

Henkel v Masiero

2013 NY Slip Op 33365(U)

March 15, 2013

Sup Ct, New York County

Docket Number: 650425/2012

Judge: Eileen Bransten

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT:

PART 3

EILEEN BRANSTEN Justice

Index Number : 650425/2012
HENKEL, ANA PAULA
vs.
MASIERO, FLORIANA RAGLIONE
SEQUENCE NUMBER : 004
DISM ACTION/INCONVENIENT FORUM

INDEX NO. 650425/2012
MOTION DATE 8/21/12
MOTION SEQ. NO. 004

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: 3-15-13 Eileen Bransten J.S.C.

- 1. CHECK ONE: CASE DISPOSED
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: IAS PART THREE

-----X
ANA PAULA HENKEL, Individually and Derivatively
on Behalf of BIDONE NERO LTD.,

Plaintiff,

-against-

FLORIANA RAGLIONE MASIERO,
GIULIANO MASIERO,
ADRIANO SALVADOR MASIERO,

Defendants,

-and-

BIDONE NERO LTD.,

Nominal Defendant.

-----X
BRANSTEN, J.

Index No. 650425/2012
Motion Date: 08/21/2012
Motion Seq. No.: 004

Defendants Floriana Raglione Masiero (“Floriana”), Giuliano Masiero (“Giuliano”) and Adriano Salvador Masiero (“Adriano”) (collectively “Defendants”) move to dismiss pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction. Plaintiff Ana Paula Henkel (“Henkel”) opposes.

I. BACKGROUND

On December 19, 2006, Annibale Raglione (“Raglione”), Floriana’s brother and Henkel’s great-uncle, established a company called Bidone Nero Ltd. (“Bidone”) “to hold cash and investments” for Raglione, Floriana, Adriano and Henkel. (Complaint (“Compl.”))

(Docket No. 1), ¶ 10.) Bidone was incorporated under the laws of the British Virgin Islands. *Id.* at ¶ 7. Bidone was jointly owned by Raglione, Henkel, Floriana and her son Adriano. *Id.* Raglione and Floriana served as Bidone's directors. *Id.* All of the owners and directors of Bidone are Brazilian citizens domiciled in Brazil.

In January 2007, Bidone opened and deposited its assets into accounts at HSBC bank in New York City. *Id.* at ¶ 11. As of March 31, 2010, Bidone's HSBC accounts contained \$8,716,079.88 in cash and investments. *Id.* at ¶ 13.

On March 15, 2010, Raglione died intestate, and his interests in Bidone were distributed equally among Bidone's three remaining owners: Henkel, Floriana and Adriano. *Id.* at ¶ 12. Floriana became Bidone's sole director. *Id.*

In May 2010, Floriana sent HSBC a "Signing Resolution" designating her husband Giuliano as an authorized signatory on Bidone's HSBC accounts. *Id.*

Henkel claims that, after Raglione's death, "Defendants commenced a systematic looting of the Bidone [a]ccounts without [Henkel's] knowledge or consent." *Id.* at ¶ 13. First, Plaintiff asserts that Defendants ran up \$86,000 in charges on credit cards linked to Bidone's HSBC accounts. Next, Henkel asserts that Floriana "and/or" Giuliano authorized a transfer of \$310,000 out of Bidone's accounts and into companies in Florida and China and a transfer of \$50,000 to relatives and friends in Italy. *Id.* at ¶ 15.

Finally, Henkel alleges that, on November 22 and 23, 2010, “all cash and investments, totaling nearly \$8 million, held in the Bidone Accounts were transferred to two other HSBC accounts in New York.” *Id.* at ¶ 17.

Henkel claims that Floriana undertook such transfer by way of a single telephone call to an HSBC employee in New York. In her Affidavit, Henkel testifies that:

[o]n March 16, 2010 . . . Floriana, made a phone call to Mr. Moises chami. The call was answered by a secretary, and as he was not there or could not answer at that time, . . . Floriana, asked that Mr. Moises Chami return her call. About an hour later, Mr. Moises Chami returned the call and . . . Floriana, took this call in front of [Henkel’s] mother and [Henkel]. . . . On such phone call, . . . Floriana, dealt with Mr. Moises Chami regarding the transfer of money to a bank account at HSBC Bank in New York and asked him to take the necessary changes to this account as Annibale had passed away.

(Affirmation of Troy Selvaratnam in Support of Plaintiff’s Opposition to Defendants’ Motion to Dismiss the Complaint, Ex. 5 (“Henkel Aff.”), ¶ 3.)

Henkel now seeks to recover the portion of Bidone Nero’s assets to which she is entitled as a part owner of the now-defunct company. Defendants move to dismiss on the grounds that this court lacks personal jurisdiction over them.

II. STANDARD OF LAW

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction.” *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994). The court accepts the facts as alleged in the non-moving party’s pleading as true and accords the non-moving party the benefit of every possible favorable inference. *Id.*

III. ANALYSIS

Henkel asserts that the court has jurisdiction over Defendants under CPLR 302(a)(1).¹ CPLR 302(a)(1) provides that, “[a]s to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary . . . who . . . transacts any business within the state”

CPLR 302(a)(1) “is a ‘single act statute’ and proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant’s activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted.” *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 467 (1988). If a party “avails itself of the benefits of the forum, has sufficient minimum contacts with it, and should reasonably expect to defend its actions there, due process is not offended if that party is subjected to jurisdiction even if not [physically] ‘present’ in that State.” *Kreutter*, 71 N.Y.2d at 466.

“Purposeful activities are those with which a defendant, through volitional acts, avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” *Fischbarg v. Doucet*, 9 N.Y.3d 375, 380 (2007) (internal quotation marks omitted).

¹ In the Complaint, Henkel claimed that the Court has general jurisdiction over Defendants under CPLR 301. Henkel now abandons that argument and asserts jurisdiction solely pursuant to CPLR 302(a)(1).

A party opposing a motion to dismiss for lack of personal jurisdiction “need only demonstrate that facts ‘may exist’ whereby to defeat the motion. It need not be demonstrated that they do exist.” *Peterson v. Spartan Indus., Inc.*, 33 N.Y.2d 463 (1974).

A. Jurisdictional over Floriana

Henkel contends that Floriana’s involvement in transferring funds out of Bidone’s New York HSBC accounts provides sufficient contacts with New York to subject Floriana to long-arm jurisdiction under CPLR 302(a)(1). Specifically, Henkel points to the phone call she overheard in which Floriana allegedly called an HSBC employee to request the transfer of funds out of the Bidone accounts.

“While electronic communications, telephone calls or letters, in and of themselves, are generally not enough to establish jurisdiction . . . , they may be sufficient if used by the defendant deliberately to project itself into business transactions occurring within New York State.” *Deutsche Bank Sec., Inc. v. Mont. Bd. of Inv.*, 21 A.D.3d 90, 94 (1st Dep’t 2005), *aff’d* 7 N.Y.3d 65 (internal citations omitted).

Henkel argues that “an out-of-state defendant can be subject to personal jurisdiction under CPLR 302(a)(1) by the act of simply opening and actively maintaining a brokerage account in New York.” (Plaintiff Ana Paula Henkel’s Memorandum of Law in Opposition to Defendants’ Motion to Dismiss the Complaint (“Pl. Memo”), p. 8.)²

² Additionally, the court notes that even if opening and maintaining a brokerage account in New York were sufficient to confer personal jurisdiction over the account holder, the HSBC accounts at issue were opened and maintained by Bidone, not Floriana.

Henkel, however, points to no authority directly supporting her position. In the cases Henkel cites, the defendants all engaged in transactions that went far beyond “maintaining a brokerage account,” such as the negotiation and purchase or sale of large volumes of securities. *See Deutsche Bank Sec., Inc. v. Montana Bd. of Invs.*, 7 N.Y.3d 65, 71-72 (2006) (finding personal jurisdiction where a “sophisticated institutional trader” had “transact[ed] business here by knowingly initiating and pursuing a negotiation . . . in New York that culminated in the sale of \$ 15 million in bonds.”); *see also L.F. Rothschild, Unterberg, Towbin v. Thompson*, 78 A.D.2d 795, 795 (1st Dep’t 1980) (finding personal jurisdiction where the agreement governing the parties’ relationship called for application of New York law and defendant engaged plaintiff stock broker to carry out “25 transactions in four months.”).

Henkel does not assert that Floriana engaged in any such transaction. Henkel claims merely that Floriana made one phone call to HSBC authorizing the transfer of funds out of Bidone’s accounts. Floriana’s alleged phone call to HSBC do “not amount to purposeful activity by which [Floriana] availed [herself] of the privilege of conducting business in New York.” *Magwitch, L.L.C. v. Pusser’s, Inc.*, 84 A.D.3d 529, 531 (1st Dep’t 2011) (holding that “[t]he acts of sending payments to a New York bank account and correspondence to a New York address, and engaging in telephone discussions with plaintiff’s principal [in New York] . . . were not a sufficient basis to satisfy the statutory requirements” of CPLR 302(a)(1)).

Henkel alternatively argues that “Floriana, at a minimum, by submitting the Signing Resolution to HSBC and having signing authority for the numerous securities transactions on Bidone’s brokerage account is subject to this Court’s personal jurisdiction under CPLR 302(a)(1).” Pl. Memo, p. 9. In support of this proposition, Henkel cites *Kulas v. Adachi*, 96 Civ. 6674, 1997 U.S. Dist. Lexis 6868 (S.D.N.Y. May 12, 1997). However, that case does not address signing authority on bank accounts or any other analogous topic. Instead, that case discusses whether a foreign principal can be subjected to long-arm jurisdiction when its only contacts with New York were phone calls and faxes made to the plaintiff, the foreign principal’s New York agent. Furthermore, the *Kulas* court granted the defendant’s motion to dismiss for lack of personal jurisdiction.

Floriana’s single alleged phone call to HSBC to transfer funds from one account to another is not a business transaction sufficient to subject her to long-arm jurisdiction in New York. Henkel has not demonstrated that Floriana “avail[ed] [her]self of the privilege of conducting activities within [New York], thus invoking the benefits and protections of its laws.” *Fischbarg v. Doucet*, 9 N.Y.3d 375, 380 (2007). Floriana’s motion to dismiss is thus granted.

B. Jurisdiction over the Remaining Defendants

Henkel contends that Giuliano and Adriano are subject to long-arm jurisdiction in New York because they are Floriana’s “co-conspirators,” and, as such, they “are subject to the Court’s jurisdiction as well.” Pl. Memo, pp. 11-12. Henkel’s argument is premised

on the assumption that the Court has personal jurisdiction over Floriana. As explained above, this Court lacks personal jurisdiction over Floriana; consequently, Henkel's argument regarding Giuliano and Adriano is unavailing. Giuliano and Adriano's motion to dismiss for lack of personal jurisdiction is granted.

Henkel alternatively requests jurisdictional discovery regarding Giuliano and Adriano. A party may obtain jurisdictional discovery if, through its "pleadings and accompanying documentation," it has "made a 'sufficient start' to warrant further discovery on the issue of personal jurisdiction." *People v. H & R Block Tax Serv., Inc.*, 58 A.D.3d 415, 416 (1st Dep't 2009). Henkel has not provided any facts establishing jurisdiction over Adriano, and has made no showing that, while Giuliano had signing authority on Bidone's accounts, he engaged in any transactions in New York. Henkel's motion for jurisdictional discovery is denied.

As the court has dismissed Henkel's claims against Defendants for lack of personal jurisdiction, Defendants' motion to dismiss on the grounds of forum non conveniens is moot.

The court's order follows on the next page.


IV. CONCLUSION

For the reasons stated above, it is hereby

ORDERED that defendants Floriana Raglione Masiero, Giuliano Masiero, Adriano Salvador Masiero's motion to dismiss for lack of personal jurisdiction is granted, and the Clerk is directed to enter judgment accordingly in favor of said defendant.

Dated: New York, New York
March 15, 2013

ENTER:

A handwritten signature in black ink, appearing to read "Eileen Bransten", written over a horizontal line.

Hon. Eileen Bransten, J.S.C.