

Fox Rothschild LLP v Schoninger

2023 NY Slip Op 34590(U)

December 29, 2023

Supreme Court, New York County

Docket Number: Index No. 655635/2021

Judge: Verna L. Saunders

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This opinion is uncorrected and not selected for official publication.

inclusive of damages, prejudgment interest, and an award of attorneys' fees. On April 5, 2021, plaintiff moved the Colorado District Court to confirm the Final Award, and same was confirmed with an additional award of \$13,731.92 in post-judgment interest at the statutory rate of 8% per annum from the date of entry of the Final Award (*nunc pro tunc from November 20, 2020*) through April 5, 2021, and thereafter at the rate of 8% per annum, or \$100.97 per diem, until the underlying judgment is satisfied in full ("judgment").

Plaintiff now seeks summary judgment in lieu of a complaint in the amount of \$474,754.97, together with interest thereon from the date of judgment, and attorney's fees, costs, and disbursements. As its main argument, plaintiff contends that conversion of the judgment should be granted in the State of New York under the doctrine of full faith and credit of Article IV of the United States Constitution because the Colorado District Court had personal and subject matter jurisdiction to confirm the arbitration award and enter the judgment. Furthermore, it asserts that defendants were duly served with the motion to confirm the final arbitration award and entry of judgment (*id.*).

In opposition, defendants argue that even though they were informed about the merger, they were not presented with a new engagement letter by plaintiff and, thus, they did not agree to any terms or conditions with plaintiff other than the fee structure. Additionally, defendants contend that they did not receive the Demand for Arbitration, despite claims to the contrary. In fact, defendants assert that they did not receive any communication about the arbitration until this instant motion was served at Schoninger's home address, despite plaintiff having access to Schoninger's address, as well as his home phone number (NYSCEF Doc. No. 22, *defs' opposition*). According to defendants, PRO Rugby moved from its One Penn Plaza, 36th Floor, NY, NY address to Schoninger's home address in October 2019. Defendants claim JAMS confirmed that it had the One Penn Plaza, 36th Floor, NY, NY address on file. Hence, defendants posit that plaintiff willfully chose not to reasonably apprise them of the JAMS arbitration because plaintiff knew that defendants had not agreed to arbitration as there was no engagement agreement between the parties, whether verbal or written. As a corollary, defendants set forth that JAMS should not have conducted the arbitration as the institution's own rules prohibit a hearing where there was no "pre-dispute written contractual provision requiring the parties to arbitrate the dispute or claim specifying JAMS administration..." (*id.*, at pg. 4). Likewise, according to defendants, the State of Colorado does not have jurisdiction over Schoninger since he neither works, lives, owns property, or has any contact therewith, and therefore, the Colorado District Court should not have issued an order confirming the Final Arbitration award. For the foregoing reasons, defendants request that the court deny plaintiff's motion.

In reply, plaintiff maintains that it obtained an enforceable, final judgment against defendants in Colorado, which is entitled to full faith and credit in New York under Article IV of the United States Constitution. According to plaintiff, jurisdiction was proper because defendants consented to the jurisdiction of the State of Colorado under Section 9 of the engagement agreement. Plaintiff asserts that it is undisputed that defendants were notified of the merger and continued to receive legal representation without raising any objections. In addition, plaintiff articulates that defendants' subjective understanding of the terms of the engagement agreement should be rejected because they offer no evidence in support of their theory that the parties agreed to terms different from those reflected in the engagement agreement.

Furthermore, plaintiff asserts that defendants agreed to submit the fee dispute to arbitration pursuant to Section 9 of the engagement agreement. Concerning service of the Notice of Arbitration and Judgment, plaintiff maintains that documentary evidence, by way of an affidavit of service, demonstrates that it served its demand for arbitration on Schoninger at PRO Rugby's office at One Penn Plaza, 36th Floor, New York, New York, 101193 on September 13, 2019, and on PRO Rugby through its registered agent on September 16, 2019, before defendants moved out of that office in October 2019. Lastly, plaintiff argues that since Section 9 of the engagement agreement provides that the rights of the parties thereunder shall be governed and construed in accordance with Colorado law, and that any court proceedings related to arbitration shall take place in a Colorado state court, the Colorado District Court had personal jurisdiction over defendants (NYSCEF Doc. No. 23, *reply*).

CPLR 3213 provides, in pertinent part: “[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.” Furthermore, “[a] judgment rendered by a court of a sister state is accorded the same credit, validity, and effect in every other court in the United States, which it had in the state where it was pronounced” (*All Terrain Properties, Inc. v Hoy*, 265 AD2d 87, 91 [1st Dept 2000]). The full faith and credit doctrine “requires recognition of [a] foreign judgment as proof of the prior-out-of-State litigation and gives it *res judicata* effect, thus avoiding re-litigation of issues in one State which have already been decided in another” (*Ionescu v Brancoveanu*, 246 AD2d 414, 416 [1st Dept 1998]).

“A plaintiff is entitled to such relief upon producing an authenticated or exemplified copy of the foreign judgment against the defendant, proof of the unsatisfied judgment, and proof that the defendant was properly served with the summons and motion papers.” (*Bob Neill of Greensboro, LLC v Oskvarek*, 2020 NY Slip Op 32596[U] at *3, citing *Mortimer Offshore Servs. Ltd. v Manufacturas Orga Ltda*, 2019 NY Slip Op 30720[U], *2-3 [Sup Ct, NY County 2019].) If these requirements are satisfied, the judgment is entitled to recognition under the doctrine of full faith and credit and “[t]he sole inquiry [before this Court], if raised by a judgment debtor, is the determination of whether the rendering court had jurisdiction to issue the judgment.” (*Robert Walters Assoc. Cal v Further Lane Sec., L.P.*, 2016 NY Slip Op 31603[U], *3 [Sup Ct, NY County 2016], citing *Fiore v Oakwood Plaza Shopping Ctr., Inc.*, 78 NY2d 572, 577 [1991], *cert denied* 506 US 823 [1992]; see *JDC Fin. Co. I v Patton*, 284 AD2d 164, 166 [1st Dept 2001].)

In the case at bar, plaintiff has presented a copy of the foreign judgment against defendants, proof of the unsatisfied judgment, and proof that the defendants were properly served with the summons and motion papers. As the burden shifts, defendants have failed to establish lack of personal jurisdiction in the underlying action. Pursuant to the forum selection clause found in Section 9 of the engagement agreement, the parties consented to the jurisdiction of Colorado courts. According to Colorado Revised Statutes 13-22-226[2], “an agreement to arbitrate providing for arbitration in this state [Colorado] confers jurisdiction on the court to enter judgment on an award” (see *In re Marriage of Dorsey*, 342 P3d 491, 495 [Colo. App. 2014]). Furthermore, the affidavits of service of the motion to confirm the final arbitration award and for entry of judgment show that defendants were duly served with the motion papers pursuant to Colorado law (see Colorado Rules of Civil Procedure 4(e)(1); 4(e)(4); NYSCEF Doc.

No. 8, affidavit of service). Specifically, Schoninger and PRO were served in accordance with Colorado Rules of Civil Procedure 4(e)(1) and 4(e)(4) respectively.

Considering now that branch of the motion seeking attorneys' fees and expenses, "[u]nder the [general] rule, attorney's fees are incidents of litigation, and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" (Sage Sys., Inc. v Liss, 39 NY3d 27, 30-31 [2022], quoting Hooper Assoc. v AGS Computers., 74 NY2d 487, 491 [1989]). Here, Section 9 of the Engagement Letter provides that "in any dispute...the prevailing party shall recover its reasonable attorneys' fees and costs." Thus, the issue with respect to attorney's fees concerning this instant motion shall be determined by a special referee. All other arguments have been considered and are either without merit or need not be addressed. Accordingly, it is hereby

ORDERED that plaintiff's motion seeking summary judgment against defendants is granted; and it is further

ORDERED and **ADJUDGED** that the Clerk of Court shall enter a money judgment in favor of plaintiff and against defendants for the principal sum of \$474,754.97, together with interest thereon from the date of judgment of \$100.97 per diem, until the judgment is satisfied in full; and it is further

ORDERED that the branch of plaintiff's motion seeking attorney's fees incurred in bringing this motion is granted and shall be referred to a special referee to hear and determine; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendants, as well as upon the Clerk of the Court, who shall enter judgment accordingly; and it is further

ORDERED that service upon the Clerk of the Court and the Special Referee Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of this court.

December 29, 2023



HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
	<input 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 checked="" type="checkbox"/> REFERENCE