

<b>Expansion Capital Group, LLC v Mentat, LLC,</b>
2019 NY Slip Op 32030(U)
July 2, 2019
Supreme Court, New York County
Docket Number: 652782/2018
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I.A.S. PART 15

-----X  
EXPANSION CAPITAL GROUP, LLC, DECISION AND ORDER

Plaintiff, Index No. 652782/2018

- against -

MENTAT, LLC,  
  
Defendant.

-----X  
**MELISSA A. CRANE, J.:**

Plaintiff Expansion Capital Group, LLC moves, pursuant to CPLR 3213, for summary judgment in lieu of a complaint to domesticate an unsatisfied money judgment, entered in default in South Dakota, against defendant Mentat, LLC.

**Background**

Plaintiff is a South Dakota limited liability company with its principal place of business in Sioux Falls, South Dakota (NY St Cts Elec Filing [NYSCEF] Doc No. 23, aff of Jonathan Doughty [Doughty], exhibit 6 [the South Dakota complaint], ¶ 1). Defendant is a limited liability company organized and existing in New York (*id.*, ¶ 2).

On January 20, 2017, defendant executed a master purchase and sale agreement with plaintiff whereby defendant agreed to sell \$45,300 of its future receivables in exchange for an advance of \$30,000, with a daily remittance of \$377 to be debited automatically from defendant's bank account or from credit card payments made to defendant until the purchased receivables were paid in full (NYSCEF Doc No. 28, affirmation of plaintiff's counsel, exhibit 1 [the Agreement] at 1-2). After defendant defaulted on its payment obligations, plaintiff commenced an action for breach of contract and unjust enrichment in Circuit Court in the Second Judicial District, Minnehaha County, South Dakota (NYSCEF Doc No. 4, aff of Herk

Christie [Christie], exhibit A at 2-3). The court granted plaintiff's motion for a default judgment on November 14, 2017, and entered a judgment in the amount of \$37,193.40, together with costs, attorneys' fees and post-judgment interest at 10% per annum (the South Dakota Judgment) (*id.*).

Plaintiff commenced this action on June 5, 2018 by filing a summons with a notice of motion for summary judgment in lieu of a complaint to enforce the South Dakota Judgment.

### **The Parties' Contentions**

Plaintiff argues that the court should enter judgment against defendant based upon the South Dakota Judgment. Christie, plaintiff's vice president, avers that defendant consented to jurisdiction in South Dakota pursuant to the forum selection clause in the Agreement, and that defendant has not appealed the South Dakota Judgment (NYSCEF Doc No. 3, Christie aff, ¶¶ 6-7), a copy of which is submitted with his affidavit (NYSCEF Doc No. 4 at 1).

In opposition, defendant tenders an affidavit from Doughty, its owner and chief executive, who attests that the Agreement constitutes an unenforceable loan agreement because plaintiff is not licensed to make loans in New York (NYSCEF Doc No. 17, ¶¶ 4 and 16). Doughty avers that defendant never received notice of the South Dakota action or this action, as plaintiff attempted to serve process at two of defendant's former addresses at 115 East 23rd Street, New York, New York, and 3264 Middleton Road, Bronx, New York, and that plaintiff should have received notices of non-delivery for those attempts (*id.*, ¶ 13). While Doughty admits that defendant receives its mail at 228 Park Avenue South (*id.*, ¶ 14), an address plaintiff's process server has described as an "Earth Class Mail" outlet (NYSCEF Doc No. 31, affirmation of plaintiff's counsel, exhibit 4 at 3), he maintains that building management "receives the mail for all its tenants and keeps an official record of what it receives, including a list and a photocopy of the envelope" (NYSCEF Doc No. 17, ¶ 14). Doughty claims that the

building's records from May 22, 2018 to July 8, 2018 do not show the receipt of any mail related to the New York lawsuit addressed to defendant (*id.*). Doughty further claims that "[a] review of prior records maintained by management shows nothing at all relating to the South Dakota lawsuit" (*id.*). He refutes Christie's averment that the Agreement contained a forum selection clause, or that defendant consented to jurisdiction in South Dakota (*id.*, ¶¶ 18-19). Lastly, Doughty asserts that illegal contracts, such as the Agreement, are unenforceable in this State (*id.*, ¶ 16).

Plaintiff counters that defendant cannot contest the merits of the underlying South Dakota action as any opposition to enforcement is limited to a challenge to jurisdiction. Plaintiff submits that South Dakota properly exercised personal jurisdiction over defendant, who had deliberately entered into the Agreement with a South Dakota resident. Next, plaintiff alleges that defendant was properly served with notice of this action through the Secretary of State. Plaintiff also urges the court to strike defendant's response pursuant to the Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1a because the opposition consisted solely of an affidavit, which is not a paper signed by an attorney, and exhibits.

### Discussion

At the outset, defendant's contention that it never received notice of this action is unfounded. It is well settled that service upon a limited liability company is "complete upon service to the Secretary of State" (*Darbeau v 136 W. 3rd St., LLC*, 144 AD3d 420, 420 [1st Dept 2016]). A properly executed "affidavit of a process server constitutes prima facie evidence of proper service" (*Matter of de Sanchez*, 57 AD3d 452, 454 [1st Dept 2008]). In addition, the statutes governing service of a summons apply equally to service of a CPLR 3213 motion (*see Capolino v Goren*, 155 AD3d 1414, 1415 [3d Dept 2017] [citation omitted]). Plaintiff has

offered proof that the summons and the notice of motion were served in accordance with Limited Liability Company Law § 303 (a) and CPLR 311-a, as indicated in an affidavit of service sworn to June 12, 2018 (NYSCEF Doc No. 30, affirmation of plaintiff's counsel, exhibit 3 at 1). Defendant failed to address whether service upon the Secretary of State was proper in its opposing affidavit. Therefore, plaintiff has established that the court has personal jurisdiction over defendant for this action.

Next, plaintiff's argument to strike defendant's opposition, predicated upon a purported violation of the Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1a, is unpersuasive. The rule states, in pertinent part, that "[e]very pleading, written motion and other paper, served on another party or filed or submitted to the court shall be signed by an attorney, or by a party if the party is not represented by an attorney," and allows the court to strike any papers that do not conform to the rule (Rules of Chief Admin of Cts [22 NYCRR] § 130-1.1a [a]). Admittedly, Doughty is not an attorney, and a limited liability company must be represented by a licensed attorney (*see DeMartino v Golden*, 150 AD3d 1200, 1201 [2d Dept 2017], citing CPLR 321 [a]; *Michael Reilly Design, Inc. v Houraney*, 40 AD3d 592, 593-594 [2d Dept 2007]). However, plaintiff does not dispute that defendant is represented by counsel, who filed a notice of appearance in this action (NYSCEF Doc No. 26, plaintiff's memorandum of law at 7), and plaintiff can point to no prejudice from the omission (*see e.g. Matter of Green v Tierney*, 59 AD3d 900, 901 [3d Dept 2009]). Moreover, what is required to oppose a motion for summary judgment is "evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Here, although the inclusion of legal arguments in an affidavit is improper (*see Taylor v African M. E. Church*, 265 App Div 858, 858 [2d Dept 1942] [stating that "[t]he practice of embodying argument on the

facts and law in an affidavit, including the citation of authorities, is improper and is disapproved”)), Doughty’s sworn, notarized statement constitutes an affidavit by a person with knowledge of the relevant facts. Thus, the court will consider the affidavit.

CPLR 5406 provides that a judgment creditor may pursue summary judgment in lieu of a complaint instead of commencing an Article 54 enforcement proceeding. CPLR 3213 allows for the enforcement of a foreign judgment obtained on default (*see Morin Boats v Acierno*, 150 AD3d 844, 845 [2d Dept 2017 [citations omitted]]). The statute partially reads that “[w]hen an action is based . . . 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).

The certification for the South Dakota Judgment submitted on the motion substantially conforms to the requirements set forth in CPLR 4540 (c) (*see Sparaco v Sparaco*, 309 AD2d 1029, 1030 [3d Dept 2003], *lv denied* 2 NY3d 702 [2004]), even though the certification lacks the requisite language that the attesting officer’s signature is believed to be genuine. The clerk of the Circuit Court of the Second Judicial Circuit, Angela M. Gries (Gries), certified that she keeps and maintains court records, that she has compared a copy of the South Dakota Judgment with the original on file with the court, and that the copy is a true and correct copy of the original (NYSCEF Doc No. 4 at 1). Judge Lawrence E. Long of the same court certified that Gries is the Minnehaha County Clerk in the Second Judicial Circuit, that she is the keeper of records, that full faith and credit should be given to her official acts, and that her attestation is in due form of law (*id.*). Gries’ deputy certified that Judge Long was a justice in the Second Judicial Circuit (*id.*). Incidentally, Judge Long had awarded plaintiff the default judgment in the South Dakota action. Consequently, the South Dakota Judgment annexed to Christie’s affidavit is both valid and admissible.

Judgments rendered in sister states are entitled to recognition under the Full Faith and Credit Clause in the U.S. Constitution, article IV, § 1 (*see Baker v General Motors Corp.*, 522 US 222, 233 [1998] [stating that “[a] final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land”]; *accord Rancho Santa Fe Assn. v Dolan-King*, 36 AD3d 460, 461 [1st Dept 2007]). A “collateral attack on the merits of a sister state’s judgment is not permissible, [but] a party may nevertheless challenge the basis of the judgment court’s personal jurisdiction” (*Repwest Ins. Co. v Country-Wide Ins. Co.*, 166 AD3d 61, 64 [1st Dept 2018]; *see also Fiore v Oakwood Plaza Shopping Ctr.*, 78 NY2d 572, 577 [1991], *rearg denied* 79 NY2d 916 [1992], *cert denied* 506 US 823 [1992] [concluding that the court’s inquiry is “limited to determining whether the rendering court had jurisdiction”]). Where there is a jurisdictional challenge, the court must consider “(1) whether the sister state’s long-arm statute has been complied with, and (2) whether that court’s exercise of jurisdiction comports with federal constitutional principles of due process” (*Repwest Ins. Co.*, 166 AD3d at 64, citing *JDC Fin. Co. I v Patton*, 284 AD2d 164, 166 [1st Dept 2001]; *Ho v McCarthy*, 90 AD3d 710, 711 [2d Dept 2011] [stating that the court must consider traditional notions of due process under the U.S. Constitution as well as the laws of the state where the judgment was rendered to assess whether jurisdiction is proper]). Hence, to the extent defendant asserts that the Agreement is unenforceable, an inquiry into whether it constitutes an illegal contract is impermissible (*see Rancho Santa Fe Assn.*, 36 AD3d at 461).

When a party opposing entry of a judgment pursuant to CPLR 3213 raises the issue of personal jurisdiction, it is incumbent upon the plaintiff seeking to enforce the judgment of proving jurisdiction (*see Cadle Co. v Tri-Angle Assoc.*, 18 AD3d 100, 103 [1st Dept 2005]). A

judgment entered in the absence of jurisdiction is “ineffective and voidable unless the defendant waives the issue” (*All Terrain Props. v Hoy*, 265 AD2d 87, 91 [1st Dept 2000] [citation omitted]). The laws of the state that rendered the judgment control (*see China Express, Inc. v Volpi & Son Mach. Corp.*, 126 AD2d 239, 242 [1st Dept 1987]).

South Dakota’s long-arm statute, (South Dakota Codified Laws § 15-7-2) states that a person is subject to jurisdiction in South Dakota “as to any cause of action arising from the doing personally, through any employee, through an agent or through a subsidiary . . . [t]he transaction of any business within the state” (S.D. Codified Laws § 15-7-2 [1]). South Dakota Codified Laws § 15-7-3 provides that “[s]ervice of process upon the persons subject to § 15-7-2 may be made by service outside this state in the same manner provided for service within this state with the same force and effect as though service had been made within this state.” Service upon a nonresident “shall be made under the circumstances and in the manner prescribed by statute” (S.D. Codified Laws § 15-6-4 [f]). To that end, delivery to a business entity’s president, partner or other head, officer, director or registered agent is sufficient (*see R.B.O. v Priests of the Sacred Heart*, 2011 SD 86, 807 NW2d 808, 811 [S.D. 2011], citing S.D. Codified Laws § 15-6-4 [d] [1]). Service by mail also is permissible (*see* S.D. Codified Laws § 15-6-4 [i]), provided that an authorized person signs an admission of service (*see Upper Plains Contr. v Pepsi Americas*, 2003 SD 3, 656 NW2d 323, 330 [S.D. 2003, Sabers, J., concurring]). The Supreme Court in South Dakota has recognized that “[p]roper service of process is no mere technicality: that parties be notified of proceedings against them affecting their legal interests is a ‘vital corollary’ to due process and the right to be heard” (*R.B.O.*, 2011 SD 86, 807 NW2d at 810 [internal quotation marks and citations omitted]). “Without a proper basis for [personal] jurisdiction, or in the absence of proper service of process, [a court] has no power to render any judgment

against the defendant's person or property unless the defendant has consented to jurisdiction or waived the lack of process" (*Spiska Eng'g Inc. v SPM Thermo-Shield, Inc.*, 2011 SD 23, 798 NW2d 683, 686 [S.D. 2011], quoting *SEC v Ross*, 504 F3d 1130, 1138-39 [9th Cir 2007]; *Bradley v Deloria*, 1998 SD 129, 587 NW2d 591, 593 [S.D. 1998] [concluding that without statutorily proper service, the court is without personal jurisdiction over the defendant]).

As noted earlier, Doughty avers that the affidavits of service filed in the South Dakota action reflect service at two locations defendant no longer occupies (NYSCEF Doc No. 17, ¶ 12). Additionally, Doughty states that the records for defendant's mail received at 228 Park Avenue South, a building where it leases space, do not reflect the receipt of any documents related to the South Dakota action (*id.*, ¶ 14). Notwithstanding defendant's failure to submit any evidence to substantiate Doughty's assertions, absent from plaintiff's papers is documentary proof, such as an affidavit of service, demonstrating that service of process in the South Dakota action complied with South Dakota law (*see Cadle Co.*, 18 AD3d at 103]). Significantly, plaintiff failed to address this facet of defendant's opposition or furnish the court with legal authority discussing how service upon a nonresident is properly effectuated under South Dakota law. Thus, questions of fact exist as to the validity of service of process in the South Dakota action and whether the Circuit Court of South Dakota acquired in personam jurisdiction over defendant that cannot be resolved without a hearing.

In view of the foregoing, the court need not discuss whether the exercise of jurisdiction was proper under South Dakota's long-arm statute and under federal due process. The Court notes that it appears undisputed that there is no forum selection clause in the relevant agreement.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment in lieu of complaint is held in abeyance; and it is further

ORDERED that this matter having come before this court on October 31, 2018 on the plaintiff's motion for summary judgment in lieu of complaint, and the plaintiff having appeared by Sarah E. Pruett, Esq., and the defendant having appeared by Joseph R. Sahid, Esq., and, pursuant to CPLR 4212, the court having on its own motion determined to consider the appointment of a referee to hear and report, and it appearing to the court that an appointment is appropriate, it is now hereby

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

- (1) the issue of whether personal jurisdiction was conferred over defendant in *Expansion Capital Group, LLC v Mentat, LLC*, 49Civ.17-2338, brought in Circuit Court, Second Judicial Circuit of the State of South Dakota; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or [spref@nycourts.gov](mailto:spref@nycourts.gov)) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; it is further

ORDERED that the plaintiff shall serve a pre-hearing memorandum within 24 days from the date of this order and the defendant shall serve objections to the pre-hearing memorandum within 20 days from service of plaintiff's papers and the foregoing papers shall be filed with the Special Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by

filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that, unless otherwise directed by this court in any Order that may be issued together with this Order of Reference to Hear and Report, the issues presented in any motion identified in the first paragraph hereof shall be held in abeyance pending submission of the Report of the JHO/Special Referee and the determination of this court thereon.

Dated: 7-2-2019

ENTER:



J.S.C.

**HON. MELISSA A. CRANE**  
J.S.C.