

**Access Advantage Master, Ltd. v Alpha Prime Fund Ltd.**

2020 NY Slip Op 30932(U)

April 9, 2020

Supreme Court, New York County

Docket Number: 654350/2019

Judge: O. Peter Sherwood

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

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**ACCESS ADVANTAGE MASTER, LTD.,**

**Plaintiff,**

**-against-**

**ALPHA PRIME FUND LTD.,**

**Defendant.**

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**O. PETER SHERWOOD, J.:**

**I. FACTS**

As this is a motion to dismiss, these facts are taken from the Verified Complaint (Complaint, NYSCEF Doc. No. 001) and assumed to be true.

Plaintiff, Access Advantage Master, Ltd. F/k/a Access Advantage Master Fund, Ltd. (Access Advantage) is a mutual fund registered in the British Virgin Islands. Defendant, Alpha Prime Fund, Ltd (Alpha Prime), is a Bermuda investment fund. Between 2004 and 2008, plaintiff invested approximately \$30.3 million in Alpha Prime pursuant to Alpha Prime’s Confidential Private Placement Memorandum dated January 2005 (the PPM). Alpha Prime invested the funds in Bernard L. Madoff Investment Securities LLC (BLMIS). Plaintiff had been formed for the purpose of investing in BLMIS via Alpha Prime. Unbeknownst to plaintiff, BLMIS and its principal, Bernard L. Madoff, operated a Ponzi scheme, causing billions in losses to investors.

Shortly after the Ponzi scheme was discovered, Access Advantage submitted a redemption request to Alpha Prime. Around the same time, Alpha Prime notified investors that redemptions were suspended in light of the Ponzi scheme. Alpha Prime’s investments in BLMIS were not liquid and Alpha Prime did not have the ability to honor redemption requests at that time.

Alpha Prime has participated in the Bankruptcy Court action and reached a partial settlement with the Madoff Trustee in February 2018, pursuant to which the Madoff Trustee paid Alpha Prime over \$76 million. As the Madoff Trustee made further distributions to BLMIS investors, Alpha Prime has received additional funds. Alpha Prime has the ability to honor plaintiff’s 2008 redemption request but has failed to do so, which constitutes a breach of the PPM.

Plaintiff Access Advantage asserts the following causes of action:

- 1- Breach of Contract- for failure to honor Access Advantage's redemption request.
- 2- Unjust Enrichment- for retaining the benefits of the funds invested by plaintiff.
- 3- Money Had and Received- for return of plaintiff's investment.
- 4- Attorneys' Fees and Costs- claimed as punitive damages.

## II. ARGUMENTS

Defendant Alpha Prime moves to dismiss the complaint pursuant to CPLR sections 327 (inconvenient forum) and 3211 (a)(1), (3), (7), and (8) (documentary evidence, lack of legal standing, failure to state a cause of action, and lack of jurisdiction).

First, Alpha Prime contends plaintiff lacks standing to assert these claims because plaintiff is not a shareholder in Alpha Prime. Access Advantage does not allege it is a shareholder, only that it "invested" in defendant and that non-party Fortis BVI, which was succeeded by ABN AMRO Fund Services (BVI) Ltd., served as custodian for plaintiff's account. The PPM, which constitutes documentary evidence, provides the rights and remedies of shareholders. Alpha Prime did not offer "accounts", but redeemable shares. The PPM does not discuss "accounts". As plaintiff does not claim to be a shareholder, it has no standing to seek a redemption or to sue over the refusal of a redemption request (Memo, NYSCEF Doc. No. 15, at 11). Further, the redemption request which forms the basis for the complaint was alleged to have been made in 2018 by telephone and email on Alpha Prime's counsel in the bankruptcy case (*id.*). As plaintiff has not asserted compliance with the bylaws, plaintiff lacks standing to sue here.

Defendant also contends this court lacks personal jurisdiction over it. The Complaint asserts jurisdiction pursuant to CPLR 301 and 302. 301, general personal jurisdiction, does not apply to the defendant, which is formed under the law of Bermuda, where it has its principal place of business. Defendant is not "at home" in New York. Nor does 302, specific jurisdiction, apply here. Defendant does not transact business in New York (CPLR 302[a][1]), and has had no contact with New York other than making and funding the BLMIS investment account. Opening the account did not give rise to the dispute at issue. The dispute concerns a decision by the directors regarding an alleged redemption request. Nor is being a defendant in a lawsuit in New York sufficient to create jurisdiction. That does not amount to the transaction of business or purposeful availment of the state. CPLR 302(a)(2) and (3) also fail to create jurisdiction here, as those provisions are limited to tort actions, and the substantive claims here (breach of contract, unjust

enrichment, and money had and received) sound in contract or quasi-contract. Also the alleged injury did not occur in New York.

Alternatively, defendant contends this case should be dismissed pursuant to CPLR 327(a), as an inconvenient forum, because this action would better adjudicated be elsewhere. The action has no connection to New York, the parties are foreign entities, neither is resident in New York or operates here, the relevant documents and witnesses are located abroad, and the PPM and Bylaws are governed by Bermuda law. The question of standing also raises questions of foreign law. This is essentially a foreign dispute and should be adjudicated elsewhere.

Defendant also argues that claim four, for attorneys' fees and punitive damages, should be dismissed for failure to state a claim. It is not an independent cause of action, but a request for damages based on the same facts as the other claims, and one which should be denied because New York courts only grant attorneys' fees if they are permitted by statute or agreement, which is not the situation here.

Plaintiff contends it has standing because Fortis BVI (Fortis) was custodian of plaintiff's account with defendant (*see* Opp, NYSCEF Doc. No. 20, at 6, citing Shareholder Register, attached as Exhibit D to Fischer aff, NYSCEF Doc. No. 12). "[C]ourts have permitted beneficial owners of stock held in the name of a nominee or fiduciary to bring law suits to protect their interests in the corporation" (Opp at 7, quoting *Petition of Bowman*, 98 Misc 2d 1028, 1030-31 [Sup Ct 1978]). Fortis, as custodian, sent defendant a redemption request on December 16, 2008, which stated the subscription documents named plaintiff as the registered and beneficial owner of the shares of defendant (Opp at 7, citing Subscription Agreements, attached as Exhibit C to Pourakis aff, NYSCEF Doc. No. 24). Accordingly, plaintiff is a shareholder of record and must be considered the registered and beneficial owner of the shares.

Plaintiff further argues the 2008 redemption request was timely, and was pending when defendant provided notice of the suspension of redemptions (Opp at 8). After submitting its request, plaintiff became a creditor, rather than a shareholder (*id.*). As far as defendant relies on the July 2011 letter from ABN AMRO's counsel (attached as Exhibit E to Fischer Aff, NYSCEF Doc. No. 13) as disputing plaintiff's status as a shareholder in 2008, that document is not an operative legal document and holds no weight (Opp at 9). Plaintiff has alleged it was a shareholder in defendant (*id.* quoting Complaint, paragraph 34). Nor is the 2018 letter a new redemption request. The Complaint relies on the original 2008 redemption request.

Plaintiff contends this court has jurisdiction over the defendant pursuant to CPLR 302(a)(1), since defendant transacted business in New York with BLMIS leading up to the redemption request in 2008. Defendant sent and received hundreds of millions of dollars in transactions with BLMIS and executed a variety of agreements related to those accounts. Plaintiff argues defendant's business with BLMIS in New York State directly or indirectly caused all of the actions at issue in this Complaint. The federal requirements of due process are also satisfied because defendant is already engaged in litigation in this state and New York has great interest in the Ponzi scheme which led to this dispute.

Substantively, plaintiff argues the Complaint states a claim for breach of the January 2005 PPM attached to the Complaint. Plaintiff alleges it performed by investing millions and defendant breached by extending the permissible temporary suspension of redemptions past the point when defendant obtained sufficient liquidity to honor the requests after settling disputes with the bankruptcy trustee (Opp at 15). Further, the unjust enrichment and money had and received claims are proper because they allege wrongdoing by the defendant independent of the PPM, after plaintiff became a creditor, rather than a shareholder.

As far as defendant seeks to dismiss plaintiff's claim for attorneys' fees, plaintiff argues the punitive damages are appropriate for a breach of contract or quasi-contract claim where the conduct is aimed at the public, is gross, and involves high moral culpability. Whether those conditions exist is an issue of fact and cannot be determined at this time.

Finally, plaintiff contends New York is a proper forum for this litigation because the burden on New York courts is negligible. Defendant is perfectly able to litigate in New York and the underlying Ponzi scheme occurred here.

In reply, defendant notes plaintiff has not claimed to follow the redemption procedure set out in the ByLaws, which provide rights only to the registered holders of the shares and not the holder of any other interest (Reply, NYSCEF Doc. No. 26, at 1, citing Bylaws, attached as Exhibit B to Fischer aff, NYSCEF Doc. No. 10, section 7.1). Further, ABN AMBRO is not a mere custodian, but, from predecessor Fortis, has a security interest in the shares (Reply at 3, citing Opp at 2). In fact, if ABN AMBRO was a mere custodian, plaintiff ought to be able to produce a letter or affidavit to that effect from that entity. Plaintiff clarified it relies on the December 16, 2008, Fortis redemption request, but claims the Fortis request should not be considered a nullity because, while it was made after the defendant's board suspended redemptions on December 15, 2008, the

board's notice of suspension was not effective for 48 hours, until after the December 16, 2008, redemption request was faxed. This argument is not supported by the Bylaws, which allow a suspension "at such time as the Board shall declare" (Bylaws, section 18.3.2). Accordingly, the redemption notice arrived post-suspension, and is a nullity (Reply at 4). Had the redemption notice arrived first, section 13.1.8 would apply, which states that any notices received but not processed at the time of suspension will be processed after the suspension.

As to personal jurisdiction, defendant notes plaintiff has not argued this court has general personal jurisdiction and argues plaintiff fails to meet its burden to show specific jurisdiction (Reply at 5). There is only one New York business transaction relevant to this dispute, the maintenance of the BLMIS brokerage account, and the causes of action here do not arise from that transaction. Nor was the plaintiff injured in New York. The claims only arose, according to plaintiff, when defendant received the settlement payment and declined to redeem the shares (*id.* at 8). The only New York contact at that time was defendant's participation in that lawsuit. Defending or settling a lawsuit does not constitute doing business in New York and the current dispute does not arise from that event (*id.* at 8-9).

Regarding the inconvenient forum argument, defendant contends New York's interest in the Madoff Ponzi scheme does not give New York an interest in this dispute. This is a dispute about a BVI entity suing a Bermuda entity for the actions of the latter's Austria-based board in failing to distribute funds from a Cayman Islands bank account to plaintiff's account. The sole contact with New York is long over and defendant did not maintain New York bank accounts. As far as plaintiff claims this court would not have to apply foreign law, New York courts follow the law of the place where the entity is incorporated to determine issues regarding the internal operations of a corporation, and New York law should not be applied to these foreign entities. It is even unclear what country's law should apply to determine the issues of standing (Reply at 12).

As to the plaintiff's arguments regarding the quasi-contract claims, defendant argues plaintiff has not alleged any legal duties other than contractual ones, so these claims should be dismissed.

### III. DISCUSSION

Plaintiff contends this court has jurisdiction over the defendant pursuant to CPLR 302(a)(1), which provides "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.” “CPLR 302(a)(1) grants New York courts jurisdiction over non-domiciliaries when the action arises out of the non-domiciliaries' transact[ion of] any business within the state. In order to determine whether personal jurisdiction exists under CPLR 302(a)(1), a court must determine (1) whether the defendant transacted business in New York and, if so, (2) whether the cause of action asserted arose from that transaction. In order to satisfy the second prong of the jurisdictional inquiry, there must be an articulable nexus or a substantial relationship between a defendant's in-state activity and the cause of action asserted” (*Fernandez v DaimlerChrysler, A.G.*, 143 AD3d 765, 767 [2d Dept 2016], *appeal dismissed*, 28 NY3d 1129 [2017][internal citations omitted]).

Notably, CPLR 302 (a) (1) is a “single act statute” in that physical presence in New York is not required and only “one New York transaction is sufficient.” However, jurisdiction may attach under this section only as to a cause of action “arising from” the transaction “of business within the state or contracts anywhere to supply goods or services in the state” (*id.*). The statute is “only applicable where the defendant's New York activities were purposeful and substantially related to the claim” (*D & R Global Selections, S.L. v Bodega Oregario Falcon Pineiro*, 90 AD3d 403, 404 [1st Dept 2011]). “Purposeful activities are those with which a defendant, through volitional acts, avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws” (*id.* [citation omitted, quotation marks in original]).

“A defendant may not be subject to personal jurisdiction under CPLR 302 (a) (1) simply because her contact with New York was a link in the chain of events giving rise to the cause of action” (*Talbot v Johnson Newspaper Corp.*, 123 AD2d 147, 149 [3d Dept 1987], *affd.*, 71 NY2d 827 [1988]). This case presents such an instance. The investment in BLMIS and its subsequent bankruptcy are links in the chain which occur in New York, but the events at issue in this dispute are the redemption request, the decisions by defendant to suspend redemptions, and defendant’s failure to pay, once it arguably had the funds. If defendant’s conduct in making the investment in BLMIS constitutes doing business in New York, it is insufficiently related to the claim here to support jurisdiction.

Further, even if there were jurisdiction over defendant, this case would be dismissed as being brought in an inconvenient forum. It is well settled that New York courts “need not entertain causes of action lacking a substantial nexus with New York” (*Martin v Mieth*, 35 NY2d 414, 418

[1974]). The doctrine of forum non conveniens “permits a court to stay or dismiss such actions where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere” (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478–479 [1984], *cert denied*, 469 US 1108 [1985], CPLR 327[a]). On a motion to dismiss on this ground, the defendant challenging the forum bears the burden of demonstrating relevant private or public interest factors which militate against accepting the litigation (*see id.*; *Straville v Land Cargo, Inc.*, 39 AD3d 735, 736 [2d Dept 2007]). The doctrine rests upon principles of justice, fairness, and convenience (*see Islamic Republic of Iran*, 62 NY2d at 479). Among the factors to be considered are “the residency of the parties, the potential hardship to proposed witnesses, the availability of an alternative forum, the situs of the underlying action, and the burden which will be imposed upon New York courts” (*Straville*, 39 AD3d at 736, [internal quotation marks omitted]). The decision is subject to the discretion of the trial court, and no single factor controls (*Islamic Republic of Iran*, 62 NY2d at 474).

While plaintiff contends defendant is clearly able to defend itself here, as it has in the bankruptcy action, this action is concerned with foreign events and entities and “cannot be said to have a substantial nexus with New York” (*Tetra Fin. [HK] Ltd. v Patry*, 115 AD2d 408, 410 [1st Dept 1985], *appeal withdrawn* 67 NY2d 758 [1986] [citation omitted]; *see also Chawafaty v Chase Manhattan Bank, N.A.*, 288 AD2d 58, 58 [1st Dept 2001], *lv denied* 98 NY2d 607 [2002][“[t]his action lacks a substantial connection to New York and would be burdensome to its courts”]). New York has no interest in adjudicating this essentially foreign dispute. According to the Complaint, plaintiff Access Advantage is a limited liability company “registered in the British Virgin Islands, with a principal place of business in Corte Madera, California” (Complaint, paragraph 9). Defendant is located in Bermuda (*id.*, paragraph 10). The only connection this action for failure to honor redemption requests has with New York is that the underlying investment was made in New York, where it was the object of a fraud and resulted in defendant’s decision (made abroad) to suspend payments on redemption requests. The underlying investment is not at issue and of the actions at issue are alleged to have occurred in New York. Defendant states that none of its relevant witnesses or documents are in New York State (Opp at 19). Plaintiff is also located outside New York State and does not state its documents or witnesses are here. Accordingly, it is hereby

**ORDERED** that the motion to dismiss is GRANTED and this case is DISMISSED; and it is additionally

occurred in New York. Defendant states that none of its relevant witnesses or documents are in New York State (Opp at 19). Plaintiff is also located outside New York State and does not state its documents or witnesses are here. Accordingly, it is hereby

**ORDERED** that the motion to dismiss is **GRANTED** and this case is **DISMISSED**; and it is additionally

**ORDERED** that as far as plaintiff seeks leave to replead, that request is **DENIED**.

This constitutes the decision and order of the court.

**DATED: April 9, 2020**

ENTER,  
  
O. PETER SHERWOOD J.S.C.