

Knits v DVII Indus., Inc.
2011 NY Slip Op 31349(U)
May 19, 2011
Supreme Court, New York County
Docket Number: 603242/2009
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:

~~DAVID B. SOLOMON~~

PART 55

Index Number : 603242/2009

KNITS, HARTLEY

INDEX NO. _____

vs

DVH INDUSTRIES INC

MOTION DATE 2/17/11

Sequence Number : 002

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3
4-7
8-9, 11-11

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

is decided by the amended Memorandum Decision and order.

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

FILED

MAY 20 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 5/19/11

[Signature]

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: PART 55

-----X
HARTLEY KNITS

Index No. 603242/2009

Plaintiff,

DECISION & ORDER

-against-

DVH INDUSTRIES, INC.,

FILED

Defendants.

MAY 20 2011

-----X

SOLOMON, J.:

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Hartley Knits (Hartley), partnership, seeks recognition of a foreign money judgment (CPLR Article 53), entered on default by the High Court of Delhi at New Delhi, India. The Delhi Court awarded Hartley the Indian Rupee (Rs.) equivalent of \$127,085.50, plus interest, as against defendant DVH Industries, Inc. (DVH), a New Jersey corporation, and non-party Coronet Group, Inc.

Hartley commenced this action by summary judgment in lieu of complaint (CPLR 3213). The motion was denied on the ground that the submissions did not conclusively establish that the Indian decision was final, due to language in it that DVH might be able to recapture its funds (Order, dated January 11, 2011, attached to Affirmation in Opposition, Ex. C). The motion was deemed a complaint and DVH answered. Hartley filed a note of issue and now moves for summary judgment on the ground that the Indian decision is a final judgment. DVH opposes the motion on the ground that the Indian court never determined, and did not

have, personal jurisdiction over DVH, and that an appeal is pending in India on that ground. By order to show cause, it moves for a stay pending the outcome of the Indian appeal under CPLR 5306.

1. The Underlying Action

The Indian action was initiated by complaint on February 29, 2000. Hartley alleged that DVH and other companies failed to pay for goods valued at \$127,085.50. DVH obtained Indian counsel and filed an answer. On September 4, 2002, the Indian court issued a partial judgment in favor of Hartley and against DVH in the amount of \$76,928.48. The action continued as to the balance of the amount sought. On September 20, 2005, the action was dismissed due to Hartley's failure to appear on three consecutive occasions (Opposition, Ex. K). DVH also failed to appear on those occasions. The case was restored on December 8, 2005 (Opposition, Ex. L), and on July 31, 2006, Hartley was directed to issue "fresh summons" to DVH (Opposition, Ex. M, ¶ 40). Hartley served DVH in New Jersey (Opposition, Ex. N) but DVH did not appear, and Hartley obtained a default judgment against it on October 12, 2007 (Opposition, Ex. O). The Indian court issued a decision on December 10, 2007 for \$127,085.50, plus 7% interest from the date of commencement of the lawsuit, and court costs in the amount of Rs. 51,416 (Singh Affidavit, Ex. A); on the same date, a "decree sheet" was filed (Griffing

Supplemental Affidavit, Ex. A).

On October 30, 2008, DVH appealed on the ground that it never received the "fresh summons." It posted a bond, in Rs., equivalent to \$76,928.48. DVH lost (Griffing Affidavit, Ex. C, p. 5-6), and the bonded amount was released to Hartley (Goyal Affidavit, attached to Griffing Affidavit).¹ DVH then initiated a special proceeding appeal which also was denied (Griffing Affidavit, Ex. D). Another appeal was taken challenging service (Appellant's moving papers, attached to Opposition, Ex. G; p. 8 [unpaginated]). Leave to appeal was granted on November 29, 2010 and it remains pending (Siegal Supplemental Affirmation, Ex. A).

2. Recognition and Enforcement

CPLR Article 53 applies "to any foreign country judgment which is final, conclusive and enforceable where rendered, even though an appeal therefrom is pending or it is subject to appeal" (CPLR 5302). A foreign country judgment is defined as one that is "conclusive between the parties to the extent that it grants or denies recovery of a sum of money" (CPLR 5303). However, a foreign judgment will not be recognized where the foreign court did not have personal jurisdiction over the defendant (CPLR 5304[a][2]).

¹ In response to the court's inquiry, Hartley submits information that it was not required to post any bond to secure the release of DVH's bond, despite certain language in the decision that appeared to require an undertaking (Information Request Response, attached to Griffing Affidavit, Ex. G).

Hartley argues that the judgment is final because it is for a fixed sum, and is conclusive and enforceable in India. DVH counters that: (1) a "decree sheet" is needed; (2) the Indian court lacked personal jurisdiction over it; and (3) the pending appeal, under Indian law, constitutes a continuation of suit, making the judgment non-final.

First, the December 10, 2007 decision (attached to Singh Affidavit, Ex. A) states that Hartley is "entitled to the recovery of US\$ 127,085.50 equivalent to Indian Rupees . . . [plus] 7 per cent per annum simple interest . . . Decree sheet be drawn up accordingly" (Id., p. 7-8). A decree sheet was made on the same date as the decision (attached to Griffing Supplemental Affirmation, Ex. A). Accordingly, this argument is unpersuasive.

Next, a foreign court must have demonstrable personal jurisdiction over a defendant before New York will enforce that court's judgments (CPLR 5305). As noted above, DVH appealed the 2007 default decision on the ground it never received service with regard to the renewed action. The High Court of Delhi reviewed the record, and held:

The service was effected on [DVH] through courier service. The courier receipt shows that [DVH] was duly served with the notice. The plaintiff also filed an affidavit about the service. [DVH] was also served through e-mail. Despite service through e-mail and despite service through courier, [DVH] chose not to appear in the Court . . . I find no reason to disbelieve the certificate issued by the courier company . . .

(Griffing Affidavit, Ex. C, p. 5). This determination

establishes valid personal jurisdiction over DVH under CPLR 5305(b).

Finally, absent an expert opinion about Indian law that an appeal suspends enforcement of an apparently final judgment, DVH has failed to prove the alleged foreign law (see, e.g., *Stein v. Siegel*, 50 AD2d 916 [2nd Dept., 1975]). Moreover, CPLR 5302 applies to final judgments "even though an appeal therefrom is pending." The fact that the judgment is being appealed is insufficient to bar recognition of the judgment under Article 53. Instead, the proper procedure is to seek a stay of recognition pending the outcome of the foreign appeal (CPLR 5306).

3. Stay

DVH argues that this action should be stayed pending the outcome of the Indian appeal under CPLR 5306, because it may lead to vacatur of the judgment. Hartley opposes but, if a stay is granted, requests that DVH be required to post an undertaking. DVH replies that a bond would be an onerous burden, and states "if this Court requires that a bond be filed in consideration for a stay, then [DVH] hereby withdraws the instant application."

CPLR 5306 provides:

If the defendant satisfies the court either that an appeal is pending . . . [in] the foreign country judgment, the court may stay the proceedings until the appeal has been determined . . .

Were the court to grant a stay, the posting of security would be required. Accordingly, the motion for such a stay is

deemed withdrawn.

4. Valuation

The Indian judgment provides for interest of 7% from February 29, 2000. Hartley seeks 7% interest on \$127,085.50 (the original principal) from that date until October 30, 2008, the date DVH tendered its \$76,928.48 bond. Thereafter, Hartley seeks the remaining principal of \$50,157.02 (the original principal minus the released bond) plus 7% interest from October 30, 2008 to the date of determination of this motion. Finally, Hartley seeks as costs of the Indian action \$1,445, the value of Rs. 51,416, converted on an unspecified date. That value is uncontested, and is awarded.

5. Conclusion

In accordance with the foregoing, it hereby is

ORDERED that Defendant's motion for a stay is deemed withdrawn; and it further is

ORDERED that Plaintiff's motion for summary judgment to recognize and enforce the foreign judgment in the case entitled *Hartley Knits v. DVH Industries, Inc*, CS(OS) No.1115 of 2000 (High Court of Delhi at New Delhi, India), dated December 10, 2007 is granted pursuant to Article 53 of the CPLR; and it further is

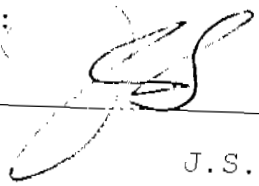
ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff Hartley Knits and against

defendant DVH Industries, Inc., as follows:

- 1) \$50,157.02 with interest at 7% from October 31, 2008 to the date of entry of judgment and thereafter at the statutory rate;
- 2) Interest on \$127,085.50, at 7% from February 29, 2000 through October 30, 2008;
- 4) Costs of the foreign action, in the amount of \$1,445;
- 5) Costs and disbursements of this action, as taxed.

Dated: 5-19- , 2011

Enter:



J.S.C.

~~NEW YORK~~

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MAY 20 2011

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