rushaid v Pictet & Cie
2014 NY Slip Op 32286(U)
August 26, 2014
Supreme Court, New York County
Docket Number: 652375/11
Judge: Saliann Scarpulla

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

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RASHEED AL RUSHAID, AL RUSHAID PETROLEUM INVESTMENT CORP., and AL RUSHAID PARKER DRILLING, LTD.,

Plaintiffs,

-against-

PICTET & CIE, PIERRE-ALAIN CHAMBAZ, PHILLIPE BERTHERAT, RÉMY ANTOINE BEST, RENAUD FERNAND DE PLANTA, JACQUES JOSEPH DE SASSURE, BERTRAND FRANÇOIS LAMBERT DEMOLE, JEAN-FRANÇOIS DEMOLE, MARC PHILLIPE PICTET, and NICOLAS LUCIEN PICTET,

Defendants.

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Index No. 652375/11
Motion Seq. No. 002

DECISION AND ORDER

HON. SALIANN SCARPULLA, J.:

Plaintiffs Rasheed Al Rushaid ("Rushaid"), Al Rushaid Petroleum Investment Corp. ("ARPIC"), and Al Rushaid Parker Drilling Ltd. ("ARPD") (collectively, "plaintiffs") commenced this action against Pictet & Cie ("Pictet"), Pierre-Alain Chambaz ("Chambaz"), Phillipe Bertherat, Rémy Antoine Best, Renaud Fernand de Planta, Jacques Joseph de Sassure, Bertrand François Lambert Demole, Jean-François Demole, Marc Philippe Pictet, and Nicolas Lucien Pictet (collectively, "defendants"), asserting causes of action for (1) aiding and abetting breach of fiduciary duty and (2) civil conspiracy, for which plaintiffs seek an excess of $350 million in damages, as well as interest, costs, and attorneys' fees.

Defendants move to dismiss the first amended complaint pursuant to CPLR § 3211 (a) (8) for lack of personal jurisdiction, CPLR § 327 for forum non conveniens, and/or CPLR § 3211 (a) (7) for failure to state a cause of action under New York law. Additionally, defendants move to dismiss the first amended complaint as to plaintiffs Rushaid and ARPIC for lack of standing, pursuant to CPLR § 3211 (a) (2).

Background

As alleged in the first amended complaint, Rushaid is a Saudi Arabian resident and co-owner of ARPIC. ARPD is a company owned by ARPIC. Both ARPD and ARPIC are organized and exist pursuant to Saudi Arabian law.[1] Pictet is a private Swiss bank, with its principal place of business in Geneva, Switzerland; Chambaz is a Vice-President and Client Relationship Manager of Pictet in Geneva; Phillipe Bertherat, Rémy Antoine Best, Renaud Fernand de Planta, Jacques Joseph de Sassure, Bertrand François Lambert Demole, Jean-François Demole, Marc Philippe Pictet, and Nicolas Lucien Pictet are all general managers of Pictet and are residents of Switzerland.

This action arises from the alleged activities of three of ARPD's former officers. The following individuals were employed at ARPD at all relevant times, but are not parties to this litigation: Shekhar Shetty ("Shetty"), the director of ARPD and chief financial officer of ARPIC at all material times after January 2006; Thomas Caplis ("Caplis"), the

[1] Unless otherwise specified, all facts are taken from the first amended complaint and will be accepted as true only for purposes of this motion to dismiss. *See Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994) ("On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction [and the court will] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory") (citations omitted).

Vice-President and general manager of ARPIC from 2000 until March 2007 and director of ARPD at all material times after January 2006; and James Wight ("Wight"), general manager of ARPD at all material times (collectively, the "non-party employees").

In late 2005, ARPD allegedly entered into oil drilling and exploratory contracts with non-party Saudi Aramco, Saudi Arabia's national oil company. Plaintiffs allege that the non-party employees were supposed to hire vendors to complete the six oil rigs which ARPD was building in conjunction with the Saudi Aramco contracts, but instead allegedly awarded contracts to those vendors who offered them bribes and kickbacks.

Plaintiffs further allege that the non-party employees knowingly approved the purchase of equipment at prices inflated by the vendors. The non-party employees also allegedly failed to monitor the orders, and as a result, the equipment often arrived late or was never delivered. They maintained the contracts with vendors that failed to perform, thereby allowing the harmful conduct to continue. Plaintiffs claim that the non-party employees' failure to enforce the contracts and monitor the delivery of equipment led to numerous delays, allegedly causing ARPD tens of thousands of dollars in damages daily, amounting to over $350 million in total, and putting ARPD at risk of losing its contracts with Saudi Aramco. The non-party employees allegedly collected more than $4 million in bribes and kickbacks.

Plaintiffs allege that since the start of this scheme, Chambaz and Pictet were aware that the non-party employees were full-time employees of ARPD and ARPIC and were breaching their fiduciary duties owed to plaintiffs. In January 2006, Chambaz allegedly began to substantially aid the non-party employees by creating a company in the British

Virgin Islands, TSJ Engineering Consulting Co. Ltd. ("TSJ"). Plaintiffs allege that Chambaz knew that TSJ would be used to defraud the plaintiffs and that he "knew, and/or had to know" that the non-party employees would launder the bribe money through TSJ.

Plaintiffs allege in the first amended complaint that on February 26, 2006, the non-party employees signed an application to open an account for TSJ at Pictet and that Chambaz helped the non-party employees and TSJ open and manage this account. Plaintiffs further allege that Pictet maintains correspondent bank accounts in New York, and that the non-party employees instructed the vendors to wire bribe money to Citibank, N.A., one of Pictet's New York correspondent banks, for "Pictet and Co. Bankers Geneva" to credit the TSJ bank account. Generally, after the money was held in the TSJ account, it was allegedly transferred into each of the non-party employees' bank accounts.

Plaintiffs allege that, by knowingly helping to create TSJ and allowing the bribery money to be laundered through Pictet's accounts, Chambaz directly aided and abetted the non-party employees in breaching their fiduciary duties, resulting in more than $350 million in damages to ARPD. Plaintiffs further allege that the non-party employees conspired with Pictet and Chambaz regarding the fraudulent scheme and in creating TSJ to surreptitiously receive the bribe money.

Discussion

Personal Jurisdiction

Under CPLR § 302 (a) (1), jurisdiction can only be established over a non-domiciliary "where (i) a defendant transacted business within the state and (ii) the cause of action arose from that transaction of business." *Johnson v. Ward*, 4 N.Y.3d 516, 519 (2005); *accord, e.g.*, *Licci v. Lebanese Canadian Bank*, 20 N.Y.3d 327, 334 (2012). "If either prong of the statute is not met, jurisdiction cannot be conferred under CPLR § 302 (a) (1)." *Johnson*, 4 N.Y.3d at 519.

Defendants move to dismiss the amended complaint due to the lack of personal jurisdiction pursuant to CPLR § 3211 (a) (8). Defendants argue that plaintiffs cannot establish jurisdiction under CPLR § 302 (a) (1) because a foreign bank's passive receipt of funds through a New York correspondent bank does not constitute a business transaction absent purposeful action by the defendant. Defendants further assert that, even if Pictet's receipt of funds constituted a business transaction, these business transactions were merely coincidental, and plaintiffs' claims do not arise from them.

Additionally, defendants argue that even if the court found that it has jurisdiction over defendants pursuant to the long-arm statute, this case should still be dismissed because plaintiffs' claims are not related to defendants' alleged contacts with New York and none of the defendants have purposely availed themselves of the state, thus failing to comport with the Due Process Clause of the United States Constitution.

In opposition, plaintiffs argue that defendants' knowledge and repeated receipt of funds through a New York correspondent bank constitutes a purposeful business

transaction, citing *Licci*, 20 N.Y.3d at 338-39. Plaintiffs further argue that these business transactions are directly related to the claims asserted and are sufficient to support jurisdiction.

1. Purposefully Transacted Business

In order to satisfy the first prong of the long-arm jurisdiction test, the defendants must have purposefully transacted business in New York, thus availing themselves of the state's protection and benefits. *See Fischbarg v. Doucet*, 9 N.Y.3d 375, 380 (2007); *see also Licci*, 20 N.Y.3d at 338-39 (a foreign bank's use of the correspondent account must be purposeful, not "adventitious"); *Amigo Foods Corp. v. Marine Midland Bank-N.Y.*, 39 N.Y.2d 391, 396 (1976) ("standing by itself, a correspondent bank relationship . . . may not form the basis for long-arm jurisdiction under CPLR 302 [(a) (1)].").

Plaintiffs primarily rely on *Licci*, arguing that Pictet's receipt of funds from its New York correspondent bank account constitutes a purposeful business transaction within the state. In *Licci*, the Court of Appeals found that a foreign bank's repeated use of a correspondent account on behalf of a client can create, as a matter of law, a "course of dealing" establishing purposeful availment sufficient to support personal jurisdiction under CPLR § 302 (a) (1). 20 N.Y.3d at 339 (internal quotation marks omitted). *See also Indosuez Int'l Fin. B.V. v. Nat'l Reserve Bank*, 98 N.Y.2d 238 (2002) (the regular use of a New York correspondent bank to receive and effect wire transfers constituted "purposeful availment of New York"); *cf. Pramer S.C.A. v. Abaplus Int'l Corp.*, 76 A.D.3d 89, 96 (1st Dept 2010) ("the mere payment into a New York account does not alone provide a basis for New York jurisdiction, especially when all aspects of the transaction occur out of state, absent more

extensive New York banking relating to the transaction in issue" [internal citations omitted]).

Here, defendants' use of the correspondent accounts was passive, not purposeful. While plaintiffs submitted documents showing that defendants knew of the third-party monetary transfers from a New York correspondent account for the benefit of the Pictet accounts, this alone does not constitute purposeful conduct. *Fischbarg*, 9 N.Y.3d at 380. This passive receipt of funds do not constitute "volitional acts" by defendants and, as such, defendants did not "avail[] [themselves] of the privilege of conducting activities within the forum State," and thereby neglect to "invoke[] the benefits and protections of its laws.'" *Id.* (internal citations and quotation marks omitted); *see also Amigo Foods Corp.*, 39 N.Y.2d at 396 (absent other contacts, the maintenance of a correspondent account does not constitute purposeful availment of the state). Accordingly, plaintiffs fail to meet the first prong of CPLR § 302 (a) (1).

2. Substantial Relationship to Asserted Claims

Even if I were to find that Pictet's passive receipt of funds through its New York correspondent bank was sufficient to constitute a purposeful business transaction, CPLR § 302 (a) (1) jurisdiction would still be improper because the second prong of the statute has not been met: the causes of actions asserted do not arise from defendants' use of the New York correspondent bank account.

The Court of Appeals in *Licci* explained that although the analysis of the second prong of CPLR § 302 (a) (1) is "relatively permissive," and "causation is not required," an "articulable nexus or substantial relationship" must exist "between the business transaction

and the claim asserted." 20 N.Y.3d at 339 (internal citations and quotation marks omitted). Under this standard, the Court must "focus[] on the defendant's conduct[,]" and it is required that "the pleadings establish the [connection] necessary for purposes of personal jurisdiction," *Id.* at 340 (internal citations omitted). However, relationships between a plaintiff's claim and a defendant's alleged business transaction that are "merely coincidental" are insufficient to establish jurisdiction pursuant to CPLR § 302 (a) (1). *Johnson*, 4 N.Y.3d at 519-20 (no specific jurisdiction because there was an insufficient nexus between the defendant's alleged business transactions, a New York driver's license and insurance, and the plaintiff's injury claim which resulted from the defendant driving negligently in New Jersey; the harm alleged would have been the same regardless of where the defendant's drivers license and insurance was issued). *See also Pramer S.C.A.*, 76 A.D.3d at 96 (payment alone into a New York account does not connote a "substantial relationship" to plaintiff's injury); *Tamam v. Fransabank Sal*, 677 F. Supp. 2d 720, 728 (S.D.N.Y. 2010) (dismissing for lack of CPLR § 302 (a) (1) jurisdiction because the foreign bank's receipt of funds through a New York correspondent account was insufficient to constitute a business transaction, and the claims did not arise from defendant's receipt of funds "'simply because [its] contact with New York was a link in a chain of events giving rise to the cause of action.'").

Plaintiffs' argument that the allegations asserted here — i.e., that Pictet's passive and continuous receipt of the funds is sufficient to show a substantial connection to the asserted claims — are stronger than those asserted in *Licci* is misguided. In *Licci*, the plaintiffs alleged that the defendant bank had taken affirmative steps to effect wire transfers

on Hezbollah's behalf and had "engaged in terrorist financing by using its correspondent account in New York to move the necessary dollars." 20 N.Y.3d at 340. The Court of Appeals concluded that these allegations were sufficient as a matter of law to establish the requisite nexus to New York under CPLR § 302 (a) (1). *Id.* 340-41.

Here, by contrast, the only allegation linking defendants to New York is that the non-party employees and vendors initiated and directed wire transfers through Pictet's correspondent New York bank account. Yet, by plaintiffs' own assertion, the fraudulent scheme allegedly began in late 2005, several months before the TSJ Pictet account was even opened. Moreover, by the time any possible connection to New York was established, plaintiffs allege that they had already suffered substantial damage at the hands of the non-party employees.

Plaintiffs' injuries stem from the non-party employees' fraudulent scheme, as well as their alleged deception, misconduct, and failure to terminate contracts when breached by vendors. The wire transfers through a New York correspondent account is "merely coincidental" to this alleged fraudulent scheme. *Johnson*, 4 N.Y.3d at 520. Plaintiffs' alleged injuries would have occurred regardless of the correspondent bank's location. *Id.*

Any other conduct by the defendants in allegedly aiding the non-party employees occurred outside of New York and does not support plaintiffs' position. Because plaintiffs have failed to allege anything more than the "mere payment into a New York account," *Pramer S.C.A.*, 76 A.D.3d at 96, they cannot establish the "articulable nexus" or

"substantial relationship" necessary to survive defendants motion to dismiss. *Licci*, 20 N.Y.3d at 339 (internal citations omitted) (internal quotation marks omitted).[2]

Finally, while in their motion papers plaintiffs seek jurisdictional discovery pursuant to CPLR § 3211 (d), at oral argument before this Court (Kapnick, J.) held on May 22, 2013, plaintiffs conceded that no further discover is actually necessary ("It's our view we don't need additional discovery. I think we have enough here. We just add that as a fallback argument."). Thus, plaintiffs' request for jurisdictional discovery is denied.

Accordingly, the first amended complaint is dismissed for lack of jurisdiction.[3]

In light of all of the above, I need not consider that portion of defendants' motion to dismiss for failure to state a cause of action.

In accordance with the foregoing, it is hereby

ORDERED that the motion by defendants' Pictet & Cie, Pierre-Alain Chambaz, Phillipe Bertherat, Rémy Anthone Best, Renaud Fernand de Planta, Jacques Joseph de

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[2] The two other cases which plaintiffs cite are unavailing. In those cases, the defendant banks purposefully effected fund transfers through, or otherwise used, a New York correspondent account in ways that were closely linked to the asserted claims. *See Dale v. Banque SCS Alliance S.A.*, 2005 WL 2347853 (S.D.N.Y. 2005) (foreign bank held accounts in New York correspondent banks which "it used to ***effect*** a number of the funds transfers that are the subject of this action") (emphasis added); *see also Correspondent Servs. Corp. v. J.V.W. Investments Ltd.*, 120 F. Supp. 2d 401, 404 (S.D.N.Y. 2000) (foreign bank "facilitate[d] international wire transfers" through an account at a New York brokerage firm and used that account to purchase mutual funds and deliver securities on behalf of a client, which was directly related to plaintiff's conversion claim).

[3] Even if the Court had personal jurisdiction over the defendants, I would most likely dismiss this case on CPLR § 327 *forum non conveniens* grounds because, among other reasons, the defendants would face significant hardship if forced to litigate in New York; discovery and witness testimony would be particularly costly and burdensome because the defendants' primary language is French; much of the evidence and most of the witnesses are located in Switzerland or Saudi Arabia; and, as discussed above, the connection to New York is tenuous.

Sassure, Bertrand François Lambert Demole, Jean-François Demole, Marc Philippe Pictet, and Nicolas Lucien Pictet to dismiss the amended complaint is granted and this action is dismissed in its entirety; and it is further

ORDERED that plaintiffs' Rasheed Al Rushaid, Al Rushaid Petroleum Investment Corp., and Al Rushaid Parker Drilling Ltd request for jurisdictional discovery pursuant to CPLR § 3211 (d) is denied; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of defendants dismissing this action.

This constitutes the decision and order of the court.

Dated: New York, New York
August 26, 2014

ENTER:

Saliann Scarpulla, J.S.C.