

Creditors Adj. Bur. Inc. v Jeans Inc.

2020 NY Slip Op 32808(U)

August 28, 2020

Supreme Court, New York County

Docket Number: 150250/2019

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

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

<p>PRESENT: <u>HON. LOUIS L. NOCK</u></p> <p style="text-align: right;"><i>Justice</i></p> <p>-----X</p> <p>CREDITORS ADJUSTMENT BUREAU INC.,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>JEANS INC.,</p> <p style="text-align: center;">Defendant.</p> <p>-----X</p>	<p>PART IAS MOTION 38EFM</p> <p>INDEX NO. <u>150250/2019</u></p> <p>MOTION DATE <u>05/09/2019</u></p> <p>MOTION SEQ. NO. <u>001</u></p> <p style="text-align: center;">DECISION + ORDER ON MOTION</p>
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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion of plaintiff Creditors Adjustment Bureau Inc. (“Plaintiff”) for summary judgment against defendant Jeans, Inc. (“Defendant”) is denied, in accord with the following memorandum decision.

Background

Plaintiff commenced this action on January 10, 2019 by filing a summons and complaint, seeking to enforce a California default judgment in the principal amount of \$61,165.61 (NYSCEF Doc. No. 10). Defendant appeared in *this* action on March 8, 2019 by filing an answer which asserts, among other defenses, that the California court (Superior Court of Los Angeles County, State of California) lacked jurisdiction over it due to lack of proper service and due to lack of personal jurisdiction (*see*, NYSCEF Doc. No. 7). Despite the foundational issue raised in the answer, Plaintiff has elected to move for summary judgment against Defendant for

the relief demanded in the Complaint. Defendant opposes the motion on the grounds of, *inter alia*, improper service and lack of jurisdiction in the California action.¹

Discussion

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law” (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad*, 64 NY2d at 853). Upon proffer of evidence establishing a prima facie case by the movant, the party opposing a motion for summary judgment bears the burden of producing 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]). “Regardless of the sufficiency of the opposing papers, in the absence of admissible evidence sufficient to preclude any material issue of fact, summary judgment is unavailable” (*Aetna Cas. & Sur. Co. v Island Transp. Corp.*, 233 AD2d 157, 157 [1st Dept 1996]). In considering a summary judgment motion, evidence should be “viewed in the light most favorable to the opponent of the motion” (*People v Grasso*, 50 AD3d at 544 [internal citation omitted]).

A plaintiff that seeks enforcement of a foreign judgment obtained by a default in appearance – such as the one in this case – must commence a plenary action, such as this one, or seek enforcement under CPLR 3213 (*Westland Garden State Plaza, L.P. v Ezat, Inc.*, 25 AD3d 516 [1st Dept 2006]). Review of the foreign judgment by the New York court “is limited to

¹ Defendant had cross-moved for summary judgment to dismiss the action on the basis of a forum selection clause in the operative contract and to amend its answer to add a defense based on the forum selection clause, but the cross-motion was withdrawn at oral argument (*see*, NYSCEF Doc. No. 36 at 6-7).

determining whether the rendering court had jurisdiction, an inquiry which includes due process considerations” (*Fiore v Oakwood Plaza Shopping Ctr., Inc.*, 78 NY2d 572, 577, cert denied 506 US 823). If such a challenge is made, this court “must look to the jurisdictional statutes of the forum in which the judgment was rendered as well as due process considerations” (*Ho v McCarthy*, 90 AD3d 710, 711 [2d Dept 2011]; *China Express v Volpi & Son Mach. Corp.*, 126 A.D.2d 239, 242 [1st Dept 1987]). The laws of the forum in which the judgment was rendered determine whether jurisdiction was properly obtained (*China Express*, 126 AD2d at 242).

In reply to Defendant’s opposition asserting a personal jurisdiction and service of process defense, Plaintiff submits the affirmation of its counsel, Kenneth J. Freed, Esq. (NYSCEF Doc. No. 31), supported by “a printout indicating that the Defendant’s registered agent was located at 2389 Main Street, Suite 100, Glastonbury, CT 06033”; a purported Amended Affidavit of Service asserting that the Defendant was served by mail, return receipt requested, pursuant to California law, upon Defendant’s registered agent; and a copy of a certified mail receipt and signature card purportedly indicating that the pleadings were received by the Defendant’s registered agent (Freed affirmation in support ¶¶ 4-6, exhibits A-C). Whereas these items were submitted on reply, they were not addressed in Defendant’s opposition, but, at oral argument. At oral argument, Defendant’s counsel objected to the purported amended affidavit of service, noting that the document is not notarized and that it seems to indicate that “the person who did the services was not a registered California process server” (NYSCEF Doc. No. 36 at 4).

The record is replete with factual issues, as the above observations make plain. Also – at the outset – the Freed affirmation neither identifies the origin of the “printout” that purports to indicate the address for Defendant’s registered agent or state how Plaintiff acquired same (*see*, Freed affirmation in opposition, exhibit A). Additionally, the signature card that allegedly

demonstrates that the mailing was received is illegible due to the poor quality of the copy, and the certified mail receipt indicates that the mailing was made to Jeans Inc. at 2389 Main St., Glastonbury, CT 06033, but the registered agent listed on the “printout” is “Registered Agents Inc.” (*id.*, exhibit C). This raises questions of fact regarding whether the mailing was sufficient to confer jurisdiction over Defendant under California law. Furthermore, Plaintiff does not identify which California statute or statutes it relies upon to demonstrate proper service. The existence of material issues of fact regarding service of process in the California proceeding, and whether proper jurisdiction was obtained vis-a-vis the California default judgment, preclude summary judgment at this time.

Accordingly, it is

ORDERED that Plaintiff’s motion for summary judgment is denied; and it is further

ORDERED that a preliminary conference will be held telephonically on October 5, 2020 at 2:00 p.m.

<u>8/28/2020</u> DATE		<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART
	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE