

Kitchens Intl., Inc. v Evans Cabinet Corp., Ltd.

2009 NY Slip Op 33032(U)

December 21, 2009

Supreme Court, New York County

Docket Number: 102466/2009

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 7

KITCHENS INTERNATIONAL, INC.,
Plaintiff,

INDEX NO. 102466/09

- v -

MOTION DATE 11/6/09

MOTION SEQ. NO. 001

EVANS CABINET CORP., LTD.,
Defendant.

MOTION CAL. NO. _____

The following papers, numbered 1 to 12 were read on this motion for summary judgment in lieu of complaint

	PAPERS NUMBERED
Notice of Motion— Affidavit — Exhibits A-G	<u>1-2</u>
Notice of Cross Motion—Affidavit — Affirmation— Exhibit A	<u>3-5</u>
Affidavit in Further Support — Exhibit A	<u>6</u>
Affidavit—Affirmation	<u>7-8</u>
Affidavit in Further Support and in Opposition to Cross Motion — Exhibit A	<u>9</u>
Affidavit—Exhibit A; Affirmation— Exhibit A	<u>10-11</u>
Affidavit in Further Support and in Opposition to Cross Motion — Exhibits A-J	<u>12</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is hereby ordered that plaintiff's motion for summary judgment in lieu of complaint and defendant's cross motion to dismiss is decided in accordance with the annexed memorandum decision and order.

Settle order

MICHAEL D. STALLMAN
J.S.C.

[Signature]
J.S.C.

Dated: 12/21/09
New York, New York

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):

12-30-09

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7**

-----X
KITCHENS INTERNATIONAL, INC.,

Plaintiff,

Index No. 102466/2009

- against -

EVANS CABINET CORP., LTD.,

Decision

Defendant.

-----X

HON. MICHAEL D. STALLMAN, J.:

Plaintiff Kitchens International, Inc. (Kitchens), which claims to be a Louisiana corporation with a principal office located in Metairie, Louisiana, moves for summary judgment in lieu of complaint against defendant Evans Cabinet Corp., Ltd. (Evans Cabinet), an alleged Georgia Corporation with a principal place in Dublin, Georgia, based on two default judgments entered against Evans Cabinet granted in Canada for \$149,354.74 CAD and \$486,751.52 CAD. Evans Cabinet cross-moves to dismiss the action pursuant to Business Corporation Law § 1312.

Evans Cabinet previously commenced an action against Kitchens in the United States District Court in the District of Massachusetts. By decision dated November 4, 2008, Judge Tauro granted summary judgment dismissing the lawsuit on the ground of res judicata, based on first default judgment obtained against Evans Cabinet for \$149,354.74 CAD.

DISCUSSION

Business Corporation Law § 1312 bars a foreign corporation doing business in New York from maintaining an action in New York unless it has been authorized to do business in New York, and has paid all fees and taxes imposed by law. In support of its contention that Kitchens is doing

business in New York, Evans Cabinet's President and Chief Executive Officer, Mark Trexler, contends that, "it is well-known throughout our industry, that the plaintiff cannot deny that it acted as an agent for Crotone, Inc., a Canadian Company, in supplying the New York City Housing Authority (located, obviously, in New York City), with cabinets for which work it, Kitchens International, was paid and received commissions." Evans Cabinet points out that, in Kitchens's moving papers, counsel states, "Kitchens is in the business of selling, distributing, and supplying kitchen cabinetry . . . throughout Canada and the United States." Shieff Aff. ¶ 3. Consequently, Evans Cabinet argues that, at the very least, there is an issue of fact that requires a hearing as to whether Kitchens is doing business in the State of New York. Kitchens maintains that another entity, Brokerwood Products International, has an exclusive contract with Crotone to sell in New York, and submits a copy of a contract between Boiserie Crotone Inc. and Brokerwood Products International (Canada), Inc. Shieff Aff. in further support (9/16/09), Ex A.

"Since Business Corporation Law § 1312 constitutes a statutory barrier to the foreign corporation's right to bring suit, the party seeking to impose the barrier, in order to rebut the presumption that the corporation does business in its state of incorporation rather than New York, has the burden of proving that the foreign corporation's activity in New York is systematic and regular. The burden of showing 'doing business' is therefore a heavy one since a lesser showing might infringe on Congress's constitutional power to regulate interstate commerce."

Airtran New York, LLC v Midwest Air Group, Inc., 46 AD3d 208, 214 (1st Dept 2007)(internal citations omitted). Here, Evans Cabinet has not its heavy burden of demonstrating even a colorable issue of fact as to whether Kitchens does business in New York. Evans Cabinet's contention that Kitchens does business with the New York City Housing Authority appears not to be based on any personal knowledge. In any event, doing business with the New York City Housing Authority does not establish that Kitchens was doing business in the state itself. To direct a hearing based on the

speculation of doing business in New York would impose too great a burden on interstate commerce. Therefore, Evans Cabinet's cross motion to dismiss the action as barred by Business Corporation Law § 1312 is denied.

"CPLR article 53 accords recognition by this state to a final foreign country judgment, which grants or denies the payment of a sum of money provided the foreign court had personal jurisdiction over the judgment debtor defendant and the judgment was rendered by a system that provides an impartial tribunal that utilizes procedures compatible with due process. As the proponent, plaintiff bears the burden of making a prima facie showing that the mandatory grounds for nonrecognition--i.e., [lack of] due process and personal jurisdiction--do not exist and that CPLR article 53 requirements are satisfied."

Wimmer Canada, Inc. v Abele Tractor & Equipment Co., Inc., 299 AD2d 47, 48-49 (3d Dept 2002).

At issue here is whether the foreign court "did not have personal jurisdiction over the defendant."

CPLR 5304 (b) (2). According to Mark Trexler, the President and Chief Executive Officer of Evans Cabinet, Evans Cabinet has never maintained any officer anywhere in Canada, has no employees located or working anywhere in Canada, and has never conducted business in Canada. Trexler Aff. (10/7/09) ¶¶ 8-10. Trexler claims that none of the construction projects were located in Canada, and that Evans Cabinet never shipped cabinets or other goods for sale into Canada pursuant to its contract with Kitchens. *Id.* ¶ 14.

"CPLR 5305(a) sets forth a nonexclusive list of bases which are deemed adequate for the foreign court's exercise of in personam jurisdiction over the judgment debtor. While clearly none of the bases listed in CPLR 5305(a) are applicable here, subdivision (b) contains a broad catchall provision which provides that '[t]he courts of this state may recognize other bases of jurisdiction' (CPLR 5305[b]). Although this Court has not previously had occasion to apply this provision, we concur that as a general rule, it will be 'appropriate for New York to recognize for a foreign judgment, under * * * CPLR 5305 [(b)], any jurisdictional basis it recognizes in its internal law.'"

Wimmer Canada, Inc., 299 AD2d at 49.

Here, the District Court has already determined that Canada properly exercised personal jurisdiction over Evans Cabinet, when it granted Kitchen's motion for summary judgment dismissing Evans Cabinet's lawsuit on the ground of res judicata. The District Court found, in pertinent part:

"Plaintiff had several contacts with Quebec. All the 'orders, communications, payments, correspondence and dealings' between Parties occurred through Defendant's [Kitchens's] Montreal Office. Moreover, Parties agreed to create a product showroom at Defendant's Montreal office which was ultimately constructed. The purpose of this showroom was to display Plaintiff's [Evans Cabinet's] products to potential customers and sales agents from Canada and New England. Because under either Quebec or Massachusetts law the Quebec Superior court properly exercised personal jurisdiction over Plaintiff, Plaintiff's argument that the Quebec default judgment is not conclusive fails."

Shiell Aff. (2/18/09), Ex F, at 9 (footnotes omitted). Thus, Evans Cabinet is collaterally estopped from raising the issue of whether the Quebec Superior Court lack jurisdiction over it when it rendered the first default judgment. Although the second default judgment had not been granted when the District Court rendered this decision, the arguments that Evans Cabinet raises as to jurisdiction are the same arguments that the District Court rejected.

As in the District Court action, Evans Cabinet's CEO denies here having knowledge of a showroom in Montreal, and claims that Evans Cabinet never requested Kitchens, nor contracted with Kitchens to design or construct the showroom. Trexler Aff. (10/7/09) ¶¶ 24-26. The District Court specifically rejected this argument, after having given the parties an opportunity to conduct discovery on the jurisdiction issue:

"Plaintiff produced an affidavit from its CEO, Mark Trexler, in which Mr. Trexler stated that Plaintiff was not aware of the Montreal showroom. Trexler Supplemental Aff. 2. But Defendant has produced overwhelming evidence that Plaintiff was both aware of the showroom and authorized its construction . . . Defendant offered a convincing explanation for Mr. Trexler's lack of knowledge of the showroom: with respect to the showroom, Defendant dealt with Paul Gatti, not Mr. Trexler. Shiell Rebuttal Aff. 2."

Shiell Aff. (2/18/09), Ex F, at 9 n 38.

Finally, Evans Cabinet argues that Kitchens may not obtain recognition of the Canadian judgments because the judgments should have been asserted as compulsory counterclaims in the District Court action in Massachusetts. This argument lacks merit. Even if Kitchens had sought affirmatively relief based on the Canadian judgments (instead of asserting one of the judgments as the defense of res judicata), Kitchens would only have obtained recognition of the Canadian judgment in Massachusetts, not New York.

Therefore, Kitchens's motion for summary judgment in lieu of complaint is granted.

CONCLUSION

Kitchens's motion for summary judgment in lieu of complaint is granted. Settle order on notice. The order must provide for entry of the judgment in US dollars, converted from the judgments in Canadian dollars using currency rates as of the close of business of the date of this decision. The settled order must be accompanied by proof of such conversion rates.

Dated: December 21, 2009
New York, New York

ENTER:



J.S.C.