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COURT OF APPEALS

STATE OF NEW YORK

LANDAUER LIMITED,

Appellant,

-against-

No. 27

JOE MONANI FISH CO., INC.,

Respondent.

20 Eagle Street
Albany, New York 12207
January 16, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Sharona Shapiro
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 27, Landauer.
2 Counselor, would you like any rebuttal
3 time?

4 MS. WILSON: Yes, Your Honor, two minutes,
5 please.

6 CHIEF JUDGE LIPPMAN: Two minutes, sure.
7 Go ahead.

8 MS. WILSON: Thank you very much. May it
9 please the court. My name is Diane Westwood Wilson.
10 I am here as counsel for the appellant-plaintiff
11 Landauer Limited.

12 This is a case where the defendant
13 corporation, Joe Monani Fish Co., chose not to appear
14 in an English proceeding that was served upon his
15 bookkeeper, since then, promoted to head bookkeeper.

16 JUDGE SMITH: It is now undisputed that
17 they had actual notice in time to appear in the
18 proceeding?

19 MS. WILSON: I believe the record reflects
20 that there was actual notice. Whether or not they
21 concede it is - - -

22 JUDGE SMITH: I'll - - - we should ask him.

23 MS. WILSON: - - - unclear.

24 JUDGE SMITH: Okay.

25 MS. WILSON: The - - - sorry. So in the -

1 - - what was interesting in preparing for this
2 argument is how many different facts seemed so
3 relevant as this case was proceeding along. And I
4 went back and read the very, very brief decision by
5 the trial court and by the First Department, and
6 interestingly, the - - - the trial court actually
7 found there was service. The trial court credited
8 that process server did identify that he had legal
9 documents for the Joe Monani Fish Company. He went
10 to the Joe Monani Fish Company's principal place of
11 business. He served someone who the process server
12 believed was the controller, as identified by
13 himself.

14 JUDGE SMITH: Did the judge find that he
15 said controller?

16 MS. WILSON: No, the judge didn't reach
17 that issue. In fact, the judge, if you look at the
18 decision, didn't make a credibility determination of
19 whether or not he believed the process server and the
20 other gentleman who accompanied the process server in
21 the - - - the identification as controller, or
22 whether he - - - he did or did not; he just didn't -
23 - - did not address that issue. But he did credit
24 that the papers were given to Mr. Cardenas on the
25 date in question by hand delivery.

1 JUDGE ABDUS-SALAAM: But Mr. Cardenas, was
2 he eligible or authorized to accept service for the
3 company?

4 MS. WILSON: According to the record, he
5 was not, and that was the basis for the decision of
6 the trial court.

7 JUDGE ABDUS-SALAAM: So then Landauer never
8 got personal service or never effected personal
9 service on Monani's company?

10 MS. WILSON: Well, our position is that
11 they did, because in accordance with the letter and
12 spirit of the Fashion Page and Galliano decisions,
13 this person, a bookkeeper, since head bookkeeper, has
14 sufficient agent discretion to accept service of
15 process - - -

16 JUDGE SMITH: Suppose - - -

17 MS. WILSON: - - - under New York law.

18 JUDGE SMITH: I mean, I'm lost. I guess
19 I'm having a little trouble finding out where the
20 judge really finds that the service was made. It
21 looked to me like he just recited everyone's
22 testimony and says the plaintiff failed to establish
23 what he was supposed to establish.

24 MS. WILSON: Well, when I read the
25 decision, which I have in front of me here, the - - -

1 the court specifically notes in the third paragraph
2 that James Cagney, who was the process server, went
3 with his father, who is Stan Cagney in the record, to
4 serve the legal papers, and he identifies them as
5 legal papers in the decision - - -

6 JUDGE SMITH: I guess, but can't you read
7 that just as a summary of the testimony rather than
8 as a finding of fact?

9 Okay. I withdraw the question; I'll ask
10 you another one. Suppose we do not find that the
11 facts on - - - on that are - - - are - - - or that
12 there are findings in the record, is there - - - do
13 you have an argument in the alternative that it
14 doesn't matter as long as the - - - as long as the
15 defendant had actual notice?

16 MS. WILSON: Yes, that is our alternative
17 argument. Our position is there was personal service
18 upon a person of suitable age and discretion. But in
19 any event, Mr. Monani was on notice, through his
20 counsel, who is his agent. We also - - -

21 JUDGE SMITH: And why is that good enough?

22 MS. WILSON: Because the whole question
23 under Galliano was whether it's fundamentally fair
24 for a defendant corporation to be subject to a
25 default judgment enforcement in a foreign proceeding.

1 And in this instance we believe that it - - - it is
2 more than fundamentally fair because we have the
3 personal service on - - -

4 JUDGE SMITH: So you're saying that the
5 service doesn't have to be good under New York law as
6 long as there's actual notice, and that's - - -
7 that's because they signed something that says that
8 we submit to jurisdiction?

9 MS. WILSON: I - - - I would say there does
10 not have to be perfect letter service under New York
11 law so long as they are on actual notice. In this
12 instance they were.

13 CHIEF JUDGE LIPPMAN: And that they
14 voluntarily submitted to the jurisdiction, right?

15 MS. WILSON: And they voluntarily
16 submitted, in this instance, by virtue of the six
17 orders of the seafood, which have the legend on the
18 front of it.

19 JUDGE RIVERA: So I take it your position
20 is that his argument that he didn't - - - he had no
21 idea, because it's on the back, that he had submitted
22 to the jurisdiction of the High Court of England, and
23 whether or not Cardenas is served up on this or - - -
24 all of that doesn't matter, because I take it your
25 position is those arguments he should have made at

1 the High Court.

2 MS. WILSON: That's exactly our argument,
3 that if he had an issue with respect to jurisdiction
4 or on the merits, the place to make that argument was
5 in the High Court in England.

6 JUDGE RIVERA: So how would that spin
7 itself out? So he says I didn't know, I didn't know,
8 and there wasn't good service. We only find out at
9 the point of default. What - - - so tell me how that
10 would have spinned out? What - - - what could he
11 then have done, since you say he had to do it in
12 England?

13 MS. WILSON: Well, I definitely am not in a
14 position to say what English procedure is to open a
15 default judgment - - -

16 JUDGE SMITH: Well - - -

17 MS. WILSON: - - - but that's what he would
18 have to do. He would have to go to the UK - - -

19 JUDGE SMITH: Well, what if the - - - I
20 thought the assumption in Judge Rivera's question was
21 if he didn't know. If he didn't know, then the
22 judgment can't be enforced against him, right, if he
23 didn't know until the time of default?

24 MS. WILSON: Right. So - - - I'm sorry,
25 but I didn't - - -

1 JUDGE SMITH: For you to win, you have to
2 show - - - even if you don't show technically good
3 service, you have to show that he had notice of the
4 proceeding in time to appear.

5 MS. WILSON: Correct.

6 JUDGE SMITH: And you say you did because
7 there are e-mails in there saying we've decided not
8 to appear.

9 MS. WILSON: Right. We say we have it both
10 ways, that there was actual service on the head
11 bookkeeper, and Mr. Monani himself testified that he
12 came back from his trip and the papers were on his
13 desk; he called his lawyer. Then they asked what
14 happened next. He said next I got the judgment.
15 Then he was in shock and awe over the fact that there
16 was a judgment entered.

17 JUDGE READ: Well, so what's the difference
18 at the - - -

19 JUDGE ABDUS-SALAAM: That's after he
20 defaults.

21 MS. WILSON: I'm sorry?

22 JUDGE ABDUS-SALAAM: You're saying he got
23 notice after he defaulted.

24 MS. WILSON: No, I'm saying he got notice
25 by virtue of the papers that were delivered to his

1 bookkeeper.

2 JUDGE ABDUS-SALAAM: Forget about the
3 papers that were delivered, because it's already been
4 determined, obviously, that he didn't get personal
5 service that way. You're saying the actual notice
6 based on notice to his lawyer? Is that what you're
7 saying?

8 MS. WILSON: I'm saying he got notice both
9 ways: by the service and through his counsel.

10 JUDGE ABDUS-SALAAM: All right. Okay. I
11 just want to deal with the counsel; I'm going to set
12 aside the personal service. So the service on his
13 counsel of what?

14 MS. WILSON: Well, his counsel wasn't
15 served; his counsel was in an ongoing dialogue with
16 English counsel - - -

17 JUDGE ABDUS-SALAAM: So it's the e-mails -
18 - -

19 MS. WILSON: - - - about the proceedings.

20 JUDGE ABDUS-SALAAM: - - - you're talking
21 about? It's the - - -

22 MS. WILSON: Right.

23 JUDGE ABDUS-SALAAM: But most of those
24 e-mails were before you even filed your suit in
25 England, right?

1 MS. WILSON: Well, there were e-mails, as
2 well, that were subsequent to the filing of the suit.

3 JUDGE READ: Does it make a difference if
4 they were in a reply brief?

5 MS. WILSON: It shouldn't, because the
6 reply is to address arguments raised in opposition,
7 and in this particular instance, there'd be no reason
8 that plaintiff would have anticipated that Monani
9 would deny that they got service through their head
10 bookkeeper, which was personal service. It wasn't a
11 mail - - -

12 JUDGE SMITH: He not only denied service;
13 he denied having any idea.

14 MS. WILSON: Right.

15 JUDGE SMITH: He said I never heard of
16 this. And then you're saying you replied by putting
17 in e-mails from your lawyer saying - - - saying you
18 did hear of it.

19 JUDGE GRAFFEO: Does the record show that
20 anyone checked with the Secretary of State to see who
21 the authorized agent for service was for this
22 corporation?

23 MS. WILSON: No, I believe it does not.

24 CHIEF JUDGE LIPPMAN: Okay, counselor,
25 thanks.

1 MS. WILSON: Thank you.

2 MR. WEISBROT: May it please the court. My
3 name is Ari Weisbrot, and I am counsel for the
4 respondent, the Joe Monani Fish Company.

5 CHIEF JUDGE LIPPMAN: Counselor, do you
6 concede that he knew about the - - - the proceeding
7 in London?

8 MR. WEISBROT: I absolutely do not concede
9 that. The only - - -

10 CHIEF JUDGE LIPPMAN: So you're saying he
11 never - - - never knew about it until he got the
12 default judgment?

13 MR. WEISBROT: It's not what I'm saying;
14 that was the only testimony, the undisputed testimony
15 - - -

16 JUDGE SMITH: The only testimony - - -

17 MR. WEISBROT: - - - produced in - - -

18 JUDGE SMITH: Before the hearing, there's
19 an e-mail, over your signature, saying, "I believe we
20 will allow your London lawsuit to proceed without our
21 appearance." How can you say he didn't know?

22 MR. WEISBROT: Absolutely. I got that
23 information from dialogue, which is also included in
24 here, but I don't know that anybody's seen it - - -
25 from dialogue with prior counsel named Richard Klass,

1 who is an attorney in Brooklyn who I had initial
2 conversations with. Those e-mails are in the record
3 as well.

4 JUDGE PIGOTT: And you mentioned - - -

5 JUDGE SMITH: So you - - - when you - - -
6 you say, "I believe we will allow your London lawsuit
7 to proceed", you're saying - - - you're saying that
8 nevertheless your client had no idea that lawsuit
9 existed?

10 MR. WEISBROT: Absolutely not, Judge. This
11 was a conversation where I was express - - - first of
12 all, I wasn't counsel of record.

13 JUDGE SMITH: Absolutely not, you mean
14 absolutely - - - you're absolutely not saying it or
15 he absolutely did not know?

16 MR. WEISBROT: He absolutely did not at
17 that time have knowledge about this lawsuit. I was -
18 - -

19 JUDGE SMITH: So you say - - - you send an
20 e-mail to your counterpart saying, "I believe we will
21 allow your London lawsuit to proceed", and you have
22 not mentioned the existence of that lawsuit to your
23 client?

24 MR. WEISBROT: Correct, Judge. We - - - me
25 and my client were under the assumption that there

1 was a New York lawsuit. In fact, I think it's a
2 little misleading in the - - - in the appellant's
3 papers where they say that I said - - - there's
4 another sentence that I'm quoted as saying, "Go ahead
5 and serve and file your lawsuit". That appears
6 repeatedly in the papers. But if you look at who I
7 said that to, I said that to Brooklyn counsel.

8 JUDGE PIGOTT: Yeah, but you - - -

9 MR. WEISBROT: This - - -

10 JUDGE PIGOTT: One of the problems that I
11 see in this case is that Article 53 seems to have
12 been ignored. And it sure looks like somebody knew
13 that this lawsuit was going on in England and - - -
14 and chose to say, go ahead and do what you want to
15 do. No one went over there. There's - - - I think
16 you guys have an office over there, don't you? You
17 don't?

18 MR. WEISBROT: No, we don't; they do.

19 Judge, and I think I want to just address
20 two things that Your Honor said that I think are - -
21 -

22 JUDGE PIGOTT: When the default judgment
23 came in, you made no effort to get counsel in England
24 to move to set it aside or anything of that nature?

25 MR. WEISBROT: Judge, the default - - - it

1 is undisputed that the default judgment - - -

2 JUDGE PIGOTT: And it's for that - - -

3 MR. WEISBROT: - - - was served on someone

4 - - -

5 JUDGE PIGOTT: And it's for that reason - -

6 -

7 MR. WEISBROT: - - - who has nothing to do

8 with my client. He was - - -

9 JUDGE PIGOTT: I'm almost done, but you
10 know, if you want to go ahead.

11 MR. WEISBROT: Oh, I'm sorry.

12 JUDGE PIGOTT: And - - - and rather than
13 move and do anything in - - - in the London thing,
14 you challenged the 311, which is okay. But doesn't
15 our law say that, you know, fundamental fairness and
16 enforcement of foreign judgments are - - - are
17 handled under Article 53?

18 MR. WEISBROT: Absolutely, Judge, and I'm
19 glad you brought that up, because that is really the
20 only major point that I - - - that I want to address
21 on my own, and that is 5304. There are so many
22 exceptions that are not only directly applicable, but
23 were found by the lower court, that I just want to
24 take ten seconds or twenty seconds to just point them
25 out.

1 First of all, the court is not permitted to
2 enforce the judgment under the following exceptions
3 that are directly applicable. The first of all is
4 where the judgment was obtained by fraud in England.
5 It is undisputed, and I've cited this, that in
6 applying for their judgment in England, initially,
7 when they started their lawsuit, they didn't tell the
8 English court that there was a six-month statute of
9 limitations in the contract.

10 JUDGE PIGOTT: You've got to do that.
11 That's - - - I mean, if - - - you're going to tell a
12 New York court that a foreign corporation said
13 something to a foreign court that we've got to do
14 something about. It doesn't happen.

15 MR. WEISBROT: We didn't know about it.
16 But - - -

17 JUDGE PIGOTT: You've got to go to England.

18 MR. WEISBROT: Judge, the - - -

19 JUDGE PIGOTT: Short trip.

20 MR. WEISBROT: 5304 is very clear. I'm not
21 admitted in England. But 5304, which I think is very
22 clear on its face, says that it can't - - - even if -
23 - - if there's notice, actual notice, it's not going
24 to be enforced if there was a fraud committed upon
25 the foreign court. And here it's undisputed. If you

1 look at their paperwork, in their initial petition to
2 the English court, they omit - - - they cite the
3 paragraph that talks about English jurisdiction, but
4 they do not cite the discussion about choosing
5 arbitraries, how it's arbitrable. And they
6 completely omit the six-month statute of limitations
7 - - -

8 JUDGE PIGOTT: That's an affirmative
9 defense in this state that you would have to have
10 asserted had you gone to England and defended this
11 lawsuit, right?

12 MR. WEISBROT: Yeah, but - - - but, that's
13 - - - okay, so that leads to the next exception.

14 JUDGE PIGOTT: All right.

15 MR. WEISBROT: The only evidence before the
16 traverse hearing, the only evidence before the lower
17 court was the testimony of my client who testified
18 that he did not have any knowledge of this action
19 until after judgment was entered.

20 JUDGE SMITH: Did he actually - - -

21 MR. WEISBROT: And they credited that.

22 JUDGE SMITH: Did he actually say that at
23 the hearing?

24 MR. WEISBROT: Word - - -

25 JUDGE SMITH: I know he said it in the

1 affidavit.

2 MR. WEISBROT: Word for word. He was
3 asked; he said I had no knowledge until after the - -
4 - until afterwards. And I think that that's
5 important, because that's the only testimony before
6 the court.

7 JUDGE SMITH: Well, let me refer you to
8 page 232 of - - - of the record, another e-mail from
9 you. "It's another thing to file a" law - - - "It's
10 another thing to try and get default judgment in a
11 foreign country four days after my client is faxed
12 the complaint". How is that not an admission that
13 your client had the complaint before they tried to
14 get default judgment?

15 MR. WEISBROT: Judge, I'm sorry; is that on
16 the top or the bottom?

17 JUDGE SMITH: The - - - the top e-mail on
18 page 232.

19 MR. WEISBROT: Judge, even if it is an
20 admission, four days is - - - according to the
21 statute, it has to be with sufficient time to defend.

22 JUDGE PIGOTT: Yeah, but you said there was
23 no notice. You're telling this court that your
24 client had no knowledge and that when you made the -
25 - - the statement to the - - - to the English counsel

1 to go ahead and get your default, that your client
2 had no knowledge that you were even making that
3 because he had no knowledge of the lawsuit. Now, are
4 we talking about days when you made - - - made one
5 representation before the second or what?

6 MR. WEISBROT: Judge, I - - - I can't speak
7 to the actual timing. I do know that when I speak of
8 my client, it could have been faxed to his office and
9 - - - and forwarded to me for a response. He said he
10 was out of the country when this was happening, so
11 clearly - - -

12 JUDGE PIGOTT: Well, be careful what you're
13 telling us. I mean, you - - - when you said that,
14 you were saying this - - - your client was dumbstruck
15 when - - - when this default judgment was laid on his
16 desk.

17 MR. WEISBROT: I didn't say that; he said
18 that to the traverse hearing and the court - - -

19 JUDGE PIGOTT: You said it.

20 MR. WEISBROT: - - - credited the
21 testimony.

22 JUDGE PIGOTT: You said that he had no
23 knowledge of - - - of the lawsuit and - - - and
24 here's an e-mail that says that - - -

25 MR. WEISBROT: Judge, absolutely.

1 JUDGE PIGOTT: - - - you faxed it to him.

2 MR. WEISBROT: Well, just I don't want to
3 leave, you know, any misapprehension here. When I
4 say "my client" in this e-mail - - - and again, this
5 was years ago - - - it was probably, if this is a
6 factual - - - truthful, factual statement, it was
7 faxed to their office. But my client says that he
8 was out of the country when this happened. So - - -
9 and maybe it's - - - it's confusion with the use of
10 the word "my client". "My client" could have been
11 the company. But the individual who is responsible
12 for this has testified he wasn't there prior to - - -
13 prior to the entry of judgment. He said he was out
14 of the country. So I can't - - - you know, maybe
15 it's a - - - a misuse of the word client. In one
16 sense, I may have been referring to the company, the
17 - - -

18 JUDGE PIGOTT: But you're talking notice.

19 MR. WEISBROT: Sorry?

20 JUDGE PIGOTT: I'm just following up on
21 Judge Smith's question about the notice.

22 MR. WEISBROT: No, I understand, and I
23 actually want to address two things that were said.
24 First of all, I think it's important to point out
25 that in the affidavits of service, that were also

1 submitted to the trial court, there are knowing - - -
2 and knowing - - - admittedly, knowingly
3 misrepresentations of truth. They say that they were
4 told that - - - that the individuals who received it
5 affirmed their authorization to accept service, and
6 then at the traverse hearing they admitted that that
7 wasn't true. So you have affidavits of service that
8 have the wrong dates of service on them.

9 JUDGE PIGOTT: When they said it was
10 untrue, what - - - what else did they say? Is that
11 all they said?

12 MR. WEISBROT: I think what they said was
13 we just assumed it because he was standing there.
14 And I asked them - - -

15 JUDGE PIGOTT: No, but what did - - - what
16 did that person say?

17 MR. WEISBROT: What did the process server
18 say?

19 JUDGE PIGOTT: Well, there's a - - -
20 there's a debate in the - - - not a debate, but there
21 is discussion where he said he said, you know, he was
22 a bookkeeper and not the controller.

23 MR. WEISBROT: Correct. That - - - and - -
24 - well, he doesn't say he said that; he just says he
25 was a bookkeeper and not the controller.

1 JUDGE SMITH: How - - - how did - - - where
2 did the process server get the idea that he said - -
3 - what prompted the process server to put controller
4 in the affidavit, and how did he just happen to hit a
5 guy who was a bookkeeper to label controller?

6 MR. WEISBROT: Well, those are completely
7 different things, but how did he get controller
8 wrong, the date wrong? How did he get the date
9 wrong?

10 JUDGE SMITH: Well, no, what - - - yeah, we
11 know - - - the one thing we do know is that the guy
12 put in an affidavit of service saying I served it on
13 a man named Cardenas who was a controller. And we
14 know there's a man named Cardenas who is a
15 bookkeeper. And you're telling me that's a
16 coincidence; he never met Cardenas?

17 MR. WEISBROT: Oh, no, I'm - - - I have no
18 reason to doubt that he walked in there and dropped
19 the papers at Mr. Cardenas' desk.

20 JUDGE SMITH: And where do you - - - where
21 do you think he got the word "controller"; he made it
22 up out of his head?

23 MR. WEISBROT: Judge, he admitted to making
24 up that he - - - that he had a conversation - - -

25 JUDGE SMITH: What's the answer to that

1 one? He made it up and he just happened - - -
2 because the guy was a bookkeeper, he figured he'd
3 exaggerate and make him the controller?

4 MR. WEISBROT: I believe that he either
5 made it up or he assumed - - - I don't know the
6 answer to that; I do know that the trial court has
7 concluded that this affidavit of service contained
8 not only mistakes but knowing misstatements of truth.
9 And therefore, when you have, on one hand, the
10 testimony of the individual served, who the trial
11 court credited his credibility - - -

12 JUDGE PIGOTT: And who is that?

13 MR. WEISBROT: Mr. Cardenas and Mr. Monani.

14 JUDGE PIGOTT: So he admits being served.

15 MR. WEISBROT: He doesn't admit being
16 served; he admits that he was handed papers.

17 JUDGE PIGOTT: Well, that's what you just
18 said.

19 MR. WEISBROT: Yeah, he admits being hand -
20 - - service is a legal - - - you know, is a legal
21 term.

22 JUDGE PIGOTT: Oh, is it?

23 MR. WEISBROT: I'm sorry?

24 JUDGE PIGOTT: I said, oh, is it?

25 MR. WEISBROT: In my opinion, it is.

1 JUDGE PIGOTT: Mine too. What I'm saying
2 is you don't have to be that patronizing; I think I
3 know what - - - what service is.

4 MR. WEISBROT: Oh, no, okay, then I - - -

5 JUDGE PIGOTT: I'm talking about a person
6 of suitable age and discretion who received the
7 papers, and you're fighting over whether or not he
8 was a bookkeeper or a controller.

9 MR. WEISBROT: I'm fighting over whether or
10 not he was authorized under the law to accept service
11 and whether the service - - -

12 JUDGE SMITH: Assume he's not; what's a
13 process server supposed to do in a situation like
14 this?

15 MR. WEISBROT: Well, they have to at least
16 confirm that the individual - - - who the individual
17 is, what his title is, and whether or not he's
18 authorized to accept service.

19 JUDGE SMITH: Suppose he said - - - suppose
20 - - - well, the testimony of the process server - - -
21 whether we have got findings, we could debate, but
22 the testimony of the process server is the man said,
23 I'm the controller, and held out his hand to take
24 them. Is that good enough?

25 MR. WEISBROT: I - - - I don't know if the

1 statute authorizes a - - - if a controller - - - I
2 think you have to be an officer - - -

3 JUDGE SMITH: Well, what are you supposed
4 to do when you go to serve papers, there's one guy in
5 the office, he says I've some legal papers here, the
6 guy holds out his hand, says are you - - - who are
7 you, he says I'm the controller, he takes them.
8 What's the process server supposed to do? How do you
9 serve somebody?

10 MR. WEISBROT: I - - - well, first of all,
11 that's crediting that he actually had that
12 conversation - - -

13 JUDGE SMITH: I understand there's a
14 credibility issue, but putting that aside, for the
15 sake of argument.

16 MR. WEISBROT: Putting that aside, I think
17 that you have to do what - - - what we do in many
18 cases, which is you have to keep trying until you get
19 somebody who's authorized to accept service. I think
20 that's - - - otherwise what's going to happen is what
21 happened in the second attempt of service when they
22 walked in and they handed a guy, who turns out he has
23 nothing to - - -

24 JUDGE GRAFFEO: The bookkeeper didn't say
25 I'm not authorized to take service.

1 MR. WEISBROT: I'm sorry?

2 JUDGE RIVERA: The bookkeeper didn't say
3 don't hand me those papers; I don't accept legal
4 papers.

5 MR. WEISBROT: Correct, but he didn't say
6 what is sworn in the affidavit of service, which is
7 that he stated that he was authorized to accept
8 service. It's a false statement, and I believe that
9 that contributed - - -

10 JUDGE GRAFFEO: Well - - -

11 MR. WEISBROT: - - - to the credibility
12 issue with the trial court.

13 JUDGE GRAFFEO: I understand the
14 credibility issue, but if this individual said I'm
15 the controller of the company, it would be reasonable
16 to presume that means he's an officer of the
17 corporation and was authorized to accept service.

18 MR. WEISBROT: Even if that argument is
19 accepted, he would still - - - you would still have
20 to believe that that conversation happened. And he
21 denied it, and the person who was on record as
22 submitting a knowingly false affidavit - - - you
23 know, you've got to decide whether you believe the
24 guy who knowingly lied - - -

25 CHIEF JUDGE LIPPMAN: Okay, counselor - - -

1 JUDGE RIVERA: And you're saying - - -

2 CHIEF JUDGE LIPPMAN: Go ahead, Judge

3 Rivera.

4 JUDGE RIVERA: - - - Cardenas said I never
5 got the papers?

6 MR. WEISBROT: I'm sorry?

7 JUDGE RIVERA: You're saying Cardenas said
8 I never got the papers?

9 MS. WILSON: The individual, Cardenas, yes,
10 he admitted that he - - - well, he - - - actually
11 what he said was he didn't recall any of this
12 happening. He never said he got the papers. He
13 never acknowledged it. But I'm willing to accept
14 that, Judge.

15 CHIEF JUDGE LIPPMAN: Okay, thanks,
16 counselor.

17 MR. WEISBROT: Thank you.

18 CHIEF JUDGE LIPPMAN: Rebuttal, counselor?

19 MS. WILSON: I just would like to make two
20 brief points, and then if you - - -

21 CHIEF JUDGE LIPPMAN: Go ahead.

22 MS. WILSON: - - - have any other
23 questions, which is with respect to the time frame of
24 knowledge. Prior to that June 15th e-mail, there is
25 a May 26th e-mail, at page 237 of the record.

1 JUDGE SMITH: The June 15th is the one I
2 was reading that said four days before the default
3 judgment - - -

4 MS. WILSON: Right.

5 JUDGE SMITH: Yeah, go ahead.

6 MS. WILSON: Right. But on May 26th, there
7 is an e-mail that goes from English counsel, Mr.
8 Preston, to Mr. Weisbrot, clearly prompted by a call
9 from Mr. Weisbrot about the English court
10 proceedings. So that takes you back even further in
11 time. It wasn't - - -

12 JUDGE SMITH: Does that one actually tell
13 him there's an English action pending?

14 MS. WILSON: It specifically states, "Thank
15 you for your voicemail message. Sorry I was out."
16 I'll parse it. "I'm happy to talk with you on the
17 phone. It's sensible to provide the attached to you
18 first, which may assist your clients." And then he -
19 - - Mr. Preston goes on to say, "Briefly, before
20 serving a claim form out of the jurisdiction of the
21 U.S., we're obliged to obtain the permission of the
22 English court". And it goes on from there. But it -
23 - - it - - - the only reasonable conclusion we would
24 submit you can draw from that is that Mr. Weisbrot
25 left him a voicemail message about the English

1 proceeding. Otherwise, he would never prompt - - -

2 JUDGE SMITH: You mean, what's he calling
3 England about if he doesn't know there's a lawsuit is
4 your - - - is your - - -

5 MS. WILSON: Right, or - - - or
6 specifically prompting Mr. Preston to explain the
7 English proceeding to him.

8 The - - - the other point I just wanted to
9 make was that in Fashion Page, the executive
10 secretary was deemed an appropriate person to accept
11 the service of process, even though she did not
12 specifically state that she was authorized or was
13 asked the question, at least according to what is in
14 - - - in the record - - - sorry, in the decision.
15 So, you know, we would submit that in this instance,
16 where you have a bookkeeper who since has been
17 promoted to head bookkeeper, he surely should be
18 considered of suitable age and discretion.

19 CHIEF JUDGE LIPPMAN: Okay.

20 MS. WILSON: Thank you.

21 CHIEF JUDGE LIPPMAN: Thanks, counsel.

22 Thank you both.

23 MR. WEISBROT: Thank you very much.

24 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Landauer Limited v. Joe Monani Fish Co., Inc., No. 27 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

Signature: _____

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