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

PRESENT: BARBARA R. KAPNICK PART 39

Index Number : 102026/2009
ELMALIACH, KEREN
vs.
BANK OF CHINA LTD
SEQUENCE NUMBER : 002
DISMISS INCONVIENT FORUM

INDEX NO. 102026/09
MOTION DATE
MOTION SEQ. NO. 002
MOTION CAL. NO.

is 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 ACCOMPANYING MEMORANDUM DECISION

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

Dated: 7/7/11

BARBARA R. KAPNICK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 39

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KEREN ELMALIACH, as an individual, as statutory representative of the Estate of EMI ELMALIACH and as natural guardian of plaintiff, JAN ELMALICAH, et al.,

Plaintiffs,

- against -

BANK OF CHINA LIMITED,
410 Madison Avenue
New York, New York 10017

Defendants.

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DECISION/ORDER
Index No. 102026/09
Motion Seq. No. 002

BARBARA R. KAPNICK, J.S.C.:

This action[1] is brought on behalf of civilian victims of terrorist bombings and rocket attacks carried out in Israel in 2006 and 2007 by the Palestine Islamic Jihad ("PIJ") and Hamas. Plaintiffs are suing The Bank of China Limited ("BOC"), alleging that the bank facilitated the attacks by providing wire transfer services to PIJ and Hamas. BOC now moves to dismiss the Complaint for failure to state a claim (CPLR 3211[a][7]), or, in the alternative, pursuant to the doctrine of *forum non conveniens* (CPLR 327[a]).

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[1] There were originally two separate actions commenced - one by Keren Elmaliach, et al. (Index No. 102026/09) and one by Janet Zamalloa, et al. (Index No. 101244/10) against The Bank of China Limited, but they were consolidated under the earlier Index No. by Decision/Order of this Court dated July 29, 2010 on defendant's motion, with no opposition by the plaintiffs.

THE COMPLAINTS

The Elmaliach Action

The *Elmaliach* action was brought on behalf of over fifty citizens and domiciliaries of Israel who were either injured in the PIJ and Hamas attacks, or who are family members or estates of persons killed in the attacks (Elmaliach ¶¶ 1, 2, 4).[2] The Complaint identifies two bombings by PIJ, on April 17, 2006 and January 29, 2007, and four rocket attacks by Hamas, on January 15, 2005, November 15, 2006, November 21, 2006, and December 26, 2006 (Elmaliach ¶¶ 40-57).

The PIJ and Hamas have each been designated by the United States as a Foreign Terrorist Organization ("FTO") continuously since 1997 and as a Specially Designated Global Terrorist ("SDGT") since 2001 (Elmaliach ¶ 39). As such, they are subject to strict economic sanctions by the United States which are intended to prevent them from conducting the banking activities which help finance their attacks, and thereby limit their ability to plan, prepare and carry out terrorist acts. (Elmaliach ¶¶ 58, 59). Nearly all banks and financial institutions around the world observe and enforce the United States sanctions, and thus PIJ and Hamas are forced to conduct their banking activities through those few which do not (Elmaliach ¶¶ 62).

[2] Citations in the complaints are abbreviated as Elmaliach ¶ __ and Zalalloa ¶ __.

BOC began to provide extensive banking services to PIJ and Hamas beginning in July 2003. Between that time and January 29, 2007, BOC executed dozens of wire transfers for the PIJ and Hamas totalling several million dollars. The transfers were initiated by the organizations' leadership in Iran, Syria and elsewhere in the Middle East, and were executed by and through BOC's branches in the United States. Most of the transfers were made to a single account at a BOC branch in Guanzhou, the third largest city in China, in the name of "S.Z.R. Alshurafa", whose owner, Said al-Shurafa ("Shurafa"), is a senior operative and agent of both the PIJ and Hamas. Other transfers were made to a second account belonging to Shurafa at the same branch (Elmaliach ¶ 63). Pursuant to instructions from the PIJ and Hamas, Shurafa moved the funds to the PIJ and Hamas leadership in Israel, the West Bank and the Gaza Strip for the purpose of planning, preparing for and executing terrorist attacks (Elmaliach ¶ 64).

Plaintiffs allege that BOC's assistance with the wire transfers was the proximate cause of their injuries (Elmaliach ¶ 70). They further assert that BOC had actual knowledge that the wire transfers were being used by the PIJ and Hamas to carry out the attacks. Specifically, plaintiffs allege that in April 2005, officials of the counterterrorism division of the Office of the Prime Minister of the State of Israel met in China with the

country's Ministry of Public Security and China's Central Bank regarding the wire transfers (Elmaliach ¶ 71). At the meeting, Israeli officials emphasized to the Chinese officials that the funds were being used to faciliate the terrorists attacks, and demanded that the Chinese officials take action to prevent BOC from making further transfers. That same month, the Chinese officials notified BOC of the Israeli officials' warnings regarding the purpose of the wire transfers and the demand to discontinue them. However, BOC ignored the information and the demand and continued executing wire transfers through and after January 2007 (Elmaliach ¶ 71).

Plaintiffs further allege that BOC knew or should have known that the transfers were being made for illegal purposes even prior to the April 2005 meeting between the Israeli and Chinese officials. They point to various red flags, such as the fact that the transfers were made in cash; that the funds were withdrawn by Shurafa within a day of being received, and often in the form of cash; that the transfers were large, mostly in the range of $100,000, in identical or similar amounts, and in round figures or sums structured to be slightly less than round figures (e.g. $99,990); and that the pattern continued for a period of years (Elmaliach ¶ 72). The Complaint alleges that all professional bankers recognize these practices as indicia of illegal activity,

and that under United States law and the rules promulgated by the Financial Action Task Force ("FATF"), BOC was under an obligation to monitor, report, and refuse to execute such suspicious and irregular banking transactions (Elmaliach ¶¶ 73, 74).

The *Elmaliach* Complaint sets forth two causes of action. The first is brought under sections 35 and 36 of Israel's Civil Wrongs Ordinance (New Version - 1968) ("CWO"), which create a "civil wrong" of negligence. (Elmaliach ¶¶ 81, 82) The statute imposes liability, *inter alia*, upon a person who injures others by committing acts (or refraining from acting) under circumstances under which a reasonable person would have done otherwise. The second cause of action is for breach of statutory duty under CWO § 63, which imposes liability for violation of any "enactment" intended for the benefit or protection of another person. Plaintiffs allege that BOC breached, inter alia, section 4 of Israel's Prevention of Terrorism Ordinance, 5708 - 1948; sections 145 and 148 of Israel's Penal Law, 5737 - 1977; and section 85 of Israel's Defense Regulations (Emergency Period) - 1945; all of which criminally prohibit the provision of material support to terrorist organizations such as Hamas and PIJ.

The Zamalloa Action

The *Zamalloa* action was brought on behalf of three relatives of Israel Zamalloa, who was killed by a PIJ suicide bomber in the

bakery where he worked in the southern Israeli resort town of Eilat on January 29, 2007 (Zamalloa ¶¶ 6-9, 19). The bakery was owned by Emi Elmaliach and Michael Ben Saadon, who were also killed in the attack (Zamalloa ¶19). Nine members of the Elmaliach and Saadon families are plaintiffs in this consolidation action (Elmaliach ¶¶ 6-11). The factual allegations and causes of action are essentially identical to those in the *Elmaliach* Complaint.

Related Litigation

Plaintiffs' counsel have commenced additional, substantially similar lawsuits on behalf of other victims of attacks in Israel, likewise seeking redress against financial institutions for providing wire transfer services to terrorist organizations. In *Licci v American Express Bank Ltd.*, 704 F Supp 2d 403 (SDNY 2010), plaintiffs were victims of rocket attacks by Hizbollah in July and August 2006. They alleged, *inter alia*, that American Express Bank Ltd. ("Amex Bank"), acting as correspondent bank to Lebanese Canadian Bank, S.A.L. ("LCB"), had effected millions of dollars in wire transfers for the Lebanon-based Shahid (Martyrs) Foundation ("Shahid"), the alleged financial arm of Hizbollah, in the two years preceding the attacks. They further claimed that the relationship between Hizbollah and Shahid was "notoriously public knowledge," even though Shahid, unlike Hizbollah, had not been

designated as an FTO or an SDGT. The Complaint in *Licci* contained a single claim for negligence under Israeli law.

In dismissing the action, the District Court (Daniels, J.) found that

> [p]laintiffs have pled no factual allegations from which it can be inferred that Amex Bank had any ties to Hizbollah, or that they knew or had reason to believe that the monies at issue would be used to carry out terrorist attacks on civilian targets. Absent such allegations, noncompliance with banking laws and industry standards alone will not render a bank negligently liable for the violent attacks committed by a terrorist organization who benefitted, in some general, nondescript manner, from monies passing through the bank during the performance of routine banking services.

Licci v American Express Bank Ltd., supra at 410.

The Court also found that plaintiffs had failed to adequately plead causation stating that "[e]ven if it were alleged that Hizbollah used some funds it received to carry out the 2006 missile attacks, that factual assertion alone would not make every financial transaction traceable to a Hizbollah-controlled entity, no matter how remote, the proximate cause of those attacks" (*Id*).[3]

In *Wultz v Islamic Republic of Iran*, 755 F Supp.2d 1 (D DC 2010), an American citizen, Daniel Wultz, was killed (and his father injured), in an April 17, 2006 suicide bombing at a

[3] The appeal of this decision was argued in the Second Circuit Court of Appeals in March 2011, but has not yet been decided.

restaurant in Tel Aviv, Israel carried out by the PIJ. That attack is also the subject of several claims in the instant action, insofar as six of the decedents died in that bombing (Elmaliach ¶¶ 12-23, 44-46). The plaintiffs in *Wultz* have named several parties, including BOC, as defendants in that action, and proceed against the bank upon the identical factual allegations and legal theories as asserted herein.

After the instant motion was made but before it was finally submitted, the District Court (Lamberth, Chief Judge), denied BOC's motion to dismiss in *Wultz*. In a lengthy and comprehensive decision, Judge Lamberth upheld the legal sufficiency of the Complaint. The Court found that plaintiffs' allegations regarding Shurafa's accounts with BOC, his position with PIJ, the meetings held between Israeli and Chinese officials, and the Chinese officials' communications with BOC, were sufficient to give rise to an inference that the bank actually knew it was providing financial services to a terrorist organization, *Wultz v Islamic Republic of Iran, supra* at 50-52. Given this knowledge, the Court further held that plaintiffs had adequately pled causation. Specifically, Judge Lamberth found that plaintiffs' injuries were reasonably foreseeable to the bank, insofar as it knew that it was "providing financial services to an agent of the PIJ, and that the PIJ would use those funds for the sole purpose of engaging in terroristic violence against Jewish civilians in Israel," *Wultz, supra at* 53.

The Court distinguished the case before it from *Licci* on the ground that the defendant in that case was not alleged to have had actual knowledge of its customer's terrorist activities, *Wultz, supra at* 66.

In a subsequent order dated January 28, 2011, Judge Lamberth granted BOC's motion for reconsideration, *Wultz v Islamic Republic of Iran*, 762 F Supp 2d 18 (D DC 2011)("*Wultz II*"). The limited question before the Court on that motion was whether BOC was subject to personal jurisdiction in the District of Columbia. The Court found that it was not, because BOC lacked minimum contacts with the district, and thus service under the particular venue-based provisions of the Federal Antiterrorism Act, 18 USC § 2331 et seq, was improper, *Wultz II*, at 30-31. However, rather than dismiss the action as against BOC, the Court severed and transferred the claims against BOC to the Southern District of New York. In doing so, the Court noted that it had already "determined that plaintiffs have adequately alleged several causes of action against BOC," that it did "not wish to further exacerbate the already-extensive delays," and that the transfer to the Southern District was directed "so that these proceedings may reach a prompt conclusion," *Wultz II, supra at* 33.

As a result, the *Wultz* plaintiffs' claims as against BOC are now pending before Judge Shira Scheindlin in the Southern District

of New York. Approximately a month after oral argument on this motion on March 8, 2011, BOC's counsel advised this Court that at an April 4, 2011 conference, Judge Scheindlin had denied BOC's request for a *de novo* briefing of its motion to dismiss, and instead would defer to Judge Lamberth's holding regarding the legal sufficiency of the Complaint, notwithstanding his subsequent ruling that he lacked personal jurisdiction over BOC (Letter from Walter P. Loughlin, Esq. dated April 7, 2011). However, Judge Scheindlin directed the parties to brief the issue of whether Israeli law rather than New York law applied to the non-federal tort claims currently pled under Israeli law. She further indicated that if Israeli law did govern, she would seek a briefing as to the elements of the causes of action, including whether they could be maintained on the basis of constructive, as opposed to actual, knowledge by the bank. In the interim, the *Wultz* parties have been directed to proceed with discovery on liability issues (Id).

DISCUSSION

Although BOC has correctly argued that the original *Wultz* determination regarding the legal sufficiency of the Complaint is not binding upon this Court, it has presented no reason why this Court, like Judge Scheindlin, should not adopt Judge Lamberth's reasoning and conclusions. In any event, this Court has conducted its own *de novo* review of the governing law and is persuaded that *Wultz* was correctly decided in view of the unique factual

allegations that it shares with the *Elmaliach* and *Zamalloa* Complaints.

In particular, this Court concurs with Judge Lamberth that the specific allegations regarding BOC's actual knowledge of Shurafa's terrorist activities sufficiently distinguishes the Complaints herein from the pleading in *Licci* and takes it outside the usual rule that "[b]anks do not owe non-customers a duty to protect them from the intentional torts committed by their customers," *Licci, supra at* 410; *Lerner v Fleet Bank, N.A.*, 459 F3d 273, 286 (2d Cir 2006). In *Licci*, the Court specifically noted that "[p]laintiffs have pled no factual allegations from which it can be inferred that Amex Bank had any ties to Hizbollah, or that they knew or had reason to believe that the monies at issue would be used to carry out terrorist attacks on civilian targets" *(Id)*. In contrast, the plaintiffs herein allege that BOC was specifically advised by Chinese officials that Shurafa's accounts were being used to fund terrorism, but nevertheless continued to facilitate the wire transfers. Although BOC disputes receiving actual notice and denigrates the quality of the evidence supporting the allegation, on a CPLR 3211(a)(7) motion, the Court is required to accept the facts pled as true.

The Court agrees with BOC that the alleged red flags which arose in connection with Shurafa's account activity prior to April

2005 would, at best, impute constructive knowledge to BOC, and thus could not alone suffice as a basis for liability, *In re Agape Litig.*, 681 F Supp 2d 352, 364 (ED NY 2010). Insofar as one of the Hamas rocket attacks identified in the *Elmaliach* Complaint occurred prior to the time BOC is alleged to have received the warnings regarding Shurafa, the claims of those injured plaintiffs may be subject to dismissal at some later date. However, a final determination shall await discovery on the general question of BOC's relationship with Shurafa and knowledge of his activities with Hamas from the time the accounts were opened in 2003.

Finally, the Court also rejects BOC's argument that a *forum non conveniens* dismissal would be appropriate here. As the Court of Appeals has held,

> Among the factors to be considered are 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. The court may also consider that both parties to the action are nonresidents and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction. No one factor is controlling. The great advantage of the rule of *forum non conveniens* is its flexibility based upon the facts and circumstances of each case. The rule rests upon justice, fairness and convenience . . .

Islamic Republic of Iran v Pahlavi, 62 NY2d 474, 479 (1984), *cert den* 469 US 1108 (1985) (citations omitted). "Generally, unless the balance is strongly in favor of the defendant, the plaintiff's

choice of forum should rarely be disturbed," *OrthoTec, LLC v Healthpoint Capital, LLC*, 84 AD3d 702 (1st Dept 2011)(internal quotation marks and citations omitted); *see also Anagnostou v Stifel*, 204 AD2d 61 (1st Dept 1994); *Waterways Ltd. v Barclays Bank PLC*, 174 AD2d 324 (1st Dept 1991).

Defendant has not met its burden of demonstrating that New York is an inconvenient forum. Although the bank is a foreign corporation, it is signficant that two of its three United States branches are in New York, *see Mionis v Bank Julius Baer & Co., Ltd.*, 9 AD3d 280, 282 (1st Dept 2004). Furthermore, in cases involving "multinational corporations with ample resources," any hardship in bringing documents or witnesses to New York is generally "minimal," *(Id); Van Deventer v CS SCF Mgt. Ltd.*, 37 AD3d 280 (1st Dept 2007); *Intertec Contracting A/S v Turner Steiner Intl., S.A.*, 6 AD3d 1 (1st Dept 2004). The possible use of New York banking facilities to process the wire transfers provides a sufficient nexus to the State, *see Georgia-Pacific Corp. v Multimark's Intl.*, 265 AD2d 109 (1st Dept 2000) and suggests that at least some of the necessary evidence will be available in New York. *See Bank Hapoalim (Switzerland) Ltd. v Banca Intesa S.p.A.*, 26 AD3d 286 (1st Dept 2006).

Finally, New York is not an inconvenient forum because BOC is already conducting discovery in New York in the *Wultz* action before Judge Scheindlin. *See Rostuca Holdings v Polo*, 246 AD2d 475 (1st Dept 1998). The bank's failure to seek a *forum non conveniens* dismissal in that forum significantly undercuts any claim of hardship. To the contrary, dismissing this action in favor of a Chinese forum would only increase the hardship on both parties by requiring that discovery on the same issues proceed in two different countries.

Accordingly, the motion of the Bank of China to dismiss is denied. Defendant is directed to serve its Answer to the consolidated Complaints within 30 days of this Order. Counsel for the parties shall appear for a preliminary conference in IA Part 39, 60 Centre Street, Room 208 on September 14, 2011 at 10:00 a.m.

This constitutes the decision and order of this Court.

Dated: July 7, 2011

BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.