

Ganidis v United Bank of Switzerland

2002 NY Slip Op 30083(U)

October 21, 2002

Supreme Court, New York County

Docket Number: 0604965/2001

Judge: Barbara R. Kapnick

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

PRESENT: BARBARA R. KAPNICK
Justice

PART 12
(KB)
604965/01

Pavlos Gaudis

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

001

United Bank of Surtgaland

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

SCANNED

NOV 01 2002

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Dated: 10/21/02

Check one: FINAL DISPOSITION

[Signature]
J.S.C.
 NON-FINAL DISPOSITION
BARBARA R. KAPNICK
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 12

-----X

PAVLOS GANIDIS,

Plaintiff,

-against-

UNITED BANK OF SWITZERLAND, AG and
LOUIS AGRO,

Defendants.

-----X

DECISION/ORDER

Index No. 604965/01

Motion Seq. No. 01

BARBARA R. KAPNICK, J. :

Plaintiff Pavlos Ganidis seeks in this action to recover damages in the amount of \$1,025,000.00, together with interest from April 28, 1999, costs, disbursements and attorneys' fees (i) against defendant United Bank of Switzerland ("UBS") for negligence/gross negligence (first cause of action), conversion (second cause of action), and wrongful receiving of monies (third cause of action), and (ii) against defendant Louis Agro for forgery/wrongful receiving of monies (fourth cause of action) and conversion (fifth cause of action).

Plaintiff claims that defendant UBS made wire transfers from his UBS account in Zurich, Switzerland to the accounts of defendant Agro in New York financial institutions pursuant to wire transfer

instructions purporting to be signed by plaintiff, but which plaintiff claims were forgeries.¹

Defendant UBS now moves for an order dismissing this complaint on the basis of forum selection clauses contained in a signature card, a General Pledge and Assignment and a supplemental signature card designating Zurich, Switzerland as the jurisdiction of any lawsuit brought against the Bank, as well as in UBS's 'General Conditions', which was incorporated by reference in said documents, which provides as follows:

15 **Applicable law and place of jurisdiction** All legal aspects of the relationship between client and Bank shall be governed exclusively by Swiss law. Place of performance shall be governed exclusively by Swiss law. Place of performance of all obligations of both parties, as well as the jurisdiction of lawsuits and any other kinds of legal proceedings shall be the domicile of the business office of the Bank with which the contractual relationship exists [*i.e., Zurich, Switzerland*]. Excepting only that the Bank may sue the client in any competent court at the domicile of the client or any other court having jurisdiction.

Defendant UBS argues that the District Court of Zurich or the Court of Commerce of Zurich (whichever plaintiff chooses) are thus the exclusive forums in which this action may be brought.

¹ The wire transfer instructions were presented to UBS on April 28, 1999 (in the amount of \$75,000.00), May 3, 1999 (\$225,000), May 11, 1999 (\$250,000.00), May 28, 1999 (\$400,000.00) and July 23, 1999 (\$75,000.00).

In the alternative, defendant UBS argues that the complaint against it must be dismissed pursuant to CPLR § 327 on forum non conveniens grounds because (i) Switzerland is an adequate forum; (ii) Swiss courts have jurisdiction over both UBS and Agro under the Federal Act on International Private Law ("FAIPL"); (iii) there is no significant nexus between this action and New York since the transfers were made from a bank in Switzerland and plaintiff allegedly represented to UBS that he was a Greek citizen and resident; (iv) the witnesses with actual knowledge of the facts of this action - i.e., the individuals who received the payment orders and processed the payments - are in Zurich; (v) the relevant documents are in Switzerland where plaintiff's bank account was opened and maintained; and (iv) the action is governed exclusively by Swiss law.

Plaintiff argues in opposition to the motion that the forum selection clause is not enforceable because (i) it is one-sided since the client may sue the Bank in Zurich only, but the Bank may sue the client in any court where it can obtain jurisdiction over the client; (ii) it was not the product of an 'arms length negotiation'; and (iii) it was not reasonably communicated to plaintiff and was in small, indistinguishable print.

Plaintiff further argues that even if defendant's forum selection clause was valid, it is inherently unfair and should not be enforced in this case because (i) a trial in Switzerland would

be seriously inconvenient for many of plaintiff's witnesses; (ii) it would be prejudicial, as well as a financial and health hardship for plaintiff to travel from New York to Switzerland; (iii) many of the relevant documents have already been forwarded to UBS's counsel in New York; and (iv) all of the operative facts and events occurred in New York.

It is well-accepted policy that forum-selection clauses are *prima facie* valid. In order to set aside such a clause, a party must show that enforcement would be unreasonable or unjust or that the clause is invalid because of fraud or overreaching such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court. (citations omitted).

British West Indies Guaranty Trust Co. v. Banque Internationale A Luxembourg, 172 A.D.2d 234 (1st Dep't 1991). See also, Shah v. Shah, 215 A.D.2d 287 (1st Dep't 1995); Lexington Investment Co. v. Southwest Stainless, Inc., 697 F.Supp. 139 (S.D.N.Y.1988).

The Appellate Division, First Department, has held that the allegation that a party "did not read the provision, or that it was not brought specifically to [his] attention are of no avail, since, as a signatory to the contract, [he] is presumed to know the contents of the instrument [he] signed and to have assented to such terms. (citation omitted)." British West Indies Guaranty Trust Co., supra at 234.

Nor, does it avail a party seeking to challenge enforcement of a forum-selection clause that the clause was contained in a form agreement and never brought to his attention, or that he may not have been in bargaining parity with the other party. See, Matter of Fidelity & Deposit Co. of Maryland v. Altman, 209 A.D.2d 195 (1st Dep't 1994). See also, Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).

Accordingly, based on all the papers submitted and the oral argument held on the record on June 19, 2002, this Court finds that plaintiff has failed to demonstrate that the forum selection clause is invalid because of fraud or overreaching or that enforcement of the clause would be so unreasonable, unjust or inconvenient that plaintiff would, for all practical purposes, be deprived of his day in court.

Defendant UBS's motion is, therefore, granted. The Clerk may enter judgment dismissing plaintiff's complaint against defendant United **Bank** of Switzerland, AG without costs or disbursements and without prejudice to plaintiff bringing an action for the same relief in the appropriate court in Zurich, Switzerland.

Plaintiff's claims against co-defendant Louis Agro are severed and continued.

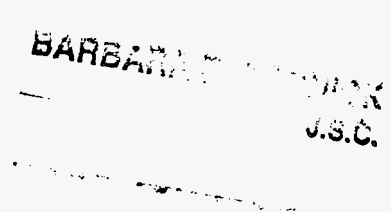
A preliminary conference shall be held in IA Part 12, 60 Centre Street, Room 341 on November 20, 2002 at 9:30 a.m. Plaintiff's counsel shall notify defendant Agro (or his counsel if he is represented) of the conference date.

This constitutes the decision and order of this Court.

Date: October 21, 2002



Barbara R. Kapnick
J.S.C.



BARBARA R. KAPNICK
J.S.C.