

**De Lage Landen Fin. Servs. Inc. v Litman &
Litman P.C.**

2007 NY Slip Op 32282(U)

July 6, 2007

Supreme Court, New York County

Docket Number: 0106741/2006

Judge: Rolando T. Acosta

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

PRESENT: ~~MONTEOLANDO T. ACOSTA~~

PART 61

Index Number : 106741/2006
DE LAGE LANDEN FINANCIAL
vs
LITMAN & LITMAN P.C.
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 1
MOTION CAL. NO. _____

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

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

PAPERS NUMBERED
see Attached

Cross-Motion: Yes No

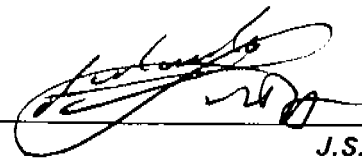
Upon the foregoing papers, it is ordered that this motion

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**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION.**

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

Dated: 7/6/07


J.S.C.

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Check if appropriate: REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 61**

De Lage Landen Financial Services Inc.,

Plaintiff,

– against –

Litman & Litman, P.C.,

Defendant.

DECISION/ORDER

Index No. 106741/06

Motion Seq. 1

Present:

Hon. Rolando T. Acosta
Supreme Court Justice

Litman & Litman, P.C.

Third-Party Plaintiff,

– against –

US Globe Corp. and US Globe Service Corp.,

Third-Party Defendants.

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The following documents were considered in reviewing plaintiff's motion for summary judgment and Third-Party Defendants' cross-motion for summary judgment:

Papers	Numbered
Notice of Motion, Affirmation, Supporting Affidavit	1, 2(Ex. A-F), 3 (Ex. F)
Affidavit in Opposition, Affirmation in Opposition	4 (Ex. A-H), 5 (Ex. A-H)

Reply Affirmation	6 (Ex. H-J)
Third-Party Defendant's Notice of Cross-Motion, Affidavit	7, 8 (Ex. A-D)
Affirmation in Opposition	9 (Ex.)
Reply Affidavit, Supplemental Reply Affidavit	10, 11

On March 9, 2006, plaintiff De Lage Landen Financial Services Inc. ("De Lage") obtained a default judgment in the Pennsylvania Court of Common Pleas, Chester County, against defendant/third-party plaintiff Litman & Litman, P.C. ("Litman") for the sum of \$38,996.99. The default arose out of an agreement executed by Litman and De Lage for the lease of a photocopying machine. Pursuant to the terms of the agreement, Litman would make thirty-six (36) monthly payments in the minimum amount of \$744.80, plus applicable taxes and fees, after which Litman was required to purchase or return the leased equipment. The lease further provides that its terms are to be governed and construed in accordance with the laws of the Commonwealth of Pennsylvania and that the lessee, viz, Litman, consents to Pennsylvania jurisdiction. Plaintiff alleges that Litman made six (6) payments and thereafter, on August 16, 2005, defaulted on its

obligations under the lease. De Lage thereafter declared the entire balance immediately due and owing, and subsequently obtained the Pennsylvania default judgment.

De Lage now brings the instant motion for summary judgment pursuant to C.P.L.R. § 3212 in its favor on the ground that no triable issues of fact exist. Specifically, De Lage argues that since the default judgment was rendered by a sister state, said judgment is entitled to full faith and credit by this Court absent fraud or jurisdictional challenge. Under New York Law, default judgments are indeed entitled to full faith and credit where jurisdiction of the defaulting party was properly attained. See 7B McKinney's Consolidated Statutes, Siegel's Practice Commentaries C5401:1 p. 564. Litman does not disagree with this legal principle, nor does it deny that pursuant to the lease agreement, it consented to the jurisdiction of Pennsylvania Courts. Rather, Litman contends that Pennsylvania did not obtain personal jurisdiction in the default action inasmuch as service was sent to its proper address and the return receipt of the service papers were not signed by an officer, director or shareholder of Litman & Litman, P.C..

Pursuant to Section 403 of the Pennsylvania Rules of Civil Procedure, “[i]f a rule of civil procedure authorizes original process to be served by mail, a copy of the process shall be mailed to the defendant by any form of mail requiring a

receipt signed by the defendant or his authorized agent.” Litman & Litman, P.C. argues however, as a law firm operating in New York State, its officers and directors are attorneys licensed to practice in New York State. Further, the signatory of the return receipt, Luis Bonnet (“Bonnet”), is not an attorney admitted to practice in New York, nor was he an authorized agent, and thus not authorized to accept service. Plaintiff counters by arguing that Luis Bonnet, although not an attorney admitted to practice in New York, nevertheless may be an individual with apparent authority to receive service by mail. See Commonwealth v. One 1991 Cadillac Seville, 853 A.2d 1093 (2004).

It is well settled that the proponent of a motion for summary judgment must establish that 'there is no defense to the cause of action or that the cause of action or defense has no merit,' (C.P.L.R. §3212[b]), sufficiently to warrant the court as a matter of law to direct judgment in his or her favor. Bush v. St. Claire's Hospital, 82 N.Y.2d 738, 739 (1993); Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 (1985). This standard requires that the proponent of the motion 'tender[] sufficient evidence to eliminate any material issues of fact from the case,' *id.*, 'by evidentiary proof in admissible form.' Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, the motion must be supported 'by affidavit [from a person having knowledge of the Facts], by a copy of the pleadings and by other

available proof, such as depositions.' C.P.L.R. §3212(b).

Where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so. Vermette v. Kenworth Truck Company, 68 N.Y.2d 714, 717 (1986); Zuckerman v. City of New York, supra, 49 N.Y.2d at 560, 562. Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist. Id. at 562.

In the instant action, there is a question of fact as to whether or not Louis Bonnet was authorized to receive service on behalf of Litman. Accordingly, plaintiff's motion for summary judgment is denied. See Com v. One 1991 Cadillac Seville, 853 A.2d 1093 (Under Pennsylvania law, nature and extent of an agent's apparent authority is a question of fact),

Third-Party Defendant U.S. Globe Corp. likewise cross-moves for summary judgment against Litman. At about the same time Litman and De Lage executed their lease agreement, U.S. Globe and Litman entered into a maintenance contract whereby U.S. Globe agreed to maintain the leased equipment at a cost that was

included Litman's monthly payment to plaintiff. U.S. globe argues however, that besides service calls for normal maintenance, it never received notice from Litman of any defects in the copy machine, and thus, Litman's cause of action against it in the third-party action for indemnification and/or contribution is baseless. Litman contends however, through the affidavit of one of its officers, Jeffrey E. Litman, that numerous requests were made to U.S. Globe to repair the defective machine. Mr. Litman's affidavit further states that a mechanic for U.S. Globe personally acknowledged to him that U.S. Globe was unable to properly repair the machine and that the machine was indeed defective. Thus, there is an issue of fact as to whether the copy machine was in fact defective and whether U.S. Globe failed to remedy the problem despite notice. Accordingly, based upon the foregoing, it is hereby

ORDERED that plaintiff De Lage Landen Financial Services Inc.'s motion for summary judgment against defendant Litman & Litman, P.C. is DENIED; and it is further

ORDERED that Third-Party Defendants U.S. Globe and U.S. Globe Service Corp.'s motion for summary judgment against Third-Party Plaintiff Litman & Litman, P.C. is DENIED.

This constitutes the Decision and Order of the Court.

Dated: July 6, 2007

ENTER



Rolando T. Acosta, J.S.C.

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