

**Whaler's Wharf, Ltd. v Khalil**

2007 NY Slip Op 32230(U)

July 11, 2007

Supreme Court, New York County

Docket Number: 0117964/2006

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 117964/2006

WHALER'S WHARF, LTD.

vs  
KHALIL, MAZHAR

Sequence Number : 001

SUMMARY JUDGMNT/LIEU COMPLAINT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

\_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits

**FILED**

PAPERS NUMBERED

Answering Affidavits — Exhibits \_\_\_\_\_

JUL 18 2007

Replying Affidavits \_\_\_\_\_

NEW YORK

Cross-Motion:  Yes  No

COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

*is decided per attached*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/11/07

J.S.C.

EMILY JANE GOODMAN

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 17

-----X  
WHALER'S WHARF, LTD.,

Plaintiff,

-against-

Index No.: 117964/06

MAZHAR KHALIL,

Defendants.

-----X

**EMILY JANE GOODMAN, J.S.C.:**

Plaintiff moves for summary judgment in lieu of complaint, pursuant to CPLR 3213, for entry of a judgment from the Circuit Court of the Second Circuit of the State of Hawaii in the sum of \$101,623.61, which was obtained against Defendant on default. Plaintiff submits the affidavit of the attorney in Hawaii who secured the judgment in a landlord tenant dispute based on Defendant's breach of a guaranty for the commercial tenant Pita City Falafel. Plaintiff further submits the affidavit of the General Manager of the shopping center where Pita City Falafel rented space.

In opposition, Defendant submits his affidavit, alleging that he was "not properly served with process, in light of the lack of jurisdiction of Hawai'ian courts over me, and the causes of action to which I have meritorious defenses" and further states "this action was improperly filed in a State without jurisdiction over me." Defendant then discusses his meritorious defenses-that he was fraudulently induced to sign the guaranty because he was told by the General Manager to sign documents which he didn't read, that he spoke to the General Manager about assigning the lease to a new tenant due to Pita City Falafel's lack of business, who refused to approve three potential new tenants, and that Pita City Falafel should be given credit for the cost of equipment

it left behind.

However, “[a]s a matter of full faith and credit, review by the courts of this State is limited to determining whether the rendering court had jurisdiction, an inquiry which includes due process considerations . . . inquiry into the merits of the underlying dispute is foreclosed” (Fiore v Oakwood Plaza Shopping Center, Inc., 78 NY2d 572, 577 [1991] [internal citations omitted]). Thus, if the Hawaiian court had jurisdiction over Defendant, his meritorious defenses, if any, are irrelevant to this motion. Defendant’s opposition does not specify the nature of the jurisdiction objection.

In support of the argument that jurisdiction was proper, Plaintiff attaches proof that service was made by Plaintiff’s attorney on Defendant by mailing process certified mail, return receipt requested to “Mr. Mazhar Khalil Pita City Falafel 180 Seventh Avenue New York, NY 10011.” A copy of the certified mailing bears a signature reading Mazhar Kahlil. Plaintiff further submits proof that it filed the affidavit of its attorney with the court in Hawaii, attaching the signed return receipt. Plaintiff maintains this was proper service under Hawaii Revised Statutes Annotated, title 34, §634-35 and §634-36. Section 634-35 provides in relevant part:

**Acts submitting to jurisdiction.**

(a) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, the person's personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of the acts:

- (1) The transaction of any business within this State;
- (2) The commission of a tortious act within this State;
- (3) The ownership, use, or possession of any real estate situated in this State;

(4) Contracting to insure any person, property, or risk located within this State at the time of contracting.

(b) Service of process upon any person who is subject to the jurisdiction of the courts of this State, as provided in this section, may be made as provided by section 634-36, if the person cannot be found in the State, with the same force and effect as though summons had been personally served within this State.

(c) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over the defendant is based upon this section.

(d) Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law.

Section 634-36 provides in relevant part:

When service of summons is provided for by section 634-33, 634-34, or 634-35, service shall be made by service upon the defendant personally by any person authorized to serve process in the place in which the defendant may be found or appointed by the court for the purpose, or sent by certified, registered, or express mail, postage prepaid, with return receipt requested, by the plaintiff or the plaintiff's attorney to the defendant. The plaintiff or the plaintiff's attorney shall file the return of the serving officer or an affidavit showing that the copy of summons and complaint were served as aforesaid or sent by certified, registered, or express mail as aforesaid, and in the latter case the return receipt signed by the defendant shall be filed with the affidavit. The service shall be complete upon delivery of the required papers to the defendant outside the State, personally or by mail as provided.

Plaintiff argues that because Defendant admits that he signed the guaranty in Hawaii and also visited Hawaii a few times thereafter to speak with the General Manager about Pita City Falafel's problems, Plaintiff transacted business within Hawaii within the meaning of § 634-35

(a) (1).<sup>1</sup> Thus, Plaintiff maintains that the service of process outside of Hawaii by certified mailing was proper under § 634-36.

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<sup>1</sup>Plaintiff also argues that Defendant or his agent used real estate in Hawaii within the meaning § 634-35 (a) (3). However, Defendant was the guarantor, not lessor, and there is no evidence that Defendant was the agent of Pita City Falafel, the lessor.

Plaintiff has met its burden to demonstrate that it is entitled to domesticate the Hawaiian judgment and Defendant has failed to demonstrate why the court in Hawaii lacked jurisdiction. The cause of action (breach of lease/guaranty) arose from Defendant's transaction of business in Hawaii. Defendant admitted that guaranty for the lease was signed in Hawaii and that he visited Hawaii a few times thereafter concerning Pita Express Falafel's problems regarding the lease. Thus, Defendant purposefully availed himself of the privilege of conducting business in Hawaii and therefore, Hawaii's exercise of jurisdiction comports with due process and does not offend the notions of fair play.

It is hereby

**ORDERED** that the motion for summary judgment in lieu of complaint is granted; and it

is further

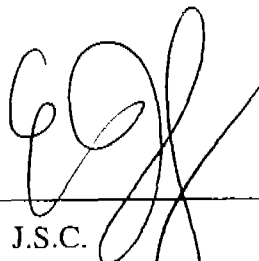
**ORDERED** that Plaintiff submit judgment on notice.

**This Constitutes the Decision and Order of the Court.**

Dated: July 11, 2007

**FILED**  
 JUL 18 2007  
 NEW YORK  
 COUNTY CLERK'S OFFICE

ENTER:



J.S.C.

**EMILY JANE GOODMAN**