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

PRESENT: Hon John A Moller Justice

PART 11

Bruce Juliano

-v-

Sam Nahvai

INDEX NO. 118798/06

MOTION DATE 2-28-08

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/~~for~~ reargue

	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 is decided in accordance with the annexed Memorandum Decision + Order.

FILED
JUN 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: June 11, 2008

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

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BRUCE JULIANI,

Plaintiff,

- against -

SAM NAHORAI d/b/a INTERNATIONAL ANTIQUE BUYERS,

Defendant.

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Index No. 11879[illegible]

JOAN A. MADDEN, J.:

Defendant Sam Nahorai d/b/a International Antique Buyers ("Nahorai") moves for leave to reargue this court's decision and order dated January 2, 2008 (hereinafter "the original decision"), asserting that the court erred in giving full faith and credit to a California judgment entered on default. Plaintiff Bruce Juliani ("Juliani") opposes the motion, which is denied for the reasons below.

Background

This motion stems from an action to enforce a California judgment in the amount of $137,284.40, entered in favor of Juliani and against Nahorai, 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"). When Nahorai failed to answer the complaint, a default order was entered against him. Nahorai, 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 so that he would be required to respond. In connection with the motion to vacate, Nahorai submitted a proposed verified answer, in which he did not assert a defense of lack of personal jurisdiction. The California court denied the motion. Nahorai then moved for reconsideration of the court's denial of the motion to vacate based, inter alia, on a more

detailed affidavit from Nahorai. The Clerk's minutes indicate that no one appeared on Nahorai's behalf when the second motion was called for a hearing, and the second motion was denied.

In its original decision, this court granted Juliani's motion to enforce the California judgment, based on 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. CPLR 5401(1) excludes from the definition of the term "foreign judgment" any judgment "obtained by a default in appearance." In its original decision, the court noted that the purpose of the 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, the court found that the 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 purpose of CPLR 5401 since although the client did not personally appear at the hearing, he submitted a letter in opposition).

As the undisputed record in the case indicates that Nahorai appeared by counsel in the California action and contested the entry of default against him in the original decision, this court held that the California judgment was entitled to full faith and credit, and that any collateral attacks on the California judgment, including Nahorai's assertion that certain issues were not addressed by the California court, were properly rejected.

Nahorai now moves for leave to reargue asserting that, in rendering its decision, the court "misapprehended or overlooked certain salient facts and case law." Specifically, Nahorai argues that as the California judgment was entered solely on default of appearance, it is exempted from the full faith and credit rule under CPLR 5401(1). In addition, Nahorai contends that Shine and Rubinstein, on which the court relied in its original decision, are distinguishable from the case at bar. In particular, Nahorai asserts that in Shine, unlike the current case, an answer was filed and jurisdiction was established. As for Rubinstein, Nahorai asserts that the court in that case also considered the merits after the answer had been filed. Although Nahorai filed a proposed answer with his motion papers seeking to vacate the default, he asserts that his answer became a nullity when the motion was denied.

In opposition, Juliani argues that Nahorai consented to the California court's jurisdiction when he hired a California lawyer who made the motion to vacate the default, filed a proposed answer that did not raise a defense based on the lack of personal jurisdiction, and asserted two counterclaims.

Discussion

A motion for reargument is addressed to the discretion of the court, and is intended to give a party an opportunity to demonstrate the court overlooked or

misapprehended the relevant facts, or misapplied a controlling principle of law. See, Foley v Roche, 68 AD2d 558, 567 (1st Dept 1979); see also, William P. Phal Equipment Corp. v Kassis, 182 AD2d 22 (1st Dept 1992).

Here, there is no basis for granting reargument. As the court noted in its original decision, the Uniform Enforcement of Foreign Judgment Act's granting of full faith to a sister state judgment provides an exception for a "default in appearance" (See CPLR 5401). However, this 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. Shine, Julianelle, Karp, Bozelko & Karazin, P.C. v Rubens, 192 AD2d at 345-46; Rubinstein v Goldman, 225 AD2d at 328.

Moreover, while Shine and Rubinstein are not factually identical to the instant case, they are sufficiently similar to warrant their application here. In Shine, the defendants interposed an answer and asserted lack of jurisdiction in a Connecticut suit. When the defendants failed to appear and defend when the case was called for trial, the Connecticut court awarded judgment for the plaintiff. The First Department denied defendants' motion to vacate the Connecticut judgment, reasoning that jurisdiction was established when the defendants "appeared" in the Connecticut action by interposing an answer. Shine, Julianelle, Karp, Bozelko & Karazin, P.C. v Rubens, 192 AD2d at 345-46. In Rubinstein, the First Department held that the defendant's argument that the New Jersey judgment was obtained by "default in appearance" was without merit since the defendant, although he did not appear personally at the hearing, opposed plaintiff's application by letter, which the court deemed to be an answer.

Here, like the defendants in Shine and Rubinstein, Nahorai appeared to contest the judgment that was originally entered on default, and thus the California judgment was not, for the purposes of CPLR 5401(1), "obtained by a default in appearance" and is thus entitled to full faith and credit. Accordingly, as the court did not misapply relevant facts or misapprehend a principle of law, reargument must be denied.

In view of the above, it is

ORDERED that the motion to reargue is denied.

DATED: June 11, 2008

J.S.C.