SUPREME COURT OF THE CITY OF NEW YORK

COUNTY OF NEW YORK : PART 1

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ROBERT M. MORGENTHAU
DISTRICT ATTORNEY OF NEW YORK COUNTY,

Plaintiff-Claiming Authority

- against - Index No. 402479/06

AVION RESOURCES LTD, et al.,,

Defendants

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111 Centre Street
New York, New York 10013

February 8, 2007

B E F O R E:

HONORABLE MARTIN SHULMAN

Justice

A P P E A R A N C E S:

OFFICE OF ROBERT M. MORGENTHAU
DISTRICT ATTORNEY OF NEW YORK COUNTY
One Hogan Place
New York, New York 10013
BY: TARA MINER, ESQ.

BUSSON & SIKORSKI
Attorneys for BEVERLY HILLS GROUP, et al.
381 Park Avenue South #615
New York, New York 10016-8806
BY: ROBERT S. SIKORSKI, ESQ.

ENIKA BODNAR CSR, RPR
Official Court Reporter

A P P E A R A N C E S (Cont.)

BERNARD D'ORAZIO, ESQ.
Attorney for HARBER CORP., et al.
100 Lafayette Street - Suite 601
New York, New York 10013-4400

HOWREY LLP
Attorneys for AVION RESOURCES LTD, et al.
Citigroup Center
153 East 53rd Street, Floor 54
New York, New York 10022
BY: JAMES G. McCARNEY, ESQ.

ENIKA BODNAR CSR, RPR
Official Court Reporter

THE COURT: Before the court is the Claiming-Authority's Order to Show Cause of August 4, 2006 to confirm a second ex-parte order of attachment issued August 2, 2006 and the defendants' cross-motions containing branches of relief uniformly adopted by each of the named corporate defendants and individual defendants, which seek to vacate the second order of attachment and to dismiss this forfeiture action based on lack of personal jurisdiction and/or insufficiency of service of process, in the interest of justice and/or grounded on forum non conveniens.

The Order of Attachment principally rests on a 104 page affidavit of Thomas Dombrowski, a Federal Customs Agent. The information contained in Mr. Dombrowski's affidavit was gleaned from, among other sources, his review of various banking records of Valley National Bank with a New York branch, faxed communications between the various named defendants and one Carolina Nolasco, a former Vice President of Valley National Bank intercepted via a wiretap authorized by the Federal courts, as well as conversations and records with U.S. Federal and Brazilian investigators.

The focus of investigation covers a six

month period between January and June 2002. It is essentially claimed that the individual and/or corporate defendants engaged in the business of transmitting money without a New York State banking license violating Banking Law 650(2(b(1) and utilized the services of Ms. Nolasco to facilitate these banking transactions on their behalf at the Valley National Bank.

As part of this record, is it noted that Ms. Nolasco was charged in a federal action, among other crimes, with operating an unlicensed money transmission business in violation of federal law and ultimately pled guilty to this crime on October 4, 2002. Significantly, Nolasco was never charged in the federal action with a purported related offense of acting in concert with the named defendants in this forfeiture action, as account holders in her place of employ, to have committed this crime or in engaging in a criminal enterprise with these defendants, via-a-vis, violating the federal banking Laws.

The following scenario is alleged to have occurred: A particularly named defendant, operating a Casa de Cambios or a money transmission business in Brazil retained the services of an attorney to

establish a British Virgin Island Corporation without a recorded principal place of business in New York or stated corporate purpose to conduct any business in New York. Said corporation, characterized as a shell corporation, was solely used by a particular Brazilian defendant or business entity to open up a bank account at the Valley National Bank. That defendant either individually or through the Brazilian corporation arranged to have Nolasco execute orders transmitted from Brazil to her at the bank to complete transactions which enabled approximately millions of dollars to be moved in and out of the respective bank account. What makes these transactions unique on this record is that no reals, that is, Brazilian dollars, were actually transmitted from Brazil to New York or U.S. dollars from New York transmitted to Brazil. With commissions paid for these transactions, the entities in Brazil tapped into discrete pools of currency in existence in both countries and maintained parallel tracking systems to reflect these transactions.

So, for example, a Brazilian customer seeking to purchase goods in New York valued at $20,000 would go to a Casa de Cambios or doleiro

operated by one of the defendants, pay $20,000 in reals plus a commission. That entity would then communicate with Nolasco to debit its New York account for $20,000 the defendant opened with its BVI corporation funded with U.S. dollars and transmit this money to pay the recipient for the goods without the Brazilian customer having to deal with the strict currency laws of Brazil and their attendant restrictions.

It is claimed that between 2000 and 2002, this type of transaction was repeated hundreds of times to the effect that over $630 million were moved in and out of the defendants' accounts at Valley National Bank with Nolasco's assistance. The claiming authority alleges that the defendants used these accounts as financial conduits to engage in the business of transmitting money without a license.

A Brief Description of the New Jersey Prosecution.

In or about 2002, Nolasco was indicted by a federal grand jury for operating a money transmitting business, filing false income tax returns, and structuring various transactions at the Valley National Bank to evade certain federal or state reporting requirements for depositing sums of

$10,000 or greater. At that time, and using warrants, the U.S. Attorney's office obtained warrants and was able to seize the accounts in issue as proceeds of Nolasco's crime of operating a money transmission without a license. They seized approximately $21 million.

Approximately two years later, after some of the named defendants commenced a federal action here in New York to recover these seized funds, the U.S. Attorney's office then obtained a superseding indictment which now included a forfeiture claim and then opposed defendants' petitions in New York to turn over the funds claiming New Jersey is the more appropriate forum to deal with the forfeiture issue and that the funds were in New Jersey.

The Southern District Court dismissed the petition grounded on lack of subject matter jurisdiction. After Nolasco pled guilty to Count 1, which is relevant to this proceeding, to illegally operating a money transferring business, the named defendants again filed ancillary proceedings to recover the seized funds as the true owners of the accounts. The U.S. Attorney's office moved to dismiss the petitions and Federal Judge Greenaway denied its motion. Thereafter, the defendants, as

account holders and not the subject of any criminal investigation or prosecution, moved for summary judgment to be entitled to the return of their respective funds. The U.S. Attorney's Office, among others arguments, used the information of Special Agent Dombrowski regarding the relationship between the defendants and Nolasco to somehow establish the defendants were not the true owners of the seized funds and that discovery was needed to flesh this out. Judge Greenaway did not find the opposition credible and in an order dated June 7, 2006, granted the defendants, petitioners in that matter before the federal court, summary judgment and then they were then entitled to the return of the seized assets presumably maintained in a New Jersey account held by U.S. Attorney's Office or under the aegis of the U.S. Customs Office. Judge Greenaway established that the petitioners in the ancillary proceedings had a clear right, title and interest in the seized proceeds, that the U.S. Attorney's opposition papers raised issues about the defendants' activities in Brazil, not relevant to the Nolasco forfeiture claim, and that for four years, the U.S. Attorney appeared to be conducting a fishing expedition and used the Nolasco prosecution

as a tool to investigate Brazilian crime and international wrongdoing.

Thereafter the Federal Court issued an Order dated June 28, 2006 directing the release of the funds. When read together, said funds were required to be turned over to the 22 petitioners, among the named defendants here. That did not occur.

The New York Procedural Posture.

In the interim, on June 20, 2006, the Claiming Authority filed and obtained an ex-parte order of attachment to seize the funds in New Jersey which were either in the custody of the U.S. Attorney's Office or U.S. Customs Office and the transfer of funds occurred.

Thereafter, the plaintiff moved to confirm the order of attachment and the return date for same was adjourned from July 18, 2006 to August 11, 2006. On August 2, the D.A. obtained a second ex-parte order of attachment and moved to confirm same. On August 11, 2006, this Court issued a bench decision vacating the June 20, 2006 TRO/Order of Attachment based upon plaintiff's failure to timely move to confirm the first order of attachment pursuant to CPLR 1317(2). As stated earlier, the defendants

cross moved to vacate the second order of attachment and dismiss this action.

Discussion.

After giving careful consideration to the record developed before this Court, I must confess that I am troubled about the manner in which this action was commenced and the selective nature of the information the D.A. made available to the Court to obtain various court orders advancing the plaintiff's position in this action.

As a preliminary observation, not advanced by the defendants, I am unclear, based upon the uncontroverted facts before the Court, why an ex-parte TRO/Order of Attachment was proper since the seized funds were in the custody of law enforcement officials and there was no potential risk of the defendants absconding with the funds. This is a real concern plaintiff reasonably experiences in almost every other forfeiture action, but should not have here. Inexplicably, the D.A.'s supporting papers for the ex-parte TRO and Order of Attachment furnished no history of the New Jersey federal action and omitted information about the exact location of the seized funds. Knowing what I know now, I would never had signed that first

ex-parte Order of Attachment. Why? Because this Court could not attach property not within its jurisdiction.

I find support in Koehler v. Bank of Bermuda, Ltd., 56 U.C.C. Rep. Serv. 2d (Callaghan) 782. There, the federal court cites with approval, National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Advanced Employment Concepts, Inc., 269 A.D. 2d 101, 703 N.Y.S.2d 3 (1st Dept. 2000), and other New York case law for the proposition that in order for property to be levied, it must exist within the jurisdiction of the state.

As the facts were then, Nolasco was the sole person convicted of operating the money transmission business using the Valley National accounts. Any linkage between Nolasco and the defendants, vis-a-vis, the alleged bribery payments from the defendants to manage their accounts was dispelled with the Kaufman supplemental Affirmation advising the Court that Nolasco stole their funds.

With that being said, on June 7, 2006, the seized funds became private funds located outside of New York which belonged to the defendants and which could not be seized as a matter of law. Further, this was not the case where the U.S. Attorney's

Office voluntarily desired to withdraw its forfeiture action believing a State claim would be more successful or appropriate, which would have ostensibly allowed a seamless transfer of the seized funds back to New York.

Contrarily, for at least two years, the Federal government, without a single claim of wrongdoing against the defendants, strenuously opposed the release of the seized assets in New York and/or New Jersey. These funds as of June 7, 2006 belonged to the defendants and were outside the jurisdiction of this Court.

Under that legal scenario, there would have been no basis to allow the filing of the second ex-parte Order of Attachment in August, even though the funds were already in New York because the transfer from U.S. Attorney's Office to the D.A.'s office was patently improper.

To round out this discussion, I fully agree with the defendants' collective position that the basis to cure a defective Order of Attachment with a second one while an action is pending does not fairly address the post-deprivation rights of the defendant in present day forfeiture proceedings.

Upon reflection, I am not certain that

Mojarrieta v. Saenz, 80 N.Y. 547 (1880) is a sound precedent to rely on, certainly not in a case as here where there was no basis for the Claiming Authority to be granted an ex-parte Order of Attachment to begin with.

I am now discussing the ground of improper service of process. After careful consideration of the legal issues in this case, I see no justifiable basis for the Plaintiff to have completed an end-run to the proper manner of obtaining personal jurisdiction over the 58 defendants in this case. The Inter-American Convention on Letters Rogatory is mandatory for signatories to that agreement.

In CFTC v. Nahas, 238 U.S. App. D.C. 93, 738 F.2d 487 (D.C. Cir., 1984) while addressing the issue of compulsory process such as an investigative subpoena to be served on a Brazilian citizen, the Circuit Court had this to say: "Brazilian law requires that service of process by foreign nations be made pursuant to a letter rogatory or a letter of request transmitted through diplomatic channels."

Equally persuasive upon this Court is Hypo Bank Claims Group, Inc. v. American Stock Transfer & Trust Company, et al., 4 Misc.3d 1020A, 791 N.Y.S.2d 870 (Sup.Ct.N.Y. Co., 2004, Edmead, J.), wherein the

court held that "cases involving a foreign corporation having its principal place of business overseas, the doctrine of comity trumps CPLR 311(a)(1) and requires the service of process be effectuated not according to New York law, but in compliance with the laws of the sovereignty where the foreign corporation is located..." See also Tucker v. Interarms, 186 F.R.D.450, 1999 U.S. Dist. LEXIS 13430 (N.D., Ohio, 1999); Alpha Omega Technology, Inc. v. PGM, et al., 1994 U.S. Dist. LEXIS 1218 (S.D.N.Y., 1994 ("New York Courts, however, interpret the doctrine the comity of nations to provide that service in violation of the law of a foreign country is ineffective..."); and Mastec Latin America v. Inepar S/A Industries E Construcoes, 2004 U.S. Dist. LEXIS 13132 (S.D.N.Y.,2004) ("Under New York law, service of process in violation of the laws of a foreign country is invalid...").

Against this legal backdrop, it was improper for the Claiming Authority to seek an ex-parte court order on August 10, 2006 providing alternative means of service pursuant to CPLR 308(5) based upon a purported claim that service via the convention would have been impracticable. The

papers reveal that the Brazilian authorities and New York have a good working relationship and that the U.S. Customs Office have been working with them since 2000. They knew who the players were, where they worked and where they lived in Brazil. There was also no showing that the process would have been evaded. After all, these same defendants are the subject of criminal and civil proceedings involving the same type of criminal activity vis-a-vis Brazil's currency laws. The Brazilian government, based upon mutual desire to deal with the burgeoning problem of the doleiros, could have easily worked to expedite the letters rogatory process. In fact, the U.S. government could have lent its good offices to move this along at a faster clip.

Parenthetically, reliance on the Mutual Legal Assistance Treaty to short circuit lawful service of process on Brazilian citizens and corporations is misplaced as this is a civil forfeiture proceeding, not a criminal matter. I might also add that counsel's appearance in this action did not waive their right to challenge improper service of process and make their respective cross-motions. Al-Dohan v. Kouyoumjian, 93 A.D.2d 714, 461 N.Y.S. 2d 2 (1st Dept., 1983).

Defendants, based upon settled federal and state case law, did not consent to jurisdiction and service of papers on counsel for the respective defendants was improper.

Finally, assuming my August 10th order granting leave to the plaintiff to complete alternative means of service and extending the time to October 10, 2006 was proper, and I hold it was not, still, the D.A.'s opposition papers contain no affidavit from someone with personal knowledge as to the manner in which any of the defendants allegedly were personally served with papers in Brazil, or any other appropriate affidavits of service by that deadline, or even to this very day. The County Clerk's file contains no affidavits of service, good, bad or otherwise.

I would also like to briefly discuss the forum non conveniens issue. Former Justice Miller in Banco Nacional Ultramarino, S.A. v. Chan, 169 Misc. 2d 182, 641 N.Y.S.2d 1006 (Sup. Ct. N.Y.Co., 1996) addressed this issue. "The doctrine is applied if notions of justice, fairness and convenience requires it. Among the factors the court must consider are (1) availability of another more convenient forum; (2) whether the dispute

centers around a transaction occurring primarily in another jurisdiction; and (3) whether the foreign jurisdiction has a permanent interest in resolving the issues..."

I do find that it is more appropriate for the District Attorney to prosecute a civil forfeiture action here in New York as a companion action to a criminal prosecution in New York related to that action. On this record before this Court it remains unclear whether Brazil or New York is the more appropriate forum. What is clear from the D.A.'s supporting papers is that Brazil is arguably even more aggressive in pursuing the defendants in both the civil and criminal actions with respect to their purported violation of currency laws and conducting their money transaction businesses.

In any event, this Court, given everything that has been said decided thus far, does not really have to reach this ground there is a sufficient basis to grant the branches of defendants' cross-motion to vacate the second Order of Attachment, to deny the Claiming Authority's Order to Show Cause to confirm that Order of Attachment and to dismiss this action.

I am directing that the parties, within

seven days, submit mutually exchanged proposed orders and judgments setting forth the recitation of the papers and my conclusions. I expect to receive a hard copy of the proposed orders and judgments with affidavits of service, as well as a companion Word Perfect disk so I can make appropriate changes as I deem fit to accurately reflect my decision and order this afternoon.

MS. MINER: Would you consider staying your ruling?

THE COURT: Pardon?

MS. MINER: Would you consider staying it a little longer.

THE COURT: Staying it? I may consider that application in the context of signing the proposed order and judgment. My decision today does not have any effect until I sign the proposed order and judgment.

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Certified to be a true and accurate record of the proceedings herein.

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ENIKA BODNAR, CSR, RPR
Official Court Reporter