2014 WL 3899209 (N.Y.Sup.), 2014 N.Y. Slip Op. 32117(U) (Trial Order)
Supreme Court, New York.
New York County

Alexander GLIKLAD, Plaintiff,
v.
BANK HAPOALIM B.M., Respondent.

No. 155195/2014.
August 4, 2014.

Decision and Order

Motion Sequence Nos. 001, 002

Melvin L. Schweitzer, J.:

***1** Alexander Gliklad (Mr. Gliklad) submitted a petition to compel Bank Hapoalim B.M. (Bank Hapoalim) to respond to a Subpoena *Duces Tecum* seeking documents concerning the bank accounts of Judgment Debtor Michael Cherney a/k/a Michael Chernoi (Mr. Cherney) and to compel the turnover of all money and other assets held by Bank Hapoalim belonging to or in which Mr. Cherney has an interest. Bank Hapoalim has moved for dismissal of the petition.

Background

On April 11, 2014, this Court granted summary judgment to Mr. Gliklad regarding enforcement of a one-page promissory note signed by Mr. Cherney. On April 15, 2014, a judgment of over $505 million dollars was entered against Mr. Cherney. Mr. Gliklad proceeded to serve a Restraining Notice and Subpoena *Duces Tecum* on Bank Hapoalim's New York branch, enjoining the transfer of any funds maintained by Mr. Cherney at Bank Hapoalim and requesting documents relating to all accounts maintained by Mr. Cherney at Bank Hapoalim, regardless of location. On May 6, 2014, Bank Hapoalim responded via letter that while it would produce documents to the extent they were held at its New York branch, it would not restrain assets or produce documents held at any other Bank Hapoalim location.

On May 13, 2014 Bank Hapoalim produced two New York Clearinghouse wire transfers, dated October 17, 2012 and November 1, 2012, which showed transfers of funds from Mr. Cherney's bank in Cyprus to his account at Bank Hapoalim's Israel branch in Tel Aviv. Both transfers originated from Alpha Bank Cyprus limited in Cyprus. The funds then moved through Deutsche Bank in New York City, to Bank Hapoalim in New York City, and finally to Bank Hapoalim's central branch in Tel Aviv. Mr. Cherney was listed as both the originator and the beneficiary of both transfers and both transfers noted that Mr. Cherney transferred his own funds. Together, the two transfers total $16 million dollars.

On May 27, 2014 Mr. Gliklad submitted a petition to compel a response from Bank Hapoalim to his subpoena and to turnover any and all funds in Mr. Cherney's account at its Tel Aviv branch. Bank Hapoalim then submitted a motion to dismiss the petition on the grounds that (1) it is not subject to general or specific personal jurisdiction in New York, (2) that service upon its New York branch is insufficient to reach documents and assets in its Tel Aviv branch under the separate entity rule, and (3) that it cannot comply with the subpoena and turnover demand without violating Israeli privacy laws.

Discussion

General Jurisdiction

In support of the assertion of general jurisdiction over Bank Hapoalim, Mr. Gliklad cites *Koehler v Bank of Bermuda Ltd*, in which the Court of Appeals of New York held that "a New York court with personal jurisdiction over a defendant may order him to turn over out-of-state property regardless of whether the defendant is a judgment debtor or a garnishee." *Koehler* 12 NY3d 533, 541 (2009). Mr. Gliklad argues that service upon Bank Hapoalim's branch in New York is enough to confer jurisdiction over Bank Hapoalim in Israel for the purpose of reaching Mr. Cherney's assets. Mr. Gliklad further contends that this has been the law in New York for some time, citing several First Department decisions holding that a turnover order can reach out of state property.

Bank Hapoalim asserts that the Supreme Court's decision in *Daimler AG v Bauman* has limited the instances in which general jurisdiction may be asserted over a foreign corporation in the United States. The court held that general jurisdiction is available only where the corporation is "fairly regarded as at home," and labeled a corporation's place of incorporation and principal place of business as "paradigm bases for general jurisdiction." *Daimler* 134 Sup Ct 746, 760 (2014). Beyond these two locations, a foreign corporation may also be considered at home where "its affiliations with the State are so continuous and systematic as to render it essentially at home in the forum State." *Daimler* at 761.

Mr. Gliklad argues that neither the holding nor the rationale of *Daimler* have any bearing on this case. The court finds that it does. As in *Daimler*, this case is concerned with the assertion of jurisdiction over a foreign entity based on its activities in the United States. Although *Daimler* may have only mentioned subsidiaries, there is no rationale to suggest that its reasoning should not be applied to a foreign bank with a branch in New York. In fact, the *Daimler* decision appears to address the concerns of the dissent in *Koehler* that "if any court with power over the garnishee can order the garnishee to change the asset's location, significant disruption in the process of deciding whose rights are superior seems inevitable. And the business of banking itself, for a bank with offices in several states or countries, will also be disrupted." *Koehler* at 542 (Smith, J., dissenting).

In assessing the capability of asserting general jurisdiction over Bank Hapoalim, the court finds that Bank Hapoalim does not meet the two paradigm bases for general jurisdiction articulated in *Daimler*. Bank Hapoalim is incorporated in Israel and its principal place of business is in Tel Aviv. The only remaining possibility for asserting general jurisdiction here is if Bank Hapoalim's activities in New York are so continuous and systematic as to render it at home in New York.

Mr. Gliklad presents Bank Hapoalim's New York branch as being the center of its operations in the United States, where it actively conducts business. Even if this is taken to be true, there is no evidence to suggest that the activity at the New York branch is substantial enough to warrant general jurisdiction in New York over Bank Hapoalim. The court finds no reason to find that Bank Hapoalim is at home in New York. To allow the exercise of general jurisdiction in a state where a corporation only engages in a substantial and continuous course of business has been found to be "unacceptably grasping." *Daimler* at 761. While Bank Hapoalim's New York branch may in fact be the center of its operations in the United States, this says nothing with respect to an elevated level of continuous and systematic activity. Center of operations is an opaque concept, having no identifiable meaning in the circumstances. It may just mean that Bank Hapoalim has its only U.S. Vice President in New York. There is no center of operations test with respect to general jurisdiction post *Daimler*.

Despite all of this, Mr. Gliklad asserts that Bank Hapoalim's objection to general jurisdiction is undone by virtue of it having consented to the jurisdiction of the New York courts. Bank Hapoalim is licensed by the New York State Department of Financial Services to conduct business in New York, and has designated the New York Superintendent of Financial Services as its agent for service of process. These facts are put forward as evidence of Bank Hapoalim's consent to general jurisdiction in New York under New York Banking Law § 200. However, this court holds that Mr. Gliklad has misinterpreted the law with regard to what provides for the exercise of general jurisdiction. New York Banking Law § 200 states that by appointing the superintendent of banking as agent for service of process a foreign bank may be subject to jurisdiction "in any action or proceeding against

it on a cause of action arising out of a transaction with its New York agency or agencies or branch or branches...” N.Y. Bank Law § 200 (3). The court agrees with Bank Hapoalim's understanding of this law as providing for the exercise of specific jurisdiction, not general.

In light of the recent decision in *Daimler*, and the lack of evidence suggesting that Bank Hapoalim has “affiliations with the State [which] are so continuous and systematic as to render it essentially at home” in New York, the court finds that there is no basis for the exercise of general jurisdiction over Bank Hapoalim. While Mr. Gliklad expresses concern that this interpretation effectively precludes Bank Hapoalim from being subjected to general jurisdiction anywhere in the United States, this does not mean that Bank Hapoalim can never be tried in a United States court. Specific jurisdiction is still an available option in appropriate circumstances, which Bank Hapoalim itself recognizes.

Specific Jurisdiction

It is Mr. Gliklad's contention that specific jurisdiction is predicated on Bank Hapoalim's role as a garnishee of funds belonging to Mr. Cherney. Mr. Cherney's transfer of $16 million through Bank Hapoalim's New York branch is presented as providing sufficient contacts with the forum to sustain specific jurisdiction. Both of these transfers took place in late 2012, over a year and half before judgment was handed down in the underlying controversy between Mr. Gliklad and Mr. Cherney. To find a bank subject to specific jurisdiction based solely on its permitting one of its customers to take advantage of a regularly available banking service would permit the extension of jurisdiction to a degree that would most certainly violate notions of “fair play and substantial justice.” *Int'l Shoe Co. v Wash.*, 66 S.Ct. 154, 159 (1945). Without any suggestion that Mr. Cherney initiated these transfers for the specific intent of depriving Mr. Gliklad of the opportunity to receive payment on the promissory note, there is no basis for establishing specific jurisdiction over Bank Hapoalim.

Separate Entity Rule

Bank Hapoalim asserts that the petition should be dismissed due to inadequate service of process under New York law, specifically under the separate entity rule. It has long been the rule of New York that each branch of a bank is to be regarded as a separate entity “in no way concerned with accounts maintained by depositors in other branches or at the home office.” *Cronan v Schilling*, 100 NYS2d 474, 476 (1950). *See also Nat* 7 *Union Fire Ins. Co. of Pittsburgh, Pa. v Adv. Employment Concepts*, 269 AD2d 101, 101 (1st Dept 2000); *Therm-X-Chemical & Oil Corp. v Extebank*, 84 AD2d 787, 787 (2d Dept 1981).

Mr. Gliklad argues that the holding in *Koehler* has abrogated the separate entity rule. There is no mention of the separate entity rule in the *Koehler* decision. As the separate entity rule appears to have played no part in the analysis of the *Koehler* court, the court finds no reason to interpret that it either endorsed or abrogated the rule. There is no reason to believe that the separate entity rule is no longer good law in New York. Mr. Gliklad's attempt to obtain the turnover of Mr. Cherney's funds located in Bank Hapoalim's Tel Aviv branch by serving its branch in New York fails.

International Comity

Based on the court's findings regarding personal jurisdiction, a decision on Bank Hapoalim's comity argument is unnecessary. However, a brief discussion inasmuch as it relates to jurisdiction concerns will provide further clarity for today's holding. In *Daimler*, the Supreme Court notes that other nations do not share the same United States views on jurisdiction. Enforcing expansive views of jurisdiction on foreign governments “have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments.” *Daimler* at 763. As applied in *Daimler*, considerations of international rapport reinforce this court's determination that subjecting Bank Hapoalim to general jurisdiction in New York would not comport with the due process demands of “fair play and substantial justice.”

Conclusion

ORDERED that Bank Hapoalim's motion to dismiss is granted; and it is further

ORDERED that Mr. Gliklad's petition to compel a response to a post-judgment subpoena and for the turnover of funds is denied.

Dated: August 4, 2014

ENTER:

<<signature>>

J.S.C.

End of Document