| **Rubens v UBS AG** |
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| 2013 NY Slip Op 32914(U) |
| November 12, 2013 |
| Supreme Court, New York County |
| Docket Number: 654383/2012 |
| Judge: Eileen Bransten |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN J.S.C. PART 3
*Justice*

Index Number : 654383/2012
RUBENS, JOSEPH
vs.
UBS AG
SEQUENCE NUMBER : 001
DISM ACTION/INCONVENIENT FORUM

INDEX NO. 654383/2012
MOTION DATE 7/18/2013
MOTION SEQ. NO. 001

The following papers, numbered 1 to 3, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits | No(s). 1
Answering Affidavits — Exhibits | No(s). 2
Replying Affidavits | No(s). 3

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 11-12-13

Eileen Bransten, J.S.C.

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: IAS PART THREE

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JOSEPH RUBENS,

Plaintiff,

-against-

Index No. 654383/2012
Motion Date: 7/18/2013
Motion Seq. No.: 001

UBS AG

Defendant.

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**BRANSTEN, J.**

In this action, Plaintiff Joseph Rubens asserts that Defendant UBS AG ("UBS") made trades without authorization using Ruben's account funds. Defendant UBS now seeks dismissal of Plaintiff's Complaint in its entirety, arguing that the parties' agreements mandate that this litigation be brought in Switzerland, not New York. Plaintiff opposes. For the reasons that follow, the Court grants Defendant's motion to dismiss.

## I. Background[1]

This litigation stems from Plaintiff's dissatisfaction with investments made by Defendant UBS in an account held by the Swiss bank.[2] Rubens opened the account at issue in October 1997. (Compl. ¶ 14.) At the time that Rubens opened this Master Account/Custody Account ("MCA"), he also executed a form granting his mother and stepfather General Power of Attorney ("GPA") over the MCA. *Id.* ¶ 19.

After opening the MCA and signing the GPA in 1997, Plaintiff subsequently executed additional agreements concerning the investment strategy for the account. Rubens signed a Portfolio Management Agreement ("PMA") with UBS in September 2003. *Id.* ¶ 22. Rubens then executed two Asset Management Agreements with UBS, first in June 2005 ("AMA1") and later in December 2005 ("AMA2"). *Id.* ¶¶ 30, 33.

The PMA, AMA1, and AMA2 each addressed the "investment strategy" for Rubens' account. The September 2003 PMA provided for a "fixed income" investment strategy, which the subsequent June 2005 AMA1 changed to "equities," and the final December 2005 AMA2 amended to an "aggressive" strategy. *See* Affidavit of Anna

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[1] All allegations described in this section are drawn from Plaintiff's Complaint, unless otherwise noted.

[2] Rubens opened his account with Swiss Bank Corporation ("SBC"), which later became Defendant UBS AG in October 1997. (Compl. ¶ 3, 14.)

Katharina Müller ("Müller Aff.") Ex. 3 at 2 (PMA), Ex. 4 at 4 (AMA1), & Ex. 5 at 4 (AMA2).

Plaintiff's allegations center on the investment strategy as executed by UBS. Rubens alleges that UBS began implementing "an aggressive and unauthorized trading strategy" beginning in 2005 without Rubens' consent and contrary to Rubens' expectation that the account was merely being invested in "high-grade U.S. corporate bonds." (Compl. ¶¶ 48, 49.) While Rubens concedes that he signed both the AMA1 and AMA2, which speak to investments in equities classified as "aggressive," Rubens nonetheless maintains that he lacked authority to sign these documents and approve these investments, given his earlier execution of the GPA. *Id.* ¶ 44. Moreover, Rubens claims that UBS knew that he lacked the authority to sign these documents but had Rubens sign the agreements regardless. In particular, Rubens alleges that UBS employees merely handed him signature pages to execute without showing him the remainder of the agreements to be signed. *Id.* ¶ 36. Nevertheless, Rubens concedes that he signed the agreements. *Id.*

Rubens now claims that UBS' purportedly unauthorized investments exposed him to significant Passive Foreign Investment Company ("PFIC") taxes under U.S. law, as well as Swiss taxes and substantial UBS investment fees. (Compl. ¶ 48.) Accordingly, in his Complaint, Rubens asserts five claims against UBS: (1) breach of contract; (2) breach of fiduciary duty; (3) fraud; (4) negligence; and, (5) securities fraud.

## II. Discussion

Defendant UBS now seeks dismissal of all counts of Plaintiff's Complaint, arguing that this action must be brought in Switzerland, pursuant to the forum selection clauses included in the parties' agreements.

### A. *Motion to Dismiss Standard*

On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in a light most favorable to the plaintiffs and the plaintiffs must be given the benefit of all reasonable inferences. *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep't 2004). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez,* 84 N.Y.2d 83, 87-88 (1994). This Court must deny a motion to dismiss, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002) (internal quotation marks and citations omitted).

However, on a CPLR 3211(a)(1) motion, "[i]t is well settled that bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence . . . are not presumed to be true on a motion to

dismiss for legal insufficiency." *O'Donnell, Fox & Gartner v. R-2000 Corp.*, 198 A.D.2d 154, 154 (1st Dep't 1993). The court is not required to accept factual allegations that are contradicted by documentary evidence or legal conclusions that are unsupported in the face of undisputed facts. *See Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 495 (1st Dep't 2006) (citing *Robinson v. Robinson*, 303 A.D.2d 234, 235 (1st Dep't 2003). Ultimately, under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon*, 84 N.Y.2d at 88.

B. *Forum Selection Clauses*

Defendants first contend that this action must be dismissed in light of the parties' contractual designation of Zurich, Switzerland as the exclusive forum for this dispute. In support, Defendants point to the forum selection clauses contained in the MCA, PMA, AMA1, and AMA2, which state that Zurich shall be the forum for any disputes between the parties pertaining to the "deposit account/custody account relationship" or any dispute arising out of or in connection with the PMA, AMA1, and AMA2. *See* Müller Aff. Ex. 1 at 2 (MCA), Ex. 3 at 1 (PMA), Ex. 4 at 3 (AMA1), & Ex. 5 at 3 (AMA2). The GPA contains similar language, requiring that the "place of jurisdiction for all disputes arising in connection with this power of attorney shall be in the place of business of the branch

office of [SBC] at which the deposit or custody account is maintained," which is Switzerland. *Id.* Ex. 2 at 1 (GPA).

"It is the policy of the courts of this State to enforce contractual provisions for choice of law and selection of a forum for litigation." *Koob v. IDS Fin. Serv., Inc.*, 213 A.D.2d 26, 33 (1st Dep't 1995). Under New York law, "[f]orum selection clauses are enforced because they provide certainty and predictability in the resolution of disputes." *Boss v. Am. Express Fin. Advisors, Inc.*, 6 N.Y.3d 242, 247 (2006). Thus, forum selection clauses are deemed "*prima facie* valid," and to set aside such a clause, the burden is on Plaintiff to demonstrate that "enforcement would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching, such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court." *British West Indies Guar. Trust Co., Ltd. v. Banque Internationale a Luxembourg*, 172 A.D.2d 234, 234 (1st Dep't 1991).

Plaintiff has made no such showing here. Contrary to Plaintiff's protestations, these are mandatory forum selection clauses that bind the parties to bring any action arising from the PMA, AMA1, AMA2, or GPA, or pertaining to the "deposit account/custody account relationship" under the MCA, in Switzerland. The PMA, AMA1, AMA2, and GPA state that such actions "shall" be brought in Zurich,

Switzerland. *See* Muller Aff. Ex. 3 at 1 (PMA), Ex. 4 at 3 (AMA1), & Ex. 5 at 3 (AMA2). By "utilizing the word 'shall'," these agreements make the selection of Switzerland as forum mandatory. *See, e.g., Spirits of St. Louis Basketball Club, L.P. v. Denver Nuggets, Inc.*, 84 A.D.3d 454, 455 (1st Dep't 2011). Further, the MCA's clear language that "place of jurisdiction for all disputes ... is Zurich" is equally clear, unambiguously providing that any disputes decided in Switzerland. *See, e.g. Boss*, 6 N.Y.3d at 245-46.

Plaintiff attempts to sidestep this clear contractual language by arguing that the forum selection clauses must be set aside since the contracts are "permeated with fraud." *See* Pl.'s Br. at 8. However, Rubens' arguments fall flat. First, Rubens does not allege any fraud with respect to the jurisdiction provision itself. *See British West Indies Guar. Trust. Co.*, 172 A.D.2d at 234. Instead, Rubens claims that he was unaware of the forum selection clauses in the AMA1 and AMA2, since he only received signature pages and did not review the entirety of the agreements. Such argument has no merit, since as a signatory to the contract, Rubens "is presumed to know the contents of the instrument [he] signed and to have assented to such terms." *Id.* ("Nor is there any evidence of overreaching; the allegations that plaintiff Grace Sanchez Brownlow, the signatory to the contract, did not read the provision, or that it was not brought specifically to her attention

are of no avail, since, as a signatory to the contract, she is presumed to know the contents of the instrument she signed and to have assented to such terms.").

Moreover, Ruben's argument that the forum selection clauses in the PMA, AMA1, and AMA2 are invalid since he lacked the authority to sign the agreements misconstrues the clear language of the GPA, as well as fundamental principles of agency. The GPA did not divest Plaintiff of any authority to act; instead, it simply "empowered" Rubens' mother and stepfather to "generally ... do everything he/she/they may deem expedient or necessary." *See* Müller Aff. Ex. 2 at 1. Put another way, the GPA merely allowed Rubens' mother and stepfather to be his "representative(s) to Swiss Bank Corporation," *see id.*, it did not state that Rubens could no longer act on his own behalf. *See Buckley v. Ritchie Knop, Inc.*, 40 A.D.3d 794, 796 (2d Dep't 2007) ("However, the appointment of an attorney-in-fact does not bar the principal from acting for herself, and the existence of a power of attorney does not, in and of itself, invalidate a conveyance made by the principal."); *see also* Reply Affidavit of Professor Dr. Felix Dasser, L.L.M. ¶ 7 (stating that under Swiss law, a "power of attorney empowers the agent to conduct legal acts on behalf of the principal, but it does not prevent the principal from conducting these legal acts himself or from providing other persons with the same power of attorney.").

Further, Rubens fails to demonstrate that a trial in Switzerland would be "so gravely difficult and inconvenient" that it would deprive him of his day in court. *British*

*West Indies Guar. Trust Co.*, 172 A.D.2d 234, 234 (1st Dep't 1991). Plaintiff contends that the unavailability of contingency fee agreements and jury trials in Switzerland make clear that trial there would be so prejudicial as to deny him the opportunity to pursue his claims. However, Plaintiff cites to no case law – nor could the Court locate any – in which a court disregarded a forum selection clause on the basis that the forum chosen by the parties did not allow for contingency fees or jury trials. Moreover, these risks were known, or were knowable, when Rubens executed the parties' agreements, each of which specified that trial would occur in Switzerland. *See* Robert L. Haig, Commercial Litigation in New York State Courts § 12.3 (3rd ed. 2010) ("However, a party cannot complain that the chosen forum does not provide fair proceedings when there has been no material change in the forum since the party agreed to litigate there."). Plaintiff's current decision regarding how to compensate counsel does not vitiate the parties' clear forum selection clauses and does not dictate where this action may be brought. For the same reasons, Plaintiff's protestations regarding the unavailability of jury trials in Switzerland fails.

Finally, enforcement of the forum selection clauses would not contravene public policy. Plaintiff does not identify any specific public policy that would be violated by trial in Switzerland. Instead, he offers generalities about New York's "strong interest in determining issues regarding enforcement of [its] tax requirements and provisions." *See*

Pl.'s Br. at 13. However, Plaintiff does not demonstrate how trial in Switzerland would contravene these interests.

Accordingly, Plaintiff has failed to demonstrate a basis for setting aside the parties' forum selection clauses. Since the parties selected Zurich, Switzerland as the forum for this dispute, Defendant's motion to dismiss Plaintiff's complaint is granted, and the remainder of Defendant's arguments are moot.

## III. Conclusion

For the foregoing reasons, it is

ORDERED that Defendant UBS AG's motion to dismiss is granted without prejudice to Plaintiff's re-filing of this action in Zurich, Switzerland; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of Defendant dismissing this action, together with costs and disbursements to Defendant, as taxed by the Clerk upon presentation of a bill of costs..

Dated: New York, New York
November 12, 2013

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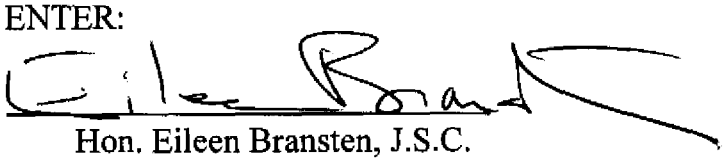

Hon. Eileen Bransten, J.S.C.