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| PD Cargo, CA v Wiesner |
| 2017 NY Slip Op 30652(U) |
| March 20, 2017 |
| Supreme Court, New York County |
| Docket Number: 155955/2016 |
| Judge: David B. Cohen |
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 58

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 PD CARGO, CA,

Plaintiff,

-against-

DECISION/ORDER
Index No. 155955/2016

NEAL WIESNER, ESQ., WIESNER LAW FIRM

Defendants.
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HON. DAVID B. COHEN, J.:

Plaintiff, a foreign corporation, and defendants entered into a relationship where defendants acted as plaintiff's attorney. Defendants' were hired to commence suit on behalf of plaintiff here in New York, against several foreign entities "CDS" and "Paten" and Morgan Stanley. The crux of still ongoing litigation is that plaintiff acted as a broker between CDS and Patten for two large purchases of cheese to a buyer in Venezuela from CDS. As part of the transaction, plaintiff agreed to advance \$255,250 as security to be held by CDS' affiliate Paten in trust for plaintiff. Upon completion of the sales, the advance was to be returned to plaintiff along with a brokerage fee. The Paten account is with Morgan Stanley, who is located in New York. Ultimately, CDS shipped the first order and was allegedly paid \$146,500. Notwithstanding the fact that plaintiff provided security for the second shipment, the second shipment was allegedly never made by CDS. Plaintiff alleged that no part of the security was ever returned to plaintiff and accordingly, it engaged defendants to commence an action for recovery. After commencement of suit, plaintiff sought and received attachment of the Paten bank account.

Paten filed a motion to dismiss based upon a lack of jurisdiction. On September 2, 2015, Justice Kern granted Paten's motion and dismissed the action for lack of jurisdiction. After finding that service was made properly, Justice Kern, nevertheless dismissed the action finding no basis for personal jurisdiction under CPLR 301 or 302, no basis for *in rem* jurisdiction and no basis for *quasi in rem* jurisdiction. Specifically, Justice Kern found that the facts alleged in that matter did not give rise to general jurisdiction under CPLR 301; that the complaint only alleged one connection between New York and Paten – the wiring

of money by plaintiff to the account - which was not sufficient minimum contacts under CPLR 302; that because the complaint sought money damages and not a specific item, *in rem* jurisdiction under CPLR 314(2) was not applicable; and that because the attachment of the account did not precede the commencement of the suit, *quasi in rem* jurisdiction was not applicable under CPLR 314(3). Accordingly, the action against Paten was dismissed. Justice Kern then ordered that pursuant to CPLR 6212(e), plaintiff was liable for costs and damages for the attachment. Justice Kern referred the issue for damages to a special referee. Currently, Justice Kern's decision is up on appeal to the Appellate Division, where plaintiff has been extended extra time to perfect and is due this term. There has also not been a final determination on the amount of damages due by plaintiff under CPLR 6212(e).

Plaintiff commenced this suit against the attorney for malpractice. Plaintiff alleges that the other matter was dismissed because of the attorney's malpractice in violating the procedural requirements of CPLR 314(3) and had defendants not been negligent, plaintiff would have obtained *quasi in rem* jurisdiction. Further, had they obtained *quasi in rem* jurisdiction, it would not have to pay the costs under CPLR 6212(e).

"Recovery for professional malpractice against an attorney requires proof of three elements: "(1) the negligence of the attorney; (2) that the negligence was the proximate cause of the loss sustained; and (3) proof of actual damages" (*Mendoza v. Schlossman*, 87 A.D.2d 606, 606-607, 448 N.Y.S.2d 45 [1982]). It requires the plaintiff to establish that counsel "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession" and that " 'but for' the attorney's negligence" the plaintiff would have prevailed in the matter or would have avoided damages" (*Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 10 [1st Dept 2008]).

The second element of proximate cause has been the source of some contradictory Court rulings. Specifically, some Courts, like the *Ulico* Court have required a more rigorous "but for" proximate cause standard and some Courts (*see Barnett v Schwartz*, 47 AD3d 197, 201 [2d Dept 2007]) have required a lesser "a" proximate cause standard (*see 180 E. 88th St. Apartment Corp. v. Law Office of Robert Jay Gumenick, P.C.*, 2010 WL 5799420 (NY Sup NY Cty); *see also Borges v Placeres*, 123 AD3d 611 [1st

Dept 2014][holding that the charge and verdict sheet appropriately required that defendant's negligence in this attorney malpractice action be a substantial factor in causing plaintiff's harm] *citing Barnett v Schwartz*, 47 AD3d 197, 201 [2d Dept 2007]). While the required standard of proximate causation is not precise, it clear that the alleged malpractice needs to be at least a substantial factor if not 'the' factor.

Here, the complaint alleges that had defendants not been negligent, plaintiff would have obtained *quasi in rem* jurisdiction. Whether *quasi in rem* jurisdiction exists in a given case involves an inquiry into the presence or absence of the constitutionally mandated minimum contacts (*Banco Ambrosiano, S.P.A. v Artoc Bank & Trust Ltd.*, 62 NY2d 65 [1984]). The complaint in this case and the complaint in the other action allege no other facts regarding Paten that show any contact with New York other than the account location. In fact, in Justice Kern's decision regarding jurisdiction under CPLR 302, Justice Kern wrote "plaintiff alleges only one connection between this case and New York," the transfer of money to a bank account located in New York. Justice Kern then went on to find that there is no evidence of continuous or repeated use of the accounts and that Paten did not initiate the use of the accounts.

Although Justice Kern wrote her findings in the context of the higher standard of minimum contacts under CPLR 302 and *Intl. Shoe Co. v State of Wash., Off. of Unemployment Compensation and Placement*, 326 US 310 [1945], the facts remain the same under this Court's analysis. Neither complaint provides any basis for the Court to find that any level of minimum contact is met, including the lesser standard under *Banco Ambrosiano*. The sole contact is the bank account, for which there is no evidence of any other use and to which the deposit was not even initiated by Paten. In fact, plaintiff does not even allege any contact it had with Paten, let alone contact that Paten has with New York. Thus, the Court finds that even had defendants sought the attachment prior to commencement of the other action, *quasi in rem* jurisdiction would not have been found under CPLR 314(3) as the minimum contact requirement would not have been satisfied.

Additionally, to the extent that plaintiff argues that *Banco Ambrosiano* stands for the proposition that *quasi in rem* jurisdiction can be found based solely on a bank account, this Court disagrees. In *Banco Ambrosiano*, the Court of Appeals specifically found that the bank account, combined with several other

factors were sufficient to meet the lower standard of minimum contacts (*Banco* at 69). The Court found that it was “not a case in which property is coincidentally located within the State's borders and forms the only relevant link to defendant” (*id.* at 68). Rather, the account was related to the claim, it was the account where plaintiff was directed by the relevant defendant to deposit the funds, was not an isolated banking transaction but was regularly used by defendant to accomplish its international banking transactions, and defendant frequently communicated with the New York entity with instructions on disbursements (*id.*). It was only the combination of these factors that allowed the *Banco Ambrosiano* Court to find *quasi in rem* jurisdiction. Here, although the account is related to the claims, the other factors are lacking and asserting *quasi in rem* jurisdiction over an entity where the only contact alleged is the location of bank account would offend due process considerations.

Additionally, the third element of malpractice, actual damages, is lacking at this time. The matter is up on appeal and the referees has not reported the amount of damages. Thus, at this time, plaintiff cannot state a cause of action as it cannot assert that it has suffered actual damages.

For the above reasons is it therefore

ORDERED, that this matter is dismissed.

This constitutes the decision and order of the Court.

DATE : 3/20/2017


COHEN, DAVID B., JSC