SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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NOREX PETROLEUM LIMITED,

Plaintiff,

-against-

Index No. 650591/11
Motion Date: 9/15/11
Motion Seq. No.: 07

LEONARD BLAVATNIK, VICTOR VEKSELBERG, SIMON KUKES, ACCESS INDUSTRIES, INC., ALFA GROUP CONSORTIUM, RENOVA INC., OAO TYUMEN OIL COMPANY, TNK-BP LIMITED, and BP PLC,

Defendants.

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The following papers, numbered 1 to 3, were read on this motion to dismiss.

	Papers Numbered
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	1
Answering Affidavits - Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes X No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision.

Dated: June 13, 2012

Eileen Bransten, J.S.C.
Hon. Eileen Bransten

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(s):

Check One: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE ☐ SETTLE/SUBMITORDER/JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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NOREX PETROLEUM LIMITED,

Plaintiff,

-against-

Index No. 650591/11
Motion Date: 9/15/11
5/31/12
Motion Seq. Nos.: 07-12

LEONARD BLAVATNIK, VICTOR VEKSELBERG, SIMON KUKES, ACCESS INDUSTRIES, INC., ALFA GROUP CONSORTIUM, RENOVA INC., OAO TYUMEN OIL COMPANY, TNK-BP LIMITED, and BP PLC,

Defendants.

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BRANSTEN, J.:

Motion sequence numbers 007, 008, 009, 010, 011 and 012 are consolidated for disposition.

In motion sequence number 007, defendants Leonard Blavatnik ("Blavatnik"), Victor Vekselberg ("Vekselberg"), Simon Kukes ("Kukes"), Access Industries, Inc., Alfa Group Consortium ("Alfa Group"), Renova, Inc. ("Renova"), OAO Tyumen Oil Company ("TNK"), and TNK-BP Limited ("TNK-BP") move, pursuant to CPLR 3211(a)(1), (5), and (7), and CPLR 327(a), for an order dismissing the complaint on the grounds that the claims are barred by the statute of limitations, are barred by res judicata, collateral estoppel and comity, fail to state a cause of action, and should be dismissed on the ground of forum non conveniens.

In motion sequence number 008, Alfa Group moves, pursuant to CPLR 3211(a)(7) and (8), to dismiss the complaint on the grounds that Alfa Group is not a legal entity capable of being sued, plaintiff fails to state a cause of action under New York law governing unincorporated associations, plaintiff fails to allege a basis for personal jurisdiction, and the court lacks subject matter over plaintiff's claim.

In motion sequence number 009, defendant BP PLC ("BP") moves, pursuant to CPLR 3211(a)(5) and (7), to dismiss the complaint as against it on the grounds that the causes of action are barred by the statute of limitations, and that plaintiff has failed to state a cause of action.

In motion sequence number 010, TNK and TNK-BP (together, the "TNK Defendants") move, pursuant to CPLR 302(a), 3211(a)(8), and BCL § 1314 (b), to dismiss the complaint as against them for lack of personal jurisdiction.

In motion sequence number 011, defendant Kukes moves, pursuant to CPLR 301, 302 and 3211(a)(8), to dismiss the complaint as against him on the ground that plaintiff fails to allege a basis for personal jurisdiction over him.

Finally, in motion sequence number 012, plaintiff Norex Petroleum Limited ("Norex") moves to supplement the record regarding defendants' motions to dismiss.

FACTS

Norex is a corporation organized under the laws of Cyprus. Its principal place of business is in Calgary, Alberta, Canada.

This action arises out of an alleged misappropriation of Norex's majority interest in oil fields in Russia that are owned by nonparty Yugraneft. Norex and nonparty Chernogorneft partnered in 1991 to form Yugraneft, a joint venture, in order to develop a lucrative oil field in the Tyumen region of Western Siberia. Norex was assigned a 60% interest in Yugraneft, based upon its contribution of capital and "know how." Chernogorneft was assigned a 40% ownership interest based on its contribution of oil field rights and capital. Chernogorneft was a major subsidiary of a Russian oil company, nonparty Sidanko.

BP invested more than half a billion dollars in Sidanko in 1997, acquiring a 10% interest in Sidanko. BP's investment provided an indirect interest in Chernogorneft, which owned 40% of Yugraneft.

Norex contends that, after the collapse of the Soviet Union, defendants Blavatnik and Vekselberg ("B&V"), two wealthy Russians living in New York, sought to gain control of Chernogorneft and then of Yugraneft.[1] According to Norex, B&V forced Chernogorneft into bankruptcy, despite the fact that it was solvent. B&V then acquired Chernogorneft's assets for a fraction of their value. This gave TNK a minority interest in Yugraneft.

Norex alleges that, after causing an action to be brought, B&V corrupted a regional Siberian court, which then rendered a decision diluting Norex's 60% controlling interest in Yugraneft. The Siberian court held that Norex was entitled to only a 20% interest in the

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[1] Blavatnik and Vekselberg own and control Access, Renova and TNK. TNK and BP formed TNK-BP in 2003.

company, and increased TNK's interest to 80%. B&V then arranged for armed militiamen to forcibly seize Yugraneft's oil field and its corporate offices, stripped Yugraneft's assets, redirected its profits to TNK-BP, withheld all dividends from Norex and arranged to wire money from New York banks to Russia in order to bribe Russian officials. Norex also maintains that, after barring Norex from voting its Yugraneft shares, TNK forged minutes of a shareholder meeting, in which it was recorded that a TNK official was elected the General Director of Yugraneft.

Knowing about all of what befell Norex, BP was concerned about its own position. It wanted to expand its oil interests in Russia. It eventually opted to form a business relationship with TNK, forming TNK-BP in 2003. TNK-BP eventually assumed control over all of Yugraneft's assets. Norex maintains that it has not received even the 20% of dividends that it should have after the corrupt legal proceedings in Russia, despite the fact that billions of dollars of dividends have been distributed to shareholders of TNK-BP.

Norex describes difficulties that BP has had with its relationship with TNK in the last few years. However, it is unnecessary for the court to relate those issues at this time.

In these motions, the defendants all contend that this action is time-barred. Some of the defendants assert that there is no jurisdiction over them in this court. Defendants further contend that the action is barred by considerations of res judicata, collateral estoppel and comity. Defendants argue that the court decisions in Russia cannot be ignored.

DISCUSSION

I. Statute of Limitations

The court must first address the question of whether the statute of limitations bars Norex's claims.

This action was commenced in 2011. Norex previously commenced an action against all of the defendants except BP in the federal court for the Southern District of New York on February 26, 2002. BP was added on December 21, 2005. Norex maintains that the decision that eventually resulted from that action, *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29 (2d Cir. 2010), was not decided on the merits. Norex contends that it is thus able to take advantage of CPLR § 205(a) in order to commence an action in New York State court. Defendants argue that, in accordance with CPLR § 202, Norex's action is untimely because it would not be timely under the laws of Alberta, Canada.

CPLR § 202

CPLR § 202 provides:

> An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.

Norex is not a New York resident. Therefore, in order to determine timeliness, this court must apply the shorter of limitations resulting from imposing New York law, or limitations imposed by the jurisdiction where the cause of action accrued.

It is well settled that when a company suffers damages, and the damages are purely economic, the cause of action accrues where those damages were felt, which is the principal place of business of the company. *Global Fin. Corp. v. Triarc Corp.*, 93 N.Y.2d 525, 529 (1999); *Brinckerhoff v. JAC Holding Corp.*, 263 A.D.2d 352, 353 (1st Dep't 1999). Norex's principal place of business is in Calgary, Alberta, Canada. Thus, this court is bound by the laws of Alberta if that jurisdiction would limit the action to an earlier date than would New York.

The Alberta statute of limitations for the torts plaintiff alleges is two years from the time the injured party first knew or ought to have known that an injury occurred, that the injury was attributable to the defendants, and that the injury warranted bringing a proceeding. *See* Alberta Limitations Act, R.S.A.2000, c. L–12, § 3; *In re Noram Resources, Inc.*, Bankruptcy No. 08–38222, 2011 WL 5357895, *15 (Bankr. S.D. Tex. Nov. 7, 2011); Affidavit of Bradley G. Nemetz, Q.C.; *see also* CPLR § 214 (New York's three year statute of limitations). Defendants assert that because the cause of action accrued well over two years before this action was commenced, plaintiff's claims in the complaint are therefore time-barred. Defendants contend that the very latest that the claims could be argued to have accrued is when Norex commenced the federal action. Clearly, the cause of action must have accrued before Norex commenced suit.

Thus, unless a tolling provision exists which would enable Norex to use either a later accrual date, or an earlier commencement date, the action would be barred under Alberta law.

CPLR § 205

Norex maintains that this court must look to the commencement of the federal action, and determine whether that action was timely commenced. Norex argues that if it was, then it will benefit from CPLR § 205 (a). Section 205(a) of the CPLR permits a plaintiff to bring a subsequent suit within six months of dismissal of an action, providing that the dismissal was not on the merits.

Defendants contend that CPLR § 205 is inapplicable, because Alberta does not have a comparable tolling statute. Further, they contend that the dismissal was a determination on the merits.

CPLR § 205 (a) provides:

> New action by plaintiff. If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff ... may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.

Here, plaintiff commenced the instant action within six months of the Second Circuit's dismissal of its action. The Second Circuit, relying on *Morrison v. National Australia Bank Ltd.*, ___ U.S. ___, 130 S. Ct. 2869 (2010), held that "absent a clear Congressional expression of a statute's extraterritorial application, a statute lacks

extraterritorial reach." *Norex*, 631 F.3d at 32. The RICO statute, on which Norex based its federal claims, was found to lack such expression. The Second Circuit therefore dismissed Norex's RICO claims. *Id.* at 33. Having dismissed the federal claims, the federal court would not exercise jurisdiction over the Norex's non-federal claims in the complaint and therefore dismissed the entire action. *Norex Petroleum Ltd. v Access Indus., Inc.*, 540 F. Supp. 2d 438, 449 (S.D.N.Y. 2007). Under CPLR § 205(a), if the federal court's dismissal was not on the merits, Norex would be entitled to recommence in New York state court within six months of the dismissal, without regard to whether the statute of limitations had run in the intervening time.

However, under Alberta law, a very different scenario emerges. Alberta law does not contain any tolling provision to enable a plaintiff to recommence an action after a prior action is dismissed. According to BP's expert, Michael A. Thackray, it is only if the action is dismissed, and another action filed within the statutory period, that a plaintiff can recommence an action. *See* Thackray Aff. at pp. 4-7 and cases cited therein. TNK's expert, Bradley G. Nemetz, concurs with the conclusion that Alberta does not have any concept of tolling the statute of limitations due to another legal proceeding. Nemetz adds that, although the specific scenario before this court does not come up in Alberta, the same issue arises in cases where proceedings are dismissed on the basis of forum non conveniens. Nemetz states that sometimes courts will grant the application on condition that the plaintiff will not raise the limitations period as a defense, but not always. If a court determines that Alberta is not

a convenient forum, and does not condition the dismissal, the plaintiff is unable to commence a new action. *See* Nemetz Aff. at pp. at 11-12 and cases cited therein.

Norex's expert, Peter J.M. Lown, does not dispute Thackray or Nemetz's statements on Alberta law. However, he counters that Alberta's limitations law is substantive rather than procedural. *See* Lown Aff. at pp. at 2-4 and cases cited therein. Norex argues that the applicability of substantive law is governed by New York's choice of law principles, and not by CPLR § 202. Norex contends that because alleged torts did not occur in Alberta, Alberta's substantive law would not apply.

The fact that Alberta's law may be substantive does not alter the fact that Alberta's limitations as to when an action may be brought are binding under New York's borrowing statute. *Ledwith v. Sears Roebuck & Co.*, 231 A.D.2d 17, 23-24 (1st Dep't 1997) ("Irrespective of whether the Oregon statute ... is considered procedural or substantive, it applies. By its own terms, CPLR [§] 202's borrowing provision is not confined to the Statute of Limitations but embraces all the laws that serve to limit the time within which an action may be brought"). Thus, the question of substantive versus procedural law that arises under choice of law principles is not implicated. Weinstein-Korn-Miller, NY Civ. Prac. ¶ 202.04.

In "embrac[ing] all the laws that serve to limit time within which an action may be brought" (*Ledwith*, 231 A.D.2d at 24), this court must embrace Alberta law, which does not allow for any tolling due to a prior action. Otherwise, the policy "to protect a non-resident defendant against an action in New York, which was timely because of the tolling provision

of [the New York statute], but had become barred elsewhere" would be defeated. *George v. Douglas Aircraft Co.*, 332 F.2d 73, 78 (2d Cir. 1964), *cert. denied* 379 U.S. 904 (1964); *see also Portfolio Recover Assoc., LLC v. King,* 14 N.Y.3d 410, 416 (2010)*; Global Fin.,* 93 N.Y.2d at 528 ("CPLR 202 requires the cause of action to be timely under the limitation periods of both New York and the jurisdiction where the cause of action accrued. This prevents nonresidents from shopping in New York for a favorable Statute of Limitations"); *Williams v. Infra Commerc Anstalt*, 131 F. Supp. 2d 451, 455 (S.D.N.Y. 2001).

Norex relies on *Icelandic Airlines v. Canadair, Ltd.*, 104 Misc. 2d 239, 244 (Sup. Ct., NY County 1980), for the proposition that a plaintiff may utilize the six-month period provided for in CPLR § 205(a) before the court applies CPLR § 202. While it is true that the court in *Icelandic Airlines* did opine that such a procedure is appropriate, that conclusion was applied to determining the New York statute of limitations. It is unclear from the decision whether the tolling provision was also being used to determine the Quebec time limitation, as the action was barred by Quebec limitations regardless. Therefore, to the extent that the decision can be read to apply CPLR § 205(a) to determine the action's commencement date for purposes of determining the Quebec statute of limitations, the conclusion is dictum. Further, as a Supreme Court decision, even had it not been dictum, that determination is not binding on this court.

In view of later Court of Appeals and First Department precedent that emphasizes the need to take into account all limitations to bringing an action in another jurisdiction,

including extensions and tolls (*see Portfolio Recover Assoc., LLC v. King,* 14 N.Y.3d at 416; *Matter of Smith Barney, Harris Upham & Co. v. Luckie,* 85 N.Y.2d 193, 207 (1995); *Ledwith,* 231 A.D.2d at 23-24), this court declines to follow the dicta in *Icelandic.*

In taking into account all of the Alberta law that would limit Norex's commencement of an action, as is required under CPLR § 202, it appears that the latest that Norex could have commenced an action against the non-BP defendants would be February 26, 2004, two years after filing its federal action. Unquestionably, by that time, Norex had a cause of action against defendants, and knew it, so the cause of action had accrued under Alberta limitations law. With respect to BP, the cause of action accrued no later than December 21, 2005,[2] when Norex amended its complaint in the federal action to add BP. Thus, the claim against BP was barred after December 21, 2007.

This action was commenced in 2011. Under Alberta law, it was clearly untimely, and therefore must be dismissed.

II. Plaintiff's Motion to Supplement the Pleadings

Norex moves, in motion sequence number 012, to supplement the record to include application of an allegedly controlling federal statute, 28 U.S.C. §1367, as well as United States Supreme Court and New York Court of Appeals case law. Norex contends that its proffered citations rebut defendants' position that Norex's claims were untimely when first

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[2] The cause of action probably accrued in 2003, when BP joined with TNK to form TNK-BP. However, it could not possibly have accrued later than 2005, when the complaint against it was filed.

filed with this court on March 7, 2011. Norex argues that the proffered references must be included in the record, despite defendants' failure to cite the cases and statute.

Norex moves to supplement the record pursuant to 22 NYCRR § 202.70, the Uniform Rules for the Supreme Court, and Rule 18 in particular. Rule 18 states:

> Sur-Reply and Post-Submission Papers. Absent express permission in advance, surreply papers, including correspondence, addressing the merits of a motion are not permitted, except that counsel may inform the court by letter of the citation of any post-submission court decision that is relevant to the pending issues, but there shall be no additional argument. Materials submitted in violation hereof will not be read or considered. Opposing counsel who receives a copy of materials submitted in violation of this rule shall not respond in kind.

Norex alleges that it is obligated to educate the court on the application of U.S.C. § 1367 and applicable case law, and to "correct" defendants' "mischaracterization of the CPLR provisions to which Defendants incorrectly and improperly confined their argument." Norex Memo.,[3] p. 2.

The court does not find "good cause" for Norex to supplement the record. *See* CPLR 2214(c). First, Norex has provided no "post-submission court decision" relevant to the pending motion. Rather, Norex admits that only after the original motions to dismiss did it feel the need to bring the current citations to the court, based on an emphasis upon the statute of limitations in oral argument. *See* Transcript of Oral Argument of May 31, 2012 (Angela

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[3] Memorandum of Law in Support of Plaintiff's Motion to Supplement the Record to Include Controlling U.S. Supreme Court and New York Court of Appeals Case Law Adverse to Defendants' Contentions That Defendants Failed to Cite in their Moving Papers and to Correct Misstatements of Law Made by Defendants During Oral Argument ("Norex Memo.").

Tolas, O.C.R.) ("5/31/12 Tr."), pp. 7-9. Norex, while admirably concise in its moving papers, offers no explanation as to why it did not previously address 28 U.S.C. § 1367 in its response to the defendants' motions.

Second, citing New York Rules of Professional Conduct, Norex attempts to place the onus for the bringing the citations to the court's attention upon defendants. Norex asserts that it was forced to bring motion sequence number 012 to correct defendants' alleged misstatements. Through this argument, Norex attempts to find "good cause" for a sur-reply under the CPLR. Norex again does not state why it did not itself raise the allegedly dispositive law in opposition to defendants' motions. While a party may be obligated to bring all relevant authority to the court, N.Y. Rules of Prof. Conduct, 3.3(a)(2), the court finds no basis for Norex's argument that a party must provide point and counterpoint to its own good-faith arguments if it believes the authority does not apply. *See generally* Defendants' Opp. Memo.[4] Further, the Rules of Professional Conduct are not a procedural mechanism to provide a basis to submit a sur-reply, and the rules do not provide good cause for Norex's new arguments. *See* New York Rules of Prof. Conduct (22 NYCRR 1200 *et seq.*), Preamble, cmt. 12. Norex's motion to supplement the record must therefore be denied.

However, even if the court were to consider Norex's new citations – which, for the sake of completeness, it does below – the decision to dismiss the complaint on statute of limitations grounds stands.

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[4] Defendants' [Proposed] Joint Memorandum of Law in Opposition to Plaintiff's Memorandum of Law Supplementing the Record ("Defendants' Opp. Memo.").

28 U.S.C. § 1367(d)

Subsection (d) of 28 U.S.C. § 1367 states that:

> (d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

Stated succinctly, subsection (a) provides supplemental jurisdiction to the federal district courts.

Norex argues that under section 1367(d), Norex's non-federal pendent claims were tolled until thirty days after the Second Circuit issued its mandate in July 2011 affirming the district court's dismissal of Norex's complaint. Norex states that under *Jinks v. Richland,* 538 U.S. 456 (2003), section 1367(d) must be applied by state courts, and that under *Goldstein v New York State Urban Dev. Corp.*, 13 N.Y.3d 511 (2009), state law provides that upon the federal matter's conclusion Norex had the right to recommence its unadjudicated state law claims in this court.

As Norex states, 28 U.S.C. § 1367 is controlling on state courts. *See Jinx*, 538 U.S. at 461-65. Under Section 1367(d), Norex had thirty days to file its case in New York after its federal case was dismissed "unless State law provides for a longer tolling period." As stated in the legislative history of section 1367(d), "[t]he purpose is to prevent the loss of claims to statutes of limitations where a state law might fail to toll the running of the period

of limitations while a supplemental claim was pending in federal court." 1990 U.S.C.C.A.N. 6860, 6876. New York provides for a six month tolling period in CPLR § 205. Section 1367(d) is therefore not dispositive on the issue. *See Doe v. Harrison*, No. 03 CIV 3943(DAB), 2006 WL 2109433, *5 (S.D.N.Y. July 28, 2006). Norex appears to have acknowledged this fact in its lack of citation to section 1367(d) in prior filings.

While New York law tolls the statute of limitations for pendent state law claims (CPLR § 205), rendering 28 U.S.C. § 1367 inapplicable, CPLR § 202 requires claims which accrue outside of New York to be timely under the limitation periods of both New York and the jurisdiction where the cause of action accrued. 28 U.S.C. § 1367, in referring to tolling the statute of limitations, specifically defines "state law" to include only the United States, the District of Columbia, the Commonwealth of Puerto Rico and "any territory or possession of the United States." 28 U.S.C. § 1367(e). "State" therefore does not include a foreign country. *See Morrison v. National Australia Bank Ltd.*, __ U.S. __, 130 S. Ct. 2869, 2873 (2010) ("When a statute gives no clear indication of an extraterritorial application, it has none."). This prevents nonresidents from shopping in New York for a favorable statute of limitations where the limitations period may have expired in the locale where the cause of action arose. *See Global Fin.,* 93 N.Y.2d at 528.

As stated *supra*, under Alberta law, Norex's principal place of business and where its claims arose, the time for Norex to bring its claims against the non-BP defendants expired on February 26, 2004, while the time for Norex to bring its claim against BP accrued no later

than December 21, 2005. Alberta's time limitations for when an action may be brought are binding under New York's borrowing statute. *Ledwith*, 231 A.D.2d at 23-24. To hold otherwise under CPLR § 202 would be inimical to the goals of preventing forum shopping in bringing actions in New York courts.

Neither *Jinx* nor *Goldstein v. N.Y. State Urban Dep. Corp.*, 13 N.Y.3d 511 (2009) controls the issue. Neither case involved an out of state party, and therefore neither confronted CPLR § 205's interaction with CPLR § 202.

For the above reasons, the complaint is dismissed as barred by the applicable statute of limitations. As a result, the remaining issues raised in these motions will not here be addressed.

(Order on following page.)

CONCLUSION

Accordingly, it is hereby

ORDERED that motion sequence numbers 007 and 009 are granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that motion sequence number 012 is denied; and it is further

ORDERED that motion sequence numbers 008, 010 and 011 are denied as moot.

This constitutes the decision and order of the court.

Dated: New York, New York
June 13, 2012

ENTER

Hon. Eileen Bransten, J.S.C.