2014 ONSC 2612
Ontario Superior Court of Justice

Kavoussi v. Moos

2014 CarswellOnt 6044, 2014 ONSC 2612, 240 A.C.W.S. (3d) 606

Howard Kavoussi, the Estate of Key Kavoussi, deceased, by his Executor Howard Kavoussi and Iran Kavoussi, Plaintiffs and Bernd Moos, Defendant

Carole J. Brown J.

Heard: March 28, 2014
Judgment: April 29, 2014
Docket: CC-12-458484

Counsel: James F Diamond, for Plaintiffs
Jean-Alexandre De Bousquet, for Defendant

Subject: Civil Practice and Procedure; International; Torts

Headnote

Conflict of laws --- Enforcement of foreign judgments — Prerequisites for enforcement — Jurisdiction of foreign court over defendant — Submission to jurisdiction — By appearance

Plaintiffs, who were residents of California, brought action there against defendant for fraud and negligent misrepresentation — Defendant, who was resident of Ontario, unsuccessfully challenged jurisdiction of California court — Defendant defended action on its merits and with assistance of counsel, participating in depositions and testifying at trial — Action was allowed, with judgment granted to plaintiffs in amount of $3 million USD — Defendant's appeal was dismissed — Plaintiffs brought motion for summary judgment, seeking order recognizing and enforcing judgment of California court — Motion granted — Defendant attorned to jurisdiction of California by his participation in original and appellate proceedings — There was real and substantial connection between plaintiffs' cause of action and California as defendant's statements to plaintiffs and consequent transaction occurred there.

Conflict of laws --- Enforcement of foreign judgments — Types of foreign judgments not enforced — Obtained by fraud

Plaintiffs, who were residents of California, brought action there against defendant for fraud and negligent misrepresentation — Defendant, who was resident of Ontario, unsuccessfully challenged jurisdiction of California court — Defendant defended action on its merits and with assistance of counsel, participating in depositions and testifying at trial — Action was allowed, with judgment granted to plaintiffs in amount of $3 million USD — Defendant's appeal was dismissed — Plaintiffs brought motion for summary judgment, seeking order recognizing and enforcing judgment of California court — Motion granted — Defendant's discovery in his home of evidence allegedly supporting his argument of fraud occurred prior to hearing of appeal in California, yet he failed to provide it to California lawyers or raise it on appeal — Evidence did not constitute new evidence that was not previously discoverable by exercise of reasonable diligence and so could not be considered — In any event, defendant's evidence did not establish judgment was obtained by fraud.

Conflict of laws --- Enforcement of foreign judgments — Types of foreign judgments not enforced — Contrary to public policy of lex fori

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Table of Authorities

Cases considered by *Carole J. Brown J.*:

Bank of Mongolia v. Taskin (2011), 2011 CarswellOnt 11725, 2011 ONSC 6083, 285 O.A.C. 263 (Ont. Div. Ct.) — referred to

Bank of Mongolia v. Taskin (2012), 2012 ONCA 220, 2012 CarswellOnt 3980 (Ont. C.A.) — referred to

Beals v. Saldanha (2003), [2003] 3 S.C.R. 416, 314 N.R. 209, 182 O.A.C. 201, 70 O.R. (3d) 94 (note), 113 C.R.R. (2d) 189, 39 B.L.R. (3d) 1, 39 C.P.C. (5th) 1, 2003 SCC 72, 2003 CarswellOnt 5101, 2003 CarswellOnt 5102, 234 D.L.R. (4th) 1 (S.C.C.) — followed

Combined Air Mechanical Services Inc. v. Flesch (2011), 13 R.P.R. (5th) 167, 14 C.P.C. (7th) 242, 2011 ONCA 764, 2011 CarswellOnt 13515, 10 C.L.R. (4th) 17, 344 D.L.R. (4th) 193, 108 O.R. (3d) 1, 286 O.A.C. 3, 97 C.C.E.L. (3d) 25, 93 B.L.R. (4th) 1 (Ont. C.A.) — followed

Combined Air Mechanical Services Inc. v. Flesch (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 2014 SCC 7, 95 E.T.R. (3d) 1, 27 C.L.R. (4th) 1, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 2014 CSC 7, (sub nom. *Hryniak v. Mauldin)* 314 O.A.C. 1, (sub nom. *Hryniak v. Mauldin)* 453 N.R. 51, 12 C.C.E.L. (4th) 1, (sub nom. *Hryniak v. Mauldin)* 366 D.L.R. (4th) 641 (S.C.C.) — considered

Combined Air Mechanical Services Inc. v. Flesch (2014), 2014 CarswellOnt 642, 2014 CarswellOnt 643, 2014 SCC 8, 27 C.L.R. (4th) 65, 37 R.P.R. (5th) 63, 2014 CSC 8, (sub nom. *Bruno Appliance and Furniture Inc. v. Hryniak)* 453 N.R. 101, (sub nom. *Bruno Appliance and Furniture Inc. v. Hryniak)* 314 O.A.C. 49, 12 C.C.E.L. (4th) 63, (sub nom. *Bruno Appliance and Furniture Inc. v. Hryniak)* 366 D.L.R. (4th) 671, 47 C.P.C. (7th) 1 (S.C.C.) — considered

CSA8-Garden Village LLC v. Dewar (2013), 2013 CarswellOnt 13896, 369 D.L.R. (4th) 125, 2013 ONSC 6229 (Ont. S.C.J.) — considered

Monte Cristo Investments LLC v. Hydroslotter Corp. (2011), 2011 ONSC 6011, 2011 CarswellOnt 10340 (Ont. S.C.J.) — referred to

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Monte Cristo Investments LLC v. Hydroslotter Corp. (2012), 2012 CarswellOnt 3866, 2012 ONCA 213 (Ont. C.A.) — referred to

State Bank of India v. Navaratna (2006), 2006 CarswellOnt 1743 (Ont. S.C.J.) — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 20 — considered

R. 20.04(2)(a) — considered

R. 20.04(2.1) [en. O. Reg. 438/08] — considered

MOTION by plaintiffs for summary judgment recognizing and enforcing judgment of California court against defendant.

***Carole J. Brown J.*:**

1 The plaintiffs bring this motion for summary judgment, seeking an order recognizing and enforcing the judgment of the Superior Court of the State of California in and for Orange County, U.S.A. dated March 13, 2012 as against the defendant, Bernd Moos for damages for fraud payable to the plaintiff in the amount of $3 million U.S.D., costs payable to the plaintiffs in the total amount of $7,640.67 and post-judgment interest at the rate of 10% per annum.

2 The defendant seeks dismissal of the motion and a hearing of this action on the merits in Ontario. It is the position of the plaintiff in this regard that the judgment should not be recognized or enforced due to fraud, and that the entire action originally heard by the Superior Court of California should be relitigated.

3 The matter first came before me on January 6, 2014. At that time, the defendant sought to introduce a substantial amount of "new evidence" which included a book of exhibits without any affidavit to introduce them in proper form. Following lengthy argument as to whether this new documentation should be introduced, I determined that it was not to be introduced in a ruling dated January 6, 2014. The main motion was thereafter adjourned to today's hearing.

History of the California action

4 The plaintiffs are all ordinarily resident in the State of California. Mr. Moos is ordinarily resident in Burlington, Ontario. The plaintiffs commenced an action against Mr. Moos in the Superior Court of the State of California on July 16, 2009, seeking damages based on fraud and negligent misrepresentation.

5 Mr. Moos initially challenged the jurisdiction of the California court, arguing that California did not have personal jurisdiction over him. The court denied his motion on January 14, 2010, finding that his version of events was not credible, given his extensive and evasive inability to recall information and that the statements made by Mr. Moos were made in California, in connection with the transaction that took place in California. This decision on jurisdiction was not appealed.

6 Mr. Moos thereafter delivered an answer to the plaintiffs' complaint on January 29, 2010 and defended the California complaint on its merits, participated in the depositions and ultimately testified at trial, all with the assistance of counsel. The judgment was rendered against him on March 13, 2012.

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7 As indicated above, an appeal was filed May 11, 2012 at the California Court of Appeal, on the grounds that Mr. Moos representations to the plaintiffs did not cause the damages awarded, the action was barred by the statute of limitations and on the basis of judicial bias. Mr. Moos attended the hearing of the appeal, which was dismissed on October 29, 2013. The second appeal to the Supreme Court of California was dismissed on January 15, 2014.

8 I was advised at the beginning of the hearing that Mr. Moos, representing himself, has now made a motion to vacate judgment on the ground that it was obtained by fraud. There is no evidence as regards the motion, no expert evidence to indicate what the motion is and where it fits, if at all, within any appeal process. As a result, I do not take this into account given the absence of any evidence in this regard.

The Issues

9 The issues before the Court in this motion are as follows:

1. Whether this Court should recognize the State of California judgment;

2. For a determination of this issue, the following will have to be determined:

   (i) Whether the plaintiff has met the test for recognition and enforcement of a foreign judgment;

   (ii) If so, whether the defendant is able to establish any defences to the recognition and enforcement of the foreign judgment;

The Law

Rule 20 and Summary Judgment

10 The plaintiff seeks the order for recognition of the foreign judgment by summary judgment. Rule 20 provides for summary judgment where there is no genuine issue requiring a trial with respect to a claim or defence.

11 The Supreme Court of Canada, in *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 7 (S.C.C.) and *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 8 (S.C.C.) [hereinafter Bruno Appliances], has recently reinterpreted Rule 20, taking into account the recognized need for access to justice for the majority of Canadians. The Supreme Court held that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims. It found that the Court of Appeal, in *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764 (Ont. C.A.), placed too high a premium on the "full appreciation" of evidence that can be gained in a conventional trial, given that such a trial is not a realistic alternative for most litigants. It held that a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.

12 On a motion for summary judgment, the judge must first determine if there is a genuine issue requiring trial based only on the evidence before the judge without using the judge's new fact-finding powers.

13 There will be no genuine issue requiring a trial if the summary judgment process provides the motion judge with the evidence required to fairly and justly adjudicate the dispute on the merits within the meaning of Rule 20.04(2)(a) and is a proportionate, more expeditious and less expensive means to achieve a just result. Where a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceedings at trial would generally not be proportionate, timely or cost-effective. However, a process that does not give the judge confidence in conclusions to be drawn can never be the

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proportionate way to resolve the dispute.

14 Madam Justice Karakatsansis, writing for the Court, observed as follows in the companion case, *Bruno Appliances*, *supra*, at paragraph 22:

> The motion judge should ask whether the matter can be resolved in a fair and just manner on a summary judgment motion. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is the proportionate, more expeditious and less expensive means to achieve a just result. If there appears to be a genuine issue requiring a trial, based only on the record before her, the judge should then ask if the need for a trial can be avoided by using the new powers provided under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice.

15 To grant summary judgment, on a review of the record, the motions judge must be "of the view that sufficient evidence has been presented on all relevant points to allow him/her to draw the inferences necessary to make dispositive findings under Rule 20.

16 The Supreme Court recognized that concerns about credibility or clarification of evidence can often be addressed by calling oral evidence on the motion itself, using the powers given to the court pursuant to Rule 20.04(2.1). However, it also recognized that there may be cases where, given the nature of the issues and the evidence required, the judge cannot make the necessary findings of fact, or apply the legal principles to reach a just and fair determination.

17 The enhanced fact-finding powers granted to motion judges in Rule 20.04(2.1) may be employed on a motion for summary judgment unless it is in the "interest of justice" for them to be exercised only at trial. The Supreme Court observed that inquiry into the interest of justice to be served by summary judgment must be assessed in relation to the full trial and the relative efficiencies of proceeding by way of summary judgment as opposed to trial, including the cost and speed of both procedures, the evidence available at trial versus that on the motion, as well as the opportunity to fairly evaluate such evidence.

18 The Supreme Court further commented that the interest of justice inquiry goes further and also considers the consequences of the motion in the context of the litigation as a whole. In cases where some claims against the parties will proceed to trial in any event, it may not be in the interest of justice to use the new fact-finding powers to grant summary judgment against a single defendant. Such partial summary judgment may run the risk of duplicative proceedings or inconsistent findings of fact and therefore the use of the powers may not be in the interest of justice.

19 The parties must each "put their best foot forward". A party is not entitled to sit back and rely on the possibility that more favourable facts may develop at trial. The court is entitled to assume that all of the evidence the parties intend to rely on at trial is before the court.

Recognition of Foreign Judgments

20 The test for recognition of a foreign judgment in this Court is as set forth in *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416 (S.C.C.). As indicated therein, and also in the case of *CSA8-Garden Village LLC v. Dewar*, 2013 ONSC 6229 (Ont. S.C.J.), the party seeking to enforce a foreign judgment must establish that the foreign court took jurisdiction according to Canadian conflict of laws rules, *i.e*. there must be a "real and substantial connection" between the subject matter of the litigation and the foreign jurisdiction. The judgment must be final and conclusive. Further, the party resisting the foreign judgment bears the burden of establishing any applicable defences, including fraud, public policy and lack of natural justice. See also *Bank of Mongolia v. Taskin*, 2011 CarswellOnt 11725 (Ont. Div. Ct.), appeal dismissed 2012 ONCA 220 (Ont. C.A.).

Real and Substantial Connection

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21 As regards a real and substantial connection, the Supreme Court of Canada, in *Beals v. Saldanha*, *supra*, stated as follows:

> The "real and substantial" connection test requires that a significant connection exist between the cause of action and the foreign court. Furthermore, a defendant can reasonably be brought within the embrace of a foreign jurisdiction's law where he or she has participated in something of significance or was actively involved in that foreign jurisdiction. A fleeting or relatively unimportant connection will not be enough to give a foreign court jurisdiction. The connection to the foreign jurisdiction must be a substantial one.

22 A foreign court will be regarded as having had jurisdiction if there was a real and substantial connection between the foreign jurisdiction and either (i) the subject matter of the action; or (ii) the defendant. A real and substantial connection with the subject matter of the action will satisfy the test: *Monte Cristo Investments LLC v. Hydroslotter Corp.*, 2011 CarswellOnt 10340 (Ont. S.C.J.), appeal dismissed 2012 ONCA 213 (Ont. C.A.).

23 In this case, Mr. Moos attorned to the jurisdiction of the State of California when he entered a defence, participated throughout the proceedings and testified at the trial, with the assistance of his legal counsel.

24 Further, a real and substantial connection existed, and the statements made by Mr. Moos to the plaintiffs and the transaction undertaken occurred in California.

25 Once the plaintiff has established that the foreign court properly took jurisdiction over the plaintiff, that the real and substantial connection test is met, and that the judgment is final, the onus shifts to the defendant to establish any of the limited defences available. Those defences include fraud, public policy and lack of natural justice.

Defences Raised by the Defendant

26 Mr. Moos relies on all three defences, but most particularly the defence of fraud.

Fraud

27 The Supreme Court of Canada, in *Beals v. Saldanha*, [2003] 3 S.C.R. 416 (S.C.C.) at paragraph 43 to 45 explained the defence of fraud as follows:

> As a general but qualified statement, neither foreign nor domestic judgments will be enforced if obtained by fraud.
>
> Inherent to the defence of fraud is the concern that defendants may try to use this defence as a means of relitigating an action previously decided and so thwart the finality sought in litigation. The desire to avoid the relitigation of issues previously tried and decided has led the courts to treat the defence of fraud narrowly. It limits the type of evidence of fraud which can be pleaded in response to a judgment. If this court were to widen the scope of the fraud defence, domestic courts would be increasingly drawn into a re-examination of the merits of foreign judgments. That result would obviously be contrary to the quest for finality.
>
> Courts have drawn a distinction between "intrinsic fraud" and "extrinsic fraud" in an attempt to clarify the types of fraud that can vitiate the judgment of a foreign court. Extrinsic fraud is identified as fraud going to the jurisdiction of the issuing court or the kind of fraud that misleads the court, foreign or domestic, into believing that it has jurisdiction over the cause of action. Evidence of this kind of fraud, if accepted, will justify setting aside the judgment. On the other hand, intrinsic fraud is fraud which goes to the merits of the case and to the existence of a cause of action. The extent to which evidence of intrinsic fraud can act as a defence to the recognition of the judgment has not been as clear as that of extrinsic fraud.

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28 The Supreme Court proceeded to clarify the distinction between intrinsic and extrinsic fraud and held, at paragraph 51, as follows:

> The historic descriptions of the distinction between intrinsic and extrinsic fraud are of no apparent value and, because of their ability to both complicate and confuse, should be discontinued. It is simpler to say that fraud going to the jurisdiction can always be raised before a domestic court to challenge the judgment. On the other hand, the merits of a foreign judgment can be challenged for fraud only where the allegations are new and not the subject of prior adjudication. Where material facts not previously discoverable arise that potentially challenge the evidence that was before the foreign court, the domestic court can decline recognition of the judgment.

29 A foreign judgment can be challenged for fraud only where the allegations are (i) new and material, (ii) not the subject of prior adjudication by the foreign court, and (iii) could not have been discovered by the defendant by the exercise of reasonable diligence: *Monte Cristo Investments LLC v. Hydroslotter Corp.*, *supra.*

30 As regards fraud, the defendant argues that he has new evidence of fraud which should be permitted to be advanced. In his sworn affidavit dated September 29, 2013, he alleges that the guarantee upon which the action was based was forged with his name and signature. Counsel for the defendant submitted that there was expert evidence in the form of handwriting analyses indicating that the document was forged. However, there was no evidence of this before this Court. It is the position of the plaintiff that this issue of a forged document was also argued at the trial of the California action, albeit in the absence of the new documentation sought to be adduced. Mr. Moos states in his affidavit that, in or about August, 2012, while looking through a box of documents containing financial information, he discovered a new document which allegedly supports his “forged guarantee defence”, and which he submits is a “complete defence” to the California claim. The box in which he purportedly found this new evidence contained personal financial records which had been provided to his former bookkeeper and which had been in Mr. Moos basement for “years... many years”.

31 The evidence indicates that he discovered this new document in the basement approximately 5 months prior to the filing of his Opening Brief in the California Court of Appeal. The evidence indicates that he never advised his California lawyers of his finding the document, and that the new evidence did not form part of the California judgment. On cross-examination, his evidence as to why he never provided the document to his California lawyers was simply “I don’t recall... I don’t remember.”

32 As regards this evidence of “fraud” which the defendant wishes to introduce, I do not find this to be new evidence which could not have been discovered by the defendant by the exercise of reasonable diligence. There is no explanation as to why he did not search for or find this documentation, which had been stored in his home for years, earlier nor why he failed to advise his California lawyers of its existence. I am of the view that this does not constitute allegations or material facts not previously discoverable which could be used to challenge the merits of the foreign judgment on the basis of “fraud” as defined in the jurisprudence regarding recognition of foreign judgments.

33 Further, as conceded by counsel for the defendant, they seek to relitigate in Ontario this action which has already been decided by the Superior Court of California, and upheld on appeal. It is the position of the plaintiff that such would be an abuse of process and should not be permitted.

Denial of Natural Justice

34 To establish a denial of natural justice, the defendant must establish that he was not granted a fair process complying with the Ontario minimum standards of fairness. The defendant claims in his statement of defence that the trial procedure followed by the Superior Court of California caused him to endure a denial of natural justice.

35 In *Beals*, in describing the nature of the natural justice defence, the Supreme Court held as follows at paragraphs 60-64:

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> The domestic court must be satisfied that minimum standards of fairness have been applied to the Ontario Defendants by the foreign court.
>
> The enforcing court must ensure that the Defendant was granted a fair process. ... [I]t is not the duty of the [party seeking enforcement] to establish that the legal system from which the judgment originates is a fair one in order to seek enforcement. The burden of alleging unfairness in the foreign legal system rests with the [party resisting enforcement].
>
> Fair process is one that, in the system from which the judgment originates, reasonably guarantees basic procedural safeguards such as judicial independence and fair ethical rules governing the participants in the judicial system. ... In the case of judgments made by courts outside Canada, the review may be more difficult but is mandatory and the enforcing court must be satisfied that fair process was used in awarding the judgment. This assessment is easier when the foreign legal system is either similar to or familiar to Canadian courts.
>
> In the present case, the Florida judgment is from a legal system similar, but not identical, to our own. If the foreign state's principles of justice, court procedures and judicial protections are not similar to ours, the domestic enforcing court will need to ensure that the minimum Canadian standards of fairness were applied. ....
>
> The defence of natural justice is restricted to the form of the foreign procedure, to due process, and does not relate to the merits of the case. The defence is limited to the procedure by which the foreign court arrived at its judgment.

36 The *Beals* case clearly recognizes that the natural justice defence is restricted to the form of the foreign process, to due process and does not relate to the merits of the case. The defence is limited to the procedure by which the foreign court arrived at its judgment.

37 Counsel for Mr. Moos argues that the judgment of the Superior Court of California as regards findings of credibility of witnesses and rulings on the admissibility of evidence impeaching the defendant's credibility were so unfair as to raise an apprehension of judicial bias. He argues that the findings of the trial court are prejudicial as the court found the plaintiff's testimony to be credible and that of the defendant to be "evasive, contradictory and unsupported". He argues that, as a result of this bias, there are serious issues of credibility which should be addressed at trial. I note that the judgment of the Superior Court was appealed on two occasions and that judicial bias would or should have been raised. The appeals were dismissed.

38 Moreover, as stated in *Beals*, the natural justice defence is restricted to the form of the foreign process, and does not relate to the merits of the case. The defence is limited to the procedure by which the foreign court arrived at its judgment. There is nothing to indicate that the procedure of the Superior Court of California is not a fair process, nor that fair process was denied to the defendant. I note that the defendant had California counsel throughout the proceedings.

39 I do not find that the defendant has established a defence of denial of natural justice.

Public policy

40 In order to establish public policy, the defendant must establish that the foreign judgment is founded on repugnant law contrary to the fundamental morality of the Canadian legal system: *State Bank of India v. Navaratna*, 2006 CarswellOnt 1743 (Ont. S.C.J.).

41 The defendant submits that the evidence of fraud in the California court is so overwhelming and the facts of the case so egregious as to stay the enforcing hand of this Court. Counsel for Mr. Moos argues that the court should be flexible and find that where the public policy defence is advanced, the court should expand the definition such that where the judgment is founded on either repugnant law or facts, the defence of public policy is met. He argues that the facts of this case, as regards the alleged fraud, are so egregious as to shock the conscience of the court in enforcing the judgment. Were the court to inquire into the facts of the case, it would essentially be relitigating the case, which should not be done. I do not find there to be any justifiable reason to expand the well-established definition of public policy such that an inquiry into facts as well as law is to be undertaken. Moreover, there is no jurisprudence to support Mr. Moos' arguments as regards the test to be met for public policy. Finally, there is no evidence to establish the fraud or the forgery alleged.

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42 Based on the foregoing, I do not find that the public policy defence is established.

Conclusion

43 I find that the judgment of the Superior Court of the State of California should be recognized and enforced.

44 As regards the test for recognizing and enforcing the foreign judgment, I am satisfied that the plaintiff has established the necessary elements as set forth in *Beals v. Saldanha*, *supra.* The decision has been appealed and dismissed to the Court of Appeal and Supreme Court, and is therefore final. As set forth at paragraph 4, above, counsel for Mr. Moos advised that Mr. Moos has now filed a motion with the Superior Court of California to have the initial judgment vacated on grounds that it was obtained by fraud. As indicated above, there is no expert evidence from an expert in Californian law before this Court as to what this motion is, nor where it fits in the appellate process in California. As a result, I have not taken this into account, due to the absence of any evidence in this regard, and I am of the view that the judgment of the California Superior Court is final.

45 As regards the real and substantial test, I find that Mr. Moos attorned to the jurisdiction of the State of California, defended the action as against him, attended the trial of the action and gave testimony. Further, he participated fully in the appellate process. Moreover, there is a real and substantial connection between the plaintiff's cause of action and the State of California. Mr. Moos challenged the jurisdiction of the California court, which challenge was considered. California was found to have jurisdiction over Mr. Moos, which decision was not appealed. Further, there was a real and substantial connection as regards the subject matter of the litigation, as set forth above.

46 As regards the defences available to the defendant, the defendant argues that forged documents were tendered into evidence at the trial of the California action, and thus that the plaintiffs "perpetrated a fraud on the California court at trial". It appears that this was not pursued at trial. While the defendant relies on what he alleges are newly discovered facts, which would assist him in proving the fraud, I do not find the documents sought to be introduced to be of assistance. According to his Affidavit, the document was in a box, in the basement of Mr. Moos' residence, his evidence was that it had been there for many years and he had discovered it before the California Court of Appeal proceeding, but nevertheless did not raise it with his lawyers. I do not find his evidence to be of assistance in establishing that the document could not have been discovered previously by the exercise of reasonable diligence.

47 The evidence further indicates that the positions taken by him in this action are completely absent in the Opening Brief filed with the California Court of Appeal. There is no evidence to explain why this was not raised during the course of the appeals, if indeed he was in possession of "new facts, documents and/or witnesses" not available to him during the trial of the California action.

48 As regards his assertions that the California judgment amounted to a denial of natural justice and was contrary to public policy, I find that there is no convincing evidence to support these arguments.

49 Based on the foregoing, I am satisfied that there is no genuine issue requiring a trial, and that that the defendant's urging in this regard that there should be a relitigation of the California action must be rejected. Summary judgment should issue.

50 I find that the decision of the Superior Court of the State of California in and for Orange County, U.S.A. dated March 13, 2012 should be recognized and enforced in Ontario and so order.

Costs

51 I would urge the parties to agree upon costs, failing which I would invite the parties to provide any costs submissions in writing, to be limited to three pages, including the Costs outline. The submissions may be forwarded to my attention, through Judges' Administration at 361 University Avenue, within thirty days of the release of this Endorsement.

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Motion granted.

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