

First Department Refuses to Expand Jurisdiction over Foreign Entities

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In [Khalife v. Audi Saradar Private Bank SAL](#), 2013 NY Slip Op 05971 (1st Dep't Sept. 24, 2013), the First Department declined to broaden CPLR § 303, holding that the statute does not authorize personal jurisdiction over a foreign person or entity when the non-domiciliary seeks some form of affirmative relief in a New York court, as opposed to commencing an action. CPLR § 303 provides that "[t]he commencement of an action in the state by a person not subject to personal jurisdiction" designates the non-domiciliary's attorney as agent for service of process. *Khalife* makes it clear that an application for affirmative relief is not enough to subject a non-domiciliary to jurisdiction in New York under CPLR § 303. Only the commencement of an action, through the filing of a complaint, will suffice.

The *Khalife* decision arises from an insider trading action by the SEC in federal court against the plaintiffs, Antoine Khalife and Iris Capital Securities SAL ("Iris"). By way of background, Khalife and Iris opened accounts with the defendant, Audi Saradar Private Bank SAL ("ASPB"), a privately owned Lebanese bank. At Khalife and Iris's instruction, ASPB, through an account it maintained with Pershing LLC, a clearing firm in New Jersey, placed certain trades that led to the SEC action for insider trading. As part of its prosecution, the SEC obtained a preliminary injunction directing Pershing LLC to freeze nearly \$2.7 million in assets in the ASPB account. Although the federal court eventually lifted the freeze, the court released the funds in the ASPB account into Khalife and Iris's counsel's escrow account. Khalife and

Iris then instructed their counsel to transfer them funds from the escrow account representing the proceeds of the trades underlying the SEC action.

ASPB unsuccessfully tried to stop the release of the funds by moving to intervene in the SEC action and obtaining a temporary restraining order. But by the time the federal court granted the restraining order, it was too late, and most of the funds had already been transferred out of the escrow account. Ultimately, ASPB withdrew its motion to intervene before it was decided.

About a year later, Khalife and Iris sued ASPB in New York State Supreme Court for breach of contract, conversion, tortious interference, and breach of fiduciary duty, alleging in essence that ASPB unlawfully restrained their accounts based on the SEC freeze order. They attempted to serve ASPB, pursuant to CPLR § 303, by leaving a copy of the Summons with Notice with ASPB's counsel in the pending federal action. The Commercial Division (Oing, J.) granted ASPB's motion to strike the defective service, finding that Khalife and Iris could not invoke CPLR § 303 to serve ASPB.

On appeal, the First Department unanimously affirmed the lower court's decision. To invoke CPLR § 303, Khalife and Iris had to show that (1) ASPB, a foreign entity, commenced the federal action in New York (the "Action Commencement Requirement") and (2) Khalife and Iris's state-court claims could have been brought as counterclaims had the federal action been brought in the Supreme Court (the "Counterclaim Requirement").

Khalife and Iris failed to establish either requirement.

The First Department held that ASPB's motion to intervene and temporary restraining order did not satisfy the Action-Commencement Requirement of CPLR § 303. Relying on a plain reading of the statute, the court rejected Khalife and Iris's broad interpretation - which urged jurisdiction over ASPB based only on its having moved to intervene and having obtained a temporary restraining order in the federal case - concluding that ASPB did not file a complaint in the federal case and therefore did not commence an action.

Likewise, Khalife and Iris failed to meet the Counterclaim Requirement of CPLR § 303. Because ASPB did not file a complaint in the federal case, it did not become a party in the litigation, meaning that Khalife and Iris would not have been able to counterclaim against ASPB had the federal action been brought in state court.

The First Department's decision in *Khalife* means that a party will not be able to use CPLR § 303 to obtain personal jurisdiction over a foreign adversary based merely on a motion for affirmative relief in a New York court. Only the filing of a complaint will implicate CPLR § 303.

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