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Joseph Norita Camacho

IN THE SUPERIOR COURT FOR THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

DO SIK KIM,

Plaintiff,

vs.

KYUNG DUK PARK AND GLOBUIL HOLDINGS,

Defendants.

CIVIL ACTION NO. 15-0131-CV

ORDER DENYING MOTION FOR SUMMARY JUDGMENT BECAUSE RECOGNITION OF A FOREIGN CRIMINAL JUDGMENT VIOLATES THE "PENAL LAW RULE," AS DEFINED BY § 489 OF THE RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW, AND PLAINTIFF'S CRIMINAL CONVICTION BY A KOREAN APPELLATE COURT FOLLOWING PLAINTIFF'S ACQUITTAL BY A KOREAN TRIAL COURT IS NOT COMPATIBLE WITH FUNDAMENTAL PRINCIPLES OF FAIRNESS AS IT VIOLATES THE PROTECTION AGAINST DOUBLE JEOPARDY PURSUANT TO NMI CONST. ART. I, § 4(E) AND U.S. CONST. AMEND. V

I. INTRODUCTION

THIS MATTER came before the Superior Court for the Commonwealth of the Northern Mariana Islands ("Commonwealth Superior Court") on September 25, 2018 at 1:30 P.M., for a hearing on Defendant Globuil Holdings' Motion for Summary Judgment. At the motion hearing, Plaintiff Do Sik Kim ("Kim") was present with his attorney Samuel Mok. Defendant Globuil Holdings ("Globuil Holdings") appeared through its attorney, Mark Scoggins. Both Defendant Kyung Duk Park ("Park") and his attorney Tiberus Mocanu did not appear. The Court heard

arguments on Defendant Globuil Holdings' Motion for Summary Judgment seeking dismissal of the Complaint.

The underlying case involves a dispute over the ownership of the Hotel Riviera, located in Fina Sisu, Saipan. Kim seeks a declaratory judgment that he is the sole and rightful owner of the outstanding shares of the Hotel Riviera and makes related claims for damages for defendants' alleged interference with his ownership. Kim alleges that he entered into a written agreement to sell his shares of Hotel Riviera to Park, but Park did not fully pay for the shares as agreed.

On May 29, 2018, Globuil Holdings filed a motion for summary judgment ("Motion for Summary Judgment") seeking dismissal of the Complaint pursuant to NMI R. CIV. P. 56(a). Globuil Holdings argued that the issues raised by Kim in this action have already been litigated in a criminal matter in the Republic of Korea, and, therefore, the issues involved in this case are barred by the doctrines of *res judicata* and collateral estoppel.[1] On June 30, 2018, Kim filed an Opposition to the Motion for Summary Judgment ("Opposition") arguing that (1) the penal law rule, which is the common law rule that foreign criminal judgments are not enforceable in courts in the United States, prohibits the Commonwealth Superior Court from using the Korean criminal judgment for preclusive purposes; and (2) that the Korean criminal judgment was contrary to United States public policy because the Korean justice system violated Kim's constitutional rights against double jeopardy. On August 7, 2018, Globuil Holdings filed a Reply to the Opposition ("Reply").

On August 13, 2018, Plaintiff Kim filed a motion to strike the Reply because the Reply made new legal arguments not previously raised. The Court permitted Kim to file a Sur-Reply,

[1] *Res judicata*, also known as "claim preclusion," "refers to the effect of a judgment in foreclosing litigation of a matter that has not been litigated, because it should have been raised in an earlier suit." *Del Rosario v. Camacho*, 2001 MP 3 ¶ 62. Collateral estoppel, also known as "issue preclusion," "refers to the effect of a judgment in foreclosing relitigation of a matter that has been already litigated and decided." *Id.*

which he filed on September 1, 2018. On September 20, 2018, Defendant Globuil Holdings filed an Opposition to the Sur-Reply.

Based on the filings, the applicable laws, and arguments of counsels, the Court hereby issues the following Order.

II. BACKGROUND

On December 16, 2016, Plaintiff Kim filed his First Amended Complaint against Defendants Park and Globuil Holdings. Kim alleged that he was the 100% owner of the shares of "Hotel Riviera" since 2009. Kim alleged that on or about February 5, 2013, Kim made an agreement to sell his shares to Defendant Park for consideration in the amount of 2.5 billion Korean Won. According to Kim, Defendant Park did not pay the balance of the agreed consideration, and the shares therefore never transferred to Park. Park later sold the shares to Defendant Globuil Holdings.

Kim had earlier attempted to deal with his dissatisfaction with Park through the criminal justice system in South Korea. Kim tried to bring a criminal case against Park in Korea by alleging that Kim and Park had made a deal that called for Park to pay consideration in the amount of 4.5 billion Korean Won.[2] However, instead of proceeding with a criminal case against Park, the Korean authorities brought a criminal case against Kim for having made a false report against Park.

The Korean trial court found Kim not guilty of the charges brought against him. However, after the proceedings at the trial level, the prosecutor appealed the not guilty verdict to the Korean appellate court. The Korean appellate court then, using only the documentary record, overturned the trial court's not guilty verdict based on a *de novo* findings of fact and convicted Kim without a new

[2] Kim alleged in his complaint filed in the Commonwealth Superior Court that the amount is 2.5 billion Won.

trial.[3] The Korean judicial system sentenced Kim to six months in prison for filing the false report against Park. Kim served his sentence and the judgment is final.

III. LEGAL STANDARD

A. Summary Judgment

The party moving for summary judgment has the burden to show that there is no material fact genuinely in dispute. *See Bank of Saipan v. Super. Ct. of the Commonwealth of the N. Mar. I.*, 2001 MP 7 ¶ 26. "A fact in contention is considered material only if its determination may affect the outcome of the case." *PAC United Corp., Ltd. (CNMI) v. Guam Concrete Builders*, 2002 MP 15 ¶ 24. "Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party to set forth admissible, specific facts to show a genuine issue for trial." *Commonwealth Dev. Auth. v. Tenorio*, 2004 MP 22 ¶ 9; NMI R. CIV. P. 56(e). If there is no genuine material fact in dispute and the movant is entitled to a favorable judgment as a matter of law, then the Court will grant the motion for summary judgment. NMI R. CIV. P. 56(d).

B. Recognizing Foreign Judgments in General

In general, "a final, conclusive, and enforceable judgment of a court of a foreign state granting or denying recovery of a sum of money, or determining a legal controversy, is entitled to recognition by courts in the United States." Restatement (Fourth) of the Foreign Relations Law of the United States § 481 (2018). However, there are several exceptions to this rule. For example, "[a] court in the United States *will not* recognize a judgment of a court of a foreign state if: (a) the judgment was rendered under a *judicial system* that does not provide impartial tribunals or procedures compatible with fundamental principles of fairness." Restatement (Fourth) of the

[3] In the Commonwealth, when a defendant's conviction is overturned on appeal, the case is then remanded back to the trial court level for a retrial. The Supreme Court of the Commonwealth of the Northern Mariana Islands does not convict defendants on appeal.

Foreign Relations Law of the United States § 483(a) (emphasis added); *see also Hurst v. Socialist People's Libyan Arab Jamahiriya*, 474 F. Supp. 2d 19, 34 (D.D.C. 2007) (stating that United States courts will not recognize foreign judgments if they were decided under a judicial system that violates "U.S. public policy"). In addition to § 483(a), Restatement (Fourth) of the Foreign Relations Law of the United States § 484(h) allows courts to not recognize a foreign judgment if "the *specific proceeding* in the foreign court leading to the judgment was not compatible with *fundamental principles of fairness*." Restatement (Fourth) of the Foreign Relations Law of the United States § 484(h) (emphasis added) (stating that non-recognition is permissive, rather than mandatory, under this section).[4]

C. The Penal Law Rule

The so-called "penal law rule" is a common law rule that prohibits courts in the United States from enforcing the penal laws of another country. *See The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825).[5] Some modern cases find that the penal law rule does not prevent courts in the United States from merely *recognizing* foreign penal judgments. *See United States v. Federative Republic of Braz.*, 748 F.3d 86, 94 n.8 (2d Cir. 2014) (finding that "the distinction between recognizing and enforcing foreign penal judgments is widely recognized").

However, in the absence of written or local law, as is the case here, "the rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed as generally understood and applied in the United States, shall be

[4] Restatement (Fourth) of the Foreign Relations Law of the United States § 484 cmt. j (stating that Restatement (Fourth) of the Foreign Relations Law of the United States § 484(h) differs from Restatement (Fourth) of the Foreign Relations Law of the United States § 483(a) in that under § 484(h), "the focus is on the specific proceeding that produced the judgment rather than on the foreign judicial system as a whole").

[5] *See also Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 289-90 (1888) ("By the law of England and of the United States, the penal laws of a country do not reach beyond its own territory, except when extended by express treaty or statute to offences committed abroad by its own citizens; and they must be administered in its own courts only, and cannot be enforced by the courts of another country."), overruled in part on other grounds by *Milwaukee Cty. v. M. E. White Co.*, 296 U.S. 268, 278 (1935).

the rules of decision in the courts of the Commonwealth." 7 CMC § 3401. As the American Law Institute articulated in Restatement (Fourth) of the Foreign Relations Law of the United States § 489, "[c]ourts in the United States do not *recognize or enforce* judgments rendered by the courts of foreign states to the extent such judgments are for taxes, fines, *or other penalties*, unless authorized by a statute or an international agreement." (Emphasis added).[6] Restatement (Fourth) of the Foreign Relations Law of the United States § 489.

D. Double Jeopardy

Both the Commonwealth Constitution and the Constitution of the United States prohibit double jeopardy. NMI CONST. art. I, § 4(e) ("No person shall be put twice in jeopardy for the same offense regardless of the governmental entity that first institutes prosecution"); U.S. CONST. amend. V ("nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb") ("U.S. Constitution's Double Jeopardy Clause"). The prohibition against double jeopardy "protects an individual against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense." *Commonwealth v. Calvo*, 2018 MP 9 ¶ 19 (citation omitted). "[O]nce the trial court finds a defendant not guilty, that decision is final and cannot be attacked." *Commonwealth v. Sablan*, 2016 MP 12 ¶ 11 n.8 (citing *Arizona v. Rumsey*, 467 U.S. 203, 211 (1984)). This finality prevents the Government from appealing an acquittal "even though an acquittal may appear to be erroneous." *See Green v. United States*, 355 U.S. 184, 188 (1957);[7] *cf. Justices of Bos. Mun. Court*

[6] There is caselaw consistent with the position that the penal law rule prevents courts from recognizing foreign criminal judgments. *See Coeur d'Alene Tribe v. Johnson*, 162 Idaho 754, 763 (2017).

[7] *See also Commonwealth v. Crisostomo*, 2005 MP 9 ¶ 21 (stating that Commonwealth courts "resort to federal case law which interprets the U.S. Constitution's Double Jeopardy Clause to ensure that our interpretation of the Commonwealth Constitution's double jeopardy provision provides at least the same protection granted defendants under the federal Double Jeopardy Clause" (citation omitted)).

v. Lydon, 466 U.S. 294, 308 (1984) (finding that double jeopardy "does not bar reprosecution of a defendant whose conviction is overturned on appeal").[8]

This prohibition against double jeopardy "is deeply ingrained in […] the Anglo-American system of jurisprudence," *Green*, 355 U.S. at 187, and is "fundamental to the American scheme of justice," *Benton v. Maryland*, 395 U.S. 784, 796 (1969). The protection against double jeopardy in the Commonwealth Constitution is even more heightened than the protection provided by the U.S. Constitution's Double Jeopardy Clause because the Commonwealth's Constitution protects an individual from being put in jeopardy a second time for the same crime "regardless of the governmental entity that first institutes prosecution," NMI CONST. art. I, § 4(e),[9] whereas the U.S. Constitution's Double Jeopardy Clause does not prohibit a defendant, who has already been prosecuted, from being prosecuted again by another government entity for the same conduct, *see Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019) (upholding the federal "dual-sovereignty" doctrine).

IV. DISCUSSION

In moving for summary judgment, Globuil Holdings argued that none of the material facts are in dispute, and that the Commonwealth Superior Court should recognize the Korean judgment because (1) Commonwealth courts can recognize foreign criminal judgments for preclusion purposes; (2) the penal law rule does not prevent Commonwealth courts from merely recognizing foreign criminal judgments; and (3) that recognizing the final Korean criminal judgment would not be contrary to the public policy of the United States because the Korean criminal proceedings did not violate Kim's right against double jeopardy.

[8] In the Commonwealth, when a defendant's conviction is overturned on appeal, the case is then remanded back to the trial court level for a retrial. The Supreme Court of the Commonwealth of the Northern Mariana Islands does not convict defendants on appeal.

[9] *See also Commonwealth v. Aguon*, 1997 MP 22 ¶ 9.

The Court examined the arguments made by Globuil Holdings and, for the reasons stated below, denies Globuil Holdings' Motion for Summary Judgment.

A. Summary Judgment

Here, the parties do not dispute that: (1) the Korean authorities brought a criminal case against Kim; (2) the Korean trial court found Kim not guilty of the charges brought against him; (3) and the Korean appellate court, using only the documentary record of the trial court, overturned the trial court based on a *de novo* findings of fact and convicted Kim on appeal. Because the issue before the Court is whether it should recognize the final Korean criminal judgment for purposes of dismissing Kim's civil action pursuant to *res judicata* and collateral estoppel, the Court finds that Globuil Holdings satisfied its burden to show that there is no genuine material fact in dispute. Therefore, all that remains is for the Court to determine whether Globuil Holdings is entitled to a judgment as a matter of law.

B. Recognizing the Korean Criminal Judgment and the Penal Law Rule

Globuil Holdings argued that the Korean criminal judgment should be recognized for preclusive purposes under Restatement (Fourth) of the Foreign Relations Law of the United States § 481 because the Korean criminal judgment is final, conclusive, enforceable, and determined a legal controversy. Globuil Holdings then cited *United States v. Federative Republic of Braz.*, 748 F.3d 86, 94 n.8 (2d Cir. 2014) to argue that the Commonwealth Superior Court is not prevented by the penal law rule from recognizing the Korean criminal judgment because the penal law rule only prevents the Commonwealth Superior Court from *enforcing* foreign criminal judgments. *Federative Republic of Braz.*, 748 F.3d at 94 n.8 (finding that "the distinction between recognizing and enforcing foreign penal judgments is widely recognized").

However, Globuil Holdings' interpretation of the penal law rule does not comport with Restatement (Fourth) of the Foreign Relations Law of the United States § 489's definition of the

rule – which prohibits courts in the United States from *recognizing and enforcing* foreign penal judgments. Restatement (Fourth) of the Foreign Relations Law of the United States § 489 (stating that "[c]ourts in the United States do not *recognize or enforce* judgments rendered by the courts of foreign states to the extent such judgments are for taxes, fines, or other penalties, unless authorized by a statute or an international agreement" (emphasis added)).

Because the Commonwealth courts must treat the restatements of the law as the rules of decision,[10] the Commonwealth Superior Court must adhere to § 489's interpretation of the penal law rule. Therefore, the Commonwealth Superior Court cannot recognize the Korean criminal judgment.[11]

C. Double Jeopardy

Globuil Holdings cited *Hurst v. Socialist People's Libyan Arab Jamahiriya*, 474 F. Supp. 2d 19, 34 (D.D.C. 2007), to argue that the Commonwealth Superior Court must not recognize the Korean criminal judgment if it finds that it was decided under a judicial system that violates "U.S. public policy." Globuil Holdings then argued that the Korean criminal justice system did not violate United States public policy because the Korean criminal justice system did not subject Kim to double jeopardy.

In support of its argument that the Korean proceeding did not violate Kim's double jeopardy rights, Globuil Holdings cited a United States Court of Appeals for the Armed Forces case,[12] *United States v. Miller*, 16 M.J. 169 (C.M.A. 1983). In *Miller*, the Court stated:

> ...trial in the Korean system is not complete until the case has been acted upon by the Supreme Court of Korea or time for appeal has elapsed. Up to that point there is no

[10] 7 CMC § 3401 ("In all proceedings, the rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed as generally understood and applied in the United States, shall be the rules of decision in the courts of the Commonwealth").

[11] For this reason alone, there is legal authority for Globuil Holdings' Motion for Summary Judgment to be denied.

[12] The United States Court of Appeals for the Armed Forces was designated as the United States Court of Military Appeals when it decided *United States v. Miller*, 16 M.J. 169 (C.M.A. 1983).

> final "judgment" to which the principle of double jeopardy would apply [….] As an example, an appeal by the prosecution from a judgment of acquittal or not guilty does not amount to double jeopardy since the "appeal" is but a continuation of the proceedings, and the trial is not complete until action by the Supreme Court (unless the time for appeal has expired).

Id. at 174. The Court in *Miller* went on to conclude that it "should follow the Korean interpretation of their own practice." *Id.* at 175. However, the holding in *Miller* is unpersuasive because the protection against double jeopardy in the Commonwealth and the United States "is deeply ingrained in […] the Anglo-American system of jurisprudence,"[13] *Green*, 355 U.S. at 187, and "fundamental to the American scheme of justice," *Benton*, 395 U.S. at 796.[14]

Here, the Korean trial court initially found Kim not guilty. However, that verdict was appealed and the Korean appellate court, using only the documentary record, reversed the trial court based on a *de novo* findings of fact and convicted Kim on appeal. By retrying Kim a second time for the same crime after a not-guilty verdict, the Korean appellate proceeding was not compatible with "fundamental principles of fairness" and United States public policy because it subjected Kim to double jeopardy – which is prohibited by the Commonwealth Constitution and the Constitution of the United States. *See Sablan*, 2016 MP 12 ¶ 11 n.8 (citation omitted) (finding that "once the trial court finds a defendant not guilty, that decision is final and cannot be attacked"); *Green*, 355 U.S. at 188 (finding that "the Government cannot secure a new trial by means of an appeal even though an

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[13] Though the protection against double jeopardy under the Commonwealth Constitution is not identical to the protection under the U.S. Constitution's Double Jeopardy Clause, such differences are not relevant or dispositive here because the "dual-sovereignty" doctrine is not implicated in this case. *See Commonwealth v. Crisostomo*, 2005 MP 9 ¶ 21 (stating that Commonwealth courts "resort to federal case law which interprets the U.S. Constitution's Double Jeopardy Clause to ensure that our interpretation of the Commonwealth Constitution's double jeopardy provision provides at least the same protection granted defendants under the federal Double Jeopardy Clause" (citation omitted)).

[14] The Commonwealth Constitution's protection against double jeopardy is even more heightened than the protection provided by the U.S. Constitution's Double Jeopardy Clause because the Commonwealth Constitution protects an individual from being put in jeopardy a second time for the same crime "regardless of the *governmental entity* that first institutes prosecution," NMI CONST. art. I, § 4(e), whereas the U.S. Constitution's Double Jeopardy Clause does not prohibit a defendant, who has already been prosecuted, from being prosecuted again by another government for the same conduct, *see Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019) (upholding the federal "dual-sovereignty" doctrine). *See also Commonwealth v. Aguon*, 1997 MP 22 ¶ 9.

acquittal may appear to be erroneous").

The Commonwealth Superior Court accordingly finds that the judicial proceedings that rendered the Korean criminal judgment violated public policy and are not compatible with fundamental principles of fairness because it violated Kim's right against double jeopardy. Therefore, the Commonwealth Superior Court declines to recognize the Korean criminal judgment.

V. CONCLUSION

IN SUMMARY, the Commonwealth Superior Court finds (1) that recognizing the Korean criminal judgment would violate the penal law rule as defined by Restatement (Fourth) of the Foreign Relations Law of the United States § 489; and (2) that the subsequent criminal conviction of Plaintiff Do Sik Kim by a Korean appellate court even after an acquittal by a Korean trial court does not comport with the Commonwealth's heighten protection against double jeopardy and is not compatible with "fundamental principles of fairness" and United States public policy.[15]

[15] Globuil Holdings also argued that the CNMI Uniform Enforcement of Judgments Act ("UEJA") allows for the recognition of "foreign judgments," which the UEJA defines as "'any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in the Commonwealth of the Northern Mariana Islands." 7 CMC § 4402. According to Globuil Holdings, the Korean criminal judgment is entitled to full faith and credit because "The Treaty of Friendship, Commerce and Navigation Between the United States of America and The Republic of Korea, 8 U.S.T. 2217, elevates a Korean judgment to the status of a sister state judgment." *Choi v. Kim*, 50 F. 3d 244, 248 (3d Cir. 1995). However, Globuil Holdings does concede that the Commonwealth Superior Court need not decide whether the UEJA is applicable to this matter because Globuil Holdings is not seeking the Court to "enforce" the Korean criminal judgment. Therefore, the Commonwealth Superior Court will only briefly address this argument. First, Globuil Holdings' argument is incorrect because the UEJA does not apply to criminal judgments. The Supreme Court of Nevada, interpreting Nevada's UEJA, found that their UEJA is not applicable to penal judgments because, even though Nevada's UEJA also applies to "any judgment of a court of the United States or of any other court which is entitled to full faith and credit in this state," "the Full Faith and Credit Clause does not apply to penal judgments." *City of Oakland v. Desert Outdoor Advert., Inc.*, 127 Nev. 533, 537 (2011); *see also Nelson v. George*, 399 U.S. 224, 229 (1970) (stating that "the full faith and credit clause does not require that sister states enforce a foreign penal judgment"). Because the Commonwealth's UEJA contains language similar to Nevada's UEJA, 7 CMC § 4402, and the Commonwealth's UEJA requires Commonwealth courts to interpret the Commonwealth's UEJA in a manner similar to that of our sister states, 7 CMC § 4408 ("This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states and other jurisdictions which enact it."). See *City of Oakland v. Desert Outdoor Advert., Inc.*, 127 Nev. 533 (2011). Second, *Choi v. Kim*, 50 F. 3d 244, 248 (3d Cir. 1995), interpreted a civil case, therefore *Choi* is distinguishable from a criminal context, as is the case here. Finally, the Restatement (Second) of the Law of Conflict of Laws mandates that the Commonwealth Superior Court not recognize penal judgments of sister states. Restat 2d of Conflict of Laws, § 93 (2nd 1988) ("A valid judgment rendered in one State of the United States must be recognized in a sister State, except as stated in §§ 103-121."); Restat 2d of Conflict of Laws,

THEREFORE, the Commonwealth Superior Court **DECLINES** to recognize the Korean criminal judgment and **DENIES** Defendant Globuil Holdings' Motion for Summary Judgment.

IT IS SO ORDERED this 27th day of September 2019.

/s/
JOSEPH N. CAMACHO, Associate Judge

§ 120 (2nd 1988) ("A valid judgment rendered on a *non-penal governmental claim* in a State of the United States will be recognized and enforced in a sister State) (emphasis added).