

**Mt. Prospect Manor Condominium, Assn., Inc. v
Fisher**

2009 NY Slip Op 33320(U)

October 27, 2009

Sup Ct, NY County

Docket Number: 111834/2009

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD
Justice

PART 61

MT. PROSPECT MANOR CONDOMINIUM,
ASSOCIATION, INC.,

Plaintiff,

INDEX NO. 111834/09

-against-

MOTION DATE Sept. 30, 2009

MICHELLE FISHER,

MOTION SEQ. NO. 001

Defendant.

MOTION CAL. NO. 14

RECEIVED
NOV 06 2009

The following papers, numbered 1 to 2 were read on 11/06/2009 for summary judgment in lieu of complaint

MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1-2

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, plaintiff's motion for an order pursuant to CPLR § 3213 for summary judgment in lieu of complaint against defendant Michelle Fisher to enforce a New Jersey judgment is decided in accordance with the accompanying decision and order.

FILED
Nov 06 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: October 27, 2009

O. P. Sherwood
O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

CTSD

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61**

-----X
**MT. PROSPECT MANOR CONDOMINIUM,
ASSOCIATION, INC.,**

Plaintiff,

-against-

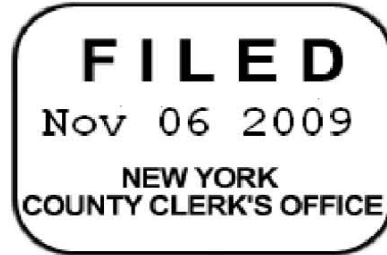
MICHELLE FISHER,

Defendant.
-----X

O. PETER SHERWOOD, J.:

**DECISION AND
ORDER**

Index No. 111834/2009



Plaintiff Mt. Prospect Manor Condominium Association, Inc. ("plaintiff") moves for summary judgment in lieu of complaint to enforce a judgment entered on default in favor of plaintiff against the defendant Michelle Fisher ("Fisher" or "defendant") in the State of New Jersey in the principal sum of \$24,197.27. A copy of the judgment is attached to the motion papers as Exhibit "A".

On or about October 29, 2007, plaintiff commenced an action against Fisher in the Superior Court of New Jersey, Essex County, seeking to recover the sum of \$14,979.95 representing outstanding common charges related to defendant's ownership of apartment #2D in a condominium complex located at 375 Mount Prospect Avenue, Newark, New Jersey, together with late fees, collection costs, interest and attorney's fees. Fisher did not appear in the New Jersey proceeding, with the result that judgment in the principal amount of \$24,197.27, together with costs was entered on default in favor of plaintiff and against Fisher on March 14, 2008.

Plaintiff then commenced this action by summons and notice of motion filed August 19, 2009, for summary judgment in lieu of complaint to docket the New Jersey judgment as against defendant Fisher in New York, plus post-judgment interest, attorney's fees, and other costs incurred in this proceeding.

A default judgment rendered by a court of a sister state is conclusive on the merits and is entitled to full faith and credit in New York unless it is shown that the judgment court lacked personal jurisdiction over the defendant judgment debtor (*see, Cadle Co. v Tri-Angle Assocs.*, 18 AD3d 100, 103 [1st Dept 2005; *All Terrain Props. v Hoy*, 265 AD2d 87, 91 [1st Dept 2000]). In instances where jurisdiction over the person has not been obtained, the ensuing judgment is ineffective and voidable unless the defendant waives the issue (*id.*). Where the sister state's

jurisdiction is challenged by a defendant, the law of that state, even if at odds with New York law, determines whether jurisdiction was properly obtained (*see, China Express v Volpi & Son Machine Corp.*, 126 AD2d 239, 242 [1st Dept 1987]; *Augusta Lumber & Supply v Herbert H. Sabbeth Corp.*, 101 AD2d 846 [2d Dept 1984]). Plaintiff has the burden of proving that jurisdiction was obtained (*see, Cadle Co. v Tri-Angle Assocs., supra*).

In the instant case, the record is insufficient to establish that jurisdiction over the person of defendant Fisher was acquired by the New Jersey court, and that the New Jersey judgment may be enforced against her. Plaintiff has submitted no affidavit of service as to service of the summons and complaint in the New Jersey action. Thus, although the fact that the out-of-state judgment was entered on default does not affect its adequacy as a ground for relief pursuant to CPLR § 3213, the court does not find the evidence submitted sufficient to demonstrate that the New Jersey court had personal jurisdiction over Fisher (*see, Westland Garden State Plaza, LP v Ezat, Inc.*, 25 AD3d 516 [1st Dept 2006]). Accordingly, the New Jersey judgment is not entitled to full faith and credit, the motion for summary judgment in lieu of complaint must be denied and the action dismissed (*see, Desai v Sterling Fibers*, 288 AD2d 428 [2d Dept 2001]; *GNOC Corp. v Cappelletti*, 208 AD2d 498 [2d Dept 1994]). This may seem to be a harsh result in light of the fact that defendant Fisher defaulted in both this proceeding as well as the New Jersey action. Nevertheless, the fact of a party's default does not warrant the court abdicating its responsibility to protect the due process rights of litigants.

In addition, plaintiff submits no evidence that it is entitled to an award of attorney's fees in collecting upon the debt. It is well settled that civil litigants bear the cost of their own attorney's fees in the absence of contractual or statutory provision or stipulation expressly authorizing such recovery (*see, Matter of Green [Potter]*, 51 NY2d 627, 629-630 [1980]; *Matter of Urbach*, 252 AD2d 318 [3d Dept. 1999]; *Wu v Kao*, 194 AD2d 666 [2d Dept. 1993]). There is nothing in this record that supports the contention in the New Jersey complaint that the plaintiff's master deed and/or by-laws that plaintiff is entitled to an award of attorney's fees and costs nor does plaintiff direct the Court to any statutory provision that would allow for an award of attorney's fees under these circumstances.

Based upon the foregoing discussion, it is

ORDERED, that plaintiff's motion for summary judgment in lieu of complaint against defendant Michelle Fisher on its claim for enforcement of a New Jersey judgment it obtained against

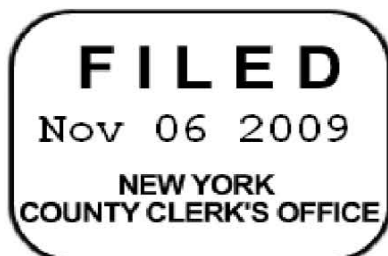
defendant Fisher in the principal sum of \$24,197.27 is denied without prejudice upon default and the action is dismissed; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED:

10/27/09



ENTER,

O. P. Sherwood

O. PETER SHERWOOD
J.S.C.