

Tamman v Schinazi

2007 NY Slip Op 32437(U)

August 2, 2007

Supreme Court, New York County

Docket Number: 0602300/2006

Judge: Jane S. Solomon

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

PRESENT: SOLOMON
Justice

PART 55

TAMMAN, SAMI
- v -
SCHINAZI, SAMUELE

INDEX NO. 602300/2006
MOTION DATE 4-6-2007
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to 10 were read on this motion to dismiss

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

PAPERS NUMBERED
<u>1-4</u>
<u>5-9</u>
<u>10</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

*NB: Prelim Conf 9/10/07 @ room.
See last page.*

FILED

AUG 07 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/2/07
JANE S. SOLOMON

[Signature]
JANE S. SOLOMON 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 55

-----X

SAMI TAMMAN and JACQUELINE TAMMAN,

Plaintiffs,

-against-

INDEX NO. 602300/06

SAMUELE SCHINAZI, a/k/a SAMY SCHINAZI
and/or SAMUEL SCHINAZI

DECISION AND ORDER

Defendant.

-----X
JANE S. SOLOMON, J.

FILED
AUG 07 2007
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In this action for repayment of \$1.4 million evidenced by defendant's signature on a receipt, defendant Samuele Schinazi, a/k/a Samy Schinazi and Samuel Schinazi ("Defendant"), moves to dismiss the Complaint for want of jurisdiction, or alternatively on the ground of *forum non conveniens*. For the reasons discussed herein, the motion is denied.

Background

Plaintiffs Sami Tamman ("Sami") and Jacqueline Tamman (together, "Plaintiffs") are citizens and residents of Geneva, Switzerland. In the Complaint, Defendant is said to do business and/or reside in New York. Defendant, who submits no affidavit himself, is said by his lawyer to be a citizen of Italy with a residence in Brazil.

Defendant's supporting memorandum, based on a deposition Sami gave in a related lawsuit, represents that Plaintiffs and Defendant are cousins and that Defendant's son Isaac Schinazi ("Isaac") and plaintiff Sami are long time friends

who visited in New York, Switzerland and Brazil; plaintiff Jacqueline's parents live in Brazil and Sami has business interests there. Defendant worked in the currency exchange business in Brazil, and due to Plaintiffs' need for local currency there, they maintained an account with Defendant since the 1980s.

Beginning in 1997, Plaintiffs began transferring funds to Brazil to provide financial assistance for Sami's father-in-law's real estate concerns. The funds were transferred through Isaac rather than directly to Sami's father-in-law, not only because the money had to be converted to Brazilian Reais, but also in order to avoid complications with a Brazilian government lien on the father-in-law's real estate.

Isaac and Sami had several discussions about investing the funds that were being transferred. Plaintiffs allege that these conversations took place while the men were in New York or Geneva, and many were conducted internationally by phone. On May 8, 1998 Isaac signed a Receipt of Monies Received (the "Receipt") acknowledging that he had received \$318,778 for investment, and that he and Defendant would be "fully responsible for the funds." The Receipt further states that "[a]t any end of month this amount can be reimbursed on request to the owner." The Receipt does not provide for a governing law or indicate where it was signed, but Plaintiffs contend they received it in New York.

After May 1998 Sami transferred more funds to Isaac

and, on March 14, 2000 (at the bar mitzvah of one of Isaac's sons in Connecticut), Defendant and Isaac updated the Receipt below the original text (the "Update") to acknowledge that the amount of funds had risen to "\$1,400,000.00 approximately". This time both Isaac and Defendant signed their names.

Sami's affidavit states that in June 2006 he spoke with Defendant in regard to repayment by calling him in New York. He also swears that Defendant has a New York Medicare card. By that time, Plaintiffs had obtained a judgment in the United States District Court for the Southern District of New York, Index No. 00 Civ. 9404 (GBD) (the "Federal Action") in the amount of \$1,389,327 plus interest from July 1, 2000 against Isaac. In or about February 9, 2006, Isaac filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Southern District of New York.

The Complaint herein is dated June 28, 2006. Defendant now moves under CPLR § 3211(a)(8) to dismiss the Complaint on the ground that this Court does not have personal jurisdiction over him, and under CPLR § 327 on the ground of *forum non conveniens*.

Discussion

Personal Jurisdiction

Plaintiffs argue that jurisdiction was achieved over Defendant when he was served personally on July 5, 2006 at 40 East 61st Street, Apt. 7A in Manhattan. The concept of jurisdiction by a defendant's presence in New York under CPLR §

301, also known as transient jurisdiction, is well recognized. See Kelly v. Kelly, 300 A.D.2d 547 (2nd Dep't 2002).

The Affidavit of Service which states Defendant was personally served on July 5, 2006, describes him as a 35 year old black male. Defendant submits no Affidavit on his own behalf, but the Reply Memorandum of Law submitted on his behalf states that Defendant is an elderly white male. The Reply Memorandum also argues that the Affidavit of Service does not include text stating that Defendant was personally served. Plaintiffs submit an affidavit from an individual employed by ServerLinks.com (the agency retained for service of process) that contends Defendant was personally served and that the text stating so was "inadvertently cut off and omitted [from the original Affidavit of Service] due to a computer word processing programming error."

An objection to personal jurisdiction based on improper service under CPLR § 3211(e) requires a defendant to move for judgment within 60 days after service of an answer containing that objection. Defendant's Verified Answer was served on September 8, 2006, by first class mail, and contains an allegation that this Court lacks personal jurisdiction over him. This motion to dismiss the Complaint is dated February 13, 2007, well after the expiration of the 60 date period. Therefore, the objection is waived and this Court's personal jurisdiction is assumed.

Since this Court has found jurisdiction based on

Defendant's waiver of an objection to personal service, other grounds for jurisdiction need not be considered. However, it is noted that Plaintiffs have alleged several issues (including the statements of the doorman at Defendant's condominium and Defendant's use of the condominium address in official documents) that call into question whether Defendant was domiciled in New York at the time this action was commenced. In addition, although Defendant flatly denies that he conducts business within New York, Plaintiffs contend that Isaac acted as his father's agent in New York, many companies that are majority owned by Defendant conduct business in New York and that the New York law firm currently representing Defendant has represented him for a number of years prior to this action.

A plaintiff need only show that he made a "sufficient start" to prove jurisdiction in order to defeat a motion to dismiss and warrant further discovery (see Bunkoff General Contractors, Inc., 296 A.D.2d 699 [3rd Dep't 2002]). Even if jurisdiction over Defendant was not obtained through personal service within the State, Plaintiffs' allegations constitute a sufficient start to show that this Court has personal jurisdiction over Defendant under CPLR § 301 because of his domicile or under the doing business standard.

Forum Non Conveniens

New York courts "need not entertain causes of action lacking a substantial nexus with New York" (Martin v Mieth, 35

N.Y.2d 414 [1974]), and may dismiss otherwise jurisdictionally sound cases under CPLR § 327(a) that would be better heard elsewhere.

Courts consider and balance the following factors in determining an application for dismissal based on *forum non conveniens*: existence of an adequate alternative forum; situs of the underlying transaction; residency of the parties; potential hardship to the defendant; location of documents; location of the majority of witnesses; and the burden on New York courts.

Islamic Republic of Iran v. Pahlavi, 62 N.Y.2d 474 (1984).

Courts also consider whether New York law governs (Diversified Research Partners Ltd. Partnership v. Pollution Research & Control Corp., 198 A.D.2d 81 [1st Dep't 1993]). "Generally, 'unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.'"

Anagnostou v. Stifel, 204 A.D.2d 61 (1st Dep't 1994) (internal citations omitted).

Defendant has failed to sustain his burden that the action would be better heard in Brazil. Even if not domiciled in New York, he owns a condominium in Manhattan and will not suffer hardship if the case is tried here. Although it is not clear that the situs of the transaction is in New York, Isaac is a potentially important witness and is present here. While it is equally unclear at this stage whether New York law should govern, both Plaintiffs and Isaac relied solely on New York law in the

Federal Action. See Tamman v. Schinazi, 2004 U.S. Dist. LEXIS 13896 (S.D.N.Y. 2004). Thus it is unlikely that this Court would be burdened by this action.

Due Process

Defendant's due process argument is unpersuasive. As stated in Deutsche Bank Securities, Inc. v. Montana Board of Investments, 21 A.D.3d 90, 94 (1st Dep't 2005):

Due process is not offended "so long as a party avails itself of the benefits of the forum, has sufficient minimum contacts with it, and should reasonably expect to defend its actions there . . . even if not 'present' in that State" . . . In order to satisfy the minimum contacts requirement, it is essential that there be "some act by which defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefit and protection of its laws" (internal citations omitted).

The submitted evidence establishes that Defendant purposefully conducted activities in New York, either directly, through his companies, or through his agent Isaac.

Accordingly, it hereby is

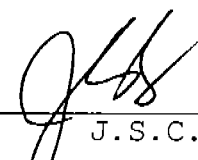
ORDERED that Defendant's motion is denied in its entirety;

ORDERED that counsel shall appear at a preliminary conference in Part 55 on September 10, 2007 at 12:00 noon.

Dated: August 2, 2007

ENTER:

FILED
AUG 07 2007
NEW YORK
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J.S.C.
JANE S. SOLOMON