

**Baker v Frascello**

2007 NY Slip Op 31706(U)

June 14, 2007

Supreme Court, Greene County

Docket Number: 0020069/8010

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
SUPREME COURT  
DEAN BAKER,

COUNTY OF GREENE

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Plaintiff,

-against-

**DECISION and ORDER**  
**INDEX NO. 06-980**  
**RJI NO. 19-07-2859**

FRANK FRASCELLO, DENNIS FRASCELLO  
FRASCELLO BROTHERS PLUMBING,

Defendant.

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Supreme Court Albany County All Purposes Term, May 21, 2006  
Reassigned to Justice Joseph C. Teresi

**APPEARANCES:**

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**TERESI, J.:**

The plaintiff moves for summary judgment pursuant to CPLR 3212 and seeks to enforce a money judgment obtained in the State of New Jersey against the defendants. The defendants

oppose the motion and allege questions of fact exist that precludes summary judgment.

The plaintiff obtained a judgment against the defendants in the State of New Jersey in the amount of \$39,963.00. The plaintiff now seeks to enforce that judgment in New York State and demands the sum of \$41,399.60 which includes interest and disbursements.

The defendants oppose the motion and allege they were never given an opportunity to appear or to litigate the merits of the original action. The defendants allege the plaintiff was hired as a plumbing sub-contractor and his services were performed in a defective manner. The defendants allege the plaintiff lacked adequate plumbing experience and walked off the job without leaving any information of how he could be contacted. The defendants contend they had to hire another plumber and the majority of plaintiff's work had to be redone.

On a motion for summary judgment, the movant must establish by admissible proof, the right to judgment as a matter of law See, Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Gilbert Frank Corp. v Federal Insurance Co., 70 NY2d 966 (1988). The burden shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact. See, Zuckerman v City of New York, 49 NY2d 557 (1980). It is well established that on a motion for summary judgment, the court's function is issue finding, not issue determination. See, Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395 (1957), and all evidence must be viewed in the light most favorable to the opponent to the motion. See, Crosland v. New York City Transit Auth., 68 NY2d 165 (1986).

In opposing a motion for summary judgment, one must produce evidentiary proof in admissible form . . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (Zuckerman v City of New York, *supra*, 562). It is incumbent upon the

non-moving party to lay bare her proof in order to defeat summary judgment. See, O'Hara v Tonner, 288 AD2d 513 (3<sup>rd</sup> Dept. 2001). Mere conclusory assertions, devoid of evidentiary fact, are insufficient to raise a genuine triable issue of fact on motion for summary judgment as is reliance upon surmise, conjecture or speculation. See, Banco Popular North America v. Victory Taxi Management, Inc., 1 NY3d 381 (2004).

A review of the affidavits of service reveal the defendants were not personally served. Service was effectuated by nail and mail pursuant to CPLR § 308(4). The court also notes the plaintiff has failed to offer any documentation that he attempted to enter the foreign judgment as a judgment of this state pursuant to the procedure set forth in CPLR § 5402.

Judgments of a sister state are entitled to full faith and credit if the rendering court had personal jurisdiction, subject matter jurisdiction and complied with due process requirements. See, Williams v. North Carolina, 317 U.S. 287 (1942). As a matter of full faith and credit, review by the courts of this State is limited to determining whether the rendering court had jurisdiction. See, Parker v. Hoefler, 2 NY2d 612 (1957). However, all judgments are not given full faith and credit in New York State. CPLR § 5401 provides:

In this article "foreign judgment" means any judgment, decree, or order of a court of the United State or of any other court which is entitle to full faith and credit in his state, except one obtained by default in appearance, or by confession of judgment.

The judgment obtained by the plaintiff in New Jersey was upon default by the defendants. While foreign judgment are entitled to full faith and credit and can be enforced in this State upon registration, that procedure is not available for default judgments. See, Schultz v. Barrows, 94 NY2d 624 (2000); Elie v. Levlex Enterprises, Ltd., 294 AD2d 534 (2<sup>nd</sup> Dept. 2002).

Accordingly, plaintiff's motion for summary judgment is denied.

All papers, including this Decision and Order are being returned to the attorneys for the defendants. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provision of that section respecting to filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York  
June 14, 2007



Joseph C. Teresi, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Motion dated February 21, 2007;
2. Affidavit of Dean Baker dated November 21, 2006 with attached exhibits;
3. Affidavit of Dennis Frascello dated March 29, 2007;
4. Affirmation of Robert O. Wilhelm, Esq. dated May 16, 2007 with attached exhibits.