BSR Fund, S.A. v Jagannath
2020 NY Slip Op 30810(U)
March 17, 2020
Supreme Court, New York County
Docket Number: 650832/2019
Judge: Joel M. Cohen

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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BSR FUND, S.A., UNITED CAPITAL TRUST, INC., VOLTERRA INVESTMENT, INC., B. ANGEL INVESTMENT CORP., GALACTICA FX TRADING CORP., VICTOR RESTIS, BELLA RESTI,

Plaintiffs,

- v -

DIWAKAR JAGANNATH, IKON GLOBAL HOLDING COMPANY, LLC, IKON GLOBAL MARKETS, INC., FTECHNICS, INC., IKON EUROPE, LTD., IKON FINANCE, LTD., IKON ATLANTIC, LTD., IOANNIS LITINAS, GEORGE DASKALEAS, MARIA KITROMILIDOU, PATRICK CUNNINGHAM

Defendants.

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INDEX NO. 650832/2019

MOTION DATE 10/21/2019, 10/22/2019, 10/22/2019

MOTION SEQ. NO. 004 006 007

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 52, 53, 54, 55, 56, 71, 76, 77, 83, 84, 85

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 65, 66, 67, 68, 69, 73, 78, 79, 86

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 60, 61, 62, 63, 64, 74, 80, 81, 89, 90, 98

were read on this motion to DISMISS.

This case is about a foreign-exchange trading fund in which no meaningful trading actually took place. The fund allegedly was created by two of the Defendants here (George Daskaleas and Ioannis Litinas), who live in Greece, and then perpetuated through a network of other individuals, entities, and accounts all over the world, including other Defendants here. Plaintiffs are two Greek residents and a number of entities incorporated in the Marshall Islands and Liberia, who invested around $88 million in the fund, enticed by the prospect of substantial

returns on their investment. In reality, Plaintiffs allege, Defendants used the illusory fund to steal the vast majority of Plaintiffs' investment for their own gain.

For the reasons set forth below, the Court finds that the action should be dismissed on the ground of forum non conveniens.[1]

BACKGROUND

The Parties

Plaintiffs are two individuals who live in Greece – Victor Restis and his mother, Bella Resti – along with multiple companies incorporated in the Marshall Islands and Liberia. Am. Compl. ¶¶10-16. Several of those companies are wholly beneficially owned by Restis. *Id.*

Defendants are also located around the world. George Daskaleas and Ioannis Litinas, who allegedly founded the Fund, live in Greece. *Id.* ¶¶24-25. Maria Kitromilidou, a Fund administrator, lives in Cyprus. *Id.* ¶¶2, 26.[2] They in turn enlisted the help of Diwakar Jagannath and Patrick Cunningham, who live in New Jersey and New York, respectively, and the Ikon entities[3], which consist of companies incorporated in the U.K., Bermuda, Delaware, and New York. *Id.* ¶¶3, 17-27. Ikon maintained offices in New York, London, Dubai, Hong Kong,

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[1] Motions to dismiss, asserting various grounds in support, were filed by the following Defendants: Ioannis Litinas (Mot. Seq. 004); Ikon Global Holding Company, LLC, Ikon Global Markets, Inc., FTechnics, Inc., Ikon Europe, Ltd., Ikon Finance, Ltd., and Ikon Atlantic, Ltd. (Mot. Seq. No. 006); and Diwakar Jagannath (Mot. Seq. No. 007) (collectively, the "Moving Defendants"). These three motions have been consolidated for purposes of this opinion. As discussed below, only Defendant Litinas's expressly asserts forum non conveniens as a ground for dismissal.

[2] The action was subsequently discontinued as against Ms. Kitromilidou on December 9, 2019. *See* NYSCEF Doc. No. 82.

[3] The Ikon entities – or "Ikon", for the purposes of this opinion – are Defendants Ikon Global Holding Company, LLC, Ikon Global Markets, Inc., Ftechnics, Inc., Ikon Europe, Ltd., Ikon Finance, Ltd., and Ikon Atlantic, Ltd. *Id.* ¶3.

Beijing, Sydney, Auckland, and possibly other locations. *Id.* ¶41. Jagannath allegedly worked out of Ikon's New York City office. *Id.* ¶42.

The Alleged Scheme

Restis was first introduced to Daskaleas sometime in 2012. *Id.* ¶56. Plaintiffs allege that Daskaleas, a supposed expert in FX trading, represented that he could consistently produce significant returns on Restis's investment – around 2% per month or more. *Id.* Restis and Resti soon began investing in a fund managed by Daskaleas. *Id.* ¶57. After those initial investments came to an end, Restis had extensive discussions with Daskaleas and Litinas about re-investing his money with them. *Id.* ¶¶58-59.

In January 2014, Daskaleas and Litinas allegedly enticed Restis and the other plaintiffs to invest in the Fund, which Daskaleas and Litinas would operate with the assistance of Jagannath and Ikon. *Id.* ¶60. Daskaleas and Litinas held themselves out as the people who came up with the concept for the Fund and as the individuals who would oversee the operations of the Fund, along with Jagannath. *Id.* ¶61. Plaintiffs believed Jagannath and Ikon would be the custodian of Plaintiffs' funds. *Id.* ¶39.

Plaintiffs then entered into subscription agreements with an entity called PK Investments Equity, Limited, based in the British Virgin Islands. *Id.* ¶62. Another BVI entity, known as PK Zeus Management, Ltd., was designated as the manager of PK Investments Equity, Limited. *Id.* ¶63. As manager, PK Investments Equity, Limited was to be paid management and incentive fees, constituting either a percentage of the net assets under management and potentially a percentage of net appreciation. *Id.* The PK Investments entity was allegedly controlled by Daskaleas and Litinas. *Id.* ¶65.

Once Plaintiffs began investing money in the Fund, Daskaleas allegedly began withdrawing it. It is unknown where exactly the money was transferred, but Plaintiffs allege that Daskaleas sent withdrawal requests seeking to wire the money to accounts with UBS AG in Zurich, First International Bank AG, Eurobank SA, and Julius Baer, among others. *Id.* ¶86. The majority of investment funds stolen from the plaintiffs passed through accounts held by Ikon at Harris Bank in Chicago as well as HSBC Bank, PLC in London. *Id.* ¶116. Records obtained by Plaintiffs also show that Defendants dispersed Plaintiffs' money to other accounts at other banks in various other countries, including Belize, Montenegro, St. Lucia, Switzerland, Germany, and others. *Id.* ¶115.

Jagannath and Ikon allegedly furthered the scheme in several ways. First, they transferred money from the Fund. *Id.* ¶46. Second, they helped create "demo" trading accounts – that is, fake accounts which did not reflect any actual balances in the Fund. *Id.* ¶¶82. These demo accounts were allegedly used to fool Plaintiffs about their investments in the Fund. Third, and relatedly, Jagannath allegedly authored letters purporting to verify the balances in the demo accounts. *See id.* ¶¶77-82. Jagannath sent one of these fraudulent letters from New York City, in December 2014. *Id.* ¶80. In 2015, Daskaleas directed Jagannath to write additional fraudulent letters, to quell Plaintiffs' increasing suspicions about the Fund. *Id.* ¶¶93-96.

The Instant Action

Plaintiffs initiated this action by filing a Summons with Notice on February 8, 2019. NYSCEF Doc. No. 1. On August 9, 2019, Plaintiffs filed a First Amended Complaint, asserting nine causes of action against various groupings of Defendants, including fraud, breach of fiduciary duty, and conversion. NYSCEF Doc. No. 32.

DISCUSSION

"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." *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).

For purposes of the forum non conveniens analysis here, the Court "presum[es], without deciding, jurisdiction" over Defendants. *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."). "[W]here personal jurisdiction is difficult to determine, and forum non conveniens considerations clearly militate in favor of dismissal, a court may dismiss on the latter ground." *Estate of Kainer v. UBS AG*, 175 A.D.3d 403, 404 (1st Dep't 2019) (dismissing case for forum non conveniens), citing *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 436 (2007) (holding that trial court may "choose among threshold grounds for denying audience to a case on the merits" and "[i]n particular, a court need not resolve whether it has . . . personal jurisdiction over the defendant if it determines that, in any event, a foreign tribunal is plainly the more suitable arbiter of the merits of the case").

To determine whether an action should be dismissed for forum non conveniens, the Court must consider several 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 evidence, 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), *cert denied* 469 U.S. 1108 (1985); *see Phat Tan Nguyen v. Banque Indosuez*, 19 A.D.3d 292, 294 (1st Dep't 2005). 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).

In weighing these considerations, "[the] plaintiff's choice of forum is entitled to strong deference," *JTS Trading Limited v. Asesores*, 178 A.D.3d 507 (1st Dep't 2019), but it "is not dispositive," *Wyser-Pratte Mgmt. Co. v. Babcock Borsig AG*, 23 A.D.3d 269, 270 (1st Dep't 2005). However, where "none of the plaintiffs is a New York resident," which is the case here, dismissal on forum non conveniens grounds may be appropriate. *Kainer v UBS AG*, No. 650026/13, 2017 WL 4922057, at *5 (Sup. Ct. N.Y. Cty. Oct. 31, 2017), *aff'd*, 175 A.D.3d 403 (1st Dep't 2019); *JTS Trading Limited*, 178 A.D.3d at 507 (affirming dismissal where "the parties are from Hong Kong and Mexico"); *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."); *compare with Broida v. Bancroft*, 103 A.D.2d 88, 92 (2d Dep't 1984) ("Plaintiffs, as New York residents, are presumptively entitled to utilize their judicial system for dispute resolution.").

The forum non conveniens factors weigh in favor of dismissal here. *First*, many of the parties to this action, including the alleged masterminds behind the Fund as well as its alleged victims, are located outside New York. *See* Am. Compl. ¶¶60-61. The predominance of foreign residents "is entitled to . . . substantial weight" in the forum non conveniens analysis. *Wyser-Pratte Mgmt. Co.*, 23 A.D.3d at 270 (dismissing action where five of nine defendants were German residents). Daskaleas and Litinas live in Greece, *id.* ¶¶24-25, while Plaintiffs are Greek residents and Marshall Islands and Liberian corporations, *id.*, ¶¶10-16, 24. *See Stoomhamer Amsterdam NV v. CLAL (Israel) Ltd.*, 204 A.D.2d 186, 186 (1st Dep't 1994) (dismissing case where plaintiffs were Israeli citizens and alleged tort took place in the Netherlands).

One individual Defendant – Mr. Cunningham – allegedly resided in New York, but Plaintiffs make only vague allegations about his role in the scheme: he is alleged to have, for example, "further[ed] . . . the conspiratorial scheme," *see* Am. Compl. ¶¶3, 32, "corresponded from New York in furtherance of the conspiracy," *id.* ¶35, "facilitated the use of the demo accounts," *id.* ¶66, and "assisted . . . the other [D]efendants in the theft of the [P]laintiffs' funds," *id.* ¶67. Cunningham's presence in New York alone does not suggest that New York is an appropriate forum for this action. *Fernie v. Wincrest Capital, Ltd.*, 177 A.D.3d 531, 532 (1st Dep't 2019) ("[A]lthough . . . one defendant is a New York resident, the court properly determined that New York is an inconvenient forum for this action.").

Second, the underlying transaction here exhibits a "strong foreign nexus . . . largely attributable to [Plaintiffs'] sophisticated business dealings abroad." *Wyser-Pratte Mgmt. Co.*, 23 A.D.3d at 270; *Pahlavi*, 62 N.Y.2d at 479. At bottom, this was a scheme allegedly hatched by a pair of Greek residents to swindle other Greek residents. And the Fund at the center of that scheme worked its alleged fraud primarily through entities and accounts outside New York. The

subscription agreements which purported to "lock up" Plaintiffs' investments in the Fund were entered into with British Virgin Islands corporations, at the urging of the Greek Defendants. Am. Compl. ¶¶63-64. The Fund was allegedly administered by a company in Cyprus. *Id.* ¶64. Defendants sought to wire money in the Fund to accounts in Europe, *id.* ¶86, and "helped disperse the [P]laintiffs' funds to other accounts at other banks in various other countries, including Belize, Montenegro, St. Lucia, Switzerland, Germany, and others," *id.* ¶115. In addition, "[t]he majority of investment funds stolen from the [P]laintiffs passed through accounts held by Ikon at Harris Bank in Chicago as well as HSBC Bank, PLC in London." *Id.* ¶116.

Third, and as a consequence, material witnesses, relevant documents, and other evidence for Plaintiffs' claims, as well as the defenses thereto, are likely to be located outside of the United States. The basis for Plaintiffs' common-law fraud and fraudulent inducement claim, for example, are representations made by Daskaleas and Litinas to Restis. Am. Compl. ¶134. All the parties to those critical communications live in Greece. Similarly, Plaintiffs' conversion claim likely depends on the foreign account transfers described above, along with communications to Restis and Resti in Greece. *Id.* ¶¶147-149. *See Bewers v. Am. Home Prods. Corp.*, 99 A.D.2d 949, 950 (1st Dep't 1984) (dismissing on forum non conveniens grounds because "[t]he vast majority of witnesses and documentation . . . are in England . . . ."), *aff'd*, 64 N.Y.2d 630 (1984); *Shin- Etsu Chem. Co. v. 3033 ICICI Bank Ltd.*, 9 A.D.3d 171, 178 (1st Dep't 2004) ("Any witness with personal knowledge of the letter of credit [at issue] is located overseas").

Fourth, adequate alternative fora for this dispute not only exist, but are currently in use. *Pahlavi*, 62 N.Y.2d at 481. Related civil suits are pending against Ikon and Daskaleas in England, while in Greece another civil action is pending against Daskaleas's daughter (who

allegedly received funds from her father) and Restis. Also in Greece, criminal charges have been filed against Restis, Daskaleas, and Ikon. Reply Decl. of Ioannis Litinas, ¶6. *See Mashreqbank PSC v. Ahmed Hamad Al Gosaibi & Bros. Co.*, 23 N.Y.3d 129, 139 (2014) ("Alternatives to a New York forum are available; indeed, the parties' briefs refer to a number of related investigations or litigations pending in several foreign countries."); *Sidaoui v. Aboumrad*, 104 A.D.3d 573, 574 (1st Dep't 2013) (affirming dismissal where "there are presently multiple actions pending between the parties in Mexico that may affect the determination of the instant action"); *see also Overseas Media, Inc. v. Skvortsov*, 441 F. Supp. 2d 610, 618 (S.D.N.Y. 2006) (finding "any assertion that a Russian court is an inadequate forum is undercut by the fact that at least one plaintiff in this action is a Russian entity that is a party to a related infringement action . . . presently pending in Russia"), *aff'd*, 277 F. App'x 92 (2d Cir. 2008).

In short, "there [must] be some factual connection between New York and the dispute." *Shin-Etsu Chem. Co.*, 9 A.D.3d at 176. That connection, in Plaintiffs' view, rests in large part on the activities of Jagannath and Ikon. Plaintiffs allege that "Defendants Ikon Global Holding Company, LLC, Ikon Global Markets, Ftechnics, Inc., Patrick Cunningham, and Diwakar Jagannath all transact or transacted business in New York relevant to the allegations in this Complaint." Am. Compl. ¶30. But "[P]laintiffs' vague references to business conducted in New York" is not enough. *Dogmoch Int'l Corp. v. Dresdner Bank AG*, 304 A.D.2d 396, 397 (1st Dep't 2003) (dismissing case). Unlike in *Banco Nacional Ultramarino, S.A. v. Chan*, 641 N.Y.S.2d 1006 (Sup. Ct. N.Y. Cty. 1996), on which Plaintiffs rely, New York was not "the hub of [Defendants'] activities" and New York banks were not "the means of disburs[ing]" the ill-gotten gains.

That some communications were allegedly sent by Jagannath from New York to other parts of the world, *see* Am. Compl. ¶80, "fail[s] to create a substantial nexus with New York." *Viking Glob. 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."). At most, assuming Plaintiffs' allegations are true, Jagannath was aiding a foreign scheme to deceive Greek residents. Even where some portion of the dispute – or the evidence – can be found in New York, dismissal on forum non conveniens grounds is still appropriate if the underlying transaction occurred primarily abroad. *See Fernie*, 177 A.D.3d at 532 ("[A]lthough there are some witnesses and evidence in New York . . . the court properly determined that New York is an inconvenient forum for this action."); *Rodionov v. Redfern*, 173 A.D.3d 410 (1st Dep't 2019) ("finding New York to be an inconvenient forum for the dispute . . . [a]lthough defendants employed a New York limited liability company and a New York investment account in carrying out the alleged fraudulent scheme"); *JTS Trading Limited*, 178 A.D.3d at 507 (holding "despite some initial contacts with one defendant's New York representative, the action was properly dismissed" for forum non conveniens).

Finally, although Litinas is the only Moving Defendant to expressly raise the forum non conveniens argument, the Court exercises its discretion to dismiss the action, as a whole, on that basis. *See Mashreqbank PSC v. Ahmed Hamad Al Gosaibi & Bros. Co.*, 23 N.Y.3d 129, 134 (2014) (affirming trial court's decision to dismiss entire action for forum non conveniens where only the third-party defendant, and not the main defendant, moved for such relief); *see also Pahlavi*, 62 N.Y.2d at 478 ("The application of the doctrine of forum non conveniens is a matter

of discretion to be exercised by the trial court and the Appellate Division."). CPLR § 327(a) permits the Court, "on the motion of *any* party," to find "*the action* should be heard in another forum" and "stay or dismiss the action in whole or in part on any conditions that may be just" (emphasis added). In Litinas's Notice of Motion and memorandum of law in support of that motion, it was evident that Litinas sought to dismiss the *action* for forum non conveniens. *See* Notice of Motion at 1 (seeking "an order dismissing the August 9, 2019 First Amended Complaint . . . for forum non conveniens under CPLR § 327(a)") (NYSCEF Doc. No. 52); Litinas Mot. to Dismiss at 14 ("[D]ismissal of this action would nonetheless be warranted under the doctrine of forum non conveniens").[4]

The same factors that compel dismissal of Litinas's claims compel dismissal of the entire action. Litinas is alleged to be one of the two "central organizers of the conspiracy," and one of the "people who came up with the concept for the Fund." Am. Compl. ¶61. Plaintiffs' allegations against Litinas are inextricably intertwined with their allegations against the other Defendants, all of whom allegedly furthered the scheme Litinas and Daskaleas came up with and most of whom are based outside of New York, so splitting up the action would only hinder the efficient resolution of Plaintiffs' claims. Moreover, if the case were to continue in this Court as to the remaining defendants, Litinas likely would be required to participate either as a central witness or simply to protect his interest against a factual determination that he was involved in an unlawful scheme, thus rendering the grant of his motion to be largely ineffectual.

* * * *

[4] At oral argument, Plaintiffs' counsel clarified that they were not seeking to litigate "half the case here and half the case somewhere else" on the basis of forum non conveniens. *See* Oral Arg. Tr. at 42. The other Moving Defendants, who also appeared at oral argument, raised no objection to dismissal of the action in its entirety. *Id.* at 55.

Accordingly, it is

ORDERED that the Moving Defendants' motions to dismiss (Mot. Seq. Nos. 4, 6, and 7) are GRANTED, on the ground asserted by Defendant Litinas, and Plaintiffs' Amended Complaint is dismissed.

This constitutes the Decision and Order of the Court.

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3/17/2020
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