

**Bank Hapaolim (Switzerland) Ltd. v Banca Intesa
S.p.A.**

2010 NY Slip Op 31108(U)

April 21, 2010

Supreme Court, New York County

Docket Number: 601430/2004

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
JUSTICE SHIRLEY WERNER KORNREICH

Index Number : 601430/2004

PART 54

BANK HAPOALIM [SWITZERLAND]

vs
BANCA INTESA S.P.A.

Sequence Number : 012

OTHER

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to 7 were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-2

3-5

6-7

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

FILED
MAY 06 2010
NEW YORK
COUNTY CLERK'S OFFICE

JUSTICE SHIRLEY WERNER KORNREICH

Dated: 4/21/10

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: PART 54

-----X
BANK HAPOALIM (SWITZERLAND) LTD.,

Index No.: 601430/2004

Plaintiff,

-against-

BANCA INTESA S.p.A.,

Defendant.

FILED

MAY 06 2010

NEW YORK
COUNTY CLERK'S OFFICE

DECISION and ORDER

-----X
KORNREICH, SHIRLEY WERNER, J.:

Defendant Banca Intesa S.p.A. (Intesa) moves under CPLR 4404(a) for an order (motion sequence no.12) setting aside the jury's October 21, 2009 verdict in favor of plaintiff Banca Hapoalim (Switzerland, Ltd.). Alternatively, Intesa seeks a new trial of a "separable issue" (never identified in its papers) relating to the wording of the Wishaw notes and side letter, or to reduce the judgment. By its verdict, the jury found Intesa liable for claims of fraud and aiding and abetting fraud, regarding the purchase by plaintiff (Hapoalim) of promissory notes guaranteed by Parmalat S.p.A. (Parmalat), an Italian food conglomerate. After trial and pursuant to the verdict, the court entered judgment for \$14,566,383.37, plus interest, against Intesa and in favor of Hapoalim.

I. *Background*

The facts and circumstances and procedural history of this action have been set forth repeatedly in prior orders of the court, and the details will not be repeated here. Briefly, Hapoalim sought to prove the following allegations at trial. In May 2003, Intesa and certain of its subsidiaries sold to Hapoalim three discounted non-interest bearing promissory notes, each in the amount of \$5 Million. The notes were issued by nonparty Wishaw Trading S.A., a Parmalat subsidiary incorporated in Uruguay, to Intesa's New York branch, which in turn sold them to

nonparty BCI Soditic Trade Finance, Ltd. (BCI), an Intesa affiliate. Hapoalim purchased the notes from BCI. The notes were each accompanied by a guarantee of payment executed by Parmalat. Parmalat's financial stability worsened and the Italian and Brazilian governments began criminal investigations. The notes matured on May 4, 2004, and have not been repaid. As a result, Hapoalim brought this action alleging that Intesa committed fraud and aided and abetted Wishaw and Parmalat to commit fraud.

A major issue at trial centered on which side letter, accompanying the notes, was sent to Hapoalim and whether Hapoalim relied on the side letter in committing to the purchase. The side letter Hapoalim claimed it received and relied upon prior to committing to the purchase, stated that the loan would be used for capital expansion. Specifically, it stated the loan would be used for "the expansion of Parmalat South American subsidiaries' raw material supply sources and to further upgrade and refurbish Parmalat's industrial plants in Brazil and other South American countries." This side letter also set forth projections of the value of the goods expected to be exported by Parmalat companies based in South America from 2003 through 2008. Hapoalim contended that it was sent this side letter prior to deciding to purchase the notes and relied on it. Hapoalim then alleged this side letter contained material omissions and false statements about Parmalat's financial condition.

Intesa contended this side letter was not sent to Hapoalim until after Hapoalim committed to purchase the notes, so Hapoalim could not have relied on it. Intesa argued to the jury that Hapoalim received and relied upon a different side letter when it committed to purchase the notes. That side letter was a form of side letter relating to a transaction involving Archer Daniels Midland, Inc. (ADM) and, Intesa claimed, was the one relied on by Hapoalim for the instant

[* 4]

transaction. The ADM side letter did not state that the loan would be used for capital expansion, but rather to finance the shipment of foodstuffs from South America.

Hapoalim witnesses, in particular Alfred Kronenberg, the head of Hapoalim's Credit Department, testified that Hapoalim had first received the ADM side letter, but subsequently received the side letter relating to capital expansion before deciding to purchase the notes. Hapoalim argued that a loan made for capital expansion was less risky than a loan made for trade finance and that it relied on this in committing to the notes.

Intesa challenged this testimony and argued to the jury that Hapoalim's witnesses lacked credibility. The jury found for Hapoalim. Intesa now argues that insufficient evidence was presented at trial from which a rational juror could answer "yes" to Questions 1(d) (with one dissent) and 3(a) on the jury's Verdict Sheet. Those questions go to Hapoalim's claims of fraud and aiding and abetting Wishaw to commit fraud. They read:

1(d). Did Bank Hapoalim prove, by clear and convincing evidence, that it justifiably relied upon Banca Intesa's and/or its agents' representations in deciding to purchase the promissory notes?

3(a). Did Bank Hapoalim prove, by clear and convincing evidence, that Wishaw Trading committed a fraud against it?

Intesa argues, as it did at trial, that Hapoalim committed to the investment eleven days before it received the side letter relating to capital expansion. Intesa again challenges the testimony of Alfred Kronenberg as incredible. Hapoalim counters that Intesa's claims are simply a disagreement with the jury's credibility determination, which is not a legal basis for relief.

Intesa also challenges Hapoalim's standing to sue for fraud relating to one of the three notes, which Hapoalim sold to its affiliate Bank Hapoalim Luxembourg (BHL) in return for a sub-

participation agreement. The court (Cahn, J., Retired), in its December 23, 2008 decision and order denying Intesa's motion for summary judgment, denied this same argument, with leave to renew at trial.

II. Discussion

CPLR 4404 (a) provides that a trial court may set aside a verdict and order a new trial "in the interest of justice." The statutory standard is not subject to precise definition, but "it is a settled rule that a jury verdict should not be set aside as against the weight of the evidence unless the jury could not have reached its verdict on any fair interpretation of the evidence."

McDermott v Coffee Beanery, Ltd., 9 AD3d 195, 206 (1st Dept 2004) (citations omitted). The credibility of witnesses and the accuracy of their testimony present clear issues of fact to be resolved by the jury. *Glover v New York City Transit Auth.*, 60 AD3d 587 (1st Dept), *lv. denied* 13 NY3d 706 (2009). Where a verdict is based on a "clear issue of credibility," it is improper to set it aside. *Sherman v Smith*, 23 AD2d 642, 643 (1st Dept 1965) (order setting aside verdict unanimously reversed); *see Rizzo v Jenn Cab Corp.*, 26 AD2d 812 (1st Dept 1966) (court reinstated jury verdict based on credibility issues as not against weight of credible evidence).

Intesa's argument that the testimony of Hapoalim's witness Alfred Kronenberg is "unworthy of belief by any rational juror" is one based on a "clear issue of credibility." *Id.* Kronenberg was extensively cross-examined at trial, and the evidence that Intesa claims proves Kronenberg fabricated his testimony was before the jury. Intesa's counsel referred to that evidence during his closing argument, in which he attacked Kronenberg's credibility on the same grounds raised in the motion. The jury resolved that issue in Hapoalim's favor; their decision was rationally based on the evidence.

Kronenberg testified that: (1) He reviewed and relied on the Wishaw documents (Trial Exhibit 5) when preparing the Credit Committee recommendation prior to the April 14, 2003 Credit Committee meeting; and (2) he attached the Wishaw documents to the package of information provided to the Credit Committee (Trial Exhibit 6). Trial Transcript (TT):157-158, 182, 200, 207-209, 242-251, 266-267. Hapoalim presented other evidence corroborating Kronenberg's testimony, including the testimony of Helmut Gareus, its Chief Financial Officer and a member of its Credit Committee. Gareus testified that he received and reviewed the Wishaw documents prior to the key April 14, 2003 Credit Committee meeting. TT: 508-511, 522-523, 529-537. According to both men, the documents included the controverted side letter.

The evidence Intesa relies on to discredit Kronenberg includes inaccurate pleading allegations by Hapoalim and statements in deposition transcripts, some of which were not utilized at trial and cannot now be used to attack the jury verdict. Intesa argues, in sum, that Hapoalim had previously asserted that it received the Wishaw documents by the end of March, 2003, which is inconsistent with Kronenberg's trial testimony that he received them through the mail in April, prior to the Credit Committee meeting. Intesa asserts that the incredulity of Kronenberg's testimony is established by this inconsistency, as well as the implausibility of his story. However, Intesa explored these weaknesses in Kronenberg's testimony at trial, and although they are considerable, they do not render the evidence supporting the verdict insufficient as a matter of law. Indeed, the jury could have determined that the prior, inconsistent assertions were merely erroneous and that regardless of how or when Kronenberg actually received the Wishaw documents, the Credit Committee reviewed and relied on them in approving the transaction.

Sub-Participation Agreement

Intesa also asserts that Hapoalim's judgment must be reduced by \$5 Million because it entered into a \$5 Million sub-participation agreement with its affiliate BHL. It argues BHL was the real party in interest as to that sum. The sub-participation agreement provides that Hapoalim "shall act in trust" for BHL, and that all agreements of the borrower would be held by Hapoalim in its own name for its and BHL's benefit. Balber Affid., Exh. H, ¶ 1. The sub-participation agreement also requires Hapoalim to take "such steps as shall be reasonably necessary in order to collect any amount ...due and unpaid ... provided, however, that before taking any such steps we shall consult with you in good faith" ¶ 5 (a). Notwithstanding this provision, the agreement entitles Hapoalim to "to take any action" they consider urgent as long as they promptly notify BHL. *Ibid.* By its terms, the agreement is to be governed by the laws of Switzerland. ¶ 6.

Intesa argues that Hapoalim has not established its right to sue in a representative capacity under Swiss law. Intesa submits a declaration of Dr. Marc Nater, a Swiss lawyer specializing in civil law, addressing the trust created under the agreement. Dr. Nater opines that "the court would expect to hear evidence that BHL and BHS [Hapoalim] consulted in good faith (as provides for in Sec. 5 (a) of the Sub-Participation Agreement) unless there was a showing of urgency to start the suit." Dr. Nater also opines that,

4. As a matter of Swiss law, under the Sub-Participation Agreement BHL acquired no derivative or subrogated rights to sue third parties on claims arising out of the Credit Facility
5. Under Swiss law, if BHL sued Banca Intesa ... for fraudulent behavior arising out of the Credit Facility ..., BHL would have to prove all elements of the claim as a damaged party ...

Hapoalim argues that under CPLR 1004, it may maintain the action because it is a person

in whom a contract has been made “for the benefit of another,” and it is a “trustee of an express trust.” Hapoalim submits an affidavit of Lukas Handschin, a professor of commercial, corporate and accounting law at the University of Basel in Switzerland, who provides an analysis of the sub-participation agreement and its legal effect under Swiss law. Prof. Handschin opines that,

4. Under Swiss law, the Sub-Participation Agreement does not transfer title to any of the three Promissory Notes issued by Wishaw The wording “we have agreed to sell to you and you have agreed to buy from us” does not effect a transfer of the notes, but rather only the obligation to transfer proceeds to BHL ... BHL acquires an undivided one-third interest in all sums recovered by [Hapoalim] on account of [Hapoalim’s] holding of the Notes. However, at all times, BHL continues to hold the Notes.
5. According to Swiss legal doctrine, all external relationships remain unaffected by the tacit partnership and [Hapoalim] (as the open partner) remains the only party entitled to assert any rights whatsoever with regard to the Notes and the purchase thereof.

Prof. Handschin also opines there is “no impediment under Swiss law to ... [Hapoalim’s] pursuit of the claims.”

Neither party submits copies of Swiss statutes or court decisions applicable to this dispute, relying instead on the sworn statements of experts opining on the application of Swiss law to the sub-participation agreement. The court does not consider this evidence sufficient to take judicial notice of pertinent Swiss law under CPLR 4511(b); *see Bank of N.Y. v Nickel*, 14 AD3d 140, 148-149 (1st Dept), *appeal dismissed* 4 NY3d 843 (2005) (finding lower court should have applied forum law where no proof of foreign law).

In any event, under New York law Hapoalim has standing to sue on its subsidiary’s behalf pursuant to the agreement, and the affidavit of Intesa’s Swiss expert Dr. Nater does not dispute Hapoalim’s standing to sue under Swiss law. CPLR 1004 recognizes *inter alia* that a

“trustee of an express trust” or a “person with whom or in whose name a contract has been made for the benefit of another, may sue or be sued without joining with him the person for or against whose interest the action is brought.” The agreement explicitly provides that Hapoalim “shall act in trust” for BHL.

Nor does Dr. Nater dispute the opinion of Prof. Handschin that Hapoalim retained title to the notes and the right to sue Intesa for fraud under Swiss law. Dr. Nater’s opinions instead address the legal extent of BHL’s rights under the agreement, as opposed to the rights retained by Hapoalim. Intesa also fails to show that Hapoalim did not confer with BHL prior to bringing the fraud suit (as required by the agreement). Even if Intesa could prove that Hapoalim had somehow failed in this regard, the court is not convinced that its failure would deprive it of standing to sue Intesa for fraud in selling it the note in the first place. Such a failure would instead arguably constitute a breach of its agreement with BHL.

Adverse Inference

Intesa’s current request for an adverse inference based on Hapoalim’s alleged failure to produce Credit Committee minutes during discovery was not made prior to the Note of Issue, prior to or during trial, or at the charge conference, and has therefore been waived. *See Harrington v Halpert*, 241 AD2d 540 (2d Dept 1997) (motion to set aside verdict must be based on proceedings during trial); *see also Melcher v City of New York*, 38 AD3d 376, 377 (1st Dept 2007) (right to further discovery waived by filing Note of Issue). Accordingly, it is hereby

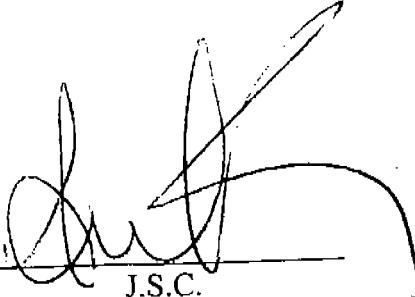
ORDERED that defendant Banca Intesa S.p.A.’s motion to set aside the jury verdict, or alternatively for a new trial, is denied; and it is further

ORDERED that defendant Banca Intesa S.p.A.’s motion to reduce the judgment by one-

third is denied.

ENTER,

Date: April 21, 2010
New York, N. Y.



J.S.C.

FILED
MAY 06 2010
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