VERMONT SUPERIOR COURT
Rutland Unit
83 Center Street
Rutland VT 05701
802-775-4394
www.vermontjudiciary.org

CIVIL DIVISION
Case No. 21-CV-01498

John H. Stewart, Personal Representative of Estate of Anne Rudder, Plaintiff v. James Sheldon, a.k.a. James F. Sheldon, Jr. and Jim Sheldon Excavating, Inc., Defendants	DECISION ON MOTION FOR SUMMARY JUDGMENT

RULING ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff John H. Stewart, as Personal Representative of the Estate of Anne Rudder, brings this action to domesticate a Florida state default judgment against Defendants James Sheldon and Jim Sheldon Excavating, Inc. (collectively, the "Sheldons"). The Florida court issued a default judgment in favor of Ms. Rudder when Defendants failed to appear. Defendants challenge the default judgment, arguing the foreign court lacked personal jurisdiction over them because they were never properly served with the action. Plaintiff contends Defendants had the opportunity to contest the issue of service in the Florida action, but failed to effectively do so, resulting in dismissal. Plaintiff is represented by Tavian M. Mayer, Esq. Defendants are represented by Mary G. Kirkpatrick, Esq. Plaintiff has moved for summary judgment pursuant to Rule 56 of the Vermont Rules of Civil Procedure. For the reasons discussed below, Plaintiff's motion for summary judgment is DENIED.

Factual Background

The following relevant facts are not in dispute. In October 2019, the decedent Anne Rudder obtained a default Final Judgment against the Sheldons in the Circuit Court of the 19th Judicial Circuit in and for Martin County, Florida, after they had failed to appear in the action. In the Judgment, the Florida court states that it "reviewed the relevant pleadings and determined that the defendants were both served with process but failed to file any response or defense." *See* Pl.'s Statement of Undisputed Material Facts ("SUMF"), filed on June 2, 2023, Ex. 3. An amended judgment was issued *nunc pro tunc* in January 2020. *See id.*, Ex. 4. Upon Ms. Rudder's death, Mr. Stewart was duly appointed as the personal representative of her estate in July 2020. Stewart made a demand for payment of the judgment from the Sheldons in April 2021. In June 2021, Stewart filed this lawsuit seeking to domesticate the Florida judgment in Vermont. The Sheldons filed an answer and the parties engaged in limited discovery.

In August 2021, the Sheldons filed a "Motion for Appeal of Judgment" with the Florida court to reopen the Florida case. *See id.*, Ex. 7. After 16 months of apparent inactivity, the Florida court set a show-cause hearing on its own motion to dismiss for lack of prosecution under Rule 1.420(e) of the Florida Rules of Civil Procedure. *See id*., Exs. 7 & 8. The Sheldons appeared at the show-cause hearing. *See id*., Ex. 9. Following the hearing, the Florida court dismissed the Sheldons' case for lack of prosecution. *Id*. Stewart then filed the instant motion for summary judgment.[1]

Discussion

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a). "Where the moving party does not bear the burden of persuasion at trial, it may satisfy its burden of production by showing the court that there is an absence of evidence in the record to support the nonmoving party's case. The nonmoving party must then show that there are material facts in dispute." *Boyd v. State*, 2022 VT 12, ¶ 19, 216 Vt. 272. "The court need consider only the materials cited in the required statements of fact, but it may consider other materials in the record." V.R.C.P. 56(c)(5). "In determining whether there is a genuine issue as to any material fact, [the court] will accept as true the allegations made in opposition to the motion for summary judgment, so long as they are supported by affidavits or other evidentiary material." *Robertson v. Mylan Labs., Inc.*, 2004 VT 15, ¶ 15, 176 Vt. 356 (citation omitted). Affidavits submitted in support of a party's motion for summary judgment or opposition to such a motion "must be made on personal knowledge and set forth facts that would be admissible in evidence." *Id*.

"A sister-state judgment is normally entitled to full faith and credit in the absence of a showing that the court lacked jurisdiction or acted to deprive defendant of a reasonable opportunity to be heard." *Lakeside Equip. Corp. v. Town of Chester*, 173 Vt. 317, 321, 795 A.2d 1174, 1178 (2002) (quotation omitted). A "defendant has the heavy burden of undermining" the other state's judgment, which is presumptively valid. *Hall v. McCormick*, 154 Vt. 592, 595, 580 A.2d 968, 970 (1990). "When a defendant fails to appear after having been served with a complaint in a state and a default judgment is entered, the defendant may defeat enforcement of that judgment in another forum by showing that the judgment was issued by a court lacking personal jurisdiction." *Lakeside Equip*., 173 Vt. at 321, 795 A.2d at 1178. "In determining jurisdiction, the foreign State's law, as limited by due process, controls." *Id*. at 322, 795 A.2d at 1179 (quotation omitted).

The key issue in this case is whether the Sheldons were properly served in the underlying Florida action. The Sheldons assert that the Florida court lacked jurisdiction over them because service of the Summons and Complaint was defective under Fla. Stat. § 48.194, rendering the

[1] The Court notes that both parties have recently made supplemental filings pertaining to the reopening of the Florida action. In light of the Court's conclusions regarding the nature and significance of the additional litigation in Florida, the Court does not find it necessary to consider these additional materials, although it will grant Plaintiff's motion for leave to file supplemental exhibits, as no objection has been filed.

default judgment void. The Sheldons contend they first learned of the Florida case when Plaintiff's counsel made a demand in April 2021. They allege the process server in the Florida action was not authorized to serve process in Vermont, and in fact, that the Affidavit of Service is fraudulent. Stewart argues that the Sheldons sought such relief in the reopened Florida case, but failed to make the necessary showing, and thus are foreclosed from doing so here. He additionally argues that the recital in the Florida court's default judgment order makes clear that service was proper, and the Sheldons cannot overcome this finding. Thus, the Court must first determine whether the Sheldons may raise the issue of improper service here, and if so, whether material issues of disputed fact exist.

I. Are Defendants Precluded from Challenging Service?

Stewart argues that the Florida court's dismissal of the Sheldons' motion to reopen the judgment precludes them from litigating the issue of sufficiency of service in the instant case. Although Stewart does not invoke any specific legal doctrine, it appears he is relying on the doctrine of collateral estoppel.

> The doctrine of collateral estoppel, also called issue preclusion . . . bars the relitigation of an issue . . . that was actually litigated by the parties and decided in a prior case. The elements of collateral estoppel are: (1) preclusion is asserted against one who was a party in the prior action; (2) the same issue was raised in the prior action; (3) the issue was resolved by a final judgment on the merits; (4) there was a full and fair opportunity to litigate the issue in the prior action; and (5) applying preclusion is fair.

In re Tariff Filing of Central Vt. Pub. Serv. Corp., 172 Vt. 14, 20, 769 A. 2d 668, 673 (2001) (citations omitted).

Stewart asserts that the validity of service and the "question as to Florida's jurisdiction over Defendants . . . have just been tested in Florida and found to be unavailing. . . . [B]oth Defendants were given notice and an opportunity to be heard at the duly noticed hearing in which both Defendants were present." Pl.'s Mot. for Summ. J., filed on June 2, 2023, at 3; *see also* Pl.'s Reply Mem. in support of Mot. for Summ. J., filed on July 5, 2023, at 1 ("Whether the Florida court lacked jurisdiction, or acted to deprive Defendants of a reasonable opportunity to be heard was just addressed by the Florida court in the course of Defendants' failed post judgment effort challenging the Florida Judgment."). However, these assertions are incorrect. The hearing held by the Florida court was not a hearing on the merits of the motion to reopen, including the issue of the validity of original service. Rather, it was a hearing to allow the Sheldons to show cause why the request to reopen should not be dismissed for failure to prosecute. *See* Pl.'s SUMF, Ex. 8. The Florida court ultimately dismissed the action to reopen for failure to prosecute and closed the case. *Id*., Ex. 9. Accordingly, the issue of sufficiency of service was not fully litigated on the merits. *See, e.g.*, *Fondel v. Ford Motor Co.*, 803 F. 2d 719 (6th Cir. 1986) (Table) ("[I]ssue preclusion, or collateral estoppel, does not attach to a judgment dismissing a suit for lack of prosecution. An issue must be actually and necessarily determined by a judgment in order for the parties to be barred from further litigating that issue under the doctrine of collateral estoppel."); *Porter v. Vaughn*, 26 Vt. 624, 625-26 (1854) (as to claim

preclusion: "[An order for dismission is no bar, unless [the court] *determines* that the plaintiff is not entitled to the relief sought; therefore, *an order dismissing the bill for want of prosecution is no bar*."). Therefore, the Court concludes the Sheldons are not precluded from raising the issue of the validity of service in this action. *See* 18 Edward H. Cooper, *Fed. Prac. & Proc. Juris.* § 4420 (3d ed. Apr. 2023 update) ("The first rule for identifying the issues to be precluded is that if there is no showing as to the issues that were actually decided, there is no issue preclusion.").

II. Were the Sheldons Properly Served Under Florida Law?

Stewart essentially argues that the Sheldons have failed to present sufficient evidence to support their claim that service in Florida was not valid under Florida law, and there are no disputed facts on this issue. Florida law provides that "service of process on a party in another state, territory, or commonwealth of the United States must be made in the same manner as service within this state *by any person authorized to serve process in the state where service shall be made*." Fla. Stat. § 48.194 (2023) (emphasis added); *see also Takiff by and through Statemen v. Takiff*, 683 So. 2d 595, 596 (Fla. Dist. Ct. App. 1996) (under § 48.194, service on an Illinois resident was effective when made by a person authorized to serve under Illinois law). Vermont law provides that "[s]ervice of all process shall be made by a sheriff or deputy sheriff, by a constable or other person authorized by law, or by some indifferent person specially appointed" by a court. Vt. R. Civ. P. 4(c); *see also* 12 V.S.A. §§ 691, 692, and 731.

Plaintiff's SUMF does not address the details of how service was accomplished in the original Florida case. However, the Sheldons have produced a sworn affidavit from the alleged process server, Kyle Vanderwarker, of Queensbury, New York, which includes a copy of the "Affidavits of Service" filed in the Florida case. *See* Defs.' Statement of Disputed Facts ¶¶ 1-2 & Ex. A. In his affidavit, Mr. Vanderwarker unequivocally disclaims being the process server for the Florida case. For example, he avers that he has never been authorized to serve process in Vermont and in fact has never served anyone in Vermont. *Id*. Further, he states that he does not remember the Florida case and did not serve process on the Sheldons at the address indicated on the return of service filed in the Florida case. *Id*. Finally, he did not prepare the Affidavits of Service and would not have signed them because his name is spelled wrong. *Id*., Ex. A, at 5-6. Mr. Vanderwarker believes the Affidavits of Service are manufactured and fake. *Id*., Ex. A.

Stewart has produced no evidence to directly rebut Mr. Vanderwarker's affidavit. Rather, relying on *H & E Equip. Servs., Inc. v. Cassani Elec., Inc.*, 2017 VT 17, he argues "the original Florida judgment's recital makes clear that Defendants were, in fact, properly served, sufficient to allow entry of judgment under Florida law." Pl.'s Reply Mem. in Support of Mot. for Summ. J. at 1; *see also* SUMF, Ex. 3. However, the Court disagrees. This case is readily distinguishable from *Cassani*, where the Supreme Court held that defendant's "bald assertion concerning lack of service was insufficient to create a genuine factual dispute," in light of the "presumptively valid" foreign judgment, which "recited that defendant had been served with the complaint." *Cassani Elec.*, 2017 VT 17, ¶ 20. Here, Mr. Vanderwarker's affidavit, along with Mr. Sheldon's similarly unchallenged affidavit which states, among other things, that he was not residing at the address where service supposedly occurred in March 2019, are sufficient to meet the Sheldons' burden and create a genuine dispute of fact about the validity of service in the

Florida case.[2] *See Kelly v. Univ. of Vt. Med. Ctr.*, 2022 VT 26, ¶ 15, 280 A.3d 366 (noting that the "nonmoving party may survive the motion if it responds with specific facts raising a triable issue, and it is able to demonstrate sufficient evidence to support a prima facie case." (quotation omitted)).

Accordingly, the Court concludes that Stewart has not met his burden to show he is entitled to summary judgment on his claim that the Florida state default judgment should be domesticated and that there are no disputed issues of material fact as to whether such judgment is void for lack of personal jurisdiction over the Sheldons.[3]

In fact, it appears that the Sheldons have presented undisputed evidence that would meet their "heavy burden" to show that the Florida Circuit Court lacked jurisdiction over them due to defects in the service of process. *See Cassani Elec.*, 2017 VT 17, ¶ 19 (defendants have "the heavy burden of undermining" a foreign state's judgment (quotation omitted)). The Affidavit of the alleged process server Kyle Vanderwarker, which has not been challenged or refuted by Stewart, states that he is not a licensed process server in Vermont. Therefore, even if he had made service on Mr. Sheldon in March 2019, this would fail to satisfy the requirements for proper service under Florida law. Under Rule 56(f), after "giving notice and a reasonable time to respond, the court may . . . grant summary judgment for a nonmovant." Vt. R. Civ. P. 56(f)(1). Based on the evidence presented and the Court's conclusions discussed above, such relief would appear to be warranted here. Thus, Plaintiff shall have 30 days to respond to Defendants' Statement of Facts, in a manner consistent with Rule 56(c) and providing citations to evidence that would establish a disputed issue of material fact as to whether service of the Florida action was valid and proper. If nothing is filed, the Court will grant summary judgment in favor of Defendants.

Order

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment (Motion 5) is DENIED.

---

[2] The Court thus rejects Plaintiff's suggestion that the Florida court's recital that Defendants "were served with process" is dispositive and settles the issue in this case of whether Florida service was valid. First, as discussed above, the issue was not actually contested or litigated before the Florida court, and there certainly is no indication that the authenticity of the Affidavits of Service was raised before it. Second, the Vermont Supreme Court's promise that a defendant may challenge a foreign default judgment for lack of personal jurisdiction would be meaningless if a mere recitation in the judgment that defendant was served could defeat the opportunity to present contrary evidence. *See, e.g.*, *Cassani Elec.*, 2017 VT 17, ¶ 19 ("A defendant who makes no appearance whatever remains free to challenge a default judgment for want of personal jurisdiction." (quoting 18 Charles A. Wright, et al., *Fed. Prac. & Proc.* § 4430, at 292 (2d ed. 1981)).

[3] Given the Court's conclusion, we need not reach the Sheldons' other arguments regarding the sufficiency of service or opportunity to be heard in the Florida case.

Defendants' Motion for Extension of Time (Motion 6) is GRANTED IN PART, but is otherwise moot. The Opposition to the summary judgment motion has been filed. Plaintiffs' Motion for Leave to File Supplemental Exhibits (Motion 7) is GRANTED.

It is hereby further ORDERED that Plaintiff shall file any response to Defendants' Statement of Facts within 30 days of the date of this Order. Any such response shall comply with Rule 56(c) and provide citations to evidence that Plaintiff asserts would establish disputed issues of material fact as to whether service of the Florida action was valid and proper. If nothing is filed, the Court will grant summary judgment in favor of Defendants pursuant to Rule 56(f)(1).

Electronically signed on September 1, 2023 at 2:13 PM pursuant to V.R.E.F. 9(d).

Megan J. Shafritz
Superior Court Judge