

**Mortimer Offshore Servs. Ltd. v Manufacturas Orga  
LTDA**

2020 NY Slip Op 33876(U)

November 13, 2020

Supreme Court, New York County

Docket Number: 654433/2018

Judge: Nancy M. Bannon

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 42**

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MORTIMER OFFSHORE SERVICES LIMITED,

Plaintiff,

-against-

**Decision and Order**

Index No. 654433/2018

Mot. Seq. 004

MANUFACTURAS ORGA LTDA,

Defendant.

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**NANCY M. BANNON, J.:**

I. BACKGROUND

In this action to domesticate a foreign judgment pursuant to CPLR 3213, the plaintiff moves pursuant to CPLR 5223 seeking post-judgment discovery from non-party HSBC Bank USA, relating to records of other subsidiaries of HSBC Holdings, plc, the parent company.

Plaintiff commenced this litigation by way of a motion for summary judgment in lieu of complaint on September 6, 2018 (NYSCEF Doc. No. 1). The motion sought to domesticate a foreign judgment of over \$7 billion plus interest, which plaintiff obtained against defendant in the High Court of Justice, Queen's Bench Division, Commercial Court on May 9, 2014. In its March 13, 2019, order resolving motion sequence numbers 002 and 003 (NYSCEF Doc. No. 36), this court granted plaintiff's motion on default. That decision, which sets forth the underlying facts, is incorporated here by reference.

On April 19, 2019, based on the March 13, 2019, order, plaintiff entered judgment for \$10,240,084,075.04, which includes the original judgment plus accrued interest. In pursuit of this award, plaintiff commenced post-judgment discovery on defendant as well as nonparties that

plaintiff believed held assets of defendant. Around June 7, 2019, plaintiff served a subpoena duces tecum on HSBC Bank, USA (HSBC) (NYSCEF Doc. No. 47). The subpoena was referable to defendant, Orga Ltd., Romero Espinosa Orlando, Gabriel Alejandro Garcia Navarette, and J. Olivas (the parties),<sup>1</sup> and requested an expansive list of materials relating to the parties' loans, bank accounts, closed bank accounts, mortgages, IRA and other security accounts, traveler's, cashier's, money orders, and other similar items, wire transfers, transactions with other banks, safe deposit boxes both current and expired, credit cards both open and closed, teller tapes showing transactions, and IRS, Customs, and other federal forms (*id.*). Plaintiff sought this information from HSBC and also indicated that HSBC should provide materials from "HSBC Holdings plc; HSBC Private Bank (Switzerland) SA; HSBC International; HSBC Expat; HSBC Private Bank; HSBC Bank, Santiago, Chile; HSBC Bank, Panama, Republic of Panama; and HSBC Amanah Malaysia" (*id.*).

According to the affirmation of plaintiff's counsel, HSBC requested several extensions of time in which to respond, and an unidentified individual in "HSBC's subpoena compliance department also initially suggested that HSBC personnel had found some responsive documents" (NYSCEF Doc. No. 46 [Harris Aff] ¶ 11). On November 5, 2019, however, HSBC sent a letter which stated, in pertinent part, that

[a]fter a diligent search of HSBC Bank USA, N.A. records, we were unable to locate account or wire transactions for the individuals and entities listed in your request with the information that was provided. Please be advised that HSBC Bank USA, N.A. does not have access to, custody or control over customer records of HSBC Holdings PLC, HSBC Private Bank (Switzerland) SA, HSBC International, HSBC Expat, HSBC Bank Santiago, Chile, HSBC Bank Pañama, Republic of Panama and HSBC Amanah Malaysia (NYSCEF Doc. No. 48).

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<sup>1</sup> Though they are not the parties in this lawsuit, they are parties who allegedly have financial connections to defendant. The court uses the term "parties" as a convenient reference.

After plaintiff received this letter, its counsel attempted to resolve the problem with HSBC's counsel. HSBC explained that its United States banks share a common parent with but are distinct from the HSBC subsidiaries in other countries. It stated that the International, Expat, and Private Bank were nonexistent, but that it would conduct a further search for any assets in HSBC Private Bank International, over which HSBC had authority. On January 17, 2020, HSBC notified plaintiff that it discovered no assets of the parties in HSBC Private Bank International, and that it would not search the holdings of the foreign banks over which it had no control or authority (NYSCEF Doc. No. 46 ¶¶ 15-16). In one of its email communications, HSBC reiterated that it did not have custody over and would not search for the records of the foreign entities (*id.* ¶ 16). Subsequently, plaintiff brought this motion pursuant to CPLR 5223 to compel a comprehensive response to the subpoena.

After review of the parties' submissions and after oral argument, the motion is denied.

## II.DISCUSSION

Plaintiff maintains that HSBC has a legal obligation to produce materials from all HSBC banks, regardless of their locations (citing CPLR 5223). Plaintiff argues that this provision is a broad one and it allows a judgment creditor to seek information from all nonparties who may have information about the judgment debtor's assets (citing, *inter alia*, *ICD Grp. Inc. v Israel Foreign Trade Co. [USA]*, 224 AD2d 293, 294 [1st Dept 1996]). Plaintiff observes that HSBC's objection – that it lacks custody and control over records from the overseas entities – rests on the separate entity rule. Under that rule, the separate branches of a single bank are separate entities and therefore they are not responsible to produce discovery from those other branches (citing *Matter of B&M Kingstone, LLC v Mega Intl. Commercial Bank Co., Ltd.*, 131 AD3d 259 [1st Dept 2015] [*B&M*

*Kingstone*], *lv dismissed*, 26 NY3d 995 [2015]). Quoting *Cronan v Schilling* (100 NYS2d 474, 476 [Sup Ct, NY County 1950], *affd* 282 App Div 940 [1st Dept 1953]), plaintiff explains that the reasoning was that the branches were “in no way concerned with” these accounts. Plaintiff states that although the separate entity rule prevents parties from levying the assets of foreign branches at a specific bank, it does not relieve one branch of a bank of its duty to produce pertinent information about its foreign branches.

Plaintiff analogizes this case to *B&M Kingstone*, in which the First Department held that the New York branch of a Taiwan-based bank had to respond to an information subpoena which sought disclosure as to its Taiwanese and other foreign branches. Due to the technological advances since the inception of the separate entity rule, the First Department found that banks could access such information without undue burden or financial cost. It stated, therefore, that “the court's general personal jurisdiction over the bank's New York branch permits it to compel that branch to produce any requested information that can be found through electronic searches performed there” (*B&M Kingstone*, 131 AD3d at 267). Accordingly, plaintiff contends that HSBC is required to comply and its failure to do so impermissibly places “obstacle in the path of one seeking to secure the enforcement of a judgment” (quoting *Siemens & Halske, GmbH. v Gres*, 77 Misc 2d 745, 745 [Sup Ct, NY County 1973] [internal quotation marks and citation omitted], *affd* 43 AD2d 1021 [1st Dept 1974]; *see U.S. Bank N.A. v APP Intl. Fin. Co., B.V.*, 100 AD3d 179, 183 [1st Dept 2012]).

In opposition, HSBC submits the affidavit of Michael T. LoVullo, a legal paper regulatory specialist at HSBC Technology Services USA (HTSU) (NYSCEF Doc. No. 56). The affidavit responds to document retrieval requests for HSBC. It states that HSBC is only “indirectly owned by HSBC Holdings, plc, in London” and “is not a branch of any foreign HSBC bank or

entity” (*id.* ¶ 3). It points out that, in response to Mortimer’s subpoena, LoVullo is the individual who informed Mortimer’s counsel that HSBC could not locate any responsive records (*id.* ¶ 5 [citing NYSCEF Doc. No. 48]). The affidavit repeats the statements HSBC USA made in the letter and in its subsequent communications to plaintiff (NYSCEF Doc. No. 56 ¶¶ 6-9). In addition, the affidavit stresses that HSBC’s computer systems and its databases “are separate and apart from any systems or databases of foreign HSBC entities,” and that HSBC lacks possession of, control over, or access to the documents and records of the foreign entities as well as the practical ability to obtain these records with ease (*id.* ¶ 10). According to HSBC, it thus lacks “constructive possession” of the documents (citing *Commonwealth of the N. Mariana Is. v. Canadian Imperial Bank of Commerce*, 21 NY3d 55, 62-63 [2013]). Further, the affidavit states that HSBC lacks the practical ability to obtain the records (*id.* ¶ 11). HSBC argues that, for both reasons, it is not obliged to produce the requested items (citing, *e.g.*, *Rosado v. Mercedes-Benz of N. Am.*, 103 AD2d 395, 398 [2d Dept 1984]; *Asphalt Maintenance Servs. Corp. v Oneil*, 2019 NY Slip Op 32562 [U], \*2 [Sup Ct, Westchester County 2019]). HSBC stresses that plaintiff has the burden of showing that HSBC has the practical ability to obtain the documents plaintiff seeks (citing *CBF Industria De Gusa S/A v AMCI Holdings, Inc.* [CBF], 2019 WL 3334503, at \*14, 2019 US Dist Lexis 124326, SDNY, July 25, 2019, Cott, J., Magistrate), and it argues that plaintiff has not satisfied this burden.

HSBC further argues that plaintiff incorrectly cites the separate entity rule, as HSBC did not object to production under that rule. Unlike the entities involved in *B&M Kingstone* and the other cases upon which plaintiff relies, HSBC is not another branch of the banks from which plaintiff seeks discovery. Instead, HSBC explains that it is independent of the other subsidiaries. Therefore, according to HSBC, the caselaw on which plaintiff relies is inapplicable. Instead, HSBC points to several Federal judges who have rejected the argument that HSBC and other similarly

constituted companies are obliged to hand over the materials that belong to other subsidiaries to which it is not connected (*e.g. ASI, Inc. v HSBC Bank USA, N.A.*, SDNY, Aug. 30, 2016, Engelmayer, J. [ASI]; *Dartell v Tibet Pharmaceuticals, Inc.*, 2016 WL 11653632, at \*3-4, [ED NJ, Feb. 29, 2016, Hammer, Magistrate J.]).

In reply, plaintiff argues that the separate entity rule applies with equal force to subsidiaries. Additionally, plaintiff contends that because HSBC has provided subsidiaries' information concerning separate subsidiaries in the context of criminal investigations, HSBC's argument that it lacks the practical ability to do so here is without merit. Plaintiff cites statements made by HSBC Holdings, plc in delayed prosecution agreements to support plaintiff's position that HSBC has ready access to the records of the foreign subsidiaries. Among other documents plaintiff has filed in support of its position that HSBC has access to the records of the other subsidiaries, plaintiff provides a copy of HSBC's Form 10-K filing with the Securities and Exchange Commission (NYSCEF Doc. No. 63).

Under CPLR § 5223, "[a] judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment, by serving upon any person a subpoena, which shall specify all of the parties to the action, the date of the judgment, the court in which it was entered, the amount of the judgment and the amount then due thereon." The provision is a broad one and it allows a judgment creditor to seek information from nonparties that may have information about the location of the judgment debtor's assets (*e.g., ICD Grp. v Israel Foreign Trade Co. [USA]*, 224 AD2d 293, 294 [1st Dept 1996]). However, the burden is on the judgment creditor seeking to enforce the subpoena to show that the subpoena – or, as here, the challenged portion of the subpoena – is proper (*see S.E.C. v Credit Bancorp, Ltd.*, 194 FRD 169, 472 [SD NY 2000] [*Credit Bancorp*] [under analogous federal statute]). If the request is onerous or unduly costly, or if the

subpoenaed party lacks access to the information, the court should deny a motion to compel enforcement of the subpoena (*see Ayyash v Koleilat*, 115 AD3d 495, 495 [1st Dept 2014] [motion denied where, inter alia, compliance “would likely cause great annoyance and expense to respondents or their employees or agents”]; *Gray v Giarrizzo*, 47 AD3d 765 [2d Dept 2008] [defendant not in contempt for failure to provide information about former spouse as he did not have access to the information]).

“[D]ocuments are considered to be under a party's control when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action” (*Bank of New York v Meridien BIAO Bank Tanzania Ltd.*, 171 FRD 135, 146-147 [SD NY 1997]). Plaintiff has not shown that HSBC has the right, authority, or practical ability to obtain responsive documents from the foreign subsidiaries of HSBC Holdings, plc. On the other hand, the affidavit of LoVullo, who conducted the document search, asserts that HSBC’s computer database is separate from those of the foreign banks, that HSBC lacks access to the other databases and does not use them in the ordinary course of business, and that “[d]ocuments of the type requested in the Subpoena do not flow freely between [HSBC] and foreign HSBC entities” for these reasons (NYSCEF Doc. No. 56 ¶ 10).

Plaintiff’s chief argument, that the separate entity rule governs, lacks merit. “The rule provides that even if a bank is subject to personal jurisdiction due to the presence of a New York branch, *the other branches of the bank* will be treated as separate entities for certain purposes” (*Tire Engineering and Distribution L.L.C. v Bank of China Ltd.*, 740 F3d 108, 111 [2d Cir 2014] [emphasis supplied], *certified question ansd, Motorola Credit Corp. v Standard Chartered Bank*, 24 NY3d 149 [2014] [*Motorola*]). Here, however, HSBC has not refused to provide discovery relating to its branches but to independent subsidiaries of HSBC Holdings, plc. Any narrowing of

that principle relates only to demands for discovery of information contained in other of the bank's branches. Therefore, the cases on which plaintiff relies are not pertinent.<sup>2</sup> Instead, the court must consider whether the relationship between HSBC and the foreign entities "present the rare circumstances to justify disregarding the separate and distinct corporate identity of HSBC" (*Dartell*, slip op at \*4 [internal quotation marks and citation omitted]).

Instead, as HSBC correctly argues, the separate entity rule is not applicable where the subpoenaed party is a subsidiary that is independent of the other subsidiaries. Instead, "a parent corporation is distinct from a separately incorporated subsidiary" (*Sicav v Wang*, at 2014 WL 2624753 at \*4 [SD NY, June 12, 2014], Engelmayer, J.). Similarly, separately incorporated subsidiaries are distinct from each other. For this reason, a document held by HSBC Holdings, plc, or by separate subsidiaries, is not automatically deemed to be within HSBC's control (*see id.*). "In the absence of control by a litigating corporation over documents in the physical possession of another corporation, the litigating corporation has no duty to produce" (*Gerling Intl. Ins. Co. v Commissioner of Internal Revenue*, 839 F2d 131, 141 [3d Cir 1988] [*Gerling*]). Therefore, this court must examine the degree of control the parties may exercise with respect to each other, determine whether the entities in question "operate as one," look at whether the parties have "demonstrated access to documents *in the ordinary course of business*," and consider whether an agency relationship exists (*Sicav*, 2014 WL 2624753 at \*4 [emphasis supplied]).

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<sup>2</sup> Plaintiff is correct in observing that the scope of that rule has been narrowed because, due to technological advances, banks often have easier access to the records available in other branches (*see The Engineering and Distribution L.L.C.*, 740 Fed at 116-117). On this basis, *B&M Kingstone* determined that Motorola applied to restraining notices and turnover orders and not to information subpoenas (*B&M Kingstone*, 131 AD3d 259, 266 [1st Dept 2015], *lv dismissed* 26 NY3d 995 [2015]). However, as stated, that is irrelevant here.

Here, plaintiff has not asserted that the banks in question operate as one, control each other, or enjoy an agency relationship. Instead, it relies on the SEC filing and on HSBC Holdings, plc's willingness to cooperate with criminal investigations to argue that HSBC has ready access to the demanded discovery. Neither position is persuasive. The SEC filing on which plaintiff relies does not provide such evidence. Specifically, plaintiff cites to two portions of the document: a section describing the structure and organization of HSBC including its relationship to HSBC Holdings, plc; and a discussion about "Services Provided Between HSBC Affiliates" (NYSCEF Doc. No. 63, at \*\*4-5, 165). However, a closer reading of these pages show that the sharing of information occurs between the North American corporations, not the foreign sister corporations. For example, the filing states that HSBC is owned by HSBC North America Holdings, Inc., that the latter company is an indirect wholly-owned subsidiary of HSBC Holdings, plc, and that HSBC "act[s] as a holding company *for its subsidiaries*" (*id.*, at \*4 [emphasis supplied]). Further, it states that HSBC "works with *its affiliates* to maximize opportunities and efficiencies in [HSBC Holdings, plc's] operations in the United States" – and, specifically, pools the resources of HTSU, the technology arm of the HSBC and its United States subsidiaries (*id.* [emphasis supplied]). Contrary to plaintiff's intimation, this does not show that HSBC has access to the documents and records of unrelated foreign subsidiaries in the ordinary course of operations. The other section to which plaintiff cites states that HSBC provides "information technology, software development, customer service, collection, risk management, and accounting" service to the United States operations, and that, among others, it turns to HSBC Global Services Limited for assistance with these services. Although HSBC Global Services is outside of the United States, its assistance with HSBC's software and other technologically based services does not indicate that HSBC has access to the files of independent subsidiaries of HSBC Holdings, plc.

Plaintiff's statement that "[t]here is no reason to believe that HSBC's practical ability to obtain information about its foreign affiliates" is the same as it is in the context of criminal investigations (NYSCEF Doc. No. 58, at \*4), is unsupported and unpersuasive. As the *ASI* Court stated in the oral argument transcript, the deferred prosecution agreement upon which the movants relied was "a one-time negotiated agreement" that existed only "because it was in the broader interests of the HSBC universe to enter into that agreement with DOJ limited to prosecutions and investigations (NYSCEF Doc. No. 54, at \*2 line 23 - 3 line 2)." The Court explained that "in the context of a criminal investigation, the incentive structure is completely different, and . . . an affiliate . . . may willingly collaborate or cooperate and produce materials" because of the incentive to avoid indictment (*id.*, at \*3 lines 11-17). Here, there is no such incentive. Moreover, in *ASI*, the court concluded that *ASI* had not shown "that there is an arrangement or mechanism that gives . . . HSBC the practical ability to access documents controlled by HSBC foreign affiliates" (*id.* at \*26 lines 4-6). In *Dartell*, upon which HSBC also relies, Magistrate Hammer concluded that the plaintiffs there did not "meet their burden of demonstrating that [HSBC] is in possession, custody, or control of the documents concerning the account in Hong Kong" (*Dartell*, slip op at \*3). Plaintiff provides no evidence or argument to conclude otherwise here.

### III.CONCLUSION

Accordingly, it is

ORDERED that the plaintiff's motion to compel post-judgment discovery is denied.

This constitutes the Decision and Order of the court.

**Dated: November 13, 2020**

  
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NANCY M. BANNON, J.S.C.  
**HON. NANCY M. BANNON**