Adams v McDaniel
2009 NY Slip Op 31273(U)
June 3, 2009
Supreme Court, New York County
Docket Number: 114905/08
Judge: Carol R. Edmead
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SCANNED ON 6/8/2009
[* 1]

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

PRESENT: Edmead, Justice

PART 35

Harold H. Adams Jr.

- v -

K.C. McDaniel et. al.

INDEX NO. 114905/08

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

FILED JUN 08 2009 COUNTY CLERK'S OFFICE NEW YORK

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by plaintiff Harold H. Adams, Jr., as trustee of the Huel D. Adams, Jr. Trust for summary judgment in lieu of complaint, pursuant to CPLR §3213, against defendants K.C. McDaniel, in her capacity as executrix of the Estate of Mary Anne Swint Bennett, and the Estate of Mary Anne Swint Bennett, is denied; and it is further

ORDERED that defendants' cross-motion for summary judgment dismissing plaintiff's Complaint, pursuant to CPLR §3212, is granted; and it is further

ORDERED that the action is hereby dismissed; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

The Clerk may enter judgment accordingly.

That constitutes the decision and order of the Court.

Dated: 6/3/09

HON. CAROL EDMEAD J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

HAROLD H. ADAMS, JR., as TRUSTEE of the HUEL D. ADAMS, Jr., TRUST,

Plaintiff,

Index No. 114905/08

-against-

DECISION/ORDER

K.C. McDANIEL, as EXECUTRIX of the ESTATE OF MARY ANNE SWINT BENNETT, and the ESTATE OF MARY ANNE SWINT BENNETT,

Defendants.

FILED
JUN 08 2009
COUNTY CLERK'S OFFICE
NEW YORK

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action, plaintiff Harold H. Adams, Jr., as trustee of the Huel D. Adams, Jr. Trust ("plaintiff"), seeks an order, pursuant to CPLR §3213, for summary judgment in lieu of complaint against defendants K.C. McDaniel ("Ms. McDaniel"), in her capacity as executrix of the Estate of Mary Anne Swint Bennett, and the Estate of Mary Anne Swint Bennett (the "Bennett Estate") (collectively, "defendants").

In response, defendants cross move for summary judgment dismissing the underlying Complaint filed in South Carolina, pursuant to CPLR §3212.

Factual Background[1]

Mary Anne Swint Bennett ("Ms. Bennett"), a resident of New York City, passed away on November 15, 1995. Ms. McDaniel, Ms. Bennett's attorney during her life, served as executrix

[1] Information is taken from plaintiff's motion, which comprises an affirmation from plaintiff's attorney Wolfgang Heimerl ("Ms. Heimerl") and a memorandum of law, and defendant's cross-motion, which comprises an affirmation from defendants' attorney Douglas R. Rosenweig ("Mr. Rosenweig") and an affidavit from Ms. McDaniel.

of the Bennett Estate from 1995 until her discharge in May 2002.

At the time of her death in 1995, Ms. Bennett held a purchase money mortgage from Huel Adams ("Mr. Adams") on her former residence, which required monthly payments. Mr. Adams failed to make several payments. While serving as executrix, Ms. McDaniel pursued the collection of the monies owed. In the course of her collection effort, Ms. McDaniel was advised and offered as an excuse for nonpayment that Mr. Adams was psychiatrically disabled and that his affairs were in the hands of a trustee. The collection efforts were settled after the Huel D. Adams Trust (the "Trust") paid the mortgage in full. On November 26, 2001, Ms. McDaniel sent the note, mortgage and a statement of release and satisfaction to the Bennett Estate's attorneys, who, upon information and belief, delivered them to the law firm representing Mr. Adams or his trustee.

Ms. McDaniel's discharge as executrix was delayed by a contested accounting proceeding. A settlement of the accounting proceeding was reached in 2001, six years after Ms. Bennett's death, and submitted for approval by New York County Surrogate Renee R. Roth ("Surrogate Roth"). On January 15, 2002, Surrogate Roth, issued an order stating that the matters in dispute were settled (see the "Settlement Order"). Thereupon, Ms. McDaniel submitted her final accounting and request for discharge. On May 29, 2002, Surrogate Roth accepted Ms. McDaniel's final accounting (see the "Discharge Order"). The Discharge Order states:

> [A]fter making the payments and distributions directed by the surrogate and after complying in all respects with the provisions of the decree: K.C. McDaniel as Executrix of the Estate of Mary Anne Swint Bennett be and hereby is released and forever discharged of and from all claims, liability and accountability whatsoever for her acts, transactions and omissions, if any, as such Executrix, including all matters and things continued in the account as filed herein and in this decree. (Discharge Order, pp. 8-9)

The Discharge Order was entered on May 30, 2002.

In October 2002, Carol H. Gunter, counsel for Mr. Adams, contacted Ms. McDaniel by telephone and in writing and advised that she could not find the mortgage-satisfaction papers ("October 2002 letter"). Ms. McDaniel advised counsel that she had been discharged as executrix of the Bennett Estate and was not in a position to have any further dealings with its assets. She referred counsel to Ms. Bennett's residual legatees for any further issues in regard to the note and mortgage.

On January 30, 2003, Elizabeth Van Doren Gray, counsel for Mr. Adams, demanded that Ms. McDaniel provide a recordable satisfaction of the mortgage. The letter states: "It is my understanding that you are the Executrix of the Estate of Ms. Bennett and, as such, are obligated as her legal representative to provide this mortgage satisfaction" ("January 2003 letter). Again, Ms. McDaniel advised counsel that she had been discharged as the executrix since May 2002 and did not have the authority to have any further dealings with the assets of the Bennett Estate. She further suggested that counsel approach the residual legatees.

Plaintiff contends that after the Trust paid the mortgage, the mortgage was not recorded as satisfied. On four separate occasions, plaintiff tried to have Ms. McDaniel satisfy the mortgage, to no avail. As a result, plaintiff sought judicial intervention to have the mortgage deemed satisfied.

On May 15, 2003, plaintiff filed a Summons and Complaint against defendants in South Carolina. Neither Ms. McDaniel nor the Bennett Estate answered the Complaint.

On March 4, 2004, plaintiff filed a "Motion for Judgment by Default." On June 10, 2004, the South Carolina Court of Common Pleas, Ninth Circuit (the "South Carolina court") granted

plaintiff's motion, ordering that the mortgage be marked as satisfied and finding defendants liable, jointly and severally, for $25,000 in penalties and $3,264.88 in costs and fees ("Default Judgment").

Plaintiff's Motion

Plaintiff now requests that this Court enter summary judgment against defendants on the basis of the Default Judgment. Citing South Carolina's long-arm statute (South Carolina Code Annotated §36-2-803), plaintiff contends that the South Carolina court had personal jurisdiction over Ms. McDaniel. As Ms. McDaniel was the executrix and represented the Bennett Estate, she performed services and or conducted business within the state of South Carolina, thus meeting the requirements for jurisdiction under §36-2-803. Accordingly, the Default Judgment against Ms. McDaniel was properly entered.

Defendants' Cross-Motion

Defendants argue that it is "beyond dispute" that Ms. McDaniel was not the executrix at the time the underlying South Carolina Complaint was filed in May 2003, or at the time the Default Judgment was entered in June 2004. Ms. McDaniel had been discharged as executrix in May 30, 2002, a full year prior to the commencement of the underlying lawsuit, defendants contend, citing the Discharge Order. Defendants also contend that at no time did Mr. Adams, his trustee or any of their attorneys appear or raise any issue in the New York County Surrogate's Court or in regard to the final accounting or discharge of Ms. McDaniel.

First, defendants argue that there is no evidence that the South Carolina court had personal jurisdiction over Ms. McDaniel. Plaintiff fails to enumerate the specific section of South Carolina's long-arm statute on which he relies. A closer look at §36-2-803 demonstrates

that there is no specific mention of an executor, and there is no indication that Ms. McDaniel "transacted any business" in the state of South Carolina. Ms. Bennett was a resident of New York, and Ms. McDaniel never traveled to South Carolina to conduct any business as an executrix, in regard to the note and mortgage or otherwise. This matter was litigated solely in the Surrogate's Court of New York County, defendants argue.

Defendants further argue that plaintiff does not cite any facts or caselaw that suggests that Ms. McDaniel should be deemed to have minimum contacts with South Carolina. Due process is not satisfied unless a non-domiciliary has "minimum contacts" with the forum state, defendants contend. The test has come to rest on whether a defendant's "conduct and connection with the forum State" are such that it "should reasonably anticipate being haled into court there." In her affidavit ("McDaniel Aff. I"), Ms. McDaniel states that she was the executrix of the estate of Ms. Bennett, a resident of New York State; that she never went to South Carolina to transact any business; that she never solicited any business from anyone in South Carolina in connection with the probate process; and that she was discharged from her duties as executrix in May 2002. After her discharge, Ms. McDaniel "certainly was not transacting any type of business in South Carolina." Defendants also argue that in the absence of any evidence to the contrary, it is clear that Ms. McDaniel does not have sufficient minimum contacts such that the South Carolina court could obtain personal jurisdiction over her, pursuant to §36-2-803, especially after May 30, 2002. Consequently, the Default Judgment, entered in 2004, is not entitled to full faith and credit in New York State.

Second, defendants argue that there is no evidence that Ms. McDaniel was properly served with a copy of the underlying Summons and Complaint. In fact, the Default Judgment

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simply states: "The Plaintiff asserts that the Defendants failed to respond to the Summons and Complaint filed on May 15, 2003."[2] Defendants also contend that plaintiff's moving papers do not contain an affidavit of service or any other proof of service.

Defendants contend that Ms. McDaniel was never served with the underlying Complaint, pursuant to CPLR §308. Her only notice of this action was a letter, dated March 2, 2004, that she received from the latest firm to represent Mr. Adams ("March 2, 2004 letter"). The letter indicated that a motion for default judgment was under way in Charleston, South Carolina. In response to the March 2, 2004 letter, Ms. McDaniel sent a letter to the South Carolina court, dated March 19, 2004, explaining that she never received or accepted service in the underlying action, and that she was discharged from the position of executrix more than a year ago ("March 19, 2004 letter"). Ms. McDaniel also included a copy of the Surrogate's Discharge Order with the March 19, 2004 letter. Ms. McDaniel "heard nothing further," defendants contend (cross-motion, ¶ 20). In the absence of proof of proper service, plaintiff's claims must be dismissed.

Third, defendants argue that although CPLR §3213 provides that, upon denial of summary judgment in lieu of a complaint, the moving and answering papers shall be deemed a complaint and answer, it also explicitly permits a court to order "otherwise." Nothing in the statute obliges a court, upon denial of summary judgment, to treat CPLR §3213 motion papers as a complaint and answer, regardless of the circumstances. Citing caselaw, defendants contend that acting within that authority courts have, for example, required the service of pleadings; they have even awarded summary judgment to the defendant. In the instant action, plaintiff failed to

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[2]The complete sentence states: "The Plaintiff asserts that the Defendants failed to respond to the Summons and Complaint filed on May 15, 2003, and personally served on January 28, 2004" (Default Judgment, p. 1).

produce any evidence, documentary or otherwise, that would demonstrate entitlement to summary judgment in lieu of a complaint. However, defendants have offered irrefutable proof that the South Carolina court did not have personal jurisdiction over Ms. McDaniel and that the underlying demand for $28,264.88 is meritless. Thus, this court should exercise its inherent jurisdiction and dismiss plaintiff's claim outright, defendants argue.

Assuming *arguendo* that this Court does not dismiss plaintiff's claim in its entirety, it is clear that the motion should be denied and the moving and answering papers shall be deemed a complaint and answer consistent with CPLR §3213, defendants argue. Citing caselaw, defendants contend that plaintiff has failed to meet the burdensome requirements that would permit this Court to grant plaintiff's motion for summary judgment. Accordingly, defendants' cross-motion should be granted, and plaintiff's motion should be denied in its entirety.

Plaintiff's Opposition[3]

Plaintiff contends that defendants' arguments that the South Carolina court lacked jurisdiction over defendants and that the Complaint lacks merit clearly fail. Plaintiff also provides a "true copy" of the Affidavit of Service for the underlying South Carolina action, signed by Bryan E. McElderry and dated January 28, 2004.

First, plaintiff maintains that Ms. McDaniel was subject to jurisdiction in South Carolina inasmuch as (1) she held an interest in real estate in South Carolina; (2) she performed services and/or conducted business within the state of South Carolina when she administered the Bennett Estate, negotiated with South Carolina residents and delivered Ms. Bennett's ashes to South Carolina; (3) due process was not violated; and (4) she made a voluntary appearance in South

[3] Plaintiff's opposition comprises an affirmation from Ms. Heimerl and a memorandum of law.

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Carolina when she wrote to the South Carolina court to object to the entry of the judgement.

Plaintiff contends that New York law has long held that an executor or executrix stands in the shoes of the decedent. Accordingly, Ms. McDaniel maintained an "interest" in real property, holding a recorded mortgage, by virtue of her position as executrix of the Bennett Estate, in accordance with §36-2-803(A)(5). In addition, as executrix, Ms. McDaniel transacted business in the state of South Carolina by virtue of her administration of the Bennett Estate (including enforcement of the rights granted under the mortgage and settling the open account on the mortgage), pursuant to §36-2-803(A)(1). The Bennett Estate held interests in property in South Carolina, and certain of its beneficiaries reside, or resided, in South Carolina. Defendant even admits that she entered the state of South Carolina to bring the ashes of Ms. Bennett to her heirs (McDaniel Aff. I, ¶ 16), clearly a function in her capacity as executrix. Plaintiff further contends that "§36-2-803 has been interpreted to be a due process analysis."

Here, Ms. McDaniel acknowledges that she received at least two letters threatening litigation prior to the time the South Carolina action was commenced, plaintiff contends. Ms. McDaniel also acknowledged that in response to the plaintiff's request for the entry of a judgment, she wrote to the South Carolina judge presiding over the matter and provided the Court with a copy of the New York Discharge Order, but she did not follow up to ensure that no judgment would be entered, plaintiff contends. By making a voluntary appearance, in the form of a written communication to the Court, to contest the entry of the very judgment she now seeks to invalidate, the defendant consented to the jurisdiction of the South Carolina court.

Plaintiff further contends that Ms. McDaniel was served, in accordance with CPLR §308(2), at her regular place of employment upon a person of suitable age and discretion,

plaintiff argues (see the Affidavit of Service). Plaintiff contends that New York courts have long held that a properly executed affidavit of service gives rise to the presumption of valid service. Had Ms. McDaniel wished to contest personal jurisdiction, she could have done so when she wrote to the Court in opposition to the entry of the judgment.

Second, citing caselaw, plaintiff argues that defendants are barred from making a collateral attack on the merits of the Default Judgment. Only the issue of jurisdiction can be challenged in this Court, plaintiff contends. This tenant of law is equally applicable in a case where the underlying judgment was entered upon default. Accordingly, defendants cannot challenge the merits of plaintiff's action in this Court, but must do so in the South Carolina courts, in accordance with South Carolina's procedural rules.

Defendants' Reply[4]

Defendants contend that it is black letter law that a party aggrieved by a judgment entered in a sister state may challenge the basis of the judgment court's personal jurisdiction. That challenge requires a two-part analysis, requiring a determination whether the sister state's long-arm statute has been complied with, and whether that court's exercise of jurisdiction comports with federal constitutional principles of due process.

Here, neither prong of this test was satisfied, defendants argue.

First, defendants argue that Ms. McDaniel did not hold interest in real property in South Carolina. It is undisputed that on November 26, 2001, Ms. McDaniel executed a release and satisfaction of mortgage, which was forwarded to the lawyers for the Bennett Estate for delivery

[4]Defendants' reply comprises an affirmation by Mr. Rosenweig and a second affidavit by Ms. McDaniel (McDaniel Aff. II).

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to plaintiff ("Release and Satisfaction"). It is further undisputed that Ms. McDaniel was discharged as executrix on or about May 30, 2002, and that after this time she had no authority to act on behalf of the decedent's estate. "It would also seem undisputed by plaintiff that the powers over any residual property interests of the estate were transferred to the residual heirs upon Ms. McDaniel's discharge in 2002," (reply, ¶ 7). Accordingly, at the time plaintiff brought suit against Ms. McDaniel in 2003, Ms. McDaniel's authority and power of the Bennett Estate's property interests had terminated with her discharge by the Surrogate Court as executor, defendants argue. It follows, therefore, that since Ms. McDaniel had no authority over the Bennett Estate's property interests at the time plaintiff brought suit, she had no "interests in real property."

Defendants argue that it is also undisputed that beginning in October 2002, Ms. McDaniel continually advised various counsel for plaintiff that she had been discharged as the executrix since May 2002 and did not have the authority to have any further dealings with the assets of the Bennett Estate. Upon information and belief, Ms. McDaniel also told counsel each time they spoke that the authority was with the residual heirs and that Mr. Adams was personally acquainted with at least two of the heirs. It is further undisputed that despite repeated statements from Ms. McDaniel advising that her service as executrix ended in May 2002, representatives of plaintiff continued to harass Ms. McDaniel with repeated demands to execute a "Lost Mortgage Satisfaction." The harassment took the form of threatened lawsuits, a request for a disciplinary proceeding against Ms. McDaniel, and a lawsuit commenced in South Carolina. It is further undisputed that the South Carolina action was commenced in May 2003, approximately one year after Ms. McDaniel was discharged as the executrix of the Bennett Estate. Ms. McDaniel had no

interest in any South Carolina property at the time the lawsuit was commenced. She was no longer serving as executrix of the Bennett Estate and had no connection with the estate in any capacity after May 30, 2002. Any interest that the Estate may have had in connection with South Carolina real estate was transferred from Ms. McDaniel on November 26, 2001, when the Release and Satisfaction was executed. If any interest or duty continued on the date of her discharge, it transferred to the residual heirs in May 2002. Furthermore, even if Ms. McDaniel had been serving as executrix at the time the lawsuit was commenced, plaintiff is unable to cite any caselaw that suggests that holding a mortgage as a fiduciary equates to personally having an "interest" in real property such that the South Carolina long-arm statute or the due process clause the U.S. Constitution would be satisfied.

Second, defendants argue that Ms. McDaniel did not transact any business in South Carolina. Plaintiff provides no evidence that Ms. McDaniel transacted business in South Carolina when she performed services and/or conducted business within South Carolina in administering the Bennett Estate and negotiating with South Carolina residents. Plaintiff fails to name any of the so-called residents of South Carolina who transacted business with Ms. McDaniel. Ms. McDaniel affirmed that she did not solicit any business or have any dealings with South Carolina residents in connection with her duties as executrix on and before May 30, 2002.

Defendants also argue that Ms. McDaniel's act of bringing the ashes of Mrs. Bennett to South Carolina does not give the South Carolina court personal jurisdiction over her. Ms. McDaniel brought Ms. Bennett's ashes to South Carolina as a final act of friendship, and not as a function as a role as executrix of the Bennett Estate, defendants argue. Upon information and belief, none of Ms. Bennett's family traveled to New York after her death. Ms. McDaniel alone

saw the body from identification through cremation, and the idea that she might have mailed or otherwise shipped the ashes of one of her best friends was abhorrent to her. In addition, plaintiff cites no caselaw suggesting that an executrix of an estate who transports the ashes of a friend to her final resting place is transacting business in South Carolina such that the state will have personal jurisdiction over such a party.

Other than the one visit to South Carolina,[5] Ms. McDaniel did not have any further physical contacts with the state that could be possibly relevant to the Bennett Estate prior to her discharge as executrix, defendants argue. Ms. McDaniel did not solicit any business from anyone in South Carolina in connection with the Bennett Estate or probate process, and she did not transact any business with anyone in South Carolina on behalf of the Bennett Estate after May 2002. Put simply, Ms. McDaniel did not have such minimum contacts with South Carolina such that the state's long-arm statute would be satisfied, defendants contend.

Third, defendants argue that Ms. McDaniel's March 19, 2004 letter to the South Carolina court does not constitute consent to personal jurisdiction. A plain reading of the letter compels the conclusion that Ms. McDaniel did not believe that she was subject to the personal jurisdiction of South Carolina, and she had no intention of answering the subject complaint, defendants argue. Citing South Carolina caselaw, defendants contend that South Carolina courts decide on a case by case basis whether a defendant's act demonstrates an intent to submit to the court's jurisdiction. Upon information and belief, there was no finding that Ms. McDaniel's letter qualifies as an intent to voluntarily submit to the South Carolina court's jurisdiction.

Fourth, defendants argue that the federal due process clause of the U.S. Constitution was

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[5]Ms. McDaniel does not indicate exactly when she made this trip to South Carolina.

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not satisfied. Plaintiff does not cite any facts or caselaw that suggests Ms. McDaniel should be deemed to have minimum contacts with South Carolina, defendants contend. Due process is not satisfied unless a non-domiciliary has "minimum contacts" with the forum state. Ms. McDaniel had absolutely no reason to suspect that she would be sued in South Carolina approximately one year after she was discharged as executrix of the Bennett Estate, defendants maintain. At the time the suit was commenced, Ms. McDaniel did not have an interest in any property in South Carolina, and any such interest that she may have had as executrix of the Bennett Estate was extinguished in 2001. Any rights left in the Estate were transferred to the residual heirs in 2002. As such, Ms. McDaniel had no reasonable expectation of being sued in South Carolina, and the South Carolina judgment is void, as it violated due process.

Fifth, defendants argue that Ms. McDaniel was not properly served with the South Carolina Summons and Complaint. Ms. McDaniel did not receive or accept service in this action prior to the Default Judgment being entered against her in June 2004, defendants contend. The Affidavit of Service submitted by plaintiff may not be used as evidence in support of plaintiff's motion for summary judgment, as it was attached to plaintiff's reply papers, defendants argue. Should the Court consider the Affidavit of Service, in opposition to the defendant's cross-motion for summary judgment, it is of significant import that Ms. McDaniel does not recall ever receiving a copy of the Summons and Complaint and cannot recall anyone authorized to receive service of process at her prior law firm who fits the description given in the affidavit. It also strains credibility that someone authorized to accept service of process would refuse to give her name. As in most major law firms, only the clerks at Ms. McDaniel's firm were authorized to accept service of process, and upon information and belief, none of them were 60-year-old

blonde females, as indicated on the Affidavit of Service. Moreover, Ms. McDaniel's prior law firm was never counsel for the Bennett Estate and, therefore, would have no basis to accept service, defendants argue. Ms. McDaniel also attests that she was not served with plaintiff's Summons and Complaint at any time prior to the entry of the Default Judgment. Ms. McDaniel's affidavit is sufficient to rebut any presumption of proper service in connection with a motion for summary judgment in lieu of complaint, defendants argue.

Analysis

Summary Judgment in Lieu of Complaint

CPLR §3213 provides the following: "When an action is based upon an instrument for the payment of money only *or upon any judgment*, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint" (*emphasis added*). "A plaintiff moving under CPLR §3213 must demonstrate that the claim is based on a judgment or an instrument itself and proof of non-payment according to its terms (*Imbriano v Seaman*, 189 Misc 2d 357, 358-359 [NY Dist Ct 2001], *citing Seaman-Andwall Corporation. v Wright Machine Corporation.*, 31 AD2d 136 [1st Dept 1968]).

A judgment of a sister state is "entitled to full faith and credit if the rendering court had personal jurisdiction, subject matter jurisdiction, and complied with due process requirements" of the U.S. Constitution, *Fiore v Oakwood Plaza Shopping Center, Inc.*, 189 AD2d 703, 704 [1st Dept 1993], *citing Williams v North Carolina*, 317 US 287 [1942]; *see also* US Constitution, article IV, §1). Without such jurisdiction, the judgment is void (54 NY Jur 2d Enforcement of Judgments §353; *Kessel v Triangle Film Corporation*, 205 AD 51, 57 [1st Dept 1923] [holding that the judgment of the rendering court "can have no greater or other force abroad than at home,

and therefore it is always competent to show that it is invalid for want of jurisdiction in the court rendering it"]).

The party challenging an out-of-state judgment must allege facts that satisfy a two-prong test, "requiring a determination whether the sister State's long arm statute has been complied with, and whether that 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, 166 ([1st Dept 2001], *citing City Fed. Sav. Bank v Reckmeyer*, 178 AD2D 503 [2d Dept 1991]). The First Department makes clear that personal jurisdiction over a defendant can be obtained only if "minimum contacts exist between that defendant and the forum state" such that the defendant should reasonably anticipate having to defend an action in that state (*JDC Finance Company I, L.P.* at 166, *citing L&M House of Jeans v Communication Control Sys.*, 88 AD2d 884, 886 [1st Dept 1982], *appeal dismissed* 57 NY2d 956, *citing World-Wide Volkswagen Corporation. v Woodson*, 444 US 286, 291 [1980]). A defendant can raise the defense of lack of personal jurisdiction either during the proceeding or after, when the plaintiff seeks to enforce the judgment (*All Terrain Properties, Inc. v Hoy,* 265 AD2d 87, 91 [1st Dept 2000]). However, collateral attack on the underlying merits of the judgment is precluded (*JDC Finance Company I, L.P.* at 166; *All Terrain Properties, Inc.* at 91).

Here, plaintiff has not established that he should be granted summary judgment in lieu of complaint. Plaintiff included in his moving papers a copy of the Default Judgment against defendants from the South Carolina court in the amount of $28,264.88. However, the record lacks sufficient evidence that the South Carolina court had personal jurisdiction over Ms. McDaniel at the time the Default Judgment was granted.

South Carolina's Long-Arm Statute

South Carolina's long-arm statute gives its courts the power to exercise personal jurisdiction over an out-of-state defendant in a cause action arising from, *inter alia*, the defendant's 1) transaction of any business in the state, or 2) having an interest in real property in the state (see SC Code Ann §36-2-803(A)(1) and (5)). According to South Carolina caselaw, "[t]he determination of whether a court may exercise personal jurisdiction over a nonresident involves a two-step analysis. First, the trial judge must determine that the South Carolina long-arm statute applies. Second, the trial judge must determine that the nonresident's contacts in South Carolina are sufficient to satisfy due process requirements" (*Southern Plastics Co. v Southern Commerce Bank*, 310 SC 256, 259 [1992]). When personal jurisdiction is contested, the plaintiff has the burden of proving that the court has personal jurisdiction "based on specific facts set forth in the record" (*Magic Toyota, Inc. v Southeast Toyota Distributors, Inc.*, 784 F Supp 306, 310 [1992]; *Sheppard v. Jacksonville Marine Supply, Inc.*, 877 F Supp 260, 264 [1995]).

Here, plaintiff has failed to meet his burden of proof.

Interest in Real Property

Plaintiff's argument that "as executrix" of the Bennett Estate, Ms. McDaniel maintained an interest in the real property Mrs. Bennett owned in South Carolina lacks merit. The issue here is whether Ms. McDaniel possessed an interest Ms. Bennett's property *under South Carolina law* at the time plaintiff filed his Complaint, so as to give the South Carolina court personal jurisdiction over Ms. McDaniel under the state's under its long-arm statute. Plaintiff fails to cite any South Carolina caselaw interpreting South Carolina's long-arm statute or the state's Probate

Code in support of his argument.[6] Further, assuming *arguendo* that New York law governs this issue (in that an executor stands in the shoes of the decedent), plaintiff has failed to establish that at the time he filed the underlying Complaint, Ms. McDaniel possessed an interest in Mrs. Bennett's property.

It is undisputed that Ms. McDaniel, a resident of New York, served as the executrix of the Estate of Mrs. Bennett from 1995 until her discharge on May 20, 2002 (see Discharge Order). It also is undisputed that the underlying Complaint was filed in South Carolina on May 15, 2003, a year after Ms. McDaniel was discharged of her duties as executrix (see the Default Order). Such documentary evidence establishes that at the time plaintiff filed his Complaint, Ms. McDaniel was no longer the executrix of the Bennett Estate, and, therefore, could not have an interest in Mrs. Bennett's property, as alleged by plaintiff.

Accordingly, the South Carolina court lacked personal jurisdiction over Ms. McDaniel, pursuant to §36-2-803(A)(1).

Transaction of Business in South Carolina

Second, plaintiff's argument that Ms. McDaniel "transacted business" within the state of South Carolina when she administered the Bennett Estate, negotiated with South Carolina residents and delivered Ms. Bennett's ashes to South Carolina lacks merit. According to the

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[6]Instead, plaintiff cites a 1907 New York case, in which the First Department held that a decedent's personal property, *i.e.* her capital stock and interest in a corporation, passed to the executor of the decedent's estate, and that executor became the legal owner of that property, standing in the decedent's shoes "not only to the possession of the capital stock, but to participate in the dividends and to vote on the stock, and, in brief, the same rights that [the decedent] would have had if living" (*In re Hastings*, 120 AD 756, 759 [1st Dept 1907]). Plaintiff also cites a short New York Surrogate's Court opinion in which the Court held that the "executor of the estate stands in the shoes of the deceased principal and thus has standing to compel an accounting from the attorney-in-fact" (*In re Seeger*, 20 Misc 3d 1120 [A], *1, 2008 WL 2795945, 2008 NY Slip Op 51490[U] [NY Sur 2008]).

[* 19]

South Carolina Supreme Court, the highest court in the state, such alleged activities are not considered "the transaction of business," pursuant to §36-2-803(A)(5). In *White v Stephens* (300 SC 241 [1990]), the plaintiffs filed an action for breach of contract and an accounting of trust funds against Corinne Stephens ("Stephens"), an out-of-state defendant whom the decedent had appointed as her attorney-in-fact. The plaintiffs argued that the South Carolina court obtained personal jurisdiction over Stephens under its long-arm statute. "The trial court noted that Stephens had attended the closing and tended to the sale of [the decedent's] furniture; that the Power of Attorney, executed and recorded in South Carolina, authorized Stephens to transact business in this state and that Stephens had made two trips to South Carolina since 1983" (*White v Stephens* at 262). In reversing the trial court, the Supreme Court held:

> The only actions that could possibly constitute the "transaction of business" in South Carolina for the purposes of the long-arm statute would be the receipt of the Power of Attorney and the making of the alleged oral trust agreement. Although the Power of Attorney was executed and recorded in South Carolina, it was never exercised in this state. . . . Therefore, we find that the mere receipt of a Power of Attorney does not constitute the transaction of business for jurisdictional purposes. In addition, we find that the making of the oral trust agreement could not constitute the transaction of business in South Carolina since it was not alleged that the contract was entered into or that it was to be performed in this state.
> (*id.* at 246)

Ms. McDaniel attests that as executrix of the Bennett Estate, she "did not conduct any business in South Carolina in regard to the Estate, the note or mortgage, or any other part of the probate. My contact with the State since Ms. Bennett's death involved a trip in which I carried her ashes to her children for their disposition." Ms. McDaniel further states that after her discharge as executrix in May 2002 she did not "transact, or have any authority to transact, any business on behalf of the Estate. I never solicited any business from anyone in South Carolina in connection with the Estate or probate process." Plaintiff fails to provide any evidence to raise an issue of fact as to

whether Ms. McDaniel conducted business or performed any services in South Carolina. Plaintiff failed to provide any evidence that Ms. McDaniel negotiated with South Carolina residents.

Therefore, plaintiff has failed to satisfy the first prong of the analysis for personal jurisdiction: He has failed to establish that the South Carolina long-arm statute applies (*Southern Plastics Co. v Southern Commerce Bank*).

Due Process/Sufficient Minimum Contacts

In any event, plaintiff also has failed to satisfy the second prong of the personal jurisdiction analysis that Ms. McDaniel's contacts in South Carolina are sufficient to satisfy due process (*id.*). The South Carolina Supreme Court explains how that state's courts analyze due process in *Cockrell v Hillerich & Bradsby Co.* (363 SC 485 [2005]):

> Due process requires that there exist minimum contacts between the defendant and the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. Burger King Corporation. v. Rudzewicz, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). Further, due process mandates that the defendant possess sufficient minimum contacts with the forum state, so that he could reasonably anticipate being haled into court there. World-Wide Volkswagen Corporation. v. Woodson, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980); Atlantic Soft Drink Co. v. South Carolina Nat'l Bank, 287 S.C. 228, 336 S.E.2d 876 (1985). Without minimum contacts, the court does not have the "power" to adjudicate the action. Southern Plastics Co. v. Southern Commerce Bank, 310 S.C. 256, 260, 423 S.E.2d 128, 131(1992). The court must also find that the exercise of jurisdiction is "reasonable" or "fair." Id.
>
> Under the fairness prong, the court must consider: (1) the duration of the activity of the nonresident within the state; (2) the character and circumstances of the commission of the nonresident's acts; (3) the inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the nonresident; and (4) the State's interest in exercising jurisdiction. Clark v. Key, 304 S.C. 497, 405 S.E.2d 599 (1991). See also Southern Plastics Co., 310 S.C. at 260, 423 S.E.2d at 131.
> (*Cockrell v. Hillerich & Bradsby Co.* at 491-492)

Here, in terms of the duration of Ms. McDaniel's activity in South Carolina, Ms. McDaniel alleges that her one trip to South Carolina was to bring Ms. Bennett's ashes to her

relatives. The Court in *White v Stephens* described the defendant's two visits to South Carolina (for unexplained reasons) as "minimal" in duration (*id.* at 247). Similarly, the Court here finds Ms. McDaniel's activity within South Carolina to be of minimal duration. Second, in terms of the character and circumstances of Ms. McDaniel's visit to South Carolina, this Court finds that Ms. McDaniel merely engaged in an act of kindness in honor of the memory of her deceased friend, Ms. Bennett (see reply, ¶¶ 15-16). She was not acting in her role as executrix of the Bennett Estate (*id.* at ¶ 15). Third, conferring jurisdiction over Ms. McDaniel in South Carolina is unlikely to inconvenience plaintiff, but would inconvenience Ms. McDaniel (*White v Stephens* at 248). According to plaintiff, Ms. Bennett's residual heirs reside or resided in South Carolina (opp., p. 2). Thus, plaintiff can pursue their action regarding the satisfaction of the mortgage documents against the residual heirs within the state. To the contrary, conferring personal jurisdiction over Ms. McDaniel would inconvenience Ms. McDaniel, who would have to travel from New York to South Carolina to defend the underlying claim. In terms of South Carolina's interest in exercising jurisdiction, this Court finds it appropriate to quote the South Carolina Supreme Court: "While South Carolina has an interest in providing redress for its citizens, that interest is diminished when no business was transacted in this state and any contract formed was not to be performed in this State" (*White v Stephens* at 248).

Therefore, plaintiff failed to demonstrate that the South Carolina court obtained personal jurisdiction over Ms. McDaniel via the state's long-arm statute.

Effect of a General Appearance in South Carolina

Finally, plaintiff argues that "by making a voluntary appearance, in the form of a written communication to the Court, to contest the entry of the very judgment she now seeks to

invalidate," Ms. McDaniel consented to the jurisdiction of the South Carolina court. In support of this proposition, plaintiff cites *Stearns Bank National Association v Glenwood Falls, L.P* (373 SC 331[2007]), which held that the defendant limited partnership made a voluntary appearance, giving the court jurisdiction, when its counsel sent a letter to plaintiff's counsel. However, not only is *Stearns Bank* distinguishable from the case at bar, South Carolina caselaw also makes clear that in determining whether a defendant has made a general appearance[7] granting the Court personal jurisdiction over her, "the inquiry is whether [the defendant's] conduct demonstrated an intent to submit to the court's jurisdiction" (*Stearns Bank* at 340).

The Court in *Stearns Bank* explained: "Although a court commonly obtains personal jurisdiction by the service of the summons and complaint, it may also obtain personal jurisdiction if the defendant makes a voluntary appearance" (*id.* at 337, *citing* Rule 4(d) of the South Carolina Rules of Civil Procedure ["Voluntary appearance by defendant is equivalent to personal service"]). South Carolina courts construe the word "appearance" broadly.

> "The term 'appearance' is used particularly to signify or designate the overt act by which one against whom suit has been commenced submits himself to the court's jurisdiction." 4 Am.Jur.2d Appearance § 1 (1995). "An appearance may be expressly made by formal written or oral declaration, or record entry, or it may be implied from some act done with the intention of appearing and submitting to the court's jurisdiction." Id. No specific act constitutes an appearance, as "a defendant may choose to come into court with trumpets, or quietly by the back door." Stephens v. Ringling, 102 S.C. 333, 342, 86 S.E. 683, 685 (1915). Accordingly, courts decide on a case by case basis whether a defendant's act demonstrates an intent to submit to the court's jurisdiction. (*Stearns Bank* at 338)

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[7] According to South Carolina law, a "general appearance" is different from a "special appearance," in which a defendant appears in court solely to contest jurisdiction (*see Connell v Connell*, 249 SC 162, 166 [1967]["Whether an appearance is general or special is determined by the relief sought, and if a defendant, by his appearance, insists only on objection that he is not in court for want of jurisdiction over his person, and confines his appearance for that purpose only, then he has made a special appearance, but if he raises any other question or asks any relief which can only be granted on the hypothesis that the court has jurisdiction of his person, then he has made a general appearance. If a party wishes to insist upon the objection that he is not in court, he must keep out for all other purposes except to make that objection."]).

In addition, a "general appearance constitutes a voluntary submission to the jurisdiction of the court and waives any defects and irregularities in the service of process" *(Stickland v Consolidated Energy Products Co.*, 274 SC 554, 555 [1980]).

South Carolina's Supreme Court has construed various types of conduct as a general appearance conferring personal jurisdiction over a defendant. For example, in *Petty v Weyerhaeuser Co.* (272 SC 282 [1979]), the South Carolina Supreme Court held the defendant had made a general appearance after the defendant's counsel wrote a letter to the plaintiff's counsel stating that the letter should be considered an informal notice of a personal appearance in the case[8]. In finding that the letter "manifests [defendant's] intent to submit to the jurisdiction of the court," the Court in *Stearns Bank* stated:

> In the November 9 letter, [defendant's counsel] not only announces his representation of [the defendant] without reservation but also expresses an intent to reach the merits of the case, especially when he writes "for DC Development, Inc., to recover any money in this action, my opinion is that Glenwood Falls, LP needs to assert a claim over and against the architects and engineers who designed this project." See Jenkinson v. Murrow Bros. Seed Co., 272 S.C. 148, 154, 249 S.E.2d 780, 783 (1978) (Ness, J., concurring) ("In order to establish waiver of the right to contest jurisdiction, *it is only necessary that a party, by its conduct, evince an intent to proceed to the merits of the case*.").
> (*Stearns Bank* at 341) (*emphasis added*)

The case of *Boland v S.C. Pub. Serv. Auth.* (281 SC 293 [1984]) distinguished *Petty* in holding that a letter from a corporate defendant's counsel to the attorney for the plaintiff estate did not

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[8]The Supreme Court in *Stearns Bank* lists other examples: "On many occasions our supreme court has found that a party can make a voluntary appearance without formally announcing it. *See, e.g., Triangle Auto Spring Co. v. Gromlovitz*, 270 S.C. 386, 389-90 n. 1, 242 S.E.2d 430, 431 n. 1 (1978) (holding that consenting to a confession of judgment constitutes a voluntary appearance); *Connell v. Connell*, 249 S.C. 162, 167, 153 S.E.2d 396, 399 (1967) (holding that raising the defense of res judicata constitutes a voluntary appearance); *Southeastern Equip. Co. v. One 1954 Autocar Diesel Tractor*, 234 S.C. 213, 218, 107 S.E.2d 340, 342 (1959) (holding that filing a motion to set aside an attachment constitutes a voluntary appearance)" (*id.* at 340).

constitute a general appearance:

> Apart from the fact that an agreement was actually reached in Petty, Petty involved a series of communications by telephone and letter between the attorneys for each side. Here, there was only the single letter prior to the default judgment being obtained. In that letter, McVety requested time for an attorney to be engaged. In Petty, one letter specifically requested that it be considered an "informal notice of appearance" and that settlement possibilities be explored. Based upon the facts before us, we cannot say that the letter . . . constituted a general appearance as a matter of law.
> (*id.* at 297)

The Court in *Boland* noted that the defendant made no other communication to plaintiff even though the plaintiff "mailed two letters notifying it of a hearing to assess damages. [The defendant's] failure to communicate and its special appearance of April 2 [to Contest the Court's jurisdiction] belie its position now that the November 9 letter was intended as a general appearance" (*Boland* at 146).

Here, the record does not contain sufficient evidence that Ms. McDaniel's March 19, 2004 letter to the South Carolina court evinced her intent to proceed to the merits of plaintiff's case against her, so as to give the South Carolina court personal jurisdiction over her. First and significantly, Ms. McDaniel's May 19, 2004 letter was addressed solely to Julie J. Armstrong ("Ms. Armstrong"), Charleston County (South Carolina) Clerk of Court. The record contains no evidence that Ms. McDaniel communicated with plaintiff's counsel about any litigation against her. Plaintiff states in his opposition that Ms. McDaniel "acknowledges that she received at least two letters threatening litigation *prior to the time South Carolina action was commenced* [*sic*]" (opp., p. 2) *(emphasis added)*. Defendants' cross-motion contains copies of two letters from law firms that formerly represented plaintiff: the October 2002 letter from Carol H. Gunter, of the law firm Mays, Foster & Gunter, L.L.P., and the January 2003 letter from Elizabeth Van Doren Gray, of the law firm Sowell, Gray, Stepp & Laffitte, LLC. Neither of the letters concerned any

litigation *commenced* against Ms. McDaniel (*cf. Stearns Bank*, *Petty v Weyerhaeuser Co.*; *Boland v S.C. Pub. Serv. Auth.).* Instead, the letters contained demands for mortgage-satisfaction papers, and threatened litigation if the papers were not forthcoming. Ms. McDaniel responded to these letters by informing them that she no longer was executrix of the Bennett Estate and directing the attorneys to consult the residual heirs to the Estate (McDaniel Aff. I, ¶¶ 10-11).

Second, the letter Ms. McDaniel sent to the South Carolina court does not indicate any intent on her part to proceed on the merits of the case. Instead, she writes to inform the court that a letter dated March 2, 2004 was sent to her office informing her that plaintiff had moved for a Motion for Default Judgment and that she was not a party to the action. The contents of the March 19, 2004 letter to Ms. Armstrong are as follows:

> The enclosed letter was sent to my office last week. I feel it necessary to write to you because [plaintiff's] action appears to be a fraud on your court.
>
> First, my law firm did not receive or accept service in this action. We are a major national law firm. No one here accepts service except our docket clerks. They advise [*sic*] me that they did not receive service, and I trust them completely. It appears that this is a case of, at best, sewer service.
>
> Second and more importantly, the Estate of Mary Anne Swint Bennett was wound up and I was discharged from the position of executrix over a year ago. The New York Surrogate's Court dealt in its orders, the accounting and the discharge of the estate with the issues, relating to the heirs who were involved with Huel Adams and his mortgage. We fully complied with the instructions of the Surrogate. We have no further obligation or power in regard to the Estate, and I am not the Executrix.
>
> We have made a point of delivering a letter in the form attached to each person attempting to serve papers on the discharged Estate. There can be no question that Huel Adams or his attorneys are innocently mistaken in their filings in your court. Huel Adams did not appear at any point in the more than six years of proceedings involving the Estate before the New York Surrogate. The lawyers filing this purported action are fully aware of the facts and are misrepresenting the facts to you and the court.
>
> The four residual legatees of the Estate are each South Carolina residents. Huel Adams appears to have acted at the direction or in communication with more than one of the

> heirs, and is presumably able to locate all of them quite easily.
> (March 19, 2004 letter)

Nothing in Ms. McDaniel's letter indicates her intent to submit to the South Carolina court's jurisdiction (*cf. Stearns Bank; Petty*). Further, nothing in the letter indicates Ms. McDaniel's intent to proceed on the merits of plaintiff's underlying Complaint (*see Jenkinson v Murrow Bros. Seed Co., Inc.*, 272 SC 148, 154 [1978], *quoting Connell v Connell*, 249 SC 162, 166 [1967] ["[I]f a defendant, by his appearance, insists only on objection that he is not in court for want of jurisdiction over his person, and confines his appearance for that purpose only, then he has made a special appearance, but if he raises any other question or asks any relief which can only be granted on the hypothesis that the court has jurisdiction of his person, then he has made a general appearance"]).

As plaintiff has failed to demonstrate that Ms. McDaniel's letter to the South Carolina court was a general appearance, plaintiff has failed to establish that the South Carolina court had personal jurisdiction over her.

Service of the Summons and Complaint

Contrary to defendants' contention, the Court may consider the Affidavit of Service as evidence. In *Ritt v Lenox Hill Hosp.* (182 AD2D 560 [1st Dept 1992]), the First Department states: "The function of a reply affidavit is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of the motion." However, here plaintiff does not provide a copy of the Affidavit of Service to introduce any new arguments. He does so to defend against an argument that *defendants raised* in their cross-motion. In any event, said affidavit fails to establish that the service of process upon Ms. McDaniel was proper.

Plaintiff contends that Ms. McDaniel was properly served with the South Carolina Summons and Complaint "in accordance with CPLR §308(2)." However, once again, plaintiff cites a New York statute and New York caselaw in support of his proposition.[9] In order to determine whether Ms. McDaniel was properly served, this Court has to examine South Carolina law.

According to Rule 4(d)(1) of the South Carolina Rules of Civil Procedure ("SCRCP 4(d)(1)"), personal service on an individual shall be made "by delivering a copy of the summons and complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by delivering a copy to an agent authorized by appointment or by law to receive service of process." According to South Carolina caselaw, "Rule 4, SCRCP serves at least two purposes. It confers personal jurisdiction on the court and assures the defendant of reasonable notice of the action" *(Roche v Young Bros., Inc. of Florence*, 318 SC 207, 209-210 [1995]). The Supreme Court in *Roche* goes on to explain: "We have never required exacting compliance with the rules to effect service of process. See Foster v. Crawford, 57 S.C. 551, 36 S.E. 5 (1900) (when officer's return defective as to time and place of service, it can be amended to state facts); Saunders v. Bobo, 2 Bailey 492 (1831) (sheriff's incomplete return that was not sworn to may be amended); Miller v. Hall, 1 Speers 1 (1842). Rather, we inquire whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings" (*id.* at 210).

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[9] Plaintiff cites *Engel v Lichterman* (62 NY2d 943, 944 -945 [1984] ["A properly executed affidavit of service raises a presumption that a proper mailing occurred"]).

In the case at bar, the Affidavit of Service states in relevant part that Bryan McEldererry served copies of the Summons and Complaint on Ms. McDaniel by *delivering them to a co-worker* of Ms. McDaniel, "a person of suitable age and discretion," *at Ms. McDaniel's place of business* in New York. There is no indication that service was made to Ms. McDaniel personally, or that copies were left with someone of suitable age and discretion residing at Ms. McDaniel's "dwelling house or usual place or abode," or that copies were delivered to "an agent authorized by appointment or by law to receive service of process," pursuant to SCRCP 4(d)(1). Further, plaintiff has failed to indicate that it even considered South Carolina's rules for service of process or attempted to comply with them. Therefore, plaintiff has failed to demonstrate that the South Carolina court had personal jurisdiction over Ms. McDaniel. Accordingly, his motion for summary judgment in lieu of complaint is denied.

Defendants' Cross-Motion

With respect to enforcing a judgment from a sister state, this Court can only examine whether the sister state had personal jurisdiction over the defendant. New York Courts are precluded from examining the underlying merits of the case (*All Terrain Properties, Inc.*, at 91, *citing Fiore v Oakwood Plaza Shopping Ctr.*, at 577). Thus, dismissal of the underlying South Carolina action on the ground that the proof establishes that the underlying demand for $28,264.88 is meritless cannot be granted.

However, in light of this Court's finding that the South Carolina court lacked personal jurisdiction over Ms. McDaniel, and that proper service of process was not effectuated upon Ms. McDaniel, dismissal of the instant action on this latter ground is warranted. "Nothing in the statute, of course, obliges a court, upon denial of summary judgment, to treat CPLR 3213 motion

papers as a complaint and answer, regardless of the circumstances. Although the statute provides that, upon denial of summary judgment, the moving and answering papers shall be deemed a complaint and answer, it also explicitly permits a court to order 'otherwise'" (*see Schulz v Barrows*, 94 NY2d 624 [2000] [finding that Supreme Court did not abuse its to dismiss the action after concluding that Texas lacked jurisdiction over defendant, rendering the default judgment unenforceable in New York]). Since the Default Judgment is unenforceable in New York, the action is hereby dismissed.

Conclusion

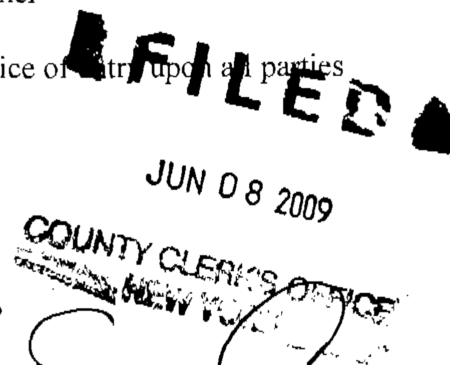
Based on the foregoing, it is hereby

ORDERED that the motion by plaintiff Harold H. Adams, Jr., as trustee of the Huel D. Adams, Jr. Trust for summary judgment in lieu of complaint, pursuant to CPLR §3213, against defendants K.C. McDaniel, in her capacity as executrix of the Estate of Mary Anne Swint Bennett, and the Estate of Mary Anne Swint Bennett, is denied; and it is further

ORDERED that defendants' cross-motion for summary judgment dismissing plaintiff's Complaint, pursuant to CPLR §3212, is granted; and it is further

ORDERED that the action is hereby dismissed; and it is further

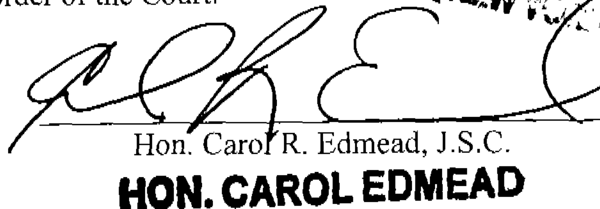
ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.



The Clerk may enter judgment accordingly.

That constitutes the decision and order of the Court.

Dated: 6/3/09



Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD