

**Smart Union Mining Invs. Ltd. v Tang Xue Jin**

2015 NY Slip Op 30196(U)

January 2, 2015

Supreme Court, Queens County

Docket Number: 703421/2013

Judge: Marguerite A. Grays

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FILED

JAN 20 2015

COUNTY CLERK  
QUEENS COUNTY

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Marguerite A. Grays IA Part 4

**ORIGINAL**

Justice

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SMART UNION MINING INVESTMENTS  
LIMITED (IN LIQUIDATION),

Index  
Number 703421/2013

Plaintiff(s)

Motion  
Date August 11, 2014

-against-

TANG XUE JIN,

Motion Cal.  
No.: 117

Defendant(s)

Motion Seq. No. 2

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X

The following papers numbered 1-5 read on this motion by defendant for leave to renew his prior (cross) motion to dismiss the complaint and upon renewal, to dismiss the action; this cross motion by plaintiff pursuant to CPLR §3213 against defendant for summary judgment in lieu of complaint in the amount not less than \$9,357,495.50.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits .....	1-4
Notice of Cross-Motion - Affidavits - Exhibits .....	5

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff brought this lawsuit pursuant to CPLR §3213 and §5303 by motion for summary judgment in lieu of complaint seeking recognition and enforcement of a foreign country money judgment entered by the High Court of the Hong Kong Special Administrative Region in an action brought in Hong Kong by plaintiff against defendant. Defendant previously cross-moved to dismiss the complaint. By order dated May 2, 2014, the motion and cross motion were denied without prejudice and with leave to renew upon

submission of proper papers. The court determined the affidavit of John Robert Lees,<sup>1</sup> offered by plaintiff in support of its motion, had been notarized in Hong Kong, but lacked a certificate of conformity pursuant to CPLR 2309, and that the copy of the Hong Kong judgment was not certified. The court also determined that defendant's affidavit was in Chinese, but the translation of such affidavit from Chinese to English was accompanied by a translator's affidavit lacking a statement as to the translator's qualifications as required pursuant to CPLR 2101(b).

Defendant now moves to dismiss the action pursuant to CPLR §3213. Plaintiff opposes the motion, and cross moves for summary judgment in lieu of complaint pursuant to CPLR §3213 to enforce the foreign money judgment.

At the outset the Court notes that when a motion pursuant to CPLR §3213 is denied, the moving and answering papers may be deemed the complaint and answer, respectively, unless the court orders otherwise (CPLR §3213). By granting plaintiff and defendant leave to renew the prior motion and cross motion upon proper papers, the court has provided plaintiff and defendant an opportunity, in effect, to supplement their original papers. Defendant made the instant motion to dismiss before plaintiff cross moved for summary judgment in lieu of complaint. Such timing is of no moment (*see generally Sea Trade Maritime Corp. v Coutsodontis*, 111 AD3d 483 [1st Dept 2013]), notwithstanding plaintiff did not serve the cross motion for summary judgment in lieu of complaint by means of service of a summons with the notice of cross motion for summary judgment and the supporting papers in lieu of complaint (*see* CPLR §3213). Defendant did not object to personal jurisdiction in opposition to the original motion, and makes no claim herein that the action was improperly commenced.

Pursuant to CPLR §5303 and §5304(a)(1), a foreign country money judgment which is final and conclusive may be enforced in New York by a motion for summary judgment in lieu of complaint. Under the doctrine of comity, the New York courts will recognize the judgment provided it is based on procedures compatible with our concepts of due process, by tribunals which are fair and impartial, and when personal jurisdiction is obtained over the defendant. For the purposes of CPLR Article 53, a foreign country judgment is considered to be conclusive as between the parties to the extent it grants or denies recovery of a sum certain (CPLR §5103; *see CIBC Mellon Trust Co. v Mora Hotel Corp.*, 100 NY2d 215, 221 [2003], *cert denied* 540 US 948 [2003]). Generally, a foreign money judgment is to be recognized in New York under article 53 unless a ground for nonrecognition under CPLR § 5304 is applicable. Under CPLR §5304(a), a foreign judgment will not be

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<sup>1</sup>

Plaintiff has been placed in liquidation, and Mr. Lees and Mat Ng were appointed as joint and several liquidators by the order of the High Court of the Hong Kong Special Administrative Region.

recognized if: “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 “the foreign court did not have personal jurisdiction over the defendant.” Certain discretionary grounds may also be a basis for refusing to recognize a foreign judgment (CPLR §5304[b]). A foreign judgment need not be recognized if “the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend” (CPLR §5304[b][2]). A foreign money judgment thus is entitled to be recognized and enforced in New York unless a ground for nonrecognition under CPLR §5304 applies (*see John Galliano, S.A. v Stallion, Inc.*, 15 NY3d 75 [2010]).

Here, defendant claims he did not receive notice of the Hong Kong action in time to defend, plaintiff did not use reasonable efforts to serve him in the United States, and that he has a meritorious defense to the breach of contract claim. Defendant contends he first learned of the Hong Kong action and judgment when he was served with plaintiff’s original motion herein, and that neither he nor anyone on his behalf received payment as required under the agreement. He also contends he is entitled to a set off. In support, he offers, among other things, his affidavit dated September 24, 2013 in Chinese (which was previously submitted in opposition to the prior motion by plaintiff), a translation from Chinese to English, an affidavit of Tabitha Ashura, dated September 25, 2013 (also previously submitted), indicating she certifies that the translation of the September 24, 2013 affidavit “is to the best of my knowledge and belief, a true and accurate translation from Chinese into English,” and an affidavit of Phillip Yan Hing Wong dated May 29, 2014, indicating that he is a translator, and that the translation of the September 24, 2013 affidavit “is, to the best of my knowledge and belief, a true and accurate translation from Chinese into English.” Defendant also offers his affidavit dated October 30, 2013 in Chinese, (which was previously submitted in reply in relation to his earlier motion), a translation from Chinese to English, and an affidavit of Kelly Kim, dated November 4, 2013 (also previously submitted), indicating she certifies that the translation of the October 30, 2013 affidavit is, “to the best of my knowledge and belief, a true and accurate translation from Chinese into English.” Defendant further offers an affidavit of George Z. Shen, dated June 10, 2014, indicating he is a translator, and that the translation of the October 30, 2013 affidavit “is, to the best of my knowledge and belief, a true and accurate translation from Chinese into English.”

To the extent defendant relies upon the English translations of his sworn statements to establish he did not receive timely notice of the Hong Kong action in time to defend, they are facially defective and inadmissible. CPLR §2101(b) provides that “[w]here an affidavit or exhibit annexed to a paper served or filed is in a foreign language, it shall be accompanied by an English translation and an affidavit by *the* translator stating his qualifications and that the translation is accurate” (emphasis supplied). The affidavits of Tabitha Ashura, Kelly Kim, Phillip Yan Hing Wong and George Z. Shen do not state that they made the translations of the respective documents. Even assuming CPLR §2101(b) allows for a party’s submission of an affidavit of a translator who played no role in preparing the translation, to prove the

translation's accuracy, the affidavits of Tabitha Ashura, Kelly Kim, Phillip Yan Hing Wong and George Z. Shen are insufficient. They do not indicate the respective affiants compared the respective Chinese language affidavits to the English translations and that the English translations are complete and accurate translations to the best of the affiant's knowledge and ability. Nor do the affidavits of Tabitha Ashura and Kelly Kim set forth their qualifications (*see* CPLR 2101[b]; *Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47 [2d Dept 2011]; *Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901 [2d Dept 2008]).

Furthermore, the affirmations of defendant's counsel are without requisite personal knowledge of whether defendant received notice of the Hong Kong action in time to defend. Defendant therefore has failed to submit proper proof in evidentiary form sufficient to establish a defense warranting dismissal of the action either pursuant to CPLR§3213 or §5304, and the motion by defendant to dismiss the action is denied.

With respect to its cross motion, plaintiff asserts that the judgment in question is final, conclusive and enforceable within the meaning of section §5302 of the CPLR, the Hong Kong court proceedings satisfied the principles of due process and the Hong Kong court which rendered the judgment had personal jurisdiction over defendant. In support of its motion, plaintiff offers, among other things, an affirmation of its counsel, two affidavits of Mr. Lees, dated July 18, 2014 (one denominated as "AFFIDAVIT" and the other denominated as a "REPLY AFFIDAVIT"), with certificates of conformity, a copy of an amended order of the Hong Kong court dated November 29, 2011 authorizing an expedient means of service of the concurrent "writ of summons" upon defendant, an order of the Hong Kong court dated March 29, 2012 authorizing service of the summons dated March 21, 2012 by the same substituted means of service as directed in the November 29, 2011 order, an affirmation dated January 9, 2012 of Leung Kenneth, clerk to Mayer Brown JSM (MBJSM), plaintiff's counsel in the Hong Kong action, an affirmation dated January 11, 2012 of Hon Kin Fai, clerk to MBSJM, affidavits dated March 21, 2012 and March 27, 2012 of Liu Kai Wan Gabrielle, a solicitor and employee of MBSJM, and a certified copy of the Hong Kong judgment with an apostille (CPLR 4542).

A plaintiff seeking enforcement of a foreign country judgment bears the burden of making a prima facie showing that the mandatory grounds for nonrecognition, i.e., lack of due process and personal jurisdiction, do not exist (*see* CPLR §5304[a][2]; *Daguerre, S.A.R.L. v Rabizadeh*, 112 AD3d 876 [2d Dept 2013]; *see also CIBC Mellon Trust Co. v Mora Hotel Corp.*, 296 AD2d 81, 97 [1st Dept], *affd* 100 NY2d 215 [2003]) and the CPLR article 53 requirements are satisfied (*see* CPLR 5302; *CIBC Mellon Trust Co. v Mora Hotel Corp.*, 296 AD2d at 97).

To the extent plaintiff asserts the Hong Kong court had a basis to exercise personal jurisdiction over defendant by virtue of the contract, it relies upon an English translation of the contract which is in the Chinese language. The translation, however, is accompanied by

an affidavit of Charles K. Smith, which fails to indicate he was the translator of the contract, set forth his qualifications and state that the translation is accurate.<sup>2</sup> In addition, plaintiff has failed to establish that the service upon defendant was reasonably calculated under all the circumstances to apprise him of the Hong Kong action. Plaintiff has failed to show that expedient service was appropriate insofar as personal service upon defendant pursuant to the methods of service set forth in CPLR §308(1), (2) and (4) were impracticable (*see* CPLR §308[5]). Plaintiff also has failed to demonstrate that a copy of the summons was published in the Chinese language newspapers in Hong Kong and the People's Republic of China in accordance with the amended order of the Hong Kong court. Plaintiff has failed to submit any English translations of the purported notices published in such newspapers and corresponding translators' affidavits, or any affidavits of publication in such newspapers, including English translations, if necessary and corresponding translators' affidavits.

Under such circumstances, the cross-motion by plaintiff for summary judgment in lieu of complaint is denied. Given that the initial motion papers were supplemented as discussed above, plaintiff is directed to serve and file a formal complaint within 30 days of service of a copy of this order with notice of entry.

Dated:

JAN 02 2015

  
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J.S.C

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Rather, Mr. Smith's affidavit states it is "true and accurate to the best of my judgment and ability (*except where otherwise noted*)..." (emphasis supplied).