

<b>PD Cargo, CA v Lacteos CDS</b>
2015 NY Slip Op 32291(U)
December 4, 2015
Supreme Court, New York County
Docket Number: 653101/2014
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

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PD CARGO, CA,

Plaintiff,

-against-

Index No. 653101/2014

**DECISION/ORDER**

LACTEOS CDS a/k/a CAPILLA DEL SENOR, SA a/k/a  
CDS, PATEN INTERNATIONAL SA and MORGAN  
STANLEY a/k/a MORGAN STANLEY INC. a/k/a  
MORGAN STANLEY, LLC,

Defendants.

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**HON. CYNTHIA KERN, J.S.C.**

**Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for:** \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affidavits in Opposition.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

This action arises from a transaction involving the sale and purchase of cheese between plaintiff P.D. Cargo, CA (“PD Cargo”) and defendants Lacteos CDS a/k/a Capilla Del Senor SA a/k/a CDS (“CDS”). Defendant Paten International SA (“Paten”) previously moved by order to show cause for an Order (1) pursuant to CPLR § 3211(a) (4), (7) and (8) dismissing the complaint as against Paten; (2) pursuant to CPLR § 6223 vacating the order of attachment entered on January 14, 2015; and (3) pursuant to CPLR § 6212(e) awarding Paten its costs, disbursements and attorney’s fees incurred in this action. This court granted the motion in its entirety.

Plaintiff now moves for an order: (1) vacating this court’s order to the extent that it

awarded damages arising from the order of attachment on the ground that the account which was allegedly attached never existed; (2) reinstating the attachment which was vacated; and (3) permitting plaintiff to renew and reargue its opposition to Paten's motion to dismiss and, upon renewal or reargument, vacating this court's order dismissing the action as against Paten. As will be explained more fully below, the motion is denied in its entirety.

The relevant facts and procedural history, which are set forth in the court's prior decision, are as follows. According to the complaint, on or about August 23, 2013, plaintiff negotiated the sale and purchase of cheese manufactured by CDS, a foreign corporation incorporated in Argentina, to a buyer in Venezuela (the "Transaction"). Plaintiff then alleges that, as part of the terms of the Transaction and at the direction of CDS, plaintiff advanced two deposits as security for CDS (the "Security Deposits") into a bank account maintained by Paten, a foreign corporation incorporated in Panama, at Morgan Stanley (the "Bank Account"). Plaintiff alleges that CDS delivered the first shipment of cheese pursuant to the terms of the transaction, but never delivered the second shipment. Plaintiff alleges that CDS was paid directly for the first shipment of cheese by the buyer in Venezuela. Plaintiff alleges that it demanded that Paten and/or CDS return the Security Deposits and that Paten and/or CDS refused. Based on these allegations, on or about October 14, 2014, plaintiff commenced the instant action asserting seven causes of action against defendants: (1) fraud; (2) conversion; (3) unjust enrichment; (4) to receive a sum certain; (5) to impose a trust; (6) violation of General Business Law § 349; and (7) negligence.

Thereafter, on or about November 7, 2014, plaintiff filed an ex parte Order to Show Cause seeking a Temporary Restraining Order and Pre-Judgment Attachment (the "Order to Show Cause") against the assets contained in the Bank Account. On or about November 12,

2014, this Court signed the Order to Show Cause and set a hearing date related to plaintiff's request for a Pre-Judgment Attachment for November 25, 2014. On or about December 9, 2014, this Court granted plaintiff's request for Pre-Judgment Attachment as to Paten's co-defendants on default, but adjourned the Order to Show Cause as against Paten to provide plaintiff time to properly serve Paten with the Order to Show Cause and supporting documents. On or about January 6, 2015, this Court granted plaintiff's request for Pre-Judgment Attachment as against Paten and has restrained its Bank Account to the extent of \$255,250.00. The Order was entered by this Court on January 14, 2015 (the "Order of Attachment"). Thereafter, on or about March 9, 2015, plaintiff filed a motion to extend its time to serve Paten and CDS pursuant to the Hague Convention, which this court granted by Order dated April 9, 2015.

The court will first address plaintiff's motion for renewal of this court's determination dismissing the action as against Paten for lack of in personam jurisdiction. A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and...shall contain reasonable justification for the failure to present such facts on the prior motion." CPLR § 2221(e) (2)-(3). Plaintiff argues that it is entitled to renewal based on subsequent discovery it obtained from former defendant Morgan Stanley, which demonstrates that Paten has engaged in more than 1000 transactions a year through its Morgan Stanley account which involved millions of dollars in deposits and withdrawals, foreign-currency sales and purchases, domestic and international fixed income sales and purchases and domestic and international securities sales and purchases. What this court cannot determine from reviewing plaintiff's papers is whether it is arguing that this additional information establishes that there is jurisdiction over Paten pursuant to CPLR section 301 or 302. However, since this

court finds that this additional information is insufficient to establish jurisdiction over Paten under either of these sections, its motion for renewal is denied.

Initially, the new evidence submitted by plaintiff is insufficient to establish that this court has general jurisdiction over Paten pursuant to CPLR section 301. As stated in this court's prior decision, general jurisdiction exists over a foreign corporation under CPLR section 301 when it is "engaged in such a continuous and systematic course of 'doing business' here as to warrant a finding of its 'presence' in this jurisdiction." *McGowan v. Smith*, 52 N.Y.2d 268, 272 (1981). In its initial motion, plaintiff failed to sufficiently allege that Paten was engaged in a continuous and systematic course of business in New York. The new evidence submitted by plaintiff, that Paten maintained an active bank account in New York with Morgan Stanley, is insufficient to establish that Paten is "doing business" in New York pursuant to CPLR section 301.

The courts have held "that the existence of a bank account in New York is generally not sufficient to confer personal jurisdiction over a foreign defendant" pursuant to CPLR section 301. *J.L.B. Equities, Inc. v. Ocwen Financial Corp.*, 131 F. Supp. 2d 544 (SDNY 2001). *See also National Sun Industries, Inc. v. Dakahlia Commercial Bank, Cairo*, 113 F.3d 1229 (2d Cir.1997) (maintenance of active bank account in New York is insufficient to demonstrate foreign corporation's presence in New York).

Moreover, the new evidence submitted by plaintiff is also insufficient to establish that this court has specific jurisdiction over Paten pursuant to CPLR section 302 (a) (1). As this court previously held, CPLR section 302 (a) (1) allows for the exercise of specific jurisdiction over an out-of-state defendant if the defendant "transaction any business within the state." "By this single act statute . . . proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here

were purposeful and there is a substantial relationship between the transaction and the claim asserted.” *Deutsche Bank Sec., Inc. v. Montana Bd. Of Invs.*, 7 N.Y.3d 65, 71 (2006) (internal quotations omitted). As the Court of Appeals held in *Licci v. Lebanese Canadian Bank, SAL*, 20 N.Y.3d 327 (2012), a complaint that alleges a defendant’s repeated and continuous use of a bank account in New York to commit the acts complained of in the action can be sufficient to show purposeful availment.

In the present case, although plaintiff has now submitted proof that the defendant Paten regularly utilizes a New York bank account, it still has not alleged that Paten repeatedly and continuously used the Morgan Stanley account to commit the specific acts complained of in this action, which was plaintiff’s transfer of the security deposits to Paten’s New York Morgan Stanley bank account. Moreover, according to plaintiff’s own complaint, it was plaintiff who transferred the security deposits to Paten’s account and such transfer was not even at the direction of Paten. Under these circumstances, plaintiff has failed to show how this new evidence would change this court’s prior decision.

Plaintiff also appears to be seeking reargument of this court’s determination that it does not have in rem jurisdiction over Paten. The motion for reargument is denied.

This court will now address plaintiff’s argument that the portion of the court’s prior order awarding damages to Paten arising from the attachment of the Morgan Stanley account should be vacated on the ground that the attachment was of an account that did not exist. Plaintiff argues that because the court’s order of attachment was limited to account #04-HODA5, an account that was purportedly closed prior to the imposition of the attachment, that no attachment actually occurred. The argument by plaintiff is without basis. In opposition to plaintiff’s motion, Paten has submitted an affidavit from Guillermo Eiben, a private wealth advisor at Morgan Stanley,

who specifically alleges that account #04-HODA5 was closed and another account was opened as a result of a change in Morgan Stanley's internal operating systems. According to the affidavit, the change of accounts was unilaterally initiated by Morgan Stanley and without Paten's involvement. Moreover, according to this affidavit, when this court granted plaintiff's motion for prejudgment attachment as against Paten, Morgan Stanley set up a new account to restrict Paten's assets in the amount of \$255,250 and that this attachment remained in place until the date that this court vacated the attachment. Based on this affidavit, there is no basis for vacating this court's prior order awarding Paten damages as the funds of Paten were attached pursuant to the order of this court. Finally, plaintiff has failed to establish any basis for reinstating the attachment at the present time.

Based on the foregoing, plaintiff's motion is denied in its entirety.

Dated: 12/4/15

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----- J.S.C.  
**CYNTHIA S. KERN**  
 J.S.C.