SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 6, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Gische, Webber, Kahn, Moulton, JJ.

9169 Primus Pacific Partners 1, LP, Index 653885/16
Plaintiff-Appellant,

-against-

Goldman Sachs Group, Inc., et al.,
Defendants-Respondents.

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Kasowitz Benson Torres LLP, New York (Sheron Korpus of counsel), for appellant.

Sullivan & Cromwell LLP, New York (Sharon L. Nelles of counsel), for Goldman Sachs Group, Inc. and Goldman Sachs (Singapore) Pte, respondents.

Wilson Sonsini Goodrich & Rosati, P.C., New York (Michael S. Sommer of counsel), for Tim Leissner, respondent.

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Appeal from order, Supreme Court, New York County (O. Peter Sherwood, J.), entered November 17, 2017, which granted defendants' motions to dismiss the complaint based on forum non conveniens, deemed an appeal from the judgment, same court and Justice, entered December 22, 2017, dismissing the complaint, and, so considered, said judgment unanimously affirmed, without costs.

This action involves the betrayal by a Singapore entity (defendant Goldman Sachs [Singapore] Pte. [GSS]) of its Malaysian client (nonparty EON Capital Sdn. Bhd.) to curry favor with the Malaysian Prime Minister.

The action was properly dismissed on forum non conveniens grounds, given the unduly burdensome inquiry involved in determining personal jurisdiction in these circumstances and the balance of the forum non conveniens considerations (*see Sinochem Intl. Co. Ltd. v Malaysia Intl. Shipping Corp.*, 549 US 422, 436 [2007] [if the court "can readily determine that it lacks jurisdiction over the . . . defendant, the proper course would be to dismiss on that ground . . . . But where . . . personal jurisdiction is difficult to determine, and *forum non conveniens* considerations weigh heavily in favor of dismissal, the court properly takes the less burdensome course"]). The decision whether the court had jurisdiction over GSS because GSS was a mere department of New-York-based Goldman Sachs Group, Inc. (GSG) would involve an "arduous inquiry" (*id.* [internal quotation marks omitted]) into whether GSG controlled GSS's finances, interfered with the selection and assignment of executive personnel, and failed to observe corporate formalities, and whether defendant Tim Leissner had sufficient contacts with New York.

Plaintiff's causes of action for fraud and breach of fiduciary duty lack a substantial nexus with New York (*see e.g. Bluewaters Communications Holdings, LLC v Ecclestone*, 122 AD3d 426, 428 [1st Dept 2014]). Furthermore, plaintiff is a Cayman Islands partnership, not a New York resident (*see Bacon v Nygard*, 160 AD3d 565, 566 [1st Dept 2018]). Finally, Malaysia has a greater interest than New York in whether one Malaysian bank (nonparty Hong Leong Bank) corruptly took over another Malaysian bank (EON) (*see e.g. Hanwha Life Ins. v UBS AG*, 127 AD3d 618, 619 [1st Dept 2015], *lv denied* 26 NY3d 912 [2015]; *Bluewaters*, 122 AD3d at 428; *Millicom Intl. Cellular v Simon*, 247 AD2d 223 [1st Dept 1998]).

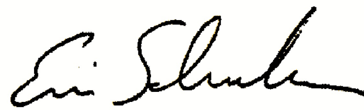
Contrary to plaintiff's contention, New York law does not require an alternative forum to be available (*see e.g. Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478, 480-484 [1984], *cert denied* 469 US 1108 [1985]; *Norex Petroleum Ltd. v Blavatnik*, 151 AD3d 647, 648 [1st Dept 2017], *lv denied* 30 NY3d 906 [2017]).

We have considered plaintiff's remaining arguments (e.g., that New York public policy will require the application of this state's law instead of Malaysian law and that the court should

have allowed plaintiff to take discovery before granting defendants’ motions) and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 6, 2019



DEPUTY CLERK

Sweeny, J.P., Manzanet-Daniels, Tom, Kapnick, Moulton, JJ.

9103 Toni G. Harvey, Index 151842/15
Plaintiff-Respondent,

-against-

42/9 Residential, LLC,
Defendant-Appellant-Respondent,

FBRM Corp., doing business as American
Home Hardware & More,
Defendant-Respondent-Appellant.

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An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Erika M. Edwards, J.), entered on or about September 5, 2017,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated May 28, 2019,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: AUGUST 6, 2019

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DEPUTY CLERK

Sweeny, J.P., Gische, Webber, Kahn, Moulton, JJ.

9182 Estate of Margaret Kainer, etc., et al., Plaintiffs-Appellants, Index 650026/13

-against-

UBS AG, etc., et al.,
Defendants-Respondents,

John Does 1-X, et al.,
Defendants.

Krauss PLLC, New York (Geri S. Krauss of counsel), for appellants.

Gibson, Dunn & Crutcher LLP, New York (Marshall R. King of counsel), for UBS AG and UBS Global Asset Management (Americas), Inc., respondents.

Franzino & Scher LLC, New York (William M. Barron of counsel), for Norbert Stiftung and Edgar Kircher, respondents.

Hunton Andrews Kurth LLP, New York (Joseph A. Patella of counsel), for Christie's Inc., respondent.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered on or about October 31, 2017, which, to the extent appealed from, granted defendants UBS AG, UBS Global Asset Management (Americas), Inc.'s (together, UBS) and Norbert Stiftung f/k/a Norbert Levy Stiftung (the Foundation) and Edgar Kircher's motions to dismiss the complaint against them on forum non conveniens grounds, granted defendant Christie's Inc.'s

motion to dismiss the complaint against it on forum non conveniens grounds to the extent of staying the action against Christie’s, with leave to restore the action to the calendar if plaintiffs obtain a final favorable determination in the European court(s), granted Christie’s motion to dismiss the causes of action for unjust enrichment and conspiracy to obtain unjust enrichment as against it, denied plaintiffs’ motion to supplement the record, and precluded jurisdictional discovery, unanimously affirmed, without costs.

This action involves a dispute among purported heirs to Margaret Kainer’s estate over ownership rights to a Degas painting, “Danseuses,” which Nazis illegally confiscated from Kainer, who died without a will or children in 1968, and which, many years later, was sold in New York at a Christie’s auction. Plaintiffs consist of Kainer’s estate and 11 heirs to the estate, according to French certificates of inheritance identifying them as such.

The Foundation, another purported heir to Kainer’s estate and thus to the painting, was founded under Swiss law and is domiciled in Switzerland. UBS AG is a Swiss bank that maintains offices in New York. Its subsidiary, UBS Global Asset Management, is a Delaware corporation. UBS managed the assets of

the Kainer family and allegedly created the Foundation. Edgar Kircher, a Swiss citizen and resident and UBS employee, served on the board of trustees of the Foundation, and allegedly directed all acts of the Foundation. Christie's, a New York auction house, was incorporated in New York and has a principal place of business in New York City.

Christie's and UBS Global Asset Management are the only defendants that do not contest personal jurisdiction in New York. No plaintiffs reside in New York, and all but one reside outside of the United States.

The motion court properly dismissed this action on forum non conveniens grounds without first determining whether it had personal jurisdiction over all the defendants. *Sinochem Intl. Co. Ltd. v Malaysia Intl. Shipping Corp.* (549 US 422 [2007]) is persuasive authority on this point. In that case, a unanimous United States Supreme Court held that a trial court

> "has discretion to respond at once to a defendant's forum non conveniens plea, and need not take up first any other threshold objection. In particular, a court need not resolve whether it has authority to adjudicate the cause (subject matter jurisidiction) or personal jurisdiction over the defendant if it determines that, in any event, a foreign tribunal is plainly the more suitable arbiter of the merits of the case"

(*id. at* 425).

To be sure, as the *Sinochem* Court noted, if a court can readily determine that it lacks personal jurisdiction over a defendant, the proper course is to dismiss on that ground. However, where personal jurisdiction is difficult to determine, and forum non conveniens considerations clearly militate in favor of dismissal, a court may dismiss on the latter ground (*id. at* 436).

Plaintiffs concede that they currently do not have a basis for personal jurisdiction in New York over any defendant except Christie's. Plaintiffs' attempt to minimize the amount of discovery necessary to establish personal jurisdiction over the remaining defendants is unconvincing. This action concerns actions taken by various entities on two continents. The defendants' alleged actions that would expose them to personal jurisdiction in New York overlap extensively with the merits of plaintiff's claims that Christie's conspired with the remaining defendants to interfere with plaintiffs' rights to the painting. As it could not readily determine, without allowing significant discovery, that it had personal jurisdiction over all the defendants, the motion court properly considered the defendants' arguments that New York is an inconvenient forum.

The doctrine of forum non conveniens permits a court to dismiss an action that is otherwise jurisdictionally sound if it finds that "in the interest of substantial justice the action should be heard in another forum" (CPLR 327[a]; *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-479 [1984], *cert denied* 469 US 1108 [1985]). The relevant factors include: (1) the burden on the New York courts; (2) potential hardship to the defendant; (3) the unavailability of an alternative forum; (4) whether both parties are nonresidents; and (5) whether the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction (*Islamic Republic of Iran*, 62 NY2d at 479; *see also Bank Hapoalim [Switzerland] Ltd. v Banca Intesa S.p.A.*, 26 AD3d 286, 287 [2006]). The court may also consider the location of potential witnesses and documents and potential applicability of foreign law (*Shin-Etsu Chem. Co., Ltd. v ICICI Bank Ltd.*, 9 AD3d 171, 176 [1st Dept 2004]).

These factors clearly demonstrate that New York is an inconvenient forum. Plaintiffs' rights as heirs to the painting arose in Germany and France, although the painting was allegedly wrongfully sold in New York. The burden on the New York court in applying Swiss and French estate law to determine the underlying issue of the lawful heirs to Kainer's estate is significant. As

the motion court noted, the parties “not only dispute the applicable foreign law, but discuss the substance of the law . . . in a manner that is, at best, opaque.” “The applicability of foreign law is an important consideration in determining a forum non conveniens motion . . . and weighs in favor of dismissal” (*Shin-Etsu Chem. Co., Ltd.*, 9 AD3d at 178; *see also Peters v Peters*, 101 AD3d 403, 403 [1st Dept 2012]).

The potential hardships to the defendants of litigating in New York are clear. Kircher lives in Switzerland, the Foundation was created and is domiciled in Switzerland, UBS AG is incorporated and headquartered there, and UBS Global Asset Management has consented to jurisdiction there. Although UBS has a New York office and resources to litigate the case here, many relevant nonparty witnesses and documents are located in Switzerland and Germany, and UBS would be powerless to compel their attendance in New York.

Switzerland appears to be an available alternative forum. France and Germany also may be possible alternatives. Plaintiffs have asked the Swiss court to find that they are the sole heirs to the Kainer estate, declare the Swiss certificates of inheritance null and void, and order that all assets – not just the painting at issue herein - originating from Kainer’s estate

be returned to plaintiffs. Whether the Foundation and Christie's could enter into their agreement to sell the painting "cannot be determined without reference to the underlying issue of ownership – the very issue that is already being litigated abroad" (*Citigroup Global Mkts., Inc. v Metals Holding Corp.*, 45 AD3d 361, 362 [1st Dept 2007]). This factor thus favors dismissal, in part due to the risk of conflicting rulings (*id.*; *see Datwani v Datwani*, 121 AD3d 449, 449 [1st Dept 2014], *lv denied* 24 NY3d 912 [2014]). Plaintiffs note that the Foundation and the Swiss localities seek dismissal of the Swiss proceedings for lack of jurisdiction and on statute of limitations grounds. In any event, while the existence of a suitable alternative forum is an important factor, its absence does not require a New York court to retain jurisdiction (*see Pahlavi*, 62 NY2d at 481).

Plaintiffs also argue that, even if the Swiss proceedings reach a determination on the merits, they will not determine plaintiffs' rights to the paintings because the Swiss courts cannot invalidate plaintiffs' French certificates of inheritance, but the same is true in New York. The certificates merely confer standing to sue, and do not conclusively resolve the question, in Switzerland or New York, of whether the Foundation has rights to the painting (*see Maestracci v Helly Nahmad Gallery, Inc.*, 155

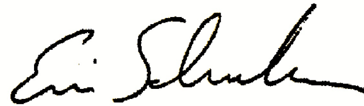
AD3d 401, 403-404 [1st Dept 2017]).[1]

The foregoing factors favor dismissal against UBS, Kircher, and the Foundation, and a stay of the proceedings against Christie's pending a determination favorable to plaintiffs in the foreign courts.

We have considered plaintiffs' remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 6, 2019



DEPUTY CLERK

[1]Plaintiffs appear to be correct that a European court may not have jurisdiction over Christie's, and thus might not be able to determine the final issue of the validity of the RSA and sale of the painting. Christie's conduct is at issue only if the Foundation is found not to be the sole lawful heir, with authorization to release claims to the painting in the RSA. Accordingly, Supreme Court issued a stay of proceedings against Christie's, conditioned upon a determination in European courts under European estate law, whether the Foundation and plaintiffs are heirs to the painting.

Sweeny, J.P., Gische, Tom, Gesmer, Singh, JJ.

9260 Nicholas Wilder, Index 100841/18
Plaintiff-Appellant,

-against-

Fresenius Medical Care Holdings,
Inc., (doing business as Fresenius
Medicare Care North America), et al.,
Defendants-Respondents.

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Nicholas Wilder, New York, appellant pro se.

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Roland T. Koke of counsel), for Fresenius Medical Care Holdings, Inc., Avantus Rental Therapy New York, LLC, Marilous Mateo, Judy Ammar, Chenille Apurada and Saraswati Kasti, respondents.

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Elliott J. Zucker of counsel), for Eliot Charen, M.D., respondent.

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Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered August 7, 2018, which denied plaintiff’s order to show cause and granted defendants’ cross motion to the extent of vacating the interim order sealing the court file, declining plaintiff’s request to proceed anonymously, and granting defendants’ request to amend the caption, unanimously modified, on the law, without costs, to reverse the order to the extent that it denied plaintiff’s request for an injunction and vacated the temporary restraining order (TRO) granted plaintiff by order dated June 25, 2018, to reinstate the TRO pending a hearing on

plaintiff's request for an injunction, and otherwise affirmed, without costs.

The motion court abused its discretion when it vacated the temporary restraining order (TRO) which it had imposed on June 25, 2018 and never held a hearing on the preliminary injunction requested, in view of the substantial issues of disputed fact raised by the parties' motion and cross motion papers.

Plaintiff suffers from end stage renal disorder, for which he must receive dialysis three times a week in order to survive. He has received dialysis from defendant Avantus Renal Therapy New York LLC (d/b/a Avantus Upper East Side Dialysis Center), a subsidiary of defendant Fresenius Medical Care Holdings, Inc., three times weekly since 2015. It is undisputed that, during that time, plaintiff and defendants had disagreements. On May 31, 2018, Fresenius sent a letter to plaintiff, notifying him that his dialysis care at Avantus would be terminated as of June 30, 2018, based on "[his] violation of safety policies as well as [his] behavior that is disruptive and abusive to the extent that it impairs the delivery of care to [him] or the ability of the facility to operate effectively." The letter provided a list of addresses and contact numbers for five other dialysis facilities.

Plaintiff commenced this action by summons with notice dated

June 22, 2018, in which he sought, inter alia, injunctive relief. By order to show cause dated June 25, 2018, plaintiff sought, inter alia, an order prohibiting defendants from terminating his dialysis treatment. He also sought a TRO requiring defendants to continue to provide him with dialysis treatment pending a hearing on his order to show cause.

On June 25, 2018, the court heard argument on plaintiff's TRO application. Defendant argued that it sought to terminate services to plaintiff because of his disruptive behavior. Plaintiff stated that he wished to seek dialysis from another facility but needed time to do so. Avantus represented that it would be willing to assist plaintiff to identify an appropriate facility, provided that he cooperate with the defendant's social worker, and sign a HIPAA release for his records. The motion court issued the TRO orally from the bench, to be in effect pending a hearing on plaintiff's order to show cause to be held on July 24, 2018. It found that "the temporary restraint is warranted because there is no dispute that dialysis is a life-saving measure which plaintiff sorely needs, and at this stage of the litigation, the defendants have not [established] that the reason for plaintiff's discharge from the facility outweigh [sic] the risks that discharge would carry with regards to plaintiff's

health." It then granted the TRO subject to five conditions: plaintiff must maintain regular contact with defendant's social worker until a transfer is effectuated, cooperate with defendants' efforts to facilitate a transfer to a new facility, execute a HIPAA release authorizing the release of his medical records to any facility to which plaintiff may be transferred, respect and not infringe upon the rights of any of defendants' employees or other patients, and cooperate with those providing him with care and abide by his prescribed medical regime. At the conclusion of its description of the TRO, plaintiff stated, "I'm not asking you to change the order." Consistent with its ruling on the record, the motion court issued a written order the same day (the TRO).[2]

On July 16, 2018, defendants submitted opposition to plaintiff's motion and cross-moved for an order vacating the TRO and for other relief. To controvert plaintiff's factual showing, defendants submitted an affirmation by counsel, two very brief

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[2]In the notice of appeal now before us, plaintiff stated that he was appealing from certain portions of the TRO, but he did not address his grounds for doing so in his brief to this court. In view of that, and his apparent concession at the June 25, 2018 argument that he had no objections to the conditions placed on the TRO, we view that appeal as abandoned. Accordingly, we need not reach the question of whether the TRO was an appealable order.

affidavits by Avantus staff members, and a 20 page excerpt from the clinical notes maintained by defendants concerning plaintiff, which was neither sworn nor certified as a business record. In reply, plaintiff submitted a 26 page affidavit, based on his personal knowledge, an affidavit by another patient corroborating some of plaintiff's assertions, and copies of emails that he had sent to defendants and their counsel.[3]

The documents submitted by plaintiff and by defendants present sharply disputed issues of fact concerning plaintiff's behavior at Avantus and his compliance with the terms of the TRO. Nonetheless, the court did not hold a hearing on plaintiff's order to show cause and defendants' cross motion, but simply heard argument on July 25, 2018 and issued the order on appeal on August 2, 2018.[4]

"A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result

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[3]In his record on appeal, plaintiff also submitted his complaint and amended complaint, dated August 27, 2018 and November 18, 2018 respectively. Since those were not before the motion court when the decisions at issue were made, this Court will not consider them.

[4]The record on appeal does not include a transcript of that argument.

unless the defendant is restrained before the hearing can be had" (CPLR 6301). A party seeking a preliminary injunction must show a likelihood of success on the merits, the possibility of irreparable harm in the absence of a preliminary injunction, and that the balance of the equities favors the movant (*Doe v Axelrod*, 73 NY2d 748, 750 [1988]).

The motion court did not have enough information before it without holding a hearing to determine the likelihood of plaintiff's success on the merits in two respects. First, the motion court correctly held, in its order dated August 2, 2018, that before a dialysis facility may discharge a patient, it must, as required by 42 CFR 494.180(f)(4), determine "that the patient's behavior is disruptive and abusive to the extent that the delivery of care to the patient or the ability of the facility to operate effectively is seriously impaired . . . . " The documents submitted to the motion court demonstrate sharp disputes of fact as to whether plaintiff's behavior was sufficiently disruptive to permit termination of his life saving care by defendants, as required by the federal regulations.

Second, 42 CFR 494.180(f)(4) further requires that, after a facility determines that a patient's behavior meets the requirements for discharge, and before it may proceed with the

discharge, the medical director of a dialysis facility must ensure that the patient’s interdisciplinary team:

> “(iii) Obtains a written physician's order that must be signed by both the medical director and the patient's attending physician concurring with the patient's discharge or transfer from the facility; (iv) Contacts another facility, attempts to place the patient there, and documents that effort; and (v) Notifies the State survey agency of the involuntary transfer or discharge.”

In its August 2, 2018 order, the motion court had found that Avantus had not produced evidence showing that it had complied with any of the federal procedural requirements for terminating a patient’s care. Defendants had not presented any new evidence that it had done so before the court issued the order presently on appeal. Indeed, the court did not address the merits of defendants’ decision to terminate plaintiff’s care at all. Accordingly, the motion court should not have denied plaintiff’s request for a preliminary injunction without holding a hearing.

The motion court also improperly vacated the TRO without a hearing. Plaintiff’s showing that he would be irreparably injured in the absence of a TRO never changed. The court was presented with no evidence inconsistent with its finding in issuing the TRO that “there is no dispute that dialysis is a life-saving measure which plaintiff sorely needs, and at this

stage of the litigation, the defendants have not established that the reasons for plaintiff’s discharge from the facility outweigh the risks that discharge would carry with regard to plaintiff’s health.”

In addition, although the court concluded that plaintiff had failed to comply with the conditions set forth in the TRO, the parties presented sharply divergent facts on that issue, which could not be resolved without a hearing.

Consequently, the court abused its discretion in failing to continue the TRO preventing defendants from discontinuing plaintiff’s dialysis treatment pending a hearing on the merits of plaintiff’s request for a preliminary injunction.

However, the motion court properly denied plaintiff’s request to allow him to proceed anonymously and seal certain filed records. At this stage, plaintiff has failed to make a showing of a substantial privacy right that outweighs the customary and constitutionally-embedded presumption of openness in judicial proceedings (*see “J. Doe No. 1" v CBS Broadcasting*

Inc., 24 AD3d 215, 215 [2005]), or of good cause to warrant sealing records (22 NYCRR 216.1; *see also Mosallem v Berenson*, 76 AD3d 345 [1st Dept 2010]).

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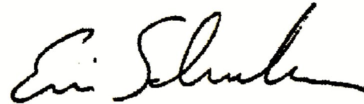

DEPUTY CLERK