

Boardwalk Regency Corp. v Feleppa

2008 NY Slip Op 30506(U)

February 15, 2008

Supreme Court, Nassau County

Docket Number: 5908-07/

Judge: Thomas Feinman

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

Hon. Thomas Feinman
Justice

BOARDWALK REGENCY CORP.,

Plaintiff,

- against -

GIOVANNI FELEPPA,

Defendant.

TRIAL/IAS PART 20
NASSAU COUNTY

INDEX NO. 15908/07

X X X

MOTION SUBMISSION
DATE: 1/11/08

MOTION SEQUENCE
NO. 1

The following papers read on this motion:

- Notice of Motion and Affidavits..... X
- Affirmation in Opposition..... X
- Reply Affirmation..... X

The plaintiff moves for summary judgment in lieu of complaint. The defendant submits opposition. The plaintiff submits a reply affirmation.

The plaintiff moves for summary judgment in lieu of complaint to enforce a foreign judgment. The foreign judgment is a judgment obtained in the Superior Court of New Jersey Law Division Atlantic County on February 8, 2007 against the defendant in the amount of \$35,945.48, plus costs.

A motion for summary judgment in lieu of complaint is made when an action is based on an instrument for the payment of money only. (CPLR §3213). A judgment qualifies as an instrument for the payment of money. (*Id.*) Article 54 of the CPLR, entitled, "Enforcement of Judgments Entitled to Full Faith and Credit" applies to the judgments of American jurisdictions, for example, those entitled to full faith and credit under the federal constitution. (*See Practice Commentaries by David Seigel, c5401:1*). §5401 provides that in this article, "foreign judgment" means any judgment of a court of the United States which is entitled to full faith and credit in this State, except one obtained by default in appearance, or by confession of judgment.

A judgment creditor may follow the filing procedure set forth in CPLR Article 54 when a foreign sister-state judgment is not issued on default. However, if the foreign sister-state judgment was issued upon default, the judgment creditor must commence a CPLR §3212 proceeding, or an ordinary action on the judgment. (CPLR §5402(a), §5406). The right of a judgment creditor to proceed by an action on the judgment, or a motion for summary judgment in lieu of complaint, instead of proceeding under this Article remains unimpaired. (CPLR §5406). A foreign judgment obtained by default may only be enforced in a plenary action which may be initiated by a motion for summary judgment in lieu of complaint. (*Glass Contractors, Inc. v. Target Supply and Display, Inc.*, 152 Misc.2d 782). A judgment of a sister state, even rendered by default, is entitled to full faith and credit and is conclusive on the merits. (*Klein Performing Products, Inc. v. Keel*, 499 NYS2d 563).

In reviewing such foreign judgments, the court's inquiry is limited to ascertaining whether the sister state possessed personal jurisdiction over the defendant. (*Glass Contractors, Inc.*, *supra*). The Full Faith and Credit Clause of Article IV of the United States Constitution requires the courts of New York to enforce judgments rendered in sister states and precludes inquiry into the merits of the judgment. (*Buckeye Retirement Co., LLC v. Lee*, 41 AD3d 183). A sister-state default judgment may be impeached by showing that the court of rendition did not have personal jurisdiction over the defendant. (*Klein Performance Products, Inc.*, *supra*).

While lack of personal jurisdiction is a defense to the enforcement of a sister-state's judgment, lack of personal jurisdiction with respect to the plenary proceedings, to wit, motion for summary judgment in lieu of complaint, is an affirmative defense that is waived, unless raised by the aggrieved party. (*Buckeye Retirement Co., LLC*, *supra*). In other words, a defendant who appears in the plenary proceedings, by way of submitting an affidavit in opposition to the motion for summary judgment in lieu of complaint, and fails to raise a jurisdictional defense has waived it. An appearance by a defendant "is equivalent to personal service of the summons upon him" unless he moves to dismiss pursuant to CPLR §3211(a)(8), or raises a jurisdictional defense in his papers. (CPLR §320(b); *Yihye v. Blumberg*, 260 AD2d 371). The imposition of opposition papers to the plaintiff's motion for summary judgment in lieu of complaint is the functional equivalent of an answer in an action commenced pursuant to CPLR §3213. (*Id.*) Therefore, the defendant who submits opposition papers to the motion for summary judgment in lieu of complaint and fails to raise jurisdictional defenses to the plenary proceeding, has waived such defenses.

Here, the defendant, in opposition, has not asserted any jurisdictional defenses to this instant New York proceedings, and therefore, has waived any jurisdictional defenses herein. The defendant does not claim that he was not properly served with the instant summons, or notice of motion for summary judgment and supporting papers. Therefore, the defendant has waived any such affirmative defense in this action. As already provided, lack of personal jurisdiction with respect to the plenary proceeding is an affirmative defense that is waived unless raised by the aggrieved party. (*Buckeye Retirement Co. LLC v. Lee*, 41 AD3d 183).

The defendant, in opposition to the motion, submits an affidavit stating that he "reside[s] in New York State, not New Jersey", and that he "was never personally served with papers in reference to this gambling debt". The defendant further avers that he "lost substantial amounts of money and feel[s] that he was placed under undue pressure to continue gambling and [go] into further debt so the casino could take my last penny". The defendant submits that this court should deny the enforcement of this debt in New York as it is a "gambling debt".

While defendant submits that it is “against public policy and the laws of New York to enter a Judgment for gambling debts in the State of New York”, the defendant refers to no authority whatsoever to substantiate such a contention. In any event, this court’s review is limited to enforcing the judgment, not the debt.

Here, the defendant does not claim that the New Jersey court did not have jurisdiction over the “debt”, that he did not incur the “debt”, or that he did not receive the New Jersey summons and complaint. Rather, the defendant avers that he did not receive “papers in reference to this gambling debt” as he was never “personally served”, leaving the inference that he was never personally served with the New Jersey summons and complaint. The defendant does not raise sufficient facts in his affidavit to conclude that service other than by personal means, was proper. However, the applicable New Jersey statute regarding service of summons and complaints on out of state defendants provides the defendant does not need to be personally served with the New Jersey summons and complaint. This court needs to look to the jurisdictional statutes of the forum in which the judgment was rendered, as well as due process considerations. (*Augusta Lumber & Supply, Inc. v. Sabbeth Corp.*, 101 AD2d 846).

New Jersey’s Rules Governing Civil Practice, §4:4-4(b)(1)(C) permits an out-of-state defendant to be served by certified mail, return receipt requested. Here, the defendant was served by certified mail, return receipt requested. The defendant was served with the New Jersey summons and complaint by certified mail return receipt requested at 2294 Milburn Avenue, Baldwin, New York, 11510, the same address that the defendant was served with the instant summons, motion for summary judgment in lieu of complaint and supporting papers. The plaintiff has demonstrated compliance with the applicable New Jersey statute. As already provided, the defendant has not asserted a jurisdictional defense to the instant New York proceeding as defendant has not claimed that he was not served with the instant summons, motion for summary judgment in lieu of complaint and supporting papers.

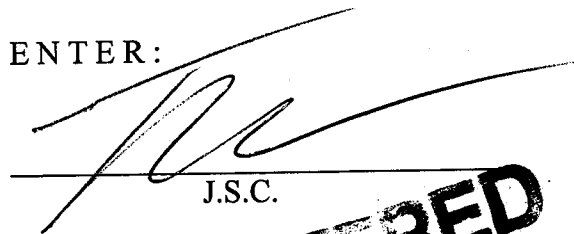
With respect to due process considerations, the defendant himself has stated that he purportedly availed himself to the jurisdiction of the New Jersey courts. The defendant stated that he lost substantial amounts of money as he felt pressured to continue gambling whereby the casino, apparently took his “last penny”. In essence, the defendant admits that he was “present” in New Jersey, as he gambled in New Jersey, and felt pressure to “continue gambling”. It has been well established that due process requires only that in order for a defendant to be subject to judgment *in personam*, if not present within the territory of the forum, that he have certain minimum contacts so that the maintenance of the lawsuit not offend “traditional notions of fair play and substantial justice”. (*International Shoe Co. v. Washington*, 326 US 310). “Jurisdiction is proper, however, where the contacts result from actions by the defendant himself that create a ‘substantial connection’ with the forum State”. (*Burger King Corp. v. Rudzewicz*, 471 US 462). When a party avails itself to the benefits of the forum, and has sufficient minimum contacts with it, the party should reasonably expect to defend its actions there. (*McGee v. International Life Ins. Co.*, 355 US 220). Due process is not offended if that party is subjected to jurisdiction even if not “present” in that State. Here, the defendant purposely availed himself to the jurisdiction of the New Jersey court as he was physically present in New Jersey, when he gambled, and therefore subjected himself to the benefits of the forum.

In the instant proceeding, as the plaintiff obtained a New Jersey judgment against the defendant by default, the plaintiff commenced a CPLR §3213 proceeding by moving for summary judgment in lieu of complaint on the judgment. The plaintiff, by providing a certified copy of the New Jersey judgment, has established proof sufficient to warrant entitlement to summary judgment. (*Hill v. Gottwold*, 358 NYS2d 883). Once a plaintiff has established a *prima facie* case by proof of the instrument and a failure to make the payment called for by its terms, or proof of judgment entered in a foreign jurisdiction, plaintiff is entitled to judgment unless the defendant comes forward with proof of evidentiary facts showing the existence of a triable issue of fact with respect to a *bona fide* defense. (*Gateway State Bank v. Shangra-La Private Club for Women*, 113 AD2d 791). Here, the defendant has failed to provide such proof thereby warranting summary judgment in favor of the plaintiff.

In light of the foregoing, the plaintiff's motion is granted, and therefore, plaintiff is granted Judgment in the sum of \$36,185.48, with interest thereon from February 8, 2007, plus costs.

The plaintiff is hereby directed to Settle Judgment on Notice. A copy of this order with notice of entry shall accompany the proposed judgment.

ENTER:



J.S.C.

Dated: February 15, 2008

cc: Weinstein, Kaplan & Cohen, P.C.
Robert W. Seiffert, Esq.

ENTERED

FEB 20 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE