

**Garmendia v O'Neill**

2006 NY Slip Op 30409(U)

April 10, 2006

Supreme Court, New York County

Docket Number: 117763/2004

Judge: Karla Moskowitz

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

PRESENT: Hon. KARLA MOSKOWITZ PART 03  
Justice

-----x  
LUIS VARGAS GARMENDIA, et al,

INDEX NO 117763/2004

Plaintiffs,

MOTION DATE \_\_\_\_\_

-against-

MOTION SEQ. NO. 001

BRIAN O'NEILL, et. al

MOTION CAL. NO. \_\_\_\_\_

Defendants.  
-----x

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

**FILED**

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

APR 13 2006

Cross-Motion:  Yes  No

CLERK OF COURT OFFICE  
NEW YORK

Upon the foregoing papers, it is

**ORDERED** that this motion is decided in accordance with the accompanying Decision and Order.

Dated: April 16, 2006

\_\_\_\_\_  
KARLA MOSKOWITZ

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 3

-----X  
LUIS VARGAS GARMENDIA, et al,

Plaintiffs,

-against-

BRIAN O'NEILL, et. al

Defendants.

Index No. 117763/2004

**DECISION and ORDER**

-----X  
**Karla Moskowitz, J.:**

Motions sequence numbers 001 and 004 are consolidated for disposition.

This is an action for negligence in connection with the demise of Banco Comercial, one of the largest and oldest banks in the Republic of Uruguay. In motion sequence 001, defendants move, pursuant to CPLR 327, to dismiss the complaint on the grounds of forum non conveniens. In motion sequence 004, plaintiffs move to compel the production of documents.

For the reasons stated below and as set forth in this court's decision in the related case of Network Finance, Inc., et al, v JPMorgan Chase & Co, et al, #116905/04 [NY Sup 2004], the court grants the motion to dismiss on the grounds of forum non conveniens and dismisses the action provided that defendants accept service of process and consent to the jurisdiction of the courts of Uruguay, waive any statute of limitations defense they did not already have before the commencement of this action and consent to the full faith and credit of any judgment that plaintiffs obtain and pay it and provided that plaintiffs commence the action within 90 days from the date of service of defendants' stipulation upon plaintiffs' counsel. The court denies the motion to compel production of documents.

The facts of this case are set forth in detail in the related Network Finance decision.

Briefly, the corporate defendants here are the alleged owners of Banco Comercial, the largest bank in Uruguay. The individual defendants are directors of Banco Comercial.

The government placed Banco Comercial (The Bank) into liquidation in December of 2002, an event that has led to numerous civil and criminal proceedings in Uruguay, as well as civil actions in the United States. The Amended Complaint alleges that two of its directors, Carlos Rohm and Jose Rohm, caused the demise of the Bank. The complaint sets forth a series of fraudulent financial schemes carried out from 1998 to 2002, that drained the bank of its assets and led to its eventual demise. These schemes involved: 1) the use of sham hedge agreements; 2) the making of irregular loans; 3) conversion of deposits; and 4) use of subsidiaries to drain the bank of its assets.

The Amended Complaint asserts a single cause of action for negligence. Plaintiffs assert that, pursuant to the laws of Uruguay, defendants owed plaintiffs a duty of good faith and loyalty, a duty to safeguard the assets of the bank and a duty to implement procedures and safeguards to prevent Banco Comercial from the type of fraudulent conduct that the Rohms allegedly carried out. Plaintiffs allege that defendants breached the duties the laws of Uruguay imposed upon them by failing to prevent the underlying fraud that led to the collapse of Banco Comercial.

Defendants move to dismiss the complaint on the grounds of forum non conveniens. "The common-law doctrine of forum non conveniens, also articulated in CPLR 327, permits a court to stay or dismiss such actions where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere." Islamic Republic of Iran v Pahlavi, 62 NY2d 474, 478-479 [1984]. The factors for the court to consider are the burden on the New York courts, the potential hardship to the defendant, and the availability of an alternative forum in which the plaintiff may bring its action. Intertec Contracting A/S v Turner

\* 4 ]  
Steiner Intern, SA, 6 AD3d 1 [1st Dept 2004]. The court should also consider whether the parties are residents of New York and whether the transactions out of which the cause of action arose occurred primarily in a foreign jurisdiction. Islamic Republic of Iran v Pahlavi, supra at 479; see, Harleysville Ins Co v Ermar Painting and Contracting, Inc, 8 AD3d 229 [2d Dept 2004].

It is undisputed that the alleged fraud underlying this action occurred primarily in Uruguay and to a lesser extent in Argentina. The Amended Complaint describes in detail the various schemes carried out in Uruguay and Argentina to drain Banco Comercial of its assets. Therefore, it is clear that this action has a strong connection to the Republic of Uruguay. Moreover, that country has a significant and compelling interest in adjudicating actions arising from those fraudulent schemes and the demise of Banco Comercial. See, Phat Tan Nguyen v Banque Indosuez, 19 AD3d 292, 294 [1st Dept 2005]; Holness v Maritime Overseas Corp, 251 AD2d 220, 225 [1st Dept 1998]. These factors weigh heavily in favor of dismissing this action on the grounds of forum non conveniens, as set forth in detail in the Network decision.

Several other factors weigh in favor of dismissal. First, it is undisputed that the law of Uruguay will apply here. As set forth above, plaintiffs' sole cause of action arises from defendants' breach of that country's law. This court can apply the laws of Uruguay. However, a court in Uruguay is better equipped to apply its own laws. See, Phat Tan Nguyen v Banque Indosuez, 19 AD3d 292 [1st Dept 2005]; De Torres v Arocna, 155 Misc2d 52 [NY Sup 1992].

Second, Uruguay provides an adequate alternate forum to New York. See, Cappellini v United Technology of New York, 79 AD2d 593 [1st Dept 1980]; De Torres v Arocna, supra. Plaintiffs argue that procedural differences between New York courts and those in Uruguay preclude dismissal. However, a forum is not considered inadequate because of the existence of

procedural differences between itself and courts in New York. See, Wyser-Pratte Management Co, Inc v Babcock Borsig AG, 23 AD3d 269 [1st Dept 2005]; Edelman v Taittinger, SA, 298 AD2d 301, 303 [1st Dept 2002].

Plaintiffs also assert that adjudicating this action in Uruguay will subject it to significant delay. However, this is speculative and not sufficient to warrant keeping this action in New York. See, Acosta v JPMorgan Chase & Co, 2006 WL 229196 [SDNY 2006] at 18 (dismissing claims arising from demise of Banco Comercial on the grounds of forum non conveniens).

The court also finds that judicial economy is served by the adjudication of this action in Uruguay. This will prevent the parties' duplication of effort and eliminate the possibility of inconsistent findings and verdicts between courts in New York and Uruguay. See, Holness v Maritime Overseas Corp, 251 AD2d 220, 225 [1st 1996].

Plaintiffs argue that this action should be adjudicated in New York because it bears a strong nexus with this forum. They assert, among other things, that at least 15 meetings of the Board of Directors of Banco Comercial took place in the United States, including some in New York.<sup>1</sup> Plaintiffs also assert that defendants received monthly financial reports in New York and conducted activities related to Banco Comercial in New York, including the underwriting of plaintiffs' bonds.

It is apparent that defendants took at least some actions in New York relating to the governance of Banco Comercial, although plaintiffs do not provide many details as to those actions. However, in the context of this lawsuit, these activities are relatively minimal in comparison to the actions that took place abroad, particularly in Uruguay, in connection with the looting of Banco Comercial. Therefore, the court dismisses this action on the grounds of forum

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<sup>1</sup> Plaintiffs do not specify how many meetings occurred in New York.

non conveniens.

Plaintiffs move to compel the production of documents from defendants in order to demonstrate a greater nexus between this action and New York. Specifically, plaintiffs seek documents generated in an arbitration between defendants Chemical Overseas Holdings, Inc., Credit Suisse First Boston and Dresdner Bank Lateinamerika and the Republic of Uruguay (RoU). Plaintiffs seek all documents that defendants submitted to the arbitrators as well as all documents disclosed to or received from the RoU in connection with the arbitration.

The arbitration at issue arose in connection with a Subscription Agreement that the defendants and the RoU executed on February 26, 2002, shortly after the revelation of the fraud at Banco Comercial. Pursuant to the agreement, defendants agreed to infuse the bank with \$100 million in an attempt to restore its solvency and to bolster confidence in the bank's stability.

On December 5, 2002, each of the defendants sent the RoU a notice that it had failed to comply with its obligation under the agreement to provide financial support to Banco Comercial. (Arbitration Award at ¶ 24). The defendants also notified the RoU that it was in breach of its obligation to purchase each defendant's shares of preferred stock in Banco Comercial for \$33.3 million. Defendants then commenced the arbitration.

Plaintiffs have not demonstrated that they are entitled to the documents generated in connection with the arbitration. First, the documents generated during the arbitration are subject to a confidentiality agreement, dated January 13, 2004, that the parties to the arbitration executed and the arbitrators so ordered.

Further, plaintiffs have not demonstrated that the documents are sufficiently relevant to their allegations in this action. Plaintiffs contend that the arbitration documents will help them establish that New York is the appropriate forum for this action by revealing actions that the

defendants took in New York in relation to the demise of Banco Comercial.

However, it is undisputed that the arbitration arose from events that took place after the looting of Banco Comercial. The parties executed the Subscription Agreement to enable Banco Comercial to attempt to remain solvent during the crisis that followed revelation of the underlying fraud. The allegations in this action flow from that fraud itself, not from events after the revelation of that fraud. Thus, plaintiffs have not demonstrated a sufficient connection between the subject matter of this action and the subject matter of the arbitration to justify compelling discovery of the documents generated in the arbitration. Accordingly, it is

ORDERED, that the court grants the motion to dismiss this action on the grounds of forum non conveniens and dismisses the action provided that defendants accept service of process and consent to the jurisdiction of the courts of Uruguay, waive any statute of limitations defense they did not already have before the commencement of this action and consent to the full faith and credit of any judgment that plaintiffs obtain and pay it and provided that plaintiffs commence the action within 90 days from the date of service of defendants' stipulation upon plaintiffs' counsel; and it is further

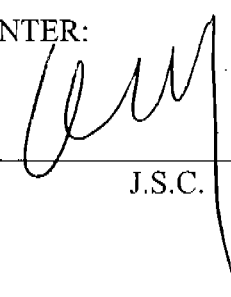
ORDERED, that the court denies the motion to compel the production of documents.

Dated: April 10, 2006

**FILED**

APR 13 2006

ENTER:

  
\_\_\_\_\_  
J.S.C.

CLERK OF COURT