SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **61M**

Justice

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RAKAEZ GEOTEKANIA KSA

Plaintiff,

- v -

FRANSABANK S.A.L.,

Defendant.

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INDEX NO. 652758/2023

MOTION DATE 07/01/2024

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 233

were read on this motion to/for DISMISSAL.

I. INTRODUCTION

In this breach of contract action, the defendant, Fransabank S.A.L. ("Fransabank"), moves, pre-answer, to dismiss the amended complaint pursuant to, *inter alia*, CPLR 3211(a)(8), lack of personal jurisdiction. The plaintiff Rakaez Geotekania KSA ("Rakaez"), opposes the motion. The motion is granted.

II. BACKGROUND

Rakaez, a Saudi Arabian oil company, was awarded a subcontract for a soil improvement project for an airport in Saudi Arabia. As part of this subcontract, Rakaez was obligated to provide two bonds, guaranteeing Rakaez's payment of certain amounts for the benefit of nonparty Safari Company Ltd. These bonds included (i) a bond guaranteeing the performance of certain works and (ii) a bond guaranteeing repayment of a certain amount (collectively, the "Bonds").

Rakaez turned to its bank, Al-Mawarid S.A.L. ("AM Bank"), a Lebanese bank, to obtain the issuance of the Bonds by Safari's bank, Banque Saudi Fransi, a Saudi Arabian bank. Because AM Bank did not have a correspondent account (an account maintained by a bank in a

country where that bank does not conduct business) in Saudi Arabia, AM Bank contacted the defendant Fransabank, a Lebanese bank, through SWIFT messages (a messaging system used by banks to send information regarding financial transactions) to procure the Bonds. AM Bank transferred $1,932,178.73, which was approximately 25% of the value of each bond (the "Cash Margin") and $17,821.27 in charges or commissions to Fransabank's correspondent New York account at Bank of New York Mellon (BONYM) on July 3, 2015. In exchange, Fransabank agreed to repay the deposited Cash Margin upon reduction, expiration, or return of the Bonds. This agreement was governed by Lebanese law. As of June 1, 2022, after several reductions made to each Bonds, Fransabank owed to Rakaez $1,472,178.77, but Fransabank refused to pay this amount.

Rakaez commenced this action on June 5, 2023, alleging two causes of action for breach of contract and unjust enrichment, seeking damages of $1,472,178.77. Rakaez moved, by Order to Show Cause, for an order of attachment against Fransabank (MOT SEQ 001). Upon stipulation of the parties, the court, in an Order to Show Cause dated July 26, 2023, granted temporary relief requiring Fransabank to "maintain $1,472,178.77 in the aggregate across its correspondent accounts with banks in New York." Fransabank, in turn moved to dismiss the complaint (MOT SEQ 002). By an order dated September 26, 2023, the court (Ostrager, J. [Ret.]), upon a further stipulation of the parties, deemed MOT SEQ 001 withdrawn and vacated the attachment previously granted.

Rakaez filed an amended complaint on October 26, 2023, pleading the same causes of action and seeking the same relief. Rakaez alleges that, after the commencement of the action, Fransabank effectuated a "fake refund" of the $1,472,178.77 owed through a local transfer to AM Bank, Rakaez's bank in Lebanon, rather than refunding the $1,472,178.77 to Rakaez in New York, as required under the agreement between AM Bank and Fransabank and by Lebanese law. By an order dated November 6, 2023, Justice Ostrager permitted MOT SEQ 002 to be withdrawn without prejudice upon the parties' stipulation. Fransabank thereafter filed the instant motion to dismiss the amended complaint, MOT SEQ 003.

III. DISCUSSION

(A) CPLR 3211(a)(8)

Fransabank's primary argument for dismissal is lack of personal jurisdiction (CPLR 3211[a][8]). In filing the complaint, the burden rests on the plaintiff as the party asserting

jurisdiction over a defendant. See O'Brien v Hackensack Univ. Med. Ctr., 305 AD2d 199 (1st Dept. 2003). The plaintiff need only make a "sufficient start" in showing the existence of personal jurisdiction in opposing the defendant's motion. Bangladesh Bank v Rizal Comm. Banking Corp., 226 AD3d 60, 74 (1st Dept. 2020), quoting James v iFinex Inc., 185 AD3d 22, 30 (1st Dept. 2020).

In its amended complaint, Rakaez states that the court has in personam jurisdiction pursuant to CPLR 302(a)(1) and quasi in rem jurisdiction pursuant to CPLR 314(3) over Fransabank through the levy upon Fransabank's correspondent account at BONYM in New York. However, Rakaez's own papers in opposition make no mention of quasi in rem jurisdiction. It argues only for in personam jurisdiction under CPLR 302(a)(1), seemingly abandoning the quasi in rem argument. Indeed, there is no quasi in rem jurisdiction as there is no present order of attachment of Fransabank's property in New York, based on Rakaez's withdrawal of MOT SEQ 001 and the vacatur of the attachment. See generally Banco Ambrosiano, S.p.A. v Artoc Bank & Tr. Ltd., 62 NY2d 65 (1984); see Majique Fashions, Ltd. v Warwick & Co., Ltd., 67 AD2d 321 (1st Dept. 1979) [two attached accounts in New York supported quasi in rem jurisdiction].

When a defendant seeks to dismiss for lack of in personam jurisdiction, "a New York court may not exercise personal jurisdiction over a non-domiciliary unless two requirements are satisfied: the action is permissible under the long-arm statute (CPLR 302) and the exercise of jurisdiction comports with due process: Williams v Beemiller, Inc., 33 NY3d 523, 528 (2019). In assessing jurisdiction under the long-arm statute, the "jurisdictional inquiry is twofold: under the first prong, the defendant must have conducted sufficient activities to have transacted business in the state, and under the second prong, the claims must arise from the transactions". Al Rushaid v Pictet & Cie, 28 NY3d 316, 323 (2016); see Bangladesh Bank v Rizal Comm. Banking Corp., supra at 80. Under the first prong, the defendant must purposefully avail itself, through volitional acts, of the privilege of conducting activities in the forum state, thus, invoking the benefits and protections of its laws. See Fischbarg v Doucet, 9 NY3d 375, 380 (2007). Determining "purposeful availment is an objective inquiry… requiring a court to closely examine the defendant's contacts for their quality". Licci v Lebanese Can. Bank, 20 NY3d 327, 338 (2012) [answering certified questions from the Second Circuit Court of Appeals in Licci v Lebanese Canadian Bank, 673 F.3d 50, 65 (2d Cir 2012)]. Under the second prong, there must be a an "articulable nexus or substantial relationship between the business transaction and the

claim asserted". Id. at 339. It is well settled that "mere maintenance of a correspondent bank account in New York does not suffice to establish personal jurisdiction there." Chaar v Arab Bank P.L.C., 220 AD3d 479, 480 (1st Dept. 2023) *quoting* Licci v Lebanese Canadian Bank, 673 F.3d 50, 65 (2d Cir 2012), see also Khalife v Audi Saradar Private Bank SAL, 129 AD3d 468 (1st Dept. 2015). Rakaez fails to establish in personam jurisdiction over Fransabank on both prongs.

Under the first prong, Rakaez argues that Fransabank purposefully availed itself of doing business in New York by maintaining a correspondent account at BONYM, and that under the terms of the agreement between Fransabank and AM Bank, Fransabank required AM Bank to deposit the Cash Margin to the Fransabank's correspondent account at BONYM. However, Rakaez's submissions, including emails between the parties and AM Bank, as well SWIFT messages between the banks, do not include any requirement that the Cash Margin be deposited at BONYM. Indeed, Fransabank's submissions show that Fransabank specified that AM Bank send the funds to Fransabank's account at "BDL Beirut", in Lebanon. Even though AM Bank deposited the Cash Margin to BONYM in July 2015, this was only one transfer that took place through Fransabank's correspondent account in New York. Rakaez does not point to any other transactions that occurred through the BONYM account, nor to any other evidence that the agreement between Fransabank and AM Bank required Fransabank to reimburse the $1,472,178.77 owed to Rakaez in New York. Furthermore, Fransabank's mere maintenance of a correspondent account in New York is insufficient to subject it to personal jurisdiction. See Licci v Lebanese Can. Bank, supra, Chaar v Arab Bank P.L.C., supra, Bangladesh Bank v Rizal Comm. Banking Corp., supra at 81. Indeed, a defendant's use of a correspondent account must be "purposeful and necessary to effectuate the alleged [wrong alleged in the complaint]". Bangladesh Bank v Rizal Comm. Banking Corp., supra at 81. No such facts are alleged here.

For similar reasons, Rakaez's complaint also fails to establish a nexus between the transaction at issue and the claims asserted under the second prong. Rakaez's amended complaint alleges that Fransabank wrongfully transferred the $1,472,178.77 owed to Rakaez through a "fake refund" to AM Bank, Rakaez's bank in Lebanon. This act is alleged to have occurred in Lebanon, not in New York. Furthermore, the one transfer that did occur in New York in July 2015 has no bearing on this alleged "fake refund" made in Lebanon.

Under due process, it must be shown that the defendant has "certain minimum contacts" with New York and that the action "does not offend traditional notions of fair play and substantial

justice". International Shoe Co. v Washington, 326 US 310, 316 (1945); see also Williams v Beemiller, Inc., supra. This constitutional inquiry focuses on the relationship between the defendant, the forum, and the litigation. Williams v Beemiller, Inc., supra. For similar reasons, exercising jurisdiction over Fransabank does not comport with due process, as Fransabank is a foreign entity with only one contact in New York; its' correspondent account at BONYM. Furthermore, the central claim against Fransabank is that it made a "false payment" to Rakaez in Lebanon, deals with facts that occurred entirely outside the forum state.

Therefore, Rakaez's amended complaint must be dismissed in its entirety, as it does not establish personal jurisdiction over Fransabank.

(B) CPLR 327(a)

While the court need not determine whether Rakaez's complaint is subject to dismissal on forum non conveniens grounds per CPLR 327(a) (see Khalife v Audi Saradar Private Bank SAL, supra; see also Ehrlich-Bober & Co., Inc. v Univ. of Houston, 49 NY2d 574 [1980]), Rakaez's amended complaint is equally dismissible under that ground. "Although a New York court may have jurisdiction over a claim, it is not, of course, compelled to retain jurisdiction if the claim has no substantial nexus with New York." Banco Ambrosiano, S.p.A. v Artoc Bank & Tr. Ltd., supra at 73 [citations omitted]. This doctrine is applied with flexibility, on a case-by-case basis. See Martin v Mieth, 35 NY2d 414 (1974). Factors include residency of the parties, the potential hardship to proposed witnesses, the availability of another forum, the situs of the underlying claim, and the burden upon the New York courts, particularly in applying foreign banking law. See Economos v Zizikas, 18 AD3d 392 (1st Dept. 2005); Shin-Etsu Chem. Co., Ltd. v 3033 ICICI Bank Ltd., 9 AD3d 171 (1st Dept. 2004). No one factor is controlling. See Islamic Republic of Iran v Pahlavi, 62 NY2d 474, 479 (1984); Irrigation & Ind. Dev. Corp. v. Indag S.A., 37 NY2d 522 (1975). Here, neither party is domiciled in New York, as Rakaez is a Saudi Arabian company and Fransabank is a Lebanese bank.The subject agreement is governed by Lebanese law, and the burden to interpret foreign banking law, particularly in a case alleging one single transfer in New York that took place eight years prior to the commencement of this action, is an important factor in dismissing the amended complaint for forum non conveniens. See Barzilai v Museum, 225 AD3d 534 (1st Dept. 2024).

(C) CPLR 3211(a)(7)

The amended complaint is also subject to dismissal pursuant to CPLR 3211(a)(7), as Rakaez fails to allege the existence of a contract between AM Bank and Fransabank, with Rakaez as a beneficiary. When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-52 (2002). "A party alleging a breach of contract must demonstrate the existence of a contract reflecting the terms and conditions of their purported agreement." Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 181-82 (2011), quoting Am.-Eur. Art Assoc., Inc. v Trend Galleries, Inc., 227 AD2d 170 (1st Dept. 1996). Here, the amended complaint fails to identify any executed contract between AM Bank and Fransabank, with Rakaez as a beneficiary, as the complaint does not plead the pertinent terms of this purported arrangement, beyond SWIFT communications between the two banks. And no contract is submitted.

Rakaez's second cause of action for unjust enrichment is also subject to dismissal under CPLR 3211(a)(7), as the amended complaint alleges that Fransabank returned the Cash Margin and did not keep it. Thus, Fransabank was never "enriched", unjustly or otherwise. See Georgia Malone & Co. v Rieder, 19 NY3d 511 (2012); Alpert v M.R. Beal & Co., 162 AD3d 491 (1st Dept. 2018).

(D) CPLR 3211(a)(10)

Under CPLR 3211(a)(10), a motion to dismiss may be made on the ground that "the court should not proceed in the absence of a person who should be a party." CLPR 1003 provides in pertinent part: "Nonjoinder of a party who should be joined under section 1001 is a ground for dismissal of an action without prejudice unless the court allows the action to proceed without that party under the provisions of that section." Under CPLR 1001(a), a party ought to be joined to an action if "complete relief is to be accorded between the persons who are parties to the action". This is especially true when the necessary party "controls the proceeds" in controversy. See Oleh v. Anlovi Corp., 106 AD3d 445 (1st Dept. 2013).

Here, Rakaez fails to join AM Bank as a necessary party to this action. Rakaez alleges that Fransabank returned the Cash Margin to Rakaez's account at AM Bank in Lebanon. Thus, AM Bank is in possession and control of the Cash Margin, and for Rakaez to obtain complete relief, i.e. return of the Cash Margin to its account in New York, Rakaez must join AM Bank as a necessary party to this action.

IV. CONCLUSION

Accordingly, upon the foregoing papers and after oral argument, it is

ORDERED that the defendant's motion to dismiss is granted, and the amended complaint is dismissed in its entirety, and it is further,

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

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

10/10/2024
DATE

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