

Nong Shim USA, Inc. v Chai Kyung Kim

2007 NY Slip Op 32819(U)

September 5, 2007

Supreme Court, New York County

Docket Number: 5957-07/

Judge: Ute W. Lally

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SHORT FORM ORDER

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 8
NASSAU COUNTY

NONG SHIM USA, INC.,

Plaintiff(s),

MOTION DATE: 6/20/07

INDEX No.:5957/07

-against-

MOTION SEQUENCE NO:1,2

CHAI KYUNG KIM, GEO ENTERPRISE USA, INC.
a/k/a GEO ENTERPRISES USA, INC. And
KEUM HEE KIM,

Defendant(s).

The following papers read on this motion for summary judgment in lieu of complaint:

Notice of Motion/ Order to Show Cause.....	1-7
Notice of Cross Motion.....	8-12
Answering Affidavits.....	13,14
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Upon the foregoing papers, it is ordered that this motion by plaintiff for an order pursuant to CPLR 3213 granting summary judgment in lieu of complaint and directing the entry of a judgment in favor of plaintiff in the amount of \$230,893.20 plus interest, costs and disbursements and cross motion by defendants for an order pursuant to CPLR 3211 dismissing plaintiff's complaint are disposed of as follows.

This is an action to recover money allegedly owed to the plaintiff by the defendants. The application is based upon a default judgment entered in the Superior Court of Bergen County, New Jersey, on February 5, 2007 against all of the defendants in the amount of \$235,893.20. Plaintiff claims the defendants have paid \$5,000 to date and are seeking to recover the remaining balance of \$230,893.20.

Defendants contend that the plaintiff's action should be dismissed as the New Jersey court did not have jurisdiction over them when the default judgment was entered.

It is beyond cavil that New York courts will not enforce a judgment of another state if it can be shown that the state in which judgment was entered did not have jurisdiction of the defendant (Cucullu v Lowe, 241 AD2d 474; see also State of Oklahoma ex. Rel. Crawford v LNP Realty Corp., 275 AD2d 773). Determining whether a court properly exercised jurisdiction over a defendant requires the use of a two pronged analysis in which the court must determine whether the requirements of the state's long-arm statute were met and whether the exercise of jurisdiction comported with the principles of due process under Federal Constitutional law (City Federal Savings Bank v Reckmeyer, 178 AD2D 503; see also Newman and Associates, P.C. v Natoli, 250 AD2d 723).

The defendants claim that the New Jersey court's exercise of jurisdiction over them did not comport with the principles of due process under Federal Constitutional law. They allege that they did not have sufficient minimum contacts with the state of New Jersey to allow the state to assert jurisdiction over them.

A state "may constitutionally exercise jurisdiction over non-domiciliary defendants provided they had certain minimum contacts with the forum State such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice" (LaMarca v Pak-Mor Manufacturing Co., 95 NY2d 210, 216; see also International Shoe v State of Washington, 326 U.S. 310). The test is whether a defendant's conduct and connection with the forum state are such that the defendant could reasonably foresee legal action being brought against them in the forum state (LaMarca v Pak-Mor Manufacturing Co., supra; see also Opticare Acquisition Corp. V Castillo, 25 AD3d 238). A commercial actor who purposefully directs its efforts toward residents of the forum state has established minimum contact with the forum state (LaMarca v Pak-More Manufacturing Co., supra; see also Burger King Corp. V Rudzewicz, 471 U.S. 462).

Shin Myung Chul, plaintiff's assistant branch manager, submitted an affidavit in which he states that defendant Chai Kyung Kim is the president and owner of defendant GEO Enterprise USA,

Inc. (hereinafter "GEO"). He further claims that defendant Keum Hee Kim also owns and manages the defendant corporation. Shin Myung Chul contends that GEO sold products to retail stores located in New Jersey. He also states that GEO bought products from the plaintiff knowing the plaintiff was a corporation in New Jersey. Mr. Chul further claims that GEO would travel to New Jersey to pick up the products it purchased from plaintiff.

Plaintiff also submits copies of checks from GEO to plaintiff. Said checks were signed by defendant Keum Hee Kim, but do not indicate what position she held with the corporation.

Defendant Keum Hee Kim submitted an affidavit in which she states she has never worked for and has no interest in GEO. Defendant Chai Kyung Kim also submits an affidavit in which he claims that he was an employee of GEO and did not own, manage or have any interest in the corporation. He further states that GEO had no business dealings with the plaintiff, but ordered products from Nong Shim Co., Ltd., who is located in Korea, and that no part of the transaction occurred in New Jersey.

No evidence has been proffered by the defendants to refute plaintiff's claims that GEO sold its products to retail stores located in New Jersey. Therefore, this court finds that, even if defendant Chai Kyung Kim's affidavit is correct, GEO still had sufficient minimum contact with the state of New Jersey in that it knowingly sold products to retail stores located in New Jersey. It should be noted that since no officer or director of GEO has submitted an affidavit refuting plaintiff's claims, there is no opposition to plaintiff's motion by GEO. This court also finds that no proof has been submitted that defending a suit in New Jersey would be an unreasonable task for GEO that would offend traditional notions of fair play and substantial justice (LaMarca v Pak-Mor Manufacturing Co., supra).

As a result thereof, this court has determined that the Superior Court of Bergen County, New Jersey properly exercised jurisdiction over GEO and, therefore, the judgment entered against the defendant corporation is entitled to be given full faith and credit in New York (Fiore, Sr. V Oakwood Plaza Shopping Center, 78 NY2d 572).

Accordingly, so much of this motion by plaintiff for an order pursuant to CPLR 3213 granting summary judgment in lieu of complaint and directing the entry of a judgment in favor of plaintiff and against defendant GEO in the amount of \$230,893.20 plus interest, costs and disbursements is granted, and that portion of plaintiff's claim is severed from the remaining causes of action.

It cannot be determined, based upon the motion papers submitted, if individual defendants Chai Lyung Kim and Keum Hee Kim had sufficient minimum contacts with the state of New Jersey to permit the Superior Court of Bergen County to assert jurisdiction over them. The affidavits submitted raise questions as to whether the defendants were employees of GEO or whether they were owners and managers of the corporation.

If the plaintiffs have mistaken their remedy and CPLR 3213 is not available, the action typically should not be dismissed but converted and the moving and answering papers shall be deemed the complaint and answer (Weissman v Sinorm Deli, supra; see also CPLR 3213).

Therefore, the remainder of the motion against defendants Chai Kyung Kim and Keum Hee Kim is denied and the moving and answering papers shall be deemed the complaint and answer. Cross motion by defendants for an order pursuant to CPLR 3211 dismissing plaintiff's action is denied, but shall be considered an affirmative defense, which should be the subject matter of a later motion to dismiss.

Counsel for all parties are directed to appear before the undersigned Justice at IAS Part 8 of this court on September 21, 2007 at 9:30 a.m. for the purpose of a preliminary conference and to discuss all necessary and outstanding discovery.

Dated: SEP 05 2007

Michael J.

ENTERED

SEP 10 2007

nong

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**