UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGE	Janet S. Baer	**Case No.**	19 B 04127
DATE	April 9, 2020	**Adversary No.**	19 A 00106
CASE TITLE	Fres William Oquendo v. Global Sports Management GmbH, POW Sports Entertainment, Inc., Square Ring, Inc., Hitz Entertainment Corporation, David Diaz, and Law Offices of Leon R. Margules, P.A. (In re Fres William Oquendo)		
TITLE OF ORDER	Order Denying Global Sports Management GmbH's Motion to Dismiss Adversary Proceeding (ECF No. 33)		

DOCKET ENTRY TEXT

The Court denies Global Sports Management GmbH's Motion to Dismiss the Adversary Proceeding filed against it by Debtor Fres William Oquendo and orders Global Sports Management GmbH to file an answer to the adversary complaint within forty-five days from the date of this ruling.
[For further details see text below.]

STATEMENT

This matter is before the Court on the Motion filed by defendant Global Sports Management GmbH ("Global") to Dismiss the Adversary Complaint for Turnover, Restraining Order and Damages filed by Fres William Oquendo (the "Debtor"). Global seeks dismissal of the complaint against it pursuant to the doctrine of *forum non conveniens* and Federal Rule of Civil Procedure 12(b)(6) (made applicable to adversary proceedings by Rule 7012(b) of the Federal Rules of Bankruptcy Procedure).[1] Global argues that: (1) the exclusive forum for disputes brought against it under the contracts at issue is Cologne, Germany; and (2) the complaint fails to state a cause of action to recover certain escrowed funds in connection with those contracts.

For the reasons that follow, the Court finds that: (1) due to the circumstances in this adversary proceeding and the Debtor's bankruptcy case, the forum selection clause providing that Germany is the exclusive forum in which the Debtor's dispute regarding the escrowed funds may be brought will not be enforced; and (2) the Debtor's complaint adequately states a claim upon which relief can be granted. As such, Global's motion to dismiss is denied.

BACKGROUND

The Debtor is a professional boxer. On or about April 11, 2018, Global and POW Sports Entertainment, Inc. ("POW"), the Debtor's alleged promoter at the time, entered into a "Heads of

[1] Unless otherwise noted, all statutory and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101 to 1532, and the Federal Rules of Bankruptcy Procedure.

Agreement" (the "HOA") under which Global agreed to promote a title boxing bout (the "Bout") between the Debtor and Manuel Charr ("Charr"). (Dkt. 1, Ex. 1; Dkt. 40 at 2.[2]) The Bout was originally set to take place on September 29, 2018. (Dkt. 1 at 3.) The Debtor and Charr each executed a "ratification and consent" of the HOA, which bound them to all terms and conditions of the agreement. (Dkt. 1, Ex. 1 at 5; Dkt. 40 at 2.) Pursuant to the "ratification and consent," the Debtor agreed "to look solely to POW for full payment of any amounts due for all rights granted and services performed by [the Debtor] thereunder, except with respect to [his] purse as provided in Paragraph 2(a)(i) of [the HOA] which [was] to be paid by [Global]." (Dkt. 1, Ex. 1 at 5.) Paragraph 2(a) of the HOA provided that Global would pay POW a "guaranteed fee" of $325,000. (Dkt. 1, Ex. 1 at 1.)

Subsequently, the Debtor, Global, POW, Square Ring, Inc. ("SRI"), Hitz Entertainment Corporation ("Hitz"), David Diaz ("Diaz"), and the Law Offices of Leon R. Margules, P.A. ("Margules"), as escrow agent, executed an agreement (the "Escrow Agreement") under which Global agreed to place into escrow $275,000 payable to POW under the HOA for the Bout.[3] (Dkt. 1, Ex 2.) The Escrow Agreement provided, among other things, that upon conclusion of the Bout, $196,250 was to be wire transferred to the Debtor. (*Id.* at 1.)

On September 19, 2018, the Voluntary Anti-Doping Association ("VADA") reported an adverse result on the urine specimen collected from Charr on August 31, 2018 in Germany. (Dkt. 1 at 4.) As a result, the Bout was cancelled. (*Id.*) On November 12, 2018, the World Boxing Association (the "WBA") issued a resolution suspending Charr for testing positive for certain prohibited substances. (*Id.*) About a month later, on December 18, 2018, the WBA reinstated Charr and indicated that the Bout was to take place within sixty days, that Charr had to be tested by VADA as soon as possible, and that a positive test result would result in suspension and removal of his title. (Dkt. 1, Ex. 5 at 2-3.) Thereafter, various correspondence circulated among the parties about the HOA, the Escrow Agreement, the WBA's reinstatement of Charr, and the Bout.

On February 15, 2019, the Debtor filed a voluntary petition for relief under chapter 13 of the Bankruptcy Code. (Bankr. No. 19 B 04127, Dkt. 1.) Four days later, on February 19, 2019, the Debtor filed an adversary complaint against Global, POW, SRI, Hitz, Diaz, and Margules, seeking, *inter alia*, turnover of funds in the amount of $275,000 allegedly belonging to the Debtor's bankruptcy estate. (Dkt. 1 at 5-6.)

On February 26, 2019, David Rodriguez, one of the Debtor's lawyers, sent a letter to counsel for the WBA regarding the Bout and related issues. (Dkt. 40-1 at 1-2.) In that letter, Rodriguez requested, among other things, that the WBA reconsider and reverse its resolution reinstating Charr and ordering the Bout to occur in sixty days. (*Id.*) On March 6, 2019, the WBA issued another resolution indicating that the Debtor had refused to sign a standard bid contract for the Bout and directing the Debtor to take certain steps in order to preserve his right to participate

[2] Unless otherwise indicated, all references to "Dkt. __" refer to the Court's docket in Adversary No. 19 A 00106.

[3] The Escrow Agreement was executed on June 29, 2018 by or on behalf of Margules; on July 1, 2018 on behalf of Hitz; on July 2, 2018 by or on behalf of the Debtor, POW, SRI, and Diaz; and on September 7, 2018 on behalf of Global. (Dkt. 1, Ex. 2 at 11-14.)

in a championship bout. (Dkt. 33, Ex. 5.) To date, the Bout has not taken place, nor has the Debtor participated in any other championship bouts.

On April 26, 2019, Global filed its motion to dismiss the adversary proceeding. (Dkt. 33.) According to Global, pursuant to the forum selection clauses of the HOA and the Escrow Agreement, the court in Cologne, Germany is the exclusive forum for actions against Global arising out of or relating to the HOA and the escrowed funds. (*Id.* at 1.) Global also contends that the adversary complaint should be dismissed because it does not state a claim upon which relief can be granted to recover the escrowed funds.

DISCUSSION

The Forum Selection Clauses

Global is a German company. (*Id.* at 6.) Pursuant to the HOA, had the Bout between the Debtor and Charr taken place, it would have been held in Cologne, Germany. (*Id.*)

The forum selection clause in the HOA states, in pertinent part, that "POW agrees (and shall cause Oquendo to agree) that it and/or he will . . . commence an action or proceeding arising out of or related to this [a]greement [only] in the German Court[,] and [Global] agrees (and shall cause Charr to agree) that it and/or he will . . . commence an action or proceeding arising out of or relating to this [a]greement [only] in the [United States] Court. (Dkt. 1, Ex. 1 at 4 ¶ 8.) Pursuant to the HOA, each party waived any objection to venue in these Exclusive Forums (as defined in the agreement), as well as any objection to any action or proceeding in the Exclusive Forums or on the basis of *forum non conveniens* as to litigation. (*Id.*) The HOA further provides that it will be governed by the laws of the state of New York and includes a "prevailing party" clause in the event that an action or proceeding is brought to enforce its terms. (*Id.*)

The HOA contains no provision that addresses what happens if the Bout does not take place *at all*. Rather, the HOA simply provides, in relevant part, that in the event the Bout does not occur because either Oquendo or Charr becomes disabled or incapacitated by any physical or mental disability, injury, or illness which prevents or interferes with his or their participation in the Bout as scheduled, then "the WBA shall decide whether to postpone the Bout, in which event all of the provisions of [the HOA] shall remain in full force and effect and shall apply to the rescheduled date of the Bout." (Dkt. 1, Ex. 1 at 3 ¶ 5.)

The Escrow Agreement contains a provision that not only complements the forum selection clause in the HOA but also addresses what happens in the event the Bout does not take place. Specifically, paragraph 6 of the Escrow Agreement states, in pertinent part, that if the Bout does not occur as scheduled and is not rescheduled as discussed in the HOA, then Global must provide a certification to the escrow agent that the Bout has been cancelled, corroborated by a news article stating the same, and the escrowed funds shall be returned to Global. (Dkt. 1, Ex. 2 at 2 ¶ 6.) The paragraph goes on to state, however, that before disbursing any funds, the escrow agent shall provide notice to all parties and explains as follows:

> If it is claimed that the event forcing cancellation was the responsibility of Global[,] any such claim must be made in good faith and any objection must set

> forth the reason it is claimed that the cancellation is the responsibility of Global…. In such case, the [e]scrow [a]gent shall not disburse any of the [e]scrowed [f]unds unless and until it receives joint instruction from the [p]arties or a non-appealable order from a court of competent jurisdiction, at which time it shall disburse the funds to the [p]arties as their interests may appear, provided that in the event such objection is made by any of the Oquendo parties, any litigation to determine the issue will be held exclusively in a court of competent jurisdiction located in Germany. Disbursement shall also be subject to any directive to hold distribution issued by either the WBA or the BDB [(the German Boxing Commission)]."

(*Id*.)

The forum selection clauses in the HOA and the Escrow Agreement are clear. They provide that any dispute arising under the agreements brought by the Debtor against Global must be litigated in Germany, and any dispute arising under the agreements brought by Global against the Debtor must be litigated in the United States.

Where, as here, an underlying transaction is fundamentally international in character, a forum selection clause is presumptively valid and should be enforced. *M/S Breman v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972); *see also Abbott Labs. v. Takeda Pharm. Co.*, 476 F.3d 421, 426 (7th Cir. 2007); *Bonny v. Society of Lloyd's*, 3 F.3d 156, 159 & n.9 (7th Cir. 1993). This presumption of validity, however, may be overcome by a clear showing that the clause is "'unreasonable' under the circumstances." *M/S Breman*, 407 U.S. at 10. Narrowly construing the exception, the Supreme Court has found that forum selection and choice of law clauses are "unreasonable" if:

> (1) Their incorporation into the contract resulted from "fraud, undue influence, or overweening bargaining power," *Carnival Cruise Lines Inc., v. Shute*, 499 U.S. 585, 591 (1991); *M/S Breman*, 407 U.S. at 12-13;
>
> (2) The selected forum is "so gravely difficult and inconvenient that [the resisting party] will for all practical purposes be deprived of his day in court," *M/S Breman*, 407 U.S. at 18; or
>
> (3) Enforcement of the clauses "would contravene a strong public policy of the forum in which [the] suit is brought, whether declared by statute or by judicial decision," *id.* at 15.

The Debtor concedes that the incorporation of the forum selection clauses into the HOA and the Escrow Agreement were not induced by fraud or overreaching and that, thus, the first factor is not applicable. The Debtor argues, however, that the other factors support a finding that the forum selection clauses are unreasonable and therefore unenforceable.

As to the second factor, the Debtor bears the "heavy burden" of showing that "the balance of convenience" is strongly in favor of this matter proceeding in the bankruptcy court, here in the United States—that is, that it will be far more inconvenient for the Debtor to litigate in Germany

than it will be for Global to litigate in the U.S. *See id.* at 19. In addition, the Debtor must demonstrate that proceeding in Germany will be "so manifestly and gravely inconvenient" to the Debtor that he "will be effectively deprived of a meaningful day in court." *Id.*

To meet his burden, the Debtor argues that requiring a trial to be held in Germany would be both inconvenient and unfair. According to the Debtor, all parties to the agreements are in Illinois except for Global, and making him and the other parties travel to Germany to litigate would be cost-prohibitive. The Court agrees and cannot help but point out the obvious: the Debtor is in a chapter 13 bankruptcy case. His current schedules show that he has approximately $286,000 in secured debt, $38,958 in priority unsecured debt, and $262,885 in nonpriority unsecured debt. (Bankr. No. 19 B 04127, Dkt. 18 at 9-18.) At the same time, the Debtor's gross wages, as outlined in his most recently filed schedules I and J, total $910 per month, his non-filing spouse's wages are approximately $1,641 per month, and his household expenses total about $5,292 per month. (*Id.*, Dkt. 106.) But for significant, regular contributions from family members and friends, the Debtor would have no ability to pay his monthly living expenses. (*See id.*)

Reviewing and weighing these considerations, there is no doubt that enforcement of the forum selection clauses and dismissal of this adversary proceeding would almost certainly keep the Debtor from commencing and prosecuting an action, thus depriving him of his day in court. In fact, the situation here presents precisely the type of unreasonable and extraordinary circumstances contemplated by the Supreme Court.

As to the third factor, the Debtor argues that enforcement of the forum selection clauses would contravene a strong public policy—namely, a chapter 13 debtor's opportunity to pursue a breach of contract suit and potentially recover a valuable asset. The Debtor further argues that because he has a bankruptcy case pending in the United States, it would be contrary to public policy to have the related issues resolved in any forum other than the bankruptcy court in this country. Finally, the Debtor contends that, as all of the parties are represented in this Court, both discovery and a trial can be held and completed here without much delay.

The public policy factor is "rarely strong enough to override the parties' preselected forum." *Mueller v. Apple Leisure Corp.*, 880 F.3d 890, 894 (7th Cir 2018) (internal quotation omitted). However, the Debtor here has identified a significant public interest that justifies superseding the contractual choice of forum—providing the Debtor with a fresh start and the opportunity to conceivably bring back to the estate a valuable asset for the benefit of all of the Debtor's creditors. Thus, the Debtor also prevails on the third factor.

In sum, the Court finds that the selected forum is "so gravely difficult and inconvenient" that the Debtor will be deprived of his day in court if a hearing is to be held in Germany. The Court further finds that enforcement of the forum selection clauses "would contravene the strong public policy" of providing debtors with potential bankruptcy relief. As such, the Debtor has met his burden of establishing that the clauses are unreasonable under the circumstances. Accordingly, the forum selection clauses will not be enforced, and Global's motion to dismiss the Debtor's complaint on *forum non conveniens* grounds is denied.[4]

[4] Citing the factors outlined by the Eleventh Circuit in *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1292 (11th Cir 1998), the Debtor also argues that the forum selection clauses are unenforceable because the

Dismissal Under Rule 12(b)(6)

Global also argues that the Debtor's adversary complaint against it should be dismissed under Rule 12(b)(6) because the complaint fails to state a cause of action to recover the escrowed funds under the contracts at issue. According to Global, the Debtor is not a party to the HOA, his ratification of the HOA does not make him either a party to or a third-party beneficiary under the HOA, the Escrow Agreement to which the Debtor is a party is not actionable because it is subject to the HOA, and, in any case, the Debtor has no claims under the Escrow Agreement because the Bout never occurred.

On a Rule 12(b)(6) motion to dismiss, the Court accepts as true all well-pleaded factual allegations in the complaint and draws all reasonable inferences in favor of the non-movant. *See Killingsworth v. HSBC Bank Nev., N.A.*, 507 F.3d 614, 618 (7th Cir. 2007); *Hernandez v. City of Goshen*, 324 F.3d 535, 537 (7th Cir. 2003). In addition to considering these allegations, the Court takes judicial notice of the contents of the dockets both in this adversary proceeding and in the Debtor's bankruptcy case. *See In re Brent*, 458 B.R. 444, 455 n.5 (Bankr. N.D. Ill. 2001). Here, the key documents in deciding Global's motion are the HOA, which includes the "ratification and consent," and the Escrow Agreement.

While Global and POW are the parties to the HOA, the purpose of the document is to "promote the bout [between the Debtor and Charr] on the terms and conditions" set forth in the agreement. (Dkt. 1, Ex 1 at 1.) Pursuant to the HOA, POW was to "provide . . . the services of [the Debtor] for the Bout," and, in consideration of the provision of those services, Global was to "pay POW a guaranteed fee" of $325,000, including $50,000 for the Debtor's purse. (*Id.* ¶¶ 1, 2(a).) The HOA expressly anticipated that "the parties [would] enter into a more formal agreement containing the terms and conditions hereof and such other terms and conditions as [were] mutually agreed." (Dkt. 1, Ex. 1 at 4 ¶ 10.)

The last page of the HOA, which contains signatures on behalf of Global and POW, also includes two "ratification and consent" sections, one signed by Charr and the other by the Debtor. The "ratification and consent" signed by the Debtor provides as follows:

> I, Fres Oquendo, have read and [sic] familiar with all the terms of the foregoing Heads of Agreement and[,] *in order to induce the parties to enter into said Agreement, I consent* to the execution thereof, *ratify and confirm in my individual capacity* all terms and conditions thereof, *agree to be bound* by all terms and conditions thereof and *agree that I shall render all services and grant all rights* as are necessary to enable [Global] and POW to comply with their respective

fundamental unfairness of German law would deprive him of a remedy. Specifically, the Debtor argues that under German law, he would be denied any rights under the contracts at issue because he is not a direct party to those agreements. The Debtor fails to explain this theory in much detail. Rather, he argues that German courts "apply the terms of a contract as they are written" and that if a contact's language "is clear on its face, that language is viewed as establishing the intent of the parties" and will be applied by the German court. (Dkt. 40 at 9 (internal quotations omitted.)) That statement of the law, however, appears to be no different from basic contract law in the United States. Thus, the Debtor's argument as to this *Lipcon* factor fails.

> obligations under said Agreement. I agree to look solely to POW for full payment of any amounts due for all rights granted and services performed by me thereunder, *except with respect to any purse* as provided in Paragraph 2(a)(i) of said Agreement which is to be paid by [Global].

(Dkt. 1, Ex. 1 at 5 (emphasis added).)

There is no doubt that the HOA was executed to obligate and benefit both POW and the Debtor, among others; that the contract terms demonstrate an intent to permit enforcement by the Debtor of the agreement (at a minimum with respect to the $50,000 purse); and that the parties to the HOA intended that there would be a further agreement (presumably the Escrow Agreement) that would contain other terms and conditions mutually agreed to by the parties.

As for the Escrow Agreement, the parties to that contract are the Debtor, Global, POW, SRI, Hitz, Diaz, and Margules, as escrow agent. Pursuant to the Escrow Agreement, Global was to place into escrow $275,000 payable to POW under the HOA for the Bout. (Dkt.1, Ex. 2 at 1.) Upon conclusion of the Bout, the escrowed funds were to be wired to various parties to the agreement, including $196,250 to the Debtor. (*Id.*)

Global argues that even though the Debtor is a party to the Escrow Agreement, that agreement is not actionable. According to Global, because the Escrow Agreement was made subject to the HOA, the former does not supersede the latter. Global further argues that the distribution of funds set out in the Escrow Agreement is an apportionment by the Oquendo parties of monies due to POW, not the Debtor, under the HOA. (*See* Dkt. 33 at 11.)

In reviewing the HOA (including the "ratification and consent") and the Escrow Agreement, the Court finds that Global's arguments—that the agreements are unenforceable based both on the merits and on a lack of privity—are ill-founded. Rather, the Court finds that the Debtor has rights and obligations under both agreements and that he is entitled to seek interpretation and enforcement of the agreements by this Court.

Global itself concedes that the HOA contains an exception with respect to the $50,000 purse, which Global is obligated to pay directly to the Debtor. This exception creates the very right to enforcement that Global otherwise argues does not exist. Specifically, Global challenges the direct obligation provision by arguing, on the merits, that the Debtor is not entitled to the purse under the HOA because the Bout did not take place. Thus, Global contends, the Debtor cannot state a cause of action under the HOA. At the same time, Global argues that the Debtor has no privity under the HOA—that he cannot enforce the agreement because he is neither a party to nor a third-party beneficiary under the HOA.

As discussed above, the HOA does not contain any provision that addresses what happens in the event the Bout does not take place. Instead, the HOA provides only that if the Bout does not occur because either Oquendo or Charr becomes disabled or incapacitated, then the WBA must decide whether to postpone the Bout, in which event all of the provisions of the HOA will remain in full force and effect and apply to the rescheduled date of the Bout. (Dkt. 1, Ex. 1 at 3 ¶ 5.)

In contrast, the Escrow Agreement includes a provision that addresses what happens if the Bout neither takes place nor is rescheduled. Specifically, the Escrow Agreement provides that, under such circumstances, Global must provide a certification to the escrow agent that the Bout has been cancelled, and the escrowed funds must be returned to Global. Before disbursing any funds, however, the escrow agent must provide notice to all parties. Further, if any party claims that the cancellation of the Bout was the "responsibility of Global," that party must provide a reason for such claim, and the claim must be made in good faith. In such a case, the escrow agent must not disburse any of the escrowed funds unless and until it receives joint instruction from the parties or a non-appealable court order. (Dkt. 1, Ex. 2 at 2 ¶ 6.)

The interpretation of the provisions in the Escrow Agreement regarding what happens to the escrowed funds if the Bout does not occur is precisely what is before the Court in this adversary proceeding. The Bout did not take place. It was cancelled and not rescheduled. The Debtor alleges in his complaint that he believes the cancellation is the responsibility of Global and that he is entitled to money being held in escrow. The Court is being asked to determine whether those claims have been made in good faith and have any merit.

The matter currently before the Court here is Global's Rule 12(b)(6) motion to dismiss the complaint for failure to state a claim upon which relief can be granted. For the reasons set forth above, the Court finds that the Debtor has stated an adequate cause of action for breach of contract under the HOA and the Escrow Agreement. Whether the Debtor will ultimately prevail on his claims is an issue left for another day.

CONCLUSION

For the foregoing reasons, Global's motion to dismiss the Debtor's adversary complaint pursuant to the doctrine of *forum non conveniens* and Federal Rule of Civil Procedure 12(b)(6) is denied. Global shall have forty-five days from the date of this order to answer the complaint.

DATED: **April 9, 2020**

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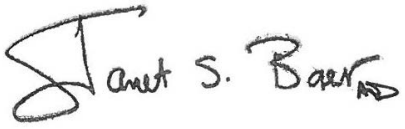

Janet S. Baer
United States Bankruptcy Judge