

Colebrooke Theat. LLP v Bibeau

2015 NY Slip Op 30672(U)

April 22, 2015

Supreme Court, New York County

Docket Number: 651440/2014

Judge: Jeffrey K. Oing

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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

-----x

COLEBROOKE THEATRICAL LLP,

Plaintiff,

-against-

STEPHANE BIBEAU, JEAN-FRANCOIS
RODRIGUE and C3 GLOBAL CAPITAL
HK LIMITED,

Defendants.

Index No. : 651440/2014

Mtn Seq. No. 003

DECISION AND ORDER

-----x

JEFFREY K. OING, J. :

Relief Sought

Plaintiff, Colebrooke Theatrical LLP, moves, pursuant to CPLR 3215, for a default judgment against the corporate defendant, C3 Global Capital HK Limited ("C3 Global"). It previously obtained a default judgment against the individual defendants, Stephane Bibeau and Jean-Francois Rodrigue (NYSCEF Doc. No. 59).

Background

Plaintiff, a British theater production company, led a group of producers in assembling a new Broadway adaptation of Truman Capote's well-known novel "Breakfast at Tiffany's." In that regard, it created a New York limited partnership, Lulamae Productions LP ("Lulamae"), to serve as the production entity for the project. Plaintiff installed itself as general partner in Lulamae's limited partnership agreement ("LPA"). The LPA called

for \$3 million to \$4 million in capital contributions from the general and limited partners by March 20, 2013 -- opening night. In early March, plaintiff made a \$500,000 contribution as a limited partner, bringing the total investment in Lulamae to \$3,950,000. The LPA permitted plaintiff to sell this \$500,000 investment to an outside investor.

As March 20, 2013 approached, defendant Stephane Bibeau ("Bibeau"), a real estate developer and restaurant owner, expressed interest in investing in Lulamae. Plaintiff provided defendant Bibeau with Lulamae's private placement memorandum and other relevant information. Plaintiff understood that defendant Bibeau was considering a personal investment and prepared the agreements accordingly. Before signing, however, defendant Bibeau informed plaintiff that defendant C3 Global, a Chinese corporation headquartered and incorporated in Hong Kong, would be the investor and that he would sign on its behalf. When defendant Bibeau signed the letter agreement on March 14, 2013 (the "letter agreement"), his signature block said that he was a director of defendant C3 Global. The letter agreement committed defendant C3 Global to invest \$500,000 by March 16, 2013. On March 18, 2013 defendant Bibeau signed the LPA on defendant C3 Global's behalf.

The play opened on March 20, 2013 to largely negative reviews. The unsuccessful production lasted only a month before

folding. C3 Global never made the \$500,000 investment, which plaintiff now pursues in this breach of contract action.

Discussion

In order to obtain a default judgment, CPLR 3215(f) requires a movant to submit (1) proof of service of the summons and complaint, (2) proof of the facts constituting the claim, (3) proof of default, and (4) proof of amount due. Although it failed to appear or move with respect to the complaint, defendant C3 Global makes a limited appearance to oppose this motion primarily on the ground that plaintiff's service of the summons and complaint was not proper and, as such, did not confer this Court with personal jurisdiction over it.

(i) Proof of Service of Process and Default

Plaintiff proffers the affidavit of Kwok Wing-sum, the process server (Calman Aff., 1/8/15, Ex. D [NYSCEF Doc. No. 32]), as proof of service of the summons and complaint on defendant C3 Global in Hong Kong, which constitutes prima facie evidence of proper service (Grinshpun v Borokhovich, 100 AD3d 551, 552 [1st Dept 2012]). Defendant C3 Global argues, however, that this Court does not have personal jurisdiction over it because service was not in compliance with the "Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters" (the "Hague Convention") and the local Civil Procedure Law for service of the People's Republic of China (Mangan

Index No. 651440/2014
Mtn Seq. No. 003

Page 4 of 12

Affirm., 2/4/15, Exs. C and D [NYSCEF Doc. Nos. 43 and 44]), and, as such, the service of process is defective.

Defendant C3 Global argues that in order to effectuate proper and valid service of process pursuant to the Hague Convention plaintiff must (1) provide duplicate copies of the summons and complaint to the Central Authority designated by the contracting state; (2) provide the Central Authority with a translated version, if required, of the summons and complaint and all attached exhibits; and (3) provide a completed Certificate including "the method, the place and the date of service and the person to whom the document was delivered" (Mangan Affirm., 2/4/15, Ex. C, Hague Convention, Art. 2-3, 5-6 [NYSCEF Doc. No. 43]). In addition, the Hague Convention rules are subject to the local and internal rules of the signatory, in this case the People's Republic of China. China's local rules for service require service upon an addressee or person entitled to receive the document (Mangan Affirm., 2/4/15, Ex. D, Formal Service, Art. 5(1)(a) [NYSCEF Doc. No. 44]). Further, China's local rules provide that "service requested within the meaning of Art. 5(1) of the Convention requires that all documents and evidence to be served must be written in Chinese or that a translation in Chinese be attached thereto, unless there are contrary prescriptions in the mutual treaties between China and other Contracting States of the Hague Convention" (Id.).

Here, the process server's affidavit provides the following information:

1. I was directed by the Registrar, High Court of Hong Kong to serve the above-named C3 Global Capital HK Limited with the following judicial documents: (i) Request; (ii) Summary of the document to be served; (iii) Certificate (unexecuted); (iv) Summons with Index No. 651440/2014; and (v) Complaint with Index No. 651440/2014.
2. I did on Tuesday the 4th day of November 2014 at 1411 hours call at the address given in the Request for Service, namely, Room 1201, Allied Kajima Building, 38 Gloucester Road, (actually known as 138 Gloucester Road) Wanchai, Hong Kong, China for effecting service of the aforesaid judicial documents.
3. On arrival at the aforesaid address, I could not find the said C3 Global Capital HK Limited. I found that the premises at the aforesaid address were occupied wholly by one company, namely Cheng & Cheng CPA Limited. I also looked at the adjacent units and could not find the name of C3 Global Capital HK Limited displayed outside those premises. Therefore I made enquiries at the said Cheng & Cheng CPA Limited and revealed the purpose of my visit to a female staff member, Ms. Tang therein. She told me that the Party for Service, namely C3 Global Capital HK Limited had lost contact with them since December 2013 and the forwarding address was unknown.
4. Pursuant to a search via the Companies Registry of Hong Kong, a matching record was found that for the search information input regarding the registered office of the Party for Service was situated at Room 1201, Allied Kajima Building, 138 Gloucester Road, Wanchai, Hong Kong, China. A Copy of Company Particulars search of situation of Registered office was produced and marked as "Exhibit KWS-1, KWS-2 and KWS-3".

5. Therefore, I did again on Tuesday the 11th day of November 2014 at 1426 hours call at the address given in the Request for Service, namely, Room 1201, Allied Kajima Building, 138 Gloucester Road, Wanchai, Hong Kong, China for effecting the service of the aforesaid judicial documents. On arrival at the aforesaid address, I therefore served the above-named C3 Global Capital HK Limited with the aforesaid judicial documents by leaving the same of the aforesaid judicial documents to the above-named C3 Global Capital HK Limited at Room 1201, Allied Kajima Building, 138 Gloucester Road, Wanchai, Hong Kong, China. I verily believe that the aforesaid address is the same address as the one stated in paragraph 2 above.

(Calman Aff., 1/8/15, Ex. D [NYSCEF Doc. No. 32]).

A review of the process server's affidavit within the above-noted framework ostensibly demonstrates that service was not in compliance with the Hague Convention and China's local rules. In that regard, defendant C3 Global accurately points out that there was a failure to serve duplicate copies of the summons and complaint, failure to serve the summons and complaint translated in Chinese, failure to complete the required Certificate, and failure to serve the addressee or person. Under these facts, defendant C3 Global appears to have prevailed on its argument that plaintiff failed to effectuate proper service pursuant to the Hague Convention and China's local rules. That, however, is not the case.

Hong Kong is deemed a Special Administrative Region ("Hong Kong SAR") of the People's Republic of China (Calman Supp. Aff.,

2/11/15, Ex. F [NYSCEF Doc. No. 48]). In this unique relationship, China retains sovereignty over Hong Kong, but Hong Kong is otherwise afforded a high degree of autonomy with respect to service of process (Id., Ex. H [NYSCEF Doc. No. 50]). Thus, while Beijing is home to China's Central Authority, an office each Hague Convention signatory is required to maintain for the handling of international service requests, the Hong Kong SAR has its own Central Authority and has its own rules for service, which differ substantially from China's local rules (Id., Ex. F [NYSCEF Doc. No. 48]). In particular, the Hong Kong SAR allows service of process upon a limited liability company or corporation to be effectuated by leaving the documents at the entity's registered office address, rather than with the addressee or a person entitled to receive the documents to be served (Id., Ex. F, Art. 5(1)(2)(b) [NYSCEF Doc. 48]). The Hong Kong SAR also allows for service in either Chinese or English, its two official languages (Id., Art. 5(3)). Evaluating the process server's affidavit in this context, the process server did in fact comply with the relevant service requirements.

Defendant C3 Global next argues that the certificate verifying service of process lacks sufficient detail, and as such, does not comply with Article 6 of the Hague Convention. That argument is unavailing. A review of the certificate indicates that it not only includes Wing-sum's description of

events, but also all the details necessary for proper service pursuant to Article 6 of the Hague Convention. In any event, in a letter dated December 4, 2014, the Chief Secretary for Administration of the Hong Kong SAR, Betty Hau, confirmed proper service:

With reference to your recent request for service, I am pleased to inform you that service has been effected on the party concerned [C3 Global].

(Calman Aff., 1/8/15, Ex. D [NYSCEF Doc. No. 32]).

Lastly, defendant C3 Global's argument that plaintiff failed to comply with Article 3 of the Hague Convention's requirement that documents be furnished in duplicate to the recipient is based on a misreading of Article 3. The plain language of Article 3 merely requires that the Central Authority, and not the recipient, be furnished with copies of the documents in duplicate. In any event, the record demonstrates that plaintiff complied with this requirement. Rick Hamilton, an employee of ABC Legal, the entity retained to serve the summons and complaint, stated that he "did submit the Summons and Complaint to the Hong Kong, China Central Authority in duplicate" (Hamilton Aff., 2/10/15 [NYSCEF Doc. No. 52]). His statement is confirmed by the Chief Secretary for Administration of the Hong Kong SAR, Betty Hau, in her December 4, 2014 letter:

I return the other copy of the documents received for service together with an Affirmation of Service

completed by the Bailiff's Assistant of the High Court for your disposal.

(Calman Aff., 1/8/15, Ex. D [NYSCEF Doc. No. 32]).

Based on the foregoing, plaintiff effectuated proper service of the summons and complaint upon defendant C3 Global, and, as such, defendant C3 Global has failed to proffer a reasonable basis to excuse its default.

(ii) Proof of Facts Constituting the Claim

To satisfy this requirement so as to prevail on a motion for a default judgment, a movant, such as plaintiff, needs to satisfy to the court the prima facie validity of the claim (Feffer v Malpeso, 210 AD2d 60, 61 [1st Dept 1994]). As the First Department has held, "[t]he standard of proof is not stringent, amounting only to some firsthand confirmation of the facts" (Id.).

Here, plaintiff has proffered the letter agreement (Calman Aff., 1/8/15, Ex. E [NYSCEF Doc. 32]), the LPA (id.), and the affidavit of Colin Ingram, plaintiff's director (NYSCEF Doc. Nos. 31, 53), as evidentiary support of its claim for breach of contract against defendant C3 Global. The letter agreement indicates that defendant Bibeau executed it on behalf of defendant C3 Global and that he was an "Authorized Signatory." Further, defendant Bibeau signed the LPA as "Director" of

defendant C3 Global. As to the plaintiff's understanding of the relationship amongst defendants, Ingram states in his affidavit:

Initially, I understood that Bibeau was considering investing on his own behalf, and documents were drawn up for his signature. Ultimately, Bibeau notified the producers that defendant C3 Global Capital HK Limited ("C3") would be the investor rather than Bibeau, but that Bibeau would sign the documents as a director of C3. It was my understanding that Bibeau's primary contact at defendant C3 was defendant Rodrigue, who is listed on C3's publicly filed documents as a director of C3.

On March 14, 2013, Bibeau, on behalf of defendant C3, signed a letter agreement with [plaintiff] in which defendants agreed to invest \$500,000 in Lulamae as part of the capitalization of the Broadway Production (the "Letter Agreement"). On March 18, 2013, Bibeau, on behalf of defendant C3, signed the Limited Partnership Agreement Joinder, in which they acknowledged receipt of the investor documents hereinabove described and specifically agreed to be bound by their terms.

* * *

It was my understanding that Rodrigue, in his capacity as a director of C3, was the individual who was supposed to deliver the \$500,000 by wire transfer.

* * *

Bibeau held himself out as a director of C3 and had apparent authority to sign the document on C3's behalf.

(Ingram Aff., 10/22/14, ¶¶ 9-10, 12, 18 [NYSCEF Doc. No. 31]).

Under these circumstances, plaintiff has demonstrated prima facie the validity of its breach of contract claim.

Nonetheless, defendant C3 Global argues that plaintiff is not entitled to a default judgment. Defendant C3 Global,

however, fails to proffer an affidavit from its principal challenging Ingram's statements and defendant Bibeau's authority to bind it. Instead, it merely relies on its attorney's affirmation, which does not set forth any arguments challenging the merits of plaintiff's claim against defendant C3 Global and, even if it did, it is not based on personal knowledge. Under these circumstances, plaintiff has satisfied its entitlement to a CPLR 3215 default judgment against defendant C3 Global (Young v Richards, 26 AD3d 249, 250 [1st Dept 2006][two-page attorney affirmation and proposed answer verified by counsel who had no personal knowledge of the underlying facts insufficient to establish either justifiable excuse for the default or meritorious defense]).

Accordingly, it is hereby

ORDERED that plaintiff's motion for a default judgment against defendant C3 Global Capital HK Limited is granted; and it is further

ORDERED that the matter shall be set down for an assessment of damages; and it is further

ORDERED that upon filing by plaintiff with the Trial Support Office (Room 158) of a copy of this order with notice of entry, and a note of issue and a statement of readiness, and the payment of proper fees, if any, by plaintiff, the Clerk of the Trial

Index No. 651440/2014

Page 12 of 12

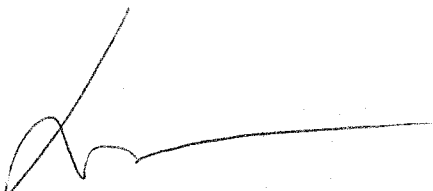
Mtn Seq. No. 003

Support Office is respectfully directed to place this matter upon the Part 48 trial calendar for an assessment of damages.

This memorandum opinion constitutes the decision and order of the Court.

Dated:

4/22/15



HON. JEFFREY K. OING, J.S.C.