

Mashreqbank PSC v Ahmed Hamad Al Gosaibi & Brothers Co.

2010 NY Slip Op 33909(U)

July 26, 2010

Sup Ct, New York County

Docket Number: 601650/09

Judge: Richard B. Lowe III

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. RICHARD B. LOWE, II

PART 56

Justice

Mashreqbank

INDEX NO.

601650/09

MOTION DATE

11/20/09

MOTION SEQ. NO.

003

- v -

Ahmed Hamad Al Bosaibi

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

Dated: _____

7/26/10

HON. RICHARD B. LOWE, II

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

-----X
MASHREQBANK PSC,

Plaintiff,

Index No. 601650/09

- against -

Case No. 1

AHMED HAMAD AL GOSAIBI & BROTHERS
COMPANY,

Defendant.

-----X
AHMED HAMAD AL GOSAIBI & BROTHERS
COMPANY,

Third-Party Plaintiff

Index No. 590643/09

- against -

MAAN ABDUL WAHEED AL SANEHA and AWAL
BANK BSC,

Third-Party Defendants.

-----X
MASHREQBANK, PSC,

Plaintiff,

Index No. 602171/2009

- against -

Case No. 2

Yousuf Ahmed Hamad Algosaibi, Abdel Mohsin Ahmed
Hamad Algosaibi, Soud Abdel Aziz Hamad Algosaibi,
Dawod Suliman Ahmad Algosaibi, Waleed Khalid Ahmad
Algosaibi, Abdul Rahman Khalid Ahmed Algosaibi,
Ebtisatm Ahmed Hamad Algosaibi, Samiha Ahmed Hamad
Algosaibi, Entisar Ahmed Hamad Algosaibi, Baheia
Abdullah Hassan Algosaibi, Najat Abdel Aziz Hamad
Algosaibi, Seham Abdel Aziz Hamad Algosaibi, Souad
Abdel Aziz Hamad Algosaibi, Sana Abdel Aziz Hamad

Algozaibi, Sahar Abdel Aziz Hamad Algozaibi, Samah Abdel Aziz Hamad Algozaibi, Wafaa Suliman Hamad Algozaibi, Wesal Suliman Hamad Algozaibi, Yasmeen Mohammed Dyaa Aldeen Konesh, and Dana Khalid Ahmed Algozaibi, Individually and As Partners of Ahmad Hamad Algozaibi & Brothers Company,

Defendants.

-----X

AL AHLI BANK OF KUWAIT K.S.C.,

Plaintiff,

Index No. 602847/09

- against -

Case No. 3

MAAN ABDULWAHED A. AL SANEHA and SAAD TRADING, CONTRACTING & FINANCIAL SERVICES CO.,

Defendants.

-----X

Hon. Richard B. Lowe, III

The following consolidates for determination seven motions in three actions.

Case No. 1, index No. 601650/09: Plaintiff Mashreqbank, PSC moves to dismiss the counterclaims (motion sequence number 003) and to consolidate Case No. 1 with Case No. 2 (motion sequence number 006); Third-party defendant Maan Abdulwahed Al Sanea (Al Sanea) moves to dismiss the third-party complaint (motion sequence number 004) and moves to vacate the deposition notice and stay all discovery pending the resolution of his motion to dismiss (motion sequence number 005).

Case No. 2, index No. 602171/09: Plaintiff Mashreqbank moves to consolidate Case No. 2 with Case No. 1 (motion sequence number 004); Defendants (with the exception of Sana Abdel Aziz Hamad Algozaibi) move to dismiss the complaint (motion sequence number 002);

Defendant Sana Abdel Aziz Hamad Algosaiabi moves to dismiss the complaint (motion sequence number 003).

Case No. 3, index No. 602847/09: Defendants Al Sanea and Saad Trading, Contracting & Financial Services Co. (Saad Trading) move to dismiss the complaint (motion sequence number 002) of plaintiff Al Ahli Bank of Kuwait K.S.C. (Al Ahli Bank).

Part 1: Cases No. 1 and 2 Allegations

Mashreqbank, plaintiff in Cases Nos. 1 and 2, is a bank located in the United Arab Emirates (UAE) with a place of business in New York City. In Case No. 1, defendant is a Saudi Arabian general partnership, Ahmad Hamad Algosaiabi & Brothers Company (AHAB). AHAB is also the third-party plaintiff and Al Sanea, resident and citizen of Saudi Arabia, and Awal Bank, a Saudi bank, are the third-party defendants. In Case No. 2, defendants are the individuals who are AHAB's general partners.

On April 28, 2009, Mashreqbank and AHAB entered into a foreign exchange transaction in which Mashreqbank transferred \$150 million in U.S. dollars to AHAB's New York bank account. AHAB was to wire Mashreqbank the equivalent sum in riyals, the Saudi currency, on May 5, 2009. It is undisputed that AHAB failed to transfer the sum. The International Banking Corporation BSC (TIBC), a subsidiary of AHAB, is located in Bahrain. On May 5, 2009, Mashreqbank and TIBC agreed to a foreign exchange transaction, whereby Mashreqbank transferred \$75 million in U.S. dollars to TIBC's bank account in New York. TIBC was to transfer to Mashreqbank the equivalent amount in riyals on May 11, 2009. TIBC failed to do so.

The complaint in Case No. 1 alleges breach of contract, unjust enrichment and breach of the implied duty of good faith and fair dealing against AHAB. The complaint in Case No. 2

alleges that the general partners of AHAB are liable to Mashreqbank for the debts and obligations of AHAB and TIBC. A separate action that Mashreqbank commenced against TIBC in this court, index No. 601616/09, has been stayed by the US Bankruptcy Court for the Southern District of New York.

In Case No. 1, AHAB asserts counterclaims against Mashreqbank. In its third-party complaint against Al Sanea and Awal Bank, AHAB alleges as follows. Al Sanea owns Awal Bank. AHAB is a conglomerate engaged in real estate development, shipping, and financial services, among other things. Al Sanea was a senior executive of AHAB's financial services unit and he used his position to siphon AHAB's funds. The April 2009 transfer of funds from Mashreqbank to (purportedly) AHAB was not authorized by AHAB, and AHAB knew nothing of the transfer until sued by Mashreqbank. The funds did not go to AHAB, but to Al Sanea, who directed the transaction and forged the signature of AHAB on the contract with Mashreqbank. After Mashreqbank transferred the funds to AHAB's bank in New York, Bank of America, Al Sanea directed that the funds be transferred to an account controlled by him, Awal's account at HSBC in New York. Al Sanea was able to accomplish this fraud by dint of controlling certain AHAB employees in financial services, who answered only to him.

AHAB seeks indemnification from Al Sanea in the event that AHAB is found liable to Mashreqbank. AHAB also charges Al Sanea with breach of fiduciary duty, conversion, unjust enrichment, and fraud. Awal Bank is subject to insolvency proceedings in Bahrain and has obtained an order from a U.S. bankruptcy court staying all U.S. proceedings against it.

Part 2: Case No. 3 Allegations

In Case No. 3, plaintiff Al Ahli Bank, a Kuwaiti bank, sues Saad Trading, a Saudi

Arabian limited partnership, and its managing partner Al Sanea. Pursuant to an agreement with Saad Trading, Al Ahli Bank issued four letters of credit for a total of \$25 million in U.S. dollars. The agreement was that Saad Trading would use the letters of credit to purchase construction and building materials. The beneficiaries on the letters of credit were purportedly sellers of such materials, who were to be paid through their accounts at TIBC in New York. One of AHAB's general partners, Sana Abdel Aziz Hamad Algozaibi, is married to Al Sanea. Her family owns TIBC.

Following Saad Trading's instructions, Al Ahli Bank instructed its bank in New York, Bank of New York Mellon, to transfer the letters of credit proceeds to the bank in New York where TIBC had an account, Bank of America, which was done on January 26, 2009. Then Bank of America arranged for HSBC, in New York, where the Saudi British Bank has an account, to transfer the funds to Saad Trading's account at the Saudi British Bank in Saudi Arabia. The funds thus went to Saad Trading and Al Sanea, not to the beneficiaries on the letters of credit.

Apparently, even if the funds had gone to the beneficiaries, the result would have been the same, in that Saad Trading and Al Sanea would have obtained the funds. Al Ahli Bank maintains that Saad Trading did not purchase any materials, that Saad Trading and Al Sanea own/control the beneficiaries, which have nothing to do with selling any materials, and that the letters of credit were a scam by which Saad Trading and Al Sanea obtained \$25 million. Al Ahli Bank asserts causes of action for breach of contract and fraud.

Part 3: Case No. 2 Motions to Dismiss

In Case No. 2, one of the general partners of AHAB, Sana Abdel Aziz Hamad Algozaibi, moved to dismiss the complaint (motion 002). The movant and Mashreqbank stipulated, as so

ordered by the court on February 14, 2010, to discontinue the action as against her, without prejudice. Hence, motion number 002 is denied as moot. The remaining partners move to dismiss on the basis of lack of personal jurisdiction (motion 003).

Under New York law, where a court has personal long-arm jurisdiction over a general partnership, it has the same over the general partners (*United States Bank Natl. Assn. v Ables & Hall Builders*, 582 F Supp 2d 605, 616 [SD NY 2008]; *Afloat in France, Inc. v Bancroft Cruises Ltd.*, 2003 WL 22400213, *5, 2003 US Dist LEXIS 18703, *14 [SD NY 2003]). CPLR 302 confers jurisdiction over non-resident general partners as a result of the partnership's activity in New York; the general partners need never have entered the forum (*Wichita Fed. Sav. and Loan Assn. v Comark*, 586 F Supp 940, 943 [SD NY 1984], *affd* 810 F2d 1161 [2d Cir 1986]).

By bringing its third-party action, AHAB submits to the jurisdiction of this court. As there is jurisdiction over AHAB, there is also jurisdiction over AHAB's partners. Whether the doctrine of forum non conveniens (FNC) requires dismissal of the action against the partners is discussed in part 4 (b).

Part 4: Cases No. 1 and 3 Motions to Dismiss

Al Sanea and Saad Trading move to dismiss Case No. 3 (motion 002) and Al Sanea moves to dismiss the third-party complaint in Case No. 1 (motion 004) on the basis of lack of personal jurisdiction and, alternatively, on the basis of FNC. Al Ahli Bank, plaintiff in Case No. 3 and AHAB, third-party plaintiff in Case No. 1, oppose the motions.

The CFO of Saad Trading states the following in his affidavit. Saad Trading is not registered to do business in New York. It does not maintain offices or employees here, does not own or lease property here, and does not solicit or advertise for business here. At one time, Saad

Trading held an account with the Bank of America. Though the affiant is not aware of whether the account is still active, he states that it was never used in relation to any transaction with Al Ahli Bank.

Al Sanea, a citizen and resident of Saudi Arabia, states that he has never lived in New York, does not have a residence here, and does not own or lease any real estate here. He has not been to New York since 2000 and he does not currently hold a visa authorizing him to enter the U.S. Al Sanea has never registered to do business in the State of New York, nor does he maintain any offices here. Al Sanea has never designated an agent to accept service of process in New York on his behalf, nor has he filed tax returns in New York State. The only bank account he ever personally maintained in New York was a joint checking account and credit card with his wife, arranged through Citibank in Geneva as a dollar account. There are currently no funds on deposit in the account and the credit card has been closed. Al Sanea does not personally maintain a correspondent bank account for any purpose in New York or anywhere in the U.S.

Al Sanea explains that his work with AHAB was conducted in Saudi Arabia, and that in the course of his role at AHAB, he did not travel to New York, nor did he communicate with any party in New York in connection with any of the events alleged in the third-party complaint. It is Al Sanea's understanding that all of AHAB's partners are Saudi citizens, one of whom resides in Dubai and the rest of whom reside in Saudi Arabia. Al Sanea believes that AHAB is not registered to do business in New York, and maintains no offices or real property anywhere in the U.S.

Al Sanea contends that matters between AHAB and himself are governed by Saudi law. AHAB has not brought a civil claim against Al Sanea in the courts of Saudi Arabia, but it did

make a similar fraud complaint against him to the Saudi authorities in May 2009, as a result of which a government committee was formed to investigate the allegations against Al Sanea. The committee has held several hearings. Al Sanea further notes that, in addition to the instant third-party action, AHAB has commenced, sought to commence and will commence proceedings against him in seven countries, making materially identical allegations in all of those proceedings.

Al Sanea argues that the acts in question in the third-party action took place in Saudi Arabia and, to his knowledge, all of AHAB's witnesses, except for its professional advisers, and all documentary evidence are in Saudi Arabia. Al Sanea argues that litigation in New York would be a substantial hardship on him because many, if not all, of the witnesses speak Arabic as a first language and many of the relevant documents are in Arabic. Al Sanea and all but one of AHAB's partners reside in Saudi Arabia. Al-Sanea believes that neither he nor any of the AHAB partners (except for the Dubai resident) could travel to New York for discovery or trial at this time because the Saudi government has restricted them from traveling outside of Saudi Arabia while the Saudi committee considers the matter of his alleged fraud. He contends that, even if the restriction is lifted in the future, there is no guaranty that any of them could obtain visas to travel to New York. Al Sanea maintains that, even if they could obtain visas, it would be enormously expensive for all of the parties and witnesses to travel to New York and to translate the proceedings between Arabic and English. He asserts that the cost and burden of conducting these proceedings in Saudi courts in Arabic, where they live, is negligible compared to the cost and burden of litigation in New York.

AHAB argues that most of the key witnesses to Al Sanea's fraudulent conduct with

respect to the currency exchanges are outside of Saudi Arabia, in various locales around the world. AHAB asserts that all of the main witnesses speak fluent English and all of the most important documents are in English. AHAB also states that New York's procedures provide better access to the sources of evidence that will expose Al Sanea's fraud. AHAB further maintains that New York has a special interest in this dispute because New York banks were used in relation to the controversy, and the tortious conversion occurred in New York.

AHAB contends that the scheme by which Al Sanea usurped its name and credit was complex and multifaceted, beginning in Saudi Arabia and then becoming global in its reach. According to AHAB, Al Sanea used AHAB's good name and credit to borrow money to finance his own separate business empire. AHAB maintains that, when Al Sanea's scheme collapsed, AHAB was left to respond to 118 banks worldwide, including Mashreqbank, which sued AHAB in New York.

Al Sanea states that the letters of credit were negotiated and consummated in Kuwait and Saudi Arabia, and that the beneficiaries were to be paid through TIBC, a Bahrain bank. Any part that he played in transferring money to and from New York banks was directed from Saudi Arabia or Kuwait. In opposition, Al Ahli Bank contends that when Al Sanea and Saad Trading asked for the letters of credit to be paid in U.S. dollars, they knew that plaintiff would be required to use its New York account. Al Ahli Bank states that key witnesses and documents related to the transfers are located in New York at the different banks engaged in transferring the proceeds.

Part 4 (a): Legal Discussion of Long-arm Jurisdiction

First, the jurisdictional question will be examined. Under CPLR 302 (a), 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 (2) commits a tortious act in the state. To determine whether a defendant has transacted business in New York, courts examine the totality of the circumstances (*Liberatore v Calvino*, 293 AD2d 217, 220 [1st Dept 2002]) and the quality rather than the quantity of the defendant's contacts with New York (*International Customs Assoc., Inc. v Ford Motor Co.*, 893 F Supp 1251, 1259 [SD NY 1995], *affd* 201 F3d 431 [2d Cir 1999]). Indeed, "proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]). The court may exercise jurisdiction over persons who, from out of state, use electronic and telephonic means to project themselves into New York to conduct business transactions (*Deutsche Bank Sec., Inc. v Montana Bd. of Investments*, 7 NY3d 65, 71 [2006]).

Likewise, where jurisdiction is based on committing a tort in New York, under CPLR 302 (a) (2), the defendant need not be physically present in order to be subject to personal jurisdiction (*Banco Nacional Ultramarino, S.A. v Chan*, 169 Misc 2d 182, 188 [Sup Ct, NY County 1996], *affd* 240 AD2d 253 [1st Dept 1997]). For instance, New York had jurisdiction over a defendant that stole money in Nigeria by transferring it to a bank in New York (*id.*). The plaintiff alleged that the defendant directed tortious activity in New York from outside New York (*id.*; *see also Davidoff v Davidoff*, 12 Misc 3d 1162[A], 2006 NY Slip Op 51002[U], *9 [Sup Ct, NY County 2006]; *Cerberus Capital Mgt., L.P. v Snelling & Snelling, Inc.*, 12 Misc 3d 1187[A], 2005 NY Slip Op 52312[U], *18 [Sup Ct, NY County 2005]; *Morgenthau v A.J. Travis Ltd.*, 184 Misc 2d

835, 843 [Sup Ct, NY County 2000]). “It would be a travesty to permit the use of our institutions to channel stolen funds ... by those who impudently claim they are beyond our borders! It would be a gross violation of common sense and reality to shelter such activities” (*Banco Nacional*, 169 Misc 2d at 188-89).

Assuming that Al Sanea acted legitimately, the court finds that he transacted business in New York by first causing Mashreqbank to transfer funds from overseas to New York and then by causing the funds to be transferred to other accounts in New York that he controlled. AHAB’s claims against Al Sanea arise from these transfers. Similarly, Al Ahli Bank sufficiently alleges that Al Sanea and Saad Trading transacted business in New York, by causing funds to be transferred from overseas to New York and then again from New York to overseas.

On the other hand, assuming that Al Sanea acted wrongly, the same conduct constitutes tortious conduct under CPLR 302 (a) (2) (*see Gulf Coast Dev. Group v Lebror*, 2003 WL 22871914, *4, 2003 US Dist LEXIS 21740, *12 [SD NY 2003]; *Correspondent Servs. Corp. v J.V.W. Inv. Ltd.*, 120 F Supp 2d 401, 405 [SD NY 2000] [same activity constituted tort and transaction of business]). The allegation that Al Sanea and Saad Trading used New York banks to fraudulently gain funds for their own benefit sufficiently states that they committed a tort in this forum.

In addition, the exercise of long-arm jurisdiction over Al Sanea and Saad Trading comports with due process notions of fair play and substantial justice (*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214, 216 [2000]). Where a non-domiciliary avails itself of the benefits of the forum, such that it can be said that it has minimum contacts with the forum, and “thus should reasonably expect to defend its actions there, due process is not offended if that party is subjected

to jurisdiction even if not ‘present’ in that State” (*Kreutter*, 71 NY2d at 466). By using banks in New York, Al Sanea and Saad Trading forged ties with New York sufficient to support an inference that they purposefully availed themselves of the privilege of conducting commercial activities in New York so as to render themselves liable to suit here (*see World-Wide Volkswagen Corp. v Woodson*, 444 US 286, 297 [1980]).

Al Sanea and Saad Trading raise policy reasons for not basing jurisdiction on the New York transfers. The transfers were effectuated through an electronic funds transfer system known as the Clearing House Interbank Payment System or CHIPS.¹ CHIPS handles 95% of all payments in U.S. dollars between countries around the world (Matthew Bender, 1-3 The Law of Electronic Funds Transfers § 3.03 [LEXIS cite], text corresponding to n 4). According to defendants, since the contracts in these actions called for payment or currency exchanges in U.S. dollars, the parties had no choice but to use CHIPS, which meant using banks in this country. If jurisdiction were found in this case, defendants argue, every transaction involving CHIPS would automatically subject the parties to the jurisdiction of a state in the U.S.

Without determining policy issues or setting down a rule applicable to all CHIPS transfers, the court finds that, in these particular actions, it may appropriately exercise jurisdiction over these particular persons, who made New York the epicenter of several large scale financial transfers. Whether their purposes were legitimate or fraudulent, having made the choice to use New York banks, they may not escape the imposition of jurisdiction.

Part 4 (b): Legal Discussion of FNC

Once jurisdiction is found, the court may turn to FNC considerations (*see Edelman v*

¹ CHIPS rules: <http://www.chips.org/financials/operations/033785.php>

Taittinger, S.A., 298 AD2d 301, 303 [1st Dept 2002]). In Case No. 1, Al Sanea moves to dismiss (motion 004) and in Case No. 3, Al Sanea and Saad Trading move to dismiss (motion 002) on the basis of FNC. Although the individual partners in Case No. 2 seek dismissal for lack of jurisdiction and not on the basis of FNC, the arguments made by Al Sanea apply to the partners as well as to himself. The court will consider Mashreqbank's action against the partners in the light of FNC.

A leading Court of Appeals case describing and discussing the FNC doctrine is *Islamic Republic of Iran v Pahlavi* (62 NY2d 474 [1984], *cert denied* 469 US 1108 [1985]). The decision as to whether to apply the doctrine is within the court's discretion (*id.* at 478). "The common-law doctrine of [FNC], also articulated in CPLR 327, permits a court to stay or dismiss such actions where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere" (*id.* at 478-79). In seeking dismissal on the basis of FNC, it is the defendant's burden to demonstrate relevant factors that weigh against accepting the action (*id.* at 479).

The factors to be weighed in determining whether to retain an action in New York include the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit (*id.*). In addition, the court is allowed to consider that both sides to the action are nonresidents and that the activities out of which the cause of action arose occurred primarily in a foreign jurisdiction (*id.*). The court, after considering and balancing the various competing factors, determines in the exercise of its sound discretion whether to retain jurisdiction or not (*id.*). "The great advantage of the rule of [FNC] is its flexibility based upon the facts and circumstances of each case" (*id.* at

479).

Al Sanea argues that all of the factors set forth in *Islamic Republic of Iran v Pahlavi* weigh in favor of dismissal of the complaints, while AHAB and Al Ahli Bank argue that the FNC factors favor a New York forum. This court finds that the factors under consideration weigh in favor of granting Al Sanea's motion to dismiss the complaints on a FNC basis.

Al Sanea argues on behalf of himself and Saad Trading, and the individual partners of AHAB, who are defendants in Case No. 2. The travel restrictions in place in Saudi Arabia mean that Al Sanea and all but one of the AHAB partners are currently unable to travel to the U.S. The large majority of witnesses are located in Bahrain, UAE, Kuwait, or Saudi Arabia. Although the alleged fraud may have taken place with use of banks in New York, the alleged fraudulent activities occurred in Saudi Arabia and Kuwait, and the issue as to whether or not Al Sanea was authorized to do what he did are questions to be resolved based on evidence and documents in those nations. Neither AHAB, nor Al Sanea, nor Saad Trading, nor Al Ahli Bank, is a resident of New York or the U.S. Furthermore, several alternative locations are available to resolve the disputes, and, indeed, AHAB has already commenced a number of actions against Al Sanea in various countries. These factors all favor granting the FNC motion.

Furthermore, as AHAB is a Saudi partnership, the law of that nation governs relations between Al Sanea and AHAB, and "the need to apply foreign law is an appropriate concern on a forum non conveniens motion" (*Fox v Fusco*, 4 AD3d 313, 313 [1st Dept 2004]). The letters of credit agreements with Al Ahli Bank state that they are governed by Kuwaiti law and provide for the jurisdiction of the Kuwait courts to settle any legal dispute arising out of the transactions. The agreements with Mashreqbank regarding the currency exchanges state that they are governed

by UAE law and provide for the jurisdiction of UAE courts. In considering the relevant factors, this court concludes that New York is not the appropriate forum for these actions (*see Alberta & Orient Glycol Co., Ltd. v Factory Mut. Ins. Co.*, 49 AD3d 276, 277 [1st Dept 2008])

The viewpoint of Mashreqbank, the plaintiff that commenced the actions against AHAB and the individual partners, is also an important factor in the FNC determination. Mashreqbank states that it commenced these litigations because, like scores of other financial institutions around the world, it is owed millions of dollars by AHAB and its partners. Mashreqbank asserts that, although the FNC issue principally involves AHAB and Al Sanea, and although New York is a proper forum for its claims against AHAB and the AHAB partners, it would not object to litigating its disputes with them in the UAE if this court were to dismiss the third-party complaint on the grounds of FNC. Mashreqbank asserts that UAE law would govern both Mashreqbank's breach of contract claim and AHAB's counterclaims.

Mashreqbank asserts that the UAE would be an adequate forum for adjudicating its claims. On July 8, 2009, following the commencement of the litigation in New York, Mashreqbank filed a breach of contract case in the UAE against AHAB and its partners, seeking to recover payment on the totality of AHAB's alleged unpaid obligations to Mashreqbank, in the amount of approximately \$400 million. This sum includes, but is not limited to, the amounts allegedly due on the foreign exchange transactions at issue in the actions against AHAB and the partners. Mashreqbank states that, at the time it commenced the instant litigations in this court, it expected AHAB and its partners to have assets in New York and the U.S. Mashreqbank explains that, by the time it began its UAE action, it was apparent that AHAB did not have sufficient assets in New York to satisfy a judgment in this case. Mashreqbank states that it has been unable

to locate any assets of AHAB or its partners in New York, which is another reason why it would not object to litigating the claims in the UAE if Al Sanea's motion to dismiss on FNC grounds is granted.

Generally, a plaintiff's choice of forum will not be disturbed on the ground of FNC unless the balance strongly favors the party seeking dismissal on such grounds (*Bata v Bata*, 304 NY 51, 56 [1952]; *Highgate Pictures v De Paul*, 153 AD2d 126, 129 [1st Dept 1990]). That principal is inapplicable to the instant actions, however, because Mashreqbank does not object to dismissal of the actions on that basis, and to litigating its claims in the UAE. Thus, the only party opposing the dismissal of the Mashreqbank actions is AHAB, which did not commence either of the primary actions herein.

In opposition to Al Sanea's motion, AHAB argues that its defense and counterclaims assert that Mashreqbank was complicit in Al Sanea's fraud, such that the same core facts must be litigated in both the first-party and third-party claims. AHAB maintains that requiring it to litigate the two sets of claims in the courts of two different jurisdictions would be inefficient and unjust. AHAB asserts that the interests of justice are best served by affording parties full relief in a single forum. Although those arguments were set forth in opposition to Al Sanea's FNC arguments, now that the court has granted the FNC motion as to the third-party action, the same factors weigh in favor of dismissing the primary action on a FNC basis as well.

None of the scores of witnesses AHAB, Mashreqbank, and Al Sanea have identified reside in New York or in the U.S. Furthermore, Mashreqbank has commenced litigation in the UAE that includes and encompasses the alleged damages and breaches set forth in the two instant primary actions. The risk of duplication of effort, as well as of inconsistent rulings by courts of

different jurisdictions, are also factors to be considered by the court in making its determination (*see World Point Trading PTE. v Credito Italiano*, 225 AD2d 153, 161 [1st Dept 1996]).

Thus, in weighing and considering the factors, this court determines that these actions are better determined in another forum (*see Silver v Great Am. Ins. Co.*, 29 NY2d 356, 360 [1972]). The UAE is the more appropriate forum for determination of the primary actions, and they will be decided in the case that Mashreqbank has already commenced there. AHAB can decide whether it prefers to bring its third-party action in the UAE as well, or to seek redress in Saudi Arabia.

As for its action against Al Sanea and Saad Trading, Al Ahli Bank argues that the employees of the New York banks are located in New York and that they will be needed to testify regarding the transfers. However, the orders for the transfers, allegedly given by Al Sanea or Saad Trading, were made in Saudi Arabia and transmitted to New York from there. The funds eventually came to rest in a Saudi bank and into the hands of Al Sanea and Saad Trading. The beneficiaries named on the letters of credit are Saudi entities. From these facts, the court concludes that most of the witnesses to these transactions are in Saudi Arabia or Kuwait, where Al Ahli Bank is resident. The same considerations that apply to the other actions lead the court to conclude that New York is not an appropriate forum for Al Ahli Bank's case.

Part 5: Conclusion

The motions are disposed of in the following manner.

1. Case No. 1, index No. 601650/09: It is

ORDERED that motion sequence number 003 by plaintiff Mashreqbank, PSC to dismiss the counterclaims is denied as moot; and it is further

ORDERED that motion sequence number 004 by third-party defendant Maan Abdulwahed Al Sanea to dismiss the third-party complaint as against himself and the other defendant Awal Bank BSC is granted and the complaint is dismissed on the ground of forum non conveniens as to both defendants, and the Clerk of the Court is directed to enter judgment accordingly in favor of defendants; and it is further

ORDERED that motion sequence number 005 by third-party defendant Maan Abdulwahed Al Sanea to vacate the deposition notice and stay all discovery pending the resolution of his motion to dismiss is denied as moot; and it is further

ORDERED that motion sequence number 006 by plaintiff Mashreqbank PSC to consolidate Case No. 1 with Case No. 2, index No. 602171/09, is denied as moot.

2. Case No. 2, index No. 602171/09: It is

ORDERED that motion sequence number 002 by defendants, except for defendant Sana Abdel Aziz Hamad Algosaibi, to dismiss the complaint is granted and the complaint is dismissed as against said defendants on the ground of forum non conveniens, and the Clerk of the Court is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that motion sequence number 003 by defendant Sana Abdel Aziz Hamad Algosaibi to dismiss the complaint is denied as moot, because the action was discontinued without prejudice as against her as so ordered by this court on February 14, 2010; and it is further

ORDERED that motion sequence number 004 by plaintiff Mashreqbank PSC to consolidate Case No. 1 with Case No. 2 is denied as moot.

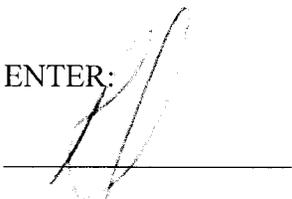
3. Case No. 3, index No. 602847/09: It is

ORDERED that motion sequence number 002 by defendants Al Sanea and Saad Trading, Contracting & Financial Services Co. to dismiss the complaint is granted and the complaint is dismissed on the ground of forum non conveniens, and the Clerk of the Court is directed to enter judgment accordingly in favor of defendants.

No costs.

Dated: July 26, 2010

ENTER:



J.S.C.