

2015 WL 2256861 (Mass.Prob. & Fam.Ct.Dept.) (Trial Order)
Massachusetts Probate and Family Court Department.
Suffolk County

NIEN HSI HSU, Individually and as Executor of Estate of Nai Cheng
Hu Hsu; and Trustee of Nai Cheng Hu Hsu Living Trust, Plaintiff,
v.
CHENG PEI HSU, et al, Defendants.

No. 00e0010.
May 11, 2015.

Memorandum and Order on Barclay Bank's Renewed Motion for Summary Judgment

Elaine M. Moriarty, Judge.

*1 This matter is again before the Court on a renewed Motion for Summary Judgment by Barclays Bank PLC asserting this Court must reconsider its earlier denial of Summary Judgment given the decision of the United States Supreme Court in *Daimler A.G. v Bauman*, 134 S. Ct. 746 (2014). See Memorandum of Decision denying Summary Judgment dated Sept 6, 2013 which sets forth some of the background of this case. Bank argues the *Daimler* decision marks a seismic shift in the manner of obtaining general in personam jurisdiction over foreign corporations. Banks motion was accompanied by affidavits of its secretary Patrick Gonsalves and Atty Colin Zick. Additional facts set forth herein are taken from these affidavits.

Additional facts:

Barclays Bank PLC was added as a defendant to this equity action (initially filed in 2000) in 2008 and was not served until 2009.

Barclays Bank PLC is a publicly limited company incorporated under the laws of England and Wales. It is a parent company of several Barclays' subsidiaries.

The Bank's registered office and headquarters have been at all times since 1990 located in London.

The Bank is primarily a British bank with extensive business operations throughout the United Kingdom. It has 36 branches located outside the United Kingdom. Three are located in the United States, including two in New York and one in Florida. There are no branches in Massachusetts.

Barclays has a representative office in Delaware, New York and District of Columbia but none in Massachusetts. (It had an office in Boston at time of service of complaint).

The Bank has no physical presence in Massachusetts and does not own or lease property here, does not hold a banking license or have any operations here.

Nearly 80% of its revenues are generated in the United Kingdom and approximately 15% from branches in the United States.

A separately incorporated subsidiary of Barclays Bank PLC maintains an investment banking office in Boston.

In Personam Jurisdiction

Plaintiff asks this Court to exercise jurisdiction over Barclays Bank PLC in London, the entity involved setting up the trust because of the presence of a subsidiary then in Boston.

Bank contends *Daimler* allows the exercise of general in personam jurisdiction over a foreign Bank, consistent with the Due Process clause, only if the corporation is incorporated or has its principal place of business within the forum and a foreign corporation may not be subjected to jurisdiction based solely on an instate subsidiary's presence or contacts within the state.

Plaintiff bears the burden of establishing by a preponderance of the evidence that this Court has in personam jurisdiction over the Bank. *Droukas v Divers Training Academy Inc.* 375 Mass. 149, 151; 376 N.E.2d 548-549 (1978). In personam jurisdiction can be general where the Court may “hear any and all claims against” defendant even those “unrelated to the foreign corporation's contacts with the state”. *Goodyear Dunlop Tires Operations S.A. v Brown*, 131 S.Ct. 2846, 2851 (2011) or specific where the issues “deriving from or (are) connected with the very controversy that establishes jurisdiction”. *Id*

*2 For considerable time Courts relied on the standard set forth in *International Shoe* where “continuous corporate operations within a state (are) so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.” *International Shoe Co. v Washington*, 326 U.S. 310, 318 (1945) Such contacts ,when sufficient ,were deemed not to offend traditional notions of “fair play and substantial justice” or the Due Process clause in requiring the corporation to defend within the particular state. However *Daimler* (a suit by foreign plaintiffs against foreign defendants for a cause of action in a foreign country) held the contacts must be so substantial and continuous that the corporation is in effect “at home”within the state. The decision restricts this Court's ability to exercise jurisdiction if the Bank's “home” is elsewhere and its activities had nothing to do with this jurisdiction. Under *Daimler* with respect to a corporation, the place of incorporation and principal place of business are paradigm bases for general jurisdiction. *Daimler* at 749. An action cannot be maintained in a jurisdiction where the corporation (Not incorporated or having a principal place of business there) engaged in “continuous and systematic activity, unrelated to the suit in the forum state”. *Federal Home Loan Bank of Boston v Ally Financial Inc.* (Civ. A. No. 11-10952-GAO 2014 WL 4964506 (2014) quoting *United States v Swiss Am Bank* , 274 F. 3d 610, 618 (1st Cir 2001)). To hold otherwise would subject foreign corporations to “global reach” in a multitude of jurisdictions, a result the United States Supreme Court did not endorse. The Bank clearly is incorporated and has its principal place of business in England. Under *Daimler* there is no general jurisdiction over it in Massachusetts.

Bank contends Plaintiff has only pled a theory of general jurisdiction and not specific jurisdiction but, in oral argument and other pleadings, Plaintiff has sought to assert both. See the Sept. 2013 Memorandum of Decision that outlines some of the actions between Barclays PLC in London and Trustee which are factually in dispute and which may warrant Barclays PLC defending at trial. However these actions took place in London. Plaintiff seeks to impute knowledge of Barclays PLC London to the Bank here where it had a representative office at time of service. However the alleged contacts with Barclays here were minimal and the overwhelming contact between the Settlor of the trust was with Barclays in London where he flew to discuss setting up the trust and transfer money from accounts there. Plaintiff makes no showing that any alleged injury was caused by significant activity of the Defendant here within this forum. The fact that here, unlike *Daimler*, plaintiff is within this jurisdiction is of no assistance to him. Contacts must be “with the forum state itself, not the defendant's contacts with persons who reside there” *Walden v. Fiore* 134 S.Ct. 1115, 1121 (2014).

Under the *Daimler* analysis it appears general jurisdiction cannot be established. Alternatively, specific jurisdiction cannot be established and Summary Judgment for Bank is warranted on jurisdictional grounds.

Comity

Given its decision on jurisdiction, this Court does not have to reach the comity issue but considers the following.

While this action was pending, Barclays Trust Jersey, the actual trustee of the Tyzee Trust, against whom enforcement of the Massachusetts divorce judgment was sought, filed an action for instructions in the Jersey Court in 2005 where the trust is located. Action was brought against Plaintiff herein and his four brothers. Trustee sought instructions on whether it should recognize the Massachusetts divorce judgment. The Jersey Court instructed it to “remain neutral in relation to the dispute over ownership of Trust assets” pending a claim Plaintiff herein might file in Jersey. Thereafter in September 2005 Plaintiff herein filed an action individually and as Executor of his Mother's estate against Barclays Trust Jersey, the actual trustee, as well as his brothers seeking an order that the Massachusetts divorce judgment be recognized. He further sought an order that Trustee be ordered to pay the judgment with accumulated interest. The Jersey Court had jurisdiction over Plaintiff, his brothers herein, the Trustee and the trust assets. Barclays Bank PLC, the defendant in this Massachusetts action, was not named a defendant in the Jersey action.

Without recounting all the procedural details (See Judgment of Royal Court of Jersey) a hearing was set and continued by agreement of the parties on a number of occasions and finally set for hearing November 2009. Plaintiff herein did not appear to be heard on his own application, nor did he comply with an order of the Royal Court dated Feb 8, 2008 which, as relevant here, set a time for him to file an affidavit and directed him to file a “skeleton argument” of his legal position. The Royal Court dismissed the action for failure of Plaintiff to appear personally or through counsel to argue his position. Plaintiff did not appeal.

*3 It may be noted that in its decision the Royal Court observed that neither Wife nor her Plaintiff Executor sought to recognize or enforce the Massachusetts divorce judgment in Jersey from 2000 until 2005. At that point Trustee filed his complaint for instructions. That Court directed not only he remain neutral but ordered Plaintiff herein to serve any “proprietary claim” on parties within a set time and if he failed to do so the Trustee would be directed to handle the assets without regard to Plaintiff's claims. After filing his action Plaintiff took no steps until February 2008.

Though it dismissed Plaintiff's actions the Royal Court gave some guidance as to its approach to resolving the issue. It indicated that if the Jersey trustee had not submitted to the Massachusetts Court, then the order would not be enforceable against Trustee without a “fresh hearing”. Given that didn't happen, and given that the Royal Court cannot exercise discretion under applicable trust law to order Trustee to do what he had no power to do, the Court considered Plaintiff's request “doomed to failure”.

The Royal Court rejected Plaintiff's arguments that he failed to appear before it as he was not represented. (His counsel represents to this Court he could not find counsel to take the case on a contingency and Trustee's legal fees were being paid by the Trust). The Royal Court viewed that as insufficient excuse for failure to appear on a summons he himself took out and failure to comply with procedural orders over 18 months. The Royal Court then directed Trustee to administer the trust without regard to claims of Massachusetts plaintiff.

Bank now asks this Court to extend comity to that judgment. Extending comity is partly within discretion of the Court. Effect is given to a foreign judgment if:

The foreign judgment appears to have been rendered by a competent court having jurisdiction of the cause and of the parties and upon due allegations and proof and opportunity to defend against them and proceedings are according to the course of a civilized jurisprudence and are stated in a clear and formal record (unless principles of international law (or) comity of our own country (directs otherwise). *Hilton v. Guyot* 159 U.S. 113 , 205-206 (1895).

It is fundamentally unfair to direct Barclays Bank PLC to defend this action after Plaintiff had earlier submitted to the jurisdiction of the Royal Court which had jurisdiction over all interested parties, and where Plaintiff had the opportunity to submit his

argument. Moreover a party who initiated a proceeding in the foreign country cannot later claim that the foreign country's decree (directing trustee how to administer assets)is invalid. *Perrin v Perrin*, 408 F2d 107 (*3rd Cir 1969).

For the aforesaid reasons Summary Judgment for Barclays Bank PLC is ALLOWED.

May 11, 2015

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Elaine M. Moriarty, Judge of Probate

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