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

PRESENT: HON. JOAN A. MADDEN J.S.C. PART 11
Justice

Bank of India

- v -

Ravi Subramanian

INDEX NO. 118307/09

MOTION DATE

MOTION SEQ. NO. 002

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 is determined in accordance with the annexed decision and order.

FILED

NOV 02 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: October 28, 2011

HON. JOAN A. MADDEN J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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BANK OF INDIA,

Petitioner,

Index No. 118307/09

-against-

RAVI SUBRAMANIAN and RAJALAKSHMI SUBRAMANIAN a/k/a RAMA SUBRAMANIAN,

Respondents.

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JOAN MADDEN, J.:

Petitioner Bank of India (BOI) moves, by order to show cause, for inter alia, an order compelling respondents, Ravi Subramanian and Rajalakshmi Subramanian to answer petitioner's post-judgment disclosure demands,[1] and for an order extending time to serve the amended petition and deeming the amended petition timely served. Respondents cross-move to dismiss for failure to timely serve the amended petition, and for lack of personal and subject matter jurisdiction.

BACKGROUND

This post-judgment proceeding arises out of an action that was commenced in the Federal District Court for the Southern District of New York in which respondents, defendants therein, reached a stipulation of settlement, which was reduced to a judgment totaling in excess of $18 million against Ravi

[1]Petitioner has withdrawn that part of the motion in which it seeks civil contempt against each respondent.

Subramanian, and in excess of $3 million against Rajalakshmi Subramanian. No part of the judgment was paid, and BOI sought post-judgment enforcement by serving information subpoenas and questionnaires (subpoenas) on respondents. Since respondents live in Ontario, Canada, and as conceded by the parties, service had to conform with the requirements of the Convention On Service Abroad of Judicial And Extrajudicial Documents in Civil or Commercial Matters (20 UST 361; "Hague Convention").

BOI initially attempted to obtain post-judgment relief through the District Court for the Southern District of New York in 2009. By order dated November 11, 2009, the court denied relief based on BOI's failure to comply with that court's "individual practices." BOI subsequently sent a letter to the presiding judge seeking permission to move for such relief. Permission was denied, by a stamp to that effect on the letter. BOI then docketed the judgment from the Southern District in the New York County Clerk's office, and proceeded to seek relief in this court.

BOI filed its original petition and order to show cause (First OSC) on or about December 31, 2009, based upon respondents' failure to respond to subpoenas allegedly served on respondents in 2009. In an order dated February 16, 2010 (the February 16 Order), the court denied the relief requested in the First OSC without prejudice to renewal on the grounds that the

instructions regarding service were confusing, as the order did not explicitly direct the manner of service on Ravi Subramanian and Rajalakshmi Subramanian.[2]

In any event, issues exist as to whether the alleged service of the petition, First OSC and supporting papers complied with the Hague Convention. Moreover, the affidavit of service is ambiguous as to the method of service employed, since it states that on February 2, 2010, respondents were served by taping an envelope containing the papers to the door of respondents' residence at 5126 Lakeshore Road, Ontario ("the Lakeshore Road address") and, that the process server ascertained that "the person was an adult member of the household by means of verbal acknowledgment."

According to BOI, after the February 16 Order, to avoid issues regarding service of the subpoenas, BOI elected to serve additional subpoenas on respondents. In this motion BOI alleges service of the subpoenas at respondents' residence, place of business, and through the mail. Specifically, BOI alleges personal service of the subpoenas on Ravi Subramanian and Rajalakshmi Subramanian on February 26, and Ravi Subramanian on

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[2]In the First OSC, BOI's type written request asked for service on respondents' attorney in the underlying federal action and on respondents by Federal Express. In ordering service pursuant to the Hague Convention, it was necessary to cross out BOI's request, and the court inadvertently crossed out the words respondents resulting in confusion as to the service ordered.

February 27, and on both Rajalakshmi Subramanian and Ravi Subramanian on March 4, and April 9, 2010. In support of its allegations regarding service, BOI submits affidavits of certain persons who identify themselves as Canadian process servers and allege service of the subpoenas by personal delivery to Ravi and Rajalakshmi Subramanian on February 26, and 27, and on April 9 at the Lakeshore Road address, and, on March 4 and April 9 at their alleged place of business, Sringeri Vidya Bharati Foundation (the Temple).[3] BOI also submits affidavits of service and other proof regarding the delivery of various documents, including Federal Express receipts for deliveries to respondents on April 6, 7, and 8.[4]

When respondents failed to respond to any of these subpoenas, on April 30, 2010, BOI amended its petition to reflect that the relief sought is predicated on service of the foregoing subpoenas. In October, 2010, BOI filed the Second OSC seeking to compel responses to the subpoenas. BOI submits an affidavit by a Canadian process server of personal service of the Second OSC and amended petition on respondents on November 9, 2010 at the

[3]In addition to the subpoenas, service of restraining notices are alleged on April 9.

[4]BOI also attaches copies of a number of envelopes that were mailed but, apparently, not delivered to respondents.

Lakeshore Road address.[5] BOI also submits affidavits of service stating that respondents were served with the Second OSC and Amended Petition on October 19, 2010, at 3:25 P.M. by delivering the papers to Rashan Lal, Office Manager, at the Temple.

In opposition, respondents argue that the motion should be denied and the amended petition dismissed as BOI failed to timely serve the amended petition and failed to comply with the Hague Convention with respect to service of the amended petition and subpoenas.

As to the timeliness of service of the amended petition, CPLR 306 (b) provides that service of a petition shall be made within 120 days of filing, and further provides if service is not made within this time frame, an extension of time may be granted for good cause or in the interests of justice. Good cause and interest of justice are two separate and independent statutory standards. Leader v Maroney, Ponzini & Spencer, 97 NY2d 95, 104 (2001). Good cause requires that a plaintiff show reasonable diligence in attempting service. However, under the interest of justice standard, reasonable diligence is but one of a number of factors a court may consider in determining whether or not to exercise its statutory powers "to accommodate late service that

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[5]Time to serve the Second OSC was extended from October 20, 2010 to November 22, 2010, and as stated above, BOI alleges service on on November 9, 2010. The affidavits of service refer to Amended/Supplemental Order to Show Cause and Amended Verified Petition. These papers will be referred to as the Second OSC.

might be due to mistake, confusion or oversight." Id at 104-105. Other factors to be considered are the expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of plaintiff's request for the extension of time, and prejudice to the defendant. Id at 104. Attempts at service which are defective do not preclude an extension of time. Simonovaskaya v Olivo, 304 AD2d 553 (2nd Dept. 2003); Wideman v Barbel Trucking, Inc. 300 AD2d 184 (2nd Dept. 2002). Nor does the failure to promptly move for an extension of time. Sutter v Reyes, 60 AD3d 448 (1st Dept. 2009).

Applying these principles to the facts in the instant case, I conclude that on balancing the factors in support of, and against an extension, that BOI's motion for an extension of time should be granted in the interests of justice. Here, notwithstanding the ambiguities in the affidavit of service of the First OSC, BOI attempted to serve it by obtaining a Canadian process server who sought to serve respondents personally at their Lakeshore Road address on February 2, 2010. Even though service may not have been effectuated, BOI's actions are sufficient to establish a good faith effort at service of the original petition and supporting papers on Ravi and Raja Subramanian.

While the First OSC was denied due to the confusion

regarding service, the denial was without prejudice. BOI had until April 30, 2010 to serve the original petition. On that date, although BOI filed the amended petition, it did not move for an extension of time to serve the amended petition, until it filed the Second OSC on October 5, 2010. BOI contends that, although it intended to file the Second OSC shortly after filing the amended petition, there were medical emergencies involving the siblings of the two attorneys working on this matter, and as a result, between May and mid-August 2010, both attorneys engaged in only limited practice of law.

While it cannot be said that BOI promptly moved for an extension of time, under the circumstances, the approximate four and on-half month delay, from May 1 to September 24, in making the motion does not bar an extension of time. Here, BOI has a meritorious request, as it is seeking enforcement of a judgment against Ravi Subramanian of over $18 million and against Rajalakshmi Subramanian of over $3 million. The judgment resulted from a stipulation of settlement agreed to by respondents. Moreover, respondents have failed to establish any prejudice if such extension is granted.

Finally, as discussed below, the record establishes that the April 9 subpoenas were served in accordance with the Hague Convention and that, although issues exist with respect to service of the amended petition, those issues require a traverse

hearing and are not grounds to deny petitioners request for an extension of time. In addition to these factors, I have considered the difficulties of service in a foreign country under the Hague Convention. For the foregoing reasons, I find after weighing the various factors for and against an extension, that petitioner's request for an extension of time to serve the amended petition should be granted nunc pro tunc and the amended petition be deemed timely served.[6]

Respondents also argue BOI amended the petition without seeking leave of the court. This argument is without merit as under CPLR 3025(a), BOI was permitted to amend as a matter of right prior to service of process.

PERSONAL JURISDICTION

As previously stated, the parties agree that service on respondents is governed by the Hague Convention. Respondents challenge service on the grounds that service of the subpoenas, petition and amended petition failed to comply with its requirements. Pursuant to the Hague Convention, there are several methods of accomplishing service of process. A party can

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[6]In reaching this conclusion I reject BOI's assertion that the 120-day time limit does not apply to service that must be made under the Hague Convention as unsupported in law. To support its position, BOI cites federal law. While the Federal Rules of Civil Procedure expressly exempt foreign service from the 120-day limit (FRCP Rule 4 [m]), CPLR 306-b does not, and there is no basis to read such an exemption into the CPLR.

serve through the foreign country's Central Authority, or alternatively, pursuant to Article 10 of the Convention. United States v Islip, 18 F. Supp.2d 1047, 1054 (CIT 1998) Article 10 provides :

> Provided the State of destination does not object, the present Convention shall not interfere with -
> (a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
> (b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,
> (c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

While there is some disagreement as to whether, under subdivision (a), the sending of judicial documents by postal means is intended to permit service of process through the post, the First Department has determined that subsection (a) of article 10 "pertains to the forwarding of informational material, not the 'service' of documents for jurisdictional purposes." Sardanis v Sumitomo Corp., 279 AD2d 225, 228-229 (1st Dept 2001). Accordingly, Article 10 (a) cannot serve as a basis for serving process and BOI's attempts to serve the amended petition through couriers or the mail does not constitute effective service.

However, a different conclusion is reached with respect to BOI's allegations of personal service through Canadian process servers, under Article 10 (b). At issue here is whether the term

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"other competent person" includes process servers. The Convention does not define the term "competent person," nor does Canada indicate in its accession to the Convention who it considers a competent person. Moreover, Canada does not "explicitly object to or qualify the language of either provision." See Canadian Accession Notification, Declaration III. United States v Islip, supra at 1046. Canada's acceptance of the terms of Article 10 (b) is titled "Service through judicial officers, notably 'huissiers', etc. of the requested State (Article 10, sub-paragraphs b) and c))." Hague Convention, Canada Declarations, III. As explained by the court in Islip, "[i]f headings are part of the official text, this could be read to indicate that Canada intended transmission of the documents through official officers to be the only alternative to transmission through a central authority." Id at 1056.

The court went on to say that "Canadian Government practice demonstrates a contrary intention," as it permits custom agents to serve process, and by not objecting to such service, it "not only approved such activities, but affirmed their validity." Id. The court determined that an expansive interpretation of who is competent to serve process, is supported by the "etc." after "judicial officers," which it found implied an inclusion of "other competent persons" mentioned in the provision as persons authorized to serve process. Id at 1056-1057. Finally, the court

relied on the fact that Canadian law does not impose strictures on methods of service under the Convention, that its laws are flexible as who is authorized to serve process, and that the laws of Ontario, the laws at issue in that case and in the instant case, do not proscribe private persons from effectuating service. Id.

I find the analysis in Islip persuasive as to whether a process server is authorized to serve process in Ontario pursuant to the Hague Convention. See also Dimensional Communications, Inc., v Oz Optics Limited, 218 F. Supp2d 653 (D. NJ 2002)(process server authorized to serve process in Ontario pursuant to Article 10 (b) of the Hague Convention); Federal Trade Commission v 1492828 Ontario Inc., 2003 WL 21038578 (N.D. Ill.)(a government official is competent to serve process under Article 10 (b) of the Hague Convention as an official and as a competent person). Accordingly, service of process is not ineffective based on service by a Canadian process server.

Turning to the issue of service, BOI submits the affidavit of Canadian process server Lincoln Allen("Allen"), who states the he personally served respondents at the Lakeshore Road address on November 9, 2010. Ravi Subramanian and Rajalakshmi Subramanian each submit affidavits, in which they deny that they were served on November 9, 2010 (or any other date) at the Lakeshore Road address or any other place.

As respondents dispute that statements by Allen regarding service of the amended petition at the Lakeshore Road address on November 9, 2010, a traverse hearing is required to resolve this dispute. Interlinks Metals and Chemical, Inc. v. Kazdan, 222 AD2d 55 (1st Dept 1996)(where hearing was held before Special Referee to determine if service was made in accordance with Hague Convention); Laino v. Cuprum S. A. de C.V., 235 AD2d 25 (2d Dept 1997)(finding issue of fact as to whether service was properly made under the Hague Convention and directing a hearing as to whether defendant was properly served).

In reaching this conclusion, respondents' argument that Allen's January 25, 2011 affidavit of service should not be considered as it includes in the documents served, the Order to Show Cause, which was not included in his November 17, 2010 affidavit, is rejected. This presents an issue of credibility which must be resolved at the hearing. Likewise, respondents' argument that the affidavit of service is defective as it does not contain the notary's name is unavailing since the name is included in the notary seal. Additionally, I am ordering that respondents will not be permitted to be served with process in connection with this matter either at the traverse hearing or on route to or from the hearing.

The next issue is whether BOI served the subpoenas in compliance with the Hague Convention. As stated above, service

through the mails has been rejected by the First Department. Sardanis v Sumitomo Corp., supra. Thus, to the extent BOI alleges service of the subpoenas by mail on April 6, 7, and 9, 2010, such service is defective. Similarly, BOI's attempts at service at respondents alleged place of business at the Temple, even if such service were allowed, is defective as respondents submit affidavits that they are not nor have they ever been employed at the Temple. Respondents also submit an affidavit of Rashan Lal, who states he is the Office Manager at the Temple, that Ravi and Rajalakshmi Subramanian's activities at the Temple were voluntary, and that they were not employees of the Temple. However, while Ravi Subramanian and Rajalakshmi Subramanian each submit three affidavits dated February 12, 2010, November 23, 2010, and March 18, 2011, addressed to various issues with respect to service, they do not specifically deny personal service of the subpoenas at the Lakeshore Road address on February 26 (Rajalakshmi Subramanian), February 27 (Ravi Subramanian), and on both respondents on April 9, 2010.

Respondents also challenge service on the grounds that the subpoenas are unsigned, undated, and have respondents' incorrect addresses, and that the affidavits of service do not include statements that prepaid addressed return envelopes were included with the subpoenas. These challenges do not render service defective. The copies of the subpoenas submitted with the motion

papers are signed. As the time to respond to the subpoenas runs from the date of receipt, the lack of date is not fatal. Nor is the fact that the subpoenas do not state respondent's current address, as respondents do not contest service of these subpoenas at the Lakeshore Road address.

Additionally, respondents argue that the process server's affidavits are defective, inter alia, as the notaries failed to print their names beneath their signature, did not set forth their license numbers or jurat and failed to set forth the date of expiration of their commissions and/or whether there are any limitations as to territory.

In reply, BOI argues that the notaries' names are contained in their notary seals and submits affidavits reflecting this with respect to the April 9, 2010 service of the subpoenas. Thus, even if it could be argued that the service of the February 26 and February 27 subpoenas are defective on these grounds, the April 10, 2010 service is sufficient. As to respondents' remaining arguments as BOI points out, respondents' affidavits suffer from the same technical defects regarding the notarizations. Under these circumstances the affidavits submitted by both BOI and respondents will be considered.

Finally, whether return envelopes were not included with the subpoenas, or whether statements regarding the envelope were inadvertently omitted from the affidavits, this irregularity

which may be corrected by mailing return envelopes or submission of supplemental affidavits.

SUBJECT MATTER JURISDICTION

Respondents contend that, pursuant to CPLR 5224 (a) (3)(iv), BOI cannot bring this amended petition and motion in this court, as the court lacks subject matter jurisdiction over enforcement proceedings in connection with a federal judgment.

CPLR 5224 (a) (3) (iv) states: "failure to comply with an information subpoena shall be governed by subdivision (b) of section twenty-three hundred eight of this chapter, except that such motion shall be made in the court that issued the underlying judgment.[7]" Since the court that entered the underlying judgment is the Federal District Court, respondents maintain that this proceeding cannot be maintained in this court.

This argument is unavailing. As a preliminary matter, the provision relied on by respondents concerns service of a subpoena on third parties and not on the judgment debtors, like respondents. See Siegel, Supplemental Practice Commentaries, McKinney's Consol. Laws of New York Book 7B, pocket part, CPLR 5101-5550, C5224:2 (noting that the amendment to CPLR 5224(a)(3)

[7]This provision treats an information subpoena as equivalent to a non-judicial subpoena, which under CPLR 2308(b), must be enforced through an application to the court. See Siegel, Supplemental Practice Commentaries, McKinney's Consol. Laws of New York Book 7B, pocket part, CPLR 5101-5550, C5224:2.

to add subparagraphs (i) through (iv) was "designed to protect [third persons and that] the amendment does not apply to an information subpoena served on the judgment debtor").

Moreover, respondents' interpretation of CPLR 5224 (a)(3)(iv) violates basic principles of statutory construction by rendering meaningless the CPLR's statutory scheme which provides for state court enforcement proceedings with respect to certain federal judgments. See Rocovich v. Consolidated Edision Co., 78 NY2d 509 (1991); Canal Carting, Inc. v. City of New York Business Integrity Commission, 66 AD3d 609 (1st Dept 2009), lv app denied, 4 NY3d 710 (2010).

Specifically, CPLR § 5018 (b) provides that a transcript of any federal judgment on file in any federal court in New York State may be filed with the county clerk of any county and requires the county clerk to docket the judgment in the same manner and with the same effect as judgment in the Supreme Court within the county.[8] CPLR § 5221 (a)(4) authorizes a special proceeding to enforce the judgment in any county in which the judgment was entered. The judgment is deemed a judgment of the

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[8]The docketing of a judgment under CPLR 5018 does not secure jurisdiction over the judgment debtor for all purposes, and a special proceeding must be commenced to obtain jurisdiction over the judgment debtor to enforce the judgment. See Siegel, Practice Commentaries, McKinney's Consol. Laws of New York, Book 7B, 5001-5100, at 530.

Supreme Court for the purpose of enforcement. Federal Deposit Insurance Corp., v Richman, 98 AD2d 790 (2d Dept. 1983); Siegel, New York Practice, § 422 (5th Ed.,2011).

Accordingly, contrary to respondents' position, the court has the authority to enforce the federal judgment filed with this court.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion to compel and for sanctions is denied; and it is further

ORDERED that the cross motion to dismiss is granted only to the extent of setting this matter down for a traverse hearing to be held beginning on December 13, 2011 in Part 11, room 351, 60 Centre Street, New York, New York 10007; and it is further

ORDERED that respondents shall not be served with process at the traverse hearing or on route to or from the hearing.

A copy of this decision and order is being mailed to counsel for the parties by my chambers.

Dated: October 28, 2011

J.S.C.