

**Fraser Direct Distrib. Servs., Ltd. v Big Tent
Entertainment, LLC**

2008 NY Slip Op 30210(U)

January 23, 2008

Supreme Court, New York County

Docket Number: 0601591/2007

Judge: Barbara Kapnick

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

BARBARA R. KAPNICK

PRESENT: _____

PART 12

Justice

Index Number : 601591/2007

FRASER DIRECT DISTRIBUTION

vs.

BIG TENT ENTERTAINMENT

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

INDEX NO. 601591/07

MOTION DATE _____

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

are read on 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

JAN 25 2008

NEW YORK
COUNTY CLERKS OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

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

Dated: 1/23/08

BARBARA R. KAPNICK J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

-----X
FRASER DIRECT DISTRIBUTION
SERVICES, LTD.,

Plaintiff,

- against -

BIG TENT ENTERTAINMENT, LLC,

Defendant.
-----X

BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 601591/07
Motion Seq. No. 001

FILED
JAN 25 2008
NEW YORK
COUNTY CLERKS OFFICE

Plaintiff Fraser Direct Distribution Services, Ltd. ("Fraser") moves for an order pursuant to CPLR §§ 3213 and 5303 directing entry of judgment against the defendant Big Tent Entertainment, LLC ("Big Tent") based on a Default Judgment entered on August 3, 2006 in the Ontario Superior Court of Justice.

Defendant acknowledges that it wilfully chose not to appear in the Canadian action after being served at its New York office with a Statement of Claim, because it knew that the Court in Ontario did not have jurisdiction over Big Tent. See, CPLR § 5304(a)(2), which provides that a foreign country judgment is not conclusive if "the foreign court did not have personal jurisdiction over the defendant."

Pursuant to CPLR § 5305, the foreign country judgment shall not be refused recognition for lack of personal jurisdiction if:

1. the defendant was served personally in the foreign state;
2. the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him;
3. the defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved;
4. the defendant was domiciled in the foreign state when the proceedings were instituted, or, being a body corporate had its principal place of business, was incorporated, or had otherwise acquired corporate status, in the foreign state;
5. the defendant had a business office in the foreign state and the proceedings in the foreign court involved a cause of action arising out of business done by the defendant through that office in the foreign state; ...

Defendant contends that it was not personally served in Ontario, that it did not voluntarily appear in the Canadian proceeding, that it never agreed to submit to that court's jurisdiction, and that it maintains no place of business in Ontario.

In addition, although defendant concedes that it had "some discussions" with plaintiff about entering into an agreement to distribute books in Canada, no written agreement was ever signed. Thus, defendant claims that plaintiff falsely represented to the Ontario court in its Statement of Claim that Fraser and Big Tent

entered into a 'proprietary agreement' that was 'made in Ontario.'

Plaintiff denies that its representation was false because the parties ultimately reached an oral agreement, as defendant admits that "Big Tent ultimately worked with Plaintiff to distribute books in Canada." Thus, plaintiff argues that the Canadian court had a valid basis for exercising jurisdiction over the defendant "as defendant purposefully transacted business in [Canada] within the meaning of this state's long-arm jurisdictional statute (see CPLR 302[a][1]; 5304[a][2]; 5305[b])." Wimmer Canada, Inc. v. Abele Tractor & Equipment Co., Inc., 299 A.D.2d 47, 50 (3rd Dep't 2002), lv. to app. denied, 99 N.Y.2d 507 (2003).

Based on the papers submitted and the oral argument held on the record on November 14, 2007, this Court finds that defendant engaged in sufficient purposeful activity in Canada to confer jurisdiction over it upon the Ontario Superior Court of Justice.

Moreover, defendant does not dispute that it was personally served with process in this action. See, cf., Attorney General of Canada v. Gorman, 2 Misc.3d 693 (Civ. Ct., Queens Co. 2003).

Accordingly, plaintiff's motion for summary judgment in lieu of Complaint is granted.

The Clerk may enter judgment in favor of plaintiff Fraser Direct Distribution Services, Ltd. and against defendant Big Tent Entertainment, LLC in the amount of \$89,885.97, together with interest to be calculated by the Clerk at the rate of 12% per annum from August 3, 2006, and costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

This constitutes the decision and order of this Court.

Dated: January 23 2008


BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.

FILED
JAN 25 2008
NEW YORK
COUNTY CLERK'S OFFICE