

Supreme Court of the State of New York  
Appellate Division: Second Judicial Department

D36495  
N/ct

\_\_\_\_\_AD3d\_\_\_\_\_

Argued - October 23, 2012

WILLIAM F. MASTRO, J.P.  
REINALDO E. RIVERA  
CHERYL E. CHAMBERS  
PLUMMER E. LOTT, JJ.

2011-07219

DECISION & ORDER

Mister Money Israel, Ltd., et al., appellants, v Abraham  
Leibowitz, etc., respondent.

(Index No. 11533/10)

Law Offices of Marc E. Bengualid, PLLC, New York, N.Y. (Ariella M. Colman of  
counsel), for appellants.

Sol Mermelstein, Brooklyn, N.Y. (S. Herman Klarsfeld of counsel), for respondent.

In an action to enforce a foreign judgment, brought by motion for summary judgment  
in lieu of complaint pursuant to CPLR 3213, the plaintiffs appeal from an order of the Supreme  
Court, Kings County (Bayne, J.), dated June 3, 2011, which denied their motion for summary  
judgment and, thereupon, directed the dismissal of the action.

ORDERED that the order is modified, on the law, by deleting the provision thereof  
directing the dismissal of the action, and substituting therefor a provision deeming the moving and  
answering papers on the plaintiffs' motion for summary judgment in lieu of complaint to be the  
complaint and answer, respectively; as so modified, the order is affirmed, without costs or  
disbursements.

The plaintiffs commenced this action to enforce a foreign judgment by filing a  
summons with notice of motion for summary judgment in lieu of complaint pursuant to CPLR 3213.  
The Supreme Court properly denied the plaintiffs' motion. In opposition to the plaintiffs' prima  
facie showing of their entitlement to judgment as a matter of law, the defendant raised a triable issue  
of fact as to whether the foreign court had personal jurisdiction over him (*see* CPLR 5304[2]; *John*

November 21, 2012

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MISTER MONEY ISRAEL, LTD. v LEIBOWITZ

*Galliano, S.A. v Stallion, Inc.*, 15 NY3d 75, 80, *cert denied* \_\_\_\_\_ US \_\_\_\_\_, 131 S Ct 288).

However, since there exists a triable issue of fact as to whether the foreign court had personal jurisdiction over the defendant, instead of dismissing the action, the Supreme Court should have deemed the moving and answering papers to the plaintiffs' motion to be the complaint and answer, respectively (*see* CPLR 3213; *Frankini v Landmark Constr. of Yonkers, Inc.*, 91 AD3d 593, 595; *Lugli v Johnston*, 78 AD3d 1133, 1133-1135; *Cadle Co. v Ayala*, 47 AD3d 919, 920; *cf. Schulz v Barrows*, 94 NY2d 624, 628-629).

MASTRO, J.P., RIVERA, CHAMBERS and LOTT, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Aprilanne Agostino". The signature is written in a cursive, flowing style.

Aprilanne Agostino  
Clerk of the Court