

Kapiteyn v Kurt Weiss Greenhouses Inc.

2014 NY Slip Op 32746(U)

October 16, 2014

Sup Ct, Suffolk County

Docket Number: 12-38461

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 4-15-14
ADJ. DATE 5-21-14
Mot. Seq. # 003 - MotD

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KAPITEYN, B.V.,		BOIES, SCHILLER & FLEXNER, LLP
	Plaintiff,	Attorney for Plaintiff
		333 Main Street
- against -		Armonk, New York 10504
		GERMANO & CAHILL, P.C.
KURT WEISS GREENHOUSES INC.,		Attorney for Defendant
	Defendant.	4250 Veterans Memorial Highway, Suite 275
		Holbrook, New York 11741
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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the plaintiff, dated March 14, 2014, and supporting papers (including Memorandum of Law dated March 14, 2014); (2) Notice of Cross Motion by the , dated , supporting papers; (3) Affirmation in Opposition by the defendant, dated April 7, 2014, and supporting papers (including Memorandum of Law dated April 7, 2013); (4) Reply Affirmation by the plaintiff, dated April 14, 2014, and supporting papers; (5) Other Reply Memorandum of Law dated April 14, 2014 (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by plaintiff for, inter alia, summary judgment in lieu of complaint on its claim to enforce judgments in its favor issued by the District Court of Amsterdam, the Netherlands, on July 11, 2012 and January 8, 2014, is granted as set forth herein, and is otherwise denied; and it is further

ORDERED that plaintiff shall have judgment against defendant in the amount of €149,900.36 for damages, plus interest of 1.5 percent per month on such amount over €133,739.33 as of January 31, 2012 and until the date of payment in full, and in the amount of €5,213.94 for litigation costs, such amounts awarded in the foreign judgment obtained July 11, 2012; and it is further

ORDERED that plaintiff shall have judgment against defendant in the amount €2,099 awarded for costs in the foreign judgment obtained January 8, 2014.

MB

In 2009, plaintiff Kapiteyn, B.V., of Breezand, the Netherlands, a private limited company in the business of trading and exporting flower bulbs, bulbous plants and tuberous plants, entered into a business relationship with defendant Kurt Weiss Greenhouses, Inc., a wholesale grower of plants that sells to nurseries and other retailers. As part of that relationship, the parties allegedly agreed that all sales agreements between them would be governed by the Royal Trade Association for Nurserystock and Flowerbulbs (Anthos) terms of sale. Such terms include, in relevant part, that all offers and agreements “shall be exclusively governed by the laws of the Netherlands,” that the parties consent to the jurisdiction of the courts of the Kingdom of the Netherlands, and that any contracts shall be governed by the laws of the Netherlands. Also, pursuant to the Anthos terms, a buyer is obliged to check the quality of the products delivered and report any complaints within seven days after delivery. In November 2010, Kurt Weiss Greenhouses placed orders for flower bulbs with Kapiteyn, which agreed to sell such bulbs for the sum of €133,739.33. When the bulbs were shipped in February 2011, invoices for the bulbs were sent by Kapiteyn to Kurt Weiss Greenhouses. Months later, reminder payment notices were sent by Kapiteyn, yet no payments were received. In August 2011, Kurt Weiss Greenhouses notified Kapiteyn that it breached the sales agreements in November 2010 by delivering bulbs infected with bacterial disease, and that such breach caused it damages.

Subsequently, Kapiteyn brought a proceeding against Kurt Weiss Greenhouses in the District Court of Amsterdam claiming breach of contract. A “writ of summons” directing Kurt Weiss Greenhouses to appear in the District Court on June 13, 2012, together with an English translation of such document, allegedly was served on Kurt Weiss Greenhouses in April 2012. Kurt Weiss Greenhouses failed to appear, and a default judgment in favor of Kapiteyn was issued on July 11, 2013. The default judgment ordered Kurt Weiss Greenhouses to pay Kapiteyn €149,900.36, “plus contractual interest at 1.5 percent per month over €133,739.33 as of January 31, 2012 and until the day of payment in full,” and to pay its litigation costs of \$5,213.94.

After Kurt Weiss Greenhouses failed to pay the judgment, Kapiteyn commenced this action to enforce the foreign judgment it obtained in June 2013 from the District Court of Amsterdam. By order issued July 10, 2013, this Court denied, without prejudice, a motion by Kapiteyn under CPLR 3213 and 5304 for summary judgment in its favor and granted a cross motion by Kurt Weiss Greenhouses under CPLR 2201 to the extent that the action was temporarily stayed until a determination was made by the District Court of Amsterdam on a “writ of opposition” filed by Kurt Weiss Greenhouses. Significantly, the July 2013 order provided that the temporary stay was granted “on condition that [Kurt Weiss Greenhouses], within 20 days after service of a copy of [such] order with notice of its entry, file with the Office of the Suffolk County Clerk and undertaking by cash or surety bond in the amount of \$250,000” to secure any judgment that might later be entered against it. Kurt Weiss Greenhouses failed to post an undertaking, even though the parties entered into an agreement in September 2013 extending the time to do so.

Subsequently, the District Court of Amsterdam issued a judgment, dated January 8, 2014, finding that Kurt Weiss Greenhouse had timely moved to vacate the default judgment entered against it. Stating that “the parties do not dispute that Dutch law governs the claims at issue,” the District Court held that the Anthos terms were part of the sales agreements at issue and, therefore, it had jurisdiction over Kurt Weiss Greenhouses. It denied Kurt Weiss Greenhouses’ application to vacate the default judgment,

confirmed the original judgment against it, and rejected the counterclaim against Kapiteyn, finding that the complaints raised about the quality of the bulbs were untimely under the terms of such agreements.

Kapiteyn now moves for an order lifting the temporary stay and granting summary judgment on its claim for recognition of the judgments it obtained in the Netherlands against Kurt Weiss Greenhouses. It also seeks an order finding Kurt Weiss Greenhouses in contempt of the July 2013 order based on its failure to post an undertaking. Kurt Weiss Greenhouses opposes the motion, arguing that the District Court of Amsterdam did not have personal jurisdiction over it and that Kapiteyn's breach of contract action should have been brought in the United States, not in the Netherlands. It also argues that it failed to post the undertaking, because it lacked the necessary financial resources. In reply, Kapiteyn asserts, in part, that Kurt Weiss Greenhouses participated in the foreign lawsuit by seeking to vacate the default judgment and to interpose a counterclaim, and that it lost on the merits. It also asserts that Kurt Weiss Greenhouses should be compelled to disclose certain financial information.

Initially, the Court notes that the sur reply filed by Kurt Weiss Greenhouses was not considered in the determination of this motion (*see* CPLR 2214 [c]). Further, Kapiteyn's request for an order compelling disclosure, made for the first time in its reply papers, is rejected as improper. Moreover, the application for an order lifting the temporary stay issued in July 2013 is denied, as the stay expired by its own terms upon Kurt Weiss Greenhouses' failure to post an undertaking.

In a proceeding brought under CPLR article 53, the judgment creditor is not seeking any new relief against the debtor; rather, it is asking the court to perform the ministerial function of recognizing a foreign judgment (*CIBC Mellon Trust Co. v Mora Hotel Corp.*, 100 NY2d 215, 222, 762 NYS2d 5 [2003]). Pursuant to CPLR article 53, "a judgment issued by the court of a foreign country is recognized and enforceable in New York State if it is 'final, conclusive and enforceable where rendered' (CPLR 5302)" (*Daguerre, S.A.R.I. v Rabizadeh*, 112 AD3d 876, 877, 978 NYS2d 80 [2d Dept 2013]). A judgment of a foreign country is considered conclusive between the parties to the extent it grants or denies recovery of a sum of money (*CIBC Mellon Trust Co. v Mora Hotel Corp.*, 100 NY2d 215, 221, 762 NYS2d 5), and will be recognized in New York unless "(1) the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law; [or] (2) the foreign court did not have personal jurisdiction over the defendant" (CPLR 5304 [a][1], [2]). However, an exception to the requirement that the foreign court have secured personal jurisdiction may be made if, prior to the commencement of the foreign action, the defendant "agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved" (CPLR 5305 [a][3]) and was given fair notice of the foreign court proceeding that led to the foreign money judgment at issue (*see Landauer Ltd. v Joe Monani Fish Co., Inc.*, 22 NY3d 1129, 985 NYS2d 463 [2014]; *John Galliano, S.A. v Stallion, Inc.*, 15 NY3d 75, 904 NYS2d 683 [2010]).

Kapiteyn's submissions in support of its motion are sufficient to establish a prima facie case that the mandatory grounds for nonrecognition of the two judgments against Kurt Weiss Greenhouses it obtained from the District Court in Amsterdam do not exist (*see Daguerre, S.A.R.I. v Rabizadeh*, 112 AD3d 876, 877, 978 NYS2d 80). Here, Kapiteyn presents copies of the initiating papers, the service of process documents, and the judgments issued by the District Court. It is undisputed that the Dutch courts are courts of competent jurisdiction and that the Dutch legal system comports with the due

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process requirements and the public policy of New York. Further, the written offer sent by Kapiteyn to Kurt Weiss Greenhouses in August 2010, as well the confirmation notices sent in November 2010 and the invoices sent in February 2011, specifically state that the Anthos terms apply to all transactions. Kurt Weiss Greenhouses, therefore, agreed to submit to the jurisdiction of the Netherlands courts in the event of a dispute arising from a sales agreement with Kapiteyn. Moreover, Kurt Weiss voluntarily appeared in the Netherlands proceeding, not only to contest the issue of jurisdiction, but also to assert a defense and a counterclaim based on the alleged defective quality of the bulbs sold by Kapiteyn (*see* CPLR 5305; *CIBC Mellon Trust Co. v Mora Hotel Corp.*, 100 NY2d 215, 762 NYS2d 5; *S.C. Chimexim S.A. v Velco Enters. Ltd.*, 36 F Supp 2d 206 [SDNY 1999]).

The burden, therefore, shifted to Kurt Weiss Greenhouses to prove a ground for nonrecognition of the Netherlands judgments (*see CIBC Mellon Trust Co. v Mora Hotel Corp.*, 100 NY2d 215, 762 NYS2d 5). In opposition, Kurt Weiss Greenhouses failed to demonstrate, or even raise, a discretionary basis for denying recognition of the foreign judgments (*see CIBC Mellon Trust Co. v Mora Hotel Corp.*, 296 AD2d 81, 743 NYS2d 408 [1st Dept 2002], *affd* 100 NY2d 215, 762 NYS2d 5). Accordingly, the branch of the motion for summary judgment in lieu of complaint recognizing and docketing the judgments in favor of Kapiteyn obtained from the District Court of Amsterdam on July 11, 2012 and January 8, 2014 is granted.

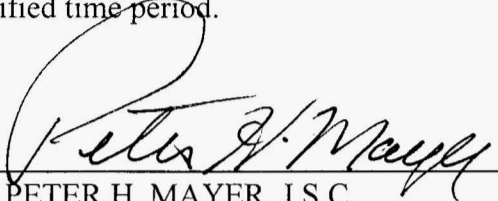
The branch of the motion for an order adjudging Kurt Weiss Greenhouses in contempt of court, however, is denied. To prevail on a motion to punish for civil contempt, the movant must demonstrate that the alleged contemnor disobeyed “a lawful judicial order expressing an unequivocal mandate” (*McCain v Dinkins*, 84 NY2d 216, 226, 616 NYS2d 335 [1994]), that the alleged contemnor had knowledge of such order, and that the offending conduct defeated, impaired, impeded or prejudiced a right of another party to the litigation (*see* Judiciary Law §753; *DeMaio v Capozello*, 114 AD2d 899, 981 NYS2d 121 [2d Dept 2014]; *El-Dehdan v El-Dehdan*, 114 AD3d 4, 978 NYS2d 239 [2d Dept 2013]; *Suissa v Baron*, 107 AD3d 690, 966 NYS2d 481 [2d Dept 2013]; *Bernard-Cadet v Gobin*, 94 AD3d 1030, 943 NYS2d 164 [2d Dept 2012]; *see also Matter of McCormick v Axelrod*, 59 NY2d 574, 466 NYS2d 279 [1983]; *Goldsmith v Goldsmith*, 261 AD2d 576, 690 NYS2d 696 [2d Dept 1999]). Further, an application to punish for contempt must be served on the alleged contemnor, unless service on his or her attorney is ordered by the court (Judiciary Law § 761), and must contain on its face a notice that the purpose of the hearing is to punish for contempt, that punishment may consist of a fine, imprisonment or both, and a warning of the consequences for failure to appear in court (Judiciary Law § 756).

Here, the contempt application is procedurally defective, as a motion for summary judgment in lieu of complaint may be used only for claims based upon an instrument for the payment of money or upon on a judgment (*see* CPLR 3213). In any event, the Court is without jurisdiction to grant the application, since the motion was not served on Kurt Weiss Greenhouses, but on its attorney, and failed to provide, in eight-point bold type, the notice and warning that “failure to appear in court may result in . . . immediate arrest and imprisonment for contempt” mandated by Judiciary Law § 756 (*see Rose v Rose*, 47 AD3d 790, 849 NYS2d 156 [2d Dept 2008]; *Xand Corp. v Reliable Sys. Alternatives Corp.*, 35 AD3d 849, 827 NYS2d 269 [2d Dept 2006]; *Matter of P & N Tiffany Props. v Williams*, 302 AD2d 466, 775 NYS2d 410 [2d Dept], *lv denied* 100 NY2d 512, 766 NYS2d 166 [2003]). Moreover,

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Kapiteyn failed to show that Kurt Weiss Greenhouses knowingly disobeyed an unequivocal mandate of the court and that such conduct prejudiced its rights (*see Reback v Reback*, 73 AD3d 890, 905 NYS2d 178 [2d Dept 2010]; *Chambers v Old Stone Hill Rd. Assoc.*, 66 AD3d 944, 889 NYS2d 598 [2d Dept 2009], *appeal dismissed* 14 NY3d 747, 898 NYS2d 80 [2010]; *Muwwakki v Metropolitan Suburban Bus Co.*, 289 AD2d 309, 734 NYS2d 586 [2d Dept 2001]; *compare Bais Yoel Ohel Feige v Congregation Yetev Lev D'Satmar of Kiryas Joel, Inc.*, 78 AD3d 626, 910 NYS2d 174 [2d Dept 2010]; *Incorporated Vil. of Plandome Manor v Ioannou*, 54 AD3d 365, 862 NYS2d 592 [2d Dept 2008]). Rather, the order issued on July 10, 2013 granted the motion by Kurt Weiss Greenhouses for a temporary stay on the condition that it post an undertaking within a specified time period.

Dated: October 16, 2014


PETER H. MAYER, J.S.C.