

Banca Electronica Del Paraguay v Basso

2008 NY Slip Op 30659(U)

March 6, 2008

Supreme Court, New York County

Docket Number: 0114853/2005

Judge: Jane S. Solomon

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

PRESENT: HON. JANE S. SOLOMON
Justice

PART 55

~~BASSO~~ Electronica
Del Parquay

INDEX NO. 114853/05
MOTION DATE 11-26-07
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

BASSO

The following papers, numbered 1 to 5 were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...	<u>1-3</u>
Answering Affidavits - Exhibits	<u>4-5</u>
Replying Affidavits	

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.

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

FILED
MAR 10 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/16/08

J.S.
HON. JANE S. SOLOMON
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 55

-----X
BANCA ELECTRONICA DEL PARAGUAY,
JORGE ABENTE, ELBA ESTEVEZ LOSINO,
MADZEN S.A., AGNES MARGRET BRIGITTE
BEYERSDORFF DE BENDLIN, UNIMARINE
PARAGUAY S.A., AMERICAS TRADE AND
FINANCE S.A., RICARDO DOS SANTOS, JORGE
DOS SANTOS, MIRTHA DOS SANTOS, RAUL
DOS SANTOS,

Index No. 114853/2005

Plaintiffs,

- against -

JUAN PEIRANO BASSO,

Defendant.

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

DECISION and ORDER

FILED
MAR 10 2008
NEW YORK
COUNTY CLERK'S OFFICE

Plaintiffs seek an order vacating the order entered
October 15, 2007, and restoring this action to the calendar.
that order, I dismissed the complaint because counsel for
plaintiffs failed to appear for a court-ordered compliance
conference.

Plaintiffs contend that there is a reasonable excuse
for the absence of plaintiffs' counsel at the October 15, 2007
conference, and that they have a meritorious cause of action, in
which they allege that defendant Juan Peirano Basso embezzled
millions of dollars from plaintiffs' accounts held at the Trade
and Commerce Banks (TCB) of the Cayman Islands, as established by
a judgment in a related action, *Donnybrook v. Juan Peirano Basso*,
Index No. 105484/05 (Donnybrook Action), in this court.

As for an excuse for the failure to appear, counsel for

plaintiffs, John P. Gleason, Esq., asserts in his affirmation that he did not receive written or oral notice from the court that a conference was scheduled for October 15, 2007, nor was he notified by the court service to which his firm subscribes, United Lawyers Service. On October 11, 2007, when defense counsel, Barry M. Traub, Esq., telephoned him to discuss issues pertaining to discovery, Traub did not mention the then-upcoming conference. Moreover, on October 12, 2007, plaintiffs filed their note of issue and statement of readiness.

On the day of the conference, Traub called Gleason's office to say he was running late. A not-yet-admitted first-year associate took Traub's call. He told Traub that Gleason was at a meeting, but "would presumably head to the conference." The associate contacted the court to determine the status of the conference, and learned that the complaint was dismissed.

As to the merits, Mr. Gleason asserts that this action is related to the Donnybrook Action, in which plaintiffs there obtained a judgment against the defendant here. Moreover, the Cayman Island authorities have appointed a liquidator for TCB, and, in the course of the dissolution proceeding, have uncovered a set of double books that defendant and his family maintained to conceal his fraud from the Cayman Island authorities and the embezzlement of plaintiffs' funds.

In opposition, defense counsel challenges the excuse,

stating that as an associate from Mr. Gleason's firm attended the June 25, 2007 preliminary conference, the date for the compliance conference provided for in the preliminary conference order was known. (Traub Aff., Ex. B). On the merits, Mr. Traub contends that the allegations pertain to TCB, not defendant, and that defendant always acted in the best interests of his clients.

Defendant also relies on a stay arising from a proceeding under chapter 15 of the United States Bankruptcy Code, *In re Trade and Commerce Bank (In Liquidation)*, pending in the Southern District of New York (05-60279). If this action were stayed by virtue of that one--which does not appear to be the case--the argument supports granting the motion.

Plaintiffs' attorney's failure to appear at the conference amounted to law office failure which can constitute a reasonable excuse (*Harwood v. Chaliha*, 291 AD2d 234, 234 [1st Dept 2002]). The circumstances there are similar to those here. Moreover, an associate's inexperience, leading to a non-willful default, can constitute law office failure, and a reasonable excuse for the default (*Ramos v. Dr. Martin Luther King, Jr. Health Ctr.*, 282 AD2d 201 [1st Dept 2001]).

Plaintiffs have the better argument here. The motion is granted, but I am conditioning the relief sought upon the payment of costs in the amount of \$300 by counsel for plaintiffs to defense counsel (see *Bodden v. Penn-Attransco Corp.*, 20 AD3d

[* 5]
334 [1st Dept 2005]), because the preliminary conference order establishes that plaintiff had notice of the scheduled conference.

Finally, Defendant's argument that the motion should not be granted because defendant should not be required to defend this action in New York in that the acts complained of occurred elsewhere is without merit. This action was commenced in 2005, and defendant has not sought relief on this ground. Defendant makes other contentions pertaining to discovery that are not germane to this motion.

Accordingly, it is

ORDERED that the motion by plaintiffs for an order vacating the order entered October 15, 2007, and restoring this action to the calendar is granted, conditioned upon the payment of costs in the amount of \$300 by counsel for plaintiffs to defense counsel prior to the conference set below, of which courtesy copies to counsel of this decision is notice; and it is further

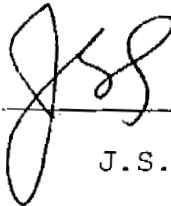
ORDERED that counsel shall appear for a pre-trial conference in Part 55, 60 Centre Street, Room 432, New York, New York, on April 7, 2008 at 2 PM.

Dated: March 6, 2008

ENTER:

FILED
MAR 10 2008

NEW YORK
COUNTY CLERK'S OFFICE



J.S.C.

HON. JANE S. SOLOMON