with American litigation, is that while these factors may be a basis for moving to dismiss or otherwise defending the action, they do not relieve RCH of the obligation to respond to the complaint.

RCH's meritorious defenses

6. I sincerely regret that I did not seek advice of knowledgeable counsel earlier and I respectfully request that this Court vacate the entry of default and allow RCH to set forth its meritorious defenses. These defenses include:

A. **The Claims against RCH are non-justiciable**

7. In 2000 and 2001, the Republic of Austria entered into a set of interrelated executive agreements (the "Executive Agreements") with the United States of America providing for compensation for various classes of Holocaust victims. Essential elements of the Executive Agreements were provisions that all compensation claims would be brought exclusively in the forums established in Austria pursuant to the Executive Agreements and that both Austria and Austrian companies would be granted "legal peace" from any then pending or subsequently brought actions in the United States. In accordance with the terms of the Executive Agreements, Austria has allowed over 19,000 claims of Jewish victims for compensation and the United States has filed Statements of Interest ("SOF") urging that any Holocaust-based claims asserted in US courts against Austria and/or Austrian companies be dismissed on the ground that their pendency would impair the foreign policy interests of the United States.

8. Since RCH, as a virtually 100% subsidiary of RCA, is deemed an "Austrian company" under the Executive Agreements, it is my understanding that RCH is included within the umbrella of "legal peace" accorded under the Executive Agreements. The accompanying declaration of Ambassador Winkler addresses this ground for dismissal in detail.

9. I have been informed by RCH's counsel, Alston & Bird LLP ("A&B"), that co-defendants Hungary and MAV have already moved to dismiss on the related ground of "political question", invoking various provisions of post-World War II Treaties between the United States

and Hungary. Since RCH is incorporated in Hungary and headquartered in Budapest, it is my understanding that RCH is protected by the provisions of those Treaties, too. RCH accordingly joins in and adopts the political question arguments of its co-defendants.

B. RCH is not subject to Personal Jurisdiction

10. Since RCH does not do or transact business in the United States and has no systematic or continuous contacts with the United States, RCH is also moving to dismiss on the ground that it is not subject to the personal jurisdiction of this Court. The accompanying declaration of Attila Czöndör of RCH sets forth the lack of RCH's jurisdictionally relevant contacts with the United States.

C. Plaintiffs' claims are time-barred

11. It appears from the face of the first amended complaint that all of the operative acts and events occurred no later than 1945, over 65 years before this action was commenced. I am informed by A&B that the longest potentially applicable statute of limitations is ten years and that the claims against RCH have accordingly been time barred for at least 55 years. RCH is moving to dismiss on that grounds as well.

D. RCH had no involvement in the Holocaust

12. Since RCH was not incorporated until 2005, 60 or more years after the events and wrongful acts alleged in the complaint are alleged to have taken place, and since RCH did not assume any Holocaust-related liabilities when it acquired certain portions of the business of co-defendant MAV, RCH is not responsible for any wrongdoing that may have occurred. While RCH is not setting forth this argument as part of its motion to vacate and dismiss, because it involves issues of fact that I have been informed by A&B can not properly be raised at this stage,

this is nevertheless a meritorious defense that I respectfully ask the Court to consider when it determines whether the entry of default should be vacated.

E. Forum Non Conveniens

13. I have been informed by A&B that the co-defendants have also moved to dismiss on the ground of Forum Non Conveniens ("FNC") and have urged that the courts of Hungary are the appropriate alternative forum to resolve plaintiffs' claims. RCH joins in and adopts the FNC motion of its co-defendants and represents that RCH is subject to and will not contest the jurisdiction of the courts of Hungary if this action is dismissed for FNC and re-filed in Hungary.

Verified Answer

14. In compliance with Local Rule 7(g), RCH has attached hereto as Exhibit B an answer to the first amended complaint.

Plaintiffs have not been prejudiced by RCH's default

15. Finally, the delay caused by RCH's default is relatively short. I have been informed by A&B that promptly after they were retained on May 13, 2011 to represent RCH in this action, Amber Wessels, a partner in that firm, reached out to plaintiffs' counsel to see whether they would agree to set aside the entry of default so (a) the Court's time would not be taken up deciding a motion to vacate and (b) both the plaintiffs and RCH could proceed to expeditiously brief RCH's motion to dismiss. Unfortunately, I am informed by A&B that plaintiffs conditioned vacating the default on obtaining RCH's agreement to forego making a motion to dismiss. This condition was unacceptable to RCH since it effectively would waive the protections afforded RCH under the Executive Agreements.

16. As soon as it became apparent, on June 6, 2011, that agreement could not be obtained on vacating the entry of default, RCH proceeded expeditiously to prepare this motion.

17. The accompanying declaration of Ms. Wessels sets forth the correspondence between A&B and plaintiffs' counsel, including plaintiffs' acknowledgement, in the email of Charles S. Fax of June 6, 2011, that "I confirm the statement I made on Friday [June 3, 2011] – we will not argue that the delay in filing between the time that Ms. Wessels first contacted me, through the duration of our discussions, should be charged against Rail Cargo [RCH]."

18. In marked contrast, the prejudice to RCH of not being allowed to assert its meritorious defenses would be substantial and wholly disproportionate. Plaintiffs seek class-wide compensatory damages in an unspecified amount (in paragraph 87 of the first amended complaint, plaintiffs allege only that the "amount in controversy exceeds Five Million Dollars (\$5,000,000, exclusive of interest and costs"), plus punitive damages and attorneys' fees.

19. I submit that it is also relevant that RCH is indirectly a virtually wholly-owned subsidiary of the Republic of Austria. While I have been informed by A&B that unlike its co-defendants, RCH is not able to assert immunity under the Foreign Sovereign Immunity Act because it is not a "first-tier" instrumentality of Austria, RCH expects that the United States will file a SOI in this case setting forth the foreign policy implications of (a) the default and (b) this action against RCH remaining outstanding.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on June 22, 2011


Dr. Maximilian Kindler

SIMPLIFIED ORGANIZATION CHART

