

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT:

Index Number : 602010/2008
PEERS, MICHAEL
VS.
MONTAGUE MORGAN SLADE LTD
SEQUENCE NUMBER : # 001
DISMISS COMPLAINT

Justice

E-FILE PART 56

INDEX NO. 602010-08

MOTION DATE 2/16/09

MOTION SEQ. NO. #001

MOTION CAL. NO.

ere read on this motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

Answering Affidavits - Exhibits

Replying Affidavits

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

ACTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

RECEIVED

DEC 11 2009

MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Dated: DEC 09 2009

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 56

-----X
MICHAEL PEERS,

Plaintiff,

-against-

Index No. 602010/08
Action No. 1

MONTAGUE MORGAN SLADE LTD. and
MMS HIGHLY DIVERSIFIED FUND PLC.,

Defendants.

-----X

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 56

-----X

MICHAEL PEERS,

Plaintiff,

-against-

Index No. 650496/08
Action No. 2

MONTAGUE MORGAN SLADE LTD. and
MMS ABSOLUTE PERFORMANCE FUND
PLC.,

Defendants.

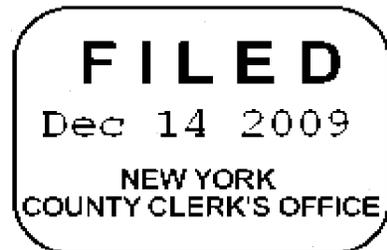
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RICHARD B. LOWE III, J.:

Motion numbers 602010/08-001 and 650496/08-001 in the above-captioned actions are consolidated for disposition. In both actions, defendants move, pursuant to CPLR 3211 (a) (2) and (a) (8), to dismiss the complaint. In both actions, plaintiff cross-moves, pursuant to CPLR 3212, for summary judgment on the first cause of action, and pursuant to CPLR 6201 for an order of attachment.

Background

Plaintiff, Michael Peers, brings the above-captioned actions to recover funds that he



DECISION AND ORDER

invested with the defendants. Peers is a citizen of the United Kingdom who is currently residing in the United Arab Emirates. Defendant Montague Morgan Slade Ltd. (MMS) is an investment manager and administrator of various hedge funds, including MMS Highly Diversified Fund Plc. (HDF), which is named as a defendant in Action No. 1, and MMS Absolute Performance Fund Plc. (APF), which is named as a defendant in action No. 2.

Peers alleges that, in mid-2005, Alan Linnitt, a Marketing Director at MMS, solicited him to invest in various funds managed by MMS. On September 16, 2005, Peers invested £42,000 (\$75,814) in APF. MMS subsequently issued Peers a "Contract Note," effective January 1, 2006, reflecting his ownership of 72,000 Guaranteed "A" units of the APF, with a value of \$72,000.

Thereafter, on April 5, 2006, Peers made an additional investment of £35,000 (\$61,095) in APF. Again, MMS issued Peers a Contract Note, effective May 23, 2006, reflecting his ownership of 61,344.50 shares of Guaranteed "A" units of the APF.

In May 2006, Linnitt solicited Peers to invest in a second MMS-managed fund, the HDF. As part of that solicitation, Linnitt offered to compensate Peers for any penalties he might incur for early withdrawal of his investment account with Royal Skandia, which would be necessary to invest with MMS. Peers alleges that, in reliance on that promise, he terminated his investment account with Royal Skandia, incurring over approximately £20,000 (\$37,368.00) in early withdrawal penalties. Thereafter, in early August 2006, Peers invested another £320,000 (\$594,220) in the HDF. On September 26, 2006, he made a final investment of £2,700 (\$5,136) with MMS. MMS issued Peers a Contract Note, dated September 4, 2006, reflecting his ownership of 582,400 units of Guaranteed "A" units in the HDF. In an e-mail, dated October 10,

2006, which is also annexed to moving papers, Linnitt, on behalf of MMS, confirmed that it would pay Peers this rebate over the first 12 months of his investment.

Approximately six months later, on March 21, 2007, Peers received a letter from Keith Park Solicitors, attorneys for MMS, informing Peers of an ongoing investigation into suspected financial irregularities committed by Linnitt, who they described as formerly "associated" with MMS. The letter informed Peers that Linnitt had arranged for the opening of a bank account under the name of MMS without the knowledge or consent of MMS, and had potential investors pay funds into that bank account, which he then diverted and used for his own personal benefit. In addition, Linnitt had misappropriated payments made by actual and potential investors and which were made other than through a bank account.

On June 27, 2007, Peers received another letter from Keith Park Solicitors indicating that Linnitt had diverted \$5,665 from Peers' proposed investment for Linnitt's own personal use.

Peers alleges that MMS's counsel did not provide him with further information regarding this alleged fraud, so in September 2007, he requested that MMS confirm the valuation of his investments with it. Peers requested this information from Gordon Spedding, the MMS Sales Director in the United Arab Emirates. Spedding informed Peers that all such requests had to be submitted to the MMS's office in New York.

By letter dated September 26, 2007, which was faxed from its New York office, MMS informed Peers that he held 582,400 shares of the HDF which was worth \$629,574.40, as of that date.

The prospectuses that Peers had received from MMS provided that a shareholder had the right to redeem his investment in the APF and HDF upon demand. Each provided as follows:

A Shareholder may request a Redemption of Shares, by written notice, fourteen (14) Business Days prior to the relevant Dealing Day. The Redemption price per Share will be equal to the Net Asset Value per Share on the corresponding Valuation Point. Settlement of Redemptions will normally take place within ten (10) Business Days after the Dealing Day on which the Redemption request is dealt

(APF Prospectus at 4, Ex. 14; HDF Prospectus at 3, Ex. 15).

On September 27, 2007, Peers sent MMS notice of his request to redeem all of his investment in the HDF, and provided information regarding the account to which MMS was to wire the redeemed funds. When he received no response, Peers followed up with a fax requesting the status of the redemption of his shares in the HDF.

On October 15, 2007, Coleman Cunningham, the "Office Manager" of the New York office, sent Peers a fax, acknowledging his request for redemption and informing him that, unfortunately, due to Linnett's actions, MMS had been forced to create a release form. As a result, MMS was in the hands of its legal advisors, and thus, there would be some delay.

On November 9, 2007, Peers again requested a valuation of his investments with MMS and inquired about his redemption of HDF shares. Thereafter, on November 13, 2007, he made a demand to withdraw all of his funds from MMS, including his APF investment.

In response, MMS faxed Peers the following letter:

Dear Mr. Peers,

We acknowledge receipt of your fax dated November 13, 2007. Also, we have been made aware, by one of our Directors, of your intentions to make a complaint to the Police Authorities. In light of this threat, we must inform you that we have been advised that this office can no longer enter into further communication with you.

We must ask you to direct future correspondence to our UK

solicitors; JST Lawyers of Colonial Chambers, Temple Street, Liverpool, L2 5RH. You are already aware that they are dealing with this complicated issue. They will write to you, along with all other shareholders, in due course with proposals for settlement and the necessary documentation to facilitate this.

Yours sincerely

(illegible)

For MMS Private Clients

(Peers Aff., Ex. 21).

By letter dated December 24, 2007, MMS counsel wrote to Peers, and, citing Linnitt's fraud, claimed that MMS was unable to value investors' shares in the APF. According to the London-based solicitors, the APF had ceased to trade and was going to be "wound up." The letter made no mention of Peers' previous demands for redemption and omitted any reference to Peers' HDF investment. The solicitors' letter offered Peers two options: the first, was that MMS would return Peers' initial investment in the APF, paying it out over 12 monthly installments. The second option was to re-invest his initial investment in another MMS fund. MMS also demanded that Peers provide them with a release and indemnity before they would make any payment. MMS calculated Peers' initial investment in the APF at \$138,409, but ignored Linnitt's promise to reimburse Peers for the £20,000.00 in early withdrawal penalties that he had incurred. In addition, MMS did not offer to redeem his investment in the APF for the value it had as of November 13, 2007, the date that Peers had demanded redemption of his investment.

On January 24, 2008, Peers' counsel wrote to MMS's counsel demanding that Peers' investments in the APF and the HDF be redeemed. At the end of February 2008, MMS and its investment manager sent Peers two "Receipt and Indemnity Deeds," one for his investment in

the HDF, and one, apparently for his wife's investment, which they requested that he sign prior to redeeming his shares in the HDF. The valuation date for both shares was February 7, 2008. MMS put the value of Peers' HDF shares at \$654,035.00, and the value of his wife's investment at \$112,300.00 (Peer's Aff., Ex. 25).

Peers signed the Receipt & Indemnity Deed and on March 27, 2008, MMS informed him that the agreed-upon payment to redeem his investment in the HDF was being made and would be received "in normal international time frame." Mrs. Peers' funds were, apparently, at that time already delivered (Peers Aff., Ex. 27).

On May 12, 2008, Peers had still not received his payment and MMS once again informed him that it would make the agreed-upon payment to redeem his investment in the HDF. The promised payment was never made. On May 19, 2008, MMS once again informed Peers that the payment was imminent and promised to pay him an additional \$16,350 as "compensation for the delay." Peers responded that the amount was acceptable for payment received by May 22, 2008.

Payment was never made on either the HDF or the APF accounts. Peers commenced Action No. 1, which relates to the HDF on July 8, 2008. He commenced Action No. 2, which relates to the APF on December 15, 2008.

In Action No. 1, Peers alleges causes of action for breach of contract (first cause of action), fraud (second cause of action), and unjust enrichment (third cause of action). In Action No. 2, Peers alleges causes of action for breach of contract (first cause of action), fraud (second and third causes of action), negligent supervision (fourth cause of action) and unjust enrichment (fifth cause of action).

Discussion

Defendants move to dismiss Actions No. 1 and 2 on the grounds that there is no basis to exercise general jurisdiction over them pursuant to CPLR 301, in that they are not “doing business” in this State within the meaning of that statute and that there is no basis to assert specific jurisdiction over them pursuant to CPLR 302. Defendants further contend that the court does not have subject matter jurisdiction over this matter because MMS is a foreign corporation, and the action deals with shares of foreign companies. They further move to dismiss on the ground of forum non conveniens.

Defendants contend that they do not do any business in New York or anywhere else in the United States. According to the defendants, MMS is incorporated in the Commonwealth of the Bahamas. Its principal place of business is in Dubai, United Arab Emirates. Both APF and HDF are public limited companies formed in the Commonwealth of Dominica.

Defendants acknowledge that MMS has a telephone number and address in New York and receives mail in New York, but they contend that it does not lease office space in New York, and merely pays for a “virtual office facility” that receives mail, facsimiles and telephone calls and forwards on same. Defendants assert that the administrative staff that handles the mail, facsimiles and telephone calls are not employees of MMS, but employees of the virtual office service provider.

Although defendants now contend that MMS does not do business in New York, they do not deny that they have previously represented to Peers and to the public at large, that they operate an office on Wall Street in New York County. MMS asserted, in both the HDF and APF Prospectuses that it was the “Administrator” of these funds, and that its address was 67 Wall

Street, 22 Floor, #2211, New York, New York 10005-3111 (Peers Aff., Ex. 14-15). Its web site also indicates that it maintains a New York office. Further, correspondence from MMS to Peers was sent from its New York fax number and signed by its "Office Manager" who was represented as being in New York. That same New York office manager requested that Peers sign redemption receipts and send the originals to the New York office. Defendants do not deny Peers's assertion that he was informed by MMS and its attorneys that all correspondence needed to be sent to the New York office.

By acknowledging their prior representations, and yet asserting that MMS never did business in this state, defendants acknowledge that they perpetrated a fraud upon the public at large, their clients, and Peers, in particular. Thus, MMS took advantage of the prestige and trust that a New York office would confer upon it, but nonetheless sought to avoid any state or judicial recourse against it. Further, having advised Peers that he could only request redemption of his shares through the New York office, MMS, in essence, used its alleged New York address to delay redeeming Peers's shares and possibly delay Peers's realization that it did not intend to return his funds. Its fraud upon Peers had the further effect of inducing him to commence this action in New York.

Defendants now seek to further take advantage of their fraud by seeking dismissal of the action and thereby incurring a further delay while Peers re-commences the action in another jurisdiction. This court will not permit defendants to gain an unfair advantage as a result of their own wrongdoing.

It is well settled that the defense of lack of personal jurisdiction may be waived (*Buckeye Retirement Co., L.L.C., Ltd. v Lee*, 41 AD3d 183, 184 [1st Dept 2007]; *Mack v Donovan*, 36 AD3d

535, 536 [1st Dept 2007]; *Butler v Goord*, 262 AD2d 694, 695 [1st Dept 1999]). Jurisdiction may be waived by appearing in a lawsuit (*Rose Ocko Foundation, Inc. v Lebovits*, 259 AD2d 685, 690 [2d Dept 1999]; *Rubino v City of New York*, 145 AD2d 285, 288 [1st Dept 1989]) or by agreeing to a forum selection clause in a contract (*National Union Fire Ins. Co. of Pittsburgh, PA. v Worley*, 257 AD2d 228, 231 [1st Dept 1999]; *National Union Fire Ins. Co. of Pittsburgh, PA. v Weir*, 131 AD2d 380 [1st Dept 1987]).

The doctrine of equitable estoppel may be invoked to preclude a defendant from challenging jurisdiction where his own wrongful conduct has misled the plaintiff. Thus, the doctrine has been used to prevent a defendant from contesting jurisdiction based upon improper service where the defendant misrepresented his address to his employer (*Board of Education of City School District of City of New York v Grullon*, 65 AD3d 934 [1st Dept 2009]), or where he had failed to update his DMV records (*Kalamadeen v Singh*, 63 AD3d 1007, 1009 [2d Dept 2009]).

The necessary elements of an equitable estoppel are: (1) lack of knowledge and means of knowledge of the truth as to the facts in question; (2) his good faith; (3) his reliance upon the words or conduct of the party to be estopped; and (4) action by him based thereon of such a character as to change his position prejudicially (21 NY Jur.2d, Estoppel, Waiver and Ratification § 60).

Here, each of these elements has been met. Peers obviously could not know that MMS's website, the letters, the representations by MMS's attorneys and the prospectus information were all part of a charade, concocted to induce him into believing that MMS was based in New York. Further, in reliance on defendants' misrepresentations, Peers commenced the action in New York,

only to face defendants' challenge to jurisdiction. Under these circumstances, defendants are estopped from contesting jurisdiction.

Defendants also argue that this Court does not have subject matter jurisdiction because there is an insufficient relationship between the subject matter, the MMS funds, and the State of New York. Defendants misstate the nature of subject matter jurisdiction. Subject matter jurisdiction is the power of the court, conferred by the Constitution or statute, to entertain the case before it (*Fry v Village of Tarrytown*, 89 NY2d 714, 718 [1997]). The New York State Constitution provides that “[t]he supreme court shall have general original jurisdiction in law and equity” (McKinney’s Const. Art. VI, § 7). Thus, our Supreme Court is a court of “unlimited and unqualified jurisdiction” (*Kagen v Kagen*, 21 NY2d 532, 537 [1968]), and “is competent to entertain all causes of actions unless its jurisdiction has been specifically proscribed” (*Thrasher v United States Liab. Ins. Co.*, 19 NY2d 159, 166 [1967]). Here, the causes of action before the court are breach of contract, fraud, unjust enrichment and negligent supervision. This Court has subject matter jurisdiction over those causes of action.

As to that part of defendants' motion seeking to dismiss on the ground of forum non conveniens, the party seeking a change of forum must clearly establish that another jurisdiction is a more appropriate forum (*National Union Fire Ins. Co. of Pittsburgh, PA.*, 257 AD2d at 232). Defendants have not established that another jurisdiction would be a more appropriate forum, and, at oral argument, defendants refused to agree to jurisdiction in Dubai.

The Cross Motion

In Action No. 1, Peers cross-moves for summary judgment on his first cause of action for breach of contract. Defendants have acknowledged that, as of September 26, 2007, Peers's

investment in the HDF was worth \$629,574.40. On that date, Peers made a formal demand for redemption of his shares, which, by the terms of the HDF prospectus, should have been redeemed within 14 business days, or October 16, 2007. Defendants in Action No. 1 are therefore liable to plaintiff in the amount of \$629,574.40, plus interest at the legal rate from October 16, 2007. Peers also moves, pursuant to Article 62, for a pre-judgment order of attachment. Inasmuch as Peers has been granted summary judgment on this cause of action, he is entitled to pursue collection of his judgment under Article 52. CPLR 5201 provides that a money judgment “may be enforced against any debt, which is past due or which is yet to become due” or against “any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested . . .” (CPLR 5201 [a] and [b]). That part of the motion for a pre-judgment attachment is denied as moot.

Peers also moves for summary judgment on his first cause of action for breach of contract in Action No. 2. As to Action No. 2, defendants have acknowledged Peers’s initial investment in the APF, but the record does not indicate the value of Peers’s investment as of November 2007. Peers alleges that his initial investment was valued at approximately \$135,000, but seeks to recover approximately \$400,000. Moreover, defendants have raised issues regarding their liability for Linnett’s promises to Peers and Linnett’s alleged theft. Accordingly, Peers’s motion for summary judgment is denied as to Action #2.

Plaintiff also moves, pursuant to Article 62 of the CPLR, for a pre-judgment order of attachment. Pursuant to CPLR 6201 (1), a court may order an attachment when “the defendant is a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in the state” (CPLR 6201 [1]). CPLR 6212 (a) sets forth the required showing for an

attachment order. It provides that plaintiff must demonstrate: (1) the existence of one or more grounds for attachment under CPLR 6201; (2) a cause of action; (3) a likelihood that the plaintiff will succeed on the merits of his claim; and (4) the amount demanded from the defendant exceeds all counterclaims known to the plaintiff (CPLR 6212 [a]; see *Ford Motor Credit Co. v Hickey Ford Sales, Inc.*, 62 NY2d 291 [1984]). While Peers has demonstrated that these criteria have been met, inasmuch as attachment is a harsh remedy which denies a defendant the use of his property prior to judgment, “even when the statutory requisites are met, the order may be denied” (see *Elliott Assoc., L.P. v Republic of Peru*, 948 F Supp 1203, 1211 [SD NY 1996], quoting *Filmtrucks, Inc. v Earls*, 635 F Supp 1158, 1162 [SD NY 1986]). Here, the purpose of an order of attachment would be to provide security for a potential judgment obtained by Peers. Peers has not demonstrated that defendants will be unable to satisfy a judgment obtained by him. The motion for an order of attachment is therefore denied.

Conclusion

Accordingly, based upon the foregoing, it is

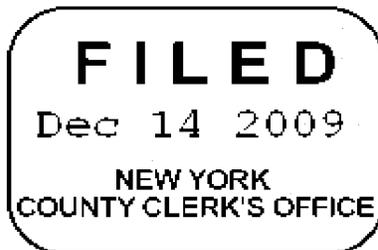
ORDERED that, as to Action No. 1 and Action No. 2, defendants’ motion to dismiss is denied; and it is further

ORDERED that, as to Action No.1, plaintiff’s cross motion for summary judgment is granted and plaintiff shall have judgment against the defendants in the amount of \$629,574.40, plus interest at the legal rate from October 16, 2007; and it is further

ORDERED that as to Action No. 1, plaintiff’s motion for an order of attachment is denied; and it is further

ORDERED that, as to Action No. 2, plaintiff's cross motion for summary judgment and for an order of attachment is denied.

Dated: December 9, 2009



ENTER:



JSC
HON. RICHARD B. LOWE, II.