Filho v Borges
2019 NY Slip Op 31192(U)
April 23, 2019
Supreme Court, New York County
Docket Number: 651935/2018
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOEL M. COHEN** **PART** **IAS MOTION 3EFM**

Justice

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INDEX NO. 651935/2018

ALCEU ANTIMO VEZOZZO FILHO, ALCEU ANTIMO VEZOZZO, MARKET STREET CORP., TOWNHOUSE VENTURES CORP., GRAND BAY ASSETS INC.

MOTION DATE 07/23/2018, 10/17/2018

Plaintiffs,

MOTION SEQ. NO. 003, 004

- v -

RAQUEL MOURA BORGES, RITA DE CASSIA RAMONI TANAJURA LEAO, GLOBAL ACCESS INVESTMENT ADVISOR, LLC,GLOBAL ACCESS INVESTMENT ADVISOR BRASIL S/S LIMITADA, GLOBAL ACCESS PARTNERS INVESTIMENTOS LIMITADA,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 33, 34, 35, 36, 37, 38, 39, 50, 54, 64

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 55, 56, 57, 58, 59, 60, 61, 62, 63

were read on this motion to DISMISS.

Upon the foregoing documents:

Plaintiffs Alceu Antimo Vezozzo Filho and Alceu Antimo Vezozzo (the "Vezozzos"), together with three corporate entities which hold their overseas assets (collectively, "Plaintiffs"), bring this action against their former financial advisors for allegedly stealing millions of dollars from the funds they were supposed to manage. Plaintiffs allege eight causes of action, including civil RICO claims, fraud, conversion, and breach of fiduciary duties.

Defendants move to dismiss Plaintiffs' claims under the doctrine of forum non conveniens or, alternatively, for lack of personal jurisdiction, failure to state a cause of action, and under applicable statutes of limitations.

For the reasons set forth below, the Complaint is dismissed on the grounds of forum non conveniens.

Factual Background

The Parties

The Vezozzos are Brazilian hotel magnates who reside in Brazil and operate a chain of luxury hotels in Brazil, Paraguay, and Argentina. (Complaint ("Compl.") ¶¶8-9). In order to hold and invest some of their assets outside of Brazil, the Vezozzos incorporated several offshore entities. Plaintiff Market Street Corp. ("Market Street") is a Bahamian corporation originally incorporated in the British Virgin Islands, while Plaintiffs Townhouse Ventures Corp. ("Townhouse") and Grand Bay Assets Inc. ("Grand Bay" and together with Market Street and Townhouse, the "Vezozzo Entities") are both British Virgin Islands corporations. (*Id.* ¶¶10-12).

Defendants are the investment advisors, and associated advisory firms, accused of defrauding the Vezozzos. For the most part, they are also Brazilian. Defendant Raquel Moura Borges ("Borges"), the alleged mastermind behind the scheme, is a Brazilian citizen and resident. (*Id.* ¶13). So too is Rita de Cassia Ramoni Tanajura Leao ("Ramoni"), who worked for Borges. (*Id.* ¶14). Borges founded the advisory firms named as additional Defendants in this action. (*Id.* ¶13). Defendants Global Access Investment Advisor, LLC, Global Access Investment Advisor Brasil S/S Limitada, and Global Access Partners Investimentos Limitada (collectively, "Global Access Brazil") are all Brazilian investment firms organized under the laws of Brazil. (*Id.* ¶¶ 13-17).

The only U.S.-based party is Defendant Global Access Investment Advisor, LLC ("Global Access NY" and, together with Global Access Brazil, the "Global Access Entities"), a corporation

with its principal place of business in New York. Borges is the sole owner of Global Access NY. (*Id.* ¶15).

The Alleged Scheme

Beginning around 1999, the Vezozzos entrusted a portion of their overseas assets to Borges's management. (*Id.* ¶28). The Vezozzos chose Borges, they say, "upon the recommendation of their trusted mutual acquaintance, Borges's professional experience at a New York bank, and Borges's assurances that she would manage the Vezozzos' overseas assets responsibly." (*Id.* ¶29; *see also id.* ¶38 ("The Vezozzos placed a high degree of trust in Borges based upon their prior relationship, her professional experience at a New York bank, and her assurances that she would protect and grow the Vezozzos' overseas assets.")).

By 2004, Borges was managing all of the Vezozzos' overseas assets—some $10 million in liquid assets and debt notes—through the Global Access Entities, the Vezozzo Entities, and related bank accounts spread around the world.[1] The Global Access Entities held bank accounts in Switzerland and New York. (*Id.* ¶40). Borges also "exercised control, directly or indirectly, over the three Vezozzo Entities . . . and their bank accounts." (*Id.* ¶52). Each Vezozzo Entity held accounts in different locations: Market Street's accounts were located in Chicago, New York, and Switzerland (*id.* ¶55); Grand Bay's in Florida and the Bahamas (*id.* ¶60); and Townhouse's in Switzerland (*id.*¶ 57).

According to Plaintiffs, Borges's investment management services were merely a "facade," concealing a complex, globe-spanning scheme to "defraud the Vezozzos of virtually all of their overseas assets that had been entrusted to Borges." (*Id.* ¶3). Essentially, Defendants are accused

[1] Ramoni was also "deeply involved in the day-to-day management and operation of the business," (*id.* ¶27), eventually becoming a 10% shareholder of Global Access Brazil.

of siphoning funds from the Vezozzo Entities through unauthorized bank transfers, and then covering their tracks by providing the Vezozzos with false financial statements that misstated the value of the overseas accounts. (*Id.* ¶¶4-5).

Vezozzo Filho discovered Borges's alleged scheme in October 2017, while attempting to repatriate his overseas assets in response to a change in Brazilian tax law. (*See id.* ¶¶6, 152). Borges had allegedly told the Vezozzos that the overseas assets were valued at about $14 million, and the Vezozzos had paid around $4 million in taxes based on that purported figure. (*Id.* ¶6). But in reality, Plaintiffs say, "the overseas assets were gone." (*Id.*) Borges allegedly confessed to her scheme, and Plaintiffs now estimate that Borges stole over $14.2 million from the Vezozzos. (*Id.* ¶7).

The Instant Action

On April 20, 2018, Plaintiffs initiated this suit against Defendants by filing a Summons and Complaint. (NYSCEF 1). The Complaint alleged eight causes of action against Defendants: civil RICO and civil RICO conspiracy (asserted only against Borges and Ramoni), fraud, conversion, breach of fiduciary duties, civil conspiracy, constructive trust, and unjust enrichment.

On July 23, 2018, Defendant Global Access NY moved to dismiss the claims against it on grounds of forum non conveniens (CPLR § 327) or, in the alternative, for failure to state a cause of action (CPLR § 3211). (*See* NYSCEF 33). The other Defendants moved to dismiss Plaintiffs' claims on October 17, 2018, asserting forum non conveniens, lack of personal jurisdiction (CPLR § 3211(a)(8)), statute of limitations grounds (CPLR § 3211(a)(5)), and for failure to state a cause of action.

Legal Analysis

"The doctrine of forum non conveniens permits a court to dismiss an action when, although it may have jurisdiction over a claim, the court determines that in the interest of substantial justice the action should be heard in another forum."[2] *Nat'l Bank & Tr. Co. of N. Am. v. Banco De Vizcaya, S.A.*, 72 N.Y.2d 1005, 1007 (1988); CPLR § 327(a) ("When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just."). This doctrine reflects the basic principle that "our courts need not entertain causes of action lacking a substantial nexus with New York." *Martin v. Mieth*, 35 N.Y.2d 414, 418 (1974).

To decide "whether to retain jurisdiction or not," New York courts must consider an array of factors, including the residence of the parties, the situs of the underlying transaction, the existence of an adequate alternative forum, the location of potential witnesses and relevant documents, potential hardship to the defendant, and the burden on New York courts. *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 478–79 (1984); *see Bluewaters Communications Holdings, LLC, v Bernard Ecclestone*, No. 653965/2012, 2014 WL 220779, at *12 (Sup. Ct. N.Y. Cty. Jan. 16, 2014). No one factor is controlling. At bottom, the analysis is about whether the action has a "substantial connection to this State." *Blueye Navigation, Inc. v. Den Norske Bank*, 239 A.D.2d 192, 192 (1st Dep't 1997).

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[2] Because Plaintiffs' claims are disposed by forum non conveniens, the Court need not reach Defendants' personal jurisdiction arguments, and makes no finding on that issue. As the U.S. Supreme Court has held, courts are free to "choose among threshold grounds for denying audience to a case on the merits." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 436 (2007); *see Payne v. Jumeirah Hosp. & Leisure (USA), Inc.*, 83 A.D.3d 518, 518 (1st Dep't 2011) ("The motion court, presuming, without deciding jurisdiction, providently exercised its discretion in dismissing the action on forum non conveniens.").

In balancing these considerations, it is the defendant who bears the "heavy burden of demonstrating that [the] plaintiff's selection of New York was not in the interest of substantial justice." *Wilson v. Dantas*, 128 A.D.3d 176, 177 (1st Dep't 2015). But the plaintiff's choice of forum "is not dispositive," *Wyser-Pratte Mgmt. Co. v. Babcock Borsig AG*, 23 A.D.3d 269, 270 (1st Dep't 2005), particularly when "none of the plaintiffs is a New York resident." *Kainer v UBS AG*, No. 650026/13, 2017 WL 4922057, at *5 (Sup. Ct. N.Y. Cty. Oct. 31, 2017); *see also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255–56 (1981) ("When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable.").

Evaluating the relevant factors here, the Court concludes that this action lacks a substantial connection to New York and should be heard in another forum.

Residence of the Parties

First, the residence of the parties weighs strongly in favor of dismissal. Nine of the 10 parties to this action are located outside the United States, including all four individuals on both sides of the case.[3] *See Wyser-Pratte Mgmt. Co.*, 23 A.D.3d at 270 (affirming forum non conveniens dismissal and noting "fact that five of the nine defendants are German residents is entitled to . . . substantial weight"); *Bluewaters*, No. 653965/2012, 2014 WL 220779, at *13 (dismissing under forum non conveniens where "[n]one of the individual or corporate defendants are United States citizens, and only [two] have a presence in New York").

[3] Plaintiffs' counsel noted at oral argument that Borges maintains a residence in New York; the Complaint, however, describes Borges as a resident of only Brazil. (Compl. ¶13). In any case, Borges's New York pied-à-terre does not alter the forum non conveniens analysis. *See Neuter, Ltd. v. Citibank, N.A.*, 239 A.D.2d 213, 213 (1st Dep't 1997) (dismissing action where, "[a]lthough plaintiff's managing agent has a residence in New York, he maintains his primary residence in Australia").

To be sure, the forum non conveniens analysis calls for more than just a tally of the parties' respective residences. Plaintiffs cite to *Hong Leong Fin. Ltd. (Singapore) v. Morgan Stanley*, 44 Misc. 3d 1231(A) (Sup. Ct. N.Y. Cty. 2014), where the court declined to dismiss an action on forum non conveniens grounds even though only two of the six defendants were New York residents. But in *Hong Leong*, the "alleged fraud was devised in New York" by the two New York corporations. *Id.* at *5. One of those corporations was, in turn, "alleged to be in control of the other defendants." *Id.* Here, the facts point the other way. The fraudulent scheme was allegedly hatched and carried out by Borges—a Brazilian citizen and resident—with the aid of her Brazilian compatriot Ramoni. (*See* Compl. ¶¶ 3, 14). And the single New York Defendant is, if anything, controlled by the non-resident Defendants. (*See id.* ¶15 ("[D]efendant Borges is the sole owner of Global Access NY."); Pls.' Opp. to Defs.' Mot. to Dismiss (NYSCEF 50) ("Borges remains the President and Owner of Global Access NY.")).

Situs of the Transactions

Second, the critical events at issue here are not alleged to have taken place in New York. Plaintiffs argue that the alleged fraud bore a substantial connection to New York because of the role played by Global Access NY. Specifically, Plaintiffs claim that "Global Access NY was the hub through which defendants' four sub-schemes were devised and executed," and "Global Access NY's posturing as a legitimate New York-based investment advisory firm was an essential component of the fraud." (Pls.' Opp. to Defs.' Mot. to Dismiss (NYSCEF 50)). Neither of these theories, however, find footing in the Plaintiffs' Complaint.

The Complaint concentrates on Borges—not Global Access NY—as the "hub" through which the alleged fraud operated. Although Plaintiffs now claim that Global Access NY "ordered unauthorized transactions from New York" and that "Global Access NY's misrepresentations

originated in New York," (*id.*), the portions of the Complaint cited for those statements establish something different. (*See* Compl. ¶¶ 15, 93-130). They allege that *Borges* "directed and/or controlled . . . Borges's first sub-scheme to fraudulently fund the accounts of unknown third parties," (*id.* ¶93), that Borges "directly or indirectly controlled . . . bank accounts in furtherance of her second sub-scheme," (*id.* ¶100), that Borges also did so "in furtherance of her third sub-scheme," (*id.* ¶109), and again "in furtherance of her fourth sub-scheme," (*id.* ¶122). (*See also id.* ¶95 ("By moving assets to third-party accounts owned and/or controlled by the Global Access Entities, Borges unlawfully obtained control over plaintiffs' assets without detection."); *id.* ¶104 ("Borges fraudulently caused transfers . . . totaling at least $2,239,439.53.")).[4]

Even the specific allegations concerning Global Access NY target the conduct of Borges—conduct that is not specifically alleged to have occurred in New York. For example, Plaintiffs emphasize emails and portfolio statements bearing Global Access NY's name and contact information as evidence of a close New York connection. But these communications were directed by Borges, from parts unknown. (*See id.* ¶72 ("Borges sent this email from her Global Access NY email account . . . [which] included Borges's Global Access NY signature block and the firm's New York contact information."); *id.* ¶84 ("Borges provided Vezozzo Filho with at least three Global Access NY portfolio statements purporting to reflect the value of Grand Bay's assets.")). Nowhere in the Complaint do Plaintiffs allege that Borges or Ramoni directed these emails, portfolio statements, and bank transfers *from New York*. Global Access NY's signature block and letterhead alone will not suffice to create a substantial connection to this state. *See Viking Glob.*

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[4] The Complaint sometimes ascribes the fraud to Defendants collectively, (*id.* ¶3 ("Borges, along with Ramoni and through the Global Access Entities, developed a complex scheme to defraud the Vezozzos...")), but frequently characterizes the scheme as "Borges's." (*See, e.g.*, *id.* ¶93). The focus on Borges underscores the importance of her location, relative to the location of one of the corporate entities she owned.

Equities, LP v. Porsche Automobil Holding SE, 101 A.D.3d 640, 641 (1st Dep't 2012) ("[E]mails sent to plaintiffs in New York but generally disseminated to parties elsewhere . . . failed to create a substantial nexus with New York, given that the events of the underlying transaction otherwise occurred entirely in a foreign jurisdiction.").

Similarly, Plaintiffs overstate the factual allegations of the Complaint by claiming that "access to Global Access NY was the *raison d'être* of [P]laintiffs' relationship with Borges." (Pls.' Opp. to Defs.' Mot. to Dismiss (NYSCEF 50)). According to the Complaint, the Vezozzos picked Borges to manage some (and later all) of their overseas assets in part because of Borges's *prior* experience at Delta National Bank in New York. (*See* Compl. ¶¶ 29, 38). There is little support in the Complaint for the idea that Global Access NY, specifically, motivated the Vezozzos to choose Borges.

Location of Documents and Witnesses

Third, many of the key witnesses and documents are likely located outside of New York. All of the individual parties, whose testimony about events could prove decisive here, live in Brazil. (Compl. ¶¶8-9, 13-14); *see Bluewaters*, No. 653965/2012, 2014 WL 220779, at *13 (dismissing case where "most, if not all, of the key fact witnesses are located in Europe"). That is especially important because many of Plaintiffs' substantive claims could hinge on the interpersonal relationships—the words exchanged, the agreements made, the authority implied—between those Brazilian residents. *See Sinochem*, 549 U.S. at 433 ("[A] court may need to identify the claims presented and the evidence relevant to adjudicating those issues to intelligently rule on a forum non conveniens motion."); Def.'s Mot. to Dismiss (NYSCEF 34) ("Defendants expect that Swiss bankers will contradict the position" that Defendants acted without Plaintiffs' authority). To prove their conversion claim, for example, Plaintiffs must establish that Borges and Ramoni

lacked authority to execute the bank transfers at issue, *Stevenson-Misischia v. L'isola D'Oro SRL*, 85 A.D.3d 551, 552 (1st Dep't 2011), while the civil RICO conspiracy claim requires showing "an agreement [between Borges and Ramoni] to commit predicate acts." *House of Spices (India), Inc. v. SMJ Servs., Inc.*, 103 A.D.3d 848, 851 (2d Dep't 2013).

Plaintiffs contend that "numerous New York financial institutions are expected to have discoverable evidence," (Pls.' Opp. to Defs.' Mot. to Dismiss (NYSCEF 50)), but that broad statement fails to move the needle on Plaintiffs' argument against dismissal on the ground of forum non conveniens. Plaintiffs have not argued that the evidence located in New York—such as account records maintained by large New York banks—could not be obtained in Brazil. And New York banks are not uniquely situated in holding such evidence, as the alleged scheme apparently involved banks located in Chicago, Switzerland, and other financial centers. The prospect of unearthing additional New York-based documents and witnesses through discovery is also not enough to retain jurisdiction, since dismissal under forum non conveniens typically precedes the discovery process. *See Jones v. Eon Labs, Inc.*, 43 A.D.3d 711 (1st Dep't 2007) (declining to dismiss case for forum non conveniens where defendant's motion was made "after significant progress in discovery").

Availability of an Alternative Forum

Fourth, it appears from the facts presented that the courts of Brazil could provide a convenient, alternative forum to adjudicate this case.

Plaintiffs' arguments to the contrary are unavailing. To begin with, Plaintiffs misstate the law by claiming that "Global Access NY has not carried its burden of demonstrating that Brazil is an available alternative forum." (Pls.' Opp. to Defs.' Mot. to Dismiss (NYSCEF 50), citing *Silver v. Great Am. Ins. Co.*, 29 N.Y.2d 356, 361 (1972)). Defendants bear no such burden, because

"[c]ontrary to [Plaintiffs'] claim, an alternative forum is not absolutely required under New York law, as opposed to federal law." *Flame S.A. v. Worldlink Int'l (Holding) Ltd.*, 107 A.D.3d 436, 438 (1st Dep't 2013). Although *Silver* did say that a forum non conveniens motion should be granted only when "another [forum] is available," *id.*, the Court of Appeals later disclaimed that statement as dicta. *Pahlavi*, 62 N.Y.2d at 481. The Court explained that such a rule "would place an undue burden on New York courts forcing them to accept foreign-based actions unrelated to this State merely because a more appropriate forum is unwilling or unable to accept jurisdiction." *Id.*; *see also Payne v. Jumeirah Hosp. & Leisure (USA), Inc.*, 83 A.D.3d 518, 518–19 (1st Dep't 2011) ("The action was properly dismissed, even though plaintiff may have no alternative forum.").

Nor have Plaintiffs shown that Brazilian courts are inadequate or unavailable. *See Flame S.A.*, 107 A.D.3d at 438 (dismissing under forum non conveniens where "Plaintiff ha[d] not shown that Samoa, Hong Kong, and Canada are inadequate alternative fora"). Instead, Plaintiffs mainly argue that litigating the dispute here is fairer because New York "permits more liberal discovery than Brazil" and "permits trial by jury." (Pls.' Opp. to Defs.' Mot. to Dismiss (NYSCEF 50)). While Plaintiffs may prefer this state's civil procedure, they have not explained why liberal discovery and trial-by-jury are particularly relevant to adjudicating this case. *Compare with Republic of Lebanon v. Sotheby's*, 167 A.D.2d 142, 145 (1st Dep't 1990) (noting that New York's liberal discovery rules "may be essential given the mystery surrounding" the provenance of ancient Roman artifacts at issue).[5]

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[5] Counterbalancing Plaintiffs' preference is the interest Brazil may have in policing the conduct at issue here. *See Shin-Etsu Chem. Co. v. 3033 ICICI Bank Ltd.*, 9 A.D.3d 171, 178 (1st Dep't 2004) ("New York courts have recognized that where a foreign forum has a substantial interest in adjudicating an action, such interest is a factor weighing in favor of dismissal."). The alleged victims are Brazilian, the alleged perpetrators include Brazilian individuals as well as Brazilian

In cases that have invoked the jury-trial right as a reason for retaining an action, the other forum non conveniens factors evinced a more substantial connection to New York. *See Wilson*, 128 A.D.3d at 187-88 (citing "potential hardship" of litigating in Brazil or Cayman Islands where relevant contracts "were negotiated and signed in New York" and "many of the witnesses and documents related to the litigation are here"). By contrast, the key parties and relevant transactions here are in Brazil or elsewhere abroad.

Burden on Defendants and New York Courts

Finally, litigating this dispute in New York would burden Defendants and the New York court system. In addition to the factors discussed above, New York is an inconvenient forum because the testimony of the individual parties (*i.e.*, Borges, Ramoni, and the Vezozzos) as well as the communications between them will all require translation of documents and testimony from Portuguese into English. *See Troni v. Banca Popolare Di Milano*, 129 A.D.2d 502, 503–04 (1st Dep't 1987) (affirming dismissal where court considered, among other things, "the need to translate documents from a foreign language"). Interpreting key documents and testimony would likely add substantial time and expense to the litigation, and "the taxpayers of this State should not be compelled to assume the heavy financial burden . . . when their interest in the suit and the connection of its subject matter to the State of New York is so ephemeral." *Pahlavi*, 62 N.Y.2d at 483.

The scheme alleged by the Complaint may have reached a number of far-flung jurisdictions—including New York—but the allegations boil down to a Brazilian financial advisor

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corporate entities, and Brazil's tax system features prominently in the facts of the case. (*See* Compl. ¶6 ("In reliance on Borges's misrepresentations, Vezozzo Filho paid more than $4.2 million in taxes, penalties and interest to the government of Brazil as a participant in a tax amnesty program.")).

misleading her Brazilian clients and stealing from their Caribbean corporations. The tenuous connection to New York is outweighed by the location of the parties, events, and likely evidence, the burden on Defendants and the courts, and the fact that a more convenient forum appears to be available. As such, Defendants' motion to dismiss on the ground of forum non conveniens is granted.

Accordingly, it is:

ORDERED that Defendants' motions to dismiss the Complaint (Mot. Seq. Nos. 003 and 004) are GRANTED for the reasons set forth above.

This constitutes the Decision and Order of the Court.

4/23/2019
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION		
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE