Sang Cheol Woo v Spackman
2018 NY Slip Op 32234(U)
July 10, 2018
Supreme Court, New York County
Docket Number: 652795/2017
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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SANG CHEOL WOO,

Plaintiff,

-against-

CHARLES C. SPACKMAN,

Defendant.

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DECISION AND ORDER
Index No.: 652795/2017

Motion Sequence No.: 001

O. PETER SHERWOOD, J.:

Under motion sequence 001, plaintiff moves for summary judgment under CPLR 3213 to enforce a judgment entered in South Korea against defendant. The motion shall be granted.

I. BACKGROUND

Plaintiff Sang Cheol Woo ("Woo") was a minority shareholder in Littauer Technologies Co. Ltd. ("Littauer"), a company founded, majority-owned, and controlled by defendant Charles Spackman ("Spackman") (*see* NYSCEF Doc. No. 4 ["pl's mem"] at 1). Shortly after plaintiff invested in Littauer, defendant purportedly caused Littauer to enter into a self-dealing merger transaction in which, for $1.3 billion[1] in Littauer stock, Littauer acquired another company defendant and his business partners had established and controlled. Plaintiff states that the other company was later revealed to be "only a paper company whose true economic value was" only $2.1 million. After the transaction was complete, defendant liquidated roughly 11.5 percent of Littauer's total outstanding shares, which caused defendant to collect a profit of more than $100 million, his business partners to earn $44 million, and Littauer to record a loss of approximately $1.2 billion.

In 2003 plaintiff sued defendant and nine other individuals in the Seoul Central District Court (25th Division) in South Korea (the "Seoul District Court"). (*Id.* at 1-2.) The Seoul District Court initially denied plaintiff's claims, but in 2011, the Seoul High Court reversed and entered a judgment of roughly $4.5 million against Spackman and the other defendants jointly and severally (*see* NYSCEF Doc. No. 6 ["High Court Judgment"] at 2). With respect to Spackman, the Seoul High Court dismissed the appeal, finding that because Spackman failed to appear after being

[1] All amounts listed are in US dollars.

properly personally served with process, he was "deemed to have made admissions" to the allegations in the complaint (*id.* at 8; *see also id.* at 3 [providing that, throughout the opinion, defendant would be referred to by his Korean name, "Yoo Shin Choi"]). Spackman appealed to the Supreme Court of Korea, which, in October of 2013, affirmed the judgment against him after finding that "[t]here is no reason to continue reviewing this case as it is deemed that [Spackman] made an admission of the Plaintiff's reasons for the claim" (*see* NYSCEF Doc. No. 7 ["Supreme Court Judgment"] at 2-3). In the same decision, that court reversed the High Court Judgment as to the other appealing defendants finding it was "difficult to accept the conclusions of the Trial Court" (*see id.* at 4, 3-8). On March 31, 2016, the Seoul High Court issued a Writ of Execution on the High Court Judgment (*see* High Court Judgment). Plaintiff's consultant on Korean law states in his affidavit that the effect of this "Execution Clause" is that the High Court Judgment is now enforceable under Korean law (*see* NYSCEF Doc. No. 8 ["Kwak declaration"] ¶ 13).

On April 26, 2017, shortly before plaintiff commenced this action, defendant commenced retrial proceedings in the Seoul High Court on the basis that plaintiff failed to properly serve Spackman with two pleadings, despite knowing his address and/or having access defendant's correct address (*see* NYSCEF Doc. No. 39 ["def's mem"] at 9; *see also* NYSCEF Doc. No. 40 ["Noh declaration"] exhibit 1 at 6). Defendant's consultant on Korean law states in his affidavit that, even where a judgment becomes a "final judgment" under Korean law – meaning that "it is no longer subject to ordinary appeal procedure" – "in certain instances where there was a significant flaw/defect, a retrial procedure is available" under the Korean Code of Civil Procedure "whereby the court which originally rendered the final judgment do have [sic] the power to re-hear and re-adjudicate the underlying issues of the final judgment upon a party's request/application" (NYSCEF Doc. No. 42 ["Chung aff"] ¶ 10). On December 21, 2017, after this motion had been fully briefed, the Seoul High Court dismissed the retrial application (*see* NYSCEF Doc. Nos. 68-69, 71). Defendant notes that, in the order dismissing the application, the Seoul High Court stated that, "if it was construed that the Defendant had not admitted to the Plaintiff's cause of action, in light of the decisions of the original judgement, as well as the judgement against the codefendants, there is a strong possibility that the Plaintiff's claim would not have been accepted. Nevertheless, in our civil litigation system which mandates the principle of party representation/duty to submit

facts, such a consequence is inevitable." (NYSCEF Doc. No. 71 at 2).[2] At oral argument, defendant's counsel confirmed that the decision of the High Court was affirmed by the Supreme Court of Korea. Defendant no longer disputes the finality of the default judgment.

II. DISCUSSION

CPLR Article 53 addresses recognition of foreign judgments "granting or denying recovery of a sum of money" (CPLR 5301 [b]). "Under Article 53 a money judgment issued by the court of a foreign country will be recognized and enforceable in New York State, unless it fits within one of the specific statutory exceptions set forth in CPLR Article 53" (*CIBC Mellon Tr. Co. v Mora Hotel Corp. N.V.*, 296 AD2d 81, 88 [1st Dept 2002], affd, 100 NY2d 215 [2003]). Those grounds are set forth in CPLR 5304.

"The two grounds for mandatory non-recognition of foreign money judgments [are] set forth in 5304 (a)" (*id.* at 88), which states that a foreign judgment is "not conclusive if: (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]). Defendant does not rely on either as a basis for avoiding enforcement of the Korean judgment.

CPLR 5304 (b) provides eight grounds for which a foreign judgment "need not be recognized." These grounds are discretionary and, in contrast with the mandatory grounds, are the defendant's burden to prove (*see CIBC Mellon Tr. Co.*, 296 AD2d at 101; *see also Ackermann v Levine*, 788 F2d 830, 842 n 12 [2d Cir 1986]).

Notably, "in proceeding under article 53, the judgment creditor does not seek any new relief against the judgment debtor, but instead merely asks the court to perform its ministerial function of recognizing the foreign country money judgment and converting it into a New York judgment" (*Abu Dhabi Commercial Bank PJSC v Saad Trading, Contr. and Fin. Services Co.*, 117 AD3d 609, 611 [1st Dept 2014], quoting *CIBC Mellon Tr. Co. v Mora Hotel Corp. N.V.*, 100 NY2d 215, 222 [2003]). Accordingly, as a general matter, "a foreign money judgment is to be recognized in New York under article 53 unless a ground for nonrecognition under CPLR 5304 is applicable" (*John Galliano, S.A. v Stallion, Inc.*, 15 NY3d 75, 80 [2010]).

[2] This is not unlike what occurs in New York when a party fails to respond to a complaint, a default judgment is rendered and a final judgment is entered after an inquest against the defaulting defendants.

In his brief in opposition to the motion, defendant argues that the judgment is not "final, conclusive and enforceable," that defendant was not served with key pleadings in sufficient time to enable him to defend himself, that the impartiality of one of the three judges behind the ruling is suspect, and that, under the doctrine set forth in *Frow v De La Vega* (82 US 552, 554 [1872]), it would be unfair to fundamentally enforce this judgment against defendant for his default where his co-defendants had already prevailed.

The Supreme Court of Korea having decided the appeal in May 2018, defendant no longer argues non-finality. Additionally, defendant does not dispute personal or subject matter jurisdiction, though as discussed further below, defendant contends that improper service constitutes a discretionary basis for non-recognition under CPLR 5304 (b) (2). Instead he relies on CPLR 5304 (b) (4) which permits non-recognition if "the cause of action on which the judgment is based is repugnant to the public policy of this state" and *Frow*.

Defendant contends that, under CPLR 5304 (b) (2), this court should not recognize the High Court Judgment because plaintiff failed to serve on defendant two key pleadings that plaintiff filed on October 30, 2009 and December 20, 2010 (def's mem at 13-14; Noh declaration, exhibit 1 ¶ 8 [b]). In reply, plaintiff argues that these documents were not served on Spackman because the documents did not pertain to him, but rather applied to the other defendants in that case (NYSCEF Doc. No. 48 ["pl's reply"] at 7-8; Lee aff ¶¶ 13-14). As evidence, plaintiff states that in three separate pleadings submitted by plaintiffs regarding Spackman, neither the October 30, 2009 document nor the December 20, 2010 document was listed and neither was considered (*see* Lee aff ¶ 13, exhibits 5-7).

Additionally, plaintiff argues that defendant was not deprived of meaningful notice since (1) defendant was the chairman and controlling shareholder of defendant Littauer, which participated in the case from its inception through the decision of the Supreme Court of Korea, and (2) because defendant was undisputedly served with process on two occasions prior to the entry of the High Court Judgment (pl's reply at 8-9). Plaintiff also notes that defendant's brief to the Supreme Court of Korea confirms service on the second of these two occasions – roughly five months before the entry of the High Court Judgment (*see* Lee aff ¶ 10, exhibit 3 [excerpt of defendant's argument stating that defendant "received the Notice of the date of pleading and the date of adjudication on April 21. 2011 while the original instance was underway" and chose not to attend because it was a trial on appeal and "there were no differences in particular in the Statement

of Reasons for Appeal and the brief included in the documents served to him by the plaintiff in comparison with the judgment at the first instance"]).

Defendant also contends that the judgment should not be enforced under CPLR 5304 (b) (4) and the *Frow* doctrine. Under *Frow*, when one of several defendants is alleged to be jointly liable with other defendants, judgment should not be entered against him unless it has also been entered against his co-defendants (def's mem at 14-15; *Frow*, 82 US at 554). Thus, defendant argues, the judgment at issue in this case is repugnant to the state as in violation of *Frow* doctrine.

Contrary to defendant's assertion, *Frow* supports the decision of the Supreme Court of Korea. In *Frow*, the United States Supreme Court held that a court can lawfully make a decree upon default against one defendant while the cause was undetermined against the others. If a court later decides in favor of the others, the defaulting defendant will "lack standing in court to receive notice and to appear in any way," 82 U.S. 552, 554 (1872).

Moreover, and as defendant's own citation reveals,

> "the holding in *Frow* has been narrowly construed to prohibit entry of default judgment against one of several defendants (1) where the theory of recovery is one of true joint liability, such that as a matter of law, no one defendant may be liable unless all defendants are liable, or (2) where the nature of the relief demanded is such that, in order to be effective, it must be granted against every defendant"

(*Martin v Coughlin,* 895 F Supp 39, 43 [ND NY 1995]). Defendant does not explain how either of these conditions applies here. Rather, defendant argues that the doctrine is triggered by virtue of the fact that the High Court Judgment found the defendants were "jointly liable for compensating . . . Plaintiff" (High Court Judgment at 24). In reply, plaintiff notes that, while the doctrine does preclude a default judgment in instances of true joint liability, it has no bearing on claims involving joint *and several* liability (pl's reply at 9-10, citing *e.g. In re Uranium Antitrust Litig.*, 617 F2d 1248, 1258 [7th Cir 1980] [finding that *Frow* "does not preclude the entry of default judgment against a group of nine defaulters prior to adjudication on the merits as to the remaining defendants, where liability is joint and several"] and *Miele v Greyling*, No. 94CIV3674(WK)(AJP), 1995 WL 217554, *3 [SD NY Apr. 13, 1995]). Plaintiff argues that the High Court Judgment is "based unequivocally on 'joint and several', not 'joint' liability" and that defendant "seizes on an English translation error in the Judgment that states the defendants are 'jointly liable for compensating . . . Plaintiff'" (*id.* at 11). Plaintiff notes that the High Court Judgment states that defendants are liable "as prescribed in Article 760 of the Civil Act," which

plaintiff's additional Korean law expert states provides for joint and several liability, not joint liability (Lee aff ¶ 16). Translations of Korean statutes made available by both the Korea Ministry of Government Legislation and the Korea Legislation Research Institute corroborate Lee's translation of Article 760 as providing for joint and several liability (*see* Civil Act [2009], available at http://www.moleg.go.kr/english/korLawEng?rctPstCnt=3&searchCondition=AllButCsfCd&searchKeyword=civil+act&x=0&y=0 [accessed July 10, 2018]; Civil Act [Dec. 20, 2016], Statutes of the Republic of Korea, Korea Legislation Research Institute, and http://elaw.klri.re.kr/eng_service/lawView.do?hseq=40944&lang=ENG [accessed July 10, 2018]).

As noted above, in order for the *Frow* doctrine to apply to plaintiff's claims in the High Court Judgment, plaintiff's claims must be of such a nature that "no one defendant may be liable unless all defendants are liable," or the relief sought must of a nature that "in order to be effective, it must be granted against every defendant." Defendant has advanced no meaningful argument that either of these scenarios apply. Accordingly, defendant has failed to demonstrate that this doctrine serves as a basis for non-recognition and the motion must be granted.

Accordingly, it is hereby

ORDERED that the motion for summary judgment of plaintiff Sang Cheol Woo is GRANTED; and it is further

ORDERED that judgment be entered against defendant Charles C. Spackman as provided in the accompanying JUDGEMENT.

DATED: July 10, 2018

ENTER,

O. PETER SHERWOOD J.S.C.