

**Diamond Films Netherlands Cooperatief U.A. v TV
Azteca S.A.B DE C.V.**

2024 NY Slip Op 33017(U)

August 26, 2024

Supreme Court, New York County

Docket Number: Index No. 655384/2020

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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DIAMOND FILMS NETHERLANDS COOPERATIEF U.A.,	INDEX NO.	<u>655384/2020</u>
Plaintiff,	MOTION DATE	<u>N/A</u>
- v -	MOTION SEQ. NO.	<u>007</u>
TV AZTECA S.A.B. DE C.V.,		
Defendant.	DECISION + ORDER ON MOTION	

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 171, 179, 180, 181, 182, 183, 184, 185, 186, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 200, 201, 203, 204, 209, 210, 211, 243, 244, 245, 264, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

In motion sequence 007, defendant TV Azteca S.A.B. DE C.V. (TV Azteca) moves pursuant to CPLR 5015 (a) (4) and (5) to vacate default judgment¹ on the grounds that (i) this court lacks jurisdiction over TV Azteca and/or (ii) this court rendered the default judgment based on a prior order that was subsequently reversed.² (NYSCEF 151, Order to Show Cause at 1.)

¹ TV Azteca's request to stay enforcement of the default judgment pending the court's decision on this motion was rejected. (NYSCEF Doc. No. [NYSCEF] 151, Order to Show Cause at 1-2; NYSCEF 160, tr at 29:2-3 [Aug. 24, 2022 conference].)

² The court was informed on August 16, 2024, that "on May 30, 2024, the 15th Federal Court of Mexico granted the amparo filed by [plaintiff] Diamond [Films Netherlands Cooperatief U.A.] and invalidated the decision of the 5th Upper Court of Mexico City that held Diamond's service of process upon [TV Azteca]—effected at its headquarters in Mexico City on September 3, 2021, pursuant to the Hague Convention—was improper." (NYSCEF 312, Letter; see NYSCEF 313, 15th Federal Court of Mexico Decision.) However, for the reasons discussed herein, this reversal is immaterial to this decision which relies on the initial certificate of service which must be final.

Background

The motion raises two issues: (1) whether TV Azteca was properly served under the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Convention); and (2) whether this court may rely on the initial determination of Mexico's Forty-Sixth Court that there was valid service of process on TV Azteca, even though the Forty-Sixth Court subsequently determined that such service of process was null and void. The motion is denied because the court properly relied on the Forty-Sixth Court's initial certification of valid service which must be final.

On August 7, 2020, TV Azteca began proceedings against Diamond in Mexico to prevent Diamond from enforcing the parties' Television Broadcasting Agreement.

(NYSCEF 51, Everardo Joaquín Espino Guerrero³ aff ¶ 31.) On August 12, 2020, a Mexican court issued a permanent injunction to prohibit Diamond from receiving payments. (*Id.* ¶ 34.) On October 16, 2020, Diamond initiated this action against TV Azteca to enforce the parties' Renegotiation and Free Television Output Agreement (Agreement). (NYSCEF 1, Summons and Complaint.) On September 3, 2021, service of process was effectuated on TV Azteca and was deemed by the Forty-Sixth Court proper under Mexican law since it occurred at the correct address, which was verified by the court clerk. (NYSCEF 124, Eduardo Facha García⁴ aff ¶¶ 3-4.)

On September 9, 2021, TV Azteca challenged the service of process as improper before the Forty-Sixth Court, which declined to rule on TV Azteca's challenge; the certificate of service was sent to this court. (*Id.* ¶¶ 4, 6.) On September 14, 2023, TV

³ Guerrero is TV Azteca's counsel and represents them in three different proceedings related to Diamond before Mexican courts. (NYSCEF 51, Guerrero aff ¶ 2.)

⁴ García is Diamond's counsel. (NYSCEF 124, García aff ¶ 1.)

Azteca sought to suspend the delivery of the certificate, which relief was denied by Tenth Federal District Court. (*Id.* ¶¶ 7-8.) On February 23, 2022, this court granted Diamond’s motion for a default judgment relying on the Forty-Sixth Court’s order that service was valid and on the Tenth Federal District Court’s decision denying Azteca’s request to suspend the delivery of the certification. (NYSCEF 90, Decision and Order at 1 [mot. seq. nos. 003, 004].)

The decision of the Forty-Sixth Court, upon which this court relied in granting the default motion, was annulled on August 9, 2022, when the Forty-Sixth Court ruled that Diamond’s service of process was null and void.⁵ (NYSCEF 150, Thomas V. Sjoblom⁶ aff ¶ 18.) However, that reversal does not affect the original determination of this court. This court maintains its reliance on the Forty-Sixth Court’s original finding of valid service of process.

Discussion

TV Azteca argues that this court must vacate the default judgment against it because it is based upon the Forty-Sixth Court’s determination, which was subsequently annulled. The relevant legal standard allows a court to relieve a party from a judgment upon the ground of “reversal, modification, or vacatur of a prior judgment or order upon which it is based.” (CPLR 5015 [a] [5].)

“[B]oth Mexico and the United States are signatories to the Hague Convention” and thereby shall conform to the requirements of the treaty. (*See Unite National Retirement Fund v Ariela, Inc.*, 643 F Supp 2d 328, 332 [SD NY 2008].) “When service

⁵ A decision holding that the September 3, 2021 service was improper was subsequently invalidated. (*See supra* at 1 n 1.)

⁶ Sjoblom is TV Azteca’s counsel. (NYSCEF 150, Sjoblom aff ¶ 1.)

of process is made in a foreign country that is a signatory of the Hague Convention ... compliance with the procedures of the Hague Convention is mandatory in State court proceedings.” (*Amerasia Bank v Saiko Enters.*, 263 AD2d 519, 520 [2d Dept 1999] [citations omitted].) The Hague Convention is “the supreme law of the land and its service requirements are mandatory.” (*Morgenthau v Avion Resources Ltd.*, 11 NY3d 383, 390 [2008].) Article 10 of the Hague Convention “permits service of process by mail directly to the person abroad provided that the State of designation does not object in its ratification to such service.” (*Low v Bayerische Motoren Werke, AG.*, 88 AD2d 504, 505 [1st Dept 1982].) Moreover, article 19 of the Hague Convention “permits service by any method permitted by the internal laws of the country in which service is being made.” (*Fernandez v Univan Leasing*, 15 AD3d 343, 344 [2d Dept 2005] [citation omitted].)

Here, this court properly relied upon the certificate of service, as it complies with the Hague Convention’s requirements that it “include the method, the place, and the date of service and the person to whom the document was delivered.” (Hague Convention, Art. 6; see NYSCEF 47, Certificate at 70-71.⁷) A plaintiff can adequately accomplish service of process if they transmit “copies of Summons and Complaint, in English and Spanish ... and the other required documents to the Central authority in Mexico ... [which] returned a certificate of service.” (*Unite National Retirement Fund v. Ariela, Inc.*, 643 F Supp 2d 328, 334 [SD NY 2008].)

⁷ NYSCEF pagination.

Service of process was presumptively valid on September 6, 2021, when Forty-Sixth Court certified service in Mexico. (NYSCEF 42, Eduardo Facha⁸ aff ¶ 8; NYSCEF 43, Translated Forty-Sixth Judge Mendoza González' "Incidente de Nulidad" Order, September 10, 2021.) The service of process certification was then sent by Mexico's Central Authority to this court. (NYSCEF 47, Certificate at 70-71.) The "return of a completed certificate of service by a Central Authority establishes prima facie evidence that the Central Authority's service on foreign defendants was made in compliance with the convention." (*Unite National Retirement Fund*, 643 F Supp 2d at 334 [citation omitted].)

As between the Forty-Sixth Court's subsequent reversal and the Hague Convention, this court is compelled to extend comity to the Hague Convention. "[T]he decision whether to extend comity is a matter of discretion" and is "normally not extended by New York courts to nonfinal, nonmerit orders." (*Banco Nacional de México, S.A. v Societe Generale*, 34 AD3d 124, 131 [1st Dept 2006] [citations omitted].) Moreover, this "court's determination to vacate a judgment is a discretionary one." (*Nash v Port Auth. Of New York & New Jersey*, 22 NY3d 220, 225 [2013].) The court must consider "the facts..., the equities affecting each party and others affected by the judgment or order, and the grounds for the requested relief." (*Id.* at 226 [internal quotation marks and citation omitted].) Disregard of the original valid certificate is the equivalent of disregarding the Hague Convention. It would create confusion and open the door to questioning valid certificates of service of process in the future. Instead, the Hague Convention envisions finality.

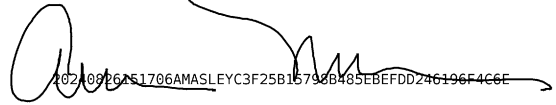
⁸ Facha is Diamond's counsel. (NYSCEF 42, Facha aff ¶ 1.)
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TV Azteca's argument that service in Mexico was not proper because the address referenced a different neighborhood is also meritless, as "failure to comply strictly with the Hague Convention is *not* automatically fatal to effective service." (*Burda Media, Inc. v Viertel*, 417 F3d 292 [2d Cir 2005] [citation omitted].) Actual notice is more important than "strict formalism." (*Id.* [internal quotation marks and citation omitted].)

Even if TV Azteca had authority to support their position that service of process in Mexico was improper, Diamond also served TV Azteca via Horacio Medal in California on October 21, 2020, at the address provided in the Agreement.⁹ (NYSCEF 6, aff of service at 1.) The Agreement provides that TV Azteca shall be served at their California address, "to Mr. Horacio Medal, or to any employee of Azteca America." (NYSCEF 2, Renegotiation and Free Television Output Agreement ¶ 23.) This court agrees with Diamond's contention that Medal, the individual who was served, conducted "direct business dealings" as "an agent, representative, and/or in-house attorney of Azteca." (NYSCEF 169, Opp MOL at 8.) As such, TV Azteca was properly served, and such service complies with the Hague Convention.

⁹ Medal was an employee and agent of a subsidiary of TV Azteca, Azteca International Corporation. (See NYSCEF 63, America Garcia Barron aff ¶¶ 3-4.) Barron is TV Azteca's Director of Human Resources. (*Id.* ¶ 1.)

Accordingly, it is
ORDERED that the motion is denied.


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8/26/2024

DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE