

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

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 1-3-11
SUBMITTED: 3-24-11
MOTION NO.: 001-MG; CASE DISP; RRH

x
STEVES & SONS, INC.,

Plaintiff,

-against-

INGERMAN SMITH, L.L.P.
Attorneys for Plaintiff
150 Motor Parkway, Suite 400
Hauppauge, New York 11788

SETH POTTISH,

Defendant.

**KRESSEL, ROTHLEIN, WALSH & ROTH,
LLC**
Attorneys for Defendant
684 Broadway
Massapequa, New York 11758

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Upon the following papers numbered 1-15 read on this motion for summary judgment in lieu of complaint ; Notice of Motion and supporting papers 1-8 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 9-11 ; Replying Affidavits and supporting papers 12-15 ; it is,

ORDERED that this motion by the plaintiff for summary judgment in lieu of complaint is granted; and it is further

ORDERED that the plaintiff is awarded damages in the amount of \$130,674.63 with interest from October 21, 2009; and it is further

ORDERED that the plaintiff’s application for attorney’s fees is referred to a hearing, which shall be held on June 30, 2011, at 2:15 p.m., Supreme Court, Courtroom 7, Arthur M. Cromarty Criminal Court Building, 210 Center Drive, Riverhead, New York 11901.

The plaintiff is a Texas corporation whose principal place of business is in San Antonio, Texas. The defendant, Seth Pottish, is a New York resident and the President of Long Island Wholesalers, Nassau-Suffolk, Inc. (“Long Island Wholesalers”), a New York corporation whose principal place of business is in Bohemia, New York. The plaintiff manufactured doors that were purchased by Long Island Wholesalers. The record reflects that Long Island

Wholesalers purchased doors from plaintiff over a period of several years pursuant to a sales credit agreement dated February 4, 2000. When Long Island Wholesalers became increasingly delinquent in its payments to the plaintiff, the plaintiff agreed to continue to supply it with doors only if Pottish personally guaranteed any future orders. The plaintiff and Pottish, as the President of Long Island Wholesalers, entered into a new credit agreement on November 30, 2007, and Pottish executed a personal guarantee in favor of the plaintiff on December 5, 2007.¹ The plaintiff continued to supply Long Island Wholesalers with doors until it again became delinquent in its payments. The plaintiff subsequently commenced an action in Texas against Pottish and Long Island Wholesalers and obtained a default judgment against them. The plaintiff moved in this court for summary judgment in lieu of complaint based on the Texas default judgment. By an order dated September 28, 2010, this court granted the motion against Long Island Wholesalers only, finding that Pottish had not been properly served pursuant to CPLR 308 (2). The plaintiff again moves for summary judgment in lieu of complaint against Pottish. Pottish opposes the motion on the ground that the courts of this state should not enforce the Texas judgment against him because the Texas court did not obtain personal jurisdiction over him.

The full-faith-and-credit doctrine requires recognition of a foreign judgment as proof of the prior out-of-state litigation and gives it *res judicata* effect (**Ionescu v Brancoveanu**, 246 AD2d 414, 416). The forum state, in this case New York, can review judgments of sister states only to determine whether the out-of-state court possessed personal jurisdiction over the defendant (**Federal Deposit Ins. Co. v De Cresenzo**, 207 AD2d 823, 823-824; **Augusta Lumber & Supply, Inc. v Herbert H. Sabbeth Corp.**, 101 AD2d 846). In doing so, the forum court must look to the jurisdictional statutes of the state in which the judgment was rendered as well as due process considerations (**Id.**). As long as jurisdiction has been obtained, a defendant's default in the rendering state will not nullify the *res judicata* effect of the judgment, and the full-faith-and-credit doctrine still applies (**Ionescu v Brancoveanu**, *supra* at 416).

Personal jurisdiction requires (1) a constitutional basis to assert jurisdiction and (2) adequate notice to the defendant (**Webpro, Inc. v Petrou**, US Dist Ct, SDNY, Sept. 25, 2002, McKenna, J., 2002 WL 31132889, at *3). Challenges to personal jurisdiction may be waived by either express or implied consent (**Id.**). In the commercial context, parties frequently stipulate in advance, for business or convenience reasons, to submit their controversies for resolution within a particular jurisdiction (**Id.**). It is well-settled that selection-of-forum clauses afford a sound basis for the exercise of personal jurisdiction over foreign defendants (**National Union Fire Ins. Co. of Pittsburgh, Pa. v Williams**, 223 AD2d 395, 398). Here, the defendant consented to personal jurisdiction in Texas by signing a personal guarantee in which he agreed to submit to the jurisdiction of the Texas courts.

¹Also on December 5, 2007, the plaintiff and Pottish, as the President of Long Island Wholesalers, entered into an equipment loan agreement.

Although once disfavored by the courts, it is now the well-settled policy of the courts of this state to enforce contractual provisions for choice of law and selection of a forum for litigation of a contract (**Id.**; *see also*, **Brooke Group v JCH Syndicate**, 87 NY2d 530, 534). Such clauses are prima facie valid, and they are enforced because they provide certainty and predictability in the resolution of disputes (**Id.**). They are not to be set aside absent a strong showing by the resisting party that they are unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or that a trial in the selected forum would be so gravely difficult that the opposing party would, for all practical purposes, be deprived of his day in court (**Di Ruocco v Flamingo Beach Hotel & Casino, Inc.**, 163 AD2d 270, 271-272; **Shalam v KPMG, LLP**, 13 Misc 3d 1205[A], at *6 [and cases cited therein]), *aff'd* 43AD3d 752.

The defendant argues that the forum-selection clause in this case should be set aside because the personal guarantee signed by him was procured through coercion or economic duress. However, the defendant does not allege facts sufficient to show that the alleged threat made by the plaintiff, to withhold delivery of future orders unless the defendant guaranteed their payment, precluded the exercise of the defendant's free will (*see*, **Orix Credit Alliance, Inc. v Hanover**, 182 AD2d 419). A mere threat by one party to a contract to breach it by not delivering required items, indeed financial or business pressure of all kinds, even if exerted in the context of unequal bargaining power, does not constitute economic duress (**Id.**) It must also appear that the threatened party could not obtain the goods from another source of supply and that the ordinary remedy of an action for breach of contract would not be adequate (**Id.**). The defendant has made no such showing.

The defendant also argues that the personal guarantee signed by him is void and unenforceable due to an absence of consideration. It is settled law that a guarantee executed in exchange for, and as a condition of, a promise to advance funds to a third party in the future, coupled with an actual advance at a later date, is supported by ample consideration (*see*, **First American Bank of New York v Builders Funding Corp.**, 200 AD2d 946, 948). The defendant does not allege, nor is there any evidence in the record, that the plaintiff did not extend the promised credit to Long Island Wholesalers. Rather, the record reflects that the plaintiff continued to extend credit to Long Island Wholesalers and to supply it with doors.

In view of the foregoing, the defendant has failed to establish that the forum-selection clause is invalid. Additionally, the defendant has failed to establish that enforcement of the forum-selection clause would be unreasonable, unjust, or contrary to public policy. The court finds that the defendant's conduct and connection with the State of Texas were such that the defendant should have reasonably anticipated that he would have to defend himself in a court of that state (*see*, **JDC Finance Co. I v Patton**, 284 AD2d 164 [Texas default judgment against a guarantor entitled to full faith and credit where guarantor's only connection with Texas was that he mailed payments there; guaranties were related to a mortgage securing property in New Jersey; the documents were executed in New Jersey; guarantor never went to Texas and carried on no business in Texas]). Accordingly, the court rejects the defendant's contention that the

forum-selection clause should be disregarded.

The defendant was served with process in the Texas action pursuant to Texas Civil Practice & Remedies Code § 17.044 (b), which designates the Texas Secretary of State as an agent for service of process on nonresidents like the defendant who engage in business in Texas, who do not maintain a regular place of business in Texas or a designated agent for service of process, and whose lawsuit arises out of the nonresident defendant's business in Texas. The record reveals that the plaintiff served the Texas Secretary of State on September 18, 2009. The Secretary of State forwarded the process by certified mail, return receipt requested, to the defendant's home address on September 23, 2009. The return receipt bearing the defendant's signature was received by the Secretary of State on September 28, 2009. The court finds that, under these circumstances, the defendant received adequate notice of the Texas lawsuit and that the Texas court obtained personal jurisdiction over him.

Since this court's review of the Texas judgment is limited to ascertaining whether the Texas court possessed personal jurisdiction over the defendant (*see*, **Federal Deposit Ins. Co. v De Cresenzo**, 207 AD2d 823, 823-824; **Augusta Lumber & Supply, Inc. v Herbert H. Sabbeth Corp.**, 101 AD2d 846), it is not necessary to reach the defendant's remaining contentions. Accordingly, the motion is granted.

Dated: May 11, 2011

J.S.C.