UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

John Wiley & Sons, Inc.,

Plaintiff,

-v.-

Supap Kirtsaeng d/b/a BlueChristine99, *et al.*,

Defendants.

Civil Action No. 08 Civ. 7834 (GEL) (DCP)

Memorandum Opinion & Order

In this action, Plaintiff publisher, John Wiley & Sons, Inc. ("Wiley") alleges that Defendant Supap Kirtsaeng ("Kirtsaeng"), and other unknown John Doe associates, have violated Wiley's copyrights by importing and selling, unauthorized by Wiley, foreign versions of Wiley textbooks in the United States. Presently, Plaintiff moves the court to hold Kirtsaeng and his bank account holder, Bank of America ("BOA"), in civil contempt of an April 27, 2009 temporary restraining order.

Because the court finds that Plaintiff has failed to support its motion with sufficient evidence of actual notice to the California branch of BOA, the court DENIES Plaintiff's motion as to

BOA.[1]

I. Background

The Order to Show Cause for Preliminary Injunction and Prejudgment Attachment and Order of Attachment ("Attachment Order")[2] at issue was entered on April 27, 2009 at 2:00 p.m. Wiley v. Kirtsaeng, No. 08 Civ. 7834 (GEL) (S.D.N.Y. Apr. 27, 2009) (prejudgment order of attachment). In the Attachment Order, the court determined that attachment "is necessary to ensure that any judgment Wiley obtains in this action is satisfied." Id. 3. Accordingly, the court ordered that

> pursuant to the Rules 64 and 65 of the Federal Rules of Civil Procedure and New York CPLR §§ 6201 and 6210, pending the hearing on Wiley's application for an order of prejudgment attachment, . . . the funds of Kirtsaeng at PayPal, Inc., Bank of America and M&T Bank be, and hereby are, attached and Kirtsaeng, his agents, servants, employees, and attorneys and all persons in active concert or participation with them who receive actual notice of this order, be, and hereby are, enjoined from transferring or withdrawing any funds from those accounts pending further order of the Court.

Id.

Plaintiff's attorney's affidavit avers that he, on April 27 at 4:10 p.m., "served by hand a copy of the Temporary Order of Attachment on Bank of America at its branch at 350 Fifth Avenue, New York, New York, and received a receipt [a copy of which is

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[1] Plaintiff's motion as to Defendant Kirtsaeng remains pending.

[2] The Attachment Order acts as a Temporary Restraining Order.

attached as Exhibit B]." (Decl. of William Dunnegan in Supp. of Pl.'s Mot. to Adjudge Def. & Bank of America in Contempt of the April 27, 2009 Temporary Order of Attach. ("Dunnegan Decl.") ¶ 4 & Ex. B.) Further, Plaintiff's attorney averred that, on April 27 at 4:22 pm, his associate "served a copy of the Temporary Order of Attachment on Mr. Sam Israel, counsel for Kirtsaeng, by e-mail [a copy of which is attached as Exhibit C]." (Dunnegan Decl. ¶ 5 & Ex. C.)

Nonetheless, as Plaintiff's attorney alleges, on April 28, Kirtsaeng "withdrew $6,400 in U.S. Currency from his Bank of America account [and a copy of the subpoenaed statement is attached as Exhibit D]." (Dunnegan Decl. ¶ 6 & Ex. D.)[3] Kirtsaeng withdrew these monies from BOA's branch in Culver Center, Culver City, California. (See Dunnegan Decl. Ex. D).

Given the above facts, Plaintiff alleges that Kirtsaeng and BOA violated the Attachment Order, and brings its instant Motion to

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[3] Plaintiff's attorney also represents to the court that, by letter dated April 29, BOA represented to Plaintiff that $1.05 was attached as a result of the Attachment Order but did not disclose the $6,400 transaction. (Dunnegan Decl. ¶ 7). Based on this letter, Plaintiff withdrew its application for attachment of the account on May 7. (Id. ¶ 8; Stipulated Prelim. Inj. & Order Vacating Temporary Order of Attach. 2). After subsequently receiving subpoenaed records from BOA revealing the April 27 withdrawal, however, Plaintiff, on June 12, notified BOA's counsel that Plaintiff would be initiating contempt proceedings if they did not receive a response by June 16. (Dunnegan Decl. ¶¶ 9, 10.) BOA apparently did not respond to Plaintiff's notice. (Id. ¶ 10.)

Adjudge Defendant Kirtseang and BOA[4] in Contempt of the April 27, 2009 Temporary Attachment Order. In sum, Wiley alleges that one of BOA's New York branches, on Fifth Avenue, received personal service of the Attachment Order prior to the transaction at issue at its Culver Center, California branch. Specifically, Wiley alleges that, despite both BOA and Kirtseang being served with the notice of attachment, Kirtsaeng was allowed to withdraw upwards of $6,400 from his BOA account, leaving the account with essentially no balance, and frustrating the purpose of Wiley's having moved to attach those funds. Wiley seeks a finding of civil contempt, the turnover of $6,400 into an escrow account and the imposition of an appropriate fine.

II. Discussion

Plaintiff, as "[t]he party seeking enforcement of an order[,] bears the burden of demonstrating that the persons to be held in contempt are within the scope of the injunction." People of N.Y. v. Operation Rescue Nat'l, 80 F.3d 64, 70 (2d Cir. 1996). A movant meets this standard with "clear and convincing evidence." See Chao v. Gotham Registry, Inc., 514 F.3d 280, 291 (2d Cir. 2008); City of New York v. Local 28, Sheet Metal Workers' Int'l Ass'n, 170 F.3d 279, 282 (2d Cir. 1999). Plaintiff has failed to meet this burden as to BOA because it has failed to demonstrate sufficient notice to

[4] BOA is not a party to the underlying action, and, despite being served with the motion, BOA has not responded to the court.

the California branch from which the funds at issue were withdrawn.

Federal and New York state law provide for the institution of the TRO. See Fed. R. Civ. P. 64; N.Y. C.P.L.R. 6201, 6210, 6214 (1980 & Supp. 2009). However, regardless of any application of New York state law in regards to TROs, Federal Rule 65 "governs such matters as procedure, notice, time periods, and the proper form and service of injunctive orders." In re Feit & Drexler, Inc., 760 F.2d 406, 415 (2d Cir. 1985). In accordance with Federal Rule 65(d), persons bound by the Attachment Order include "only the following who receive actual notice of it by personal service or otherwise":

> (A) the parties;
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> (B) the parties' officers, agents, servants, employees, and attorneys; and
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> (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

(emphasis added).[5] "Actual notice" is "[n]otice given directly to,

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[5] Notably, this is not inconsistent with New York state law. According to New York state law, "court orders must be obeyed as a matter of public policy and personal service of an order is not a prerequisite to holding a person in contempt where he or she has actual knowledge of the order." Police Benevolent Ass'n of N. Y. State Troopers v. Div. of N.Y. State Police, 811 N.Y.S.2d 176, 178 (N.Y. App. Div. 2006). See also City Sch. Dist. of Schenectady v. Schenectady Fed'n of Teachers, 375 N.Y.S.2d 179, 182 (N.Y. App. Div. 1975) ("[p]ersonal service of a certified copy of an order is not necessary to hold a party in contempt thereof if the party had actual knowledge of that order.") (citing People ex rel. Stearns v. Marr, 74 N.E. 431, 434 (N.Y. 1905); Yorktown Cent. School Dist. No. 2 v. Yorktown Cong. of Teachers, 348 N.Y.S.2d 367, 372-73 (N.Y. App. Div. 1973) (per curiam); Puro v. Puro, 333 N.Y.S.2d 560, 561 (N.Y. App. Div. 1972) (per curiam), aff'd, 305 N.E.2d 778 (N.Y. 1973) (mem.)).

or received personally by, a party." Black's Law Dictionary 1164 (9th ed. 2009). See also 66 C.J.S. Notice § 4 ("notice is regarded in law as actual when the person sought to be affected by it knows of the existence of the particular fact in question, or is conscious of having the means of knowing it."); 58 Am. Jur. 2d, Notice § 4 ("The words 'actual notice' do not always mean in law what in metaphysical strictness they import. They more often mean knowledge of facts and circumstances sufficiently pertinent in character to enable reasonably cautious and prudent persons to investigate and ascertain the ultimate facts. Notice is regarded as actual where the person charged with notice either knows the particular facts in question or is conscious of having the means to know them, even though such means have not been used. . . . Actual notice embraces those things that reasonably diligent inquiry and exercise of the means of information at hand would disclose." (footnotes omitted)).[6] The Supreme Court has equated "actual

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[6] Implied actual notice is different from constructive notice. See 58 Am. Jur. 2d, Notice §§ 5-6. Ogle v. Salamatof Native Ass'n, 906 F. Supp. 1321, 1326 (D. Alaska 1995) differentiates the two concepts in a useful way:

> Similar to implied actual notice is constructive notice. Constructive notice is a legal inference or a legal presumption of notice which may not be disputed or controverted. The importance of the classification of notice of this character arises from the fact that constructive notice is a legal inference, while implied actual notice is an inference of fact.

Id. (citations omitted).

notice" to "receipt of notice." Dusenbery v. United States, 534 U.S. 161, 169 n.5 (2002).

It is clear that the BOA's Fifth Avenue branch received actual notice of the attachment. However, pursuant to Fed. R. Civ. P. 64, the remedy of attachment - and thus the reach of the Attachment Order - is governed by state law. See Fed. R. Civ. P. 64(a); Chem. Bank v. Haseotes, 13 F.3d 569, 572 (2d Cir. 1994) (per curiam); Cargill, Inc. v. Sabine Trading & Shipping Co., 756 F.2d 224, 227 (2d Cir. 1985). New York state law limits the reach of the Attachment Order and the notice thereof.

In New York, the "separate entity rule"-- "which in its pristine form provides that 'each branch of a bank is treated as a separate entity . . . in no way concerned with accounts maintained by depositors in other branches or at a home office'"-- limits the effect of Plaintiff's service in New York. Motorola Credit Corp. v. Uzan, 288 F. Supp. 2d 558, 560 (S.D.N.Y. 2003) (quoting Lok Prakashan Ltd. v. India Abroad Publ'ns, Inc., No. 00 Civ. 5852 (LAP), 2002 WL 1585820, at *1 (S.D.N.Y. July 16, 2002) (citations omitted); Cronan v. Schilling, 100 N.Y.S.2d 474, 476 (N.Y. Super. Ct. 1950), aff'd, 126 N.Y.S.2d 192 (N.Y. App. Div. 1953) (mem.)). As a consequence, the "mere fact that a bank may have a branch within New York is insufficient to render accounts outside of New York subject to attachment." Id. (quoting Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Advanced Employment Concepts, Inc., 703

N.Y.S.2d 3, 4 (N.Y. App. Div. 2000)); Nat'l Audubon Soc'y, Inc. v. Sonopia Corp., No. 09 Civ. 975 (PGG), 2009 U.S. Dist. LEXIS 17094, at *15-16 n.3 (S.D.N.Y. Mar. 6, 2009).[7] Compare United States v. First Nat'l City Bank, 379 U.S. 378, 383-84 (1965) (holding that, under federal law, national parent bank may be sued *in personam* and, once such jurisdiction is obtained, a court can order attachment of property in a foreign branch bank; this is because "[o]nce personal jurisdiction of a party is obtained, the District Court has authority to 'freeze' property under [the party's] control, whether the property be within or without the United States"); Koehler v. Bank of Bermuda Ltd., 12 N.Y.3d 533, 537, 538-41 (N.Y. 2009) (holding that a court can, where a creditor has obtained a judgment against a debtor pursuant to C.P.L.R. art. 52,

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[7] "The putative purpose of this doctrine is to avoid undue interference with ordinary banking transactions." Id. "The rationale . . . has to do with the practical realities of branch banking - namely, that branches cannot (or could not, at the time the rules were first formulated) communicate instantaneously and therefore, in order to avoid multiple liabilities, a bank must be able to limit its responsibilities to one branch at a time." Greenbaum v. Svenska Handelsbanken, 26 F. Supp. 2d 649, 654 (S.D.N.Y. 1998) (refusing to extend the separate entity rule to federal Title VII law, and exercising jurisdiction over foreign parent bank given *in personam* jurisdiction over its local branch pursuant to the established federal and New York state doctrine that, for purposes of personal jurisdiction of named defendants, "the domestic branch of a foreign bank is not a separate legal entity"). "Unless each branch of a bank is treated as a separate entity for attachment purposes, no branch could safely pay a check drawn by its depositor without checking with all other branches and the main office to make sure that no warrant of attachment had been served upon any of them." Motorola, 288 F. Supp. 2d at 560-61 (footnote and citation omitted).

as "post-judgment enforcement requires only jurisdiction over persons," once such judgment creditor files an action against a defendant bank and the court obtains *in personam* jurisdiction over this bank, the court in New York can order the turnover of property located outside of the state); In re N.Y. Agency and Other Assets of Bank of Commerce & Credit Int'l, S.A., 683 N.E.2d 756, 762 (N.Y. 1997).[8]

New York's "separate entity rule" is not without its limits. In Digitrex, Inc. v. Johnson, 491 F. Supp. 66 (S.D.N.Y. 1980), the court "opined that modern bank computerization had rendered this fear [of inappropriately disrupting the banking system] obsolete, thus casting doubt on the continued viability of the separate entity doctrine." Motorola, 288 F. Supp. 2d at 561 (citing Digitrex, 491 F. Supp. at 68-69). See also McCarthy v. Wachovia Bank, N.A., No. CV 08-1122, 2008 U.S. Dist. LEXIS 98586, at *13-15 (S.D.N.Y. Dec. 4, 2008). Accordingly, now, New York courts have started to re-examine the "separate entity rule"; "[i]t now appears clear, for example, that a restraining notice served on a bank's main New York office may in appropriate circumstances restrain accounts in all branches of that bank located in the issuing court's geographic jurisdiction." Motorola, 288 F. Supp. 2d at 561 (citing Limonium Maritime, S.A. v. Mizushima Marinera, S.A., 961 F.

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[8] As noted above, Plaintiff never made BOA a party to this action and has not, to the court's knowledge, filed any other action on this matter against BOA.

Supp. 600, 607 (S.D.N.Y. 1997) (citing cases); Fidelity Partners, Inc. v. Philippine Exp. & Foreign Loan Guar. Corp., 921 F. Supp. 1113, 1119-20 (S.D.N.Y. 1996); Therm-X-Chemical & Oil Corp. v. Extebank, 444 N.Y.S.2d 26, 27 (N.Y. App. Div. 1981); Carrick Realty Corp. v. Flores, 598 N.Y.S.2d 903, 907 (N.Y. City Civ. Ct. 1993)). But see Gavilanes v. Matavosian, 475 N.Y.S.2d 987, 989-91 (N.Y. City Civ. Ct. 1984) (holding that BOA could be forced to respond to a judgment creditor's information subpoena served upon its New York office that requested information about a judgment debtor's account held at the bank's San Francisco office, yet the court specifically limited its holding to information subpoenas and reiterated the well-known rule that a New York court may not attach property that lies outside its jurisdiction).

But New York courts still hold to the "separate entity" rule unless certain requirements are met: "[t]he Digitrex exception to the separate entity rule is only applicable where: (1) the restraining notice is served on the bank's main office; (2) the bank's main office and branches are within the same jurisdiction; and (3) the bank branches are connected to the main office by high-speed computers and are under the centralized control of the main office." Limonium Maritime, 961 F. Supp. at 607-08. See also Mones v. Commercial Bank of Kuwait, S.A.K., 399 F. Supp. 2d 310, 318 n.57 (S.D.N.Y. 2005) ("the Digitrex holding cannot be extended to allow attachment of accounts outside the jurisdiction without a

pronouncement from the Court of Appeals or an act of the Legislature. Without such a pronouncement, this Court likewise can neither apply Digitrex nor extend its holding") (quotation marks omitted)), vacated on other grounds, 204 F. App'x 988 (2d Cir. 2006); Yayasan Sabah Dua Shipping SDN BHB v. Scandinavian Liquid Carriers, Ltd., 335 F. Supp. 2d 441, 447-48 n.42 (S.D.N.Y. 2004) ("Digitrex cannot be read so broadly as to permit extraterritorial reach of Rule B attachment or garnishment."); Reibor Int'l Ltd. v. Cargo Carriers (KACZ-CO.), Ltd., No. 83 Civ. 793 (CES), 1984 WL 1467, at *1 (S.D.N.Y. July 24, 1984) ("the goods or credits sought to be attached must be presently within the district.") (citation omitted), aff'd, 759 F.2d 262 (2d Cir. 1985)). Accord Sara Lee Corp. v. Gregg, No. 1:02CV195, 2003 U.S. Dist. LEXIS 23479, at *8-12 (M.D.N.C. Dec. 18, 2003); Blueye Navigation, Inc. v. Oltenia Navigation, Inc., No. 94 Civ. 1500 (LAP) & 94 Civ. 2653 (LAP), 1995 U.S. Dist. LEXIS 1844, at *13-14 (S.D.N.Y. Feb. 15, 1995).[9]

Moreover, under New York commercial law, "notice received by one branch of a bank does not [even] constitute constructive notice

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[9] One New York state opinion has followed Digitrex, but only to the extent that notice was served on a main office. See S & S Mach. Corp. v. Mfrs. Hanover Trust Co., 638 N.Y.S.2d 953, 955-56 (N.Y. App. Div. 1996). The Second Circuit has not spoken on this issue other than to note the Digitrex opinion in passing. See Reibor Int'l Ltd. v. Cargo Carriers (KACZ-CO.) Ltd., 759 F.2d 262, 264-65 (2d Cir. 1985). The court notes that, although indeed the separate entity rule may be outdated, the court must follow the rule absent direction from the New York legislature, New York state courts or the Second Circuit.

to any other branch of the same bank." Gutekunst v. Cont'l Ins. Co., 486 F.2d 194, 196 (2d Cir. 1973) (per curiam) (citing U.C.C. § 4-106; Chrzanowska v. Corn Exch. Bank, 159 N.Y.S. 385, 388 (N.Y. App. Div. 1916), aff'd, 122 N.E. 877 (N.Y. 1919) (per curiam) (mem.)); Rosner v. Bank of China, No. 06 CV 13562, 2008 U.S. Dist. LEXIS 105984, at *29 (S.D.N.Y. Dec. 18, 2008). This rule has been applied outside the context of notice pursuant to the U.C.C. See, e.g., United States, Small Bus. Admin. v. Bridges, 894 F.2d 108, 112-13 & n.2 (5th Cir. 1990) (per curiam) (notice of Chapter 11 bankruptcy proceedings). See also Carr v. Marietta Corp., 211 F.3d 724, 732 (2d Cir. 2000) (applying Gutekunst notice to "good faith" in the context of the Business Corporations Law).

Plaintiff has not presented evidence that the BOA branch at 350 Fifth Avenue is a "main office." Moreover, this court could not have attached accounts in a bank's branch in California, the *res* at issue in this case, even were the "separate entity rule" inapplicable here. See Yayasan, 335 F. Supp. 2d at 447-48;[10] Nat'l

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[10] Yayasan, like Digitrex, recognized the problems associated with according a *situs* to a bank account, especially given today's commercial banking realities. See Yayasan, 335 F. Supp. 2d at 448 ("In this wired age, the location of an intangible, especially a bank account, is a metaphysical question. By and large, bank deposits exist as electronic impulses embedded in silicone chips. In a sense, therefore, bank funds are both everywhere and nowhere."); see also McCarthy, 2008 U.S. Dist. LEXIS 98586, at *13-14 (noting that the "separate entity" rule is "outdated in light of current banking transactions" and "[t]here is no question that modern banking makes Plaintiff's funds available to him at any branch in the country and likely, the world."--"This is not a case where a piece of real or tangible

Audubon Soc'y, 2009 U.S. Dist. LEXIS 17094, at *15-16 n.3; Blueye Navigation, 1995 U.S. Dist. LEXIS 1844, at *14; Det Bergenske Dampskibsselskab v. Sabre Shipping Corp., 341 F.2d 50, 52, 53-54 (2d Cir. 1965) (property attached in Eastern District of New York did not provide jurisdiction over bank account located in the Southern District). See also Koehler, 12 N.Y.3d at 538-39 (distinguishing between C.P.L.R. art. 62 attachment and C.P.L.R. art. 52 post-judgment collection suits; as to the former, "[i]t is a fundamental rule that in attachment proceedings the *res* must be within the jurisdiction of the court issuing the process, in order

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personal property exists only in a foreign state, but a case of funds located in a bank account with presumably worldwide access. It is can certainly be argued that such assets are located both everywhere, and nowhere."; refusing to dismiss the action as, on the record before the court, fact issues existed as to the applicability of the "separate entity" rule). However, the court in Yayashan nonetheless also noted:

> But the problem is not a new one. Before the advent of electronic banking, courts grappled with the dilemma of pinpointing the location of intangible assets. It is a dilemma that calls for a practical judgment. As Judge Cardozo so eloquently put it in Severnoe Securities Corporation v. London & Lancashire Inc.:
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> > "The situs of intangibles is in truth a legal fiction, but there are times when justice and convenience requires that a legal situs be ascribed to them . . . [citations omitted] . . . At the root of the selection is generally a common sense appraisal of the requirements of justice and convenience in particular conditions."

Yayashan, 335 F. Supp. 2d at 448 (quoting Severnoe Secs. Corp. v. London & Lancashire Ins. Co., 174 N.E. 299, 300 (N.Y. 1931)) (footnotes omitted).

to confer jurisdiction"; "attachment suits partake of the nature of suits *in rem*, and are distinctly such when they proceed without jurisdiction having been acquired of the person of the debtor in the attachment.") (citations and internal quotation marks omitted). In this regard, Plaintiff has presented the court with no evidence that Kirtsaeng's account was within this court's jurisdiction.

In addition, Plaintiff has presented the court with no evidence that the Culver Center branch had actual notice of the Attachment Order, or evidence from which the existence of such actual notice could be inferred. For example, Plaintiff has made no showing that the New York branch in fact communicated notice of the Attachment Order to an actual custodian of Defendant's account.

III. Conclusion

Plaintiff has failed to present the court with "clear and convincing evidence" to warrant a finding of civil contempt and an institution of a fine against Bank of America. For this reason, Plaintiff's motion as to Bank of America is DENIED.

It is SO ORDERED.

Donald C. Pogue, Judge[11]

Dated: September 15, 2009
New York, New York

[11] Judge Donald C. Pogue of the United States Court of International Trade, sitting by designation.