

Eclair Advisor Ltd. v Jindo Am., Inc.

2007 NY Slip Op 33095(U)

September 11, 2007

Supreme Court, New York County

Docket Number: 0605683/1999

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
Charles Edward Ramos 53

PRESENT: _____
Justice

PART _____

Index Number : 605683/1999
ECLAIRE ADVISOR
vs
JINDO AMERICA
Sequence Number : 014
DEFAULT JUDGMENT

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

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
SEP 26 2007
NEW YORK
COUNTY CLERK'S OFFICE

is decided in accordance with
accompanying memorandum decision and order.

Dated: 9/11/07


HON. CHARLES E. RAMOS J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

-----X
ECLAIRE ADVISOR LTD. As the Trustee of
DAEWOO INTERNATIONAL (AMERICA) CORP.
TRUST,

Plaintiff,

Index No. 605683/99

-against-

JINDO AMERICA, INC.; JINDO CORP.;
DAEWOO INTERNATIONAL CORP.; DAEWOO
CORP.,

Defendants.

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COUNTY CLERK'S OFFICE

-----X
Charles Edward Ramos, J.S.C.:

Plaintiff, Eclair Advisor Ltd. ("Eclair"), moves, pursuant to CPLR 3215, for default judgment against Defendant Jindo Corporation ("Jindo Korea") in the amount of \$37,433,594 plus interest, less \$320,000 that Jindo Korea had previously paid in a prior bankruptcy proceeding. Jindo Korea cross-moves, pursuant to CPLR 3012(d), for an extension of time to answer the amended complaint.

Background

Eclair is trustee of the Daewoo International (America) Trust ("Daewoo Trust"). Daewoo Trust was created when Daewoo America, a New York-based subsidiary of the Korean incorporated Daewoo Corporation ("Daewoo Korea"), filed for bankruptcy. When Daewoo America was subsequently reorganized in 2002, all of its claims against Jindo America, a New York-based subsidiary of Jindo Korea, were assigned to the Daewoo Trust. Although Daewoo America initiated this action in 1999, Eclair subsequently substituted for Daewoo America as the plaintiff in July 2004. Jindo Korea, a Korean corporation, is the parent of Jindo

America. Jindo Korea, Jindo America, Daewoo Korea, and Daewoo America are all in the business of manufacturing and trading cargo containers.

From 1996 to 1999, Jindo America purchased cargo containers from Daewoo America. After shipping the containers, Daewoo America invoiced the outstanding payments to Jindo America.

In 1997, Daewoo Corporation, Jindo Korea, Daewoo America, and Jindo America entered into a Four-Party Agreement (the "Agreement") to take advantage of programs created by the Korean government.

The Agreement, which is the subject of this dispute, addresses the rights and duties between Daewoo Korea and Jindo Korea, along with a provision for Daewoo America and Jindo America to make separate agreements. Among other things, the Agreement designates Jindo Korea a guarantor of Jindo America's debt to Daewoo America.

From time to time, Jindo America fell behind on its payments to Daewoo America. Daewoo America alleges that by 1999, Jindo America owed \$35,170,000 in accounts payable and \$2,263,594 in interest payable. This action followed.

In 2005, Jindo Korea filed for bankruptcy protection in Korea. During the bankruptcy proceeding, Daewoo Korea filed a proof of claim on Daewoo America's behalf to collect on Jindo Korea's guarantee of Jindo America's debt to Daewoo America. Admittedly, Daewoo Korea collected \$320,000 from the bankruptcy proceeding, a relatively small fraction of the total debt owed by

Jindo Korea.

In March 2005, upon Jindo America's motion to dismiss against Eclair, this Court ordered Daewoo Korea and Jindo Korea to be joined as defendants.

On April 22, 2005, Eclair filed a supplemental summons and amended complaint to recover the obligation Jindo Korea has guaranteed. After an alleged unsuccessful attempt to serve Jindo Korea abroad through the Hague Convention, Eclair subsequently served papers on an alleged California subsidiary, JD USA, Inc., on August 9, 2006 in Oakland, California.

Discussion

Eclair's motion for default judgment is denied and Jindo Korea's request to extend its time to answer or otherwise move relative to the amended complaint is granted because Jindo Korea has shown a reasonable excuse for its default.

CPLR 3012(d) provides:

Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default.

Plaintiff argues that it had personally served the complaint and summons on JD USA, alleging it to be a subsidiary of Jindo Korea in California. JD USA is not a party to this action. Plaintiff has failed to adequately show JD USA to be a subsidiary of Jindo Korea. Further, plaintiff has failed to show JD USA to be a "mere department" of Jindo Korea under an agency theory as in *Taca Int'l Airlines, S.A. v Rolls-Royce of Eng., Ltd.*, 15 NY2d

97 (1965) (if a subsidiary corporation is deemed a "mere department" of the parent, service may be effectuated upon such subsidiaries in actions against a parent corporation). In fact, plaintiff sets forth nothing in support of the assertion that service was proper on JD USA except an internet printout from Jindo Korea's website listing Mr. B.Y. Kim, from JD USA as a contact for container inquiries in the United States.

Additionally, even if service upon JD USA was proper under *Taca Int'l Airlines*, 15 NY2d 97, *supra*, service was ultimately untimely. Although the supplemental summons and amended complaint were filed on April 22, 2005, service on JD USA did not occur until August 9, 2006, approximately sixteen months after this Court directed service. CPLR 306(b) states "service of the summons and complaint shall be made within one hundred twenty days after the filing of summons and complaint."

Eclair, without any detailed explanation, did not serve JD USA within the one hundred twenty days of the filing of the supplemental summons and amended complaint. Moreover, Eclair never moved for an extension of time to serve under CPLR 306(b).

Clearly, as set forth above, the defendant has demonstrated a reasonable excuse for its default. Consequently, Jindo Korea, having now acknowledged subsequent receipt of the papers, shall have twenty days from service of this order with notice of entry to answer the amended complaint, or otherwise move.

Accordingly, it is

ORDERED that defendant's motion for an extension to answer

or otherwise move relative to the supplemental summons and amended complaint is hereby granted; and it is further

ORDERED that such answer or motion shall be filed and served within twenty days after service of this order with notice of entry.

Dated: September 11, 2007



HON. CHARLES E. RAMOS

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.

FILED
SEP 26 2007
NEW YORK
COUNTY CLERKS OFFICE

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

PRESENT: HELEN E. FREEDMAN

PART 39

Justice

Joseph Mc Keon

INDEX NO. 113240/05

- v -

MOTION DATE _____

A. W. Chesterton

MOTION SEQ. NO. 9

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

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

w/drawn

FILED
SEP 26 2007
NEW YORK
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FILED
AUG 31 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/26/07

HEF

J.S.C.

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MIAAT

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