

**Performing Right Socy. Ltd. v eMusic.com Inc.**

2019 NY Slip Op 31140(U)

April 23, 2019

Supreme Court, New York County

Docket Number: 159264/2018

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 6

-----X  
Performing Right Society Limited;  
Mechanical-Copyright Protection Society Limited,

Plaintiffs,

- v -

eMusic.com Inc.,

Defendant.  
-----X

Index No.  
159264/2018

DECISION  
and ORDER

Mot. Seq. 001

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiffs Performing Right Society Limited and Mechanical-Copyright Protection Society Limited (collectively, "Plaintiffs") seek, by way of summary judgment in lieu of complaint pursuant to CPLR § 3213 and Article 53 of the CPLR, recognition of a foreign country money judgment ("the Judgment") that the Business List of the High Court of Justice in the United Kingdom ("English Court") rendered in Plaintiffs' favor against Defendant eMusic.com Inc. ("Defendant") in the amount of £85,442.06, or approximately \$112,266.69 on August 24, 2018. Defendant opposes.

Plaintiffs submit the attorney affirmation of Daniel J. Kornstein and a copy of the Judgment. Kornstein avers that "[t]he judgment was not obtained by default in appearance of by confession of judgment," "[e]nforcement of the judgment has not been stayed," and "[t]he entirety of the judgment remains unpaid."

Defendant opposes the recognition and enforcement of the Judgment in New York on the grounds that the Judgment was obtained by default. Defendant further claims that there are issues concerning service and the validity of the Judgment.

In reply, Plaintiffs submit the affirmation of Fiona McAllister, a solicitor of the Senior Courts of England and Wales who represented Plaintiffs before the English Court. McAllister avers that the Complaint that initiated Plaintiffs' action in

the English Court was served on Defendant on February 15, 2018, and that Lee & Thompson LLP, a firm of English solicitors, filed a formal “Acknowledgement of Service” on Defendants’ behalf on March 9, 2018, indicating that Defendant intended to defend Plaintiffs’ claim and did not intend to dispute jurisdiction. (A copy of the “Acknowledgement of Service” is attached as Exhibit A to McAllister’s Affirmation). McAllister further avers that Defendant subsequently entered into a Settlement Agreement with Plaintiffs, which set up a payment schedule, and Defendant agreed to the entry of judgment against it if Defendant defaulted on payments. McAllister further states that upon Defendant’s default, Plaintiffs filed an application to enter judgment for the amounts due under the Settlement Agreement, notified Defendant of the hearing on the application, and Defendant did not appear. McAllister further states that the English Court considered the merits of Plaintiffs’ application before rendering its August 24, 2018 decision and that Defendant did not thereafter appeal that decision.

### Legal Standard

CPLR § 3213 provides, in pertinent part, that “[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint.” CPLR § 3213 is an instrument that may be used to enforce foreign judgments. (see generally *Schultz v. Barrows*, 94 N.Y.2d 624 [2000]).

The recognition of foreign country judgments is governed by Article 53 of the CPLR. Under CPLR § 5301(b), a “foreign country judgment” is “any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters.” CPLR § 5301(a) defines “foreign state” as “any governmental unit other than the United States, or any state, district, commonwealth, territory, insular possession thereof, or the Panama Canal Zone or the Trust Territory of the Pacific Islands.” Article 53 applies to “any foreign country judgment which is final, conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal.” (CPLR § 5302).

CPLR § 5304 sets forth “grounds for non-recognition” of a foreign judgment:

- (a) No recognition. A foreign country 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;
  2. the foreign court did not have personal jurisdiction over the defendant.
- (b) Other grounds for non-recognition. A foreign country judgment need not be recognized if:
1. the foreign court did not have jurisdiction over the subject matter;
  2. the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;
  3. the judgment was obtained by fraud;
  4. the cause of action on which the judgment is based is repugnant to the public policy of this state;
  5. the judgment conflicts with another final and conclusive judgment;
  6. the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court;
  7. in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action; or
  8. the cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless the court before which the matter is brought sitting in this state first determines that the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by both the United States and New York constitutions.

Further, CPLR § 5305(a) sets forth the bases of jurisdiction and provides that a foreign country judgment “shall not be refused recognition for lack of personal jurisdiction if:

1. the defendant was served personally in the foreign state;
2. the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him;
3. the defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved;
4. the defendant was domiciled in the foreign state when the proceedings were instituted, or, being a body corporate had its principal place of business, was incorporated, or had otherwise acquired corporate status, in the foreign state;
5. the defendant had a business office in the foreign state and the proceedings in the foreign court involved a cause of action arising out of business done by the defendant through that office in the foreign state; or
6. the defendant operated a motor vehicle or airplane in the foreign state and the proceedings involved a cause of action arising out of such operation.”

#### Discussion

Here, Defendant fails to demonstrate any CPLR §5304 defense to the recognition or enforcement of the Judgment. Defendant does not demonstrate that “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 that the English Court “did not have personal jurisdiction over the defendant.” Rather, Defendant contends that the Judgment was obtained by default. However, New York courts have recognized foreign country judgments that were obtained by default. (*See* §5304; *see e.g.*, *CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.*, 100 N.Y.2d 215, 220-22 [2003] [recognizing and enforcing default judgment obtained in English Court]). Furthermore, Plaintiffs demonstrate through McAllister’s reply affirmation that the Judgment was entered after Defendant appeared in the action through counsel, agreed to a Settlement Agreement consenting to the entry of judgment upon its breach, was notified of Plaintiffs’ application for the entry of

judgment and its hearing date, and the English Court considered the merits of Plaintiffs' claims.

Wherefore, it is hereby

ORDERED that Plaintiffs Performing Right Society Limited and Mechanical-Copyright Protection Society Limited's motion for summary judgment in lieu of complaint is granted; and it is further

ORDERED that the Judgment issued by Business List of the High Court of Justice in the United Kingdom rendered in favor of Plaintiffs Performing Right Society Limited and Mechanical-Copyright Protection Society Limited, and against Defendant eMusic.com Inc., on August 24, 2018, is entitled to recognition and entry as a judgment in New York; and it is further

ORDERED that the Clerk enter judgment in favor of Plaintiffs, Performing Right Society Limited and Mechanical-Copyright Protection Society Limited, and against, Defendant, eMusic.com Inc., in the amount in the amount of £85,442.06, or approximately \$112,266.69, together with interest as prayed for allowable by law until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: APRIL 23, 2019



EILEEN A. RAKOWER, J.S.C.