

Horowitz v PCP Int'l Ltd.

2012 NY Slip Op 30640(U)

January 31, 2012

Sup Ct, Nassau County

Docket Number: 005492/11

Judge: F. Dana Winslow

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SCAN

**SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK**

Present:
HON. F. DANA WINSLOW,

**Justice
TRIAL/IAS, PART 3
NASSAU COUNTY**

**GOLDMAN, HOROWITZ & CHERNO,
LLP and STEVEN D. GREIF,**

Plaintiff,

INDEX NO.: 005492/11

- against -

MOTION SEQ. NO.: 001

PCP INTERNATIONAL LTD.,

INTERIM ORDER

Defendant.

The following papers read on this motion (numbered 1):

Notice of Motion.....1

Pursuant to this Part's Rule, namely I(B), the Court automatically adjourns all motions that are submitted without opposition for one month, to determine whether or not there was either an administrative delay or excusable neglect. Such adjournment is made without prejudice to the moving party to have the merits of such an adjournment considered in the event that there is a subsequent submission.

This is an action to recover attorney's fees in the amount of \$65,202 together with interest arising out of representation during the period July 6, 2008 through October 8, 2010 provided by plaintiffs to defendant in connection with a dispute with the United Nations (the "UN"). Plaintiff STEVEN D. GREIF ("GREIF") *pro se* and his firm GOLDMAN, HOROWITZ & CHERNO, LLP ("GOLDMAN") seek a default judgment pursuant to CPLR §3215 against defendant based upon the failure of such defendant to answer or appear. Alternatively, plaintiffs seek a default judgment on liability and an Order directing an Inquest on damages.

In support of their motion, plaintiffs have proffered (i) the Summons and Verified Complaint filed with the County Clerk on April 13, 2011 setting forth the facts constituting the claim; and (ii) an affirmation of GREIF, dated September 26, 2011, as to defendant's failure to answer or appear. The Court notes that since GREIF is a named plaintiff in the subject action, GREIF's submission of an affirmation instead of an

affidavit is improper. **CPLR §2106**. See generally **Nazario v. Ciafone**, 65 AD3d 1240, 1241; **Finger v. Saal**, 56 AD3d 606, 607. The Court may, however, disregard a mistake, or permit it to be corrected, so long as a substantial right of a party is not prejudiced. **CPLR §2001**. The Court notes that as the Complaint is verified *and* notarized by GREIF individually and as a partner of GOLDMAN, the Court shall disregard the error. The Court notes further that **CPLR §3215(f)** provides that a verified complaint may be used as the affidavit of fact.

Plaintiffs contend that defendant was a contractor to the UN but that in 2006 the UN cancelled three ongoing contracts on the basis that an inappropriate relationship existed between defendant and a UN procurement officer. Plaintiffs claim that the contracts had a potential gross revenue in excess of \$11 million. Plaintiffs allege that they were retained to represent defendant to attempt to recover damages from the UN as a result of the UN's cancellation of these contracts. Plaintiffs claim further that they agreed to represent defendant on the basis of defendant's disclosure to GREIF that the only impropriety committed by defendant was defendant's provision of an apartment in London for several days for the use by the son of a UN procurement officer.

At the outset, the Court must determine (1) whether the Court can exercise personal jurisdiction over defendant in the first instance, and if so, (2) whether defendant was properly served in India. Plaintiffs allege upon information and belief that defendant is a foreign corporation with its principal place of business in the city of Chandigarh, India.

Personal Jurisdiction

On the question of personal jurisdiction, first, the Court must determine whether the "long arm" provisions of the Civil Practice Law and Rules provide a basis for jurisdiction. If they do, then the Court must conduct a constitutional inquiry to determine whether the exercise of personal jurisdiction would offend due process pursuant to **International Shoe Company v. Washington**, 326 U.S. 310 and its progeny. **777388 Ontario Ltd. v. Lencore Acoustics Corp.**, 142 F.Supp.2d 309; **Opticare Acquisition Corp. v. Castillo**, 25 AD3d 238. The burden of establishing jurisdiction rests on the party asserting it. **Id.**

In pertinent part, **CPLR §302(a)(1)** permits the New York courts to exercise personal jurisdiction over a non-domiciliary who "transacts any business within the state," if the cause of action arises out of such transaction. **CPLR §302(a)(1); Opticare**, 25 AD3d 238. "To determine whether a party has 'transacted business' for purposes of "long-arm" jurisdiction, courts must look to the totality of circumstances concerning the

party's interactions with, and activities within, the state.” **Scheuer v. Schwartz**, 42 AD3d 314 *quoting* **Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez**, 171 F3d 779, 787. *See* **Farkas v. Farkas**, 36 AD3d 852; **Olympus America, Inc. v. Fujinon, Inc.**, 8 AD3d 76; **Liberatore v. Calvino**, 293 AD2d 217; **Catauro v. Goldome Bank for Savings**, 189 AD2d 747.

The Court need not belabor this point in the context of this motion. It is alleged, without opposition, that the Court can assert jurisdiction over defendant because the defendant transacted business in New York by meeting with plaintiffs in NY, retaining plaintiffs for an arbitration proceeding conducted in NY and attending the arbitration proceedings with plaintiffs which took place in NY. Insofar as defendant has filed no opposition to this motion, it is deemed to have admitted the facts as asserted by plaintiffs. **Kuehne & Nagel, Inc. v. Baiden**, 36 NY2d 539; **Arteaga v. 231/249 W 39 Street Corp.**, 45 AD3d 320, 321. The Court finds that based on these allegations, defendant's activities were sufficient to invoke jurisdiction and there is a substantial relationship between the transaction and the claim asserted.

Service of Process

With respect to the second question as to whether or not defendant was properly served in India, plaintiffs submit proof demonstrating service pursuant to the **CPLR**, and in addition proof that defendant was served in accordance with the Hague Service Convention treaty. **CPLR §313** provides that a person subject to jurisdiction in NY may be served in the same manner without the state, as service is made within the state, by a person authorized to make such service by the laws of the country in which service is made. In accordance therewith, plaintiffs proffer proof that defendant was seemingly served in accordance with **CPLR §311(a)(1)**.

The Court notes, however, that “where there exists a treaty requiring a specific form of service of process such as the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention), that treaty, of course, is the supreme law of the land and its service requirements are mandatory” **Morgenthau v. Avion Resources Ltd.**, 11 NY3d 383, 390 *citing* US Const., art VI, cl. 2; **Volkswagenwerk Aktiengesellschaft v. Schlunk**, 486 US 694. In the case at bar, unlike in **Morgenthau**, the Hague Service Convention is implicated because India is a signatory to that convention. The Hague Service Convention provides a procedure to effect service through the Indian Central Authority. In connection therewith, plaintiffs have submitted sufficient proof that the ‘documents’ [defined in the ‘Request for Service Abroad of Judicial or Extra Judicial Documents’ to include the summons and verified complaint]

were served on defendant on July 2, 2011 in accordance with the Hague Service Convention.

Defendant's Answer

Plaintiffs submit an email from Edwin Nhliziyo, CPA addressed to GREIF, which purportedly attaches a four page answer referred to as an 'Answer to Summons filed on April 13, 2011 and Served on Defendant on July 2, 2011 [Motion Exh. L]'. There is no indication who submitted this 'answer' and no proof of service of the answer on plaintiffs. The Court notes that this document cannot serve as a valid answer for defendant since a corporation cannot appear *pro se* and therefore said 'answer' must be disregarded by the Court. **CPLR 321(a)**.

Merits

Plaintiffs contend that the arbitration tribunal found that the UN had the right to cancel two of the contracts and awarded defendant nominal damages on the third contract. Plaintiffs further state that it is subject to a confidentiality agreement in connection with the proceedings [Motion Exh. J], and as such, the arbitration award can only be disclosed to the Court *in camera*.

Of concern to the Court, is the insufficiency of plaintiffs' proof with respect to the merits of their claim. "**CPLR §3215** does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action." **Joosten v. Gale**, 129 AD2d 531. The Court recognizes that the standard of proof set forth in **Joosten** is not stringent. Generally, all that is required is some first-hand confirmation of the facts. **Id.**, at 535.

In support, plaintiffs proffer a Retainer Agreement, dated July 2, 2008, entered into between plaintiffs and defendant [Motion Exh. I]. The Court notes that the Agreement was executed by a representative of defendant in Dubai and includes what appears to be a certification by the Vice Consul of the Consulate General of India. The provision in dispute herein provides:

The undersigned attorney has agreed to enter into this retainer agreement on a contingent fee basis in reliance upon representations made to the United Nations in letters dated November 16, 2006; February 13, 2007; and May 26, 2007; which basically contend that the cancellation of contracts was improper because PCP conducts its business in an ethical manner. All other available approaches will be made by counsel in order to seek relief

for the client, PCP. In the event that there is a finding by an Arbitration forum that improprieties were committed by PCP other than the provision of short term hospitality to the son of the UN procurement officer, Mr. Bahel, then the undersigned attorney reserves the right to bill PCP for his legal fees on an hourly fee basis, at \$300.00 per hour.

Plaintiffs contend that in June 2010, a four day hearing was held in NY and that on or about August 31, 2010, the arbitration tribunal rendered a decision which found that defendant committed improprieties other than the provision of short term hospitality to the son of a UN procurement officer.

Plaintiffs' claim that the arbitration tribunal found improprieties other than the provision by defendant of short term hospitality to the son of a UN procurement officer, thereby allegedly invoking plaintiffs' right to an hourly fee, is supported only by the assertions made by GREIF in his affirmation. Consequently, the Court cannot make a determination on the record presented as to whether plaintiffs have established *prima facie* their entitlement to a default judgment. The Court must be satisfied that the decision of the arbitration tribunal effectively invoked the provision in the Retainer Agreement entitling plaintiffs to a legal fee on an hourly fee basis.

Based on the foregoing, it is

ORDERED, that plaintiffs shall produce for *in camera* review a copy of the determination of the arbitration tribunal in this matter on or before **February 29, 2012**; and it is further

ORDERED, that plaintiff *pro se*, or by counsel if represented, and defendant by counsel shall appear for a conference before the undersigned on **March 27, 2012 at 10:30 a.m.**, in Part 3 of the NYS Supreme Court, 100 Supreme Court Drive, Mineola, New York; and it is further


ORDERED, that the motion is **adjourned** to the conference date, as set forth above, or any duly authorized adjournment thereof. The parties or their counsel are directed to contact the Court after 3:00 p.m. on the business day immediately preceding the conference date, or any duly authorized adjournment thereof, to confirm the appearance of the parties and to ascertain that no conflict has arisen in the Court's schedule; and it is further

ORDERED, that plaintiffs shall serve a copy of this Order as entered upon defendant in accordance with the procedures of the Hague Service Convention within thirty business days of entry of this Order in the records of the Nassau County Clerk, and

shall provide proof of such service at the conference or any duly authorized adjournment thereof.

This constitutes the Order of the Court.

Dated: Jan 31, 2012


J.S.C.

ENTERED
MAR 08 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE