To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER , J.S.C.

----------x

GEMSTAR CANADA INC.,

Plaintiff,

-against-

Index No. 28489/10
DECISION & ORDER

GEORGE A. FULLER COMPANY, INC.,
Defendants.

----------x

The following papers numbered 1 to 10 were read on plaintiff's motion for summary judgment in lieu of complaint:

PAPERS	**NUMBERED**
Notice of Motion/Affidavit/Exhibits A- E	1
Affidavit of Ian P. Katchin for Plaintiff/Exhibits A-Z	2
Plaintiff's Memorandum of Law	3
Affidavit In Opposition /Exhibits A-F	4
Memorandum of Law In Opposition	5
Reply Affidavit of Ian P. Katchin in further Support of Plaintiff's Motion	6
Reply Affirmation of Lori Jordan/ Exhibit A-B	7
Affidavit of Ian P. Katchin in Support of Plaintiff's Motion	8
Reply Affidavit of Frank Rossi in Further Support of Plaintiff's Motion	9
Plaintiff's Reply Memorandum	10

Plaintiff brings this action for summary judgment in lieu of complaint pursuant to CPLR §3213 and CPLR Article 53, seeking recovery of $134,332.14 pursuant to a judgment in favor of Plaintiff, dated April 14, 2010. The judgement was obtained from the Ontario Superior Court of Justice, Canada. Plaintiff urges that the judgement is a valid and final foreign country judgment of a court of record in the province of Ontario, Canada against Defendant , and that the judgment qualifies for recognition pursuant to CPLR Article 53.

Defendant argues that Plaintiff has not established entitlement to judgment as a matter of law by reason of the Plaintiff's failure to submit a copy of the Affidavit of Service indicating the method of service employed by Plaintiff with respect to its Statement of Claim and due to Plaintiff's failure to support its motion by admissible evidence. Defendant also states that the motion cannot be granted as the Plaintiff's are in violation of Business Corporation Law (BCL) §1312 in that they are doing business in New York State as a regular and continuous course of conduct.

Article 53 of the CPLR provides for the enforcement and recognition of foreign country judgments in the State of New York if the conditions of its provisions are met. Generally, a foreign money judgment is to be recognized in New York unless there exists a ground for non recognition, *John Galliano, S.A. v. Stallion, Inc.*, 15 N.Y.3d 75,(2010), cert. denied, 2010 WL 2786789 (U.S. 2010). CPLR 5303 provides for enforcement of the foreign judgment by motion for summary judgment in lieu of complaint. Judicial procedures and substantive laws of Ontario, a common-law jurisdiction, comport with due process

requirements and with state's public policy and, as a general matter, Ontario judgment are accorded the same recognition as a sister state judgment, U.S.C.A. Const. Amend. 14; McKinney's CPLR 5303, 5402.

The instant motion is supported by the affidavits of Plaintiff's attorney and copies of the Canadian judgment. Plaintiffs have asserted that the Canadian court had jurisdiction over Defendant and that its judgment was "final and conclusive" and remained unsatisfied. CPLR article 53, accords recognition to certain foreign country judgments-those directing the payment of money only-as a matter of international comity (see, CPLR 5301, 5303). Article 53 sets forth substantive requirements that must be met before a foreign country money judgment will be recognized in New York (see, CPLR 5303, 5304, 5305). Those primarily concern whether the foreign country's court had personal jurisdiction over the judgment debtor and subject matter jurisdiction over the case (see, CPLR 5304[a][2]; [b][1]; CPLR 5305); whether it was an impartial tribunal utilizing procedures compatible with due process of law (see, CPLR 5304[a] [1]); and whether enforcing the foreign country money judgment would be unfair, work a fraud, or violate New York's public policy (see, CPLR 5304 [b] [2]-[7]; see generally, *Islamic Republic of Iran v. Pahlavi,* 94 A.D.2d 374, 378 (1st Dept. 1983), affd. 62 N.Y.2d 474, cert. denied 469 U.S. 1108; *Dunstan v. Higgins*, 138 N.Y.70 (1883); *Harris S.A. De C.V. v. Grupo Sistemas Integrales De Telecomunicacion*, 279 A.D.2d 263 (1st Dept. 2001); *Aspinall's Club v. Aryeh*, 86 A.D.2d 428, 434 (2nd Dept. 1982). Where the foreign country money judgment meets those conditions, it is "conclusive" and entitled to recognition (CPLR 5302, 5303; see, 5305[a]; *Overseas Dev. Bank in Liquidation v. Nothmann*, 103 AD 2d 534 (2nd Dept. 1984); *Citadel Mgt. v. Hertzog*, 182 Misc.2d 902 (Sup. Ct. Queens Cty. 1999).

Plaintiff's have established that the Canadian Court that issued the judgment had personal jurisdiction over the Defendant having served a copy of the amended statement of claim on Plaintiff's counsel and provided an affidavit of service with respect to said service[1]. "When an amended complaint has been served, it supersedes the original complaint and becomes the only complaint in the case" [*St. Lawrence Explosives Corp. v Law Bros. Contr. Corp.*, 170 AD2d 957, 957(4th Dept. 1991)].

With respect to Defendant's claim that the motion for summary judgement is unsupported by admissible evidence, the Plaintiff's motion is accompanied by copies of the judgment and costs order and the decision of the Hon. Madam Justice Low which was also reported on line by the official Canadian reporting service.

It is clear that the Canadian court had subject matter jurisdiction over the case and was an impartial tribunal that utilized procedures that are compatible with the requirements of due process of law. It is also evident that the enforcement of the Canadian money judgment would not be unfair, work a fraud or violate New York's public policy. However, Defendant has raised an issue with respect to the Plaintiff's standing to bring the motion stating that the Plaintiff violates BCL §1312. Business corporations "are creatures of statute and, as such, require statutory authority to sue and be sued". *Community Bd. 7 of Borough of Manhattan v. Schaffer*, 84 N.Y.2d 148 (1994), *citing*, BCL § 202 (a)(2). New York BCL §1312, entitled "Actions or special proceedings by unauthorized foreign corporations" provides:

---

[1]In addition, Defendant through their former counsel Albert J. Pirro, Jr., Esq., who represented Defendant in the Canadian action, acknowledged that Defendant had been served with the initial Summons and Complaint.

> A foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state and it has paid to the state all fees and taxes imposed under the tax law or any related statute, as defined in section eighteen hundred of such law, as well as penalties and interest charges related thereto, accrued against the corporation. This prohibition shall apply to any successor in interest of such foreign corporation. BCL §1312(a).

While its purpose is not to enable the avoidance of valid contractual obligations, BCL §1312, commonly referred to as New York's "door closing statute", is a means to regulate foreign corporations which are doing business within New York. *S & T Bank v. Spectrum Cabinet Sales, Inc.*, 247 A.D.2d 373(2nd Dept., 1998).

"In order for a court to find that a foreign corporation is 'doing business' in New York within the meaning of Business Corporation Law § 1312(a), 'the corporation must be engaged in a regular and continuous course of conduct in the State'." *Highfill, Inc. v. Bruce and Iris, Inc.*, 50 A.D.3d 742 (2nd Dept., 2008), *quoting, Commodity Ocean Transp. Corp. of N.Y. v. Royce*, 221 A.D.2d 406, 407(2nd Dept., 1995).

While Plaintiff denies it is doing business in the State of New York, a framed issue hearing is necessary to determine this threshold matter. See, *Alicanto, S.A. v. Woolverton*, 129 A.D.2d 601 (2nd Dept., 1987). "Determination of this question must be approached on a case by case basis with inquiry made into the type of business being conducted". Id. Furthermore, it is the Defendant's burden, as the party relying upon this statutory barrier, to prove that Plaintiff is in fact conducting business in the State of New York. Id.

Accordingly, both parties shall appear at Courtroom 1600 on **June 10, 2011 at 9:30 a.m.** for the scheduling of a framed issue hearing.

The foregoing shall constitute the decision and order of the Court.

Dated: White Plains, New York
May 4, 2010

HON. SAM D. WALKER J.S.C.

cc:
Epstein Becker & Green, P.C.
Attorney for Plaintiff
250 Park Avenue
New York, NY 10177

Delbello Donnellan Weingarten Wise & Weiderkehr, LLP
Attorney for Defendant
One North Lexington Avenue
White Plains, New York 10601