

Mashreqbank PSC v Ahmed Hamad Al Gosaibi & Bros. Co.
2012 NY Slip Op 06271 [101 AD3d 1]
September 25, 2012
Catterson, J.
Appellate Division, First Department
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
As corrected through Wednesday, January 16, 2013

[*1]

Mashreqbank PSC, Respondent, v Ahmed Hamad Al Gosaibi & Brothers Company, Appellant. Ahmed Hamad Al Gosaibi & Brothers Company, Third-Party Plaintiff-Appellant, v Maan Abdul Waheed Al Sanea, Third-Party Defendant-Respondent, et al., Third-Party Defendant.
--

First Department, September 25, 2012

APPEARANCES OF COUNSEL

Lewis Baach PLLC, New York City (*Bruce R. Grace* and *Eric L. Lewis* of counsel), for appellant.

Cleary Gottlieb Steen & Hamilton LLP, New York City (*Carmin D. Boccuzzi*, *David E. Brodsky*, *Lisa M. Gouldy* and *Liana Roza Vitale* of counsel), for Mashreqbank PSC, respondent.

Gibson, Dunn & Crutcher LLP, New York City (*Robert F. Serio* and *Gabriel Herrmann* of counsel), for Maan Abdul Waheed Al Sanea, respondent.

{**101 AD3d at 3} OPINION OF THE COURT

Catterson, J.

In these dual actions arising from an alleged Ponzi scheme of global proportions, precedent mandates reversal of the motion court's sua sponte dismissal of the main action on a forum non conveniens ground. Moreover, we find that dismissal of the related third-party action, on notice of motion, on a forum non {**101 AD3d at 4} conveniens ground, was an improvident exercise of the

court's discretion. New York has a compelling interest in adjudicating controversies that implicate its preeminent position in the international banking system, and in any event, the third-party defendant failed to demonstrate that New York is an inconvenient forum.

Plaintiff Mashreqbank PSC (hereinafter referred to as Mashreqbank) is a United Arab Emirates (hereinafter referred to as UAE) bank with its principal place of business located in New York. Mashreqbank filed the instant action against defendant Ahmed Hamad Al Gosaibi & Brothers Company (hereinafter referred to as AHAB) seeking to recover \$150 million in connection with a series of financial transactions executed in New York. AHAB is a Saudi Arabian general partnership with a principal place of business in Saudi Arabia.

Mashreqbank alleges that it wired the \$150 million to an account at the Bank of America in New York as part of a currency exchange transaction with AHAB. Mashreqbank further alleges that AHAB failed to transfer the Saudi riyals contemplated by the currency exchange. Instead, the funds in the Bank of America account were transferred to an HSBC account located in New York and controlled by third-party defendant Maan Abdul Waheed Al Sanea (hereinafter referred to as Al Sanea). The HSBC account was in the name of Awal Bank BSC (hereinafter referred to as Awal). Awal is a bank established by Al Sanea in Bahrain.

Mashreqbank filed the instant action seeking damages for breach of contract for the currency exchanges that took place in New York through Mashreqbank's bank in New York to AHAB's bank in New York. Additionally, Mashreqbank filed an order of attachment against AHAB's property in New York including the funds contained in the AHAB Bank of America [*2] account, which AHAB alleges was controlled by Al Sanea. At the time of the attachment, Al Sanea had already transferred all of the money in question through the HSBC account in New York to institutions outside of the United States.

AHAB filed its answer and a third-party action against Al Sanea and Awal alleging that both third-party defendants engaged in an international Ponzi scheme using AHAB's accounts without AHAB's knowledge and/or consent. Thus, AHAB claimed that any liability that AHAB might have to Mashreqbank was solely due to Al Sanea's theft of the money through the currency exchange transactions that took place in New York. {**101 AD3d at 5} AHAB later counterclaimed against Mashreqbank asserting that Mashreqbank aided and abetted Al Sanea in the perpetration of Al Sanea's Ponzi scheme.

Al Sanea moved to dismiss the third-party complaint on the ground of forum non conveniens

and lack of personal jurisdiction. ^[FN*] In support of his motion, insofar as relevant, Al Sanea averred as follows: that he is a Saudi citizen and resident; that he holds a 47% interest in defendant Awal Bank, which he also controls; that AHAB is a Saudi partnership; and that the transaction would be governed by Saudi law. He further averred that at least one of the underlying transactional documents selected a UAE forum; that all of AHAB's witnesses, except its professional advisers, and all its documents are in Saudi Arabia; and that both translation and travel would be expensive because many, if not all, of the witnesses speak Arabic as a first language and many of the documents are in Arabic. Al Sanea also maintained that legal restrictions would prevent most of the witnesses from traveling to New York.

Al Sanea further stated that AHAB made a fraud claim to Saudi authorities and that there are pending criminal and civil proceedings in Bahrain, the UAE, the Cayman Islands, and the United Kingdom. Al Sanea also submitted the affidavit of an expert on Saudi law who opined that Saudi Arabia is capable of adjudicating this type of commercial dispute and could hear the [*3] matter through its Board of Grievances. The expert further opined that the ad hoc committee that was formed can investigate and resolve the dispute.

In opposition, Mashreqbank submitted a list indicating that most of the relevant documents are in English. The former general manager of the Money Exchange, the entity involved in the subject transaction, averred that the employees with knowledge of the transaction speak English fluently, and reside in England, {**101 AD3d at 6} Bahrain, Saudi Arabia, India, Jordan and Canada. He further stated that the documents located in Saudi Arabia are available electronically.

Mashreqbank also submitted the affidavit of the Saudi lawyer who had represented Mashreqbank before the Saudi special committee. He disagreed with Al Sanea's expert about the ad hoc committee's role, averring that it lacks the power to adjudicate the dispute between the parties. Mashreqbank's expert in Saudi law opined that differences between New York and Saudi law would limit access to documents and testimony. He further testified that, although the Saudi Board of Grievances can adjudicate this dispute, there could be long delays and uncertainty over whether the Board would exercise jurisdiction.

In reply, Al Sanea identified witnesses who do not reside in New York. He noted that none of the witnesses identified in Mashreqbank's and AHAB's discovery responses reside in New York, and only three reside in countries subject to the Hague Convention rules on taking evidence abroad in commercial matters. He further noted that the amount Mashreqbank seeks from AHAB in this action is encompassed in Mashreqbank's action against AHAB in the UAE.

The motion court dismissed the third-party action, finding that the factors in *Islamic Republic of Iran v Pahlavi* (62 NY2d 474 [1984], *cert denied* 469 US 1108 [1985]) weighed in favor of dismissal on the ground of forum non conveniens. Having found that the relevant factors warrant dismissal of the third-party action, the court sua sponte dismissed the main action. For the reasons set forth below, this was error.

In *VSL Corp. v Dunes Hotels & Casinos* (70 NY2d 948 [1988]), the Court of Appeals reversed this Court's sua sponte dismissal of an action concerning construction in Las Vegas. The dispute was between California and Nevada corporations. A New York corporation provided a financial guarantee, and resolution of the dispute required an interpretation of Nevada law. The Court stated that "[u]nder CPLR 327 (a) a court may stay or dismiss an action in whole or in part on forum non conveniens grounds only upon the motion of a party; a court does not have the authority to invoke the doctrine on its own motion." (70 NY2d at 949.)

We have consistently adhered to the Court of Appeals admonition after *VSL Corp.* In *Todtman, Young, Tunick, Nachamie, Hendler, Spizz & Drogin v Richardson* (231 AD2d 1 [1st Dept 1997]), we reversed Supreme Court's sua sponte forum non conveniens {**101 AD3d at 7} dismissal: "A court does not have the power to invoke the doctrine of forum non conveniens on its own." (231 AD2d at 5 [citing *VSL Corp.*]; *see Matter of Bernz (Widschi)*, 139 AD2d 444 [1st Dept 1988].)

Al Sanea's reliance on *Imperial Imports Co. v Neu & Sons* (161 AD2d 411 [1st Dept 1990]), to controvert the plain holdings of *VSL Corp.*, *Todtman, Young*, [*4] and *Bernz*, is misplaced. In *Imperial Imports*, third-party defendant Hanover Warehouses, a New Jersey corporation, moved to dismiss the entire New York action. This Court, relying specifically on the Court of Appeals holding in *VSL Corp.*, again ruled that "[p]ursuant to CPLR 327 (a)[,] a court may stay or dismiss an action in whole or in part on forum non conveniens grounds upon the motion of a party." (161 AD2d at 412.) We then granted the motion of the third-party defendant in part by severing the third-party action. Of course, in the instant case, it is uncontroverted that Al Sanea made no such motion to dismiss the entire case. Al Sanea also relies on *Shiboleth v Yerushalmi* (268 AD2d 300 [1st Dept 2000]), but once again, the case supports AHAB's position. In *Shiboleth*, one of the two third-party defendants moved to dismiss the entire third-party complaint. This Court affirmed Supreme Court's dismissal of just the third-party action under CPLR 327 (a). Unlike the instant case, the dismissal was not sua sponte.

The dissent's rationale is based upon the incorrect basic premise that dismissal of the main

action on a forum non conveniens ground was proper because "the third-party defendant moved to dismiss the third-party complaint on forum non conveniens grounds" and the "third-party complaint, counterclaims and defense to the complaint are admittedly intertwined" with the main action. However, no authority is cited for that proposition and, as discussed above, it runs counter to the precedent of this Department and the Court of Appeals.

Furthermore, Al Sanea distorts the record of the proceeding below. Al Sanea asserts, and the dissent accepts the assertion, that the motion court invited submissions for dismissal of the entire case. This is simply not true. While the motion court expressed reservations concerning whether the entire case "belong[ed] here," the court only scheduled briefing for Al Sanea's motion to dismiss the third-party action. Mashreqbank did not participate in that initial briefing on Al Sanea's motion because, as Mashreqbank's counsel stated, "[N]o one ha[d] made a forum non [conveniens] motion against my client {**101 AD3d at 8} Mashreqbank." Despite what Mashreqbank may have ultimately stated to the motion court at oral argument, when Mashreqbank finally briefed the forum non conveniens question with regard to Al Sanea's motion, Mashreqbank argued against dismissal of the main action. The dissent's view, that because Mashreqbank conceded that the UAE "would be an adequate forum" Mashreqbank necessarily advocated for a forum non conveniens dismissal of its own case, is similarly without support in the record. Of course, Mashreqbank, as plaintiff in the main action, could have moved the court to withdraw the action in its entirety. Mashreqbank, however, continued to argue that New York was the appropriate forum.

The dissent's reliance on our decision in *Banco do Estado de Sao Paulo v Mendes Jr. Intl. Co.* (249 AD2d 137, 139 [1st Dept 1998]) is also misplaced. In *Banco do Estado de Sao Paulo*, we acknowledged that the motion was technically denominated as one for summary judgment. However, both plaintiff and defendants in that motion fully briefed the forum non conveniens issue as a "clearly articulated motif" of the motion. (*Id.*) There simply is no indication that we raised the question sua sponte. Indeed, we explicitly recognized in *Banco do Estado de Sao Paulo* that our holding in *Todtman, Young* would have precluded such sua sponte application of forum non conveniens. [*5]

Moreover, it is clear that the motion court improvidently exercised its discretion in dismissing the third-party action on forum non conveniens grounds. In *Islamic Republic of Iran v Pahlavi* (62 NY2d 474 [1984], *supra*), the Court of Appeals set out the factors to be considered in a forum non conveniens dismissal. These factors, discussed in seriatim below, support reinstatement of the complaints.

The *Pahlavi* Court began with the premise that, "[t]he burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation." (62 NY2d at 479, citing, inter alia, *Piper Aircraft Co. v Reyno*, 454 US 235 [1981].) Al Sanea argues, inter alia, that all of the transactions at issue occurred outside of New York. Thus, argues Al Sanea, there is no real nexus to the New York banking system, a factor militating in favor of dismissal.

This argument fails for two basic reasons. First, it is beyond cavil that New York has a compelling interest in the protection of the native banking system from misfeasance or malfeasance. The Court of Appeals holding in *J. Zeevi & Sons v Grindlays{**101 AD3d at 9} Bank (Uganda)* (37 NY2d 220 [1975], *cert denied* 423 US 866 [1975]), could not be clearer in this regard. In *Zeevi*, the Court was faced with a dispute over a letter of credit repudiated at Citibank in New York. The plaintiff, an Israeli company, deposited funds with the defendant Ugandan bank which issued the letter of credit. At the direction of the Ugandan government and pursuant to Ugandan law, the defendant refused to honor the letter of credit and communicated that repudiation to Citibank in New York.

The Court of Appeals held that, inter alia:

"New York has an overriding and paramount interest in the outcome of this litigation. It is a financial capital of the world, serving as an international clearinghouse and market place for a plethora of international transactions, such as to be so recognized by our decisional law (*Intercontinental Planning v Daystrom, Inc.*, [24 NY2d 372, 383-384 (1969)]). A vast amount of international letter of credit business is customarily handled by certain New York banks whose facilities and foreign connections are particularly adaptable to this field of operation (34 NY Jur, Letters of Credit, § 10, p 427). The parties, by listing United States dollars as the form of payment, impliedly accepted these facts and set up procedures to implement their trust in our policies. In order to maintain its pre-eminent financial position, it is important that the justified expectations of the parties to the contract be protected (cf. *Kossick v United Fruit Co.*, 365 US 731, 741 [1961]). Since New York has the greatest interest and is most intimately concerned with the outcome of this litigation, its laws should be accorded paramount control over the legal issues presented (cf. *Auten v Auten*, 308 NY 155, 161 [1954])." (37 NY2d at 227.)

The parallels to the instant dispute are striking. In *Zeevi*, both parties were foreign nationals, with one being a foreign chartered bank. The letter of credit transaction in *Zeevi* was [*6]one of a vast amount of letter of credit transactions in New York banks that happen every day. The foreign exchange laws of Uganda were central to the dispute.

In the instant case, the parties to the main action and third-party action are foreign nationals or a foreign chartered financial institution. The currency swaps utilizing the federal {**101 AD3d at 10} reserve bank in New York and various New York corresponding banks are little different from the letter of credit transactions in *Zeevi*. That there was a currency swap versus the negotiation of a letter of credit drawn against funds in a foreign bank is a distinction immaterial to the *Zeevi* Court's holding.

The second reason that Al Sanea's argument on nexus to New York fails is that Al Sanea consistently recasts the allegations in both the main complaint and the third-party complaint to suit this forum non conveniens argument. The dissent appears to suffer from the same error. AHAB framed the allegations in the third-party complaint as a scheme whereby Al Sanea committed fraud, forgery and improper use of AHAB's credit to borrow money solely for Al Sanea's benefit. AHAB also alleges that Al Sanea used AHAB's New York bank accounts to further this scheme and then stole the money from these New York accounts.

In his motion to dismiss that third-party complaint, Al Sanea consistently characterizes the dispute as one over Al Sanea's authority to act on behalf of AHAB; a dispute that Al Sanea contends is governed by Saudi law. Indeed, the motion court appears to have accepted Al Sanea's premise in ruling on the motion to dismiss. The motion court specifically pondered "whether or not Mr. Al Sanea was authorized to do what he did."

This constituted fundamental error by the motion court. In *Ehrlich-Bober & Co. v University of Houston* (49 NY2d 574 [1980]), the Court of Appeals reversed this Court's dismissal on forum non conveniens grounds of an action between a New York securities dealer and an agency of the State of Texas. The ruling in *Ehrlich-Bober* is instructive in several aspects. Most importantly, the Court was unequivocal in its view that the allegations in the complaint *must be accepted as true*:

"Preliminary to our consideration of the comity issue, we note our agreement with the conclusions reached by the Appellate Division that there was a proper basis for the exercise of long-arm jurisdiction and that the doctrine of *forum non conveniens* is inapplicable here. Although 'standing by itself, a correspondent bank relationship, without any other indicia or evidence to explain its essence, may not form the basis for long-arm jurisdiction under CPLR 302 (subd [a], par 1)' (*Amigo Foods Corp. v Marine Midland Bank-New York*, 39 NY2d 391, 396 [1976]), the facts alleged here, which we accept as true for {**101 AD3d at 11} this purpose, show substantially more (cf. *Longines-Wittnauer Watch Co. v Barnes & Reinecke*, 15 NY2d 443 [1965])." (49 NY2d at 579.)

Thus, the motion court plainly erred in not accepting as true AHAB's allegations that Al Sanea

used for its own purposes, and then looted, AHAB's New York bank accounts. *Ehrlich-Bober* is also instructive for its recitation of the principle enunciated above that New York has a paramount interest in protecting its own financial institutions. The Texas statute at issue [*7] provided that the defendant, as an agency of that state, enjoyed immunity from suit. The Court of Appeals was faced with both forum non conveniens and the question of whether the doctrine of comity precluded the action in New York.

The *Ehrlich-Bober* Court held that

"[a]rrayed against that policy which essentially serves administrative convenience, is New York's recognized interest in maintaining and fostering its undisputed status as the preeminent commercial and financial nerve center of the Nation and the world (*International Planning v Daystrom, Inc.*, 24 NY2d 372 [1969]; see, also, *Bache & Co. v International Controls Corp.*, 339 F Supp 341 [1972]). That interest naturally embraces a very strong policy of assuring ready access to a forum for redress of injuries arising out of transactions spawned here. Indeed, access to a convenient forum which dispassionately administers a known, stable, and commercially sophisticated body of law may be considered as much an attraction to conducting business in New York as its unique financial and communications resources.

"New York's interest in providing a convenient forum is least subject to challenge when a transaction is centered here (see *Rubin v Irving Trust Co.*, 305 NY 288, 305 [1953]; and *Auten v Auten*, 308 NY 155, 160 [1954]), and particularly when it is wholly commercial in character (see *Et Ve Balik Kurumu v B.N.S. Int. Sales Corp.*, 25 Misc 2d 299 [1960], affd 17 AD2d 927 [1962]; *Tiernan v Missouri New World's Fair Comm.*, 48 Misc 2d 376 [1965]; cf. *Dunhill of London v Cuba*, 425 US 682 [1976]). . . .

"In the instant case the transactions in question, {**101 AD3d at 12} judged by any indicator, must be considered to have been centered here. They were initiated by an employee of the defendant university in a phone call to the plaintiff's New York offices. They were accepted in New York by the plaintiff. The money was paid in New York. The securities were delivered in New York. And finally, the repurchases were to have been accomplished in New York. It must also be concluded that these were ordinary commercial transactions having no more than an indirect relation to the fulfillment of the defendant university's governmental responsibilities." (49 NY2d at 581-582.)

When we analyze the facts in this case as framed by AHAB's third-party complaint, the scenario is analytically indistinguishable from that described in *Ehrlich-Bober*.

The motion court erred in its analysis in other areas as well. The question of an alternative forum, one of the *Pahlavi* factors, was given short shrift by the motion court and is given even

shorter treatment by the dissent. The court failed to identify an alternative forum that would have jurisdiction over the dispute as framed by the complaints, let alone whether the dispute would be "better adjudicated" in the alternative forum. [*8]

The motion court held only that AHAB had "several alternative locations . . . to resolve the disputes." Furthermore, AHAB could "decide whether it prefers to bring its third-party action in the UAE as well, or to seek redress in Saudi Arabia." The facts of record simply do not support the motion court's musing. Mashreqbank asserted that it was not subject to jurisdiction in Saudi Arabia. Al Sanea maintained that he was only subject to jurisdiction in Saudi Arabia. There are no facts of record to support any alternative forum, let alone Saudi Arabia, Bahrain, or the UAE. More importantly, though, *Pahlavi* does not suggest that merely because a party may be subject to suit in a country establishes that it would be an alternative forum.

The *Pahlavi* analysis is far more nuanced. *Pahlavi* cited with approval the factors set forth in *Gulf Oil Corp. v Gilbert* (330 US 501, 508 [1947]), which were reaffirmed in *Piper Aircraft Co. v Reyno* (454 US 235, 241 n 6 [1981]). These factors include: "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses." (330 US at 508.) The motion court simply made no factual findings whatsoever on any of these factors. {**101 AD3d at 13}

There is no finding that witnesses subject to a travel bar in Saudi Arabia would be precluded from testifying via some alternate means. Similarly, and perhaps more importantly, there is no finding that the witnesses could even testify in Saudi Arabia, Bahrain or the UAE. AHAB proffered that two of the witnesses with the most knowledge of the Al Sanea scheme reside in England and Los Angeles. Al Sanea identified no witnesses in his moving brief. It was only in reply that he listed a series of witnesses but failed to link their proposed testimony to the allegations of the third-party complaint.

The record is similarly inadequate on the issues of access to documents. Only AHAB specified which documents were necessary and none support dismissal on forum non conveniens grounds.

Finally, crediting the allegations in the third-party complaint as true, as we must, it is patent that New York law will apply. The law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating conduct within its borders. (*Banco Nacional Ultramarino v Chan*, 169 Misc 2d 182 [Sup Ct, NY County 1996], *affd* 240 AD2d 253 [1st Dept 1997].)

In light of our reinstatement of the complaints, we need not address the issue of whether further forum discovery should have been permitted.

Accordingly, the judgment of the Supreme Court, New York County (Richard B. Lowe, III, J.), entered August 11, 2010, dismissing the action and the third-party action, should be reversed, on the law, with costs, the judgment vacated and the complaints reinstated. The appeal from the order of the same court and Justice, entered July 29, 2010, which granted third-party defendant's motion to dismiss, should be dismissed, without costs, as subsumed in the appeal from the judgment.

Andrias, J. (dissenting). Under the particular circumstances before us, Supreme Court did not exceed its authority and providently exercised its discretion when it dismissed both the action and third-party action on forum non conveniens grounds. Accordingly, I respectfully dissent.

Plaintiff, a United Arab Emirates (UAE) bank, is headquartered in Dubai and has a branch in New York. In 2009, it brought this action against defendant Ahmed Hamad Al Gosaibi & Brothers Company (AHAB), a Saudi Arabian general partnership, seeking to recover, under the theories of breach of contract, **{**101 AD3d at 14}** unjust enrichment and breach of implied duty of good faith and fair dealing, damages for AHAB's default on a US dollars for Saudi Arabian riyals currency swap. Plaintiff alleges that it wired \$150 million to AHAB's account at the Bank of America in New York, but AHAB failed to wire the riyals to plaintiff. The funds in the Bank of America account were then transferred to an HSBC account in New York controlled by third-party defendant Maan Abdul Waheed Al Sanea (Al Sanea), a Saudi national and the head of operations of AHAB's Money Exchange. Plaintiff filed an order of attachment against AHAB's property in New York, but by that time Al Sanea had already transferred the funds to institutions outside New York.

AHAB answered and filed a third-party complaint against Al Sanea and Awal Bank, a Bahrain bank that Al Sanea owned and controlled. AHAB alleged that the subject foreign exchange transaction was part of a massive fraudulent scheme perpetrated by Al Sanea through which he caused unauthorized borrowing of more than \$10 billion in the name of AHAB and then siphoned the bulk of those funds into his own accounts or those of his companies, including Awal. Al Sanea allegedly used the fraudulent foreign exchange deals to hide disguised short term loans he obtained to keep his scheme going. AHAB also asserted counterclaims alleging that plaintiff aided and abetted Al Sanea in his fraudulent scheme and, as an affirmative defense, alleged that "[v]enue in

this Court is improper."

Al Sanea moved to dismiss the third-party complaint against himself and Awal pursuant to CPLR 327 (a) on forum non conveniens grounds. Plaintiff moved to dismiss the counterclaims on other grounds. After twice hearing oral argument, the court dismissed the complaint, counterclaims and third-party complaint on forum non conveniens grounds.

The majority believes that the motion court lacked the authority to dismiss the main action because no party formally moved to dismiss it on forum non conveniens grounds, and a court does not have authority to invoke the doctrine sua sponte (*see VSL Corp. v Dunes Hotels & Casinos*, 70 NY2d 948 [1988]; *Todtman, Young, Tunick, Nachamie, Hendler, Spizz & Drogin v Richardson*, 231 AD2d 1 [1997]). However, CPLR 327 (a) provides:

"When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, *on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just*. The domicile or residence {**101 AD3d at 15} in this state of any party to the action shall not preclude the court from staying or dismissing the action" (emphasis added).

[*9]

Here, unlike *VSL Corp.*, where the Appellate Division dismissed the complaint sua sponte on forum non conveniens grounds, and *Todtman, Young*, where the defendants sought only to dismiss the complaint for lack of subject matter jurisdiction, the third-party defendant moved to dismiss the third-party action based on the doctrine. Further, "[a]lthough no formal motion was made to dismiss the [main action] on the ground of forum non conveniens, the doctrine was raised before the court, and the parties contested the matter" (*Matter of Smith v Miller*, 237 AD2d 294, 295 [1997]).

When the court heard argument on January 5, 2010, it immediately expressed its view that "if the motion to dismiss for forum non conveniens has . . . legs, it affects everything else" and stated that it wanted the issue fully briefed. While the majority contends that we are distorting the record of the proceeding below and that the court only scheduled briefing for Al Sanea's motion to dismiss the third-party complaint, the majority is wrong. True, after the court first stated that it would have the forum non conveniens issue fully briefed, Al Sanea's counsel stated, "It's against AHAB," and the court responded, "Right." However, the court immediately clarified that "I want you to respond to a forum non conveniens argument because I am very, very concerned, if you will, that *these cases do not belong here*" (emphasis added). The court also made clear that even though no one had made a formal forum non conveniens motion against plaintiff, it wanted to hear from plaintiff on

the issue and granted plaintiff's request that it first see the third-party defendants' reply before it submitted its papers.

At oral argument on March 25, 2010, third-party defendants, by counsel, reiterated their position that the court "would be well grounded in its discretion to dismiss the entire action." Counsel noted that plaintiff had submitted supplemental papers stating:

"[plaintiff] does not dispute that the UAE . . . would be an adequate forum for litigating its first-party case against Ahab. Indeed, as explained in its prior brief, [plaintiff] has already commenced a breach of contract case in the UAE against Ahab and its partners, that encompasses a claim based on the foreign-exchange transaction at issue here. . . .
. {**101 AD3d at 16}

"Notably, neither Ahab nor its partners have contested the jurisdiction of the UAE courts as they have in this court in New York. *For those reasons, and because it has been unable to locate any assets of Ahab or its partners in New York, [plaintiff] would not object to litigating its breach of contract claims against Ahab and the Ahab partners in the UAE in the event that this Court were to dismiss Ahab's third party complaint*" (emphasis added).

Plaintiff's counsel confirmed that this was in fact plaintiff's position and the court reiterated its view that there were two parts to the application, one for the third-party defendants to be "cut out," and the other "to consider forum non conveniens as to everybody." While counsel for the third-party plaintiff AHAB stated that he opposed both parts, he acknowledged [*10] that "our case against Al Sanea, is completely intertwined with our defense to the contract case that [plaintiff] has brought and also with our counterclaim." Counsel did not argue that the court lacked the authority to dismiss the main action because no party had filed a formal motion seeking that relief.

Under these circumstances, where the third-party defendant moved to dismiss the third-party complaint on forum non conveniens grounds, placing the doctrine before the court, and the dismissal of the main action on that ground was addressed by the parties at oral argument, the court had discretion to dismiss the entire action in whole or in part, especially where AHAB's third-party complaint, counterclaims and defense to the complaint are admittedly intertwined and plaintiff stated its position that if the third-party complaint was dismissed, the complaint should be dismissed as well (*see Banco do Estado de Sao Paulo v Mendes Jr. Intl. Co.*, 249 AD2d 137, 139 [1998] ["Although plaintiff did not move for summary judgment on forum non conveniens grounds, and the court may not *sua sponte* invoke this basis for dismissal, forum non conveniens had been raised by plaintiff as an affirmative defense to the counterclaims and was a clearly articulated motif of

plaintiff's arguments in the motion proceedings"] [citations omitted]; see *Smith v Miller*, 237 AD2d at 295).

The majority makes no attempt to distinguish *Smith v Miller*, and states that *Banco do Estado* is inapposite because there the issue of forum non conveniens was fully briefed. However, irrespective of the scope of the briefs submitted to the motion court, the salient point is that in both cases, although no formal motion {**101 AD3d at 17} was made, the doctrine of forum non conveniens was squarely before the court and the parties had a full and fair opportunity to litigate the issue.

As set forth above, the record in this case clearly shows that all parties were made fully aware that the court was considering whether the main action should also be dismissed on forum non conveniens grounds and were given the opportunity to brief the issue, which they addressed at the second oral argument. While the majority emphasizes that plaintiff submitted papers opposing the motion to dismiss, it ignores the concessions plaintiff's counsel later made at the March 25, 2010 oral argument, and the fact that plaintiff has submitted a brief in support of the dismissal of the entire action on this appeal (see *Ridge Meadows Homeowners' Assn. v Tara Dev. Co.*, 242 AD2d 947 [1997]).

The majority also states that our view that "because [plaintiff] conceded that the UAE 'would be an adequate forum' [plaintiff] necessarily advocated for a forum non conveniens dismissal of its own case, is similarly without support in the record." However, the record establishes that after the third-party defendants moved to dismiss the third-party complaint, and the court indicated its view that the entire case should be dismissed on that ground, plaintiff confirmed that it would not object to litigating its claims against defendant in the UAE in the event that the court dismissed the third-party complaint.

As to the merits, the common-law doctrine of forum non conveniens, codified in CPLR 327, permits a court to dismiss an action, when it finds that "in the interest of substantial justice the action should be heard in another forum" (CPLR 327 [a]). A motion to dismiss on the ground of forum non conveniens is subject to the discretion of the trial court, and "should turn on considerations of justice, fairness and convenience" (*Silver v Great Am. Ins. Co.*, 29 NY2d 356, [*11]361 [1972]). A court's determination generally will not be disturbed on appeal unless the court has failed to properly consider and balance all of the relevant factors, which include the existence of an adequate alternative forum; situs of the underlying transaction; residency of the parties; the potential hardship to the defendant; location of documents; the location of a majority of the

witnesses; and the burden on New York courts (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985]). "No one factor is controlling," and the "great advantage" of the doctrine is "its flexibility based upon the facts and circumstances of each case" (*id.*). If the balance of **{**101 AD3d at 18}** conveniences indicates that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper (*id.*; *see also Matter of New York City Asbestos Litig.*, 239 AD2d 303 [1997]).

Applying these principles, the motion court correctly considered and balanced the appropriate factors in finding that New York is an inconvenient forum for this dispute because it is between a foreign bank and foreign businesses, the alleged wrongdoing took place in foreign countries even though New York banks were its instrumentalities, documentary evidence and witnesses are located outside of New York, and the resolution likely requires the application of foreign law (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d at 480; [Kuwaiti Eng'g Group v Consortium of Intl. Consultants, LLC](#), 50 AD3d 599 [2008]; [Garmendia v O'Neill](#), 46 AD3d 361, 362 [2007]). In reaching its conclusion that Supreme Court improvidently exercised its discretion in balancing the *Pahlavi* factors, the majority again gives short shrift to the facts that (1) the third-party defendant moved to dismiss the third-party complaint, which was based on Al Sanea's alleged Ponzi scheme which originated in the Middle East, (2) the third-party plaintiff conceded at oral argument that "our case against Al Sanea, is completely intertwined with our defense to the contract case that [plaintiff] has brought and also with our counterclaim," and (3) plaintiff, who now advocates for the dismissal of the entire action, represented to the motion court that it agreed that if the third-party complaint was dismissed on forum non conveniens grounds, the complaint should be dismissed on that ground as well.

Citing *J. Zeevi & Sons v Grindlays Bank (Uganda)* (37 NY2d 220 [1975], *cert denied* 423 US 866 [1975]), the majority also states that Supreme Court erred because "New York has a compelling interest in the protection of the native banking system from misfeasance or malfeasance." However, the language which the dissent quotes from *Zeevi* in support of its position addressed choice-of-law issues, not forum non conveniens.

Further, while "[t]he doctrine [of forum non conveniens] rests, in large part, on considerations of public policy . . . our courts should not be under any compulsion to add to their heavy burdens by accepting jurisdiction of a cause of action having no substantial nexus with New York" (*Silver v Great Am. Ins. Co.*, 29 NY2d at 361 [internal quotation marks omitted]). Thus, insofar as *Zeevi* stands for the premise that New York is a **{**101 AD3d at 19}** "financial capital of the world" (37

NY2d at 227), and that the passage of global capital through New York requires that its courts be open to the settling of commercial disputes that are transacted here, "this principle is not without its limitations, and commercial disputes that are more fundamentally connected to other venues are more appropriately settled there" (*Wilson v ImageSat Intl. N.V.*, 2008 WL 2851511, *7 n 13, 2008 US Dist LEXIS 57897, *26 n 13 [SD NY 2008]; *see also Martin v Mieth*, 35 [*12] NY2d 414, 418 [1974] [it is well settled that New York courts "need not entertain causes of action lacking a substantial nexus with New York"]; *P.T. Delami Garment Indus. v Cassa di Risparmio di Torino*, 164 Misc 2d 38 [Sup Ct, NY County 1994], *affd World Point Trading PTE. v Credito Italiano*, 225 AD2d 153 [1996] [suit predicated on New York situs of issuer's correspondent bank dismissed]).

Furthermore, in *Zeevi*, where Grindlays had anticipatorily breached its obligations under a letter of credit, there was a closer nexus to New York in that "New York was the locus of repudiation" of the instrument because the "defendant's order countermanding payment by cable and letter took effect upon receipt by Citibank in New York and then gave rise to a cause of action here" (*Zeevi*, 37 NY2d at 226). Here, Al Sanea's alleged Ponzi scheme, perpetrated in the Middle East, is the dominant feature of AHAB's defense to the complaint, counterclaim, and third-party complaint.

The majority also contends that the motion court erred "in not accepting as true AHAB's allegations that Al Sanea used for its own purposes, and then looted, AHAB's New York bank accounts." However, the fact that the proceeds of Al Sanea's fraudulent scheme passed through the New York banking system is a peripheral and transitory contact, which, without more, does not give New York an interest in transactions that otherwise are foreign (*see Calgarth Invs., Ltd. v Bank Saderat Iran*, 1996 WL 204470, *6, 1996 US Dist LEXIS 5562, *20 [SD NY 1996], *affd* 108 F3d 329 [2d Cir 1997] ["(D)ebits and credits at New York bank accounts, without more, do not give New York or the United States an interest in transactions that otherwise are entirely foreign"]; *Sussman v Bank of Israel*, 801 F Supp 1068, 1074 [1992], *affd* 990 F2d 71 [2d Cir 1993] [bank's "use of its New York branch . . . to route the loan proceeds . . . cannot be regarded, in the overall scheme of things, as other than peripheral"]; *Lan Assoc. XVIII, L.P. v Bank of Nova Scotia*, 1997 WL 458753, *6, 1997 US Dist LEXIS 11931, *16 [SD NY 1997] {**101 AD3d at 20} ["Were such a minimal contact with New York to be deemed significant, this Court, located in one of the world's largest and busiest financial centers, would be burdened with countless international financial disputes having no real, substantive link to New York"]; *see also Finance & Trading Ltd. v Rhodia S.A.*, 28 AD3d 346 [2006], *lv denied* 7 NY3d 706 [2006] [purported meetings in New York City between the defendants and the plaintiff's principal did not suffice to create substantial nexus with

New York in that underlying transaction occurred primarily in foreign jurisdiction]). Accordingly, the judgment should be affirmed.

Abdus-Salaam and Manzanet-Daniels, JJ., concur with Catterson, J.; Mazzairelli, J.P., and Andrias, J., dissent in a separate opinion by Andrias, J.

Judgment, Supreme Court, New York County, entered August 11, 2010, reversed, on the law, with costs, the judgment vacated and the complaints reinstated. Appeal from the order, same court and Justice, entered July 29, 2010, dismissed, without costs, as subsumed in the appeal from the judgment.

Footnotes

Footnote *: The portion of the order denying Al Sanea's motion to dismiss for lack of personal jurisdiction is not on appeal. However, were we to consider the issue, we would agree with the motion court that there is personal jurisdiction based on Al Sanea's transaction of business in New York (*see e.g. Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71 [2006], *cert denied* 549 US 1095 [2006] [the court may exercise long-arm jurisdiction over persons who, from out of state, use electronic and telephonic means to project themselves into New York to conduct business transactions]), and/or his commission of a tort in New York (*see e.g. Banco Nacional Ultramarino v Chan*, 169 Misc 2d 182, 188 [Sup Ct, NY County 1996], *affd* 240 AD2d 253 [1st Dept 1997] [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]).