

**Deutsche Bank Sec., Inc. v Colleen
Inv., LLC.**

2008 NY Slip Op 31398(U)

May 14, 2008

Supreme Court, New York County

Docket Number: 0600473/2007

Judge: Emily Jane Goodman

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

EMILY JANE GOODMAN

PRESENT:

PART 1

Index Number : 600473/2007

DEUTSCHE BANK SECURITIES INC

vs

COLLEEN INVESTMENTS LLC

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

is decided per decision attached to motion seq 001

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

FILED

MAY 19 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/14/08

EMILY JANE GOODMAN ^{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 17

-----x
DEUTSCHE BANK SECURITIES, INC. and
DEUTSCHE BANK TRUST COMPANY AMERICAS,

Plaintiffs,

-against-

COLLEEN INVESTMENT, LLC., COLLEEN
INVESTMENTS A.G. and MARCO STOFFEL,

Defendants.

Index No. 600473/07

FILED
MAY 19 2008
COUNTY CLERK'S OFFICE
NEW YORK

-----x
Emily Jane Goodman, J.S.C.:

Motions bearing sequence numbers 001, 002 and 003 are consolidated for disposition.

This is an interpleader action by plaintiffs Deutsche Bank Securities, Inc. and Deutsche Bank Trust Company Americas in connection with certain financial and investment accounts held by plaintiffs. In motion sequence 001, non-parties Borderline Personality Disorder Research Foundation (BPDRF) and Third Millennium Foundation (TMF) move, pursuant to CPLR 1012(a)(3), for an order permitting them to intervene in this action and directing that they be added as defendants. In motion sequence 002, defendant Marco Stoffel (Stoffel) moves, pursuant to CPLR 327, for an order dismissing this action on the grounds of forum non conveniens. In motion sequence 003, defendants Colleen Investment, LLC. and Colleen Investments A.G. (Colleen) move, pursuant to CPLR 3212, for an order granting summary judgment dismissing Stoffel from this

action. For the reasons stated below, the motion to intervene is granted. The motion to dismiss based on forum non conveniens is denied and the motion for summary judgment is denied.

1. Background

Deutsche Bank Securities, Inc. is a Delaware corporation with its principal offices in New York. Deutsche Bank Trust Company Americas is a New York State chartered bank with its principal offices in New York. Colleen LLC is a Delaware limited liability company whose sole member is Colleen AG, which was formed under the laws of Switzerland. The Complaint states that Stoffel is a resident of New York.

According to Stoffel, in December of 1998, non-party Angela Blicke pledged approximately \$24 million for research on borderline personality disorder. A company named Madison Corporate Developments Limited, Ireland (Madison) was formed under the laws of Ireland to receive the donation. Stoffel states that on December 18, 1998, Blicke established three trusts under the jurisdiction of Jersey, Channel Islands (Jersey Trusts) and Blicke then transferred the stock of Madison into the trusts.

Stoffel states that on January 15, 1999, Madison entered into an escrow agreement (Escrow Confirmation) for the benefit of two entities being formed in the United States and Switzerland, referred to as Personality Disorder Foundation USA and Personality

Disorder Foundation Switzerland. In the Escrow Confirmation, Madison acknowledged that it had received securities worth approximately \$24 million and that it held such funds in favor of the charitable foundations as legal owners of the funds. The Escrow Confirmation also provided that Madison would pay out amounts to the foundations as per the instructions of the Treasurer of the foundations. The Escrow Confirmation provided that any disputes arising under the agreement would be resolved by arbitration in Switzerland.

In January of 1999, the Escrow Confirmation was modified in order to reflect that Madison had been liquidated and replaced by Maytown Universal SA and Plympton Universal SA as successors to the Escrow Confirmation. The agreement was also modified to reflect that two foundations had been added as principals: Third Millennium Foundation (TMF), which is a potential intervenor here and Stiftung Persoenlichkeitsstoerungen, a Swiss company. Thus, these two foundations became principals along with BPDRF.¹

The modified confirmation also provided that certain of the funds were to be transferred to an account established by Colleen LLC, under Maytown's control, with Bankers Trust in New York, which

¹ The modified agreement does not distinguish between Personality Disorder Foundation USA and Personality Disorder Foundation Switzerland. However, it is undisputed here that the principal referred to in the modified agreement is BPRDF, the potential intervenor here.

is now plaintiff Deutsche Bank.

The modified Escrow Confirmation states that any funds that had been or would be transferred to the Colleen LLC accounts would remain subject to the obligations and rights of the Escrow Confirmation. The new agreement also reiterated that disputes were subject to arbitration in Switzerland.

Stoffel states that on May 15, 2002, in his capacity as Treasurer for all three of the escrow principals, he executed a Consent of Treasurer, whereby he directed Maytown to disburse funds in differing amounts to all three of the foundations.² He states that \$3 million was, in fact, disbursed to Stiftung Persoenlichkeitsstoerungen, as directed. However, the remaining funds, which are at issue here, were not disbursed and remain in the Colleen LLC accounts at Deutsche Bank.

Deutsche Bank states that from the inception of Colleen LLC's accounts, it received directions and instructions regarding the accounts from Stoffel, who was acting at the time on behalf of Colleen AG, the managing member of Colleen LLC. On December 12, 2006, Deutsche Bank received a letter from a New York law firm, Chadbourne & Parke LLP (Chadbourne) representing Colleen LLC and Colleen AG. The letter purported to notify Deutsche Bank of changes

² The amounts were: \$3 million to Stiftung Persoenlichkeitsstoerungen; \$10 million to BPDRF; and \$11 million to TMF.

to the Board of Directors and officers of Colleen AG, and set forth the names of the newly elected directors. Stoffel was not a member of the newly elected Board or an officer. The letter also advised Deutsche Bank that all future transactions regarding the accounts would be executed by the newly elected Board.

By e-mail dated December 26, 2006, Stoffel requested that Deutsche Bank "not follow any instructions or give any information to the wrongfully alleged new owners of Colleen." (Complaint at ¶ 11). In an e-mail dated January 5, 2007, Stoffel advised Deutsche Bank that "if payments in the normal course of business are not executed by your bank, your bank will make itself subject to possible damage claims." (Complaint at ¶ 12). An e-mail of the same date from Chadbourne stated that "contrary to Dr. Stoffel's directions, if Deutsche Bank or any other entity were to give Dr. Stoffel authority that he does not possess...the Bank would indeed be liable but not to him. Instead, it would be liable to our companies, having permitted unauthorized transfers of funds belonging to them..." (Complaint at ¶ 13).

By letter dated January 7, 2007, Deutsche Bank notified Stoffel and Chadbourne that, in view of the conflicting instructions received from the parties, it would not act on any instructions with regard to the accounts, without written authorization from Stoffel and the members of the newly elected

Board. Deutsche Bank then commenced this interpleader action in February of 2007, seeking to determine how to handle and dispose of the accounts at issue.

2. Intervention

BPDRF and TMF move for permission to intervene in this action. CPLR 1012(a)(3) provides that a person shall be permitted to intervene in any action which "involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment." Furthermore, "[t]he court, in its discretion, may permit a person to intervene, inter alia, 'when the person's claim or defense and the main action have a common question of law or fact'". Sieger v Sieger, 297 AD2d 33, 35-36 [2d Dept 2002], quoting CPLR 1013. "[I]t has been held under liberal rules of construction that whether intervention is sought as a matter of right under CPLR 1012(a), or as a matter of discretion under CPLR 1013 is of little practical significance,' and that 'intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings.'" Id at 36, quoting Perl v Aspromonte Realty Corp, 143 AD2d 824, 825 [2d Dept 1988].

Here, BPDRF and TMF have demonstrated that they have a real and substantial interest in the outcome of this action and that they may be adversely affected by a judgment here. As set forth

above, Stoffel asserts that on May 15, 2002, he executed a Consent of Treasurer, whereby he directed Maytown to disburse funds in differing amounts to all three of the foundations, including BPDRF and TMF. As a result, BPDRF and TMF contend that they are the legal owners of the funds at issue here and they have submitted a proposed Answer seeking an order directing Deutsche Bank "to hold the Accounts until the defendants' (including the Intervenors') respective rights are adjudicated pursuant to their arbitration agreement". (Proposed Answer at ¶ 15). Based on these factors, the court finds, in its discretion, that BPDRF and TMF have a substantial interest in this action and should be permitted to participate in it. Therefore, the motion to intervene is granted.

3. Control of the Accounts

Colleen LLC and Colleen AG move for summary judgment dismissing Stoffel from this action. They argue that Stoffel's removal as an officer of Colleen LLC in December of 2006 means that he can no longer claim to have any authority to control the Colleen LLC accounts which are at issue here. As such, they contend that he has no interest in those accounts or in this action.

Stoffel does not dispute that he was removed from his position as an officer and concedes that he is not currently employed by Colleen LLC. However, he asserts that he was wrongfully removed from that position and, as such, asserts that the termination of

his authority over the accounts was not valid. He points out that the issue of control over Colleen AG, and thus, Colleen LLC, is currently the subject of several arbitration proceedings in Switzerland, as well as an action in Delaware.

The court finds that questions of fact exist with regards to control of the Colleen LLC accounts which preclude dismissal of Stoffel at this point. Among other things, the parties sharply dispute whether Stoffel was properly removed his position as an officer of Colleen LLC and whether his authority with respect to control of the accounts was properly terminated. Moreover, it is not yet clear who controls Colleen AG. As such, it is also unclear who controls Colleen LLC and the accounts at issue here. According to the parties, the issue of control of Colleen AG is the subject of numerous arbitration proceedings in Switzerland.³ Given that the outcome of those proceedings has not yet been determined, dismissal of Stoffel from the instant action is not warranted at this point.⁴

³Colleen AG and Colleen LLC assert that two of the Swiss arbitration proceedings related to control of the Colleen accounts have been recently dismissed. However, it is not clear whether those dismissals are final adjudications. In one case, Stoffel states that his action was dismissed on procedural grounds and that he has appealed that decision.

⁴ Stoffel also asserts that he should remain in this action as a representative of BPDRF and TMF. However, that argument is now moot since the court has permitted BPDRF and TMF to intervene in this action.

4. Forum Non Conveniens

Stoffel moves to dismiss this action on the grounds of forum non conveniens. He argues that Switzerland is the appropriate forum for the dispute over control of the funds in the Colleen LLC accounts which are held at Deutsche Bank.

"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 moving party must demonstrate relevant private or public interest factors which militate against the court accepting the litigation. Id. at 479. Whether to dismiss an action on the grounds of forum non conveniens rests within the court's discretion. Id.; Wyser-Pratte Management Co, Inc v Babcock Borsig AG, 23 AD3d 269 [1st Dept 2005]. Factors to be considered include the burden on the New York courts, the potential hardship to the defendants, and the availability of an alternative forum in which the plaintiffs may bring the action. Islamic Republic of Iran v Pahlavi, supra at 479; Banco Ambrosiano, SPA v Artoc Bank & Trust, 62 NY2d 65, 73 [1984]; Intertec Contracting A/S v Turner Steiner Intern, SA, 6 AD3d 1, 4 [1st Dept 2004]. The court should also consider whether the parties are residents of New York and whether the transactions at issue

occurred primarily in a foreign jurisdiction. Islamic Republic of Iran v Pahlavi, supra at 479; see, Harlevsille Ins Co v Ermarr Painting and Contracting, Inc, 8 AD3d 229 [2d Dept 2004]. No single factor is determinative. Islamic Republic of Iran v Pahlavi, supra at 479; Intertec Contracting A/S v Turner Steiner Intern, SA, supra at 4. Here, Stoffel has not demonstrated that this action should be dismissed based on forum non conveniens.

Several factors weigh against dismissal. First, the accounts are located and controlled in New York, which is where the transactions at issue primarily occurred. Thus, there is a substantial connection between this action and New York.

The parties to this action also have a substantial connection to New York. The plaintiffs, who chose New York as their forum, have their principal place of business in New York. Stoffel himself is also a resident of New York. Colleen LLC is authorized to do business in New York. The intervenors, BPRDF and TMF, are also located in New York.

The court also finds that Stoffel has not demonstrated that litigation of this action here would place an undue burden on the New York court system. Nor has he demonstrated that litigating here would be a hardship for any of the parties. Therefore, the motion to dismiss based on forum non conveniens is denied.⁵ Accordingly,

⁵ BPDRF and TMF suggest that the instant action should be stayed pending final resolution of the other litigations that are

it is

ORDERED that the motion to intervene, sequence 001, is granted; and it is further

ORDERED that plaintiff submit a proposed order, on notice, amending the caption to reflect the intervention of Borderline Personality Disorder Research Foundation and Third Millennium Foundation; and it is further

ORDERED that defendant's motion to dismiss on the grounds of forum non conveniens, sequence 002, is denied; and it is further


ORDERED that defendants' motion for summary judgment, sequence 003, is denied; and it is further

ORDERED that the parties appear for a preliminary conference on June 26, 2008 at 10am, 60 Centre Street, Room 442.

This Constitutes the Decision and Order of the Court.

DATED: May 14, 2008

ENTER:



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ongoing, particularly those in Switzerland which concern the issue of which party controls Colleen AG and Colleen LLC. However, the question of whether to stay this action is not at issue on this motion.