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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: PAULA J. OMANSKY PART 47
Justice

Glenn Guadagno

- v -

Direct Marketing

INDEX NO. 103494/01

MOTION DATE 12/16/01

MOTION SEQ. NO. 001

MOTION CAL. NO. 71

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

SCANNED
FEB 25 2002

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 2/13/02

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

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GLENN GUADAGNO

Index No. 011034/01

Plaintiff,

DECISION AND ORDER

-against-

DIRECT MARKETING & COMMUNICATIONS, LLC, KENNETH LEVIN, AND JACK G. SCHWARTZ

Defendants.

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PAULA J. OMANSKY, J.:

In this action to recover a judgment, plaintiff Glenn Guadagno moves for summary judgment in lieu of complaint directing entry of judgment against defendants Direct Marketing & Communications, LLC, ("DM&C") Kenneth Levin, and Jack G. Schwartz in the amount of $152,041.67 with interest and costs based on a money judgment rendered by default, in the State of New Jersey, by the Superior Court of New Jersey Law Division: Monmouth County (the "New Jersey Court") (Docket No. L960-00) on September 25, 2001 (the New Jersey Judgment") against all defendants.

Individual defendant Kenneth Levin cross-moves to dismiss the present New York action on the ground that plaintiff failed to serve the instant application within 120 days of commencement of this action (January 26, 2001) in accordance with CPLR 306-b, that this court lacks subject matter and personal jurisdiction (CPLR 3211[a][2]; CPLR 3211[a][8]) over defendants, that defendants Levin may not be sued in his individual capacity (CPLR 3211([a][3]).

FACTS

Moving defendant Kenneth Levin stated that he served a Managing Director of co-defendant, pro se, DM&C, a corporation which Levin states has its principle place of business in New York. According to Levin, DM&C ceased doing business in May 2000.

During it time of operation, DM&C was a wholesale distributor of medical vending machines and short-wave radio stations. On February 15, 1999, the Sales Manager of Dano & Sons ("Dano"), a non-party, was Richard Guadagno, a non-party and plaintiff's brother. In his capacity as sales manager, Richard entered into sales contract with DM&C on behalf of Dano to buy 26 medical vending machines ($16,990) and a short-wave radio station ($12,500.00). The purchase agreement stated that the contract would be construed and enforced in accordance with the laws of the State of New York. In addition, the contract stated that "[t]he Purchaser agrees that any action or proceeding brought under this agreement may be brought only in the Supreme Court of the State of New York, New York County, and Purchaser hereby submits to the jurisdiction of such court."

Plaintiff states that Dano paid for the items but never received them and he filed a complaint with the National Business Opportunity Bureau as well as commence legal action for breach of contract in the New Jersey Court.

The New Jersey Court granted a default judgment against all

the defendants in the New Jersey action, jointly and severally, in the amount of $153,042.68 and found that the plaintiff in the New Jersey action was entitled to post judgment interest rate of 10% and that interest shall accrue each day in the amount of $42.50 form the date of the entry of the New Jersey Judgment up to and including the date of the judgment's satisfaction.

Mr. Levin maintains that he was never served personally in the New Jersey action and has a number of meritorious defenses, including improper venue, lack of subject matter jurisdiction, lack of personal jurisdiction, as well as plaintiff's inability to commence an action in his individual capacity as the contracting party with DM&C.

Levin alleges that Dano never took delivery of its radio station equipment but demanded its money back asking DM&C's, managing director, Jack G. Schwartz if defendant corporation could sell the equipment for him. Schwartz allegedly informed plaintiff that DM&C guarantees the items it sells against all defects but that the company does not take equipment back just because the purchaser decided that he is no longer interested in the product.

Levin has not filed a motion to vacate the New Jersey Judgment. Defendant DM&C and individual defendant, Jack G. Schwartz, have not appeared in this New York application or submitted any objection to plaintiff's motion.

DISCUSSION

A judgment of a sister state rendered on default may be enforced in New York by moving for summary judgment in lieu of complaint Staton Wholesale v Barker, 257 AD2d 902, 903 [3d Dept 1994], citing CPLR 3212; cf. CPLR 5402). Under the Full Faith and Credit Clause of the United States Constitution, the judgment of one court is conclusive and binding in another State only if the first court had jurisdiction to render it (Farmland Dairies v Barber, 65 NY2d 51, 55, rearg denied 65 NY2d 929 [1985], citing Underwriters Nat. Assur. Co. v North Carolina Life and Acc. And Health Ins. Guar. Assn., 455 US 691, 704-705 [1982][remaining citation omitted]); US Const, art IV, §1). New York recognizes foreign judgments predicated on any jurisdictional basis that it recognizes in its internal law (Porisini v Petricca, 90 AD2d 949, 950 [4th Dept 1982]; CPLR 5305 et seq). This court may, therefore, consider whether the New Jersey had jurisdiction over the nonappearing parties (Schultz v Barrow, 263 AD2d 565, 660 [3d Dept 1999], affd 94 NY2d 624 [2000], citing Fiore v Oakwood Plaza Shopping Ctr., 78 NY2d 572, 577 [1991], cert denied 506 US 823 [1992] [remaining citations omitted])[1].

[1]The clause in the sales agreement which provides that New York law governs only refers to substantive disputes; procedural matters are govern by the law of the forum state (American Nat. Bank & Trust of New Jersey v Alba, 111 AD2d 294, 296-297 [2d Dept 1985], citing Childs v Brandon, 60 NY2d 927 [1983][remaining citations omitted]).

Defendant Levin has failed to present any authority to support his assertion that a forum selection clause ousts a court of subject matter jurisdiction. In fact, New Jersey holds that the parties' agreement does not oust the State of judicial jurisdiction (Kubis & Perszyk Assocs., Inc. v Sun Microsystems, Inc., 146 NJ 176, 187 [1996]). In New Jersey, the question of enforceablilty of forum selection clause is a matter of personal jurisdiction because an Appellate Court of that State had held that in personam jurisdiction flows from a valid forum selection clause (Copelco Capital, Inc. v Shapiro, 331 NJ Super 1, 7 (Superior Court, AD 2000]). Hence, New Jersey would not dismiss plaintiff's New Jersey action on the basis of lack of competency and that branch of defendant Levine's motion to dismiss on the ground of CPLR 3211(a)(2) is denied.

Forum selection clauses are prima facie valid and enforceable in New Jersey, especially if the clause is found in a commercial agreement entered into by sophisticated business persons/entities (Copelco Capital, Inc. v Shapiro, supra, 331 NJ Super, at 4; Caspi v Microsoft Network, LLC, 323 NJ Super 118, 122 (Superior Court, AD 1999], cert denied 162 NJ 199 [1999]). New Jersey courts will not, however, enforce a clause which is the result of fraud, "overweening bargaining power," or if enforcement would violate either the strong public policy of New Jersey or the named forum,

or if enforcement would seriously inconvenience the parties (Copelco Capital, Inc. v Shapiro, supra, 331 NJ Super, at 4; Caspi v Microsoft Network, LLC, supra, 323 NJ Super, at 122).

The present record does not indicate the presence of fraud at the bargaining stage or show that one of the parties had superior bargaining power over the other. Moreover, there is no indication that the submitted clause violates New Jersey's public policy or that a trial in New York would ~~be~~ seriously inconvenience the parties.

There is also no basis for New Jersey to reject the forum selection clause as violating the public policy of the home forum. New York public policy favors enforcement of mandatory forum selection clause (National Union Fire Ins. Co of Pittsburgh, PA v Worley, 257 AD2d 228, 230 [1st Dept 1999]; Babcock & Wilcon Co. v Control Components, Inc., 161 Misc2d 636, 640 [Sup Ct, NY County 1993]). Forum selection clauses in contracts for the sale of goods worth under $1 million are valid in this State (General Obligations Law § 5-1402[2]), and, just as in New Jersey, will not be set aside except for fraud or overreaching or if enforcement would be so gravely difficult and inconvenient in the selected forum so that the challenging party would, for all practical purposes, be deprived of his or her day in court (Brooke Group v JCH Syndicate, 87 NY2d 530, 533 [1996] (Fidelity & Deposit Co. of Maryland v Altman, 209 AD2d 195 [1st Dept 1994]).

The New Jersey court, if it had the opportunity to review the underlying dispute on the merits, would enforce the contract provision mandating a New York forum against the signatories of the New York sales agreement, DM&C and Dano, and dismiss all claims between these parties for lack of personal jurisdiction.

However, Dano did not commence the New Jersey Action. Instead, plaintiff, an individual, filed a complaint listing himself as the party seeking damages against defendant DM&C, its principal and the corporate sales manager. Plaintiff and individual defendants Levin and Schwartz are not signatories to the underlying sales contract and the forum selection clause does not apply to them.

Yet, plaintiff's New Jersey Judgment is still unenforceable, even assuming that the New Jersey court would have held that plaintiff was entitled to sue on behalf of Dano, as there is no evidence in this application that this corporation transferred its right to sue to its principal. The New Jersey Court would have dismissed the complaint for lack of personal jurisdiction on the ground that there is no basis for New Jersey to exercise long arm jurisdiction over the defendants since they had no contact with that State (American Nat. Bank & Trust of New Jersey v Alba, 111 AD2d 294, 297 [2d Dept 1985]; Copelco Capital, Inc. v Shapiro, supra, 331 NJ Super, at 7). The submitted record shows that the sales contract is a New York agreement and that all transactions

and payments occurred in this State. Therefore, this court finds that New Jersey Court lacked personal jurisdiction over the defendants in the New Jersey action and this court declines to enforce the New Jersey Judgment against any of the defendants in the New York action. Plaintiff's motion for summary judgment on the basis of an out of state judgment is denied.

Plaintiff has also failed to show that he has a viable claim suitable for expedited treatment under the provisions of CPLR 3213 since the underlying sales contract is not an instrument for money only (Weissman v Sinorm Deli, Inc., 88 NY2d 437, 444 [1996]). Resolution of the underlying claims also requires proof outside the submitted documents (ibid.). Plaintiff has not presented any evidence which indicates that he has the right to enforce Dano's corporate claims and the parties dispute whether the contracted goods were conforming. Defendant Levine's motion to dismiss plaintiff's application for summary judgment in lieu of complaint, is granted.

This court exercises its discretion under CPLR 3213, and denies all requests to convert this application to an action (Schultz v Burrows, supra, 263 AD2d, at 573). As already noted, plaintiff has failed to state sufficient facts concerning his right to enforce the terms of the underlying sales agreement against DC&M. The present submissions do not indicate why the individual defendants are personally liable for contract claims made against

the corporate entity (Morris v New York State Dept. of Taxation and Finance, 82 NY2d 135, 140 [1993]).

In addition, plaintiff has failed to present evidence that it complied with the personal service requirements for Levine under CPLR 308 since the affidavit of service only states that it served defendant Levine's attorney on October 22, 2001, which is almost nine months since commencement of this action (see, CPLR 306-b). Plaintiff has also failed to show that he complied with personal service requirements for the remaining defendants (CPLR 308 and 311) and that service on these parties was timely made pursuant to CPLR 306-b.

Given the lack of proper personal service, the insufficiency of the pleadings, and the presence of numerous other procedural irregularities, this action is dismissed with prejudice.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that defendant Levine's cross motion to dismiss

plaintiff's application on the ground that the New Jersey Court lacked personal jurisdiction is granted. This action is dismissed, with prejudice, against all defendants, with costs and disbursements as taxed by the clerk; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: February 11, 2002

ENTER:

PAULA J. OMANSKY
J.S.C.