

Banca Electronica Del Paraguay v Basso

2008 NY Slip Op 33096(U)

November 18, 2008

Supreme Court, New York ounty

Docket Number: 114853/2005

Judge: Jane S. Solomon

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

HON. JANE S. SOLOMON

PRESENT:

PART 55

Justica

Index Number : 114853/2005

BANCA ELECTRONICA

vs.

BASSO, JUAN PEIRANO

SEQUENCE NUMBER : 004

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for dismiss.

PAPERS NUMBERED

1-2

3-4

5

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the annexed Decision and Order.

FILED

NOV 19 2008

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 11/18/08



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,	:
	:
Plaintiffs,	:
	:
-against-	:
	:
JUAN PEIRANO BASSO,	:
	:
Defendant.	:
-----X	

INDEX NO. 114853/2005

DECISION AND ORDER

INTRODUCTION

In this action for fraud and deceit, defendant moves to dismiss pursuant to CPLR 3211(a)(7) (failure to state a cause of action) and CPLR 3211(a)(8) (lack of personal jurisdiction). Plaintiffs contend that they have properly stated their cause of action and that the Court has personal jurisdiction under CPLR 302(a)(3). Defendant's motion is granted.

FACTUAL BACKGROUND

Plaintiffs commenced suit for fraud and deceit by filing a summons and verified complaint (the "Complaint"). The crux of the Complaint is that the defendant misappropriated monies deposited by plaintiffs in a bank owned by defendant. Plaintiffs allege that defendant acquired and controlled a Cayman Islands bank known as the Trade and Commerce Bank ("TCB") to

handle off-shore banking services for businesses that were owned or controlled by defendant or his family members through an organization known as the Velox Group and to receive deposits from third parties. Complaint at ¶8.

Plaintiffs aver that plaintiffs Banca Electronica del Paraguay, Jorge Abente, Elba Estevez Losino, and Madzen, S.A. each deposited funds on account with TCB and purchased Certificates of Deposits which were issued to each of them by TCB. Complaint at ¶9. Plaintiffs claim that the defendant and his family kept two sets of books for TCB:

One set of books was disclosed to regulators and auditors. The second set of accounts recorded the fact that Peirano and his family withdrew the deposits made by plaintiffs in order to fund the activities of the Velox Group and their own personal lifestyles.

Complaint at ¶10. The set of books that was shown to regulators allegedly contained fictitious or code-named accounts which helped to disguise the misappropriation of the funds deposited by plaintiffs. Complaint at ¶11.

Defendant allegedly used the TCB deposits of plaintiffs to repay two loans that involved New York financial institutions. Complaint at ¶¶12-21. Specifically, the funds were allegedly used to make payments on loans made by Deutsche Bank AG New York and Brown Brothers Harriman & Co. *Id.*

Plaintiff further claims that TCB funds were used to finance a supermarket chain that traded on the New York Stock

Exchange, but when shares in the supermarket chain were sold, defendant did not transfer the proceeds of the sale to TCB, but diverted the funds to other entities to be used for family business and personal matters. Complaint at ¶¶22-26.

DISCUSSION

"Where a defendant moves to dismiss the complaint pursuant to CPLR 3211(a)(8) on the ground of lack of personal jurisdiction, a plaintiff 'need only make a prima facie showing' that such jurisdiction exists." *Lang v. Wycoff Heights Medical Center*, 2008 WL 4682518, at *1 (2nd Dept. 2008) (quoting *Cornely v. Dynamic HVAC Supply*, 44 A.D.3d 986, 986 (2nd Dept. 2007)).

Here, plaintiffs contend that jurisdiction exists under CPLR § 302(a)(3) which authorizes jurisdiction over causes of action arising out of a tortious act committed outside of New York which causes injury to person or property within the state. Plaintiff's Memorandum of Law in Opposition to Motion to Dismiss at p. 7. Plaintiffs contend that CPLR 302(a)(3) applies merely because it is alleged that the funds that defendant misappropriated from TCB were used to make payments on loans involving New York financial institutions. Based on this, plaintiffs conclude that defendant's "tortious acts committed outside the State caused injury to plaintiffs' property within the State." *Id.* at 8. Plaintiffs then argue that defendant had minimum contacts with New York and purposefully availed himself

of the benefits and protections of New York such that personal jurisdiction over him does not "offend traditional notions of fair play and substantial justice." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987).

Contrary to plaintiffs' contention, plaintiffs have not made a prima facie showing that jurisdiction exists pursuant to CPLR 302(a)(3). Jurisdiction under that provision only exists where a defendant has committed "a tortious act without the state causing injury to person or property within the state" and either:

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce

CPLR 302 (a) (3).

Plaintiffs have not made a prima facie showing that this standard is met in the present case. Plaintiffs' allegation that certain monies deposited by plaintiffs in TCB were used to make payments on loans involving New York banking entities are insufficient. Significantly, plaintiffs do not show that an injury occurred in New York within the meaning of CPLR 302(a)(3). See *Weinstein, Korn & Miller*, N.Y. Civ. Prac. ¶ 302.14[4]. Nor do plaintiffs make a showing that the additional elements for

jurisdiction under CPLR 302(a)(3) found in subsections (i) or (ii) of that provision are satisfied. Where, as here, a party opposing a motion to dismiss pursuant to CPLR 3211(a)(8) argues that jurisdiction is appropriate under CPLR 302(a)(3), but does not make a prima facie showing that jurisdiction exists under that section, the motion must be denied. See *Lang*, 2008 WL 4682518 at *1.

In light of the Court's determination that the defendant's motion should be granted because personal jurisdiction does not exist under CPLR 302(a)(3), the Court need not reach the issue of whether the Complaint should be dismissed for failure to state a cause of action pursuant to CPLR 3211(a)(7).

CONCLUSION

In view of the foregoing it is:

ORDERED that defendant's motion is granted and the Complaint is dismissed; and it is further

ORDERED that the Clerk shall enter judgment accordingly with costs and disbursements as taxed.

Dated: November 18, 2008

FILED
NOV 19 2008
ENTER: [Signature]
J.S.C.
COUNTY CLERK'S OFFICE
NEW YORK
JANE S. SOLOMON