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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB Justice — PART 15

PEQUOT 1, LLC,

Plaintiff,

- v -

BANQUE DEGROOF,

Defendants.

INDEX NO. 601442/2004

MOTION DATE 2/18/05

MOTION SEQ. NO. 001

MOTION CAL. NO. ____

The following papers, numbered 1 to 14 were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

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

This constitutes the decision and order of the court.

FILED
DEC - 9 2005
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/6/2005

WALTER B. TOLUB, *J.S.C.*

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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PEQUOT 1 LLC,

Plaintiff,

Index No. 601442/2004
Mtn Seq. 001

-against-

BANQUE DEGROOF

Defendants.

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WALTER B. TOLUB, J.:

By this motion, defendant seeks dismissal of plaintiff's verified complaint pursuant to CPLR 3211. Defendant's primary contention in support of its motion is that this court lacks personal jurisdiction.[1]

Background History

Plaintiff is a Delaware limited liability company with an office located at Holm & Drath LLP, 400 Park Avenue in New York. From November 1, 2001 until November 24, 2003, plaintiff was comprised of three "member companies": Second Sibling LLC, managed by Steven I. Holm; Joli LLC, managed by John Voloshin; and Y&O Investments, of which Yoav Rubinstein was the president. Messrs. Holm, Voloshin, and Rubinstein served as Plaintiff's managers.

Defendant is a commercial bank chartered in 1987 under the

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[1] Contained within the papers is also an argument concerning whether or not service was properly effectuated on defendant pursuant to Banking Law §207. Inasmuch as defendant failed to move to dismiss the complaint within sixty days after service of the answer, any defense based on improper service is waived (CPLR 3211(e); *Aretakis v Tarantino*, 300 AD2d 160 [1st Dept. 2002]).

laws of the Grand Duchy of Luxembourg, with all of its offices are located in Luxembourg. Defendant does not maintain a bank branch in New York, has no offices in New York, does not solicit business in New York, and has no agent for any purpose in New York. Defendant does however maintain a correspondent bank account with JP Morgan Chase & Co, and since 2000, has had a custodian account and broker representation with Brown Brothers Harriman (Affidavit of Jean-Francois Leidner in Support of Motion to Dismiss).[2]

On January 3, 2001, defendant issued a written loan commitment to plaintiff in the amount of $2,500,000 in connection with plaintiff's investment with Eagle Rode Center LLC ("Eagle"), a non-New York limited liability company.[3] This loan commitment letter, addressed to Mr. Rubinstein at a 51st Street address in New York, identified the security interest for the loan as all of plaintiff's 83.33% membership interest in Eagle. The letter additionally indicated that the terms of the loan were to be governed and construed under the laws of the Grand Duchy of Luxembourg (Loan Commitment Letter, ¶ 7(d); Affidavit of Jean-Francois Leidner in

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[2] Defendant additionally admits to having retained legal counsel in New York in order to obtain advice on various legal matters involving this case (*Id.*).

[3] The court identifies Eagle in this manner because although defendant's affidavits indicate that Eagle is a Delaware LLC, the Loan Commitment letter as well as the other loan documents submitted identify Eagle as being a Connecticut LLC. Confusion aside, the only relevant fact for the purposes of this decision, is that the security interest for the subject loan is neither incorporated nor located in New York.

Support of Motion to Dismiss, Exhibit A).

On May 30, 2001, Mr. Rubenstein, on behalf of and with the authority of plaintiff, executed both the promissory note and Pledge Agreement, dated January 3, 2001, with defendant. These documents were executed in Defendant's Luxembourg office (Affidavit of Jean-Francois Leidner; Affidavit of Yoav Rubenstein in Support of Motion to Dismiss). As with the loan commitment letter, both the promissory note and the pledge agreement clearly indicate that the respective terms of the documents were to be governed and construed under the laws of the Grand Duchy of Luxembourg (Pequot I LLC Promissory Note, ¶ 11; Pledge Agreement, ¶ 15; See, Affidavit of Jean-Francois Leidner, Exhibits B-C).

Pursuant to the terms of the promissory note, plaintiff Pequot I, LLC was to pay defendant on a quarterly basis

> at Lender's bank, Boulevard Joseph II, No. 7, L-1840 Luxembourg, or at such other bank or place outside the United States

(Pequot I LLC Note, page 1 (emphasis added); Affidavit of Yoav Rubenstein, Ex. B; Affidavit of Jean-Francois Leidner, Ex. B). Notwithstanding this provision however, plaintiff made the required loan payments by utilizing defendant's correspondent account in New York. The court notes that while defendant could have rejected payment in this manner as it was not in conformity with the promissory note, defendant chose to accept the payments.

At some point prior to the note's final payment date in June,

2003, plaintiff's members began negotiations to sell the membership interests in plaintiff that were held by Second Sibling and Y&O Investments to Joli LLC. What happened next is a bit unclear, but the papers submitted indicate that several major events transpired, the most significant of which is that plaintiff failed to make the last required loan payment and defaulted under the note. The parties then apparently entered into some kind of loan extension agreement with defendant, which rendered plaintiff liable to defendant for various fees. Although the parties' papers are devoid of any loan extension document(s), defendant's affidavit, as do the affidavits submitted by Second Sibling and Y&O Investments confirm the existence of some kind of loan extension agreement.

In June or July of 2003, plaintiff's members (Second Sibling, Y&O Investments and Joli LLC) entered into an "Agreement of Sale of Membership Interests" to effectuate the sale and transfer of Second Sibling and Y&O Investments interests in plaintiff to Joli LLC. This agreement, which is not included in the papers, was then extended by an extension agreement[4]. This agreement, signed by the representatives of plaintiff's members in November, 2003 included language rendering the parties liable for portions of Banque DeGroof's extension fees. These fees were paid by plaintiff's

[4] The extension agreement is included as Exhibit A to the Affidavit of Steven I. Holm, Esq. in Support of the Motion to Dismiss.

members[5] on plaintiff's behalf (Exhibit A, Affidavit of Steven I. Holm, Esq. in Support of the Motion to Dismiss).

On November 12, 2003, Joli LLC, which had apparently filed for Chapter 11 Bankruptcy, was granted an order dismissing its Chapter 11 case by the United States Bankruptcy Court, District of Connecticut.[6] During the latter part of November 2003, plaintiff paid off the remaining principal balance of the Note, including all accrued interest and other charges due to defendant. Plaintiff now asserts[7] that it was forced to pay a total $115,000 in loan extension fees[8] that it did not agree to pay. Plaintiff subsequently commenced the instant action alleging two causes of

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[5] $40,000 was paid by Second Sibling and Y&O in June, 2003 ($20,000 of which was reimbursed by Joli as Joli's payment on behalf of Pequot); Joli paid $50,000 in fees in August, 2003; and 25,000 in fees was paid in August, $15,000 of which contributed by Joli.

[6] By the terms of the Bankruptcy Court's order, a November 5, 2003 Order granting a previously made motion to assume an executory contract was to survive the dismissal of the Chapter 11 case and was deemed binding on the parties, successors, and assigns, remaining in full force and effect. Furthermore, Joli LLC was precluded from enjoining enforcement or seeking modification of the November 5, 2003 order in any State or Federal Court (Affidavit of Steven I. Holm, Esq., in Support of the Motion to Dismiss, Ex. B).

[7] Inasmuch as plaintiff's opposition to this motion was solely based on the Affirmation of counsel, and did not include an affidavit from anyone affiliated with plaintiff with personal knowledge, this court bases all factual allegations made by plaintiff solely on the complaint, and disregards all of the factual allegations in counsel's Affirmation in Opposition (see, *DiSabato v. Soffes*, 9 Ad2d 297 *[1st Dept. 1959]*.

[8] These fees are referenced in footnote 4, *supra*.

action: one asserting breach of the terms of the Promissory Note and Pledge Agreement, and one for conversion of plaintiff's funds. The instant motion to dismiss followed.

Discussion

As a preliminary matter, the court must first address defendant's challenge that this court does not have the requisite personal jurisdiction over defendant to entertain this action. This requires an analysis pursuant to CPLR 302, as it is under this provision that the courts may exercise jurisdiction over a non-domiciliary provided that the non-domiciliary engages in some kind of significant conduct which gives rise to plaintiff's cause of action (CPLR 302; See generally, Barr, Altman, Lipshie and Gerstman; *New York Civil Practice Before Trial* [James Publishing 2004] §7:200 *et seq.*). The conduct need not be ongoing; all that is needed is a single transaction, and, if defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted, that single transaction may be sufficient to invoke jurisdiction (*Opticare Acquisition Corp. v Castillo*, __ NYS2d ___; 2005 WL 3005744 [2nd Dept. 2005]; *Kreutter v. McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]; *Banco Ambrosiano SPA v Artoc Bank & Trust Ltd.*, 62 NY2d 65 [1984]).

Plaintiff's argument that defendant is subject to this court's jurisdiction is largely predicated upon the contention that the

contract, i.e. the loan issued by defendant, was performed within New York because payments were regularly made into a correspondent bank account located in New York. Defendant, however, is a Luxembourg bank. It is not licensed to do business in New York State, owns no property here, has no offices or bank branches here, and does not solicit business in New York. Defendant's only contact in New York is a correspondent bank account which plaintiff used, contrary to the terms of the loan agreement, to repay a loan which originated in Luxembourg.

Although jurisdiction under CPLR 302(a)(1) may be established over an entity whose only contact with this state is the maintenance of a correspondent account (*Chase Manhattan Bank v Banque Generale du Commerce*, No. 96 Civ 5184(KMW) 1997 WL 266968 [SDNY 1997]; *Banco Ambrosiano*, 62 NY2d 65 [1984]), it is this court's opinion that the facts of the instant case do not support the argument that defendant has engaged in any business activities sufficient to satisfy the requirements of CPLR 302 (*Faravelli v Bankers Trust Co.*, 85 AD2d 335 [1st Dept. 1982], *aff'd*, 59 NY2d 615 [1983]). Simply put, the fact that defendant had a correspondent bank account in New York, which it did not intend to use for collection of the loan payments, is not enough to establish jurisdiction under CPLR 302. Moreover, even if this court were to find jurisdiction, it would not retain jurisdiction since, on the facts, plaintiff's claim does not have a substantial nexus with New

York (*Banco Ambrosiano*, 62 NY2d 65), and would be better resolved under the jurisdiction of the Grand Duchy of Luxembourg. Accordingly, it is

ORDERED that defendant's motion to dismiss the within action is granted.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 12/6/05

HON. WALTER B. TOLUB, J.S.C.