Garcia v Banco BCT S.A.
2018 NY Slip Op 32989(U)
November 28, 2018
Supreme Court, New York County
Docket Number: 155078/2017
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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VICTOR GARCIA, TRUSTEE OF THE VIDA ECOLOGICA TRUST,

Plaintiff,

-against-

BANCO BCT S.A., BANCO BCT INTERNACIONAL, AND ARIEL VISHNIA BARUCH,

Defendants.

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DECISION AND ORDER
Index No.: 155078/2017

Mot. Seq. No.: 003

O. PETER SHERWOOD, J.:

I. FACTS

On a motion to dismiss, the facts are taken from the complaint and are assumed to be true.

According to the Second Amended Complaint (NYSCEF Doc. No. 29), plaintiff Victor Garcia is a principal of First Costa Rican Legal and Trust S.A., and court appointed trustee of the Vida Ecologica Trust (the Trust). The Trust, which held about $62 million, was created by John Bender and Ann Patton in about 2005 to create a wildlife reserve in Costa Rica and provide for the support and maintenance of Patton. Non-party Juan de Dios Alvarez Aguilar (Alvarez), an attorney, was established as the trustee. He quickly began stealing from the Trust.

After Bender's death in 2010, Alvarez accelerated his thefts. Alvarez even used Trust assets to implicate Patton in Bender's death, and to keep her hospitalized and imprisoned while Alvarez stole tens of millions of dollars. As Costa Rica has no double jeopardy rule, Patton is now awaiting her fourth trial. She has been convicted once, which was then overturned, and acquitted twice. Alvarez has been removed as trustee, and the new trustee brings this suit.

Alvarez sought help from defendant Ariel Vishnia Baruch (Vishnia), an officer of defendant Banco BCT S.A. (BCT), a Costa Rican bank. Banco BCT Internacional (BBI, and with BCT, the Banks) is an affiliate or department of BCT, based in Panama. The Banks held the Trust's funds. Alvarez controlled the Trust funds. Because of those funds and his law firm's funds held at the Banks, Alvarez was an important client.

Vishnia is a principal with BCT and sits on its Executive Committee, as well as other committees. He is also the nephew of the president and majority shareholder of Corporacion BCT

S.A., which owns the banks. Vishnia was Alvarez's primary contact at BCT and personally received Alvarez's fund transfer requests. Vishnia took payments from Alvarez to allow Alvarez to loot the Trust, including the purchased two Trust properties at below-market prices. Some or all of the sale proceeds were then transferred to Alvarez's personal accounts or accounts belonging to his family.

The Banks were aware Alvarez was transferring Trust funds into his personal accounts at BBI or at other banks. The Banks had the "Know Your Customer" forms and information from the Trust and each Trust entity, as well as for the unrelated entities controlled by Alvarez. The Banks were also aware such actions violated the terms of the Trust. Over 200 transfers totaling over $5 million were made from Trust accounts to Alvarez's accounts. The Banks did nothing, despite their obligations to use due diligence and anti-money laundering controls which would have flagged these transactions. Had the banks used the proper procedures, they would have detected and stopped the transfers.

Alvarez also caused Trust entities to take out unnecessary loans from BCT, which would benefit BCT. To date, despite plaintiff's presentation of the proper credentials as trustee, BCT has not disclosed a complete set of BBI's bank records or cooperated in recovering the stolen funds.

Plaintiff asserts the following claims:

1) Aiding and Abetting Breach of Fiduciary Duty by Alvarez, and
2) Civil Conspiracy to breach Alvarez's fiduciary duties and loot the Trust, as well as receive non-market profits and kickbacks.

II. ARGUMENTS

A. Motion to Dismiss

Defendants move to dismiss on jurisdictional grounds pursuant to CPLR 3211(a)(2) (lack of subject matter jurisdiction pursuant to Banking Law section 200-b) and CPLR 3211(a)(8) (lack of personal jurisdiction under CPLR 302[a][1]), as an inconvenient forum (CPLR 327[a]), and as barred by the Statute of Limitations (CPLR 3211[a][5]).

1. Subject Matter Jurisdiction

Defendants argue this court lacks subject matter jurisdiction because Banking Law section 200-b provides an action by a non-resident against a foreign bank may only be maintained under certain, enumerated, circumstances: where a contract at issue was to be performed in this state, where the subject matter of the litigation is here, where the cause of action arose here, where the

action is based on liability for acts performed in this state or the foreign bank does business in this state (Memo at 6-7, citing Banking Law section 200-b). None of these requirements are satisfied here. No breach of contract is alleged. Defendants are not alleged to do business here. The complaint does not allege defendants performed any affirmative act in New York (*id.* at 7).

2. Personal Jurisdiction- CPLR 302[a][1]

CPLR 302(a)(1) provides jurisdiction over a non-domiciliary who transacts business in the state if the cause of action arises from those transactions. The only connection alleged between New York and the events at issue is that some money was transferred to correspondent accounts in New York[1]. The occasional use of a New York account, alone, does not show a "lack of coincidence" (*id.* at 9, quoting *Licci v Lebanese Can. Bank*, 20 NY3d 327, 340 [2012]). The only allegations that relate to New York are that Alvarez made three transfers of funds (out of over 200) to New York BCT accounts (Memo at 10). There are no allegations Vishnia had involvement with any of those transfers. There are no allegations BBI has any New York correspondence accounts, only that BBI uses BCT accounts for transactions (*id.* at 11). While BCT has New York correspondence accounts, plaintiff asserts Alvarez transferred funds to those accounts, or that BCT allowed Alvarez to do so (*id.* at 12). BCT is not alleged to have taken any affirmative action or selected the destination for those funds. There were many thefts which did not touch New York, and the existence of the New York accounts does not appear to be central to the alleged conduct (*id.* at 14).

Further, exercising jurisdiction would violate due process. Plaintiffs have not pled defendant's minimum contacts with New York. There is no allegation any defendant purposefully picked or used the New York correspondent accounts to allow Alvarez to loot the Trust. All of the allegations involve defendants' interactions with Alvarez in Costa Rica (*id.* at 16). Defendants could not have reasonably foreseen being haled into court in New York based on these interactions. "Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice'" (*Burger King Corp. v Rudzewicz*, 471 US 462, 476 [1985] quoting *Intl. Shoe Co. v State of Wash., Off. of*

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[1] "A correspondent account is an account . . . established by a banking institution to receive deposits from, make payments on behalf of, or handle other financial transactions for another financial institution. Correspondent accounts are established through bilateral agreements between the two banks" (Wikipedia, available at https://en.wikipedia.org/wiki/Correspondent_account).

Unemployment Compensation and Placement, 326 US 310, 320 [1945]). The Banks are foreign banks, with no New York presence. Vishnia is a Costa Rican citizen living in Costa Rica. Forcing them to defend a suit in New York would constitute a substantial burden. Nor does New York have a significant interest in the dispute. Plaintiff is not a resident of New York. Very few allegations are related to New York. Costa Rican law will likely govern, and there is already a Costa Rican litigation against Alvarez. The evidence and witnesses are in Costa Rica or Panama.

3. Forum Non Conveniens

Even if personal jurisdiction exists, New York lacks a substantial nexus with this case and this court should dismiss for *forum non conveniens*. The burden rests on the defendants, but it is met, as there is an adequate alternative forum in Costa Rica. None of the parties are New York residents; there is no substantial connection to New York; none of the challenged transactions started or ended here; the relevant witnesses and documents are in Costa Rica and Panama; Costa Rican law would apply; and litigating here would burden both the parties and the courts (Memo at 20-23).

4. Time Barred

Defendants also contend plaintiff's claims are time barred. First, New York does not recognized a civil conspiracy claim, so this claim should be dismissed (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 128 [1st Dept 2002] ["the motion court properly dismissed the . . . seventh cause of action for civil conspiracy since no independent cause of action exists for such a claim"]). As to the fiduciary duty-related claim, a three-year statute of limitations applies where, as here, the only remedy sought is monetary damages (*Kaufman v Cohen*, 307 AD2d 113, 118 [1st Dept 2003]). All of the allegations in the current complaint are outside the statute of limitations (Memo at 25). The claim begins to run on the earliest date when the breach causes an injury. The complaint alleges Alvarez's thefts started in earnest at Bender's death in 2010. That would have started the statute of limitations running (*id.*). Even if the statute of limitations was tolled, or did not begin to run until Alvarez was removed as trustee, that occurred on December 17, 2012. That was the last date on which he could have looted Trust assets. This action was filed on June 2, 2017, outside the statute of limitations.

B. <u>Opposition</u>

1. Personal Jurisdiction

Plaintiff claims defendants are subject to New York jurisdiction. *Al Rushaid v Pictet & Cie* held that "defendants' intentional and repeated use of New York correspondent bank accounts to launder their customers' illegally obtained funds constitutes purposeful transaction of business substantially related to plaintiffs' claims, thus conferring personal jurisdiction within the meaning of CPLR 302 (a) (1)" (28 NY3d 316, 319 [2016], *reargdenied sub nom. Rushaid v Pictet & Cie*, 28 NY3d 1161 [2017]). While defendants have argued the case represents a stretching of New York jurisdictional law, and that the facts of this case are being stretched to fit that mold, BCT has correspondent accounts with New York banks and defendants used these accounts and made them available to Alvarez. Even if *Rushaid* is an extension of New York law, it is New York law, and binding (Opp at 7).

BCT's activities in New York are sufficient to satisfy the "transacting business" prong of CPLR 302(a)(1). BCT maintained at least two correspondent bank accounts in New York and uses them to transfer millions of dollars annually, advertising possession of those accounts as a customer benefit. This is not passive or incidental. "Repeated, deliberate use that is approved by the foreign bank on behalf and for the benefit of a customer . . . demonstrates volitional activity constituting transaction of business. In other words, the quantity and quality of a foreign bank's contacts with the correspondent bank must demonstrate more than banking by happenstance" (*Al Rushaid*, 28 NY3d at 327). BCT could have routed the money from the illicit transactions through an account in another state, but chose its New York accounts. To open such an account, a bank must authorize an agent for the acceptance of service (Opp at 9). Here, as in *Al Rushaid*, the Banks marketed the New York accounts on their websites, used the accounts to receive funds and send them abroad, knew the transfers were illicit, made no inquiry about the funds being sent to New York, and distributed the funds to foreign payees to facilitate the schemes (*id.* at 9-10).

There also is an articulable nexus between the correspondent accounts and the claim, satisfying the second requirement of CLR 302(a)(1). In *Rushaid*, the nexus was that the defendants acted as bankers, necessary to the laundering of money by the non-party actors. Here, the Banks held the Trust money, and Alvarez could not have stolen the funds or transferred them abroad without defendants' help (Opp at 11).

Exercising jurisdiction over defendants is reasonable and consistent with due process (*id.* at 12). The facts in *Al Rushaid* were similar and found to comport with due process (*id.* at 12). As in *Al Rushaid*, "defendants' maintenance and repeated use of a New York correspondent bank

account to achieve the wrong complained of in this suit satisfies the minimum contacts component of the due process inquiry" (*Al Rushaid*, 28 NY3d at 331, [internal quotation omitted]). New York has an interest in the outcome of this litigation, since New York has an interest in fraudulent use of its banking system. Nor could this case be better pursued in Costa Rica. BCT is powerful there and has thwarted attempts to investigate the fraud. Costa Rica does not have the robust discovery New York does. Given what has happened to Patton, it is unlikely the plaintiff could obtain satisfaction there.

2. Subject Matter Jurisdiction

New York Banking Law 200-b provides that an action may be pursued by a non-resident against a foreign bank "where the action . . . is based on a liability for acts done within this state by a foreign banking corporation [or] where the defendant is a foreign banking corporation doing business in this state" (Opp at 13, quoting Banking Law 200-b). Both of these possibilities have been satisfied (*id.* at 13-15).

3. Forum Non Conveniens

"New York has an overriding and paramount interest in the outcome of this litigation. It is a financial capital of the world, serving as an international clearinghouse and market place for a plethora of international transactions, such as to be so recognized by our decisional law" (*J. Zeevi and Sons, Ltd. v Grindlays Bank (Uganda) Ltd.*, 37 NY2d 220, 227 [1975]). The possible inconvenience to the parties to litigate here is shadowed by "New York's recognized interest in maintaining and fostering its undisputed status as the preeminent commercial and financial nerve center of the Nation and the world. That interest naturally embraces a very strong policy of assuring ready access to a forum for redress of injuries arising out of transactions spawned here" (*Ehrlich-Bober & Co., Inc. v Univ. of Houston*, 49 NY2d 574, 581 [1980]). Wherever it originated, this scheme was implemented through the misuse of New York bank accounts (Opp at 16, citing *Banco Nacional Ultramarino, S.A. v Chan* (169 Misc 2d 182, 188 [Sup Ct 1996], *affd sub nom. Banco Nacional Ultramarino, S.A. v Moneycenter Tr. Co. Ltd.*, 240 AD2d 253 [1st Dept 1997] ["The allegation that Money Center used its BONY account to receive and transfer the stolen funds, thus converting the money, satisfies the statutory requirement that the tort occur within the State"]). The location of the transaction is New York, as BCT's receipt of the funds into the New York correspondent account is at the root of the claims (Opp at 17). As far as defendants argue that witnesses and documents are located outside of New York, defendants do not provide the

required specifics, such as which witnesses (*id.* at 18). Nor do defendants establish that BBI, a Panamanian bank, would be subject to jurisdiction in Costa Rica. In fact, witnesses will be available in New York that will not be available in Costa Rica. Patton is now living in the United States and will not appear in Costa Rica, due to her legal jeopardy there. Another main witness, Milton Jimenez, Alvarez's former accountant, with actual knowledge of the fraud, is willing to appear in New York[2]. The Banks are large and powerful, and will have no trouble appearing in New York (Opp at 19).

As far as defendants argue that Costa Rican law will have to be applied, they make no showing that Costa Rican law differs substantially, or that the court will have to engage in the choice of law analysis and apply Costa Rican law. If it does, this court has the experience to apply foreign law (*id.* at 20). Costa Rica is not an adequate alternative. Patton will not appear there, and the lack of discovery available, and the Banks' influence, mean that litigating in New York will better serve the ends of justice (*id.* at 21).

4. Claims are Timely

Both of plaintiff's claims are timely under New York law because they are governed by a six-year statute of limitations. The six-year period applies to a claim for aiding and abetting a breach of fiduciary duty claim where the breach is predicated on fraud, regardless of the nature of the remedy (*id.* at 22). Alvarez's underlying actions in looting the Trust are based on fraud (*id.*). Because the same facts underlie the civil conspiracy claim, the same limitations period applies (*id.*). The lack of alleged misrepresentations by defendants is irrelevant. The fraud by Alvarez provides the basis (*id.* at 23). Further, the limitations period starts to run when Alvarez was removed as trustee, which was in 2012. Accordingly, this action is timely.

Alternatively, plaintiff requests leave to take jurisdictional discovery, as well as on defendants' argument of forum non conveniens.

C. <u>Reply</u>

1. Subject Matter Jurisdiction

According to Banking Law section 200-b, there is no subject matter jurisdiction. Plaintiff argues that, because there is personal jurisdiction under CPLR 302(a)(1), there is subject matter jurisdiction under Banking Law. The case relied upon by plaintiff found subject matter jurisdiction under BCL section 1314-b, because there was personal jurisdiction under CPLR 302(a)(1).

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[2] Plaintiff does not state Jimenez is unavailable to appear in Costa Rica.

Plaintiff argues that, because the language in Banking Law 200-b and BCL 1314-b are similar, the same analysis should apply (Reply at 2). However, there are important distinctions in the language of the statutes. BCL 1314-b(4) states a court will have subject matter jurisdiction wherever the non-domiciliary would be subject to personal jurisdiction. There is no such provision in Banking Law. Banking Law 200-b(2)(d) is similar to CPLR 302(a)(2), which grants personal jurisdiction over a defendant who committed a tort within the state (Reply at 3). Plaintiff here does not allege defendants were present in New York or that their conduct occurred here. Nor are the Banks foreign banking corporations doing business in this state, such that there would be jurisdiction pursuant to Banking Law section 200-b(2)(e) (*id.*).

2. Personal Jurisdiction

Plaintiff did not respond to defendants' arguments that there are no allegations Vishnia or BBI were involved with transfers through BCT's correspondent accounts, or that BBI had correspondent accounts in New York (*id.* at 4). Accordingly, the motion to dismiss for lack of personal jurisdiction should be granted as to those two defendants.

As to BCT, that entity did not purposefully transact business in New York, making CPLR 302(a)(1) inapplicable. Even after *Al Rushaid*, the mere fact that a foreign bank has correspondent accounts in New York, alone, is insufficient to provide jurisdiction (Reply at 5, citing *Hau Yin To v HSBC Holdings, PLC*, 700 Fed Appx 66, 67 [2d Cir 2017] ["Nor does the mere maintenance of correspondent bank accounts at an affiliate bank in New York" give rise to personal jurisdiction]). In *Al Rushaid*, the correspondent accounts were considered in relation to the alleged scheme, that the movement of money to New York was part of the plan. Here, no such plan is alleged (Reply at 5-6). Over 99% of Alvarez's transfers to third parties, and about 92% of transfers abroad, did not go through New York (*id.* at 6). For the transfers through the New York correspondent accounts, defendants did not have to take affirmative actions. When a customer initiates a transfer in United States dollars, the rest of the process is automatic (*id.*, citing Morsink aff, ¶¶ 13-14).

Nor are the New York correspondent accounts sufficiently related to the claims to create jurisdiction over BCT (*id.* at 6). Most of the alleged stolen funds remained in Costa Rica or were transferred through states other than New York, and unlike *Al Rushaid*, there was no allegation or indication that the money laundering could not have been completed without the New York correspondent accounts (*id.*).

Exercising personal jurisdiction here would violate due process (*id.* at 7). While plaintiff relies on the analysis in *Al Rushaid*, plaintiff ignores the distinctions between this fact pattern and that one. Unlike *Al Rushaid*, the connection between the conduct and the New York account was attenuated. Also unlike *Al Rushaid*, all of the parties (save one defendant) are from the same country, where all of the conduct took place, giving Costa Rica a significant interest in deciding this case (*id.*). There is already a Costa Rican civil action by Patton, seeking to recover $200 million from Alvarez and other entities involved in his wrongdoing. That complaint includes allegations about BCT and BBI, and Vishnia is a potential witness (*id.*).

3. Forum Non Conveniens

Plaintiff seems to contend that, if New York's banking system is involved in any way, no foreign bank could meet the burden of outweighing New York's interest in adjudicating the dispute (Reply at 8). That is not the law. Unlike *Banco Nacional Ultramarino, S.A.* (169 Misc 2d at 182), these defendants did not commit an affirmative act in New York or direct tortious activities here. Further, in that case, the court held New York to be a proper forum because it became the hub of defendant's activities. That is not alleged here (Reply at 10). Defendants are alleged to have aided and abetted or conspired to assist tortious acts in Costa Rica. There is no affirmative act alleged to have occurred in New York.

Further, almost all of the relevant witnesses and documents are in Costa Rica, including Alvarez and his accountants. Alvarez is unlikely to appear in New York. While all of the specific individuals and documents have not been named, a defendant, pre-answer, is not required to identify the specifics (Reply at 14).

As to plaintiff's arguments that the Banks are large and powerful, and able to cover the expenses of litigating in New York for themselves and Vishnia, whether the Banks are paying for Vishnia is irrelevant (*id.*) Nor are the Banks sufficiently large and powerful that they would make proceedings in Costa Rica unfair[3].

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[3] Defendants claim that the agreements with BCT and BBI setting up the trust "memorialized [their] expectations" that "issues with customers would be handled domestically" (Reply at 15). However, in the Memo where that argument is initially made, it explains that the BCT contracts and BBI contract only specify that Costa Rican and Panamanian laws, respectively, will apply. Defendants do not claim those agreements specify a forum (Memo at 22, n3).

4. Statute of Limitations

Plaintiff argues that, while a three-year statute of limitations would normally apply, since the underlying fiduciary duty claims are based on fraud, a six-year statute of limitations applies (*id.* at 17). However the cases cited do not support this exception (Reply at 18, citing *D. Penguin Bros. Ltd. v Natl. Black United Fund, Inc.*, 137 AD3d 460, 461 [1st Dept 2016][“The six-year limitations period applies to the aiding and abetting breach of fiduciary duty claims, since those claims are based on allegations of actual fraud”]; and *Kaufman v Cohen*, 307 AD2d 113, 126-27 [1st Dept 2003]). Further, the complaint fails to make out a claim of fraud against Alvarez, which is required to prevent alleging fraud merely to take advantage of the longer statute of limitations (Reply at 18, citing *Kaufman*, 307 AD2d at 119 [“courts will not apply the fraud Statute of Limitations if the fraud allegation is only incidental to the claim asserted; otherwise, fraud would be used as a means to litigate stale claims”] [internal quotation omitted]). The Second Amended Complaint here alleges Alvarez’s looting of the Trust. It does not allege any misrepresentations to support a fraud claim.

As far as plaintiff requests discovery addressed to jurisdiction and forum non conveniens, the court need not reach these questions, as it lacks subject matter jurisdiction. Further, plaintiff has already received the affidavit of BCT’s Corporate Services Manager, who oversees its correspondent banking, and many documents from BBI, BCT, and the correspondent banks (Reply at 20). Plaintiff has also retained an expert in correspondent banking. Plaintiff has ample information to use to make any arguments available. As to discovery regarding forum non conveniens, plaintiff only includes this as a vague afterthought, a hope that a fishing expedition might prove fruitful (*id.*).

III. DISCUSSION

A. Civil Conspiracy Claim

Defendants are incorrect that a civil conspiracy claim does not exist under New York law. “[U]nder New York law, to establish a claim of civil conspiracy, the plaintiff must demonstrate the primary tort, plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury” (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474 [1st Dept 2010]). However, “New York does not recognize an

independent cause of action for conspiracy to commit a civil tort" (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474 [1st Dept 2010][emphasis added]). "[A] cause of action sounding in civil conspiracy cannot stand alone, but stands or falls with the underlying tort" (*Romano v Romano*, 2 AD3d 430, 432 [2d Dept 2003]). Plaintiff bases the claim on a conspiracy to "breach fiduciary duties and to loot the Trust" (Second Amended Complaint at 25). Plaintiff has pled facts which would support a claim against Alvarez for breach of fiduciary duty.[4] Accordingly, this claim stands, if the case survives the other challenges.

B. Personal Jurisdiction

CPLR 302(a) sets forth four different scenarios in which the New York courts can exercise specific or long arm jurisdiction over non-domiciliary defendants (*see* CPLR 302(a)(1)-(a)(4)):

> "a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:
>
> 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
>
> 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
>
> 3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
>
> 4. owns, uses or possesses any real property situated within the state"

(*id.*). "[T]he party seeking to assert personal jurisdiction, the plaintiff[,] bears the ultimate burden of proof on this issue" (*Marist Coll. v Brady*, 84 AD3d 1322, 1322-1323 [2d Dept 2011]).

Plaintiff claims this court has personal jurisdiction over the defendants based on section (a)(1), that they transacted business in the state, based on the use of BCT's correspondent accounts in New York (Opp at 8).

Plaintiff relies on *Al Rushaid*. Al Rushaid was a Saudi resident, and owner of co-plaintiff entity Al Rushaid Petroleum Investment Corporation, a Saudi Arabian company. The *Al Rushaid* plaintiffs sued a private bank, the bank's general partners, and the bank's client relationship manager for "concealing ill-gotten money from a scheme orchestrated by three of plaintiffs'

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[4] In order to establish a breach of fiduciary duty, a plaintiff must plead and prove the existence of a fiduciary relationship, misconduct by the defendant, and damages directly caused by the defendant's misconduct (*Pokoik v Pokoik*, 115 AD3d 428 [1st Dept 2014]).

employees" (28 NY3d at 320). The basis for jurisdiction was the use of correspondent accounts, as well as other accounts in New York at various banks, for "numerous transfers . . . which . . . totaled over $4 million" (*id.* at 321-22). The Court of Appeals determined that the *Al Rushaid* defendants' use of the correspondent bank accounts was purposeful, and that the claims against the defendants arose from those transactions, noting that "the quantity and quality of contacts establish a "course of dealing" with New York, and the transaction and claim are not "merely coincidental" (*Al Rushaid*, 28 NY3d at 323). The Court of Appeals has elsewhere noted that "a correspondent bank relationship, without any other indicia or evidence to explain its essence, may not form the basis for long-arm jurisdiction under CPLR 302 (subd [a], par 1)" (*Amigo Foods Corp. v Mar. Midland Bank-New York*, 39 NY2d 391 [1976], cited in *Al Rushaid*, 28 NY3d at 324). In *Amigo Foods Corp.*, defendant Aroostook Trust Company, a Maine Bank, whose New York correspondent account received certain funds at issue, was deemed not to be subject to jurisdiction because it had "not purposely availed itself of the privilege of conducting activities in New York thereby invoking the benefits and protections of its laws. On the contrary, it has passively and unilaterally been made the recipient of funds which at its customer's direction it has declined." (*Amigo Foods Corp.*, 61 AD2d at 896).

In *Al Rushaid*, the Court of Appeals clarified that a bank cannot escape jurisdiction by arguing that it was merely following client instructions (*Al Rushaid*, 29 NY3d at 328). The bank's participation in moving the funds through New York is sufficient (*id.*). The question is whether the New York account was "integral to the scheme" (*id.*). "The focus of the jurisdictional analysis is the foreign bank's conduct vis-à-vis the correspondent bank, meaning how it uses the correspondent accounts not whether some other bank could have been used instead" (*id.*). That court found the use of the correspondent accounts to move funds sufficient to constitute the transaction of business in New York pursuant to CPLR 302(a)(1).

Here, the alleged contacts, use of the correspondent accounts to move the funds at issue, are similar to those in *Al Rushaid*, and constitute transacting business in New York.

To establish jurisdiction pursuant to CPLR 302(a)(1), the business transacted must also have an "articulable nexus or substantial relationship between the business transaction and the claim asserted" (*id.* at 329, internal quotations omitted). The inquiry merely requires "a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former, regardless of the ultimate merits of the claim" (*Licci v Lebanese Can. Bank*, 20 NY3d

327, 339 [2012]). In *Al Rushaid*, the Court of Appeals held that there was such a substantial relationship because "the money laundering could not proceed without the use of the correspondent bank account. . . . The money laundering scheme . . . relied precisely on the existence of bank accounts in different jurisdictions, through which the money would pass [and the] claim of aiding and abetting breaches of fiduciary duties and conspiracy turn entirely on the money laundering . . ., necessarily including the use of the New York bank account" (*Rushaid*, 29 NY3d at 330).

Here, the New York correspondent account was used only minimally, apparently coincidentally, related to the claims at issue. The Second Amended Complaint vaguely states that "a substantial number of illicit transfers" were routed through New York accounts (Second Amended Complaint at 23). Plaintiff further argues that Alvarez could not have transferred the funds without the Banks' assistance and he "could not have transferred the Trust monies to his chosen payees abroad unless the defendants made available to him the use of the correspondent accounts in New York" (Opp at 11). According to plaintiff, the Banks "specifically chose to route illicit transactions through New York, while defendant Vishnia was the bank officer responsible for effecting each transfer upon receipt of instructions from Alvarez" (*id.*).

Defendants argue that a relatively small percentage of the funds allegedly moved through the New York correspondent accounts, and there is no allegation that the movement through those accounts was key to the alleged looting of the Trust and that most of the Trust funds were moved to other accounts, even through correspondent accounts in other jurisdictions.

Plaintiff's allegations about the use and importance of the correspondent accounts are vague and conclusory. Plaintiff has not met its burden to show that the transfers to the correspondent accounts in New York were sufficiently connected to the claims at issue (that the theft of funds relied on the use of the New York correspondent accounts, or could not have succeeded without those accounts) to provide a basis for personal jurisdiction over the defendants in New York. As the relevant information about how those accounts were used is within the Banks' possession, some jurisdictional discovery may be appropriate, if this case survives the remaining challenges.

If the contacts suffice to confer jurisdiction pursuant to New York's long-arm statute (CPLR 302), the court must then "determine whether the exercise of jurisdiction comports with due process" (*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214 [2000]). The defendants must have had minimum contacts with New York such that they "should reasonably anticipate being

haled into court there" (*World-Wide Volkswagen Corp. v Woodson*, 444 US 286, 287 [1980]). "A non-domiciliary tortfeasor has "minimum contacts" with the forum State —and may thus reasonably foresee the prospect of defending a suit there—if it purposefully avails itself of the privilege of conducting activities within the forum State" (*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 216 [2000] [internal quotation omitted]). "The prospect of defending a suit in the forum State must also comport with traditional notions of 'fair play and substantial justice'" (*id.*, at 217). In *Al Rushaid*, the court found the due process had been satisfied because "the defendants' maintenance and repeated use of a New York correspondent bank account to achieve the wrong complained of his this suit satisfies the minimum contacts component of the due process inquiry" (28 NY3d at 331 [internal quotation omitted]). Here is not clearly alleged that the defendants used the New York correspondent accounts to achieve the wrong alleged; or whether the use of the correspondent accounts was incidental and/or coincidental.

C. Subject Matter Jurisdiction

Banking Law section 200-g provides that:

> "2. Except as otherwise provided in this chapter, an action or special proceeding against a foreign banking corporation may be maintained by another foreign corporation or foreign banking corporation or by a non-resident in the following cases only:
>
> (a) where the action 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 at the time of the making of the contract;
>
> (b) where the subject matter of the litigation is situated within this state;
>
> (c) 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;
>
> (d) where the action or special proceeding is based on a liability for acts done within this state by a foreign banking corporation;
>
> (e) where the defendant is a foreign banking corporation doing business in this state."

Plaintiff claims subsections (d) and (e) apply here, because there is personal jurisdiction under CPLR 302(a)(1), which provides that "a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent . . . transacts any business within the state or contracts anywhere to supply goods or services in the state" (Opp at 13, CPLR 302[a][1]). Plaintiff acknowledges that "both provisions require that the action arise from or be based on the acts or business done by the non-domiciliary within the State of New

York" (Opp at 13). Accordingly, this argument fails for the same reason as the personal jurisdiction argument above.

D. Forum Non Conveniens

On a motion to dismiss on the ground of *forum non conveniens*, the defendant challenging the forum bears the burden of demonstrating relevant private or public interest factors which militate against accepting the litigation (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985]; *Straville v Land Cargo, Inc.*, 39 AD3d 735, 736 [2d Dept 2007]). The doctrine rests upon principles of justice, fairness, and convenience (*see Islamic Republic of Iran*, 62 NY2d at 479). Among the factors to be considered are "the residency of the parties, the potential hardship to proposed witnesses, the availability of an alternative forum, the situs of the underlying action, and the burden which will be imposed upon New York courts, with no one factor controlling" (*Straville*, 39 AD3d at 736, [internal quotation marks omitted]).

Here, the burden to the New York courts is minimal, the addition of one case. The parties save one are all in Costa Rica or Panama, and the burden to them is likely to be substantial. The only contact the defendants are alleged to have with New York is the correspondent accounts, and, while plaintiff argues that they are the equivalent of a local branch, presumably that is for their customers. The correspondent banks do not appear to provide any practical support for litigation. Virtually all of the witnesses and documents are likely to be in Costa Rica, or possibly Panama, with the exception of Patton who, according to her website, annpatton.net, is based in Tulsa and Orlando. While plaintiff argues that defendants' failure to identify the specific foreign witnesses is fatal to this argument, plaintiff relies on a case which merely states that the Supreme Court properly used its discretion to deny a motion based on *forum non conveniens* "on the ground that, in part, defendants had failed to identify those witnesses who would be inconvenienced by a New York trial" (*Firegreen Ltd. v Claxton*, 160 AD2d 409, 412 [1st Dept 1990]). It does not imply such a conclusion would be required here. The other case cited by plaintiff, *O'Connor v Bonanza Intern., Inc.* (129 AD2d 569, 570 [2d Dept 1987]) is similarly flawed, as it noted several witnesses and relevant events having occurred in New York, concluding that there was going to be inconvenience either way, and it was not clear whose inconvenience would be outweighed by having the case heard in either relevant location.

Further, the Costa Rican forum appears able to hear this case. While plaintiff argues the courts there will not provide a fair hearing, that was the forum chosen by the creators of the Trust

when they made the Trust in Costa Rica. Presumably, they chose that venue for a reason, and to have benefitted from their choice then, only to now claim it deficient and incapable, seems unfair. Further, the transactions in the New York accounts are not at the heart of this case. In short, plaintiff appears to be forum shopping, attempting to bring this case in the preferred forum based on a thread.

Accordingly, considering the principles of justice, fairness, and convenience, it appears the case should be heard in Costa Rica.

E. Statute of Limitations

Plaintiff's claim to a six-year statute of limitations hinges on its argument that the claims are grounded in Alvarez's fraud. However, "[s]ince these defendants are not alleged to have made any representation, and further owed no fiduciary duty to plaintiff[], the aiding and abetting claim against them sounds in constructive fraud, not actual fraud and the three-year statute of limitations applies" (*Kaufman*, 307 AD2d at 126-27). The six-year statute of limitations might apply where the claim for breach of fiduciary duty alleges fraud that is essential to the cause of action pleaded and when there would be no damages but for the fraud (*see Paolucci v. Mauro*, 74 AD3d 1517, 1519-20 [3d Dept 2010]). This claim is, at its heart, about the looting, and not about fraud. The complaint does not allege fraud by Alvarez with the particularity required by CPLR 3016. Accordingly, the claims are untimely.

CONCLUSIONS

This court lacks subject matter jurisdiction. No discovery in aid of jurisdiction is warranted here because the case should also be dismissed on the ground of *forum non conveniens*. Even if the court were to retain the case, it would have to be dismissed because the applicable statute of limitations has expired. Because plaintiff has abandoned the claims against BBI and Vishnia, the complaint shall be dismissed as against them for this reason as well.

Accordingly, it is hereby

ORDERED that the motion of defendants Banco BCT S.A., Banco BCT Internacional, and Ariel Vishnia Baruch, to dismiss the complaint of plaintiff, Victor Garcia, Trustee of the Vida Ecologica Trust, is GRANTED in its entirety; and it is further

ORDERED that the complaint is DISMISSED and the Clerk of the Court is directed to enter judgment in favor of said defendants' and against said plaintiff together with costs and disbursements in an amount to be fixed by the Clerk upon presentation of a proper bill of costs.

This constitutes the decision and order of the court.

DATED: November 28, 2018

E N T E R,

O. PETER SHERWOOD J.S.C.