SJC-13026

CASSOUTO-NOFF & CO. vs. AMY DIAMOND.

Berkshire. March 3, 2021. - July 6, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Money-Judgments of Foreign States. Judgment, Enforcement. Due Process of Law, Notice. Practice, Civil, Service of process. Public Policy.

Civil action commenced in the Superior Court Department on February 18, 2016.

The case was heard by John A. Agostini, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

David E. Valicenti for the defendant.
Laurence K. Richmond for the plaintiff.

LOWY, J. After the defendant, Amy Diamond, failed to pay the plaintiff, the Israeli law firm Cassouto-Noff & Co., its agreed-upon fees, an Israeli court held her liable for the debt. The plaintiff then initiated the current action in the Superior

Court to recognize the Israeli judgment under the Massachusetts Uniform Foreign Money-Judgments Recognition Act, G. L. c. 235, § 23A (recognition act), a statute governing the enforcement of foreign money-judgments. Following a bench trial, the judge recognized the judgment, allowing it to be enforced. The defendant appealed, and we transferred the case to this court sua sponte. Although the defendant argues otherwise, we hold that the recognition act does not require compliance with Mass. R. Civ. P. 4 (d), as amended, 370 Mass. 918 (1976), and the Israeli judgment does not offend public policy. We thus affirm.

Background. We summarize the facts found by the trial judge. In 2012 and 2013, the defendant held executive-level positions in business organizations collectively called the Bandel Group. After a venture launched by the Bandel Group in Israel encountered legal issues, the defendant contacted the plaintiff. Acting on behalf of the Bandel Group, the defendant entered into a written fee agreement for legal services with the plaintiff. The final provision specified that the agreement was governed exclusively by Israeli law and that Israeli courts would have sole jurisdiction over disputes arising from the agreement. In addition to signing the agreement, the defendant repeatedly declared that "She was Bandel," and agreed, albeit orally, to be personally responsible for paying the fees.

Once the representation concluded, the plaintiff sent a bill directed to the defendant for its services in February 2013. When the defendant did not respond to that bill, the plaintiff sent a second one in March 2013. Months passed without payment. In July 2013, the plaintiff sent an e-mail message to the defendant, stating: "In our last conversation you have confirmed that you will transfer our legal fees by the end of June, but that transfer has not been made. Therefore, I would kindly request you to do so [as] soon as possible." A month later, the defendant replied, stating: "We have set terms with the new operator and are waiting on contracts . . . . Apologies for the delay." After this, the defendant did not communicate further, prompting the plaintiff to threaten to sue. These notifications went unanswered for a year, leading the plaintiff to send another demand for payment to the defendant, and when this, too, was met with silence, an e-mail message asserting application of the arbitration clause in the fee agreement. The defendant did not respond.

The plaintiff sued the defendant in Israel over the unpaid fees. In conformity with the Israeli rules of civil procedure, the Israeli court permitted the plaintiff to serve the defendant at her residence in Massachusetts. The plaintiff opted to use the Berkshire County sheriff's office to render service. A deputy sheriff went to the defendant's residence four times, but

the defendant never answered the door. On two of these occasions, the deputy spoke with the defendant's husband. Once, the deputy spoke with the defendant over the telephone, and she said that "she would not arrange to accept the service and was told by her attorney that she did not have to."

When the Israeli court was notified of these developments, it found that the defendant had evaded service and entered a default judgment against her. The Superior Court judge subsequently found that the defendant had notice of the lawsuit before the default judgment entered.

Discussion.[1] 1. Notice. The recognition act allows courts to enforce foreign money-judgments that are "final and conclusive and enforceable where rendered." G. L. c. 235, § 23A, first par. To this end, a defendant must have received notice of the foreign court proceedings "in sufficient time to enable him [or her] to defend."[2] G. L. c. 235, § 23A, third par. The defendant claims that the recognition act incorporates Mass. R. Civ. P. 4 (d) and that because the plaintiff failed to comply

[1] "The standard of review relating to a jury-waived proceeding is well established -- '[t]he findings of fact of the judge are accepted unless they are clearly erroneous' and '[w]e review the judge's legal conclusions de novo'" (citation omitted). Cavadi v. DeYeso, 458 Mass. 615, 624 (2011).

[2] A foreign court must also have personal jurisdiction for a money-judgment to be recognizable. G. L. c. 235, § 23A, second par. Because the defendant conceded that a basis for personal jurisdiction existed, we do not address this issue.

with this rule, the Israeli judgment cannot be recognized.[3] We disagree.

The recognition act is derived from a model statute, one that aimed to streamline recognition procedures across the United States. See Uniform Foreign Money-Judgments Recognition Act (1962). If foreign courts had to comport with the idiosyncratic notice requirements of every State, then the goal of creating such uniformity would be frustrated. See 18 C.A. Wright, A.R. Miller, & E.H. Cooper, Federal Practice and Procedure § 4473, at 743 (1981) ("It is intrinsically awkward to confront foreign judgments with the potentially divergent law of fifty states and federal courts . . .").

For this reason, the recognition act is best understood as requiring the same level of notice as required by due process.

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[3] Rule 4 (d) (1) dictates that service of a summons and a copy of the complaint must be made on a defendant

> "by delivering a copy of the summons and of the complaint to him [or her] personally; or by leaving copies thereof at his [or her] last and usual place of abode; or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by statute to receive service of process, provided that any further notice required by such statute be given. If the person authorized to serve process makes return that after diligent search he [or she] can find neither the defendant, nor defendant's last and usual abode, nor any agent upon whom service may be made in compliance with this subsection, the court may on application of the plaintiff issue an order of notice in the manner and form prescribed by law."

Notice, in other words, must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Jones v. Flowers, 547 U.S. 220, 226 (2006), quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). Due process is a constitutional baseline; judgments cannot be enforced unless it is satisfied. See Kulko v. Superior Court, 436 U.S. 84, 91 (1978). Conversely, the requirement advances uniformity; all courts -- foreign and domestic -- must meet at least this standard for their judgments to be recognized in the United States. We thus construe the notice provision in G. L. c. 235, § 23A, third par., to require notice that satisfies the requirements of due process.

By its nature, personal service often satisfies due process. See Greene v. Lindsey, 456 U.S. 444, 449 (1982). Yet "certain less rigorous notice procedures [than personal service] have enjoyed substantial acceptance throughout our legal history." Id. Consequently, whether notice is adequate is ultimately a functional, not formal, inquiry. See, e.g., Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478, 484 (1988) ("whether a particular method of notice is reasonable depends on the particular circumstances"). The absence of service of process is not dispositive. Cf. Jones, 547 U.S. at 226 ("Due process does not require that a property owner receive

actual notice before the government may take his property," only that reasonable efforts to provide such notice be made).

The defendant received adequate notice. After the defendant orally agreed to guarantee the legal fees, the plaintiff repeatedly notified her when these came due, making clear that it would hold her personally liable. The defendant certainly received at least one of these requests, as she responded to the demand sent in July 2013, even apologizing for the delay. Apologies aside, this would be the last that the plaintiff heard from the defendant during these exchanges. More alerts about possible litigation followed, but the defendant continued not to respond.

Although these facts alone are not sufficient notice, they contextualize what happened next: four attempts to serve the defendant, one of which included a telephone conversation between the defendant and the process server in which the defendant informed the server that she would not accept the papers. Throughout these efforts, the defendant cloaked herself in a veil of ignorance, leading the Israeli and Superior Court judges to make their respective findings about notice. See Commonwealth v. Olivo, 369 Mass. 62, 69 (1975), quoting National Labor Relations Bd. v. Local 3, Bloomingdale, Dist. 65, Retail, Wholesale & Dep't Store Union, CIO, 216 F.2d 285, 288 (2d Cir. 1954) ("A party may not 'shut his [or her] eyes to the means of

knowledge which he [or she] knows are at hand, and thereby escape the consequences which would flow from the notice of it had actually been received'"). The defendant's evasion, combined with the other indicia of notice, therefore satisfied the recognition act.

2. Repugnancy. The recognition act also forbids the recognition of a foreign money-judgment if "the cause of action on which the judgment is based is repugnant to the public policy of this state." G. L. c. 235, § 23A, third par. Because she signed the agreement as a representative of the Bandel Group, the defendant contends that recognition -- which would lead to her being personally liable for the legal fees -- would violate Massachusetts's public policy of respecting the corporate form. See G. L. c. 156C, § 22 (limited liability company is solely responsible for its debts); Milliken & Co. v. Duro Textiles, LLC, 451 Mass. 547, 561 (2008) (noting, in context of determining successor liability, "our strong interest in respecting corporate structures" [citation omitted]). We disagree.

Repugnancy is strong medicine, best administered sparingly.[4] A judgment will offend public policy when "the original claim is

[4] Other courts have repeatedly made this point. See, e.g., Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción, 832 F.3d 92, 106 (2d

repugnant to fundamental notions of what is decent and just in the State where enforcement is sought." Restatement (Second) of Conflict of Laws § 117 comment c (1971). "In the classic formulation, a judgment that 'tends clearly' to undermine the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or of private property is against public policy." Ackermann v. Levine, 788 F.2d 830, 841 (2d Cir. 1986), quoting Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 443 (3d Cir. 1971), cert. denied, 405 U.S. 1017 (1972).

The Israeli judgment is not repugnant. This judgment was premised on the plaintiff asking the Israeli court to pierce the Bandel Group's corporate veil and hold the defendant personally liable.[5] As both the Superior Court judge and other courts have noted, Israeli courts take corporate veil piercing seriously. See Tahan v. Hodgson, 662 F.2d 862, 867 (D.C. Cir. 1981) ("With

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Cir. 2016), cert. dismissed, 137 S. Ct. 1622 (2017) ("The public policy exception does not swallow the rule [of recognizing qualifying foreign judgments]"); Ohno v. Yasuma, 723 F.3d 984, 1002 (9th Cir. 2013) ("California courts have set a high bar for repugnancy under the Uniform Act"); Tahan v. Hodgson, 662 F.2d 862, 866 n.17 (D.C. Cir. 1981) ("Only in clear-cut cases ought [repugnancy] to avail defendant").

[5] The complaint also claimed that the defendant was liable because she personally, albeit orally, guaranteed the debt. Because the default judgment does not specify the grounds of relief, we do not address whether a judgment enforcing an oral debt guarantee is repugnant.

respect to the argument that enforcement of this judgment would violate the American policy against holding corporate officers personally liable for corporate debts, it should be pointed out that Israel also has a policy against lightly piercing the corporate veil"). The defendant should have argued in Israel against holding her personally liable, not in Massachusetts. See Ohno v. Yasuma, 723 F.3d 984, 1003 (9th Cir. 2013) ("Foreign judgments are not to be 'tried afresh' in [United States] courts, applying domestic concepts").

Judgment affirmed.