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CIVIL PRACTICE LAW AND RULES

CPLR 301: United States District Court for the Southern District of New York holds that bank account may be sufficient to satisfy "doing business" test for a general basis of personal jurisdiction

Pursuant to CPLR 301, personal jurisdiction over a foreign corporation may be obtained by virtue of the corporation's "doing business" in New York.¹ While there is no "precise test of the nature or extent of the business that must be done"² to satisfy the "doing business" requirement,³ New York courts have consistently limited the scope of the "doing business" predicate to corporations deemed to be present in New York "with a fair measure of permanence and continuity."⁴ Recently, however, in *United Rope Dis-*

¹ See CPLR 301 (McKinney 1990) ("A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore."). Since New York had the power, prior to enactment of the CPLR, to subject a foreign corporation to personal jurisdiction because it was "doing business," it can continue to exercise such jurisdiction. See *id.* commentary at 8.

² *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 268, 115 N.E. 915, 918 (1917).

³ See *Sterling Novelty Corp. v. Frank & Hirsch Distr. Co.*, 299 N.Y. 208, 211, 86 N.E.2d 564, 565 (1949). "There is, of course, no precise measure of the nature or extent of local purchasing activities which will render a foreign corporation amenable to process in this state. Each case must be decided on its own particular facts." *Id.* at 210. See generally Carmody Wait 2d § 121:32 (Carl T. Dreschler ed., 1967) (discussing uncertainty of "doing business" test).

⁴ *Tauza*, 220 N.Y. at 267, 115 N.E. at 917; see *Laufer v. Ostrow*, 55 N.Y.2d 305, 309-10, 434 N.E.2d 692, 694, 449 N.Y.S.2d 456, 458 (1982) (quoting *McGowan v. Smith*, 52 N.Y.2d 268, 419 N.E.2d 321, 437 N.Y.S.2d 643 (1981)). Under CPLR 301, "the authority of the New York courts [to exercise jurisdiction over a foreign corporation] is based solely upon the fact that the defendant is 'engaged in such a continuous and systematic course of "doing business" here as to warrant a finding of its "presence" in this jurisdiction.'" *Id.*; *McGowan*, 52 N.Y.2d at 272, 419 N.E.2d at 323, 437 N.Y.S.2d at 645.

The focus on a "fair measure of permanence and continuity" (or any formulation thereof) in the jurisdictional analysis is essential because any inference of a foreign corporation's "presence" must satisfy due process concerns. See *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). In order to subject an out-of-state defendant to personal jurisdiction, due process requires "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* But see *National Am. Corp. v. Federal Republic*, 425 F. Supp. 1365, 1369 (S.D.N.Y. 1977) ("New York has thus far declined to expand its jurisdiction to the constitutionally permissible limits of *International Shoe*").

Although the New York courts have declined to articulate a precise test to determine whether a foreign corporation is "doing business" in a regular and continuous manner in New York, they have traditionally emphasized certain activities in their analyses, including the maintenance of an office, the regular and continuous sales or shipment of goods in the

tributors, Inc. v. Kimberly Line,⁵ the United States District Court for the Southern District of New York held that maintenance of a New York bank account was sufficient to establish corporate presence within the state for jurisdictional purposes.⁶

United Rope was an admiralty action for damages arising from the loss of cargo caused by the sinking of the *Katia*.⁷ United Rope Distributors, Inc. ("United Rope"), the intended recipient of the cargo, instituted an action against Kim-Sail Ltd. ("Kim-Sail"), the sub-charterer of the *Katia*.⁸ In turn, Kim-Sail impleaded the owner of the *Katia*, Seatriumph Marine Corp. ("Seatriumph"), a Liberian corporation with its principal place of business in Greece, seeking indemnification or contribution.⁹ Seatriumph moved to dismiss the third-party complaint for lack of personal jurisdiction.¹⁰ The United States District Court for the Southern District of New York denied the motion, holding that Seatriumph's use of a bank account in New York amounted to "doing business" in New York and was therefore sufficient to subject the corporation to personal jurisdiction under CPLR 301.¹¹

state, or the acts of an agent which constitute "doing business" and which can be predicated upon the foreign corporation. WK&M ¶ 301.16 at 3-33 to 3-45; see, e.g., *Frummer v. Hilton Hotels Int'l, Inc.*, 19 N.Y.2d 533, 538, 277 N.E.2d 851, 854, 281 N.Y.S.2d 41, 45 (1967) (defendant's "presence" established by activities conducted within state by its agent); *Bryant v. Finnish Nat'l Airline*, 15 N.Y.2d 426, 429, 208 N.E.2d 439, 440, 260 N.Y.S.2d 625, 626-27 (1965) (defendant "doing business" by maintaining one-and-a-half room office with three full-time and four part-time employees, whose function it was to receive and transmit reservations to defendant in Europe, and by using local bank account to pay rent and salaries); *Tauza*, 220 N.Y. at 265, 115 N.E. at 917 (defendant "doing business" by virtue of maintenance of office and bank account, working with eight salesmen under direction of sales agent, and receiving "continuous shipments" from Pennsylvania in New York).

⁵ 785 F. Supp. 446 (S.D.N.Y. 1992).

⁶ *Id.* at 451.

⁷ *Id.* at 447. At the time the cause of action arose, Seatriumph was the owner of the *Katia*. *Id.* Seatriumph chartered the *Katia* to a Danish company who subchartered it to Kim-Sail. *Id.* Kim-Sail accepted 300,000 bales of twine for shipment on the *Katia* to the plaintiff. *Id.* The *Katia*, which had loaded the cargo in Brazil for shipment to plaintiff in Wisconsin, sank en route to its destination off the coast of Nova Scotia. *United Rope Distributors, Inc. v. Kimberly Line*, No. 89 Civ. 1166, 1992 U.S. Dist. LEXIS 3539, at *4 (S.D.N.Y. Mar. 24, 1992).

⁸ *United Rope Distributors, Inc. v. Kimberly Line*, 785 F. Supp. 446, 447 (S.D.N.Y. 1992). United Rope is a Delaware Corporation with its principal place of business in Minnesota, and Kim-Sail is a Cayman Islands corporation with its principal place of business in New York City. *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *United Rope Distributors, Inc. v. Kimberly Line*, 770 F. Supp. 123, 133 (S.D.N.Y. 1991). After this decision, United Rope joined Seatriumph as a defendant. See *United Rope*, 785

On reconsideration, the court adhered to its initial determination.¹² Judge Cedarbaum rejected Seatriumph's assertion that maintaining an in-state bank account does not by itself constitute sufficient presence of a foreign corporation to subject it to personal jurisdiction in New York.¹³ The court distinguished the cases cited by Seatriumph¹⁴ because "they all concerned bank accounts which were incidental to the business activities of the corporations that owned them."¹⁵ In contrast, Seatriumph's bank account, the court

F. Supp. at 447.

¹² See *United Rope*, 785 F. Supp. at 447. Judge Cedarbaum, however, did grant Seatriumph's motion to certify the interlocutory order to the Second Circuit. *Id.* at 453. A three-judge panel of the Court of Appeals for the Second Circuit denied permission to appeal, and later denied a motion for reconsideration and clarification. Barbara Franklin, *Jurisdiction Question; Banks Warn Ruling May Deter Foreign Clients*, N.Y. L.J., May 21, 1992, at 5. Seatriumph then petitioned for an en banc review of the denial. *Id.*

Significantly, the New York Clearing House Association, the Business Law Section of the New York State Bar Association, and the New York State Bankers Association all filed letters with the court in support of en banc review of the denial of petition to appeal. *Id.* The letter filed by the New York Clearing House Association, a group of 12 of the city's leading commercial banks, expressed fear that Judge Cedarbaum's decision in *United Rope* would put New York banks at a competitive disadvantage in attracting foreign customers and criticized the decision as being contrary to public policy and interest. *Id.* The letter stated that "[m]any companies, in opening New York bank accounts, have relied on the longstanding rule that a bank account, in the absence of other contacts, does not expose them to jurisdiction in New York for unrelated litigation." *Id.*

¹³ See *United Rope*, 785 F. Supp. at 450. The bank account in question was actually held by Richmond Investments Ltd. ("Richmond"), which had agreed with Seatriumph's managing agent, Global Ship Management Ltd. ("Global"), to receive the *Katia's* charter hire. *Id.* at 448. Control of Richmond, Seatriumph, and Global is shared among four parties. *Id.* The directors of Richmond are Michael Petropoulos, C. Petropoulos (his mother), and D. Petropoulos. *Id.* The directors of Seatriumph are Michael Petropoulos, C. Petropoulos, and A. Doukladzi. *Id.* The directors of Global are C. Petropoulos and A. Doukladzi. *Id.* The court therefore noted "as did Seatriumph, [we] treat the Richmond bank account in New York as the account of Seatriumph." *Id.* at 449.

¹⁴ *Id.* at 450. Seatriumph cited numerous decisions from both state and federal courts in support of its assertion. See, e.g., *Grove Valve & Regulator Co. v. Iranian Oil Servs. Ltd.*, 87 F.R.D. 93, 95 (S.D.N.Y. 1980) (in accord with New York courts' consistent holdings, English corporation's maintenance of local bank account does not, without more, amount to "doing business" within state); *National Am. Corp. v. Federal Republic*, 425 F. Supp. 1365, 1369 (S.D.N.Y. 1977) (Central Bank of Nigeria's maintenance of bank accounts in New York does not constitute "doing business" in New York); *Weinberg v. Colonial Williamsburg, Inc.*, 215 F. Supp. 633, 639-40 (E.D.N.Y. 1963) (bank accounts inconclusive as to fairness of asserting personal jurisdiction); *Fremay, Inc. v. Modern Plastic Mach. Corp.*, 15 A.D.2d 235, 241, 222 N.Y.S.2d 694, 700 (1st Dep't 1961) (existence of bank account insufficient to establish "doing business" in New York as basis for personal jurisdiction over foreign corporation); *Hastings v. Piper Aircraft Corp.*, 274 A.D. 435, 438, 84 N.Y.S.2d 580, 583 (1st Dep't 1948) (non-resident manufacturer not continuously and systematically soliciting business in New York not "doing business" by solely virtue of local bank account).

¹⁵ *United Rope*, 785 F. Supp. at 450. The court apparently decided to focus on the

noted, was used to receive substantially all of its charter hire payments and to pay the wages of its crew and other expenses.¹⁶ Accordingly, the court considered the bank account to be "the vehicle through which Seatriumph conducted almost all of its business."¹⁷ Further, the court remarked that Seatriumph's choice of a bank account in New York was not "accidental," rather that Seatriumph "chose to avail itself of the special advantages of conducting its business through a New York bank and thus deliberately invoked the benefits and protections of New York's laws."¹⁸ Finally, Judge Cedarbaum justified her finding of Seatriumph's presence based on the New York bank's conduct as an "agent" of Seatriumph.¹⁹

It is submitted that the court's liberal interpretation of the CPLR 301 "doing business" test unjustifiably expanded the general basis for personal jurisdiction over a foreign corporation. A survey of New York case law indicates that the maintenance of a bank account in and of itself has never been a predicate for personal jurisdiction under CPLR 301.²⁰ It is further asserted that the mere maintenance of a bank account does not constitute "continu-

amount of income that was deposited and whether it was used to pay most of the corporation's business expenses in determining whether a corporation's bank account is "incidental" to its business activity. *See id.* The court concluded "that the bank account in this case represents a more substantial voluntary activity in New York than is found in the other New York cases." *Id.*

But see Hastings v. Piper Aircraft Corp., 274 A.D. 435, 84 N.Y.S.2d 580 (1st Dep't 1948). In *Hastings*, a case cited by Seatriumph, the defendant maintained a substantial and active bank account in New York City, and even borrowed money from the bank on occasion, yet the court held that the defendant was neither "present" nor "doing business" in New York. *Id.*

The *United Rope* court also distinguished *Landoil Resources Corp. v. Alexander & Alexander Servs., Inc.*, 77 N.Y.2d 28, 33, 565 N.E.2d 488, 490, 563 N.Y.S.2d 739, 741 (1990), which held that personal jurisdiction was not conferred by a bank account, noting that "the court did not hold that a New York bank account can never ground section 301 jurisdiction." *See United Rope*, 785 F. Supp. at 451. *But see* Lawrence W. Newman & Michael Burrows, *Bank Account as Basis for Personal Jurisdiction*, N.Y. L.J., May 21, 1992, at 3 ("*Landoil* does not, however, stand for the proposition that a bank account alone can be the basis for jurisdiction.").

¹⁶ *United Rope*, 785 F. Supp. at 450.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* The court noted that "[t]he ready availability of the telephone, telex, and fax makes it possible, from an office in Greece, to use a bank account in New York to do all the things that a foreign corporation once needed to send an agent to New York to do." *Id.*

²⁰ *See supra* note 14 (listing cases holding that maintenance of bank account, without more, does not satisfy CPLR 301 "doing business" analysis); *see, e.g.*, *A.C.K. Sports, Inc. v. Doug Wilson Enters.*, 661 F. Supp. 386, 389 (S.D.N.Y. 1987) ("[M]aintenance of a bank account does not, without more, constitute 'doing business' in this state.").

ous and systematic" contact or corporate activity that is undertaken "with a fair measure of permanence and continuity."²¹ In fact, the New York Supreme Court in *Fikaris v. Atlantic Oil Carriers*,²² held that "the maintenance of substantial bank accounts in this state must be linked with activities of a regular and continuous nature for such determination."²³

United Rope appears to continue the expansion of personal jurisdiction based on the "doing business" standard, which was initiated in *Frummer v. Hilton Hotels International, Inc.*²⁴ and *Gelfand v. Tanner Motor Tours, Ltd.*²⁵ In *Frummer*, an action for personal injuries suffered without the state, the New York Court of Appeals upheld the exercise of personal jurisdiction over the defendant British hotel chain based on the activities of its related reservation service.²⁶ The court concluded that the "doing business" standard was satisfied since the Hilton Reservation Service was an "agent" among whose duties it was to generate business for the defendant.²⁷ In *Gelfand*, the Second Circuit Court of Appeals, in upholding personal jurisdiction over an out-of-state tour operator, construed *Frummer* to mean that

a foreign corporation is doing business in New York . . . when its

²¹ See WK&M [P] 301.16 at 3-32 (" 'Presence' implies substance, continuity, regularity, and permanence at the time the action is brought. ").

²² 138 N.Y.S.2d 896 (Sup. Ct. N.Y. County 1955).

²³ *Id.* at 897. In *Fikaris*, the plaintiff was injured off the coast of Wales while on board a ship owned by the defendant, a Liberian corporation. *Id.* The defendant maintained substantial bank accounts in New York banks and employed a broker within the state which arranged charters for the defendant's ship. *Id.* The court held that neither the bank accounts nor the broker's activities were sufficient to predicate jurisdiction over the defendant, where the broker was an independent firm doing business for other customers as well. *Id.* Since no substantial indicia of defendant's presence was found, the shipowner was deemed not to be "doing business" within the state. *Id.*; see also *Masonite Corp. v. Hellenic Lines, Ltd.*, 412 F. Supp. 434, 438 (S.D.N.Y. 1976). In *Masonite*, a third party defendant shipowner was sued by a subcharterer for indemnification resulting from the shipment of damaged cargo. *Id.* at 437. The shipowner maintained a bank account in New York into which the vessel's hire was paid, prior to transfer to a London account. *Id.* at 438. The court held that the bank account in New York did not amount to "doing business" in New York and that the third party defendant was not "present" in New York under CPLR 301 because "few of the classic indicia of presence have been demonstrated [The third party defendant] has no office and no employees within the state It solicits no business and does not conduct any regular service to or from New York whether by business representative or subsidiary." *Id.*

²⁴ 19 N.Y.2d 533, 227 N.E.2d 851, 281 N.Y.S.2d 41, cert. denied, 389 U.S. 923 (1967).

²⁵ 385 F.2d 116 (2d Cir. 1967), cert. denied, 390 U.S. 996 (1968).

²⁶ *Frummer*, 19 N.Y.2d at 535, 227 N.E.2d at 852, 281 N.Y.S.2d at 42.

²⁷ *Id.* at 537-38, 227 N.E.2d at 854, 281 N.Y.S.2d at 44-45.

New York representative provides services beyond mere solicitation and these services are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services.²⁸

The *United Rope* court, which did not cite *Gelfand*, nevertheless used similar language in concluding that Seatriumph was "doing business" in New York.²⁹

However, *United Rope* may be distinguished from *Gelfand*. The agent in *Gelfand* solicited customers and made reservations, in other words, conducted the business of the tour operator,³⁰ whereas the bank in *United Rope* did not solicit any business for Seatriumph.³¹ Rather, the bank merely followed orders regarding transactions with Seatriumph's account.³² Additional support for distinguishing the bank in *United Rope* from the agent in *Gelfand* is found in *Miller v. Surf Properties*,³³ in which a New York agent took reservations for the Florida defendant's hotel. The court held that the defendant was not "doing business" in New York, stressing that the New York agent was an independent economic entity in business for itself to make a profit.³⁴ Similarly, a bank is an independent entity that handles many transactions which are unrelated to a customer's account, and conducted solely for the bank's own financial purposes.³⁵

²⁸ *Gelfand*, 385 F.2d at 121.

²⁹ Compare *supra* text accompanying note 28 with *United Rope*, 785 F. Supp. at 450 ("These activities were sufficiently important to Seatriumph that if it had not had the bank account and the bank's personnel to carry them out, its own officers would have had to travel to New York to perform them.").

³⁰ See *Gelfand*, 385 F.2d at 121. The court emphasized the fact that the "agent" independent contractor booked 3/7s of the defendant's tours, generating \$120,000 a year for the defendant. *Id.*

³¹ See *United Rope*, 785 F. Supp. at 450 (noting that bank's personnel only assisted defendant "in getting funds quickly to various destinations"). Under the holdings in *Frummer* and *Gelfand*, it would seem that any inquiry into an "agency" relationship between the bank and the defendant ought to focus on the defendant's actual business, *i.e.* shipping, and not on its banking activity. See CPLR 301 commentary at 2 (McKinney Supp. 1992). As noted by Professor Vincent C. Alexander, "Although the flow of money to and from the shipowner may have been the blood that gave life to the business, the body simply was not in New York." *Id.*

³² See *United Rope*, 785 F. Supp. at 450 (supervisor of defendant's account was just doing what she was "instructed" to do by defendant).

³³ 4 N.Y.2d 475, 151 N.E.2d 874, 176 N.Y.S.2d 318 (1958).

³⁴ *Id.* at 481, 151 N.E.2d at 877, 176 N.Y.S.2d at 322.

³⁵ See generally EDWARD L. SYMONS, JR. & JAMES J. WHITE, *BANKING LAW* ch. 3, § 2 (1991) (examining "business of banking").

Notwithstanding any factual similarities, *United Rope's* apparent expansion of *Gelfand* must be questioned in light of Judge McLaughlin's commentary remarking that *Gelfand* and *Frummer* represented "sharp turns in the long road which began with *Tauza*."³⁶ Indeed, if those cases were "sharp turns," it is submitted that *United Rope* has run off the road.

Finally, it is submitted that the *United Rope* court disregarded the economic ramifications of its holding. The New York legislature has consistently enacted legislation intended to enhance New York's status as a center of banking and commerce.³⁷ The New York Business Corporation Law ("BCL") furthers this policy by allowing foreign corporations to maintain bank accounts in New York without requiring authorization to "do business" in the state.³⁸ The specific exception for bank accounts from the BCL definition of "doing business" indicates a legislative intent to promote the banking industry.³⁹ Moreover, subjecting foreign corporations to personal jurisdiction based solely on the maintenance of bank accounts is likely to discourage the use of New York banks.⁴⁰

³⁶ See CPLR 301 commentary at 16-18 (McKinney 1990). Judge Joseph McLaughlin described *Frummer* as a "close call" and the *Gelfand* rule as "so liberal . . . as to approach the perimeter of due process . . ." *Id.* at 18.

³⁷ See, e.g., *infra* note 38.

³⁸ See N.Y. BUS. CORP. LAW art. 13 (McKinney 1986). Section 1301(a) states that "[a] foreign corporation shall not do business in this state until it has been authorized to do so as provided in this article." *Id.* at 248. Section 1301(b) further states that "a foreign corporation shall not be considered to be doing business in this state, for purposes of this chapter, by reason of carrying on in this state any one or more of the following activities: . . . (3) Maintaining bank accounts." *Id.* As Professor David Siegel remarks, the BCL 1301(b)(3) classification seems extremely important for it applies to BCL 1314(b)(5), which is "a kind of *forum non conveniens* provision that requires a showing in certain cases that a defendant corporation is doing business in New York before the court is authorized to entertain the case." Siegel, § 83, at 120 (2d ed. 1991). Siegel states that "the CPLR 301 and the BCL 1314 tests are said by case law to be the same." *Id.* (emphasis added). Thus, it is inferable that the legislature did not intend that a bank account by itself should constitute "doing business" in the state of New York.

But see N.Y. BUS. CORP. LAW § 1301(c) (McKinney 1986) ("The specification in paragraph (b) does not establish a standard for activities which may subject a foreign corporation to service of process under this chapter or any other statute of this state."); *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 267, 115 N.E. 915, 917 (1917) ("But activities insufficient to make out the transaction of business, within the meaning of [the General Corporation Law], may yet be sufficient to bring the corporation within the state so as to render it amenable to process.").

³⁹ See *supra* note 38.

⁴⁰ See *Fremay, Inc. v. Modern Plastic Corp.*, 15 A.D.2d 235, 239, 222 N.Y.S.2d 694, 699 (1st Dep't 1961) (interpreting New York statutes as not extending jurisdiction over foreign corporation which maintained bank account in New York). The *Fremay* court stated, "In a

In light of *United Rope*, the prudent practitioner, whose client's sole contact with New York is the maintenance of a bank account, should consider reducing any of the client's substantial connections with the New York bank or completely severing those connections if the client wishes to avoid possible jurisdictional implications.⁴¹

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commercial and banking community such as New York City . . . the economic impact of any changes would be carefully weighed." *Id.* at 240, 222 N.Y.S.2d at 699; *see also* *Ames v. Senco Prods., Inc.*, 1 A.D.2d 658, 658, 146 N.Y.S.2d 298, 299 (1st Dep't 1955) (Changes in jurisdiction over foreign corporation "should be effected by legislation rather than judicial decision. In that way, circumstances affecting the convenience of commerce may be more generally considered.").

⁴¹ *See* *Newman & Burrows*, *supra* note 15, at 3 ("The decision of the court in *United Rope* will have to be carefully analyzed by persons who wish to limit their banking activities and other activities in New York in order to avoid jurisdiction under CPLR 301."). The possibility of decisions by foreign corporations to limit or sever their New York banking connections has caused much anxiety in the banking community. *See* *Barbara Franklin, Jurisdiction Question; Banks Warn Ruling May Deter Foreign Clients*, N.Y. L.J., May 21, 1992, at 5 ("[T]he city's major banks [claim that] if bank accounts subject corporations to New York jurisdiction, the result could be a huge loss of business from foreign corporations who will take their money elsewhere rather than risk being sued here.").