

**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY**

PRESENT: Honorable Elizabeth H. Emerson

SBARRO, INC.,

Plaintiff,

-against-

TUKDAN HOLDINGS, LTD. a/k/a TAKDAN,
LTD. AND DANNY WERNER,

Defendants.

_____x

MOTION DATE: 8-13-10; 2-10-11
SUBMITTED: 2-10-11
MOTION NO.: 001-RRH
002-MOT D

**STEINBERG, FINEO, BERGER &
FISCHOFF P.C.**
Attorneys for Plaintiff
40 Crossways Park Drive
Woodbury, New York 11797

SHIBOLETH LLP
Attorneys for Defendants
1 Penn Plaza, Suite 2527
New York, New York 10119

Upon the following papers numbered 1-17 read on this motion for default and cross motion to dismiss ; Notice of Motion and supporting papers 1-5 ; Notice of Cross Motion and supporting papers 6-12 ; Answering Affidavits and supporting papers 14-16 ; Replying Affidavits and supporting papers ; Other 17 ; it is,

ORDERED that the motion by the plaintiff for an order of default against the defendants and the branch of the cross motion by the defendants for a stay of this action are referred to oral argument, which shall be held on June 22, 2011 at 11:00 a.m., Supreme Court, Courtroom 7, Arthur M. Cromarty Criminal Court Building, 210 Center Drive, Riverhead, New York 11901 ; and it is further

ORDERED that the branch of the cross motion by the defendants to dismiss the complaint is denied.

The defendant Tukdan Holdings, Ltd. (“Tukdan”), is an Israeli corporation whose principal place of business is in Israel, and the defendant Danny Werner is an Israeli resident. The plaintiff, a New York corporation whose principal place of business is in Melville, New York, commenced this action against the defendants, Tukdan and Werner, by personally serving them in Israel in accordance with Israeli law and by mailing copies of the summons and

complaint to them by registered mail in Israel. The defendants failed to answer the complaint or otherwise appear. The plaintiff subsequently moved for an order of default against them, and the defendants cross moved, inter alia, to dismiss the complaint on the ground that they were not properly served pursuant to the Hague Convention. Specifically, the defendants argue that, pursuant to Israel's declarations and reservation to the Hague Convention, the only permissible method of service on the defendants was through Israel's Central Authority.

The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (20 UST 361, TIAS No. 6638 [1969]) is a multilateral treaty designed to simplify the methods for serving process abroad to assure that defendants sued in foreign jurisdictions receive actual and timely notice of suit and to facilitate proof of service abroad (*see, Fernandez v Univan Leasing*, 15 AD3d 343, 344 [2nd Dept]). Pursuant to the Hague Convention, the primary method of service is through the Central Authority established by each member state. The use of the Central Authority, however, is not mandatory (*see, Canizio & Singh*, Service of Process and the Hague Convention, NYLJ, Aug. 27, 2010). Article 19 of the Hague Convention permits service by any method permitted by the internal laws of the country in which service is being made (*see, Fernandez v Univan Leasing, supra* at 344). Moreover, article 10 permits service of process by mail directly to the person abroad provided that the State of destination does not object in its ratification to such service (*Id.* at 344). Article 10 provides as follows:

Provided the State of destination does not object, the present Convention shall not interfere with -

(a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

(b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

(c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

It is undisputed that the State of Israel is a signatory to the Hague Convention and that it objected to paragraphs (b) and (c) of article 10.

At issue, then, is paragraph (a) and its use of the word "send" rather than the word "service," which is used in paragraphs (b) and (c). The First and Third Departments interpret the word "send" in article 10 (a) to authorize something other than "service" in the legal sense, such

as the mere transmittal of notices and legal documents, and not the service of process that initiates a lawsuit and secures jurisdiction over an adversary party (*see*, **Sardanis v Sumitomo Corp.**, 279 AD2d 225, 229 [1st Dept]; **Reynolds v Woosup Koh**, 109 AD2d 97, 99 [3rd Dept]). That interpretation, however, has not been followed in the Second Department and is not binding on this court. The Second Department has followed the Fourth Department in interpreting the word “send” in article 10 (a) as synonymous with “service” and permitting service of process by registered mail when, as here, the State of destination has not objected to the use of postal channels under article 10 (a) (*see*, **Fernandez v Univan Leasing**, 15 AD3d 343, 344-345 [2nd Dept]; **Rissew v Yamaha Motor Co.**, 129 AD2d 94, 97-98 [4th Dept]). Moreover, a Special Commission of the Hague Convention that met in 2003 considered the issue and concluded that the term “send” in article 10 (a) is to be understood as meaning “service” through postal channels (*see*, Canizio & Singh, *Service of Process and the Hague Convention*, NYLJ, Aug. 27, 2010). The U. S. State Department has, likewise, stated that it is incorrect to suggest that the Hague Convention prohibits as a method of service the sending of a copy of the summons and complaint by registered mail to a defendant in a foreign country (**Id.**).

Here, the defendants were personally served in accordance with Israeli law and copies of the summons and complaint were mailed to them by registered mail in Israel. The court finds that, under these circumstances, service was proper. Accordingly, the branch of the cross motion by the defendants which is to dismiss the complaint is denied.

The remaining issues are referred to oral argument. Only counsel fully familiar with and authorized to settle, stipulate, or dispose of this action shall appear at oral argument.

Dated: April 28, 2011

J.S.C.