SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

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IMAX CORP.,

Plaintiff,

-against-

Index No. 100596/12
Seq 002

E-CITY ENTERTAINMENT (I) PVT. LTD.,

Defendant.

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Coin, J.:

Defendant E-City Entertainment (I) Pvt. Ltd. (E-City) moves this Court by Order to Show Cause for an order (1)pursuant to CPLR 5015(a)(4) vacating the default judgment entered against it in this Court on May 4, 2012; and (2)restraining plaintiff from seeking relief against and/or seeking to collect monies from (a)defendant and/or (b)third persons and entities, based upon the default judgment. Defendant alleges that this Court lacked jurisdiction to render the judgment. Plaintiff opposes the motion.

Background

This case arises out of an arbitration held in London, United Kingdom, pursuant to the rules of the International Chamber of Commerce, in which both sides participated. The arbitration culminated in a Partial Final Award on Liability in February 2006 in favor of Imax Ltd (plaintiff's former subsidiary, now merged into plaintiff Imax Corporation); a Partial Final Award on Jurisdiction and Quantum on August 24,

2007 awarding the sum of $9,406,148.31 to Imax Corporation for damages, plus interest and costs; and a Final Award on March 27, 2008 providing for E-City to pay to Imax Corporation (1)interest to and including September 30, 2007 in the sum of $1,118,558.54; (2)interest at the rate of $2,512.60 per day from October 1, 2007 until payment of the award; (3)attorneys' fees, expert fees and related expenses in the sum of $384,789.21; and (4)$400,000 as the costs of the arbitration.

Plaintiff Imax Corporation (Imax) alleges that during the ICC arbitration, E-City began a demerger process to divest itself of all or substantially all of its assets, while failing to give notice to Imax of the proceedings and failing to disclose the existence of the Imax arbitration and award to the court in India overseeing the demerger proceeding.

In 2009 E-City brought a proceeding in Mumbai, India to challenge the ICC awards. Accordingly to Imax, there was an initial decision on the standard of review of the awards, which is now on appeal.

In the meantime, on June 24, 2011, Imax commenced a proceeding before the Superior Court of Justice of Ontario, Canada, to confirm the arbitration awards. E-City appeared in the Ontario Superior Court, opposing the proceeding. On November 29, 2011, the Superior Court of Justice in Ontario, Canada, recognized the ICC Final Award of March 27, 2008 and the Partial

Final Award on Jurisdiction and Quantum of August 24, 2007 as an enforceable judgment of the Ontario Superior Court, with full force and effect. E-City did not appeal from the November 29, 2011 order.

The instant action

On January 18, 2012, Imax commenced this action, moving pursuant to CPLR 3213 for summary judgment in lieu of complaint for recognition of the Canadian judgment. Imax effected service by personal delivery in India to an Assistant Manager-Legal of defendant at its registered office in Mumbai. E-City did not appear to contest the action, and this Court granted Imax's motion on default. Judgment was entered on May 4, 2012 in favor of plaintiff and against defendant in the total sum of $15,547,611.51.

E-City's instant motion is predicated on its contention that as a private limited company existing in and under the laws of India, plaintiff's service upon it of the papers underlying this action was improper for failure to comply with the requirements of the Hague Convention.

In addition to lack of personal jurisdiction, defendant argues that this court lacks subject matter jurisdiction. It contends that India is the center of activities upon which the parties premised their respective obligations. E-City notes that by order dated June 10, 2013, the Bombay High Court in India

determined that India is the appropriate jurisdiction to entertain its challenge to the arbitration award and that Indian law applies to the dispute between the parties. (Ex A to affidavit of Atul Goel, sworn to February 10, 2014).

Discussion

Where there is a treaty requiring a specific form of service of process such as the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention), that treaty is the supreme law of the land and its service requirements are mandatory. (*Morgenthau v Avion Resources Ltd.*, 11 NY3d 383, 390 [2008]; *Alfred E. Mann Living Trust v ETIRC Aviation S.A.R.L.*, 78 AD3d 137, 140 [1st Dept 2010]; *Casa de Cambio Delgado v Casa de Cambio Puebla, S.A.*, 196 Misc2d 1, 5 [Sup Ct, Queens County 2003]).

In this case the Hague Service Convention is implicated because both the United States and India are signatories to that convention. The Hague Service Convention provides a procedure to effect service through the Indian Central Authority. (*See e.g. Goldman, Horowitz & Cherno, LLP v PCP Intl. Ltd.*, 2012 WL 978584 [Sup Ct, Nassau County 2012]). It is uncontested that plaintiff did not effect service in accordance with the provisions of the Hague Convention.

Plaintiff's citations of cases upholding enforcement of judgments, including *Lenchyshyn v Pelko Elec., Inc.* (281 AD2d 42

[4th Dept 2001]) and its progeny, are inapposite. In those cases the defendants did not contest the manner of service, but contended that since they were not present or transacting business in New York, this state had no basis for personal jurisdiction over them pursuant to CPLR §§301 or 302. (281 AD2d at 44; *Abu Dhabi Commercial Bank PJSC v Saad Trading, Contr. & Fin. Servs. Co.*, 36 Misc3d 389, 393 n 1 [Sup Ct, New York County 2012], aff'd 117 AD3d 609 [1ST Dept 2014]; *Shipcraft v Arms Corp. of the Philippines, Inc.*, 2013 WL 649415 [Sup Ct, New York County 2013]).

The issue here, in contrast, is proper effectuation of service. If service has not been properly effected, the court is without jurisdiction and a default judgment must be unconditionally vacated. (*Daguerre, S.A.R.L. v Rabizadeh*, 112 AD3d 876 [2d Dept 2013]; *DeMartino v Rivera*, 148 AD2d 568, 569 [2d Dept 1989]); *Citibank v Keller*, 133 AD2d 63, 64-65 [2d Dept 1987]).

Plaintiff's reliance on Article 16 of the Hague Convention is similarly unavailing. Plaintiff notes that the United States has declared that an application under Article 16 for relief from a judgment will not be entertained if filed (a) after the expiration of the period within which the same may be filed under the procedural regulations of the court in which the judgment has been entered, or (b) after the expiration of one year following

the date of judgment, whichever is later. CPLR 5015(a)(4) contains no time limitation. Thus, defendant's motion is not untimely.

Plaintiff's citations of *Stone Int'l Inc. v Pumex, S.A.* (1993 WL 284316 [ND Ill 1993]), *Gould Entm't Corp. v Bodo* (107 FRD 308 [SD NY 1985]) and *White v Ratcliffe* (674 NE2d 906 [App Ct Ill 1996]) fail to support its Article 16 argument. In all of those cases service was made in accordance with the Hague Convention. Here, in contrast, plaintiff failed to effect service in accordance with the Hague Convention. Instead, plaintiff seeks to invoke Article 16 to this motion to vacate its judgment obtained in contravention of the Hague Convention.

Plaintiff further argues that defendant waived its defense of lack of personal jurisdiction. However, it fails to cite any act by defendant after the commencement of this action that would effect a waiver of such defense. The affidavit of its director Atul Goel in the related turnover proceeding, indicating his awareness of the instant judgment, fails to demonstrate any act that could be deemed to constitute waiver.

The Court will not accede to plaintiff's after-the-fact request that it approve plaintiff's service on E-City because service through the Hague Convention in India entails "extreme delays." (Plaintiff's Memorandum of Law at 15). Aside from the fact that it comes after, not before, service, there is the

matter of the mandatory requirement of compliance with the Hague Convention. (*Morgenthau v Avion Resources Ltd.*, 11 NY3d at 390). Significantly, none of plaintiff's citations in this context involve a failure to follow the Hague procedures.

Nor does E-City's failure to allege the existence of a meritorious defense preclude vacatur of its default. It is well settled that a movant asserting lack of personal jurisdiction as a ground for vacatur is relieved of the obligation to demonstrate a meritorious defense. (*Harkless v Reid*, 23 AD3d 622, 622-623 [2d Dept 2005]).

Finally, plaintiff asks that even if the Court vacates defendant's default, that the judgment remain in place as security pursuant to the provision permitting vacatur "upon such terms as may be just." (CPLR 5015(a)). Since jurisdiction is lacking, the court has no jurisdiction to do anything but vacate the judgment and dismiss the action. (*Ananda Capital Partners, Inc. v Stav Elec. Sys. (1994) Ltd.*, 301 AD2d 430 [1st Dept 2003]).

Accordingly, it is hereby

ORDERED that defendant's motion to vacate its default herein is granted, and the balance of the motion is denied as moot, and it is further

ORDERED that the Clerk is directed to enter judgment in favor of defendant dismissing this action, together with costs

and disbursements to defendant, as taxed by the Clerk upon presentation of a bill of costs.

ENTER:

Dated: July 2, 2014

Ellen M. Coin, A.J.S.C.