

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

PRESENT: **STEVEN E. LIEBMAN**
SPECIAL REFEREE

PART 86

Index Number : 115446/2005

AMERICAN BANK NOTE

vs

DANIELE, HERNAN DANIEL

Sequence Number : 008

JURISDICTIONAL DISCOVERY *of Jurisdiction*
Hear + Determine

INDEX NO.

115446/05

MOTION DATE

SEP 28 2006

MOTION SEQ. NO.

008

MOTION CAL. NO.

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

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

COPY

Upon the submitted referral, this matter, under sequence number 008, is disposed of in accordance with the accompanying Special Referee's Decision and Order.

Dated:

JUN 26 2009

[Signature]
STEVEN E. LIEBMAN
SPECIAL REFEREE

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FILED IN JURISDICTION FOR THE FOLLOWING REASON(S)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 86

COPY

-----X

AMERICAN BANKNOTE CORPORATION, ABN
SOUTH AMERICA, INC. and TRANSTEX, SA,

Plaintiffs,

INDEX NO. 115446/05

SEQ. NO. 008

-against-

REFEREE'S REPORT
DECISION & ORDER

HERNAN DANIEL DANIELE and DIANA VIRGINIA
FERNANDEZ ROSAS,

Defendants.

-----X

FROM THE SUPREME COURT : NEW YORK COUNTY - IAS PART 23

Upon the motion by the plaintiffs for an attachment and the cross-motion by the defendants to dismiss this action for lack of personal jurisdiction and *forum non conveniens*, an amended opinion and order of the Honorable Richard F. Braun, dated February 24, 2006, and filed thereafter on March 2, 2006, directed a jurisdictional hearing pursuant to CPLR §2218 regarding the defendants' contacts with this State, and allowed for directed discovery on the jurisdictional issues pursuant to CPLR §3211(d). By so ordered Stipulation, dated March 7, 2006, pursuant to CPLR §4317(a), the issue as to personal jurisdiction over the individual

defendants, Hernan Daniel Daniele ("Daniele") and Diana Virginia Fernandez Rosas ("Rosas"), was referred for a framed traverse hearing to a Special Referee to hear and determine as to whether there is proper personal jurisdiction over the named defendants. The underlying action, inclusive of defendants' cross-motion for an order dismissing the complaint and the underlying action against the defendants on jurisdictional grounds, was otherwise stayed and held in abeyance pending the determination of the Special Referee. The subsequent denial of a stay of this action by the Appellate Division, First Department, resulted in a further order by Justice Braun, dated June 30, 2006, which directed that, this matter having been restored to active status, this action be recalendared to the Special Referee's part for assignment in accordance with the court's February 23, 2006 order and the March 7, 2006 so ordered Stipulation.

This referenced matter was assigned to the undersigned Special Referee on September 28, 2006, at which time the plaintiffs and the defendants appeared by their respective counsel of record. Both the plaintiffs' and the defendants' attorneys confirmed and agreed on the record that this framed referenced jurisdictional hearing, inclusive of all related discovery related to the jurisdictional issues, and the underlying cross-motion by the defendants to dismiss the underlying action against them, as was otherwise held in abeyance by Justice Braun in his prior orders, would be before the undersigned Special Referee on a hear and determine basis, pursuant to CPLR §4317(a). All discovery

production and rulings pertaining to this reference in accordance with CPLR §3211(d) were disposed of by the Special Referee and eventually finalized on the record of September 23, 2008, by a so ordered transcript constituting the decision and order of the court, dated September 25, 2008.

This traverse hearing was commenced on September 29, 2008, continued on October 20, 2008 and concluded on October 28, 2008. The plaintiffs' and the defendants' counsel both presented opening statements on the record; however, both sides waived the presentation of any closing arguments on the record and opted in place and stead to submit responsive post-hearing memoranda of law. Final submission of the memoranda of law was on December 9, 2008, and are filed with this decision and order. Notwithstanding counsels' and the parties' prior consent that the Special Referee hear and determine the respective issues, both sides waived of the filing of the transcription of the minutes of the hearing before the Special Referee, as would have otherwise been required pursuant to CPLR §4320(b) on a hear and report reference. Nonetheless, the hearing transcripts have been filed. All exhibits offered, marked and submitted in evidence [Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 11 & 14] are similarly filed with this decision and order.

The underlying action instituted by the plaintiffs against the defendants is an action for breach of fiduciary duty, fraud, and misappropriation/self-dealing. The plaintiffs have alleged that New York State has "long-arm" personal jurisdiction over these defendants pursuant to CPLR §302(a)(1)&(2), in that the

defendants have allegedly committed torts within the state and have transacted business here. The plaintiffs have alleged that, on or about November 1, 2005, it was discovered that the defendant Daniele, as the previous CFO and the then CEO and President of plaintiff Transtex S.A., and the defendant Rosas, as Daniele's then wife, engaged in a scheme to defraud plaintiffs. It was alleged that over two million dollars was stolen from the plaintiffs by the defendants. The plaintiffs claim that in uncovering the defendants' alleged wrongdoing in Argentina it was discovered that there were several New York bank accounts in both defendants names in New York banks, to wit: Citibank and HSBC. The plaintiffs also alleged that it discovered certain alleged phony invoices which were paid for by Transtex checks signed by Daniele for which goods were never received, and which were deposited into another New York account with another New York Bank, to wit: North Fork Bank. The plaintiffs assert that the defendant Daniele committed other tortious acts within New York State, which included traveling to New York and making misrepresentations to plaintiffs regarding the business of Transtex. It is also alleged by the plaintiffs that the defendant Daniele transacted business in this state by providing card services through several New York businesses.

At the hearing the plaintiffs tendered the testimony of three witnesses: Patrick Gentile ("Gentile"), the CFO of American Banknote Corporation, Steven Singer ("Singer"), the CEO of American Banknote Corporation, and Juan Mejia ("Mejia") as a non-party and the CEO of Products Technology Corporation a/k/a Protec. The

defendants Daniele and Rosas both testified through videoconference feed from Argentina.

The various proofs at the hearing offered by the plaintiffs to establish personal jurisdiction over the defendants stem primarily from their claims that the defendants' used New York bank accounts for fraudulent purposes [CPLR §302(a)(2)], the commission of a tortious act with the state of New York [CPLR §302(a)(2)], and the transaction of business within the state of New York [CPLR §302(a)(1)] .

Plaintiffs argue that the defendants used these New York bank accounts for fraudulent purposes, including their use to divert and funnel funds stolen from Transtex arising out of the payments by Transtex for fictitious invoices and for goods never actually received. The defendants counter this claim with the position that plaintiffs' presented no evidence that any of the claimed fraudulent Transtex checks were deposited into any bank account in New York in which the defendants' had an interest. Moreover, the defendants aver that the accounts in their own names were merely account repositories of their life savings placed at international banking entities of Citibank and HSBC for safe keeping from the vicissitudes of the Argentinean economy. No viable evidence was offered by plaintiffs of substantiate their claim that the defendants did not have separate and sufficient personal assets as the source of the defendants' accounts. While the plaintiffs did present evidence that certain Transtex checks were deposited into an account at the North Fork Bank, no proof was

presented to show that either defendant had any connection or interest in such accounts. The conclusory statements by plaintiffs' witnesses as to the defendants' intentions or finances were at best merely conclusory and speculative. The claim by plaintiffs that the defendant Daniele committed tortious acts within the state by making fraudulent misrepresentations to plaintiffs' executives regarding the state of Transtex at a dinner "meeting" in Manhattan is unpersuasive in light of the fact that the actual business meeting was in New Jersey that day followed by this alleged dinner "meeting" in New York. Defendant maintains that he came through New York by landing at the JFK Airport on his way to the business meetings held at the business offices of American Banknote Corp. in New Jersey and not in New York. Defendant Daniele pointed to the fact that whatever claims the plaintiffs might have against him, it is obvious that those claims as alleged arose in Argentina and not out of anything said at any dinner. Additionally, only speculation has been offered by plaintiffs that any portion of money belonging to Transtex was clearly diverted into any of the accounts in the defendants' names. It appears undisputed that all of the deposits that were made by wire transfer requests to the accounts in the defendants' names originated from Argentina and that such accounts were opened and maintained entirely from Argentina through bank branches located in Argentina. Moreover, it appears that the deposits into the defendants' bank accounts, except for a small deposit in 2004, pre-date the time period during which that plaintiffs' allege that their claims arose. Lastly, the

plaintiffs' claim that the defendant Daniele contracted on behalf of Transtex to provide goods and services in New York by personally providing gift cards to New York merchants on behalf of Transtex is sufficient to establish contacts with the state as having the defendant Daniele subject to its personal jurisdiction. The defendant Daniele indicates that since the claims in this action have no connection with the sales of gift cards by Transtex, it provides no basis to assert a jurisdictional contact sufficient to establish purposeful and relevant contacts.

After the plaintiffs rested their case, the defendants rested upon the record as presented. The defendants' position is that the evidence submitted by the plaintiffs is unreliable and insufficient to meet their burden of proof to establish that this court has personal jurisdiction over them. Inasmuch as the defendants are non-residents, it is the clear that it is the burden of the plaintiffs to establish that this court has acquired personal jurisdiction over the named defendants in accordance with the long-arm jurisdictional authority under CPLR §302. (*Stewart v Volkswagen of America*, 81 NY2d 203 [1993]). Moreover, such long-arm jurisdiction is fundamentally claim specific sufficient to show that the causes of action must arise out of and have a substantial connection to the statutorily enumerated New York contacts and must bear proof of a substantial relationship between the long-arm contacts and the causes of action. (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460 467 [1988]).

It is well established that it is the plaintiff who bears

the ultimate burden of proving by a preponderance of the evidence that personal jurisdiction over the defendant was obtained (see: *Powell v. Powell*, 114 AD2d 443 [2nd Dept., 1985]). It appears that the plaintiffs have, among other things, failed to demonstrate and present sufficiently credible documentary evidence or testimonial proof, other than the suspect affidavits and questionable conclusory testimony of the witnesses.

Upon review of the record herein, inclusive of the examination of the marked exhibits, evaluation of the testimony offered by the various witnesses presented at the hearing and their demeanor under examination with assessment of their respective credibility, and in the consideration of the parties' postured positions which initiated this referenced hearing and arguments on the record and as supplemented by the submitted memoranda of law and counsels' arguments therein, I find that the plaintiffs have failed to sufficiently demonstrate, by a preponderance of the evidence, that the named individual defendants Daniele and Rosas have sufficient minimum contacts with New York State so as to establish, with consideration to due process rights, that this court acquired proper long-arm personal jurisdiction over the defendants in this action. I find a failure of proof by the plaintiffs in trying to establish the existence of tortious acts by the defendants within this state or the contracting to provide goods and services within the state. Inasmuch as personal jurisdiction over the defendants has failed to be established by the plaintiffs, the issues of personal service upon the defendants,

which was not part of the framed reference, is otherwise deemed moot.

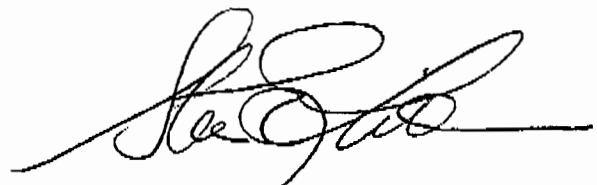
I hereby report my findings as herein indicated above and herein determine that the plaintiffs have failed to establish that personal jurisdiction was acquired over the defendants Daniele and Rosas, pursuant to CPLR §302(a)(1)&(2). I herein further find that the underlying requested relief of the individual defendants by cross-motion, which was otherwise held in abeyance, to dismiss this action against them in accordance with CPLR §3211(d) should be granted for lack of personal jurisdiction.

The underlying application to dismiss the Complaint and this action as it applied to the defendants, as it was otherwise held in abeyance, is GRANTED and it is hereby,

ORDERED that the complaint and the underlying action as against the defendants, Hernan Daniel Daniele and Diana V.F. Rosas, are dismissed for lack of personal jurisdiction.

The foregoing constitutes the decision and order of the court.

DATED: **JUN 26 2009**



STEVEN E. LIEBMAN

Special Referee