

**West v Empire Facilities Mgt. Group**

2017 NY Slip Op 30581(U)

March 28, 2017

Supreme Court, Suffolk County

Docket Number: 20004/2015

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 20004/2015

SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI  
Acting Justice Supreme Court

CHERYL K. WEST and ALBERT R. WEST,  
II, h/w,

Plaintiffs,

-against-

EMPIRE FACILITIES MANAGEMENT  
GROUP, FRONT STREET FACILITY  
SOLUTIONS, INC., MRJI, INC., f/k/a EMPIRE  
FACILITIES MANAGEMENT GROUP, INC.,

Defendants.

ORIG. RETURN DATE: FEBRUARY 11, 2016  
FINAL SUBMISSION DATE: APRIL 14, 2016  
MTN. SEQ. #: 001  
MOTION: MG

ORIG. RETURN DATE: APRIL 14, 2016  
FINAL SUBMISSION DATE: APRIL 14, 2016  
MTN. SEQ. #: 002  
CROSS-MOTION: XMD

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Upon the following papers numbered 1 to 16 read on this motion \_\_\_\_\_  
FOR SUMMARY JUDGMENT IN LIEU OF COMPLAINT AND CROSS-MOTION TO DISMISS.  
Notice of Motion and supporting papers 1-3; Notice of Cross-motion and supporting papers  
4-6; Affidavit in Support of Cross-motion and supporting papers 7, 8; Affidavit in Support  
of Cross-motion and supporting papers 9, 10; Affidavit in Support of Cross-motion and  
supporting papers 11, 12; Affirmation and Affidavit in Opposition and supporting papers 13-15;  
Reply Affirmation 16; it is,

**ORDERED** that this motion (seq. #001) by plaintiffs CHERYL K.  
WEST and ALBERT R. WEST, II, h/w for an Order, pursuant to CPLR 3213,  
granting plaintiffs summary judgment in lieu of complaint against defendants  
EMPIRE FACILITIES MANAGEMENT GROUP, FRONT STREET FACILITY  
SOLUTIONS, INC., and MRJI, INC., f/k/a EMPIRE FACILITIES MANAGEMENT  
GROUP, INC. in the amount of \$210,000.00, together with interest of 5.75% per  
annum for the calendar years 2014 and 2015, on the grounds that this is an

action based upon a judgment, is hereby **GRANTED** to the extent set forth herein; and it is further

**ORDERED** that this cross-motion (seq. #002) by defendants for an Order: (1) pursuant to CPLR 3211 (a) (2), (a) (7) and (a) (8), dismissing plaintiffs' motion for summary judgment in lieu of complaint with prejudice; and (2) pursuant to CPLR 3213, dismissing the motion in lieu of complaint with prejudice for lack of personal jurisdiction in the underlying Delaware action, is hereby **DENIED** for the reasons set forth hereinafter. The Court has received opposition to this cross-motion from plaintiffs.

This is a motion for summary judgment in lieu of complaint to convert a Delaware judgment issued out of the Superior Court of the State of Delaware, New Castle County, to a New York judgment. A certified and exemplified copy of the default judgment was entered on July 1, 2014, in the amount of \$210,000.00, plus "post-judgment interest at the statutory rate." Plaintiffs rely on their own affidavits to set forth the facts of the underlying judgment. According to plaintiffs, upon information and belief, no part of the judgment entered in the Superior Court matter, which is the subject of this motion, has been paid or satisfied to date.

In opposition, defendants contend that this Court must dismiss plaintiffs' action with prejudice as a matter of law because the Delaware Superior Court improperly exercised personal jurisdiction over the defendants in the underlying action, and that plaintiffs cannot establish proper service upon defendants. The affidavits of service filed in the underlying matter do not state plaintiffs served defendants with their amended summons and amended complaint; rather, the affidavit of service states plaintiffs served "a notice" upon defendants. Defendants contend that to establish proof of service, plaintiffs were required to "specify the papers served" upon defendants (see CPLR 306). They did not. Instead, the statement that they served "a notice" does not satisfy plaintiffs' burden to demonstrate that they served defendants with the amended summons and complaint. Defendants take the position that under these circumstances, plaintiffs are not entitled to a presumption of effective service.

As held in *Mt. Prospect Manor Condominium, Assn., Inc. v Fisher*, 2009 NY Slip Op 33320(U) (Sup Ct, New York County 2009):

A default judgment rendered by a court of a sister state is conclusive on the merits and is entitled to full faith and

credit in New York unless it is shown that the judgment court lacked personal jurisdiction over the defendant judgment debtor (see *Cadle Co. v Tri-Angle Assocs.*, 18 AD3d 100, 103, 798 NYS2d 360 [1st Dept 2005]; *All Terrain Props. v Hoy*, 265 AD2d 87, 91, 705 NYS2d 350 [1st Dept 2000]). In instances where jurisdiction over the person has not been obtained, the ensuing judgment is ineffective and voidable unless the defendant waives the issue (*id.*). Where the sister state's jurisdiction is challenged by a defendant, the law of that state, even if at odds with New York law, determines whether jurisdiction was properly obtained (see *China Express v Volpi & Son Machine Corp.*, 126 AD2d 239, 242, 513 NYS2d 388 [1st Dept 1987]; *Augusta Lumber & Supply v Herbert H. Sabbeth Corp.*, 101 AD2d 846, 475 NYS2d 878 [2d Dept 1984]). Plaintiff has the burden of proving that jurisdiction was obtained (see *Cadle Co. v Tri-Angle Assocs.*, *supra*).

In the instant case, the record is insufficient to establish that jurisdiction over the person of defendant Fisher was acquired by the New Jersey court, and that the New Jersey judgment may be enforced against her. Plaintiff has submitted no affidavit of service as to service of the summons and complaint in the New Jersey action. Thus, although the fact that the out-of-state judgment was entered on default does not affect its adequacy as a ground for relief pursuant to CPLR § 3213, the court does not find the evidence submitted sufficient to demonstrate that the New Jersey court had personal jurisdiction over Fisher (see *Westland Garden State Plaza, LP v Ezat, Inc.*, 25 AD3d 516, 810 NYS2d 131 [1st Dept 2006]). Accordingly, the New Jersey judgment is not entitled to full faith and credit, the motion for summary judgment in lieu of complaint must be denied and the action dismissed (see *Desai v Sterling Fibers*, 288 AD2d 428, 733 NYS2d 481 [2d Dept 2001]; *GNOC Corp. v Cappelletti*, 208 AD2d 498, 616 NYS2d 1018 [2d Dept 1994]). This may seem to be a harsh result in light

of the fact that defendant Fisher defaulted in both this proceeding as well as the New Jersey action. Nevertheless, the fact of a party's default does not warrant the court abdicating its responsibility to protect the due process rights of litigants

(*Mt. Prospect Manor Condominium, Assn., Inc.*, 2009 NY Slip Op 33320[U] at \*\*2-3).

CPLR 3211 sets forth the grounds for dismissal asserted by defendants in their cross-motion, to wit:

CPLR 3211. Motion to dismiss

(a) Motion to Dismiss Cause of Action.

A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

\* \* \*

2. the court has not jurisdiction of the subject matter of the cause of action; or

\* \* \*

7. the pleading fails to state a cause of action; or

8. the court has not jurisdiction of the person of the defendant

(CPLR 3211 [a] [2], [7], [8]).

Delaware's long-arm jurisdiction is found at 10 Del C § 3104:

§ 3104. Personal jurisdiction by acts of nonresidents

(a) The term "person" in this section includes any natural person, association, partnership or corporation.

(b) The following acts constitute legal presence within the State. Any person who commits any of the acts hereinafter enumerated thereby submits to the jurisdiction of the Delaware courts.

(c) As to a cause of action brought by any person arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nonresident, or a personal representative, who in person or through an agent:

\* \* \*

(3) Causes tortious injury in the State by an act or omission in this State

(10 Del C § 3104 [a], [b], [c] [3]).

In the application of this section of law, Delaware follows a statutory and constitutional analysis and procedure:

Delaware courts apply a two-step analysis in determining the issue of personal jurisdiction over a nonresident. *LaNuova D & B SpA v. Bowe Co., Inc.*, Del. Supr., 513 A.2d 764, 768 (1986). First, we must consider whether Delaware's long arm statute is applicable, recognizing that 10 Del. C. § 3104 (c) is to be broadly construed to confer jurisdiction to the maximum extent possible under the Due Process Clause. *Id.* (citing *Speakman Co. v. Harper Buffing Mach. Co.*, 583 F. Supp. 273 (D. Del. 1984); *Moore v. Little Giant Indus., Inc.*, 513 F. Supp. 1043, 1048 (D. Del. 1981), *aff'd*, 681 F.2d 807 (3d Cir. 1982)). Next, the court must determine whether subjecting the nonresident defendant to jurisdiction in Delaware violates the Due Process Clause of the Fourteenth Amendment. *Id.*

(*Hercules, Inc. v Leu Trust & Banking, Ltd.*, 611 A2d 476, 480-481 [Del Supr 1992]).

It is clear from the record that the gravamen of this action sounds in negligence, and that the employees of the defendants were physically present in Delaware at the time the plaintiff sustained her injury. Plaintiffs, through counsel, have complied with the mailing requirements for the purpose of exercising and obtaining long-arm jurisdiction as against the defendants. In addition, and as stated by counsel for the plaintiffs, there had been communication between plaintiffs' counsel and defendants' counsel after service of the summons and complaint, as well as after the amended summons and amended complaint, for the purpose of attempting to resolve the action.

Notably, Delaware statute 10 Del C § 3104 provides for service by mailing and receipt:

(d) When the law of this State authorizes service of process outside the State, the service, when reasonably calculated to give actual notice, may be made:

\* \* \*

(3) By any form of mail addressed to the person to be served and requiring a signed receipt

(10 Del C § 3104 [d] [3]). Further, subdivision (h) (2) of 10 Del C § 3104 provides:

The return receipt or other official proof of delivery shall constitute presumptive evidence that the notice mailed was received by the defendant or the defendant's agent; and the notation of refusal shall constitute presumptive evidence that the refusal was by the defendant or the defendant's agent

(10 Del C § 3104 [h] [2]).

It is clear from the submissions that the mailing took place and that signed receipts were returned. This Court concludes that the jurisdictional requirements of the State of Delaware were fully complied with and that jurisdiction was obtained over EMPIRE FACILITIES MANAGEMENT GROUP, FRONT STREET FACILITY SOLUTIONS, INC., MRJI, INC. and EMPIRE FACILITIES MANAGEMENT GROUP, INC. The defendants have not rebutted

the presumption of good service, and have provided no indication that the corporate succession of these entities in any way insulated the resulting successors from liability of their respective predecessors.

Defendants further contend that New York's CPLR 306 requires specificity with respect to affidavits of service. The aforementioned section provides, in pertinent part:

§ 306. Proof of service

(a) Generally. Proof of service *shall specify the papers served*, the person who was served and the date, time, address, or, in the event there is no address, place and manner of service, and set forth facts showing that the service was made by an authorized person and in an authorized manner

(CPLR 306 [a] [emphasis added]).

While a correct recitation of New York law, the service provisions in question are those of the State of Delaware that provide for a Notice to be sent, which was done in this case accompanied by correspondence including enclosures. There are signed receipts for service by an employee of the defendants. Defendants do not contradict these facts. There is no requirement under Delaware law that service by mail must be upon a person who holds a particular position within the corporate hierarchy of a defendant corporation. Those requirements under the Delaware statutory scheme apply in the case of personal service and are not specified in the service by mail provisions of the statute.

In addition, the Delaware court, in the context of this litigation, has also denied defendant EMPIRE FACILITIES MANAGEMENT GROUP, INC.'s motion to vacate the default judgment. The corporation appeared by counsel in Delaware on a motion to vacate the default and acknowledged that the pleadings, including the amended pleadings, were received by certified mail and "somehow that complaint worked its way up to the people who should have received that amended complaint" (Superior Court of the State of Delaware, New Castle County, C.A. No. N13C-03-275 [JAP], Hearing Transcript, Sept. 5, 2014, p. 3, l. 7-9). The only amendment concerned the addition of MRJI, INC. as a defendant.

Under the circumstances presented herein, for the purpose of this motion by plaintiffs for an Order granting plaintiffs summary judgment in lieu of complaint against defendants in the amount of \$210,000.00, together with interest of 5.75% per annum for the calendar years 2014 and 2015, on the grounds that this is an action based upon a judgment of a sister state, the plaintiffs have satisfied the requirements of CPLR 3213, and defendants have failed to establish any violation or infirmity under Delaware law concerning the obtainment of jurisdiction in the original action within the Superior Court of the State of Delaware, New Castle County, under C.A. No. N13C-03-275 (JAP).

**WHEREFORE**, plaintiffs are awarded judgment against defendants in the amount of \$210,000.00., plus costs and interest.

The foregoing constitutes the decision and Order of the Court.

**SETTLE JUDGMENT ON NOTICE**

Dated: March 28, 2017



*Joseph Farneti*  
\_\_\_\_\_  
HON. JOSEPH FARNETI  
Acting Justice Supreme Court

FINAL DISPOSITION

NON-FINAL DISPOSITION