

**Opus Holdings One LP v Shandong Sanwei Group
Co., Ltd.**

2011 NY Slip Op 31901(U)

July 11, 2011

Sup Ct, NY County

Docket Number: 113801/10

Judge: Judith J. Gische

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SCANNED ON 7/12/2011

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

PRESENT: **HON. JUDITH J. GISCHE**

PART 10

Index Number : 113801/2010

OPUS HOLDINGS ONE LP

vs

SHANDONG SANWEI GROUP CO., LTD

Sequence Number : 001

DEFAULT JUDGMENT

INDEX NO. _____

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 _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

FILED

JUL 12 2011

NEW YORK
COUNTY CLERK'S OFFICE

JUL 11 2011

Dated: 7/11/11

HON. JUDITH J. GISCHE 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: PART 10

-----x
OPUS HOLDINGS ONE LP,

Plaintiff,

-against-

SHANDONG SANWEI GROUP CO., LTD,

Defendants.
-----x

DECISION/ORDER
Index No.: 113801/10
Seq. No.: 001

Present:
Hon. Judith J. Gische
J.S.C.

FILED

JUL 12 2011

NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219 [a], of the papers considered in the motion:

Papers	Numbered
Pl's motion (default) w/ GB affid, TL affid, exhs	1

Upon the foregoing papers, the decision and order of the court is as follows:

This is plaintiff, Opus Holdings One LP's, motion for a default judgment, pursuant to CPLR § 3215, seeking enforcement as assignee of a judgment rendered in Texas ("Texas Judgment") against defendant, Shandong Sanwei Group Co., Ltd.¹ In the alternative, plaintiff moves for a default judgment on its breach of contract claim.

This motion has been submitted to the court without opposition; it will be decided on default. Plaintiff commenced this action on December 27, 2010 with personal service of the summons and complaint, in Chinese and English, on Jiang Shuyan, an attorney authorized by defendant to accept service in this action. Service complied with

¹ Plaintiff's complaint sets forth: "Upon information and belief, defendant is a corporation organized and existing under the laws of the People's Republic of China."

Article 5(a) of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, signed at The Hague, November 15, 1965. See Amerasia Bank v. Saiko Enters., Inc., 263 A.D.2d 519, 520 (2d Dept. 1999) (“Where service of process is made in a foreign country that is a signatory of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, compliance with the procedures of the Hague Convention is mandatory in State court proceedings”). Defendant, a foreign corporation, was also served on December 27, 2010 pursuant to CPLR § 311(a)(1).² Accordingly, the court has personal jurisdiction over defendant.

Plaintiff moves for a default judgment pursuant to CPLR § 3215(a): “When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial . . . the plaintiff may seek a default judgment against him.” Defendant has neither appeared nor answered in this action. “By failing to answer . . . [a defendant] admits all traversable allegations contained in the complaint.” McClelland v. Climax Hosiery Mills, 252 N.Y. 347, 351 (1930); Rokina Optical Co. v. Camera King, Inc., 63 N.Y.2d 728, 730 (1984). Defendant also admits “all reasonable inferences that flow from” those allegations. Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62, 71 (2003). However, Defendant does not admit to damages alleged in the complaint. See McClelland v. Climax Hosiery Mills, *supra* at 351.

Together with the application for default judgment, Plaintiff is required to file:

“proof of service of the summons and the complaint . . . and proof of the facts

² In an order dated February 18, 2011, Hon. Joan B. Lobis in the Supreme Court of the State of New York granted plaintiff a time extension to effectuate service, expiring on June 20, 2011.

constituting the claim, the default and the amount due by affidavit made by the party". CPLR § 3215(f). While "[t]he standard of proof is not stringent, amounting only to some firsthand confirmation of the facts", the plaintiff must make a *prima facie* showing of liability. Joosten v. Gale, 129 A.D.2d 531, 535 (1987).

Plaintiff provides the affidavit of Glenn Backer, plaintiff's attorney, and Trevor Ling, plaintiff's managing partner. Plaintiff asserts two causes of action against defendant, for enforcement of the Texas Judgment (COA1) and for breach of contract (COA2).

Plaintiff alleges, in COA1, that the Texas Judgment was entered against Shandong, on default, in Harris County, Texas on May 10, 2010 for failure to appear or answer. (Danny Chan and Kevan Casey, as assignee of Opus Holdings One LP, China Discovery Investors, LP, Lee Bear I, LLC and Joseph R. Lee v. Shandong Sanwei Group Co., Ltd., District Court of Harris County Texas, May 10, 2010) ("Texas Action"). Danny Chan ("Chan") and Kevan Casey ("Casey") were original parties to the Texas Action. By an "Assignment of Rights and Claims" on June 18, 2010, acknowledged September 2, 2010, Chan assigned to plaintiff all right, title, and interest in and to the Texas Action, plus future benefits arising therefrom. By an "Assignment of Judgment" dated September 23, 2010, filed in Harris County, Texas, Casey assigned to plaintiff all right, title, and interest in and to the Texas Judgment, plus any money from enforcement or further related proceedings.

Plaintiff alleges, in COA2, that defendant breached a Subscription Agreement

(the "Subscription Agreement").³ Pursuant to Section 1.5 of the Subscription Agreement: "If the closing of the proposed Merger does not occur on or before September 30, 2009, the Subscribers will be returned their full investment amount and the Offering Securities will be returned to the Company for cancellation." The merger did not take place by the proposed date, and defendant returned \$1,014,800 of plaintiff's investment, rather than the full amount of \$1,200,000.

On its first cause of action, plaintiff seeks \$197,200 plus interest, including legal fees awarded to Chan and Casey in the Texas Judgment. In the alternative, on the second cause of action, plaintiff seeks \$185,200 plus interest.

Discussion

As to COA1, "New York courts are required to enforce judgments rendered in other states under article IV of the United States Constitution." Cadle Co. v. Tri-Angle Assocs., 18 A.D.3d 100, 103 (1st Dept. 2005). When a default in appearance is the basis for a foreign judgment, "a judgment creditor [can] . . . proceed by an action on the judgment or a motion for summary judgment in lieu of complaint . . ." CPLR § 5406; see also CPLR §§ 5401-02 (excluding default judgments, based on lack of appearance, from the § 5402 filing procedure); Steinberg v. Metro Entm't Corp., 145 A.D.2d 333, 334 (1st Dept. 1988). Plaintiff must obtain personal jurisdiction over the defendant when following either of these procedures. Hill v. Gottwald, 79 Misc. 2d 40, 41 (Sup. Ct., N.Y. Co. 1974).

Furthermore, "[a]s a matter of full faith and credit, review by the courts of this

³ Although the Subscription Agreement is only signed by defendant, it is undisputed that plaintiff agreed to the terms of the agreement and invested \$1.2 million in defendant's business plan, in accordance with the Subscription Agreement.

State is limited to determining whether the rendering court had jurisdiction, an inquiry which includes due process considerations". Fiore v. Oakwood Plaza Shopping Ctr., Inc. 78 N.Y.2d 572, 577 (1991). Accordingly, a sister state may not examine the merits of a foreign judgment. Cadle Co. v. Tri-Angle Assocs., *supra* at 103. In Texas, service of citation and related matters are prescribed by Rules 99 -124 of the Texas Rules of Civil Procedure. A default judgment may not be entered unless return of service requirements are met, pursuant to Tex. R. Civ. P. 107.

In the Texas Action, the Texas Judgment indicated that Shandong was properly served with citation and "duly and legally cited to appear and answer". The means and method of service, however, are not indicated in the Texas Judgment. Nor does plaintiff otherwise provide proof regarding how defendant was served in the Texas Action. Therefore, plaintiff has not shown this court that jurisdiction was appropriate in the Texas Action, which is the legal predicate to full faith and credit here. Consequently, plaintiff's motion as to COA1 is denied without prejudice to renew, on proper papers, which shall include the affidavit of service from the Texas Action. See Fiore v. Oakwood Plaza Shopping Ctr., Inc., *supra* at 577.

As to COA2, "[i]t is the policy of the courts of this State to enforce contractual provisions for choice of law and selection of forum for litigation". Koob v. IDS Fin. Servs., Inc., 213 A.D.2d 26, 33 (1st Dept. 1995) (citations omitted); see Mena Films, Inc. v. Painted Zebra, Prods., Inc., No. 601050/2006, slip op. at 1-2 (Sup. Ct., N.Y. Co. 2006) (interpreting a jurisdictional clause according to California law in light of the agreement's choice of law provision).

Here, Section 6.1 of the Subscription Agreement provides that "[t]he parties . . .

submit to the exclusive jurisdiction of the United States federal and state courts located in the State of Texas with respect to any dispute arising under this Agreement or the transactions contemplated hereby or thereby." Additionally, there is no evidence of sufficient contacts with the state to render jurisdiction appropriate. CPLR §§ 301, 302. Finally, COA2 is duplicative of the Texas Action, and plaintiff may not proceed here on such cause of action. Therefore, in the interests of justice, plaintiff's second claim is hereby severed and dismissed.


It is hereby:

ORDERED that plaintiff's motion for default judgment as to the first cause of action is DENIED without prejudice to renew, on proper papers, which shall include the affidavit of service from the Texas Action, and the second cause of action is severed and dismissed.

Dated: New York, New York
July 11, 2011

So Ordered.

FILED
JUL 12 2011
NEW YORK
COUNTY CLERK'S OFFICE



HON. JUDITH J. GISCHE, J.S.C.