Milan Indus. Ltd. v Wilson Worldwide Propriety Ltd.
2011 NY Slip Op 33770(U)
May 25, 2011
Sup Ct, NY County
Docket Number: 101242/10
Judge: Milton A. Tingling
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

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

PRESENT: MILTON A. TINGLING Justice

PART 44

Milan Industries

- v -

Wilson

INDEX NO. 101242/10

MOTION DATE 6/14/10

MOTION SEQ. NO. 1

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

Plaintiff Milan Industries Limited filed an action pursuant to CPLR Article 53, the Uniform Foreign Country Money-Judgments Recognition Act (Article 53), seeking to recognize a default judgment entered by the High Court of Lagos in Lagos, Nigeria against defendant Wilson Worldwide Proprietary Limited (Wilson Ltd.), a South African corporation. In addition to Wilson Ltd., the named defendant in the Nigerian judgment, plaintiff seeks to recognize and enforce the foreign judgment against its alleged principals, partners, and/or alter ego entities: Wilson & Associates LLC (Wilson LLC), a limited liability company organized under the laws of Delaware; Wilson & Associates, Inc. (Wilson Inc.), a Texas corporation; and Ms. Tricia Wilson (Ms. Wilson), a natural person domiciled in Texas. Defendant now seeks an order dismissing the complaint pursuant to CPLR 3211(a)(1), and (a)(7), or in the alternative, granting summary judgment in its favor pursuant to CPLR 3212; dismissing the complaint on the basis of improper venue pursuant to CPLR 503; or dismissing the complaint for *forum non conveniens* pursuant to CPLR 327. Plaintiff opposes this motion to dismiss and has filed a cross motion

Dated: 5/26/11

_____ J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

seeking an order granting partial summary judgment to recognize the Nigerian judgment against Wilson Ltd. pursuant to CPLR Article 53 and CPLR 3212.

The dispute underlying Plaintiff's action arises out of the apparent breach of a contract entered into between Plaintiff, a Nigerian corporation and Wilson Ltd., a South African Corporation. Plaintiff contracted with Wilson Ltd. to provide architectural and design services in connection with plaintiff's construction of a luxury hotel in Lagos, Nigeria. This contract was allegedly breached and Plaintiff filed an action in the High Court of Lagos in Lagos, Nigeria seeking damages of at least $1,156,200.00 plus legal fees. Although it admits to receiving timely notice of the Nigerian action, Wilson Ltd. relied on its South African counsel who advised that, pursuant to South African law, the Nigerian court did not have valid jurisdiction over Wilson Ltd. and therefore any judgment entered could not be enforced in South Africa. As such, Wilson Ltd. elected not to appear and defend the action in the Nigerian court. Consequently, default judgment was entered against Wilson Ltd. for the total amount sought by plaintiff.

The only party named as a defendant in the Nigerian action was Wilson Ltd. Therefore, the Nigerian judgment was entered solely against Wilson Ltd. However, Plaintiff now argues that Wilson LLC, Wilson Inc., and Ms. Wilson are all principals, partners and/or "alter egos" of Wilson Ltd. and seek an order recognizing and enforcing the foreign judgment against those parties as well. Defendants contest plaintiff's attempts to recognize and enforce the Nigerian judgment in New York against any party named to this action.

As a threshold matter, defendants contend that this court must have a valid basis of personal jurisdiction over Wilson Ltd. in order to recognize the Nigerian judgment. This is not the case. Precedent in New York establishes that "a party seeking recognition in New York of a foreign money judgment (whether of a sister state or a foreign country) need not establish a basis for the exercise of personal jurisdiction over the judgment debtor by the New York courts" (*Lenchyshyn v. Pelko Elec., Inc.* 281 A.D.2d 42, 47). Much like the defendants in *Lenchyshyn*, the defendants here cite *Beil v. Boehm* (94 Misc2d 946 [Sup. Ct. Suffolk Cty.]) as their sole authority supporting the proposition that a basis of personal jurisdiction is required for a New York court to recognize a foreign country judgment. The Appellate Division Fourth Department determined correctly that the relevant language in *Beil* was based on a misreading of a footnote in the landmark United States Supreme Court case of *Shaffer v. Heitner* (433 U.S. 186, 210, n.36). The footnote in question reads as follows:

> "Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the debt as an original matter." *Shaffer v. Heitner* (433 U.S. 186, 210, n.36).

This footnote clearly supports the proposition that a basis of personal jurisdiction over the defendants is not required to recognize and enforce a foreign judgment. However, it does raise two important issues which must be addressed. The first is whether the default judgment was entered by a court of competent jurisdiction, and the second is whether the defendant must have property in New York in order to recognize and enforce the foreign judgment in New York Courts.

In analyzing whether the foreign judgment was entered by a court of competent jurisdiction, Article 53 of the CPLR and the New York Court of Appeals case of *Sung Hwan Co. v. Rite Aid* (7 N.Y.3d 78, 817 N.Y.S.2d 600) are instructive. Article 53 applies to any foreign country judgment which is final, conclusive and enforceable where rendered (CPLR 5302). CPLR 5304 delineates specific grounds upon which New York courts will not recognize a foreign country judgment. The only two grounds for non-recognition which are at issue here are CPLR 5304(a)(2) and 5304(b)(4). It is true that defendant relied on the advice of its South African counsel, who advised that *pursuant to South African law*, the Nigerian court did not have valid personal jurisdiction over Wilson Ltd. However, when New York law is applied, one must reach the opposite conclusion and find that the High Court of Lagos had a valid basis of personal jurisdiction over Wilson Ltd. This court is bound by the express language of the New York Court of Appeals:

> "...CPLR 5304(2) states that a foreign judgment will not be recognized if the foreign court did not have personal jurisdiction over the judgment debtor. CPLR 5305...enumerates six bases for jurisdiction as well as a catchall phrase providing that the courts of this state may recognize other bases of jurisdiction. Thus, the inquiry turns on whether exercise of jurisdiction by the foreign court comports with New York's concept of personal jurisdiction, and if so, whether that foreign jurisdiction shares our notions of procedure and due process of law. If the above criteria are met, and enforcement of the judgment is not otherwise repugnant to our notion of fairness, the foreign judgment should be enforced in New York under well-settled comity principles without microscopic analysis of the underlying proceeding. When addressing CPLR Article 53, absent a finding of personal jurisdiction under CPLR 5305(a), our courts have typically looked to the framework of CPLR 302, New York's long-arm statute, using it as a parallel to assess the propriety of the foreign court's exercise of jurisdiction over a judgment debtor." *Sung Hwan Co. v. Rite Aid,* 7 N.Y.3d 78, 817 N.Y.S.2d 600.

This court has not found a ground for the Nigerian court's exercise of personal jurisdiction under CPLR 5305(a). Therefore, pursuant to the procedure outlined above by the Court of Appeals, this court now turns to CPLR 302 as a parallel to assess the propriety of the Nigerian court's exercise of personal jurisdiction over Wilson Ltd. CPLR 302(a)(1) states the following: "[A] court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent transacts any business within the state or contracts anywhere to supply goods or services in the state." It is undisputed that the defendant

contracted to supply architectural and design services to plaintiff in Nigeria. The Nigerian judgment, sought to be recognized by this court, was entered against Wilson Ltd. for the breach of that same contract. As such, it is abundantly clear that the underlying cause of action for breach of contract arose out of a contact with the forum state (Nigeria) such that the Nigerian court's exercise of jurisdiction does not offend our traditional notions of fair play and substantial justice. Because the Nigerian court's exercise of jurisdiction clearly comports with the requirements of CPLR 302, this court must recognize that the High Court of Lagos had a proper basis of personal jurisdiction over Wilson Ltd. Further, there is no dispute that defendant Wilson Ltd. received timely service in the underlying action, and there is no assertion that Nigerian courts fail to share our notions of due process of law. Based on the foregoing, this court finds that the default judgment granted by the High Court of Lagos was granted by a court of competent jurisdiction.

Whether a New York court must have *in rem* jurisdiction over property of the defendant in order to recognize a foreign judgment appears to be a question of first impression in the first department. As such, we look to the Appellate Division Fourth Department's *Lenchyshyn* decision, which expressly held that such jurisdiction is not necessary.[1] Having determined that the foreign judgment was entered against Wilson Ltd. by a court of competent jurisdiction and that *in rem* jurisdiction over some property of the defendant is not necessary to enforce the judgment, there would seem to be no unfairness in allowing plaintiff's action to realize on the debt owed to it by Wilson Ltd.

One final factor must be addressed to determine whether the recognition of the Nigerian judgment is repugnant to our notions of fairness. The defendants have alleged that the general damages awarded to the plaintiff by the Nigerian court are punitive in nature and, therefore, they violate New York's public policy against awarding punitive damages in actions for breach of contract. The judgment entered by the High Court of Lagos itemized the damages awarded as follows:

(a) The sum of $100,950.00 being the loss suffered by the claimant as a result of rewarding the contract for the interior and architectural design of the hotel;
(b) A refund of $55,250.00 for work not done on the interior architectural development drawings;
(c) General damages in the sum of $1 million for the unilateral breach of the contract by the defendant and for the resulting delay an [sic] inconvenience caused by the claimant, the hotel project and other consultants engaged by the plaintiff; and
(d) Cost of this action which includes legal fees of N4.2 million (approximately $28,000).

[1] The relevant section of *Lenchyshyn* reads as follows: "Moreover, even if defendants do not presently have assets in New York, plaintiffs nevertheless should be granted recognition of the foreign country judgment pursuant to CPLR article 53, and thereby should have the opportunity to pursue all such enforcement steps in future...." 281 A.D.2d 42 (4th Dept 2001).

It is well established that Wilson Ltd. bears the burden of proving that grounds for non-recognition of the foreign judgment exist under CPLR 5304(b) (*Blacklink v. Von Summer*, 856 N.Y.S.2d 496 (2008)), and that unsupported statements made by a party's counsel are insufficient to establish a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980)). Even when viewing the facts and drawing all inferences in the light most favorable to the non-moving party, defendant has not offered any evidence beyond a mere unsupported allegation by its American counsel that the damages awarded were punitive rather than the natural consequence of their breach. On the contrary, the plaintiff has offered the testimony of a Nigerian attorney, Mr. Alade Babtunde Kasunmu, whose status as an expert is unchallenged by Defendant. Mr. Kasunmu stated that "under Nigerian law, the term 'general damages' refers to such damages as the law will presume to be the natural consequences of the act complained of. This is to be distinguished from special damages which must be established and particularized." (Affidavit of Alade Babatunde Kasunmu, pg. 3). Even if Mr. Kasunmu's testimony were not offered, the result would not differ. Defendant bears the burden of proving that the foreign judgment should not be recognized. No admissible evidence has been presented by defendant to meet this burden. Defendant had ample opportunity to challenge the damages award in Nigeria, yet it made the tactical decision to sit on its hands and allow a default judgment to be entered. Without some evidence beyond the bare assertion of defendant's American counsel, this court cannot conclude that defendant has met its burden of proving a that a triable issue of fact exists, or that the enforcement of the judgment would be "inherently vicious, wicked or immoral, and shocking to the prevailing moral sense" (*Sung Hwan Co., Ltd. v. Rite Aid,* 7 N.Y.3d 78, 817 N.Y.S.2d 600 (2006)) to provide a basis to refuse the enforcement of the judgment on public policy grounds pursuant to CPLR 5304(b)(4).

Because, as explained above, the Nigerian judgment was issued by a court of competent jurisdiction, that no basis of personal jurisdiction over the judgment debtor is necessary for a New York Court to enforce a foreign judgment pursuant to CPLR Article 53, and that there is no evidence upon which this court can conclude that the Nigerian judgment violates the public policy of New York, this court must obey principles of comity without engaging in a microscopic analysis of the underlying proceeding and grant plaintiff's motion for partial summary judgment recognizing the Nigerian judgment against Wilson Worldwide Proprietary Limited (Wilson Ltd.).

In addition to seeking recognition of the Nigerian judgment against Wilson Ltd., Plaintiff also seeks recognition and enforcement against the co-defendants in this action who were unnamed in the Nigerian judgment. Plaintiff alleges that Wilson & Associates LLC, Wilson & Associates Inc., and Ms. Tricia Wilson are all principals, partners, and/or alter egos of Wilson Worldwide Proprietary Limited, and therefore requests that this court disregard Wilson Ltd.'s corporate form and recognize and enforce the foreign judgment against these alleged partners and/or alter ego entities. Personal jurisdiction is not contested in this matter with regard to Wilson LLC and Wilson Inc. Both are licensed to do business in New York and have therefore consented to this

court's jurisdiction pursuant to Section 304 of New York's Business Corporation Law. However, defendant challenges this court's exercise of personal jurisdiction over Ms. Wilson. This issue will be addressed infra.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. *Leon v. Martinez* 84 N.Y.2d 83, 638 N.E.2d 511 (1994). When reviewing such a motion the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Id.*). In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Id.*) However, a court need not accept as true legal conclusions or factual allegations that are either inherently incredible or flatly contradicted by documentary evidence. *Maas v. Cornell University*, 94 N.Y.2d 87, 721 N.E.2d 966 (1999)

New York courts are reluctant to disregard the corporate form. The Appellate Division First Department articulated the following standard:

> [P]iercing the corporate veil generally requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury. Parent and subsidiary or affiliated corporations are, as a rule, treated separately and independently so that one will not be held liable for the contractual obligations of the other absent a demonstration that there was an exercise of complete dominion and control, but evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance. *Sheridan Broadcasting Corp. v. Small*, 19 A.D.3d 331 (1st Dept 2005) *internal citations omitted.*

Plaintiff alleges that 100% of Wilson Ltd. stock was at one time owned by Ms. Tricia Wilson, but was contributed by Ms. Wilson to Wilson LLC, a Delaware limited liability company; that this contribution was not made on an arms-length basis and was not made for adequate consideration; that Ms. Tricia Wilson is the sole and/or controlling shareholder of Wilson LLC and Wilson Inc.; and that Wilson Inc., Wilson LLC, and Wilson Ltd. repeatedly represented to the public and to plaintiff that they are, in fact, one single worldwide entity transacting business under the tradename "Wilson & Associates". To support this contention, Plaintiff points to the defendant entities' common use of a single website; representations allegedly made on said website; representations made in the contract between Wilson Ltd. and Plaintiff; representations made by managerial-level employees of at least one of the defendant entities; and the alleged commingling of assets and resources by defendants. Specifically, Plaintiff asserts that, although the only defendant entity which appears to have an office in South Africa is Wilson Ltd., the website, used by all of the defendant entities in the alleged absence of any licensing agreement, advertises the worldwide reach of "Wilson & Associates" claiming common ownership of

offices in South Africa, New York, Texas, California, Singapore and China, without disclosing any legal distinctions among the various entities. Additionally, the contract between Wilson Ltd. and Plaintiff includes a section entitled "Introduction to Wilson & Associates". One could read this section as implying that Wilson Ltd. is the South African office of Wilson & Associates. Additionally, the text of the aforementioned section allegedly promotes Wilson & Associates as though it were a single entity with six international offices, and with one set of projects, clients, and staff. Plaintiff further alleges that it was presented business cards by Shiree Darley and Jan Lewis, respectively holding the titles of Managing Director and Principal of Wilson & Associates. The business cards allegedly implied that the Wilson Ltd.'s office in South Africa was simply one of Wilson & Associates' six international offices and not a separate entity. Further, Ms. Darley, Managing Director of Wilson & Associates, was allegedly the point of contact between Plaintiff and Wilson Ltd. with regard to questions and concerns about the contract between the parties, indicating common management of the entities. Here, Plaintiff has made specific, fact-based allegations asserting that Defendants have held themselves out to the public and plaintiff as a single entity, as principals, partners and/or alter egos of each other. Further, it is alleged that despite holding itself out as a single, worldwide entity, Defendants are hiding behind the alleged unenforceability of the judgment in South Africa to avoid liability to Plaintiff under the contract and, ultimately, the judgment. On a motion to dismiss pursuant to CPLR 3211 the facts must be viewed and all inferences must be drawn in the light most favorable to the non-moving party, here Plaintiff. As such, Plaintiff's fact specific allegations are sufficient to warrant discovery to determine the relationships among the various defendant entities and withstand a motion to dismiss the action pursuant to CPLR 3211. Further, both parties readily admit that the question of whether Defendants are principals, alter-egos and/or partners is a factual issue to be determined at trial. Therefore, Defendants' motion to dismiss must be denied.

This court cannot conclude that a clear basis for personal jurisdiction exists over Ms. Tricia Wilson. However, the question of jurisdiction and the question of her relationship as a principal, partner and/or alter ego of the other defendant entities are intertwined. See e.g, *Wm. Passalacqua Builders, Inc. v. Resnich Dev. South, Inc.*, 933 F.2d. 131 (2nd Cir. 1991). If it is determined that Ms. Wilson is, in fact, a partner, principal and/or alter ego of the entities, which have consented to jurisdiction in New York (Wilson LLC and Wilson Inc.), jurisdiction will attach because the alter-egos will be treated as one entity (*ABKO Industries v. Apple Corps*, 25 A.D.2d 435).[1] As such, because Plaintiff has properly presented a prima facie case that Ms. Wilson is a principal, partner and/or alter ego of Wilson Ltd., further discovery is warranted and on these issues and the motion to dismiss for lack of personal jurisdiction over Ms. Wilson must be denied.

Defendant's contention that this court lacks subject matter jurisdiction is unfounded. "The Supreme Court of New York is a court of original, unlimited and unqualified jurisdiction and is competent to hear all causes of action unless its jurisdiction has been specifically proscribed"

(*Lacks v. Lacks*, 41 N.Y.2d 71 (1976). The cause of action here is one to recognize a foreign judgment pursuant to Article 53 of the CPLR. Surely this court is competent to hear a case seeking to enforce a New York statute. Defendant claims that the Supreme Court of the State of New York has subject matter jurisdiction only over those actions where a substantial nexus exists between the subject matter of the action and the state of New York. Even if that were correct, the subject matter of this action is the judgment, now recognized in New York pursuant to CPLR Article 53, not the breach of contract claim for which the judgment was entered. See *Byblos Bank Europe, S.A v. Sekerbank Turk Anonym Syrketi*, 12 Misc.3d 792 (N.Y. Cty 2006), *aff'd*, 40 A.D.3d 497 (1st Dep't 2007) *citing Beers v. Shannon*, 73 N.Y. 292 (1878).

New York's Business Corporation Law § 1314(b) permits cases to be brought in New York Courts by foreign corporations against other foreign corporations in specific circumstances. These circumstances include: "when the subject matter of the litigation is situated within this state" (B.C.L. §1314(b)(2)), and "where the defendant is a foreign corporation doing business or authorized to do business in this state" (B.C.L. §1314(b)(5)). Here, both are satisfied. As discussed supra, the subject matter of the litigation is the judgment, which we have recognized as a New York judgment pursuant to Article 53 of the CPLR. Two of the defendant entities, which are alleged to be partners, principals and/or alter egos of the judgment debtor, are authorized to do business in New York and actively advertise their maintenance of an office in New York. The combination of these two factors is sufficient to establish the nexus necessary to defer to the Plaintiff's choice of forum and maintain the action in New York. The motion to dismiss on the grounds of *forum non conveniens* pursuant to CPLR 327 is denied.

Finally, Defendant's motion to dismiss for improper venue seeks an inappropriate remedy and is therefore denied. The venue provisions of the CPLR concern whether venue is proper among the various counties of New York. The remedy for improper venue is a transfer to the county in New York where venue properly lies, not a dismissal of the action. CPLR § 509. See, Siegel, New York Practice § 116, p.210 (4 Ed.) ("If suit in the New York Supreme Court is brought in the wrong county, the New York statute precludes dismissal; the court is required to entertain the case unless the venue is changed to a proper county on motion"). Defendant does not assert that venue is proper in any other New York County.

Accordingly, Defendant's motions to dismiss is denied and Plaintiff's motion for partial summary judgment is granted. Further discovery is warranted to determine whether the defendant entities are principals, partners and/or alter egos of each other.

Parties are to appear for a conference on August 1, 2011 at 9:30 a.m.

[1] "Jurisdiction over Apple Corps Ltd., which does no business in New York, was acquired by service on its subsidiary in New York, the alter ego of the parent through which it acted." 52 A.D2d. 435, 440.

May 25, 2011

MILTON A. TINGLING