

**BDP International Finance Corporation v First
Affiliated Securities**

2006 NY Slip Op 30083(U)

April 10, 2006

Supreme Court, New York County

Docket Number: 0600409/0409

Judge: Richard B. Lowe

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

PRESENT: RICHARD B. LOWE III
Lowell
Justice

PART 56m

BDP International

INDEX NO. 600409/06

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

First Affiliated

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

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
APR 17 2006
NEW YORK COUNTY CLERK'S OFFICE

Dated: 7/10/2006

RICHARD B. LOWE III
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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

-----X
BDP INTERNATIONAL FINANCE CORPORATION,
CARIBBEAN CARD SYSTEM, INC., CREDI PROGRESSO,
S.A., and BANCO DOMINICANO DEL PROGRESSO, S.A.,
Plaintiffs,

Index No. 600409/2006

- against -

**DECISION
AND ORDER**

FIRST AFFILIATED SECURITIES and PEDRO CASTILLO,
Defendants.
-----X

RICHARD B. LOWE, III, J.:

Plaintiffs BDP International Finance Corporation (BDP), Caribbean Card System, Inc. (Caribbean Card), Credi Progresso, S.A. (Credi Progresso), and Banco Dominicano Del Progresso, S.A. (Banco) move for an order of attachment pursuant to CPLR 6201 against defendants First Affiliated Securities (First Affiliated) and Pedro Castillo (Castillo) for the alleged fraudulent transfers of plaintiffs' assets to various banking and financial institutions which have offices and corporate headquarters in the State of New York.

BACKGROUND

BDP, Caribbean Card, and Credi Progresso are subsidiaries of Banco, all of which are organized and incorporated under the laws of the Dominican Republic. Castillo, a citizen and resident of the Dominican Republic, went to work for BDP, holding various positions with BDP, Banco, Caribbean Card, and Credi Progresso since 1986. In 1998, Castillo was promoted to Executive Vice President and in 2000, was promoted to President of BDP. In 2002, he was promoted to Chairman of the Board of the Directors. He was terminated in October 2005, though he currently remains a Director of BDP.

FILED
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Castillo is also a Director of defendant First Affiliated, a business incorporated in the British Virgin Islands on March 22, 1993, through which Castillo makes and hold various investments.

It is alleged that Castillo, since 1997, engaged in a complex scheme to defraud the plaintiffs of several million dollars by utilizing sham companies and other individuals to assist in his unlawful activities. The plaintiffs cite a number of instances of alleged fraudulent transfers:

- on January 31, 2000, through his personal assistant, Castillo directed a check for \$100,000 to be paid on behalf of Topspin Partners, L.P.
- on July 5, 2000, according to a record of Caribbean Card transactions, \$50,000 was transferred from a Caribbean Card account to Prudential Securities.
- on July 24, 2000, Castillo's personal assistant directed that \$100,000 be paid via check from a Caribbean Card account at Coutts (now known as Banco Santander) to Topspin Partners, L.P.
- on May 23, 2001, Castillo, through his personal assistant, directed the transfer of \$100,000 from a Credi Progreso account to Topspin Partners, L.P.

The plaintiffs allege that they were "duped" into approving or participating in approving the theft of such funds. Further, the plaintiffs aver that Castillo procured several letters of credit from Banco, utilizing these letters to obtain and pay for loans Castillo used to purchase a ski lodge in Vail, Colorado, under the name of another corporation owned and controlled by Castillo.

The plaintiffs allege that Castillo moved plaintiffs' assets through First Affiliated into such accounts in and investments at Merrill Lynch, the Medallion Fund, Topspin Partners, L.P., Tweedy, Brown Company LLC, Wachovia Securities LLC (formerly known as Prudential Securities), Merritt Research Corporation, and other corporations. All of these institutions are either based in or have offices located in New York. Castillo and First Affiliated notes that the various accounts are not located or originated in New York: the Merrill Lynch account is maintained in the Dominican Republic, that the Medallion Fund accounts are located in Bermuda, that the Topspin Partners, L.P.

* 4]
accounts are managed in Delaware, that the Tweedy, Brown Company LLC accounts are held in Luxembourg, that the Wachovia Securities LLC account is in Miami, and that the Merritt Research Corporation investment has been distributed to Castillo and is no longer in existence (Castillo Aff ¶ 9).

On February 7, 2006, the plaintiffs brought action by Verified Complaint against the defendants. As against Castillo, the plaintiffs allege fraud and negligent misrepresentation. As against all the defendants, the plaintiffs allege conversion.

DISCUSSION

The plaintiffs move for an order of attachment against the defendants' assets in the state of New York. Specifically, the plaintiffs move to attach accounts at Merrill Lynch, the Medallion Fund, Topspin Partners, L.P., Tweedy, Brown Company LLC, Wachovia Securities LLC (formerly known as Prudential Securities), and Merritt Research Corporation. The plaintiffs also move to attach any other accounts held by either Castillo or First Affiliated, as well as any account held by affiliates and/or associates of Castillo or First Affiliated.

An order of attachment may be granted when "the defendant is a non domiciliary residing without the state, or is a foreign corporation not qualified to do business in the state" and has assets in the state (CPLR 6201 [1]), or when "the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment . . . has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts" (CPLR 6201 [3]). The moving party has the burden of demonstrating, through affidavit or other written evidence, that a valid cause of action for a money judgment exists, that it will probably succeed on the merits, that it has satisfied

one of the statutorily-enumerated grounds of CPLR 6201, and the need for such an order (*see* CPLR 6212 [a]; *A & M Exports v Meridien Int'l. Bank*, 207 A.D.2d 741, 742 [1st Dept 1994]). Where the plaintiff seeks an order of attachment pursuant to CPLR 6201 (3), it is incumbent upon the plaintiff to demonstrate that the defendant is acting with intent to defraud, and fraud is not lightly inferred; the moving papers must contain evidentiary facts, as opposed to conclusions, proving the fraud (*Shisgal v Brown*, 3 AD3d 434 [1st Dept 2004], citing *Societe Generale Alsacienne De Banque, Zurich v Flemingdon Dev. Corp.*, 118 AD2d 769, 772 [2d Dept 1986]; *see also Jannuzzo v De Cuevas*, 216 AD2d 37 [1st Dept 1995]).

A. First Affiliated

Defendant First Affiliated claims that the plaintiffs have failed to provide any basis for jurisdiction in this court. First Affiliated also argues that the plaintiffs have failed to state a cause of action against it that would allow for an attachment. As such, the defendant argues, an order of attachment is improper. This court agrees.

As noted above, the plaintiffs must allege a valid cause of action for which a money judgment exists in order for a valid order of attachment to be forthcoming. Here, the plaintiffs allege only a cause of action for conversion against First Affiliated. However, as to its moving papers as well as in the Complaint, the plaintiffs have failed to demonstrate how First Affiliated converted plaintiffs' assets. Other than the fact that Castillo is a Director of First Affiliated and holds various investments in the defendant company, the Complaint is devoid of any suggestion or fact that connects First Affiliated to the alleged misappropriations made by Castillo. Nor do the affidavits supplied by the plaintiffs demonstrate otherwise. Here, the plaintiffs have failed to establish how First Affiliated is involved, and, in turn, how the court may attach its assets where the plaintiffs have

not shown that there are assets that the court may attach (*accord Sigmoid Resources, N.V. v Pan Ocean Oil Corp.*, 234 AD2d 103, 105 [1st Dept 1996] [the “plaintiff’s right to attach a given item of property is only the same as the defendant’s own interest in it”]; *Considar, Inc. v Redi Corp. Establishment*, 238 AD2d 111, 113 [1st Dept 1997]).

In addition, the plaintiffs allege conversions by Castillo in 2000 and 2001. Even if the plaintiffs provided enough facts to link Castillo’s fraudulent transactions with First Affiliated, insofar as the statute of limitations is concerned, the plaintiffs have alleged facts in the Complaint outside the requisite time period and, as such, are irrelevant to this motion for an attachment (*see* CPLR 214 [3]; *Vigilant Ins. Co. of Am. v Housing Auth.*, 87 NY2d 36, 44 [1995]). Nor, from the record before this court, have the plaintiffs made a demand of defendant First Affiliated, in which the defendant has failed to respond in kind (*see D’Amico v First Union Nat’l Bank*, 285 AD2d 166, 172 [1st Dept 2001], citing *MacDonnell v Buffalo Loan, Trust & Safe Deposit Co.*, 193 NY 92, 101 [1908] [the statute of limitations runs from the time there is a demand and refusal]).

Finally, there is the issue of whether the court may even attach any of First Affiliated’s assets. The plaintiffs aver that the assets may be attached because the moneys are held in banks which have offices and branches in New York. However, the long-standing general rule in New York is that each bank is a separate entity and that, in order to reach a particular bank account, the branch of the bank where the account is maintained must be served (*National Union Fire Ins. Co. v Advanced Empl. Concepts, Inc.*, 269 AD2d 101 [1st Dept 2002]). “In order to be subject to attachment, property must be within the court’s jurisdiction (*ABKCO Indus. v Apple Films*, 39 NY2d 670 [1976]), and the mere fact that a bank may have a branch within New York is insufficient to render accounts outside of New York subject to attachment merely by serving a New York branch” (*id.*). Indeed, as

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is pointed out by affidavit, these accounts and investments were opened and maintained outside the state of New York. As such, this court has no authority to attach such assets in New York where there is no evidence of any assets in this jurisdiction.

Even where these corporations and banks have corporate offices in New York, which the plaintiffs aver this court has jurisdiction pursuant to the “separate entity rule” (*see Therm-X-Chemical & Oil Corp. v Extebank*, 84 AD2d 787 [2d Dept 1981]), “the exception to the separate entity rule is applicable only where the restraining notice is served on the bank’s main office; the main office and the branches where the accounts in question are maintained *are within the same jurisdiction*; and the bank branches are connected to the main office by high-speed computers and are under its centralized control” (*National Union Fire Ins. Co.*, 269 AD2d at 102 [emphasis in original], citing *LiLimonium Mar. v Mizushima Marinera*, 961 F Supp 600 [SD NY 1997]). As the First Department noted, “to encompass all of a bank’s branches, notwithstanding their physical location outside of this jurisdiction . . . would require . . . a pronouncement from the Court of Appeals or an act of the Legislature” (*id.*). Because the plaintiffs have failed to demonstrate that any of the assets the plaintiffs seek to attach are in New York, this court has no jurisdiction to attach any of First Affiliated’s assets.

Based on the foregoing, the motion for an order of attachment against First Affiliated is denied.

B. Castillo

Defendant Castillo claims that the plaintiffs have failed to provide a basis for jurisdiction in this court to order an attachment of Castillo’s assets. Castillo also argues that he sued the plaintiffs for wrongful termination in excess of what the plaintiffs are alleging. Accordingly, Castillo argues,

an order of attachment is improper. The court agrees.

As noted above, the court may not attach assets which are not in New York. As the defendants point out, the accounts and investments the plaintiffs seek to attach were opened and maintained outside the state of New York. Because the court has no authority to attach assets not in New York, this order for an attachment must be denied (*see National Union Fire Ins. Co.*, 269 AD2d at 102).

Furthermore, the Complaint fails to demonstrate that Castillo is acting with intent to defraud or that there are facts to support that presumption of fraud. Fraud is not lightly inferred; the moving papers *must contain evidentiary facts*, as opposed to conclusions, proving the fraud (*see Shisgal*, 3 AD3d 434 [emphasis added]). Here, the plaintiffs rely heavily on a forensic audit submitted by the plaintiffs as evidence of fraud (*see Velez Aff, Ex. A*). However, the audit as well as the plaintiffs' affidavits and statements set forth only conclusory facts stating that the defendant directed checks and funds to be transferred from plaintiffs' assets to Castillo, but fail to provide any indication as to his intent or any evidence to demonstrate fraud. For one, the audit aptly demonstrates that the plaintiffs have no recourse in this court because the moneys the plaintiffs seek to attach are not located in New York. More importantly, the audit does not in itself evidence Castillo's fraudulent intent. The audit suggests that money was transferred; the audit does not show how the money was transferred, what "complex scheme" was involved, or Castillo's intent. Indeed, the only statement provided by the plaintiffs to indicate that Castillo intended to defraud the plaintiffs is that a "Banco official discovered . . . that Mr. Castillo . . . had been engaged in a massively complex scheme to defraud Banco of millions of dollars" (*id.*). This is not enough to state a claim of fraud. Because the affidavits and the Complaint suggest only "mere suspicions of an intent to defraud" (*id.*, citing

Rosenthal v Rochester Button Co., 148 AD2d 375, 376 [1st Dept 1989]), without more, the papers are wholly inadequate for the relief sought.

As to the final argument regarding the counterclaims made by Castillo against the plaintiffs in excess of plaintiffs' claims, the court need not deal with that as the amounts are disputed (see February 24, 2006 Minutes [plaintiffs claim that the amount continues to rise according to forensic accounting; Castillo claims at least \$9 million]). While Castillo may have damages exceeding the plaintiffs' claims, since the court has no jurisdiction over Castillo's assets (indeed, it is questionable whether the court even has personal jurisdiction over the defendants themselves) it is irrelevant at this stage whether Castillo's damage claims in the Dominican Republic would trump the plaintiffs' damages demands.

Accordingly, the court denies the order for an attachment as against defendant Castillo.

CONCLUSION


For the foregoing reasons, it is hereby

ORDERED that the plaintiffs' motion for an attachment is denied in its entirety, and it is further

ORDERED that the temporary restraining order is lifted as against the defendants.

Dated: April 10, 2006

ENTER:


RICHARD G. LOWE III, J.S.C.
RICHARD G. LOWE III

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