SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Index Number : 150273/2011
SIDAOUI, MONICA
vs
ABOUMRAD, GUILLERMO
Sequence Number : 002
DISMISS ACTION

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

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendant Guillermo Aboumrad to dismiss the Amended Complaint of Monica Sidaoui pursuant to CPLR 3211(a)[8] for lack of personal jurisdiction, pursuant to CPLR 327(a) on the ground that New York is an inconvenient forum, pursuant to CPLR 3211(a)[4] based on another action pending, and pursuant to CPLR 3211(a)[7] for failure to state a cause of action, and in the alternative, for a stay of this action pursuant to CPLR 2201 or CPLR 327 until the other action pending is decided, is granted solely to the extent that dismissal based on CPLR 327(a) on the ground that New York is an inconvenient forum is granted and this action is hereby dismissed; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

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

Dated: 2.10.2012

_____, J.S.C.
HON. CAROL EDMEAD

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------x

MONICA SIDAOUI,

Plaintiff,

-against-

GUILLERMO ABOUMRAD,

Defendant.

----------x

Index No. 150273/2011

DECISION/ORDER
Motion #002

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action for fraudulent inducement and conversion, defendant Guillermo Aboumrad ("defendant") moves to dismiss the Amended Complaint of his ex-wife Monica Sidaoui ("plaintiff") pursuant to CPLR 3211(a)[8] for lack of personal jurisdiction, pursuant to CPLR 327(a) on the ground that New York is an inconvenient forum, pursuant to CPLR 3211(a)[4] based on another action pending, and pursuant to CPLR 3211(a)[7] for failure to state a cause of action, and in the alternative, for a stay of this action pursuant to CPLR 2201 or CPLR 327 until the other action pending is decided.

Factual Background[1]

Plaintiff and defendant were married in 1995 in Mexico under the "Separate Property" statutes in that country, wherein spouses retain ownership of property belonging to them, respectively, and thus all earnings of these goods remain the exclusive domain of their owner.

Defendant claims that in 2004, defendant opened an account at Smith Barney (which later became Morgan Stanley Smith Barney, LLC ("Morgan Stanley")), with a small initial balance followed by deposits through February 2006 made solely from defendant. Defendant allegedly

[1] The factual background is taken in large part from the moving papers.

created the account in order to manage investments for himself and his mother and sisters. There was no contribution or withdrawal of money by plaintiff.

In March 2006, defendant allegedly added plaintiff to the account to permit her access solely in the event of his illness or death. All of the documents to add plaintiff to the account were executed at the marital residence in Mexico City and sent back by messenger service. The account was changed to bear the parties' names, "JTWROS" (hereinafter, referred to as the "Joint Account"). Plaintiff never budgeted the household expenses or inquired about the management of this account.

Thereafter, in June of 2006, Michael Saidi ("Saidi"), a financial advisor at Morgan Stanley, became the financial advisor to the Joint Account and came to the Marital Residence in Mexico to deal with account matters. While Saidi was employed by Morgan Stanley, defendant was working for Banco Nacional de Mexico, S.A. owned by Citigroup from 2001 to March 2007. Plaintiff claims that while defendant and Saidi worked together at Citigroup Global Markets, Inc., Saidi came to the Marital Residence upon Mr. Aboumrad's request with several account opening documents written in English for her to sign. Defendant claims he never worked in the same Citigroup office as Saidi, and that his trips to New York had nothing to do with Morgan Stanley or Saidi.

Defendant dealt exclusively with the Joint Account through June 2010 when the account was closed. According to plaintiff's complaint in this action, at the time the Joint Account was closed, it had a $0 balance as a result of transfers on August 14, 2009 defendant directed Saidi to make to other accounts held in his name, all without plaintiff's knowledge.

On October 14, 2010, defendant filed a divorce action under the Mexican Statute

"Divorce Without Cause," (the "divorce action") and a final divorce decree was issued on January 14, 2011. According to defendant, it was not until the divorce decree was issued that plaintiff sent a letter to Morgan Stanley in March 2011 demanding that her name be restored to the Joint Account.

However, two other actions filed pursuant to Article 267 and 287 of the Federal District Civil Code of Mexico, regarding the division of the parties' assets, were filed before the instant action. Namely, plaintiff commenced an action on April 6, 2011 in Mexico against defendant for up to 50% of defendant's alleged assets acquired during the marriage, including the Joint Account. The Marital Residence, which was titled in plaintiff's name, was not included in plaintiff's action, as she alleges that she transferred it to a trust. And, defendant commenced an action in Mexico for a distribution of assets, including the division of the Marital Residence. Defendant alleges that he contributed more than 50% of the funds to purchase, renovate and furnish the Marital Residence, located in Mexico, which is valued at $1,500,000.

Plaintiff also commenced an additional action on October 28, 2010 against defendant for alimony, in which plaintiff was awarded a provisional alimony payment equal to 40% of defendant's salary. There is also a custody and visitation action in Mexico between the parties concerning their two children.

Throughout their marriage, and presently, the parties have been citizens and residents of Mexico.

In support of dismissal, defendant argues that plaintiff's complaint fails to allege sufficient facts under CPLR § 301 and § 302(a) to establish personal jurisdiction over him, a non-domiciliary. Plaintiff admits that the parties are residents of Mexico, the account was

opened in Mexico, the paperwork was executed in Mexico, and Saidi came to Mexico with account opening documents. The only reference to New York in the Complaint is in paragraph six where plaintiff alleges that Saidi serviced the Joint Account in New York, and paragraph eight where plaintiff alleges that defendant "has visited New York and trusts Mr. Saidi," which are insufficient to bring the defendant into New York. The Complaint does not allege that the defendant transacts any business within New York or contracts anywhere to supply goods or services in New York sufficient to assert jurisdiction under CPLR 302(a)(1). Nor is there jurisdiction under CPLR 302(a)(2) as the defendant has not committed a tortious act within the state. There is also no personal jurisdiction pursuant to CPLR 302(a)(3), as the alleged tortious acts took place outside of New York and is related to money that is no longer in New York.

Defendant also argues that under CPLR 327, New York is an inconvenient forum. None of parties are, or were residents of New York during the alleged causes of action in the Complaint. This action is based on events that took place in Mexico, and that the majority of the witnesses (including defendant's mother and sisters to whom the money in Joint Account also belongs), the Marital Residence, and the parties' other assets are in Mexico and would need to be appraised there. A New York Court would be making a decision that would have no effect in New York. And, since the two actions in Mexico are currently pending in Mexican Courts, including the specific claim for the money in the Joint Account which is the subject of the instant lawsuit, a decision of this Court would be a duplication of efforts with the Mexican Courts with a high likelihood of divergent rulings as to a decision the Mexican Court will make. Since the Joint Account is the subject of the plaintiff's lawsuit currently pending in Mexico and the parties were married and divorced under the laws of Mexico, the resolution of the underlying dispute

implicates the application of foreign law. In addition, traveling to and from New York could jeopardize defendant's custody and visitation proceeding in Mexico. In defendant's new employment, he will be traveling to Monterrey Nuevo Leon in the Republic of Mexico, and traveling to New York could jeopardize his employment. Defendant was fired from his previous employment on May 31, 2011 and was unemployed for approximately four months, and recently accepted new employment at approximately half of his previous salary. Not only is the Mexican Court available, but it is the proper Court to hear the issues. All of the facts, evidence, and the majority of the witnesses relating to the cause of action for conversion are located in Mexico including the Defendant's mother, sister, and other family members, and the New York Court would only be able to make a determination by looking at the laws of Mexico.

Furthermore, there are other actions pending between the same parties for the same cause of action, which were commenced before this action, and therefore this action should be dismissed under CPLR 3211(a)[4]. The courts have interpreted CPLR 3211(a)[4] to apply to exclude other actions pending in a court of a foreign country in Mexico. Although it seems that an exception should be made with regard to Mexico as our neighboring country, if CPLR 3211(a)[4] does not apply, then a stay should be granted under CPLR 2201 until the other actions pending in Mexico are resolved.

The defendant has failed to state a cause of action under CPLR § 3211(a)[7] fraudulent inducement, as there is no allegation that defendant made a representation of any fact, which was false or known to be false by defendant, that she relied on any statement or representation by defendant, and there was no injury to plaintiff. As to the conversion claim, defendant had the right to withdraw the funds and it is up to the Mexican Court how those funds are distributed

amongst the parties per the plaintiff's other action. Even if there was a cause of action for conversion, the New York Court would only be able to make a determination by looking at the laws of Mexico, dealing with evidence and witnesses in Mexico, and it would have a material effect on the current litigation for the plaintiff's and defendant's other actions pending in Mexico.

In opposition, plaintiff argues that the parties created the Joint Account with Citigroup Global Markets, Inc., currently known as Morgan Stanley.

Because the parties could not agree on compensation during the divorce action, the judge reserved the right of each spouse to enforce an agreement through a secondary trial. As such, plaintiff continues her action for alimony, with the remaining issues being whether plaintiff has the right to compensation pursuant to Article 267, and if so what percentage of compensation not to exceed 50%. As for defendant's divorce action, the family judge must rule as to whether he is entitled to 50% of the Marital Residence.

However, the instant action centers around the parties' Joint Account. When Saidi, a former co-worker of defendant, came to the Marital Residence in 2006, the account opening documents were written in English. At that time, plaintiff did not understand English well enough to understand the account opening documents, nor did she understand the nature of the "joint tenancy with right of survivorship" account that she and the defendant created. Plaintiff understood the Joint Account would contain family funds that defendant did not have the authority or desire to convert to other accounts outside of plaintiff's control. In August 2009, without plaintiff's knowledge or consent, defendant instructed Saidi to transfer funds out of the Joint Account. Plaintiff was not aware of the transfers defendant made, or that defendant closed the Joint Account until early 2011.

The Court has personal jurisdiction over the defendant pursuant to CPLR 302(a)(1). Defendant worked for Citigroup Global Markets, Inc., the same bank that housed the funds in the Joint Account. Although defendant worked out of a Citibank Banamex branch in Mexico City, he traveled to New York several times a year between the years of 1998 through 2008 on business for Citigroup Global Markets, Inc. In fact, defendant worked with Saidi on his trips to New York. The Joint Account statements show that Saidi worked out of the New York office of Citigroup Global Markets, Inc. and later that of Morgan Stanley. There is no requirement that a non-domiciliary transact business that relates to the claim filed in the New York court. As such, defendant clearly transacted business in New York in a manner defined by CPLR 302(a)(1).

Further, CPLR 302(a)(2) confers long-arm jurisdiction over defendant, since he committed a tort in New York State through an agent. Defendant acted through Saidi to convert the funds held in the Joint Account. As stated in the Amended Complaint, Saidi was the registered representative on the Joint Account and all instructions to transfer funds out of the account were sent to Saidi in New York. Plaintiff's affidavit clearly states that the funds were and continue to be held in an account in New York. In addition, defendant's own exhibits state that the Joint Account was housed in New York.

The New York court is not an inconvenient forum. This case centers on funds in an account that were housed in a New York bank and managed by Saidi, a registered representative located in New York. Thus, the documents required for this matter are held in New York. Moreover, one of the main witnesses in this matter is Saidi and his office is located in New York. Also, defendant will not be inconvenienced if this matter remains in New York because defendant is New York several times a year on business. The funds in the Joint Account are not

part of the actions in Mexico. The Joint Account is included in plaintiff's alimony action merely to demonstrate defendant's ability to pay plaintiff alimony. As such, the actions pending in Mexico do not affect the instant action nor do they make the funds in the Joint Account subject to the actions in Mexico. That other assets owned by defendant may be located in Mexico does not bring the Joint Account under Mexican law or jurisdiction. At all times prior to the transfers that took place in the Joint Account in or around August 2009, the funds were housed in New York. Plaintiff states a claim for a conversion that took place in New York when defendant sent a request to Morgan Stanley's New York office requesting that Saidi transfer the funds to an account solely in defendant's name. Therefore, plaintiff's claim for conversion arises out of transactions which took place in New York. As such, Mexico would not be the proper forum for plaintiff's action. Moreover, the subject funds remain in New York. After defendant withdrew the funds from the Joint Account he placed them in Morgan Stanley accounts solely in his name. However, on or about September 27, 2010, shortly before filing for divorce, defendant moved the funds to a Morgan Stanley account in the name of Elaine Laila Aboumrad Arida. Subsequently, in October 2010 defendant moved the funds to Safra National Bank of New York ("Safra Bank Account"). As such, the funds are still present in New York.

Broad allegations that issues of a foreign law will arise or that witnesses or documents are located outside New York are not sufficient to prevent a New York court from hearing a case on *forum non conveniens* grounds.

Further, the other actions pending in Mexico are not grounds to dismiss this case pursuant to CPLR3211(a)(4) nor stay the action pursuant to CPLR 2201. The actions in Mexico arise out of a divorce and a request for permanent alimony. This case arises out of defendant's acts of

fraud, deceit and subsequent conversion of funds from the Joint Account, which is located in New York. The relief sought in these actions is very different. In the alimony action, plaintiff seeks an alimony payment equivalent to no more than 50% of defendant's entire assets, based on defendant's financial status as determined by the court. The Joint Account, as stated above was included in the alimony Action, along with several other of defendant's accounts, as evidence of defendant's ability to pay a permanent alimony settlement. The issues in this matter are in no way similar to those raised in the divorce action or the alimony action. As such, there would not be a duplication of effort or divergent rulings. Therefore, this action should not be dismissed based on CPLR 3211(a)(4) or stayed pursuant to CPLR 2201.

And, plaintiff has stated a cause of action for fraudulent inducement. Defendant told plaintiff that the Joint Account was to hold funds for the benefit of their family—plaintiff, defendant and their children. Plaintiff relied on defendant's representation when she signed the account opening documents in June 2006. Defendant led plaintiff to believe that he was creating the Joint Account for their benefit and for the benefit of their children, not as a matter of convenience. Defendant led plaintiff to believe that she was granted a one-half interest in the deposited funds. As such, plaintiff signed the necessary documents, and when defendant transferred all of the funds in the Joint Account, defendant removed plaintiff's half interest in those funds causing her injury.

In support of her conversion claim, plaintiff argues that defendant interfered with plaintiff's possessory right to one-half of the funds in the Joint Account without plaintiff's authority or consent. Defendant created a joint account pursuant to New York Banking Law §675. Defendant's withdrawal of all the funds is not sufficient to overcome the presumption a

joint account was created pursuant to New York Banking Law 675. Plaintiff had access to the Joint Account and was able to make deposits or withdrawals if she chose to. Moreover, the funds deposited into the Joint Account were household funds that plaintiff helped make available to the account by budgeting the household expenses. As such, defendant has not rebutted the presumption that plaintiff and defendant created a joint account pursuant to New York Banking Law §675. Defendant's withdrawal of the entire balance of the Joint Account makes him liable to plaintiff for one-half of the monies held therein. Defendant knowingly withdrew the complete value of funds from the Joint Account, obtaining exclusive dominion and control over the funds.

In reply, defendant adds that plaintiff's argument makes clear that the Mexican Court will also be making a decision regarding the Joint Account in the determination of any alimony award. Article 267, Section IV of the Federal District Civil Code of Mexico clearly deals with the value of the assets acquired during the marriage which relates to plaintiff's other action for assets in Mexico.

Plaintiff's allegation that defendant traveled to New York several times a year and that his friend, Saidi worked out of the New York office of Citigroup Global Markets, Inc. and later that of Morgan Stanley do not satisfy plaintiff's burden of establishing jurisdiction over the defendant.

Nothing in the complaint alleges that defendant made a representation of any fact, which was false or known to be false by defendant to support a fraudulent inducement claim. Plaintiff makes no allegation that she relied on any statement or representation by defendant. In fact, plaintiff clearly understands and can communicate in English. This is not a case where plaintiff had an individual account and defendant convinced her to convert it to a joint account so that

defendant could access it. Defendant gave access to plaintiff for convenience purposes in the case of defendant's illness or death that plaintiff never had. Plaintiff could not have suffered any damages.

The money in the account had been solely defendant's; defendant managed the account for himself, his mother and three sisters; defendant made all of the decisions regarding the investments; he has always had exclusive possession of the account statements and passwords to gain online access; and plaintiff has never made any deposits to or withdrawals from the account. These factors have been held to satisfy the burden of the party seeking to rebut the presumption of a joint tenancy created by section 675 of the Banking Law by providing direct proof that no joint tenancy was intended or substantial circumstantial proof that the joint account had been opened for convenience only.

And, the issue of this "other action pending" is an important factor under CPLR §327 and would be a dispositive factor under CPLR 3211(a)(4) if plaintiff's other action for assets in Mexico was in another state in the United States. However if CPLR 3211(a) 4 does not apply, then a stay should be granted under CPLR §2201 until the other actions pending in Mexico are resolved.

Discussion

Under CPLR 3211(a)[8], the Court may dismiss the complaint against defendant for lack of personal jurisdiction.

CPLR 302(a)(1), on which plaintiff relies to establish jurisdiction, provides:

302. Personal jurisdiction by acts of non-domiciliaries

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of

> the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent:
>
> 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; . . . .

Thus, "long-arm jurisdiction over a non-domiciliary exists where a defendant transacted business within the state, and the cause of action arose from that transaction. 'If either prong of the statute is not met, jurisdiction cannot be conferred.'" (*Copp v. Ramirez*, 62 A.D.3d 23, 874 N.Y.S.2d 52 [1st Dept. 2009] (internal citations omitted)). Under the statute, "proof of one transaction in New York is sufficient to invoke jurisdiction ... so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" (*id*). However, the burden rests on plaintiff, as the party asserting jurisdiction to establish sufficient facts indicating that New York's long-arm statute confers jurisdiction over defendant (*id., citing Bunkoff Gen. Contrs. v. State Auto. Mut. Ins. Co.*, 296 A.D.2d 699, 700, 745 N.Y.S.2d 247 [2002]).

"In determining whether a "transaction of business" has occurred "[t]he key inquiry is whether [the] defendant purposefully availed itself of the benefits of New York's laws" *(State v. McLeod*, 12 Misc.3d 1157(A), 819 N.Y.S.2d 213 (Table) [Sup. Ct. New York County 2006] *citing Courtroom Television Network v. Focus Media, Inc.*, 264 A.D.2d 351, 353, 695 N.Y.S.2d 17 [1st Dept 1999]).

Plaintiff alleges that (1) defendant's travel to New York several times a year between 1998 and 2008 [the period during which the Joint Account was created and funded] on business for Citigroup Global Markets, Inc. and (2) the alleged fact that defendant worked with Saidi, the Joint Account representative, while in New York (Plaintiff's Aff. in Opp. Pg. 6). Further, it is

uncontested that although documents creating the Joint Account may have been executed in Mexico, the Joint Account was maintained by a New York based broker.

Such facts are sufficient to establish that defendant transacted business in New York.

By actively maintaining the Joint Account, about which this action is based, with Morgan Stanley in New York, defendant gained "both the protection of New York's banking and securities trading laws, and access to New York's banks and securities markets" (*State v. McLeod*, 12 Misc.3d 1157, *supra*). "Indeed, both New York State and federal courts have held that actively maintaining such an account constitutes 'transacting business' within the statutory definition (*See Ehrlich–Bober & Co., Inc. v. University of Houston*, 49 N.Y.2d 574, 427 N.Y.S.2d 604, 404 N.E.2d 726 (1980) (Acknowledging that defendant had "transacted business" pursuant to CPLR 302(a)(1), and thereby subjected itself to the jurisdiction of the New York courts, by conducting 22 securities purchases-mainly by telephone-with New York brokerage firm); *Deutsche Bank Securities, Inc. v. Montana Bd. of Investments*, 21 A.D.3d 90, 797 N.Y.S.2d 439 (1st Dept 2005) (Jurisdiction lay under CPLR 302(a)(2) where defendants' investment officer negotiated a single securities purchase with a New York-based bank via an internet instant messaging system); *L.F. Rothschild, Unterberg, Towbin v. Thompson*, 78 A.D.2d 795, 433 N.Y.S.2d 6 (1st Dept 1980) (Non-domiciliary defendant, who only dealt with plaintiff securities broker by telephone and mail and never came to New York, held subject to personal jurisdiction pursuant to CPLR 302(a)(1) because he sent checks and securities to New York and conducted 25 transactions in four months.); *Credit Lyonnais Securities (USA), Inc. v. Alcantara*, 183 F.3d 151 (2d Cir.1999) (Defendant "transacted business" in New York, within meaning of CPLR 302(a)(1), where it maintained an "active account" with its New York-based securities

broker and agreed to sell that broker various securities through that account); *Newbro v. Freed*, 337 F Supp 2d 428 (S.D.N.Y.2004) (Personal jurisdiction lay under CPLR 302(a)(1) where defendants maintained a brokerage account in New York and traveled there for meetings with the broker))." (*State v. McLeod*, 12 Misc.3d 1157, *supra*).

Next, the Court must determine whether "the cause of action [is] directly related to, and arise[s] from, the business so transacted." (*State v. McLeod*, *supra citing, Storch v. Vigneau*, 162 A.D.2d at 242, 556 N.Y.S.2d 342). New York State law requires "that a substantial relationship' must be established between a defendant's transactions in New York and a plaintiff's cause of action in order to satisfy the nexus requirement of the statute" (*State v. McLeod*, 12 Misc.3d 1157, *supra citing Johnson v. Ward*, 4 N.Y.3d 516, 519, 797 N.Y.S.2d 33, 829 N.E.2d 1201 (2005), *quoting Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 467, 527 N.Y.S.2d 195, 522 N.E.2d 40 (1988)).

Here, a substantial nexus exists between the cause of actions for fraudulent inducement and conversion of the funds in the Joint Account, and the defendant's transaction of business concerning the Joint Account. Plaintiff's claims arise directly out of defendant's use, maintenance, and control over the Joint Account.

As to jurisdiction pursuant to CPLR 302(a)(2) provides, this section subjects defendant to this Court's jurisdiction based allegations that defendant "commit[ed] a tortious act within the state . . . ." It is alleged that defendant worked with his agent, Saidi, while in New York, and that through defendant's actions *via* his New York based agent, defendant committed tortious acts within the State by depleting the Joint Account without plaintiff's knowledge or consent. Thus, defendant's alleged contacts with New York, which concerns the funds at issue, support the

exercise of this court's jurisdiction (*Banco Internacional, S.A. v. Vilaseca*, 166 Misc.2d 72, 631 N.Y.S.2d 468 [Sup. Ct., New York County, 1994]).

Therefore, dismissal based on CPLR 3211(a)[8] based on the lack of personal jurisdiction is denied.

Dismissal pursuant to CPLR 3211(a)[4] on the ground that another action pending, is also unwarranted. This section permits dismissal where "there is another action pending between the same parties for the same cause of action in a court of *any state or the United States*; the court need not dismiss upon this ground but may make such order as justice requires" (emphasis added). Here, the previously-filed actions between the parties are pending in Mexico, and not in another state of the United States. Therefore, defendant's motion to dismiss based on CPLR 3211(a)(4) is denied (*ABKCO Industries, Inc. v. Lennon*, 85 Misc. 2d 465, 377 N.Y.S.2d 362 [Sup. Ct., New York County 1975] ("Pendency of suit in a foreign jurisdiction does not support a dismissal on grounds of prior action pending."); *Mary F. B. v. David B.*, 112 Misc.2d 475, 447 N.Y.S.2d 375 [N.Y. Fam. Ct. 1982] ("As Professor Siegel indicates, CPLR § 3211(a)(4) is intended to apply in the case of actions pending within the United States")).

Turning to whether plaintiff stated a cause of action for fraudulent inducement and conversion, it is well established that in determining whether to grant a motion to dismiss based upon a failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be afforded a liberal construction, and the court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory (*Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118, 741 N.Y.S.2d 9 [1st Dept. 2002] *citing Leon v. Martinez*, 84 N.Y.2d 83, 87–88, 614

N.Y.S.2d 972, 638 N.E.2d 511).

To state a claim for fraudulent inducement, there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury (*Gosmile, Inc. v. Levine*, 81 A.D.3d 77, 915 N.Y.S.2d 521 [1st Dept. 2010] *citing Sokolow, Dunaud, Mercadier & Carreras, LLP v. Lacher*, 299 A.D.2d 64, 70, 747 N.Y.S.2d 441 [2002]). Here, the pleadings, coupled with plaintiff's affidavit, sufficiently allege that defendant told plaintiff that the Joint Account was to hold funds for the benefit of their family, in order to obtain plaintiff's signature on the documents, and that plaintiff relied on defendant's representation when she signed the account opening documents. It is uncontested that under N.Y. Banking Law § 675, deposits into a joint bank account creates a presumption that the co-tenant, such as plaintiff, is entitled to a one-half interest in the deposited funds. Thus, plaintiff allegedly believed that she was entitled to a one-half interest in the deposited funds, and when defendant transferred all of the funds in the Joint Account without plaintiff's knowledge or consent, defendant removed plaintiff's half interest in those funds causing her injury. Such facts are sufficient to state a claim for fraudulent inducement.

To state a claim for conversion, plaintiff must allege that defendant "intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Demry v. Wind,* 82 A.D.3d 670, 920 N.Y.S.2d 318 [1st Dept. 2011] *citing Colavito v. New York Organ Donor Network, Inc.*, 8 N.Y.3d 43, 49–50, 827 N.Y.S.2d 96, 860 N.E.2d 713 [2006]). Here, plaintiff alleges that defendant interfered with Plaintiff's possessory right to one-half of the funds in the Joint Account without her authority or consent. It is alleged that defendant knowingly withdrew all of the funds from

the Joint Account, thereby obtaining exclusive dominion and control over the funds. Thus, assuming the truth of such allegations, defendant would be liable to plaintiff for one-half of the funds held in the Joint Account at the time of the withdrawal. As such, plaintiff states a conversion claim against defendant, and dismissal of same is unwarranted.

However, dismissal is warranted pursuant to CPLR 327(a) on the ground that New York is an inconvenient forum, this section provides:

> When the court finds that in the interest of substantial justice the action should be heard in another forum, the court . . . may stay or dismiss the action . . . on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.

"The burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation" (*World Point Trading PTE, Ltd. v. Credito Italiano*, 225 A.D.2d 153, 649 N.Y.S.2d 689 [1st Dept 1996]). "Among the factors to be considered are the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit" (*World Point Trading PTE, Ltd., supra*). The court may also consider the nonresidency of the parties and the foreign situs of the transaction out of which the action arose (*World Point Trading PTE, Ltd., supra*).

Among the factors that militate against retaining suit in New York are the foreign residence of the pertinent parties, *i.e.*, plaintiff and defendant, the foreign locus of the asserted fraudulent inducement concerning plaintiff's execution of account opening documents in Mexico, the fact that the other potential witness, Saidi, traveled to Mexico in connection with the account opening documents, the fact that the plaintiff's action in Mexico has asserted a claim to

the Joint Account, which is the subject of this action, and the burden the litigation would impose on the courts of this State because of the multiplicity of actions (*see World Point Trading PTE, Ltd., supra*). There is no indiction that the issue as to the rightful owner or owners of the Joint Account, and claims of fraud and conversion related thereto, cannot be subsumed in the pending actions in Mexico. The record indicates the defendant no longer travels to New York for business due to the change in his employment. That the funds may have been transferred to an account based in New York does not outweigh the remaining factors which militate against maintaining this action in New York. Therefore, dismissal of the action based on CPLR 327(a) is warranted, and the alternate relief of a stay pursuant to CPLR 327 and/or CPLR 2201 is moot.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant Guillermo Aboumrad to dismiss the Amended Complaint of Monica Sidaoui pursuant to CPLR 3211(a)[8] for lack of personal jurisdiction, pursuant to CPLR 327(a) on the ground that New York is an inconvenient forum, pursuant to CPLR 3211(a)[4] based on another action pending, and pursuant to CPLR 3211(a)[7] for failure to state a cause of action, and in the alternative, for a stay of this action pursuant to CPLR 2201 or CPLR 327 until the other action pending is decided, is granted solely to the extent that dismissal based on CPLR 327(a) on the ground that New York is an inconvenient forum is granted and this action is hereby dismissed; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all

parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: February 10, 2012

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD