

Taormina Sales Co., Inc. v Gannon

2011 NY Slip Op 31772(U)

June 27, 2011

Supreme Court, New York County

Docket Number: 603631/2009

Judge: Saliann Scarpulla

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

PRESENT: SALIANN SCARPULLA
Justice

PART 19

Index Number : 603631/2009
TAORMINA SALES COMPANY, INC.
vs.
GANNON, ANNA T.
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

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

²⁵
motion and ~~cross-motion~~ are decided in accordance
with accompanying memorandum decision.

This constitutes the decision and order of the Court.

FILED

JUN 30 2011

Dated: June 27, 2011

NEW YORK COUNTY CLERK'S OFFICE
Saliann Scarpulla
SALIANN SCARPULLA J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X
TAORMINA SALES COMPANY, INC. and
JOSEPH TAORMINA
Plaintiffs,

Index Number 603631/2009
Submission Date 3/30/2011
Mot. Seq. No. 002 and 003
DECISION & ORDER

-against-

ANNA T. GANNON
Defendant.

FILED

JUN 30 2011

----- X
Appearances: **For Plaintiffs:**
Schulman, Blitz & Williamson, LLP
By Noah D. Zakim, Esq.
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For Defendant:
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By Sarit Shmulevitz, Esq.
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Scarsdale, New York 10583
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COUNTY CLERK'S OFFICE

Papers considered in review of this motion to amend the complaint:

Papers	Numbered
Notice of Mot. and Motion with Annexed. Ex.....	1
Memo. of Law in Supp. of Motion.....	2
A2B's Affirm. in Opp.....	3

HON SALIANN SCARPULLA, J.:

In this action for recovery on a personal guaranty arising out of an alleged breach of an asset purchase agreement (hereinafter the "APA"), plaintiffs Joseph Taormina ("Taormina") and Taormina Sales Company, Inc. (herein collectively "plaintiffs") move, in motion sequence 002, pursuant to CPLR 5406 for summary judgment to domesticate a New Jersey Superior Court judgment in the amount of \$352,726.66, issued on October 13, 2009. In motion sequence 003, defendant Anna T. Gannon ("Gannon") seeks leave to amend her previously submitted *pro se* answer to assert counterclaims under the guidance

of counsel. For the purposes of this decision, motion sequences 002 and 003 are herein joined for disposition.

On December 1, 2009, plaintiffs commenced this action asserting three causes of action for breach of contract, anticipatory breach and personal guaranty, demanding judgment individually against Gannon in the amount of \$ 353,826.66 in post closing costs, together with interest, costs of suit and reasonable attorney's fees. According to the complaint, on October 31, 2006, Gannon purchased most tangible assets and business goodwill from plaintiff Taormina Sales Company, Inc., a food importing business, for approximately \$3,870,000 through a specially created entity, TSC Holding Company, LLC ("TSC Holding").

As part of the transaction, Gannon entered into the APA, as well as a consulting agreement. In relevant part, the APA provided for an assignment and assumption of leasehold for the business premises at 1 DeWolf Road, Old Tappan, New Jersey, transfer of all "Included Assets" and payment of the purchase price and post closing obligations, including disbursements of a consulting fee, advisory fee and earn out payments based on net revenue generated by TSC for three years after the sale. As part of the transaction, Gannon executed "Continuing Individual Guaranty of Limited Liability Indebtedness (the Guaranty)", assuming individual liability for payment of all moneys owed to Taormina under the APA and the consulting agreement.

On top of the purchase price, APA Section 2.2 (Earn Out) required TSC Holding to pay a maximum sum of \$ 500,000.00 to Taormina in three annual installments ending on October 31, 2009. TSC Holding allegedly made only the first two annual installments. In addition, APA Section 3.4 (Advisory Fee) required forty-eight consecutive monthly payments of \$ 6,405.63 to Taormina, out of which TSC Holding allegedly made only nineteen payments.

On August 3, 2009, plaintiffs filed a complaint against Gannon and TSC Holding in New Jersey Superior Court, Bergen County (hereinafter "the New Jersey action") and obtained a default judgment against Gannon on October 13, 2009, when Gannon's counsel allegedly failed to timely serve an answer. On October 26, 2010, more than a year after the issuance of the default judgment and after the present action was commenced, Gannon moved by counsel in New Jersey Superior Court to set aside the default judgment and compel acceptance of the answer, but this motion was denied.

In opposition to plaintiff's summary judgment motion to domesticate the New Jersey judgment, Gannon submits an affidavit attempting to raise issues of material fact. Specifically, Gannon alleges that Taormina breached APA Section 6.1, which required him to "use commercially reasonable efforts to maintain the existing caliber of operation and preserve the Seller's relationships with customers, employees, suppliers and other contractors." Taormina also became an officer of TSC Holding pursuant to the consulting and operating agreements. According to Gannon, these agreements provided

for earnout payments and consulting and advisory fees in addition to the selling price as performance incentives to ensure “a smooth transition of ownership and to utilize Taormina’s expertise and reputation in the industry.”

Gannon alleges that Taormina failed to assist in the transition of the business, because he did not inform the Italian suppliers of the change in ownership, did not attempt to help TSC Holding negotiate credit terms with its suppliers, and did not bring a single new client. Taormina’s omissions allegedly contributed to TSC Holding’s bankruptcy. As a result, Gannon also seeks to amend her *pro se* answer to assert counter-claims for overpayment of \$ 450,000.00 in unearned and undeserved compensation.

Discussion

Full faith and credit must be given by each State to those “public Acts, Records, and Judicial Proceedings of every other State.” US Const., art IV, § 1. This doctrine is premised on the notion that “[t]he judgment of a state court should have the same credit, validity and effect, in every other court of the United States, which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such State, and none others, could be pleaded in any other court in the United States.” *Hampton v. McConnel*, 16 U.S. (3 Wheat.) 234, 235, 4 L.Ed. 378 (1818).

A judgment of a sister state may be filed with a County Clerk in New York pursuant to CPLR 5401 *et seq.*, whereupon the judgment is treated in the same manner as a judgment of the Supreme Court of this state. CPLR 5402(b). However, Article 54

registration does not apply to foreign judgments obtained by a default in appearance. *Steinberg v Metro Entertainment Corp.*, 145 A.D.2d 333, 334 (1st Dep't 1988); CPLR 5401. Where, as here, the foreign judgment was entered upon default, the plaintiff may proceed pursuant to CPLR 3213 for summary judgment in lieu of complaint, or by plenary action. *See Madjar v Rosa*, 2011 N.Y. Slip. Op. 3555, *2 (2nd Dep't 2011) (citations omitted); *see also* CPLR 5406.

Here while plaintiffs' moving papers contain compelling argument for the domestication of the New Jersey judgment, the Court may not presently grant plaintiffs' motion. Summary judgment on any given cause of action is not available if the cause of action is not included in the complaint. *Cf. Messina v New York City Tr. Auth.*, 2010 N.Y. Slip. Op. 32643U, *10-11 (Sup. Ct., New York County, September 16, 2010) (deeming a motion for summary judgment on a Labor Law § 240(1) cause of action moot after determining the complaint did not contain it); *see also* CPLR 3212(b) (permitting summary judgment "if, upon all papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party"). Plaintiffs' complaint does not plead a cause of action to domesticate a foreign judgment, but instead contains only the underlying claims for breach of contract, anticipatory breach and personal guaranty, effectively mirroring the complaint previously filed in New Jersey. Accordingly, the Court denies the summary

-judgment motion, with leave to renew once plaintiffs take necessary steps to amend the complaint to assert a cause of action to domesticate a judgment.

With respect to Gannon's cross-motion to amend the answer, the Court denies leave as futile. *See Viacom Intl. v Midtown Realty Co.*, 235 A.D.2d 332, 333 (1st Dep't 1997). The Full Faith and Credit Clause of Article IV of the United States Constitution precludes this Court from inquiring into the merits of the claims underlying plaintiffs' New Jersey judgment. *See Buckeye Retirement Co., L.L.C. v Lee*, 41 A.D.3d 183, 183-84 (1st Dep't 2007). Because Gannon intends to raise only substantive claims in her proposed amended answer, not issues of absence of either personal or subject matter jurisdiction, her proposed amended answer would have to be stricken once plaintiffs amend their complaint and move to domesticate the New Jersey judgment. *See Id.*

In accordance with the foregoing, it is hereby

ORDERED that motion for summary judgment brought by plaintiffs Taormina Sales Company, Inc. and Joseph Taormina is denied with leave to renew in compliance with the above decision; and it is further

ORDERED that defendant Anna T. Gannon's motion for leave to amend the answer is denied.

This constitutes the decision and order of the Court.

Dated: *June 27, 2011*
New York, New York

FILED

JUN 30 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

ENTER:

Saliann Scarpulla
Hon. Saliann Scarpulla, J.S.C.