

**Smitty's Supply, Inc. v Fried**

2007 NY Slip Op 33903(U)

November 29, 2007

Supreme Court, Suffolk County

Docket Number: 0019430/2007

Judge: Sandra L. Sgroi

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INDEX NO.19430-2007

SUPREME COURT - STATE OF NEW YORK  
SPECIAL TERM, PART 19 SUFFOLK COUNTY

Mot Seq: 001 Mot D

Present:

Hon. SANDRA L. SGROI

**CONFERENCE - JANUARY**  
**24, 2008**

Adj'd Date: 11-15-07

Return Date: 9-28-07

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SMITTY'S SUPPLY, INC. ,  
Plaintiff,

-against-

MEREDITY FRIED and GIANT ENTERPRISES,  
INC., Defendants.

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RONALD S. COOK, ESQ.  
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LAW OFFICES OF J. ANKLOWITZ  
Attorney for Defendants  
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Upon the following papers numbered 1 to 26 read on this Motion for summary judgment: Notice of Motion and supporting papers 1-6; Affirmation and affidavit in opposition and supporting papers 7-9; Affirmation in Reply and supporting papers 10-17; Affirmation in Sur-Reply and supporting papers 18-20; Affirmation in Response to Sur Reply and supporting papers 21-26; it is,

**ORDERED** that the motion of the Plaintiff for summary judgment against the Defendant Giant Enterprises, Inc. is granted to the extent that a hearing is ordered held to determine if the Defendant Giant Enterprises, Inc. was properly served with process; and it is further

**ORDERED** that a conference be scheduled for January 24, 2008 at 9:30 a.m. at the Supreme Court Courthouse in Central Islip, New York, Courtroom S23 at which time the issues in this matter will be discussed, including

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the scheduling of any hearing that may be required; and it is further

**ORDERED** that the motion of the Plaintiff for summary judgment is granted against only the Defendant Meredith Fried; and it is further

**ORDERED** that the action against the Defendant Meredith Fried is severed from this action and the Plaintiff may enter judgment plus interest, costs and disbursements against the Defendant Meredith Fried immediately.

The Plaintiff, Smitty's Supply Inc., has moved for summary judgment in this action. According to the Plaintiff, on April 5, 2007, a judgment was entered in favor of the Plaintiff and against the Defendants in the State of Louisiana in the sum of \$49,957.38. A copy of the judgment is attached to the motion papers as an unnumbered Exhibit. It appears to this Court that this is a motion for summary judgment in lieu of complaint and the motion for summary judgment will be treated as such. The Defendants have not raised the issue of the propriety of the method sought by the Plaintiff to enforce the sister state judgment.

In opposition, the attorney for the Defendants has submitted an affirmation and a one page affidavit from John McCaffery, the President of the Defendant Giant Enterprises, Inc. The Court has no affidavit from the Defendant Meredith Fried. McCaffery alleges in his affidavit in opposition to the motion for summary judgment that "[b]efore receiving the papers currently before this court, I was unaware of litigation involving the plaintiff and Giant Enterprises, Inc. I never received, signed for or have knowledge of any papers being served here."

In response to these allegations, the Plaintiff's attorney has alleged that before judgment was entered against the Defendants in Louisiana process was served pursuant to the provisions of Louisiana Law § 3204 of Title 13 by service by certified mail to two different addresses, one to 16 Poplar Lane, Commack New York 11725 and the other to 929-13 Lincoln Avenue, Holbrook, New York 11741. The Plaintiff alleges that this service by certified mail was good service pursuant to Louisiana law. A review of the affidavits of service attached as unnumbered Exhibits to the reply reveals that the summons and complaint mailed to Commack was addressed not to Poplar Lane but to Poplar Lane (the Court cannot ascertain whether the certified mail notice was delivered to Poplar Lane). There are no issues concerning the address on the second, mailed summons and complaint sent to Holbrook and the Plaintiff alleges that the letter sent to Lincoln Avenue in Holbrook was signed for by Jose Cuamoro.

In response to these statements, the Defendant Giant Enterprises, Inc. has submitted another affidavit from John McCaffery, the President of the that corporation, and he alleges that he has searched all employment and ownership records of Giant Enterprises, Inc. and that his search has revealed that no one by the name of Meredith Fried has ever been an owner, employee, or agent of Giant Enterprises, Inc. Further, he alleges that his search reveals that Jose Cuamoro, the person who signed the certified mail receipt for the summons and complaint, has never been an owner, employee, or agent of Giant Enterprises, Inc. McCaffery further states that he does not know either Cuamoro or Fried and that he has never heard of either individual.

In response to this affidavit, the Plaintiff has submitted a copy of a personal guarantee signed by Meredith Fried listing his home address as 16 Poplar Lane, Commack New York 11725 (emphasis is provided by the Court

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because there is an issue as to the first name of Fried and the address where service was effectuated). The handwriting of Fried on the guarantee makes it difficult to distinguish some of the letters of his name and the address at which service may be made. This personal guarantee states that the name of the business whose account is guaranteed is Giant Enterprises. The Court notes that this guarantee does not indicate that Giant Enterprises is the same entity sued herein as Giant Enterprises, Inc. However, at the present time there are no facts in this record that would indicate that Giant Enterprises and Giant Enterprises, Inc. are different entities. The Court is unaware of the facts underlying the merits of the Louisiana complaint and judgment entered in Louisiana against the Defendants named in this law suit.

However, the Plaintiff has submitted a search of the New York State Department of State records for Giant Enterprises, Inc. which indicates that Giant Enterprises, Inc. is an active corporation established in 2004 and that effective service of process on that corporation may be made upon Meredith *h* Fried at 16 Poplar Lane, Commack, New York 11725(emphasis provided by the Court). In addition to this, the Plaintiff has submitted proof that Giant Enterprises, Inc. is doing business at the Holbrook address.

Under these circumstances, there are no facts that would show that Meredith Fried was not properly served with process and the Court will permit the Plaintiff to enter judgment against that Defendant. The President of the Defendant Giant Enterprises, Inc. has alleged that he has never heard of and is unaware of the identity of any individual named Meredith Fried (emphasis provided by the Court). Since the Court has no affidavit from Fried contesting service of process in this action and the attorney for the Defendant Giant Enterprises, Inc. has no grounds to contest the motion of the Plaintiff against Fried, the motion for summary judgment against that Defendant will be granted.

The motion of the Plaintiff for entry of judgment against the Defendant Giant Enterprises, Inc. presents issues that require further discussion. In the absence of a jurisdictional challenge to the Louisiana judgment in this action, the default of Giant Enterprises, Inc. in the Louisiana forum is not an impediment to a finding in this New York action that the Louisiana judgment is conclusive and entitled to be given full faith and credit in New York (see, *GNOC Corp. v. Capelletti*, 208 A.D.2d 498, 616 N.Y.S.2d 1018; *All Terrain Properties, Inc. v. Hoy*, 265 A.D.2d 87, 705 N.Y.S.2d 350; *JDC Finance Company I, L.P. v. Patton*, 284 A.D.2d 164, 727 N.Y.S.2d 71; see also *Ionescu v. Brancoveanu*, 246 A.D.2d 414, 668 N.Y.S.2d 164).

Where, as here, a challenge to personal jurisdiction has been made by the defaulting Defendant, this Court's review is limited to determining whether the Louisiana court had personal jurisdiction over that Defendant (see, *Fiore v. Oakwood Plaza Shopping Center, Inc.*, 78 N.Y.2d 572, 578 N.Y.S.2d 115, 585 N.E.2d 364; *F.D.I.C. v. De Cresenzo*, 207 A.D.2d 823, 616 N.Y.S.2d 638; *Desai v. Sterling Fibers, Inc.*, 288 A.D.2d 428, 733 N.Y.S.2d 481; see also *Webpro Inc. v. Petrou*, 2002 WL 31132889, S.D.N.Y. Sep 25, 2002). If the sister state properly acquired jurisdiction of the Defendant, the judgment will be given *res judicata* effect in New York and the motion for summary judgment will be granted (see, *Dominican Sisters of Ontario, Inc. v. Dunn*, 272 A.D.2d 414, 668 N.Y.S.2d 164; *Ionescu v. Brancoveanu*, 246 A.D.2d 414, 668 N.Y.S.2d 164 *Glass Contractors, Inc. v. Target Supply and Display, Inc.*, 152 Misc.2d 782, 587 N.Y.S.2d 471).

The full faith and credit clause of the United States Constitution requires that all of the State and Federal Courts in the United States of America recognize and enforce each others' judgments. Therefore, as long as the

judgment entered in Louisiana was validly rendered by that forum after obtaining personal and subject matter jurisdiction<sup>1</sup>, full faith and credit requires that this Court grant the relief requested herein against Giant Enterprises, Inc. If this Court determines that the Louisiana Court had personal jurisdiction of Giant Enterprises, Inc., any alleged error made in Louisiana must be reviewed by the Courts of Louisiana and the error underlying the judgment may not be challenged by the Defendant in the New York Courts (see, *Fauntleroy v. Lum* 210 U.S. 230, 28 S.Ct. 641, 52 L.Ed. 1039).<sup>2</sup>

Where the sister state's exercise of jurisdiction is challenged by the Defendant, the law of that state, even though it may be at odds with New York law, determines whether jurisdiction was properly obtained (see, *Augusta Lbr. & Supply v. Herbert H. Sabbeth Corp.*, 101 A.D.2d 846, 475 N.Y.S.2d 878; *L & M House of Jeans v. Communication Control Systems*, 88 A.D.2d 884, 452 N.Y.S.2d 602; *app. dismd.* 57 N.Y.2d 956; *F.D.I.C. v. De Cresenzo*, 207 A.D.2d 823, 616 N.Y.S.2d 638). While New York has not chosen to extend its exercise of jurisdiction to the limits of constitutional tolerance, the judgments of the States that have opted to exercise jurisdiction within the constitutionally permitted broader parameters defined by the United States Supreme Court are enforceable in New York (see, *Longines-Wittnauer Watch Co. v. Barnes & Reinecke*, 15 N.Y.2d 443, 261 N.Y.S.2d 8, 209 N.E.2d 68; also, *Masonite Corp. v. Hellenic Lines, Ltd.*, 412 F.Supp. 434, 438; *Columbia Pictures Industries, Inc. v. Schneider*, 435 F.Supp. 742, 749.)

However, if this Court finds that the Louisiana Court did not obtain personal jurisdiction over Giant Enterprises, Inc., full faith and credit will not be accorded Louisiana's judgment by this New York Court (see, *State of Oklahoma v. LNP Realty Corp.*, 275 A.D.2d 773, 713 N.Y.S.2d 537; *Cucullu v. Lowe*, 241 A.D.2d 474, 661 N.Y.S.2d 16; *City Federal Savings Bank v. Reckmeyer*, 178 A.D.2d 503, 577 N.Y.S.2d 430).

Once the issue of personal jurisdiction has been raised as a defense in opposition to the motion for summary judgment, the Plaintiff has the burden of proving that jurisdiction was obtained in Louisiana under constitutionally permissible Louisiana law (see *Cadle Co. v. Tri-Angle Associates*, 18 AD3d 100, 798 N.Y.S.2d 360). As noted previously, it is the law of Louisiana that determines whether jurisdiction was properly obtained (see, *Augusta Lumber & Supply, Inc. v. Herbert H. Sabbeth Corp.*, *supra*; *China Express, Inc. v. Volpi & Son Machine Corp.*, 126 A.D.2d 239, 513 N.Y.S.2d 388). In the New York action, this Court must not only determine if Louisiana's service statutes have been complied with in the Louisiana action, but it must determine if the Louisiana "court's exercise of jurisdiction comports with Federal constitutional principles of due process." (*JDC Finance Company I, L.P. v. Patton*, 284 A.D.2d 164, 727 N.Y.S.2d 71; see also, *Cucullu v. Lowe*, 241 A.D.2d 474, 475, 661 N.Y.S.2d 16; *City Federal Savings Bank v. Reckmeyer*, 178 A.D.2d 503, 577 N.Y.S.2d

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<sup>1</sup>The Defendant Giant Enterprise, Inc. has not raised the issue of subject matter jurisdiction in opposing this motion for summary judgment.

<sup>2</sup>Article IV, § 1 of the United States Constitution requires that the ... judicial proceedings of each State should be given full faith and credit in every other State." (*Luna v. Dobson*, 97 N.Y.2d 178, 738 N.Y.S.2d 5,

430).

In New York, the entry of a default judgment in another jurisdiction after the service of summons by mail pursuant to the laws of the sister state has been held sufficient to meet constitutional due process standards (see, *Boardwalk Regency Corp. v. Friedman*, 122 Misc.2d 338, 470 N.Y.S.2d 102).

As noted above, the Defendant's effort to attack collaterally the validity of the judgment imposes an initial and substantial burden of showing on that Defendant that the sister state judgment is invalid due to a lack of personal jurisdiction (9 *Carmody-Wait 2d*, 63:609). In *Cook v. Cook*, (342 U.S. 126, 72 S.Ct. 157, 96 L.Ed. 146), the United States Supreme Court stated that "\*\*\*the burden of undermining the decree of a sister state 'rests heavily upon the assailant' (*cites omitted*) (see also, *Schoenbrod v. Siegler*, 20 N.Y.2d 403, 283 N.Y.S.2d 881, 230 N.E.2d 638). Once the issue of lack of personal jurisdiction is raised by a proper and sufficient showing in the affidavits of the Defendant, the Plaintiff has the burden of proving jurisdiction was obtained (see, *Cadle Co. v. Tri-Angle Associates*, 18 A.D.3d 100, 798 N.Y.S.2d 360<sup>3</sup>; *Ziperman v. Frontier Hotel of Las Vegas*, 50 A.D.2d 581, 374 N.Y.S.2d 697; see generally, *Diners Club, Inc. v. Makoujy*, 110 Misc.2d 870, 443 N.Y.S.2d 116).

Here, the Defendant Giant Enterprises, Inc. has met that initial burden by submitting two affidavits from John McCaffrey, the President of that entity, wherein McCaffery alleges that he is not aware of the identity of Jose Cuamoro, the person who signed the certified receipt slip and that he does not know a person named Meredith Fried. The Court recognizes that the record is silent as to John McCaffrey's knowledge of a person named Meredith Fried. If Meredith Fried is or was an owner of Giant Enterprises, Inc. it is unlikely that this Court will deny Plaintiff's motion for summary judgment in lieu of complaint or refuse to permit the Plaintiff to enforce the Louisiana judgment in New York.

However, since the initial burden by the Defendant has been met, the Court will schedule this matter for a conference to determine, among other matters, if additional discovery by either party is necessary before a hearing is scheduled to determine if the Louisiana Courts had jurisdiction to enter a judgment against Giant Enterprises, Inc. The parties should be prepared at the conference to provide the Courts with a list of witnesses that they will call at the hearing and to pre-mark evidence that will be submitted at the hearing.

In addressing the issue of whether a return receipt must be signed in order to determine if there was good jurisdiction, the Louisiana Appellate Court in *Williams v. Doctors' Hosp. of Shreveport, Inc.*, 902 So 39,609 held that "\*\*\*a defendant does not have to personally sign the return receipt on certified mail for purposes of service under the Long Arm Statute\*\*\*." Furthermore, in *HTS, Inc. v. Seahawk Oil & Gas, Inc.*, (889 So.2d 442, 2004-892) the Louisiana Appellate Court specifically held that

Under the clear wording of § 3204, all that is necessary to constitute service upon a non-resident under the long-arm statute is that counsel for the plaintiff send a certified copy of the citation

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<sup>3</sup>This case is instructive on the issue of minor errors in the address of a Defendant where process is served by mail.

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and of the petition in the suit to the defendant by registered or certified mail, or actually deliver it in person. There is no requirement under § 3204 for a signed return receipt.

Furthermore, "the law is clear that a defendant may not be allowed to defeat valid service by merely refusing to accept the letter containing the citation." *Decca Leasing Corp. v. Torres*, 465 So.2d 910 (La.App. 3 Cir.1985).

To the extent that there is an issue as to whether a judgment can be enforced against Meredith Fried, the two Louisiana Appellate Court cases cited above answer that question in the affirmative.

Dated: 11/29/07

  
SANDRA L. SGROI, J. S. C.