Matter of Murray v Society for Worldwide Interbank Fin. Communication
2012 NY Slip Op 32810(U)
November 5, 2012
Supreme Court, New York County
Docket Number: 0102794/2012
Judge: Louis B. York
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SCANNED ON 11/29/2012

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

PRESENT: York, Justice — PART 2

ROBIN FRANCIS MURRAY

-v-

INDEX NO. 102794/12

MOTION DATE

MOTION SEQ. NO. 1

MOTION CAL. NO.

The following papers, numbered 1 to ______ 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, it is ordered that this motion

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Motion is DECIDED in ACCORDANCE with accompanying MEMORANDUM DECISION

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

Dated: 11/5/12

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

---x

IN THE MATTER OF THE APPLICATION OF
ROBIN FRANCIS MURRAY

Petitioner,

Index No 102794/12

For an Order to Compel the Production of
Documents from SOCIETY FOR WORLDWIDE
INTERBANK FINANCIAL COMMUNICATION

Respondent.

---x

YORK, J.:

Petitioner Robin Francis Murray ("Murray" or "Petitioner") moves, by order to show cause, to compel Respondent Society for Worldwide Interbank Financial Communication ("SWIFT" or "Respondent") to produce documents, pursuant to CPLR 3102(c), to be used to frame a complaint against Bank of New Zealand and other banking institutions before the High Court of New Zealand. Respondent SWIFT opposes the motion and cross-moves for sanctions, pursuant to N.Y.R.R. §130-1.1, against Petitioner.

BACKGROUND

Petitioner and family trusts in which he had a beneficial interest entered into five foreign currency loan transactions with Bank of New Zealand ("BNZ") between September 1984 and December 1989 in the aggregate principal amount of two million three hundred thousand New Zealand dollars (NZ $2,300,000). BNZ represented that it would enter into foreign currency exchange contracts with correspondent foreign banks for the purchase of foreign currency at a rate of exchange favorable to the borrowers. Petitioner alleges that he learned through legal

actions commenced by him and other borrowers against BNZ that BNZ had not in fact entered into these foreign exchange contracts on many occasions but instead used its internal foreign reserves. Due to currency fluctuations unfavorable to the borrowers, Petitioner suffered losses that he evaluates at NZ $4,519,228.

Petitioner and his affiliated companies have filed numerous suits in New Zealand courts against BNZ and other banks ("Banks") starting in 1992. All were unsuccessful. He now seeks additional evidence of the fraudulent nature of the foreign currency loans "in order that certain borrowers whose contractual claims against the Banks were previously barred by the statute of limitations or defeated at trial may commence new actions against the Banks grounded in claims of fraud" (Lilly's Aff. at ¶13). Petitioner believes that if the foreign currency transactions were genuine, they are reflected in the database maintained by SWIFT. SWIFT stores all messages and data relating to international payments of its members' clients in two operating centers, one of which is located in the United States. Murray seeks the copies of all books, records, and documents in the possession of the New York office of SWIFT that contain records of all transactions between BNZ and the Banks as lenders, and Petitioner and his companies as borrowers between September 1, 1984 and December 31, 1994 (as in the Order to Show Cause) or September 1, 1984 and December 31, 1989 (as in Lilly's Affirmation).

Respondent objects on several grounds. It asserts that SWIFT does not have the documents from the 1980s that Murray requests and has already informed him of this fact multiple times. Next, in Respondent's opinion, only the court that has subject-matter jurisdiction over the contemplated action has power to order pre-action disclosure. Petitioner has conceded that the action will be filed in New Zealand rather than in New York. Respondent further argues that Murray does not need the discovery to frame a complaint since he has ample discovery from

previous suits and investigations of the underlying facts over almost twenty years. Finally, the discovery is overbroad and unduly burdensome, especially on a non-party foreign corporation (Respondent's Memo. of Law p. 1). Respondent bases its requests for sanctions on Petitioner's refusal to withdraw the application after he was advised that the application lacks merit.

DISCUSSION

This application for pre-action discovery in New York involves a dispute which Petitioner intends to litigate, or more precisely, re-litigate in New Zealand. CPLR 3102(c) is silent whether such discovery is available for an action to be brought in a foreign jurisdiction ("Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order.") In contrast, CPLR 3102(e), which deals with discovery in an action pending in another jurisdiction, specifically refers to "any court of record in any other state, territory, district or foreign jurisdiction." Respondent urges this court to deny the pre-action petition on the ground that the court does not have jurisdiction over the underlying dispute. In support of its position Respondent cites two cases, one on appeal from a Surrogate's Court (Estate of Matter of Wallace, 239 AD2d 14; 667 N.Y.S.2d 768 [3d Dept 1998]), the other from the Civil Court of the City of New York (Perez v New York Presbyt. Hosp., 11 Misc 3d 722; 811 N.Y.S.2d 914 [N.Y.Civ Ct 2006]). Both cases were decided by courts of limited jurisdiction. The New York Supreme Court, being the court of general jurisdiction, is not similarly constrained. Though it is uncontroverted in this proceeding that New York courts do not have jurisdiction to adjudicate claims of fraud against the Bank of New Zealand, it does not follow that they lack power to order discovery in an action to be commenced in New Zealand.

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The case law does not reveal any case in New York in which discovery was granted in aid of framing a complaint in a foreign country. This is not surprising given that an applicant has to convince the court that the potential suit has merit. "Pre-action discovery is not permissible as a fishing expedition to ascertain whether a cause of action exists and is only available where a petitioner demonstrates that he or she has a meritorious cause of action and that the information sought is material and necessary to the actionable wrong. Generally, the determination of whether a party has demonstrated merit lies in the sound discretion of the trial court." Bishop v Stevenson Commons Assocs., L.P., 74 AD3d 640, 641; 905 N.Y.S.2d 29 [1st Dept 2010] (internal quotations omitted). At a minimum, an applicant has to apprise the court about causes of action under foreign law applicable to the potential suit and demonstrate that allegations fit elements of the proposed causes of action. The petition at bar barely mentions the claim of fraud, or "concealed fraud" that Murray plans to pursue against the Banks, and does not advise the court of the statute of limitations applicable to fraud under New Zealand law. Only in a reply memorandum of law does Petitioner add the second cause of action – violation of the New Zealand Credit Contracts Act – without providing any information on the substance of this act and by implication, its relevance to the described events (Petitioner's Reply Memo. of Law, p. 7). Contrary to Petitioner's confidence that these claims are well-founded, this court has no grounds to evaluate them without briefing on New Zealand law.

The court agrees with Respondent that the application was submitted for an improper purpose – to gather additional facts to support his claim against BNZ. In particular, the petition seeks a confirmation of his allegation that the foreign currency transactions which BNZ entered into were a sham. Respondent's expert, Alistair Bruce Kelman, states in his affidavit that "[i]f there are no data records of transactions recorded at SWIFT, then there were no transactions

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(either drawdowns, interest payments or repayments) that occurred. It follows that if there are no data records of transactions then the "offshore loans" made to borrowers in New Zealand were fabricated locally." (Kelman Aff., Petitioner's Exh. 1, at ¶65). Petitioner's Reply memorandum of law elaborates: "Upon information and belief, the Records contain facts regarding the occurrence or non-occurrence of certain purported foreign currency loan transactions." (Petitioner's Reply Memo. of Law, p. 9). It is well established that pre-action disclosure is unavailable to ascertain whether facts supporting a cause of action exist. Uddin v New York City Tr. Auth., 27 AD3d 265, 266; 810 N.Y.S.2d 198 [1st Dept 2006] (while pre-action disclosure may be appropriate to preserve evidence or to identify potential defendants, it may not be used to ascertain whether a prospective plaintiff has a cause of action worth pursuing). A device created to facilitate framing a complaint would otherwise be employed to substitute for a suit itself.

Petitioner's failure to describe meritorious claims and attempts to use pre-action discovery for an improper purpose would merit the dismissal of the petition. However an additional circumstance makes this petition not only deficient, but frivolous. The two causes of action which Petitioner allegedly plans to litigate in a New Zealand court have indeed been already litigated to a final conclusion. The New Zealand Court of Appeals issued a decision in 2004 in the case named Bank of New Zealand v Savril Contractors Ltd, CA 108/02 & 12/03, [2005] 2 NZLR 475. In this decision the court recounted the long history of proceedings that Murray and business interests associated with him conducted against BNZ. In the course of these proceedings the claim that foreign currency loans were fraudulent and fictitious was introduced, withdrawn, then reintroduced. In 2000, the trial court dismissed the action for failure to prosecute, and the Court of Appeals affirmed. In 2000 Murray started the second round of

proceedings with the same causes of actions. Fraud and violation of the New Zealand Credit Contracts Act were among them.

The case reached the Court of Appeals, and the issue before it was whether the proceedings represented an abuse of process. The court explained what an "abuse of process" means.

> "The public interest in the due administration of justice necessarily extends to ensuring that the Courts' processes are fairly used and that they do not lend themselves to oppression and injustice. The justification for the extreme step of staying a prosecution or striking out a statement of claim is that the Court is obliged to do so in order to prevent the abuse of its processes."

Bank of New Zealand v Savril Contractors Ltd, at ¶101. Applying this concept to the case at bar the court concluded:

> "The transactions that are the subject of these proceedings happened some 20 years ago now and litigation in respect of those transactions has been before the Courts for over ten years. This Court has already determined that the delay in prosecuting substantially similar proceedings was inordinate and that a fair trial is now impossible. To allow the proceedings again to come before the Courts is in these circumstances an abuse of process. The litigation must end."

(*id.*, at ¶111).

The clear language of this decision leaves no doubt that the third round of proceedings would not be possible in New Zealand. Nevertheless, eight years after the decision Murray applied to a New York court alleging that he intended to do just that. He sought to invoke the

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jurisdiction of a foreign court while misrepresenting the history of prior litigation, thus abusing the New York court system. This behavior must be sanctioned pursuant to N.Y.R.R. §130-1.1.

CONCLUSION

For the foregoing reasons, it is

ORDERED and ADJUDGED that the petition is dismissed, with costs, and it is further

ORDERED that Respondent's motion for sanctions in the form of attorney's fees is granted. The issue of the amount of reasonable attorney's fees Respondent may recover against Petitioner is referred to a Special Referee to hear and decide; and it is further

ORDERED that counsel for Respondent shall, within 20 days from the date of entry of this decision, serve a copy of this decision with notice of entry, together with a completed information Sheet (available on the Court's website) upon the Special Referees' Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referees' Part for the earliest convenient date.

Dated: 11/5/12

ENTER:

J.S.C.