Guardian Fiduciary Trust Ltd. v Stopanska Bank AD-Skopje
2013 NY Slip Op 31309(U)
June 17, 2013
Sup Ct, NY County
Docket Number: 650799/2012
Judge: Eileen Bransten

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN BRANSTEN
J.S.C.

PRESENT: _____ **PART** 3
Justice

Index Number : 650799/2012
GUARDIAN FIDUCIARY TRUST
vs.
STOPANSKA BANKA NA - SKOPJE
SEQUENCE NUMBER : 001
DISMISS ACTION INCONVENIENT FORUM

INDEX NO. 650799/2012
MOTION DATE 4/3/13
MOTION SEQ. NO. 001

The following papers, numbered 1 to 3 **, were read on this motion to/for** dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** 1
Answering Affidavits — Exhibits _____ **No(s).** 2
Replying Affidavits _____ **No(s).** 3

Upon the foregoing papers, it is ordered that this motion is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 6-17-13

Eileen Branston, **J.S.C.**

1. **CHECK ONE:** ☑ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE: MOTION IS:** ☑ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3
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GUARDIAN FIDUCIARY TRUST LIMITED f/k/a CAPITAL CONSERVATOR SAVINGS & LOAN, LIMITED,

Plaintiff,

-against-

Index No. 650799/2012
Motion Date: 4/3/13
Motion Seq. No. 001

STOPANSKA BANK AD-SKOPJE,

Defendant.

----------X

Eileen Bransten, J.:

In this breach of contract action, Defendant Stopanska Bank AD-Skopje ("SB") moves, pursuant to CPLR 3211(a)(1), (2), (5) and (8), and CPLR 327(a), to dismiss the complaint, based on an alleged lack of subject or personal jurisdiction, the doctrines of comity, res judicata and collateral estoppel, and on the ground of forum non conveniens. For the reasons that follow, Defendant's motion is granted.

I. Background

Plaintiff Guardian Fiduciary Trust Limited f/k/a Capital Conservator Savings & Loan, Limited is a New Zealand company, having offices in Uruguay and Serbia. According to the complaint, Plaintiff provided "fee-based private trust banking and wire services, private major high-limit traditional and nontraditional Mastercard debit cards,

private on-line trading and private gold and precious metal purchases ... ." Compl., ¶ 23. SB is a Macedonian bank, authorized to do business in Macedonia, under Macedonian banking regulations. SB is not authorized to do business in New York, nor does it own property in New York.

On November 2, 2007, Plaintiff and SB entered into an agreement ("Agreement") (Affidavit of Maya Andreevska-Blazevska ("Andreevska-Blazevska Aff."), Ex. 2), by which Plaintiff opened two accounts with SB: a non-resident foreign currency account, and a non-resident MKD denar account ("Accounts"). Pursuant to Article 1 of the Agreement, Plaintiff was to collect and make payments from the Accounts, in foreign currency and denars, respectively, while, pursuant to Article 4, SB would pay interest on the funds deposited in the Accounts, and collect commissions based on the payments and disbursements made from the Accounts. Pursuant to Article 7 of the Agreement, the Accounts could be closed on Plaintiff's written request, or "on the basis of Law."

In April 2009, SB's Foreign Payment Operations Department reported to SB's Compliance Department transactions in the Accounts it considered to be suspicious, possibly related to money laundering. On April 24, 2009, SB submitted a Suspicious Transaction Report to the Macedonian Office of Money Laundering and Terrorist Finance Prevention.

On June 5, 2009, SB was notified by JP Morgan in an email that JP Morgan would no longer process transactions for Plaintiff, due to suspicions of money laundering. JP Morgan requested that no further transactions on behalf of Plaintiff be routed to JP Morgan. (Andreevska-Blazevska Aff., Ex. 3.) On June 11, 2009, SB notified Plaintiff that SB would be terminating relations with Plaintiff as of June 12, 2009. *Id.*, Ex. 4. SB requested that Plaintiff inform SB where to transfer the nearly $3 million in the Accounts. The monies were then transferred to Eurostandard Bank.

In the complaint it is alleged that, on August 31, 2009, Plaintiff's director, Borko Markovic ("Markovic"), was arrested for money laundering in the amount of $30 million. A criminal proceeding was commenced against Markovic in Macedonia. He was found guilty.

In June 2010, Plaintiff commenced an action against SB in Macedonia, before that Court of First Instance Skopje 2, Skopje Department of Economic Disputes, seeking damages of €250,000,000 it claimed to have suffered as a result of SB's closing of the Accounts. On December 20, 2011, the Macedonian court found Plaintiff's complaint to be unfounded, and dismissed the action. Plaintiff was required to compensate SB for its legal costs. Among other holdings, the Macedonian court found that there were "no damage, no causal relations of illegality of the actions of the [SB]." (Affidavit of Natasha

Trpenoska-Trenchevska ("Trpenoska-Trenchevska Aff."), Ex. 6) ("Macedonian Trial Court Verdict").

Plaintiff appealed the Macedonian Trial Verdict to the Court of Appeal in Skopje on January 23, 2012. Before the appeal was decided, Plaintiff commenced the present action in New York, based on the same allegations, and seeking the same damages, which it had made, and had sought, in the Macedonian action. The Macedonian Court of Appeals affirmed the trial courts's ruling, finding that the complaint was unfounded, the law had been properly implemented, and the trial court had correctly found no causal relation between SB's actions and Plaintiff's alleged damages. Plaintiff was directed to pay SB for the costs of the appeal.

Plaintiff has apparently appealed the determination of the Macedonian Court of Appeals, and is awaiting a decision.

Plaintiff brings the present action, alleging causes of action for breach of contract, negligence, and negligent misrepresentation, seeking compensatory damages of $400,000,000, along with punitive damages, attorney's fees and costs. SB moves for dismissal of the action, claiming a lack of personal jurisdiction; a lack of subject matter jurisdiction under Business Corporations Law § 1314; the bar of comity, res judicata and collateral estoppel; and on the basis of forum non conveniens.

II. Discussion

A. *Jurisdiction*

The question of jurisdiction must be addressed first, as it is a threshold issue. *See National Union Fire Ins. Co. of Pittsburgh v. St. Barnabas Cmty Enter., Inc.*, 48 A.D.3d 248, 249 (1st Dep't 2008); *Elm Mgmt. Corp. v. Sprung*, 33 A.D.3d 753, 755 (2d Dep't 2006) (error to determine motion to dismiss before addressing jurisdiction). SB argues that there is a question of a lack of subject matter jurisdiction under New York Business Corporation Law § 1314, and a lack of personal jurisdiction under the State's long-arm statute, CPLR 302. Plaintiff does not dispute a lack of jurisdiction under CPLR 302, but, rather, claims there is personal jurisdiction under CPLR 301.

Under Business Corporation Law § 1314,

> (b) Except as otherwise provided in this article, an action or special proceeding against a foreign corporation may be maintained by another foreign corporation of any type or kind or by a non-resident in the following cases only:
>
> > (1) Where it is brought to recover damages for the breach of a contract made or to be performed within this state, or relating to property situated within this state or at the time of the making of the contract.
> >
> > (2) Where the subject matter of the litigation is situated within this state.

> (3) Where the cause of action arose within this state, except where the object of the action or special proceeding is to affect the title of real property situated outside this state.
>
> (4) Where, in any case not included in the preceding subparagraphs, a non-domiciliary would be subject to the personal jurisdiction of the courts of this state under section 302 of the civil practice law and rules.
>
> (5) Where the Defendant is a foreign corporation doing business or authorized to do business in this state.

The evidence establishes that the Agreement was not made or to be performed in New York; the subject matter of the dispute is not situated here; the causes of action did not arise here, nor do they involve real property; in personam jurisdiction is not premised under CPLR 302; and SB is not authorized to do business in New York. Therefore, Plaintiff's right to sue in this jurisdiction depends on whether SB is "doing business" here, the very subject of SB's argument that there is no personal jurisdiction under CPLR 301.

> A foreign corporation is amenable to suit in New York courts under CPLR 301 if it has engaged in such a continuous and systematic course of "doing business" here that a finding of its "presence" in this jurisdiction is warranted. The test for "doing business" is a "simple [and] pragmatic one," which varies in its application depending on the particular facts of each case. The court must be able to say from the facts that the corporation is "present" in the State "not occasionally or casually, but with a fair measure of permanence and continuity" [internal citations omitted].

Landoil Res. Corp. v. Alexander & Alexander Serv., Inc., 77 N.Y.2d 28, 33-34 (1990); *see also Laufer v. Ostrow*, 55 N.Y.2d 305, 310 (1982); *Farahmand v. Dalhousie Univ.*, 96 AD3d 618, 618-19 (1st Dep't 2012). Plaintiff claims that SB is subject to jurisdiction in New York State because it "conducts its banking business in New York." (Plaintiff's Memo. of Law, at 1.) In pushing for jurisdiction, Plaintiff relies on the fact that SB has 11 bank accounts at three banks located in New York, and maintains a relationship with Mastercard International, Inc. ("Mastercard") and Visa, Inc. ("Visa") in New York.

It is firmly established that, "[t]he existence of a bank account in New York by itself is not sufficient" to warrant a finding of "doing business" in New York for jurisdictional purposes. *Fremay, Inc. v. Modern Plastic Mach. Corp.*, 15 A.D.2d 235, 241 (1st Dep't 1961); *see also Pub. Adm'r of Cnty. of N.Y. v. Odeco, Inc.*, 88 A.D.2d 543, 545 (1st Dep't 1982) (ownership of several bank accounts "did not constitute the doing of business" in New York); *Hastings v. Piper Aircraft Corp.*, 274 A.D. 435, 438 (1st Dep't 1948) (local bank account insufficient basis for jurisdiction); *First Capital Asset Mgmt., Inc. v. Brickellbush, Inc.*, 218 F. Supp. 2d 369, 393 (S.D.N.Y. 2002), *aff'd* 385 F.3d 159 (2d Cir. 2004) (maintenance of New York bank accounts "is not alone sufficient to subject [Defendant] to jurisdiction under Section 301 [of the CPLR]"); *Grove Valve & Regulator Co., Inc. v. Iranian Oil Serv. Ltd.*, 87 F.R.D. 93, 95 (S.D.N.Y. 1980) ("maintenance of local bank accounts" insufficient to warrant jurisdiction).

Plaintiff, in an effort to emphasize SB's presence in New York, notes that SB has several different types of accounts here, in more than one bank. However, Plaintiff has failed to show how even numerous banking transactions conducted here amount to doing business, in light of the law as discussed above. For instance, in *Bank of America v. Whitney Central National Bank,* 261 U.S. 171 (1923), the Court found that, even when a foreign bank conducted a "large New York business," which involved "varied, important and extensive" transactions in New York through six correspondent banks, jurisdiction was not founded where the Defendant had no place of business in New York. *Id.* at 173. The Court found that it was the correspondent banks that were "doing business" in New York, not the Defendant. *Id.*

Plaintiff relies on several cases in which jurisdiction was found based on the existence of bank accounts in New York. However, these cases are distinguishable, based on how integral the bank accounts were to the company's business. For instance, in *Holtzman v. Lauder,* 1994 WL 88013, at *5 (S.D.N.Y. 1994), the court recognized that, in general, the maintenance of a bank account in New York is insufficient for jurisdiction under CPLR 301, but found that the Defendant use of the bank account was an "essential activity" of the Defendant, "if not the principal activity" of the Defendant at the time in question. In *Georgia-Pacific Corporation v. Multimark's International Ltd.,* 265 A.D.2d 109, 111 (1st Dep't 2000), it was found that the use of a bank account "'for the receipt of

substantially all of the income of a foreign corporation and for the payment of substantially all of its business expenses' [internal citations omitted]," was enough to overcome the rule that a bank account is generally not a basis of jurisdiction in New York. *See also Turbana Corp. v. M/V "SUMMER MEADOWS," her engines, boilers, etc*, 2003 WL 22852742, at *3 (S.D.N.Y. 2003) ("the entity must utilize the bank account more than nominally, and/or must exert control over the bank account ... if the entity places substantially all of its income in the account, the account, alone, may be sufficient"); *Matter of Gaming Lottery Sec. Litig.*, 2000 WL 702978, at *1 n.3, (S.D.N.Y. 2000) (bank account is "essential" to the company's business).

SB is a bank licensed and authorized to do business in Macedonia. There is nothing to show that the use of its New York bank accounts was "essential" to its business, or that it did "substantially all" of its business through the accounts. Apparently, SB did ordinary banking business in the accounts, and this is not enough to create jurisdiction under the "doing business" standard in CPLR 301. Similarly, its relationship with Mastercard and Visa does not appear to be of a magnitude as to warrant the imposition of jurisdiction here. Plaintiff's speculation that discovery might reveal proof of a stronger relationship with New York through the various bank accounts is not enough to create a delay in dismissing this action for lack of jurisdiction, under CPLR 301, or Business Corporation Law § 1314.

B. *Res Judicata*

Dismissal is also warranted under the doctrine of res judicata. "Under the doctrine of res judicata, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter." *Matter of Hunter*, 4 N.Y.3d 260, 269 (2005); *see also Josey v. Goord*, 9 N.Y.3d 386 (2007). "The rationale underlying this principle is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again." *In re Hunter*, 4 N.Y.3d at 269. "[T]he fundamental inquiry is whether relitigation should be permitted in a particular case in light of ... fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results [interior quotation marks and citations omitted]." *Buechel v. Bain*, 97 N.Y.2d 295, 304 (2001).

There is no question that Plaintiff herein is bringing an action identical to the one it lost in Macedonia. There is also no question that Plaintiff is unhappy with certain evidentiary and other rulings made against it by the Macedonian trial court. Plaintiff insists, however, that the basis for its complaint against the Macedonian court verdict is the fundamental and pervasive corruption of the Macedonian court system, which Plaintiff alleges made it wholly impossible for it to get a fair trial in Macedonia.

Plaintiff contends that "abundant" evidence exists that "reveal[s] a chronic pattern of systemic injustice that conclusively demonstrates that Macedonia is not a fair forum"

Plaintiff's Memo. of Law, at 16. The evidence it provides is contained in a 2007 report entitled "Doing Business in Macedonia; a Country Commercial Guide for U.S. Companies" (Aff. of Patrick J. Sullivan, Ex. D), put out by the U.S. & Foreign Commercial Service, and the Department of State. This document recites, in its introduction, "Macedonia is a small Southeastern European country that has implemented substantial reform in its economic, legal and political systems in order to improve its attractiveness to foreign investors. However, problems with enforcement of these reforms and respect for the rule of law in general continue to affect business opportunities." *Id.* at 2. The Report continues that "[t]he country's weak judicial system and significant levels of corruption present challenges. While reforms of the legal system are underway, the courts are slow, inefficient, and subject to political pressures and corruption. This makes it difficult in some instances to enforce contracts." *Id.* The Report does state that "[t]he World Bank recently ranked Macedonia as the 22nd best country in the world in which to do business." *Id.*

Plaintiff also offers the World Economic Forum "Global Competitive Report 2012-2013" (Sullivan Aff., Ex. E) ("Global Report"), a hefty document which

purportedly ranks Macedonia poorly in "judicial independence" (Global Report, at 393) and "favoritism with respect to decisions of government officials." *Id.* at 393.[1]

Even assuming that these documents were to be found admissible as evidence, which is doubtful, they appear to be highly subjective, and unscientific. *See, e.g.,* Global Report, at 394 (United States ranked behind 59 countries, including Libya and Iran, on indicators of "favoritism in decisions of government officials); Global Report, at 397 (United States ranked behind 35 countries, including Rwanda and Sri Lanka, in "efficacy of legal framework in settling disputes.") And, while, by some indicators, Macedonia is given relatively low scores in various business capacities, other indicators of modern development are more favorable. Similar documents provided by SB (which appear as dubiously admissible as Plaintiff's reports), show a brighter picture for Macedonia's judicial system. *See* Grival Aff., Ex. 10, Monyval Report, at 25 (2010 core reform laws adopted "incorporating the best European practices, solutions and standards" to "strengthen the independence of the judiciary"); *id.* at 29 ("[r]egarding the efficiency of the judiciary, evident are positive results and timeliness in resolving court cases, as the result of the strengthening of institutions' capacity ...").[2]

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[1]The court should not be compelled to wade through a 575-page document to find Plaintiff's references.

[2]The court has also been provided by SB with copies of reports from the World Bank "Doing Business 2012" for Macedonia, and "The World Justice Project/ Rule of Law Index" for

The bar to bypassing the judicial system of foreign countries, to try cases not related to New York in New York, is high. In Plaintiff's cases, *Bridgeway Corp. v. Citibank,* 201 F.3d 134 (2d Cir. 2000), the Court ruled that Liberia, in the midst of civil war, did not have a judicial system to which the New York court could, in fairness, defer, while in *Bank Melli Iran v. Pahlavi,* 58 F.3d 1406 (9th Cir. 1995), the Court found that the Defendant, the sister of the deposed Shah of Iran, could not expect to get a fair trial in Iran. Both these cases clearly indicate situations where the foreign country's judiciary was compromised, casting significant doubt on the fairness of any decision its courts might render, under the circumstances.

On the other hand, United States' courts have found that "[a] foreign forum is not inadequate unless its procedures are so deficient as to be wholly devoid of due process [interior quotation marks and citations omitted]." *Marra v. Papandreou*, 59 F. Supp. 2d 65, 73 (D.D.C. 1999), *aff'd* 216 F'3d 1119 (D.C. Cir. 2000) (in context of enforcing forum selection clause); *see also Türedi v. Coca Cola Co.*, 343 Fed. App'x 623, 625-626 (2d Cir. 2009) ("[a] forum may be deemed inadequate if it is characterized by a complete absence of due process or an inability of the forum to provide substantial justice [interior quotation marks and citation omitted]" in the context of forum non conveniens).

2012-2013, for its reading pleasure.

Plaintiff has failed to convince this court that the Macedonian court, and, in particular, the court which ruled against it in Macedonia, is so corrupt that justice cannot be had, or that due process was lacking. All indicators show that a fair trial was had by Plaintiff in Macedonia, regardless of some inefficiency and possible corruption in the Macedonian system as a whole. Thus, as the Macedonian action was identical to the present action, and was decided against Plaintiff, the doctrine of res judicata bars this court from allowing Plaintiff to relitigate the dispute. The complaint should be dismissed on this ground as well.

As a result of the foregoing, it is unnecessary to address any other arguments raised by the parties.

III. Conclusion

This action is unsupportable, as the court lacks subject matter jurisdiction to address the dispute of two foreign countries in New York under Business Corporation Law § 1314; because of a lack of jurisdiction under CPLR 301; and on grounds of res judicata.

Accordingly, it is

ORDERED that the motion brought by Defendant Stopanska Bank AD-Skopje to dismiss the complaint is granted; and it is further

ORDERED that the complaint is hereby dismissed, with costs and disbursements to this Defendant as taxed by the Clerk of the Court upon presentation of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: New York, New York
June 17, 2013

ENTER:

Hon. Eileen Bransten, J.S.C.