

<b>Citigroup Global Mkts., Inc. v Newberry</b>
2007 NY Slip Op 31975(U)
July 2, 2007
Supreme Court, New York County
Docket Number: 0603604/2006
Judge: Shirley W. Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Hon. Shirley Kornreich  
Justice

PART 54

Citigroup

INDEX NO. 603604/06

MOTION DATE 4/19/07

MOTION SEQ. NO. 001

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

- v -

Newberry J

The following papers, numbered 1 to 7 were read on this motion to/for \_\_\_\_\_

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

PAPERS NUMBERED

1, 2, 3

Answering Affidavits - Exhibits \_\_\_\_\_

4, 5

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

6, 7

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

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

**FILED**

JUL 06 2007

NEW YORK CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.**

Dated: 7/2/07

HON. SHIRLEY KORNREICH  
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: PART 54

----- X  
CITIGROUP GLOBAL MARKETS, INC.,

Plaintiff,

Index No.: 603604/06

- against-

DECISION  
and ORDER

TERRY NEWBERRY, FIRST TENNESSEE BANK,  
SOUTHERN TIRE MART, LLC, BANK OF AMERICA  
AND JOHN DOE

Defendants.

----- X  
KORNREICH, SHIRLEY WERNER, J.:

This action sounding in negligence, breach of presentment warranties, breach of contract and check dishonor, arises from plaintiff's acceptance of a fraudulent check issued by defendant Southern Tire Mart, LLC ("STM"). STM now moves, by special appearance only, to dismiss the complaint for lack of personal jurisdiction. Plaintiff opposes.

I. *Statement of Facts*

STM is a limited liability company incorporated under the laws of Mississippi with its corporate headquarters/principal place of business located at 529 Industrial Park Road, Columbia, Mississippi. Defendant Terry Newberry ("Newberry") is an individual residing at 4361 East Mission Sp. 73, Montclair, California.

On or about December 6, 2005, STM issued a check drawn from its account at defendant First Tennessee Bank ("FTB"), payable to Newberry. The check was dated December 8, 2006, and was drawn in the amount of \$45,800.90 ("the check"). On December 15, 2005, Newberry

opened an account at the Irvine, California branch of Smith Barney ("SB").<sup>1</sup> On December 16, 2005, Newberry deposited the check into his SB account.

On December 20, 2005, Newberry requested that plaintiff issue three checks totaling \$22,500 against his SB account. In order to process this request, SB employee Anthony Morillo contacted FTB and received assurances from FTB representative Adam Watson that the check cleared on December 19, 2005. Plaintiff then processed these three check requests on December 20, 2005.

On December 21, 2005, Newberry requested a federal funds transfer of \$5,000 from his SB account to his personal account at Wells Fargo. Once again, SB contacted FTB and received assurances that the original check had cleared. Plaintiff, thus, processed Newberry's request that same day.

On December 27, 2005, Newberry requested another federal funds transfer to his Wells Fargo account this time for \$18,262.54. SB, for the third time, received assurances from FTB that the check had cleared on December 19, 2005 and processed Newberry's request.

On January 11, 2006, a representative from Bank of America, plaintiff's cashing bank, contacted plaintiff and informed it that the check had been returned by FTB. Dawn Walsh ("Walsh"), plaintiff's Vice President, avers that during her investigation into the return of the check, she spoke with Janet Price ("Price"), STM's accountant. Walsh avers that Price informed her that STM did not issue the check in question, had experienced several problems with its

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<sup>1</sup>Smith Barney is a division of plaintiff Citigroup Global Capital Markets, Inc., specializing in brokerage, investment banking, and asset management.

account at FTB, including the issuance of fraudulent checks, and made the conscious decision not to close its FTB account because it was a business account and closing it would be difficult.

Price avers that none of the acts allegedly committed by STM took place within the State of New York, and that STM has no offices, real or personal property, bank accounts, employees or agents in New York, and conducts no business, pays no taxes or has any other contacts with the State.

## II. *Conclusions of Law*

### A. *Personal Jurisdiction*

To determine if a non-domiciliary is subject to suit in New York, the Court must first determine whether the long-arm statute (CPLR 302) places jurisdiction over defendant based upon its contacts with the State. *LaMarca v. Pak-Mor Manu. Co.*, 95 N.Y.2d 210, 214 (2000). If defendant's contacts with New York meet the requirements of CPLR 302, the Court will then determine if the exercise of jurisdiction meets due process requirements. *LaMarca*, 95 N.Y.2d at 214.

To confer long-arm jurisdiction pursuant to CPLR 302(a)(3)(ii), it must be shown that: (1) defendant committed a tortious act outside of New York; (2) the cause of action arises from the tortious act; (3) the act caused injury to a person or property in New York; (4) defendant expected or reasonably should have expected the act to have consequences in New York; and (5) defendant derived substantial revenue from interstate or international commerce. *Id.* In the context of commercial torts, where damages are solely economic in nature, the situs of the nonphysical commercial injury is where the critical events associated with the action or dispute

took place, not where any damages or financial loss occurred. See *Weiss v. Greenberg, Traurig, Askew, Hoffman, Lipoff, Quentel & Wolff*, 85 A.D.2d 861, 862 (3<sup>rd</sup> Dept. 1981); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Davis, Wright, Todd, Relse and Jones*, 157 A.D.2d 571 (1<sup>st</sup> Dept. 1990); *Mid-Atlantic Residential Investors L.P. v Perkins & Zures, Inc.*, 166 A.D.2d 205, 296 (1<sup>st</sup> Dept. 1990); *Polansky v. Gelrod*, 20 A.D.3d 663, 664 (3<sup>rd</sup> Dept. 2005).

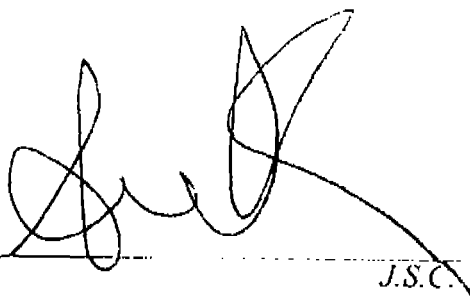
Plaintiff argues that although it has branches all over the U.S., each branch is controlled by plaintiff's New York headquarters, and therefore, any injury to plaintiff throughout the U.S. results in injury at its headquarters. Plaintiff alleges that STM was negligent by failing to prevent the alteration and forgery of checks coming out of its FTB account in Mississippi. Plaintiff further alleges this resulted in a returned check in the amount of \$45,800.90, on its SB account, which proximately caused damages to plaintiff in New York.

Here, this Court does not have personal jurisdiction over STM. The critical events associated with this dispute took place in Mississippi. That is where STM allegedly was negligent by failing to prevent the alteration of checks coming from its FTB account. Plaintiff does not offer any evidence to show that any of the critical events associated with the fraudulent check in question took place in New York. At best, some events occurred in California. There is no connection between this commercial injury and New York. Accordingly, it is

ORDERED that the motion to dismiss of Southern Tire Mart, LLC is granted and the causes of action against it are dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the causes of action as against defendant's Terry Newberry, First Tennessee Bank, Bank of America, and John Doe are severed and shall continue.

ENTER



A handwritten signature in black ink, appearing to be "J.S.C.", is written over a horizontal line. The signature is stylized and cursive.

DATE: July 2, 2007  
New York, NY