

Juliani v Nahorai

2008 NY Slip Op 30031(U)

January 2, 2008

Supreme Court, New York County

Docket Number: 0118798/2006

Judge: Joan Madden

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

PRESENT: Hon. Joak A. Modder Justice

PART 11

Index Number : 118798/2006

JULIANI, BRUCE
vs
NAHORAI, SAM
Sequence Number : 001
DEFAULT JUDGEMENT

INDEX NO. _____
MOTION DATE 9-20-07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, _____ his 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 is decided in accordance with the annexed Memorandum Decision + Order.

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

FILED
JAN 11 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: January 2, 2008

[Signature] J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

-----X
BRUCE JULIANI,

Index No. 118798/06

Plaintiff,

-against-

SAM NAHORAI d/b/a INTERNATIONAL
ANTIQUÉ BUYERS,

Defendant.

-----X
JOAN A. MADDEN, J.:

Plaintiff moves for an order directing that a judgment be entered in his favor based on a judgment entered in the Superior Court of California, Los Angeles, County on March 3, 2006 ("the California judgment"). Defendant opposes the motion, which is granted as set forth below.

FILED
JAN 11 2008
NEW YORK COUNTY CLERKS OFFICE

Background

This is an action to enforce the California judgment in the amount of \$137,284.40, against defendant, who is a New York resident. The parties are former friends and business partners, and the action in California arose out of a dispute regarding their business dealings ("the California action").

Defendant failed to answer the complaint, and a default order was entered against him. Defendant, who was represented by counsel, subsequently moved to vacate the default on the grounds that he was unaware that he was personally served with the complaint such that he would be required to respond. In

connection with the motion, defendant submitted a proposed verified answer, in which he did not assert a defense of lack of personal jurisdiction. The California court denied the motion. Defendant then moved for reconsideration of the court's denial of the motion to vacate based, inter alia, on a more detailed affidavit from defendant. The Clerk's minutes indicate that no one appeared on defendant's behalf when the second motion was called for a hearing, and the second motion was denied.

Plaintiff subsequently commenced this action seeking to enforce the California judgment, and defendant answered the complaint.

Plaintiff requests that a judgment be entered in this court based on the California judgment. In support of his motion, plaintiff submits a copy of the California judgment which indicates that it was granted on default after considering plaintiff's written declaration. Plaintiff also submits the two motions made by defendant in the California action seeking to vacate his default, and defendant's proposed verified answer.

In opposition to the motion, defendant argues that under CPLR 5401, the California judgment is not considered a foreign judgment entitled to full faith and credit in New York since it was entered on default.¹ Defendant also argues that plaintiff

¹CPLR 5401 provides, in relevant part, that "'a foreign judgment' means any judgment, decree, or order of a court of the United States or of any other court which is entitled to full

did not follow the proper procedure for filing a foreign judgment under CPLR 5402(a), as the California judgment was not filed in New York within 90 days of its being authenticated in California. Defendant further contends that the California court did not address all of the issues raised in defendant's motion to set aside his default.

In reply, plaintiff argues that as defendant appeared before the California court to seek to vacate the default against him and filed a proposed verified answer in which he did not contest court's jurisdiction over him, the California judgment is entitled to full faith and credit in New York. Plaintiff also asserts that since he commenced a plenary action to enforce the California judgment instead of seeking to file the California judgment in this court, the requirements of CPLR 5402(a), including the 90-day time limit relied on by defendant, are inapplicable here.

Discussion

"A judgment rendered by a court of a sister state is accorded 'the same credit, validity, and effect in every other court of the United States, which it had in the state where it was pronounced.'" All Terrain Properties, Inc. v. Hoy, 265 AD2d

faith and credit in this state, except one obtained by default in appearance, or by confession of judgment." In support of his argument, plaintiff selectively quotes from the provision to omit the word appearance.

87, 91 (1st Dept 2000), quoting, Hampton v. McConnell, 16 U.S. 234, 235 (1818).

The Uniform Enforcement of Foreign Judgment Act (CPLR 5401-5408) which permits a foreign judgment to be filed in this court and entitles it to full faith and credit, excludes from the definition of the term "foreign judgment" any judgment "obtained by a default in appearance" (See CPLR 5401). The purpose of this exception is to exclude judgments obtained by a default in appearance as a result of "sewer service."

Rubinstein v. Goldman, 225 AD2d 328, 328 (1st Dept), lv. denied, 88 NY2d 815 (1996).

However, such exception does not apply when the party against whom the default is entered appears in the sister state action and contests the validity of the judgment, including with respect to the issue of jurisdiction. Shine, Julianelle, Karp, Bozelko & Karazin, P.C. v. Rubens, 192 AD2d 345 (1st Dept), appeal dismissed, 82 NY2d 778 (1993), cert denied, 511 US 1142 (1994) (a foreign judgment was not obtained by default in appearance so as to bar its enforcement in New York, where defendant failed to respond to a calendar call but submitted an answer and litigated the issue of jurisdiction); Rubinstein v. Goldman, 225 AD2d at 328 (holding that New Jersey judgment against former client for attorneys fees was not obtained by "a default in appearance" for the purposes of CPLR 5401 since

although the client did not personally appear at the hearing, he submitted a letter in opposition); L&W Air Conditioning Co., Inc. v. Varsity Inn of Rochester, Inc., 82 Misc2d 937, (Sup Ct. Monroe Co. 1975), aff'd, 56 AD2d 735 (4th Dept 1977) (noting that the exclusion from recognition under Article 54 of foreign judgments "is intended to exclude not all judgments taken by default, but only those default judgments where there is no appearance at all").

As the undisputed record in this case shows that defendant appeared by counsel in the California action and contested the entrance of a default against him, the California judgment is entitled to full faith and credit. Under these circumstances, any collateral attacks on the California judgment, including defendants' assertion that certain issues were not addressed by the California court, must be rejected. Rubinstein v. Goldman, 225 AD2d at 328.

Finally, defendant's argument that plaintiff failed to file the California judgment in this court as required under Article 54 is irrelevant, since plaintiff elected to enforce the judgment through a plenary action and not via the non-exclusive procedures of Article 54. See CPLR 5406 (providing that the "right of a judgment creditor to proceed by an action on the judgment...instead of proceeding under this article, remains unimpaired); Ethel K. v. Sheldon K., 107 Misc2d 405,

406 (Fam. Ct. NY Co. 1980) (streamlined procedures provided under Article 54 for enforcing foreign judgment do not preclude resort to a plenary action which need not be confined by the requirements of its provisions, including that a copy of the judgment be filed with the county clerk within the state).

Accordingly, plaintiff's motion to enforce the California judgment must be granted.

Conclusion

In view of the above, it is

ORDERED that plaintiff's motion is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff Bruce Juliani and against defendant Sam Nahorai d/b/a International Antique Buyers, in the amount of \$137,284.40, together with interest as computed by the Clerk, and costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs.

DATED: *January 2, 2007*
~~December 7~~ 2007

J. C.
FILED
JAN 11 2008
NEW YORK
COUNTY CLERK'S OFFICE