

**Beltran Tech., Inc. v Citibank, N.A.**

2024 NY Slip Op 33261(U)

September 3, 2024

Supreme Court, Kings County

Docket Number: Index No. 521893/2022

Judge: Carolyn E. Wade

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: HON. CAROLYN E. WADE (PART 84)

<p>BELTRAN TECHNOLOGIES, INC.,</p> <p style="text-align: right;"><i>Plaintiff,</i></p> <p style="text-align: center;">-against-</p> <p>CITIBANK, N.A., ING BANK, N.V., and JOHN DOE SCAMMER,</p> <p style="text-align: right;"><i>Defendants.</i></p>
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**DECISION/ORDER**

Index No.: 521893/2022

Motion Seq. No. 4

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Defendant ING Bank, N.V.’s (“ING”) Pre-Answer Motion to Dismiss the Amended Complaint as against it, pursuant to CPLR §§ 3211(a)(8) and (a)(7), is decided as follows:

Plaintiff Beltran Technologies, Inc. (“Plaintiff”), by its Amended Complaint (“AC”), alleges that in August 2020, it received a fraudulent email from defendant “John Doe Scammer” – a “cybercriminal whose current whereabouts and identity are unknown” (“Fraudster”) – directing it to transfer by wire the sum of \$148,065 to a fraudulent account purportedly held in the name of one of its legitimate vendors but which, in fact, was held in the Fraudster’s name at ING (AC, ¶¶ 2-5, 97, 108, 114). Plaintiff unwittingly complied with the fraudulent email and directed its bank, codefendant Citibank, N.A. (“Citibank”), to wire money to the Fraudster’s account at ING in the Netherlands (AC, ¶¶ 6, 112). In the UCC article 4-A terminology, Plaintiff and the Fraudster are known as the “originator” and the

“beneficiary,” respectively, whereas Citibank and ING are known as the “originator’s bank” and the “beneficiary’s bank,” respectively.

ING processed the wire transfer (AC, ¶ 54). Further, ING permitted the Fraudster to withdraw from the account some (but not all) of the wired funds (AC, ¶ 137). ING has “refused to return the funds to [Plaintiff’s] account” at Citibank (AC, ¶¶ 47 and 62). To date, “ING fails and refuses to identify the [Fraudster] or divulge the [amount of Plaintiff’s] funds remaining [on deposit]” (AC, ¶¶ 63, 69, 112). Upon information and belief, the Fraudster is “an employee of ING” (AC, ¶ 75).

In its Amended Complaint, Plaintiff pleads five causes of action against ING. They are commercial bad faith, conversion, unjust enrichment, violation of UCC article 4-A, and deceptive trade practices. In lieu of an answer, ING served the instant pre-answer motion to dismiss the Amended Complaint against it for lack of personal jurisdiction and for failure to state a cause of action, pursuant to CPLR §§ 3211(a)(8) and (a)(7), respectively. Plaintiff opposed. The motion was fully submitted on April 24, 2024, with the Court reserving decision.

The threshold issue is whether the Court has personal jurisdiction over ING (*see e.g. McSpedon v Levine*, 158 AD3d 618, 620 [2d Dept 2018]). The Court agrees with ING that it lacks general and/or specific personal jurisdiction over ING.<sup>1</sup>

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<sup>1</sup> ING has waived its separate objection to the lack of service of process (*see* ING’s Reply Memorandum of Law, dated April 23, 2024, page 5 n 1 [“ING . . . has withdrawn its argument that it was not properly served with process. . . .”]).

The Amended Complaint (in ¶¶ 76-83) predicates personal jurisdiction over ING on three grounds: (1) CPLR § 301; (2) General Obligations Law (“GOL”) § 5-1402; and (3) CPLR § 302. None of the jurisdictional predicates is meritorious.

As the initial matter, jurisdiction over ING under CPLR § 301 is unsupported because Plaintiff has failed to show that ING had such continuous and systematic affiliations with New York as to render it “at home” in this State (*see Aybar v Aybar*, 37 NY3d 274, 289 [2021]). In this regard, it is undisputed that: (1) ING is incorporated, and has its principal place of business, in the Netherlands; (2) it is not registered with the New York State Secretary of State to conduct business in this State; and (3) ING’s representative office in New York is limited in its functions and does not engage in any banking services.<sup>2</sup>

Plaintiff’s next contention that ING is subject to jurisdiction under GOL § 5-1402 is misplaced. Plaintiff is not a party to the Citibank-ING agreement which (according to AC, ¶ 78) selected New York as the forum state (*see Sherrod v Mount Sinai St. Luke’s*, 204 AD3d 1053, 1055-1056 [2d Dept 2022]).

Plaintiff’s fallback position that ING is subject to the long-arm jurisdiction under one or more of the three subsections of CPLR § 302(a) is without merit.<sup>3</sup> Starting with subsection (a)(1) of CPLR § 302, the Court notes that this subsection imposes a two-prong

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<sup>2</sup> See ING’s Joint Affirmation of Boukje (B.M.) Stoelinga and Teun (T.M.) Schölvineck in Support of ING’s Motion, dated October 23, 2023 (“ING’s Supporting Affirmation”), ¶¶ 5, 8-9, 15-18.

<sup>3</sup> Plaintiff, for the first time, cites to CPLR § 302 (a) (4) in its opposition to ING’s motion (*see* Plaintiff’s Memorandum of Law in Opposition, dated April 17, 2024, pages 10-11). Under CPLR § 302 (a) (4), New York courts may exercise personal jurisdiction over non-domiciliaries when the action arises from the non-domiciliaries’ “own[ership], use[,], or possess[ion] [of] any real property situated within the state.” Plaintiff’s belated reliance on CPLR § 302(a)(4) is unavailing because its claims do not arise in any conceivable way from any acts or omissions of ING’s representative office in New York (*see* ING’s Supporting Affirmation, ¶¶ 15-18).

requirement; first, “whether the defendant has purposefully availed itself of the privilege of conducting activities in New York by either transacting business or contracting to supply goods or services there,” and, second, “whether the claim asserted arises from that business transaction or from the contract to supply goods or services” (*Vaval v Stanco, LLC*, 219 AD3d 1466, 1468 [2d Dept 2023] [internal quotation marks omitted]). “To satisfy the second prong, there must be an articulable nexus or a substantial relationship between a defendant’s New York activities and the cause of action asserted” (*id.* [internal quotation marks omitted]). The Amended Complaint fails to allege that ING purposefully availed itself of the New York jurisdiction regarding the wire transfer at issue. Rather, ING (which acted as the Fraudster’s “beneficiary’s bank”) merely received the wire transfer initiated by Plaintiff with Citibank (which acted as Plaintiff’s “originator’s bank”).

Proceeding to subsection (a)(2) of CPLR § 302, the Court observes that it confers jurisdiction over a non-domiciliary when it “commits a tortious act within the state.” Jurisdiction pursuant to CPLR § 302(a)(2) can not be established where (as is the instance here) there is no allegation that ING committed any tortious act within this State. All alleged tortious acts occurred in the Netherlands where ING is based and where it performs all its banking services.<sup>4</sup> ING’s subsequent alleged failure to release the funds deposited into its Netherlands-based account likewise did not occur within this State.

Concluding with subsection (a)(3) of CPLR § 302, the Court finds that ING does not regularly conduct or solicit banking business in New York in a manner consistent with the

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<sup>4</sup> See ING’s Supporting Affirmation, ¶¶ 33-37.

“persistent course of conduct” which (under appropriate circumstances) would have justified the imposition of personal jurisdiction under this subsection. Plaintiff’s contention that ING’s alleged tortious conduct outside the State caused injury within the State by adversely affecting the financial condition of one of its domiciliaries (*i.e.*, Plaintiff herein) runs afoul of the well-established principle that “[w]here, as here, commercial, non-physical losses are alleged, the situs of the injury is not where the losses are sustained, but where the critical events associated with the dispute took place” (*Benifits By Design Corp. v Contractor Mgt. Servs., LLC*, 75 AD3d 826, 830 [3d Dept 2010] [internal quotation marks omitted]; *see Vaichunas v Tonyes*, 61 AD3d 850, 851 [2d Dept 2009] [“The situs of the injury is the location of the original event which caused the injury, not the location where the resultant damages are subsequently felt by the plaintiff.”] [internal quotation marks omitted]).

Accordingly, the initial branch of ING’s motion which is for an order, pursuant to CPLR § 3211(a)(8), dismissing the Amended Complaint as against it for lack of personal jurisdiction is granted as more fully set forth below.

In light of its determination, the Court need not consider the remaining branch of ING’s motion which is for dismissal of the Amended Complaint as against it for failure to state a cause of action under CPLR § 3211(a)(7). Were the Court to consider the remaining branch of ING’s motion, it would find that Plaintiff’s claims (in its capacity as the originator) as against ING (in the latter’s capacity as the beneficiary’s bank) are devoid of merit under UCC article 4-A; in particular, under UCC § 4-A-402 (the “money-back guarantee” rule), and, more generally, for lack of privity between Plaintiff and ING (*see Grain Traders, Inc. v Citibank, N.A.*, 160 F3d 97, 101 [2d Cir 1998]; *Frankel-Ross v Congregation OHR Hatalmud*, 2016 WL

4939074, \*2-4 [SDNY 2016] [the decision which is on all fours and dispositive of Plaintiff's opposition to the branch of ING's motion which is to dismiss the Amended Complaint as against it for failure to state a cause of action];<sup>5</sup> *see also Scura, Wigfield, Heyer, Stevens & Cammarota, LLP v Citibank, NA*, 2022 WL 16706948, \*4-5 [D NJ 2022]; *see further Ma v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 597 F3d 84, 87-93 [2d Cir 2010]; *Receivers of Sabena SA v Deutsche Bank A.G.*, 142 AD3d 242, 243 [1st Dept 2016]).<sup>6</sup>

Accordingly, it is

**ORDERED** that the initial branch of ING's pre-answer motion which is to dismiss the Amended Complaint against it for lack of personal jurisdiction, pursuant to CPLR § 3211(a)(8), is **granted**, and the Amended Complaint is dismissed in its entirety **with prejudice** and without costs and disbursements as against it. The remaining branch of its motion which is to dismiss, pursuant to CPLR § 3211(a)(7), is denied as academic; and it is further

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<sup>5</sup> Plaintiff's contention (at page 18 of its Memorandum of Law in Opposition) that "[t]hree facts distinguish *Frankel[-]Ross* [from the facts of this case, namely]: (1) there was no indication that the [beneficiary's] bank detected any issue at any time, (2) there was at least some resemblance between the name on the wire and the account name, and (3) there was a legitimate explanation for the wire," is unpersuasive. These distinctions (assuming, for the sake of argument, that they exist between *Frankel-Ross* and this case) make no difference. The two-part point which Plaintiff appears to overlook is that, first, its potential recovery lies solely against Citibank (as this Court had already ruled by Decision/Order, dated July 20, 2023, in denying Citibank's pre-answer motion to dismiss the Amended Complaint as against it), and that, second, the potential loss (if any) will ultimately fall on ING (*see Simple Helix, LLC v Relus Tech., LLC*, 493 F Supp 3d 1087, 1101 [ND Ala 2020] [explaining, by way of a hypothetical, that the "Beneficiary's Bank takes the loss (by way of its obligation to reimburse the Originator's Bank). Its only cause of action is against (the) Thief (or Fraudster in this case)."]).

<sup>6</sup> Plaintiff's throwaway argument that ING failed to comply with the "Know Your Customer" banking regulations cannot form the basis for its cause of action against it (*see e.g. Targoff v Wells Fargo Bank, N.A.*, 67 Misc 3d 504, 510 [Sup Ct, Westchester County 2020]).

**ORDERED** that the action is severed and continued against the remaining defendants, Citibank, N.A., and John Doe Scammer, and the caption is amended accordingly; and it is further

**ORDERED** that ING's counsel shall electronically serve a copy of this Decision and Order with notice of entry on the other parties' respective counsel and shall electronically file an affidavit of said service with the Kings County Clerk; and it is further

**ORDERED** that the remaining parties are reminded of their next scheduled appearance in the Intake Part on September 3, 2024.

This constitutes the Decision and Order of the Court.

Dated: September <sup>3<sup>rd</sup></sup>, 2024  
Brooklyn, New York

ENTER,

Hon. Carolyn E. Wade, J.S.C.

**HON. CAROLYN E. WADE  
JUSTICE OF THE SUPREME COURT**

2024 SEP 16 A 11:10  
KINGS COUNTY CLERK  
FILED