Heymann v Klam
2002 NY Slip Op 30157(U)
December 18, 2002
Supreme Court, New York County
Docket Number: 605939/01
Judge: Marcy S. Friedman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Friedman, *Justice* — **PART** 52

Dr K. Heymann

- v -

Klaus Klam et al

INDEX NO. 605939-9

MOTION DATE

MOTION SEQ. NO. 02

MOTION CAL. NO.

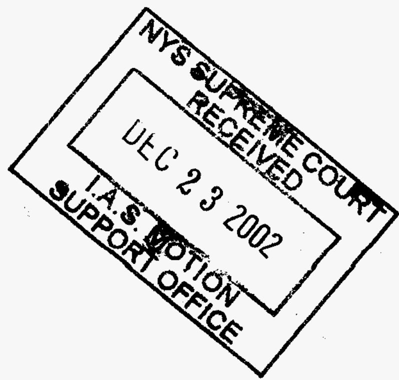
The following papers, numbered 1 to ____ were read on this motion to/for enter default

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... Notice of Cross-Motion + Exhibits	1
Answering Affidavits — Exhibits	2, 2a
Replying Affidavits	4, 6, 7

Memos of Law 3, 5, 8, 9

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is granted APS. Cross-motion is denied per decision/order dated 12/18/02



MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 12/18/02 ____ J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

——————————————————————— x

DR. KLAUS HEYMANN,

Plaintiff,

- against -

KLAUS KLAM, PUBLIC PARKING, INC. and
MOHAMMED ESMAEIL YAGHOUBI,

Defendants.

——————————————————————— x

Index No.: 605939/01

DECISION/ORDER

In this action to quiet title and for imposition of a constructive trust, plaintiff Dr. Klaus Heymann initially moved for a default judgment against defendant Klaus Klam. This motion was settled by stipulation, dated July 11, 2002, by which plaintiff withdrew the motion, and agreed to accept defendant's answer with counterclaims and cross-claims. By cross-motion, which remains for disposition, defendant Klam moves to dismiss the complaint pursuant to CPLR 3211, to strike the notice of pendency, and for other relief.

Service

As a threshold matter, defendant Klam moves to dismiss the complaint as against him based on improper service. In the moving papers, defendant claims that he was not served pursuant to CPLR 308. In opposition, plaintiff contends that service was proper pursuant to the provisions of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("the Hague Convention") (20 UST 361.) In reply, defendant apparently concedes that service in this matter is governed by the Hague Convention, but contends that service was not made in conformity with its requirements.

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"The provisions of the Hague Convention covering service of process in foreign jurisdictions were intended 'to assure that defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad'." (Salomon Bros. Inc. v Huitong Intl. Trust and Inv. Corp., 1997 US Dist LEXIS 8325, at 4, 1997 WL 324051, at **2** [SD ***NY,*** June 13, 19971, quoting Volkswagenwerk Aktiengesellschaft v Schlunk, 486 U **S** 694,698 [19881.) By its terms, it applies "in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." (Hague Convention, Art. 1.) Rule 4(f) of the Federal Rules of Civil Procedure expressly incorporates the Hague Convention into United States law, providing that service may be effected outside of the United States "by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention." (Fed Rules Civ Pro rule 4[f][1].)

Article **2** of the Hague Convention provides for the designation of a "Central Authority" in each contracting State to receive requests for service, and Articles 3 through 6 provide the procedures for service through the Central Authority. However, Articles 8 and 10 of the Hague Convention also provide for alternative methods of service and allow ratifying states to decide whether they will object to such service. Article 10 provides that where "the State of destination does not object" service may be effected "directly through the judicial officers, officials or other competent persons of the State of destination." (Art 10[b],[c].)

In ratifying the Hague Convention, the United Kingdom declared that "[w]ith reference to the provisions of paragraphs (b) and (c) of Article 10 of the Convention, documents for service through official channels will be accepted in the United Kingdom only by the central or additional authorities and only from judicial, consular or diplomatic officers of other Contracting States." (FN 14[d] following the list of signatories to the Hague Convention.)

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Plaintiff submits an affidavit of service from an English process server, who attests that after several unsuccessful attempts to deliver the summons and complaint to defendant at his last known address, he served the papers by inserting them through a letterbox, "in accordance with a method prescribed by the internal law of England." (Aff of John Frederick Talbot, ¶¶ 5, 6.)

Defendant Klam argues that service upon him was improper because it was not effected through a Central Authority pursuant to Article 5. However, as it is clear that the Hague Convention provides for alternative methods of service, that argument is rejected.

Defendant also contends that the affidavit of service, as well as the certificate of service issued by England's Central Authority, are "fatally defective" because they assert that service was effected pursuant to Article 5 and not Article 10 as plaintiff now asserts. However, it is well settled that "defects in the affidavit of service do not defeat an otherwise properly commenced action, but are mere nonjurisdictional irregularities." (Bell v Bell, Kalnick, Klee & Green, 246 AD2d 442,443 [1st Dept 19981. See Lambert v Lambert, 270 **NY 422** [1936]; Morrissey v Sostar, S.A., 63 AD2d 944 [1978].)

Finally, defendant Klam contends that service upon him under Article 10 was improper in view of the United Kingdom's declaration regarding the Article 10 provisions. Defendant's objection to the service under Article 10 is that "process issued at the behest of 'Celeste Ingalls, US Notary Public," and that the affidavit of service did not indicate whether "process issued from a designated authority." To the extent that defendant's argument is that this service did not comply with the United Kingdom's declaration that "documents for service through official channels will be accepted * * * only from judicial, consular or diplomatic officers," defendant submits no legal authority to support his contention that the declaration applies in this instance.

On the contrary, while courts in this jurisdiction have not interpreted the United Kingdom

declaration regarding Article 10, courts in other jurisdictions have repeatedly held that the Article 10 declaration does not preclude service by "other competent persons," including solicitors and process servers. (See Koehler v Dodwell, 152 F3d 304 [4th Cir 19981; Tax Lease Underwriters, Inc. v Blackwall Green, Ltd., **106** FRD 595 **[US** Dist Ct, ED Mo [1985]; Balcom v Hiller, **46** Cal App **4**th 1758 [Cal App **2** Dist 19961.)

Here, it is not disputed that service was made by a process server authorized to effect service under English law. Nor does defendant make any showing that service was not made in a manner authorized by English law. The court accordingly concludes that service was properly effected under Article 10 of the Hague Convention.

Res Judicata

Defendant Klam further contends that this action is barred by res judicata because plaintiff allegedly unsuccessfully litigated ownership of the subject property against Klam in a prior action commenced in Germany.

Under the doctrine of res judicata, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." (O'Brien v. Citv of Syracuse, 54 NY2d 353, 357 [1981].)

Here, however, the German action did not result in a final determination that would support the application of res judicata. The ownership of the subject property was at issue in the German action, as that action sought a "title correction" regarding the subject property, and an order directing Mr. Klam to "transfer and assign" the property to plaintiff. However, the German action was litigated only through the preliminary injunction stage. **A** motion for preliminary relief was initially heard by the Berlin Regional Court, which determined that the court lacked

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jurisdiction to hear the matter, and must defer to the foreign court having jurisdiction at the location in which the property is located. The lower court's determination was appealed to the Court of Appeal which rendered a determination dated June 14,2001, which rejected the lower court's holding as to lack of jurisdiction, but held the appeal "unsuccessful on the merits of the case."

Although the decision by its terms addresses the merits, and contains findings that Dr. Heymann did not establish ownership of the subject property, the language of the opinion, so far as can be determined from the awkward and, at times, abstruse translation, is consistent with the conclusion that the German court addressed only the prima facie merits of ownership, concluding that plaintiffs statements were insufficient to meet his burden of demonstrating ownership.'

More importantly, plaintiff submits the affidavit of Frank Zahn, an attorney licensed to practice law in Germany, who opines that, under German law and procedure, a determination of preliminary judicial relief is based on a summary review of the facts and legal implications of a case, and is made without the formal taking of evidence; that it is not binding upon, and is subject to the outcome, of the main proceeding; and that it does not constitute a final

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'The determination thus states, for example:

> On the merits of the case, however, the Plaintiffs appeal is unsuccessful. The Senate is unable to take the measures requested by the Plaintiff to secure, on an interim basis, his alleged legal position pursuant to §§ 938,940 ZPO because it does not follow from the summary judgment, which is merely possible as part of the interim injunction procedure, that the plaintiff has real rights to the property at issue in the dispute. Nor can the existence of claims under the law of obligations be concluded from the Plaintiffs statements. [emphasis supplied.]

And again:

> In the summary judgment, merely possible in an interim injunction procedure, of the foreign law concerned, if evident [citation omitted], it cannot be assumed that the real property was effectively transferred from OHG I to the partnership under the Civil Code.

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determination for res judicata purposes under German law. (Zahn Aff. at 2-5.) Although defendant submits legal opinions on other issues under German law, he does not submit a legal opinion contesting Zahn's opinion on the res judicata effect of the Court of Appeal decision.

Under New York law, similarly, the granting or denial of a motion for a temporary injunction "does not constitute the law of the case or an adjudication on the merits, and the issues must be tried to the same extent as though no temporary injunction had been applied for." (J A Preston Corp. v Fabrication Enters., 68 NY2d 397,402 [1986].)

The court accordingly holds that the German Court of Appeal's determination was not a final determination which has res judicata effect. Moreover, as it is undisputed that the German proceeding was withdrawn without prejudice (see Zahn Aff. at 9), the German action is not a bar.

The court further holds that a separate German proceeding before the Charlottenburg Local Court, in which Dr. Heymann sought the appointment of a supplementary liquidator, also does not have res judicata effect. It is undisputed that the denial of this relief, purportedly based on a finding that title to the subject property must also be attributed to Mr. Klam, was made by a registrar rather than the court, and is in the form of a letter rather than a formal decision. (See Kahn Aff. at 5-8.)

Documentary Evidence

Defendant Klam also seeks dismissal of the complaint and notice of pendency, on the ground that the action lacks merit. The documentary evidence submitted in support of this branch of the motion is not self-explanatory and is insufficient, without affidavits, to demonstrate ownership of the subject property. (See CPLR 3211[a][1].)

Defendant Klam contends that the property was initially purchased by a German general

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partnership (an "OHG"), and that when plaintiff subsequently withdrew from the partnership, its assets remained with the partnership, of which defendant Klam became the sole proprietor. In his initial opposition to the cross-motion, plaintiff contends that subsequent to the purchase of the property by the German general partnership, the property was transferred to a German civil partnership. Plaintiff also contends that the purchase of the property was funded by a separate partnership ("lending partnership") of which plaintiff and a Walter Kreuels were partners; that defendant Klam made no monetary contribution to the purchase of the property; and that Mr. Klam was relieved of liability for the loan to purchase the property in consideration for the surrender of his interest in the civil partnership. (Verified Complaint ¶¶ 11-18.)

Plaintiff does not submit a deed evidencing the transfer from the general partnership to the civil partnership, and relies on tax returns which are not self-explanatory. It also appears that the record ownership of the property may remain in the general partnership. It is noteworthy, however, that defendant Klam does not deny plaintiffs allegations as to the transactions, particularly, the parties' intent to transfer the property to the civil partnership, and his lack of any financial contribution to the purchase. Moreover, plaintiff seeks not only a declaration of ownership, but imposition of a constructive trust on the property.

Under these circumstances, the court finds that plaintiff raises a bona fide factual issue as to his ownership interest in the property, and that the documentary evidence as to the record ownership of the property does not serve, without reference to affidavits or testimonial evidence, to establish the parties' respective ownership interests. Nor, given the parties' sharp factual dispute as to ownership, does the court find that the notice of pendency was filed in bad faith. The court notes, however, plaintiff should have disclosed to the court that the German action was

pending as of the commencement of the instant action.

The court has considered defendant Klam's remaining contentions and finds them to be without merit. Defendant Klam's motion to dismiss the complaint and notice of pendency should accordingly be denied.

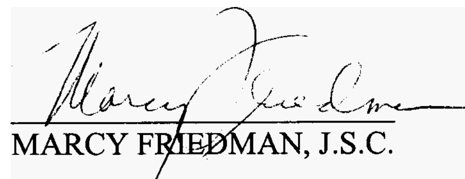
Amendment of Complaint

Plaintiffs attorney filed an affirmation, without formal notice of motion, seeking to amend the complaint. The amendment apparently seeks to allege a theory of ownership that is inconsistent with that alleged in the complaint - namely, that the property was initially purchased not by a German general partnership but by a New York partnership. The documents, including the deed, that were submitted in support of the amendment do not demonstrate on their face that the partnership was a New York partnership. Nor is the request to amend supported by an affidavit of merit based on personal knowledge, supporting the new claim and explaining the inconsistency with the complaint that plaintiff verified. The court accordingly declines to consider the request to amend on the submitted papers.

Defendant Klam's motion is accordingly denied in its entirety. Sanctions are denied in discretion of the court. Plaintiffs request for leave to amend the complaint is denied without prejudice to a motion on proper papers which shall address the above issues.

This constitutes the decision and order of the court.

Dated: New York, New York
December 18,2002


MARCY FRIEDMAN, J.S.C.