

Wedbush Morgan Sec., Inc. v Koren
2005 NY Slip Op 30555(U)
October 27, 2005
Supreme Court, New York County
Docket Number: 107180/05
Judge: Kibbie F. Payne
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 4**

WEDBUSH MORGAN SECURITIES, INC.,

Index No. 107180/05

Plaintiff,

Motion Seq. 001

- against -

YOSSI KOREN,

Defendant.

JUDGMENT

KIBBIE F. PAYNE, J.:

Plaintiff Wedbush Morgan Securities, Inc. moves, pursuant to CPLR 3213, for an award of judgment predicated upon the entry of a California judgment, which confirmed an arbitration award in its favor. Defendant cross-moves for an order dismissing plaintiff's motion, arguing that plaintiff's successful motion to vacate an earlier order of this court entering the same California judgment precludes this action under the doctrine of res judicata. For the reasons stated below, defendant's cross-motion is granted, plaintiff's motion for summary judgment in lieu of complaint is denied and the motion is dismissed.

On November 11, 2003, the Superior Court of California, Los Angeles County, having already confirmed an arbitration award in plaintiff's favor against defendant, ordered that plaintiff recover from defendant \$657,158.02 plus post-judgment interest. No appeal was taken from the California judgment, and plaintiff

moved for entry of that judgment in this state (see CPLR 5402). This court, different justice, granted plaintiff's motion and judgment was entered recognizing the California judgment.

Shortly thereafter, plaintiff made a motion to vacate the entry of judgment. Plaintiff's counsel argued that the California court lacked jurisdiction to render judgment in the arbitration proceeding, conceding that plaintiff had failed to properly serve defendant with either the motion to confirm the arbitration award or the subsequent judgment of confirmation. This court, different justice, granted plaintiff's motion and vacated the order entering the California judgment in this state.

In the interim, plaintiff moved to confirm the arbitration award pursuant to CPLR 7510 on the ground that the arbitration hearing was held in New York County. This court denied plaintiff's application to confirm the award without prejudice to renewal upon resolution of the then pending motion to vacate entry of the California judgment. Following vacatur, plaintiff renewed the application for confirmation of the arbitration award in this state. The court denied the application, and dismissed the petition. Noting that the California judgment confirming the same arbitration award remains valid and in effect, the court refused to render judgment granting duplicate relief.

Thereafter, plaintiff on a new tact moved for the instant summary judgment in lieu of complaint, seeking entry of the

California judgment confirming the arbitration award. Plaintiff asserts that it moved to vacate the original order of entry because it believed that the service of the pleadings in the California action may have been improper and that the California judgment was obtained by default (see CPLR 5402 [a]). Plaintiff "now believes that the California judgment is valid based on California and New York law." Defendant cross-moves for an order dismissing plaintiff's motion to recognize the sister state judgment, arguing in part that res judicata precludes plaintiff's contention that the California judgment is valid and enforceable.

In view of the extraordinary procedural history of this matter, the doctrine of judicial estoppel, rather than res judicata, is applicable to this case. Judicial estoppel precludes "a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed" (D&L Holdings, LLC v RCG Goldman Co., 287 AD2d 65, 71 [1st Dept 2001] [quotations and citations omitted], lv denied 97 NY2d 611 [2002]; see also Mass v Cornell Univ., 253 AD2d 1, 5 [1st Dept 1999], aff'd 94 NY2d 87, 92-93 [1999]; see also State of New Hampshire v State of Maine, 532 US 742, 748-749 [2001] [distinguishing judicial estoppel from both res judicata and collateral estoppel and setting forth in detail the doctrine of judicial estoppel]).

Plaintiff's shifting interests here have caused it to adopt one position and then renounce that position for a contrary position depending on the exigencies of the moment. Due to the success in her motion to vacate the California judgment's entry and her unsuccessful attempt to confirm the arbitration award in this state, counsel now flagrantly deems it is appropriate to seek entry of the California judgment for a second time. Counsel apparently is unconcerned that she has already argued before this court that the California judgment was rendered without jurisdiction or, as she concedes, that it was rendered on default. She merely exchanges her prior position to now assert that the judgment is actually valid for purposes of entry in this state. Given counsel's deliberate disregard for judicial integrity, and fairness to respondent, the balance of the equities favor that the present motion be barred.

The remaining contentions of the parties are thereby rendered academic. Accordingly, it is

ORDERED and ADJUDGED that plaintiff's motion for summary judgment in lieu of complaint is denied and this motion is dismissed. The foregoing constitutes the judgment and order of the court.

DATED: October 27, 2005

ENTER:

A handwritten signature, possibly "J.P.", enclosed in a circle, positioned above a horizontal line.

J.S.C.