

Williamsport Capital Ltd. v Costa

2008 NY Slip Op 31385(U)

May 12, 2008

Supreme Court, New York County

Docket Number: 0101984/2006

Judge: Michael D. Stallman

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

PRESENT: HON. MICHAEL D. STALLMAN
Justice

PART 7

WILLIAMSPORT CAPITAL LTD et al and

INDEX NO. 101984/06

- v -

Gaspar Roberto Lopez COSTA

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to 8 were read on this motion to/for letter rogatory
cross-motion to determine

- Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
- Motion (+ answers)
- Answering Affidavits Exhibits (+ answers)
- Affidavit of BISHAL
- Replying Affidavits in support of XMET

PAPERS NUMBERED	
1 + 2	
3 + 4	
5 + 6	
7	
8	

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the attached memoranda decision and order.

Letter rogatory signed

FILED

MAY 14 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/12/08

[Signature]
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 7**

-----X
WILLIAMSPORT CAPITAL LTD. and
MARIA del CARMEN ONRUBIA de BEECK,

Plaintiffs,

-against-

GASPAR ROBERTO LOPEZ COSTA,

Defendant.

-----X
HON. MICHAEL D. STALLMAN, J.:

Index No. 101984/06

Decision and Order

FILED
MAY 14 2008
COUNTY CLERK'S OFFICE
NEW YORK

In this action for a declaratory judgment, plaintiffs Williamsport Capital Ltd. (Williamsport) and Maria del Carmen Onrubia de Beck (Beeck) move for an order to grant the issuance of a letter rogatory, pursuant to CPLR 3108, to take the deposition of a witness residing in a foreign jurisdiction.

Defendant Gaspar Roberto Lopez Costa (Costa) cross-moves to dismiss the second, third, fourth and fifth causes of action (denominated as counts in the complaint) of the complaint, pursuant to CPLR 327 (a), on the ground of inconvenient forum.

PLAINTIFF'S ALLEGATIONS

The following allegations are taken from the complaint. Williamsport is a corporation organized as an international business company under the laws of the British Virgin Islands. Its registered office is on the island of Tortola, British Virgin Islands.

Beeck is a citizen of Peru residing in Lima, Peru and Buenos Aires, Argentina. Beeck is the sole shareholder of all the issued and outstanding bearer shares of Williamsport. Beeck is a descendant and member of the Romero family, which has investments and operating interests in major financial institutions and trading companies in Peru and elsewhere in the Americas.

Costa is a citizen and resident of Argentina who holds himself out as a licensed psychotherapist, with a professional practice in Buenos Aires, Argentina.

In 1987, Costa began counseling sessions in Peru with Beeck and her husband. Soon thereafter, Costa expanded his counseling to include all of the members of Beeck's immediate family (three sons and a daughter, then aged 17 to 22). Costa's counseling sessions became his single most important professional undertaking. He devoted an increasing number of hours and days to their joint therapy. By 1988, Costa convinced Beeck to relocate to Buenos Aires with her four children to continue their counseling sessions. Under the expressed purpose of helping Beeck to establish economic independence from the Romero family, Costa convinced Beeck to give him control over her wealth by making and managing investments on her behalf in Argentina.

Beeck invested approximately \$1,150,000 in the purchase of a parking garage in Buenos Aires. At Costa's direction, the initial investment was made through funds deposited into an account at the Uruguayan subsidiary of Israel Discount Bank of New York (IDB), an account which was opened and controlled by Costa.

Between 1992 and 1993, Costa sold the parking garage and reinvested the proceeds from that sale into a construction company named Pacifico del Sur S.A. located in Buenos Aires. Although the investment was made entirely with the funds supplied by Beeck, Costa gave himself and his accountant, Roberto Macho, two-thirds of the controlling shares in the company. In the ensuing years, Costa used existing investments, funded entirely by Beeck, to make additional investments in a variety of companies and off-shore entities. The full extent of Costa's deployment of these funds is not known. However, Beeck family money was invested in the following Argentine companies: Agroamerica S.A., Eco Salad S.A. and Nahuel Construcciones S.A. (Nahuel).

Nahuel built and sold several apartment buildings located in Buenos Aires. Notwithstanding the fact that Nahuel was funded entirely by Beeck, Costa appointed himself one of only two principal shareholders, together with his wife at that time, Ariana Catanese. Beeck did not appear in the records of the company as a shareholder, officer or director. Nahuel is now the subject of criminal complaints brought against Costa for the crime of "fraudulent administration" in Argentina. As part of the claims against Costa in that criminal action, there has been evidence adduced of a system of back-to-back loans involving IDB or its subsidiary bank office in Uruguay.

Throughout the remaining portion of the decade through 2004, Costa demanded increasing amounts of money from Beeck, allegedly to finance investments on her behalf and under his control. At Costa's direction, Beeck issued scores of blank checks, drawn on her account at the Atlantic Security Bank in Miami, Florida (a bank related to the Romero financial holdings) in increments of \$10,000, \$13,000, and \$15,000. In many instances, Costa negotiated the checks through exchange houses and money transmitters based in Argentina and Uruguay. The conversions between Argentine and US dollars were generally effected through correspondent bank accounts in New York and Miami.

Throughout the period in question, Beeck wrote from seven to ten checks each month, averaging as much as \$70,000 a month, in order to finance or maintain Costa's alleged investments. As part of her therapy, Costa insisted that Beeck not inform her husband or her children of these investments or the millions of dollars of her inheritance that she had entrusted to Costa.

Instead of managing or preserving Beeck's money, Costa created a number of off-shore companies including the following: Williamsport, Rikner, a Uruguayan company wholly-owned by an Argentine company named Celco S.A.; Monsall Corporation, a Uruguayan company; Temide

S.A., an Argentine company; and Zaffro Investments located in the British Virgin Islands.

These and other limited purpose companies are linked through bank accounts opened and maintained with IDB and its branches or subsidiaries in New York, Uruguay, and the Cayman Islands. A substantial portion of the allegedly embezzled funds were put on deposit in, or transferred through, bank accounts in New York. In order to disguise the origin and illicit source of the funds, Costa used intermediary accounts, money transmitters and foreign exchange houses, including Foreign Trade Associates, Inc. (Foreign) and Beacon Hill Services Corp. (Beacon Hill), both of which are located in New York.

In February 2004, Beacon Hill was indicted in New York and found guilty of banking law violations related to money laundering. That investigation led to an investigation of IDB. In December 2005, IDB paid a \$25 million fine to the city and state of New York for laundering \$2.2 billion for illegal money transmitters from South America.

In total, Beeck claims to have delivered more than \$10 million to Costa for his alleged faithful investment and administration, none of which has been returned to Beeck or accounted for by Costa. Beeck's capital was invested by Costa in business ventures of foreign bank accounts earning him millions of dollars in profits. Beeck believes that substantial portions of these millions moved through accounts at IDB in New York, including an account held by Williamsport.

In early 2004, Costa delivered to Beeck a certain amount of cash, the bearer shares for Williamsport, and corporate documents for other alleged investment vehicles. By Costa delivering the bearer shares to Beeck, Beeck asserts that Costa transferred ownership of Williamsport to Beeck. In September 2004, Costa presented Beeck with a fraudulent document, backdated to 1996, purporting to establish a debt of \$2 million, collateralized by the shares of Nahuel. The apparent

purpose of the document was to give Costa false evidence to file with the Argentine courts in the criminal proceedings commenced against him concerning Nahuel.

In November 2004, Beeck severed her business ties with Costa by discharging Costa as the administrator of the Williamsport account. She also took immediate steps to locate and secure the assets embezzled by Costa. Beeck estimates that Costa has defrauded her out of more than \$10 million, and that she has been denied the profits accruing from the investment of these funds.

As part of the process to resume direct control, Beeck removed Costa from his position as president and secretary of Williamsport and by consent of the sole shareholder, appointed herself as president and her daughter, Maria del Carmen Beeck (Carmen Beeck), as vice-president and secretary. In January 2005, Beeck and Carmen Beeck arrived at IDB's headquarters in New York carrying the original bearer shares of Williamsport and the appropriate letter of direction establishing their authority to act on behalf of Williamsport. However, they were denied access to the account by the bank officers because Costa has reported the shares as stolen. In the ensuing months, plaintiffs communicated again with IDB through counsel. IDB informed plaintiffs' counsel that absent a court order from a New York court, IDB would not comply with any requests with regard to Williamsport or its account at IDB because it had received competing instructions from Costa.

As a result, plaintiffs commenced this lawsuit asserting five causes of action. The first cause of action seeks a declaratory judgment that: (1) Beeck is the sole shareholder and owner of Williamsport, (2) her funds are on deposit in the name of Williamsport at IDB, (3) establishes Beeck's rights to the funds on deposit at IDB in account 08-3174-4, and (4) directs IDB to honor all requests and directions made by plaintiffs and their properly-designated representatives, with respect to any and all Williamsport accounts. The remaining four causes of action are for fraud, breach of

fiduciary duty, unjust enrichment, and an accounting.

Costa has asserted counterclaims seeking replevin of the bearer bonds, a declaration establishing his rights to the funds on deposit at IDB, and conversion.

Forum Non Conveniens

Neither Beeck nor Costa resides in New York. Beeck is a citizen of Peru and a resident of Argentina, while Costa is a resident and citizen of Argentina. Ordinarily, nonresidents are permitted to enter New York courts to litigate their disputes as a matter of comity. However, our courts are not required to add to their financial and administrative burdens by entertaining litigation which does not have any connection with this State.

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 [1984], *cert denied* 469 US 1108 [1985]). The burden rests upon the defendant challenging the forum to demonstrate the relevant private or public interest factors which militate against accepting the litigation and the court, after considering and balancing the various competing factors, must determine in the exercise of sound discretion whether to retain jurisdiction or not (*id.* at 479). Among the factors to be considered are the burdens on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit (*id.*). The court may also consider that both parties to the action are nonresidents and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction (*id.*). No one factor is controlling (*id.*). The great advantage of the rule of forum non conveniens is its flexibility based upon the facts and circumstances of each case (*id.*). The rule rests upon justice, fairness and

convenience and the Court of Appeals has held that when the court takes these various factors into account in making its decision, there has been no abuse of discretion (*id.*).

Here, Costa has not met his burden of demonstrating that there are relevant private or public interest factors which militate against this Court accepting this litigation at this time. Although Costa argues that the transactions upon which the second through fifth causes of action are based did not arise in New York in that he, as Beeck's therapist, provided counseling to her while either in Peru or Argentina and that he only provided guidance to Beeck as her business advisor when discussing companies and investments that were based in Argentina, there are other factors that indicate that this Court should maintain jurisdiction over all of plaintiffs' causes of action.

Factors militating in favor of permitting plaintiffs to proceed in New York include the fact that the relevant bearer bonds in dispute are located in this jurisdiction. Williamsport holds an account in its name at JDB totaling more than \$2.5 million. At the heart of Beeck's allegations is her contention that Costa took advantage of his relationship as her therapist and business advisor, and that he subsequently defrauded her out of millions of dollars. Plaintiffs allege that Costa directed Beeck to issue him multiple blank checks in increments of \$10,000, \$12,000, \$13,000 and \$15,000 (Exhibit 7 to Affirmation of Kathleen M. Kunder, dated June 15, 2005) (Kunder Aff.). According to plaintiffs' accounting expert, over several years, the checks totaled approximately \$6.1 million related to investment monies, \$1.7 million related to purported professional fees for Costa's therapy, and \$1.2 million related to "expense/investment" checks (Exhibit 10 to Kunder Aff.). The blank checks that Beeck issued were paid to Beacon Hill Service Corporation (Beacon Hill), an exchange agent that cashes checks on behalf of its foreign clients (Exhibit 11 to Kunder Aff.). Beacon Hill maintained an account at Chase Manhattan Bank, New York where Beeck's investment

checks were deposited. In 2004, Beacon Hill was convicted in this jurisdiction of operating as an unlicensed money transmitter. Taking all of these factors into consideration, it appears that New York has a substantial nexus with all the claims and counterclaims in this lawsuit.

Moreover, the second through fifth causes of action assert claims for fraud, breach of fiduciary duty, unjust enrichment, constructive trust and an accounting. In order to determine who is the true owner of the Williamsport bearer shares, at issue in plaintiffs' first cause of action and in Costa's counterclaims, this Court must examine plaintiffs' allegations in the remaining causes of action.

Despite Costa's arguments, that the parties in this action are nonresidents is one, but only one, factor that may establish inconvenience (*American BankNote Corp. v Daniele*, 45 AD3d 338, 340 [1st Dept 2007]). The record demonstrates that the parties have engaged in extensive litigation of this case here already. The preliminary conference and compliance conferences have been held. Pre-trial discovery has reached an advanced state. More than 20,000 pages of documents have been produced and seven depositions have been taken.

Moreover, the fact that some documentary and testimonial evidence will have to be translated from Spanish into English does not render it more difficult for Costa to proceed in New York. The courts of this State are fully capable of applying Argentine or Peruvian law, should such law be found governing in this case (*see American BankNote Corp. v Daniele*, 45 AD3d 338, *supra*). Costa is not seeking to dismiss the first cause of action on the grounds of forum non conveniens, and thus his litigating additional related claims to that first cause of action should not impose an undue hardship upon him.

The most significant factor militating in favor of retaining jurisdiction in New York involves Costa's inexcusable delay in moving for such relief. Costa's motion, made some two years after the commencement of this action, and after significant progress in discovery, is untimely (*Jones v Eon Labs, Inc.*, 43 AD3d 711 [1st Dept 2007]).

"Where the parties have engaged in substantial pretrial discovery and invested a great deal of valuable time and resources, the presumption against dismissal on the basis of forum non conveniens greatly increases" (*Intertec Contr. v Turner Steiner Intl.*, 6 AD3d 1, 4-5 [1st Dept 2004]). Although plaintiffs' cause of action arises in South America, Costa has failed to demonstrate that he would suffer any greater hardship if the action remained in New York, particularly where here the parties engaged in extensive pretrial discovery in both the New York State and federal courts.

Plaintiffs originally commenced suit against IDB in the United States District Court for the Southern District of New York on March 3, 2005 (Kundar Aff.). In that federal action, plaintiffs asserted claims for breach of contract and sought a declaratory judgment in connection with the Williamsport account maintained at IDB (*id.*). On May 2, 2005, Costa intervened in the federal action. On June 15, 2005, he filed an answer to the federal complaint and asserted counterclaims in the action for replevin and conversion. During the same time period, Costa served Beeck with his first request for documents. In July 2005, Costa requested a pre-motion conference prior to moving to dismiss plaintiffs' additional claims against Costa for lack of subject matter jurisdiction. The pre-motion conference was held on August 15, 2005. On February 9, 2006, the parties filed a stipulation in the federal action where they agreed to dismiss the federal action without prejudice. As stated above, this action was filed on February 10, 2006. On March 10, 2006, Costa served his answer and counterclaims with his first request for an examination before trial of Beeck and three of her

children: Mari Beeck, Willy Beeck, and Gerardo Beeck. He also requested additional discovery in the form of interrogatories. On October 30, 2006, Costa served his response to plaintiffs' first request for production of documents. On April 10, 2007, plaintiffs served Costa with a second request for production of documents. On May 14, 2007, plaintiffs served their responses and objections to requests for production of documents at depositions. In June 2007, plaintiffs served Costa with its first set of interrogatories. In July 2007, Costa served plaintiffs with a second demand for documents and interrogatories. Depositions were taken on both sides through July 2007. Over seven compliance conferences were held between September 2006 and September 2007. The July 19, 2007 compliance conference order provided that plaintiffs were to produce any expert reports on or before September 21, 2007; that the parties exchange witness lists on October 15, 2007; that Costa produce any expert reports on or before October 24, 2007; and that discovery would close on November 14, 2007. Costa waited until October 5, 2007, to file a motion to dismiss the second through fifth causes of action on the ground of *forum non conveniens*.

Costa's motion to dismiss the second through fifth causes of action was made almost two and a half years after plaintiffs commenced an action in federal court, and 20 months after plaintiffs commenced an action in this jurisdiction. Moreover, there has been significant activity, including discovery and pretrial conferences over that time period. Therefore, Costa having taken advantage of the resources of the New York courts should not, at such late point in time, be allowed to remove the action on the grounds of inconvenient forum (*Corines v Dobson*, 135 AD2d 390, 392 [1st Dept 1987]).

Balancing the relevant public and private factors, the Court concludes that Costa failed to meet his burden of demonstrating that plaintiffs' designation of New York as the forum for the

instant litigation is an inconvenient forum.

Letter Rogatory

A commission or letters rogatory may be issued where necessary or convenient for the taking of a deposition outside of the state (*see* CPLR 3108). Here, the record demonstrates that the information sought from the out-of-state non-party witness is material and necessary to the litigation of plaintiffs' claims (*Meckert v Sears Roebuck & Co.*, 275 AD2d 308, 309 [2d Dept 2000]).

A commission to examine a witness out of the State may permit use of oral questions (open commission) or written questions (scaled commission) (*Wiseman v American Motors Sales Corp.*, 103 AD2d 230, 241 [2d Dept 1984]). In the case at bar, the nature of the allegations present issues of credibility for the fact-finder. Oral questioning is a more effective method for eliciting information and establishing credibility. Therefore, the testimony sought pursuant to a commission to examine a witness, shall be videotaped in order that the fact-finder may have an opportunity to observe the expressions and responses of the witnesses. The expenses incurred in connection with this disclosure are to be paid by the respective parties and said expenses may be taxed as disbursements by the prevailing litigant.

Accordingly, it is

ORDERED that the motion by plaintiffs Williamsport Capital Ltd. and Maria del Carmen Onrubia de Becck is granted, directing the issuance of letters rogatory to any judge or judicial officer having jurisdiction of civil actions in Buenos Aires, Argentina, to take the testimony of Dr. Martin Redrado, Central Bank of Argentina, Reconquista 266 C1003ABF, Capital Federal, Buenos Aires, Argentina upon written interrogatories to be annexed to said letters rogatory; and it is further

ORDERED that defendant Gaspar Roberto Lopez Costa's cross-motion to dismiss the second through fifth causes of action is denied.

Dated: May 13, 2008
New York, New York

ENTER:



J.S.C.

FILED
MAY 14 2008
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