

Chung Luo v Beauty Beauty USA, Inc.

2018 NY Slip Op 32323(U)

September 17, 2018

Supreme Court, New York County

Docket Number: 651131/2010

Judge: Debra A. James

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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CHUNG LUO,

Plaintiff,

- v -

BEAUTY BEAUTY USA, INC., WYAN WANG, and CINDY CHEN,

Defendants.

INDEX NO. 651131/2010

MOTION DATE 05/02/2017

MOTION SEQ. NO. 009

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 009) 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256

were read on this motion to/for

RESETTLE ORDER

ORDER

Upon the foregoing documents, it is

ORDERED that in the exercise of discretion by this court, the motion of plaintiff Chun Hong Luo, pursuant to CPLR 2221 and 5019 (a), to resettle the judgment contained in the order of this court dated May 12, 2016 to the extent of deleting the third decretal paragraph of the May 12, 2016 order is GRANTED, and the following is substituted in its stead:

"ADJUDGED that the plaintiff Chun Hong Luo, having an address at 345 9th Street, Oakland, CA 94607, do recover from defendants Beauty Beauty USA, and Wyan Wang, the sum of \$225,407.64, which includes interest in the amount of \$3,687.64 and costs in the amount of \$620, plus interest at the statutory

rate from July 7, 2009, the date of filing of the judgment in Luo v Beauty Beauty USA, Inc., in the Superior Court of the State of California, County of San Francisco, CGC-08-478034, as computed by the Clerk in the amount of \$ _____, together with costs and disbursements in the amount of \$ _____, and that plaintiff have execution thereon;" and it is further

ORDERED that the Clerk shall enter judgment accordingly.

DECISION

Plaintiff, judgment creditor Chung Hong Luo moves, pursuant to CPLR 2221 (a) and 5019 (a), to resettle a converted judgment of this court (the Judgment). The Judgment, originally rendered by the Superior Court of California on July 7, 2009, was duly converted to a New York judgment, in the total amount of \$225,407.64, including prejudgment interest and costs, the entry of which was authorized by this court's May 12, 2016 decision and order.

The relief sought is the correction of a clerical error as to the amount of the Judgment, and the removal of defendant Cindy Chen, as a named judgment debtor, on the undisputed ground that her debt has been discharged by a final decree of the Bankruptcy Court for the Eastern District of New York, entered on February 16, 2015.

The 2016 Order erroneously states the amount of the Judgment as \$22,100.00, plus interest and costs, as charged by

the Superior Court of California, instead of \$225,407.64, including interest and costs, which is the actual amount stated in the Judgment, as rendered by the Superior Court of California. Defendant Wyan Wang (Wang) does not dispute that \$225,407.64 is the amount awarded by the California Court, or that the error is clerical.

The issues involving the enforceability, conversion and validity of the California judgment have all been fully litigated before this court, culminating in the 2016 Order, authorizing the entry of the Judgment in New York. Wang does not contest any of the factual or legal determinations underlying the 2016 Order.

Wang argues that this motion must be denied, and the Judgment deemed abandoned, because this motion was not made within 60 days of the filing of the Judgment. 22 NYCRR § 202.48, captioned "Submission of orders, judgments and decrees for signature," provides, as pertinent:

"(a) Proposed orders or judgments, with proof of service on all parties where the order is directed to be settled or submitted on notice, must be submitted for signature, unless otherwise directed by the court, within 60 days after the signing and filing of the decision directing that the order be settled or submitted. (b) Failure to submit the order or judgment timely shall be deemed an abandonment of the motion or action, unless for good cause shown"
(id. [emphasis supplied]).

The Judgment contained in the 2016 Order is dated May 12, 2016. This motion is dated December 7, 2016, more than 60 days after the signing of the 2016 Order. If 22 NYCRR section 202.48 were applicable, plaintiff would have to show good cause for the delay, which showing has not been made.

The court holds that 22 NYCRR section 202.48 does not apply to this motion, and plaintiff is not required to make a showing of good cause for the delay. While laches or delay in moving for resettlement may be considered, Wang has made no showing of prejudice caused by any such delay in making the motion (see Kiker v Nassau County, 85 NY2d 879, 881 [1995]).

NYCRR § 202.48, by its terms, applies where the order or judgment to be resettled was directed to be settled or submitted on notice. There is no direction here by the court, or requirement under CPLR 5019 (a), that plaintiff submit the proposed resettled judgment on notice. Thus, there is no requirement that plaintiff show good cause for the delay in seeking resettlement.

Plaintiff moves pursuant to both CPLR 2221 and 5019 (a). CPLR 2221, captioned, "Motion affecting prior order," provides, in subdivision (a), as pertinent: "[a] motion for leave to renew or to reargue a prior motion, for leave to appeal from, or to stay, vacate or modify, an order shall be made, on notice, to the judge who signed the order . . ." (id.).

CPLR 5019, captioned "Validity and correction of judgment or order; amendment of docket," provides in subdivision (a), for the "correction of [a] judgment," and authorizes the court, in its discretion, to require that any "mistake, defect or irregularity" be corrected, to the extent that a judgment "contains a mistake, defect, or irregularity not affecting a substantial right of a party" (Kiker, 85 NY2d at 881).

The general rule is that, where the error is substantive, affecting a substantial right of a party, the correct procedure is to proceed by appeal, or, if appropriate, by a motion to vacate (see Johnson v Societe Generale S.A., 94 AD3d 663, 664 [1st Dept 2012]), rather than pursuant to CPLR 5019 (a). Arguably, correcting the amount of the Judgment would affect a substantial right of defendants. Even if that is the case, there is an exception to the rule stated in Johnson, which allows correction pursuant to CPLR 5019 (a), even if a substantial right of a party is affected, where the error "is clearly inconsistent with the intentions of the court and the parties as demonstrated by the record" (id.; see Woolfalk v New York City Hous. Auth., 36 AD3d 444, 444 [1st Dept 2007]) (holding that errors in calculating present value of future award are correctable under CPLR 5019).

As the Appellate Division, Second Department aptly stated:

"[t]his is not a case where the Supreme Court has amended its own judgment in order to correct what it perceives to be a mistake on a question of law or in the exercise of its fact-finding or discretionary powers. Rather, this is a case where the Supreme Court properly amended a judgment so as to conform the terms of the judgment to the actual decision of the court" (Hanlon v Thonsen, 146 AD2d 743, 744 [2d Dept 1989] [citation omitted]).

There is no dispute here, nor could there be, that the judgment amount stated in the 2016 Order is inconsistent with the amount of the California judgment, or that Cindy Chen should be removed as a judgment debtor because of her discharge in bankruptcy. While the inclusion of Cindy Chen as a judgment debtor is not a clerical error, under CPLR 5019 (a), the court's discretion is sufficiently broad to authorize this correction (see Follender v Maxim, 44 AD3d 1227, 1229 [3d Dept 2007]). The court in Follender approved the amendment of a judgment to add a defendant not included in the original judgment, where that defendant had erroneously been omitted from that judgment, despite having been duly named as a defendant and properly served, and then having defaulted.

9/17/2018
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

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| CHECK ONE: | <input checked="" type="checkbox"/> CASE DISPOSED | <input type="checkbox"/> DENIED | <input type="checkbox"/> NON-FINAL DISPOSITION | <input type="checkbox"/> OTHER |
| APPLICATION: | <input checked="" type="checkbox"/> GRANTED | <input type="checkbox"/> DENIED | <input type="checkbox"/> GRANTED IN PART | <input type="checkbox"/> OTHER |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> SETTLE ORDER | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> SUBMIT ORDER | <input type="checkbox"/> FIDUCIARY APPOINTMENT |
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