

**SBPT, INC. v Schaming**

2007 NY Slip Op 32901(U)

September 12, 2007

Supreme Court, Suffolk County

Docket Number: 0011207/2007

Judge: Edward D. Burke

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.



In response to the plaintiff's motion-in-chief for summary judgment pursuant to CPLR 3213, each defendant cross-moved to dismiss on the grounds that the Illinois judgments sued upon in this action are not enforceable because the Illinois Court lacked person jurisdiction over the defendants due to their insufficient contacts with the State of Illinois. The record adduced on the instant motion and cross-motions reveal that the facts, outlined below, are not in dispute.

In the summer of 2004, defendant Khwaja learned from a non-party that the plaintiff owned certain medical diagnostic equipment which he wished to sell. Defendant Khwaja and his business partner, defendant Schaming, expressed interest in purchasing said equipment. The third-party "introduced" the plaintiff to defendant Khwaja and they negotiated, via telephone and facsimile transmissions, the material terms of an installment contract pursuant to which the plaintiff would sell its diagnostic equipment to defendant Schaming and ship same from Illinois to an address in Lindenhurst, New York whereat the defendants operated their medical diagnostic business.

Prior to shipping the subject equipment, the plaintiff prepared and forwarded, by facsimile transmission, an equipment purchase agreement which provided for defendant Schaming's purchase of the subject equipment. Defendant Schaming objected, *inter alia*, to the choice of laws provision which designated Illinois law as controlling. Defendant Schaming renegotiated that provision with the plaintiff who agreed to change the choice of laws governing provision from Illinois to New York. The agreement executed by the plaintiff and defendant Schaming on August 10, 2004, via facsimile transmission, provided that said "Agreement shall be governed by the Laws of the State of New York." The agreement, as executed, did not contain a forum selection clause. The purchase agreement did provide that defendant Schaming, as purchaser, was required to insure the equipment for the duration of the installment payments and agree to name the plaintiff as loss-payee under the insurance policy purchased.

On August 19, 2004, plaintiff shipped the equipment to the Lindenhurst address designated by the defendants without payment from defendant Schaming as no monies were due under the installment payment provision of the purchase agreement until November 15, 2004.

After receiving no payments from defendant Schaming in the fall of 2004, the plaintiff, by its Illinois counsel, wrote to defendant Schaming's New York counsel in January of 2005 and advised that the plaintiff was prepared to commence legal action against defendant Schaming unless the plaintiff forthwith received all past due installment payments together with late charges. When no payments were received from defendant Schaming, the plaintiff commenced the action in Illinois to recover damages from defendant Schaming by reason of his breach of the purchase agreement and to recover damages from defendant Khwaja by reason of his purported conversion of the subject equipment. Said action culminated in the separate judgments entered in favor of the plaintiff upon each of the defendants' default in answering which are the subject of this action.

While each of the defendants dispute the plaintiff's claims of non-payment and the plaintiff's claim of conversion, none of the defendants' claims of non-liability are relevant to the court's determination of the applications now before it. A default judgment entered in another state is conclusive on the merits and is entitled to full faith and credit in New York (*Fiore v Oakwood Plaza Shopping Center, Inc.*, 78 NY2d 572, 578 NYS2d 115; *Thorpe v McCaffrey*, 157 AD2d 879, 549 NY2d 881). However, New York courts will not enforce a judgment of a sister state where it is

shown that the state in which the judgment was entered did not have jurisdiction over the defendant (*State of Oklahoma v LNP Realty Corp.*, 275 AD2d 773, 713 NYS2d 537; *City Federal Savings Bank v Reckmeyer*, 178 AD2d 503, 577 NYS2d 430).

Defendants' claims that the Illinois court lacked *in personam* jurisdiction over them due to the absence of sufficient contacts with Illinois such that the maintenance of plaintiff's suit in Illinois offended traditional notions of fair play and substantial justice which the due process requirements of the Federal Constitution guarantee requires this court to determine whether the Illinois court properly asserted jurisdiction over the defendants in the Illinois action. In support of such claims, defendant Schaming asserts that he never went to Illinois to meet or otherwise engage the plaintiff/seller. Defendant Schaming did, however, negotiate various material terms of the purchase agreement and purportedly contacted the plaintiff on numerous occasions after delivery of the equipment with respect to working condition of said equipment. Defendant Schaming further asserts that payments were made under the terms of the contract until October of 2005 when the contract was assigned to a non-party. Defendant Khwaja claims to have "no connection" with the state of Illinois and asserts that he made no promise to or contract with the plaintiff as he is not a signatory to the subject agreement.

Since the defendants have raised the issue of personal jurisdiction, albeit limited to due process considerations<sup>1</sup>, the plaintiff has the burden of proving that the Illinois court had the requisite jurisdiction over the defendants (*Cadle Co. v Triangle Associates*, 18 AD3d 100, 798 NYS2d 360). In determining whether the plaintiff has met its burden, the court must determine whether (1) the requirements of the Illinois long-arm statute were met (*Augusta Lumber & Supply, Inc. v Herbert H. Sabeth Corp.*, 101 AD2d 846, 475 NYS2d 878); and (2) whether the exercise of jurisdiction by the Illinois court comports with principles of due process under federal constitutional law (*City Federal Savings Bank v Reckmeyer, supra*; see also, *JDC Finance Company I, LP v Patton*, 284 AD2d 164, 727 NYS2d 71).

Under Illinois Law, personal jurisdiction over residents and non-residents may be exercised under certain enumerated circumstances such as (1) the transaction of any business within the state; (2) contracting to insure any person, property or risk located within the state at the time of contracting; (3) the making and performance of any contract or promise substantially connected with the state; (4) the acquisition of ownership, possession or control of any asset or thing of value present within the state when such ownership, possession or control was acquired; (5) in any action arising within or without the state against any person or corporation doing business within the state; and (6) under any other basis permitted by Illinois and United States Constitution [75 ILCS 5/2-209(a)(1); (4); (7); (10)(b) and (4)(c)]. In support of its motion for summary judgment, the plaintiff relies only upon subparagraph (a)(3) of the Illinois long-arm statute which permits the exercise of jurisdiction over non-residents who make or perform any contract or promise substantially connected with the State of Illinois (75 ILCS 5/2-209(a)(3)).

The plaintiff's claims against defendant Khwaja must be dismissed as said defendant neither made nor performed any contract or promise substantially connected with the State of Illinois. The

---

<sup>1</sup>Neither defendant disputes the propriety of service of the summons and complaint upon them in New York, which is evidenced by the affidavits of service attached as exhibits to the plaintiff's moving papers.

provisions of the Illinois long-arm statute relied upon by the plaintiff were not met as it is clear beyond *per adventure* that defendant Khwaja was not a signatory nor obligee to the purchase agreement sued upon. Indeed, the plaintiff's Illinois judgment against defendant Khwaja is based upon his purportedly tortious conduct in converting the subject equipment to his own use in the State of New York and not upon the making or performance of any contract or promise substantially connected to the State of Illinois as contemplated by subparagraph (A)(3) of the Illinois long-arm statute at 75 ICS 5/2 209. Since the plaintiff failed to sustain its burden of establishing that the requirements of the Illinois long-arm statute were met and, if met, that exercise of jurisdiction by the Illinois court over defendant Khwaja comported with the principles of due process under the federal constitution, the plaintiff is not entitled to the relief demanded by it against defendant Khwaja in this action. Accordingly, those portions of defendant Khwaja's cross-motion (#002) wherein he demands the dismissal of the plaintiff's claims for enforcement of the Illinois judgment is granted while those portions of the plaintiff's motion-in-chief (#001) wherein it seeks enforcement of said judgment against defendant Khwaja are denied as unmeritorious.

The plaintiff's claims for enforcement of the money judgment in the amount of \$95,000.00 it obtained in the Illinois action against defendant Schaming is granted. The moving papers submitted by the plaintiff established, *prima facie*, that the requirements of the relied upon provisions of the Illinois long-arm statute were satisfied inasmuch as defendant Schaming made a contract containing promises which were substantially related to the State of Illinois (*see, David Neuman & Associates, PC v Natoli*, 250 AD2d 723, 673 NYS2d 191). The moving papers also established, *prima facie*, that the exercise of jurisdiction over defendant Schaming by the Illinois court comported with principles of due process under the federal constitution (*Cucullu v Lowe*, 241 AD2d 474, 661 NYS2d 16; *City Federal Savings Bank v Reckmeyer*, 178 AD2d 503, 577 NYS2d 430, *supra*; *Thorpe v McCaffrey*, 157 AD2d 879, 549 NY2d 881, *supra*). While it is not clear from the record whether it was the plaintiff or defendant Schaming who made the initial contact, it is clear that defendant Schaming's conduct in purposefully seeking to purchase the plaintiff's out-of-state diagnostic equipment by actively negotiating the contract and his failure to pay for the equipment caused foreseeable injuries to the plaintiff and thus subjected defendant Schaming to personal jurisdiction in Illinois (*Cucullu v Lowe, supra*; *Burger King Corp. v Rudzewicz*, 471 US 462, 105 S.Ct. 2174). Clearly, the "fair warning" requirement of the due process clause was met by defendant Schaming who purposefully directed his activities at the plaintiff, an Illinois resident who sued as a result of injuries sustained by reason of defendant Schaming's purposeful activities. Contrary to the assertions of defendant Schaming, the choice of laws clause set forth in the purchase agreement does not warrant a different result as it did not insulate defendant Schaming from being sued in Illinois (*see, Burger King Corp. v Rudzewicz, supra*).

Accordingly, defendant Schaming's cross-motion (#003) for dismissal of the plaintiff's demands for enforcement of its Illinois judgment is denied. Those portions of the plaintiff's motion-in-chief (#001) wherein demands for summary judgment in lieu of complaint on its claims for enforcement of the \$95,000.00 Illinois judgment it obtained against defendant Schaming is granted.

*Settle judgment* upon a copy of this order.

Dated: September 12, 2007.

  
EDWARD D. BURKE, A.J.S.C.