

13-4054(L)
NML Capital, Ltd. v. Republic of Argentina

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated term of the United States Court of Appeals
2 for the Second Circuit, held at the Thurgood Marshall United
3 States Courthouse, 40 Foley Square, in the City of New York,
4 on the 23rd day of December, two thousand fourteen.

5
6 **PRESENT: RALPH K. WINTER,**
7 **DENNIS JACOBS,**
8 **BARRINGTON D. PARKER,**
9 Circuit Judges.

10
11 - - - - -X

12 **AURELIUS CAPITAL MASTER, LTD., ACP**
13 **MASTER, LTD., AURELIUS OPPORTUNITIES**
14 **FUND II, LLC, BLUE ANGEL CAPITAL I**
15 **LLC, DIETER SCHECK, LYDIA SCHECK,**
16 **AURELIUS CAPITAL PARTNERS, LP,**
17 Plaintiffs-Appellees,

18
19 **NML CAPITAL, LTD.,**
20 Plaintiff-Counter-Defendant-
21 Appellee,

22
23 **-v.-**

24
25 13-4054(L)
26 13-4059(CON), 13-4063(CON)
27 13-4068(CON), 13-4075(CON),
28 13-4082(CON), 13-4085(CON),
29 13-4086(CON), 13-4088(CON),
 13-4089(CON), 13-4090(CON),

13-4109(CON), 13-4110(CON),
13-4112(CON), 13-4114(CON),
13-4116(CON), 13-4118(CON),
13-4119(CON), 13-4120(CON),
13-4122(CON), 13-4123(CON),
13-4124(CON), 13-4125(CON)

THE REPUBLIC OF ARGENTINA,
Defendant-Counter-Claimant-
Appellant.

- - - - -X

FOR APPELLANT: JONATHAN I. BLACKMAN (Carmine D. Boccuzzi, Daniel J. Northrop, and Michael M. Brennan, on the brief), Cleary Gottlieb Steen & Hamilton LLP, New York, New York.

FOR APPELLEES: MATTHEW D. MCGILL (Theodore B. Olson, Gibson, Dunn & Crutcher LLP, Washington, DC; Robert A. Cohen, Dechert LLP, New York, New York; Roy T. Englert, Jr. and Mark T. Stancil, Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP, Washington, DC; Martin Gusy, Cozen O'Connor, New York, New York, on the brief), Gibson, Dunn & Crutcher LLP, Washington, DC.

Appeal from an order of the United States District Court for the Southern District of New York (Griesa, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the order of the district court be **AFFIRMED.**

Appellant the Republic of Argentina ("Argentina" or the "Republic") appeals from the order of the United States District Court for the Southern District of New York (Griesa, J.), denying Argentina's motions to quash and granting appellees' motions to compel with respect to certain post-judgment discovery demands that appellees served on Argentina and non-party banks. We assume the

1 parties' familiarity with the underlying facts, the
 2 procedural history, and the issues presented for review.

3
 4 Ordinarily, a post-judgment discovery order is not
 5 immediately appealable because it is not a final decision
 6 under 28 U.S.C. § 1291. EM Ltd. v. Republic of Argentina,
 7 695 F.3d 201, 205 (2d Cir. 2012). We have, however,
 8 exercised review under the collateral order doctrine over
 9 otherwise non-final orders that present issues of sovereign
 10 immunity, Blue Ridge Investments, LLC v. Republic of
 11 Argentina, 735 F.3d 72, 80 (2d Cir. 2013), or treaty
 12 interpretation, Swarna v. Al-Awadi, 622 F.3d 123, 140-41 (2d
 13 Cir. 2010), because such orders conclusively resolve
 14 important issues that are separate from the merits and
 15 unreviewable from final judgment, EM Ltd., 695 F.3d at 205-
 16 06. Our review of the district court's order is in that
 17 category because Argentina invokes the Foreign Sovereign
 18 Immunities Act ("FSIA"), the Vienna Convention on Diplomatic
 19 Relations ("VCDR"), and the Vienna Convention on Consular
 20 Relations ("VCCR"). Insofar as Argentina challenges the
 21 order on other grounds, we exercise pendent appellate
 22 jurisdiction over those additional issues "to ensure
 23 meaningful review of the appealable order." Myers v. Hertz
 24 Corp., 624 F.3d 537, 552 (2d Cir. 2010) (citation and
 25 internal quotation marks omitted).

26
 27 District court rulings on motions to compel or motions
 28 to quash are reviewed for abuse of discretion. See
 29 Arista Records, LLC v. Doe 3, 604 F.3d 110, 117 (2d Cir.
 30 2010); Gualandi v. Adams, 385 F.3d 236, 244-45 (2d Cir.
 31 2004).

32
 33 "[B]road post-judgment discovery in aid of execution is
 34 the norm in federal and New York state courts." EM Ltd.,
 35 695 F.3d at 207. Federal Rule of Civil Procedure 69(a)(2)
 36 allows judgment creditors like appellees to "obtain
 37 discovery from any person--including the judgment debtor--as
 38 provided in these rules or by the procedure of the state
 39 where the court is located." Fed. R. Civ. P. 69(a)(2).
 40 Both the federal and the New York state rules allow liberal
 41 post-judgment discovery. See Fed. R. Civ. P. 26(b)(1)
 42 (permitting discovery "regarding any nonprivileged matter
 43 that is relevant to any party's claim or defense"); N.Y.
 44 C.P.L.R. § 5223 (permitting discovery of "all matter
 45 relevant to the satisfaction of the judgment").
 46

1 Argentina challenges appellees' discovery demands on a
 2 number of grounds.¹ First, Argentina contends that the FSIA
 3 prohibits discovery of sovereign property that is
 4 potentially immune from attachment. See 28 U.S.C. §§ 1609,
 5 1610. That argument, however, has already been rejected by
 6 the Supreme Court. Republic of Argentina v. NML Capital,
 7 Ltd., 134 S. Ct. 2250, 2256-58 (2014).

8
 9 Second, Argentina argues that the VCDR and VCCR--
 10 treaties to which the United States and Argentina are
 11 signatories--prohibit (a) attachment of diplomatic and
 12 consular *property* and (b) discovery of diplomatic and
 13 consular *documents*. See, e.g., VCDR arts. 22, 24, 27; VCCR
 14 arts. 33, 35.

15
 16 We take no view on Argentina's treaty interpretations
 17 because even if those interpretations are correct,
 18 appellees' discovery demands need not be quashed. Insofar
 19 as the discovery demands reach diplomatic or consular
 20 *property* that is immune from attachment, Argentina should
 21 object if and when appellees actually seek to execute on
 22 such property; its "self-serving legal assertion" of
 23 immunity does not entitle it to withhold otherwise
 24 discoverable information. See NML Capital, 134 S. Ct. at
 25 2257-58; see also EM Ltd., 695 F.3d at 209 (holding that a
 26 judgment creditor "need not satisfy the stringent
 27 requirements for attachment in order to simply receive
 28 information about Argentina's assets"). Insofar as the
 29 discovery demands reach diplomatic or consular *documents*
 30 that may be privileged or "inviolable" under the treaties,
 31 Argentina should present its objections to the district
 32 court in the form of assertions of privilege or
 33 inviolability.

34
 35 At this juncture, it is entirely speculative whether
 36 documents Argentina regards as privileged or inviolable will
 37 be responsive to appellees' discovery requests and, if so,
 38 whether appellees will persist in demanding such documents
 39 in the face of particularized claims of privilege or

¹ We recognize that each group of appellees served different discovery demands and, furthermore, that the demands served on Argentina differed from the demands served on non-party banks. While these distinctions may be important under certain circumstances, they do not affect the analysis.

1 inviolability by Argentina. Where the diplomatic (or
 2 military) documents of a *foreign* state are concerned, the
 3 district courts' usual practice of examining contested
 4 documents *in camera* may not be practicable. Cf. Zuckerbraun
 5 v. Gen. Dynamics Corp., 935 F.2d 544, 546-48 (2d Cir. 1991)
 6 ("In camera review is a method by which a court can
 7 confidentially review the evidence for which a privilege is
 8 claimed and determine the propriety of the assertion of the
 9 privilege."). The district court will modify usual
 10 procedures to accommodate that unusual eventuality in a way
 11 that is effective and respectful.

12
 13 Third, Argentina argues that appellees' discovery
 14 demands reach military property that is immune from
 15 attachment under the FSIA and international law. See 28
 16 U.S.C. § 1611(b)(2). Again, the potential immunity of
 17 property from attachment does not preclude discovery of that
 18 property; indeed, discovery may be necessary for the parties
 19 to properly litigate the existence of immunity. NML
 20 Capital, 134 S. Ct. at 2257-58.

21
 22 Finally, Argentina argues that appellees' discovery
 23 demands are overbroad because they reach entities--and, in
 24 some cases, individuals--that are not alter egos of the
 25 Republic and therefore not liable for Argentina's debts.
 26 The district court clearly considered this argument: in
 27 permitting discovery to proceed, the court specifically
 28 excluded certain discovery demands concerning Banco de la
 29 Nación Argentina. In any event, we are not persuaded that
 30 the district court abused its discretion by permitting
 31 discovery that concerns entities legally distinct from
 32 Argentina. Even if an entity is not an alter ego (and thus
 33 is not liable for Argentina's debts), it may nevertheless
 34 hold attachable assets on behalf of Argentina. Furthermore,
 35 an entity that is closely tied to (but legally distinct
 36 from) Argentina may possess information about Argentina's
 37 assets, even if it does not own or hold those assets itself.
 38 Again, "broad post-judgment discovery in aid of execution is
 39 the norm in federal and New York state courts." EM Ltd.,
 40 695 F.3d at 207. To the extent that Argentina's objections
 41 also encompass assertions of head-of-state or foreign
 42 official immunity under federal common law, Argentina should
 43 present those objections in the same manner as it does
 44 objections under the VCDR and VCCR.

45
 46 Although we affirm the district court's order in all
 47 respects, we stress that Argentina--like all foreign

1 sovereigns--is entitled to a degree of grace and comity.
 2 Cf. Republic of Austria v. Altmann, 541 U.S. 677, 689
 3 (2004). These considerations are of particular weight when
 4 it comes to a foreign sovereign's diplomatic and military
 5 affairs. Accordingly, we urge the district court to closely
 6 consider Argentina's sovereign interests in managing
 7 discovery, and to prioritize discovery of those documents
 8 that are unlikely to prove invasive of sovereign dignity.

9
 10 For the foregoing reasons, and finding no merit in
 11 Argentina's other arguments, we hereby **AFFIRM** the order of
 12 the district court. The mandate shall issue forthwith.

13
 14 FOR THE COURT:
 15 CATHERINE O'HAGAN WOLFE, CLERK
 16