EXHIBIT
A

mcd 10/11/2013
363 58/01500

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF ORANGEBURG	)	FIRST JUDICIAL CIRCUIT
	)	
Directory Assistants, Inc.,	)	
	)	2011-CP-38-00853
Plaintiff,	)	
	)	
Dennis Shay, d/b/a Marsch Chiropractic Center,	)	
	)	
Defendant.	)	

ORDER GRANTING DEFENDANT'S MOTION FOR RELIEF FROM FOREIGN JUDGMENT

This case is before the Court on Defendant's Objection to the Plaintiff's filing of a foreign Judgment against him, and his related motions under Rules 59 and 60, SCRCP. After considering the pleadings, affidavits and exhibits stipulated into evidence, and hearing argument of counsel, the Court finds that Defendant's Motions should be Granted.

FACTS

The Plaintiff, Directory Assistants, Inc., (DAI) is a Connecticut corporation. In 2009, DAI obtained an arbitration award for $34,582.00 against Defendant "Dennis Shay, d/b/a Marsch Chiropractic" from the American Dispute Resolution Center, also based in Connecticut. DAI filed the arbitration award in the Connecticut Superior Court, and obtained a judgment confirming it. DAI then filed its judgment in this Court on July 20, 2011. Besides the judgment and interest, DAI claims entitlement to fees and costs totaling $13,935.00 for filing the judgment and attempting to collect the debt in South Carolina (Aff. Of Fees, 1/28/2013).

Defendant, Dennis Shay (Shay) is a chiropractor who practices in Orangeburg. After receiving notice that DAI had filed its judgment in South Carolina, Shay filed an objection in this Court and moved to amend or vacate the judgment as provided by §15-35-940. Shay maintains that that the judgment mistakenly was entered against him individually, rather than his chiropractic business. He also points out that that no court has ever ruled of whether DAI's claims were subject to arbitration, as required by both the laws of South Carolina and Connecticut.

1/5

ATTEST: TRUE COPY
Winnie B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

ISSUES

The issues before the Court are thus as follows:

1) whether Shay is entitled to have the entry of judgment in South Carolina vacated under §15-35-940, and

2) whether DAI is entitled to fees and costs for its South Carolina filing and collection activities.

DISCUSSION

A. Entitlement to Relief Under Rule 60

The filing and enforcement of foreign judgments is governed by the Uniform Enforcement of Foreign Judgments Act (the Act). Both Connecticut and South Carolina have adopted the Act. See, Connecticut Code Sec. 52-604, et. seq., and S.C. Code §15-35-900, et. seq. The Act sets forth the procedure for filing a foreign judgment in South Carolina. The intent of the Act is that each state treat the judgments of its fellow states as it would its own judgments. This includes not only giving the same "full faith and credit" to the foreign judgment as it would to its own judgments, but giving the judgment debtor the same "defenses, proceedings for reopening, vacating or staying the judgment" as well. Conn. Code Sec. 52-605; S.C. Code §15-35-940.

The Act, as adopted by both states, provides that a judgment debtor against whom a foreign judgment is filed may move for relief from the judgment "on any other ground for which relief from a judgment of *this* state is allowed." §15-35-940. (Emphasis added). The South Carolina Supreme Court has held that this relief allows for a post-judgment motion under Rule 60, SCRCP. *Erickson v. Boykin,* 383 S.C. 497 (2009). Shay now presents such a motion. Thus, if Shay is entitled to relief under Rule 60, DAI's Connecticut judgment must be vacated in South Carolina.

Under Rule 60, the court may relieve a party from a judgment, inter alia, where the judgment is the product of mistake or where it is otherwise void.

1. Relief Based on Mistake

Viewing the entire record and the extrinsic evidence stipulated in by the parties, I find that Dr. Shay is entitled to relief under Rule 60(b) on the grounds of mistake. The mistake lies in the false premise that the party to whom DAI's consulting contract provided services for was "Dennis Shay d/b/a Marsch Chiropractic."

2/5

It is clear from the evidence stipulated into the record the chiropractic business is not a "d/b/a" but a professional corporation. According to its Articles of Incorporation, "Dennis J. Shay, PA" was incorporated in South Carolina on March 31, 1994. (Articles of Incorporation).

The fact that the professional corporation is the actual party for whom DAI was to provide its services is evidenced by DAI's Consulting Contract. First, the Contract expressly identifies Marsch as the "Advertiser." Second, it refers repeatedly to DAI's providing "business" services. (Contract, p. 1-2). Third, the business services offered revolve solely around yellow page advertising, which by definition is business advertising. Fourth, the contract references Shay only as the "Person Authorized to Contract *for* Advertiser" indicating Shay and the "advertiser" were not one and the same. (Contract, p. 2).[1]

In summary, it is clear that any services to be provided were to be provided to the corporation, Dennis J. Shay, PA, not to Dennis Shay individually. Rule 60(b) expressly provides relief on grounds of mistake, regardless of whether the mistake is the moving party's or not. [2] I therefore find that Shay is entitled to relief from judgment on the grounds of mistake. Rule 60, SCRCP. *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502-03 (2006)(decision to grant or deny a motion for relief from judgment lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion).

2. Relief based on Validity of Connecticut Judgment

Although a finding of "mistake" alone is a sufficient basis for relief, the Court will briefly address Dr. Shay's additional argument that the Connecticut judgment is void because no court ever determined whether he had to arbitrate before the arbitration actually took place. The Court finds this argument persuasive as well.

Both Connecticut and South Carolina law require that a court – not an arbitrator – must determine the existence of a valid arbitration agreement before a party can be compelled to arbitrate. See, *Reiss v. Chase Bank USA, N.A.*, 2008 Conn. Super. LEXIS 1959 (Conn. Super. Ct. July 30, 2008) (a party who contests making a contract containing an arbitration provision cannot be compelled to arbitrate the threshold issue of agreement to arbitrate); *MBNA Am. Bank, N.A. v. Christianson*, 377 S.C. 210 (S.C. Ct. App. 2008; (aff'd Feb. 1, 2010) (if there is a

[1] Shay's actual signature does not appear on the contract.

[2] Rule 60(b) is substantially the same as Code § 15-27-130. There are two differences. First, existing State law provides for relief from a "judgment taken against him through his mistake." Rule 60(b) deletes "his" and thus there may be a motion for relief from other mistakes.

challenge to an arbitration, it is for the courts, not the arbitrator, to decide whether the agreement to arbitrate exists).

In the present case, Dr. Shay contested the validity of the arbitration agreement. However, no court determination of arbitrability has ever been sought or made.

The record reflects, and the parties do not dispute, that DAI filed a demand for Arbitration with the American Dispute Resolution Center, Inc., in the Spring of 2009. The arbitrator then set a hearing in Connecticut. Prior to the hearing, Dr. Shay's counsel made a written objection to the arbitrator challenging the validity of the arbitration provision. This letter, stipulated into evidence by the parties, stated:

> "The contract was made in South Carolina. Under South Carolina law and the Federal Arbitration Act, the party asserting the existence of an arbitration agreement (i.e., DAI) is required to seek court intervention to determine whether there is an agreement to arbitrate before proceeding through arbitration. See, 9 USC §4 (2000); MBNA America Bank v. Christianson, Slip Op. 4349 (Ct. App. March 4, 2008)." (P. 2, Shay Obj. Letter).[3]

Despite this objection, the matter proceeded to arbitration on September 17, 2009 with no prior court determination of arbitrability. After getting its award, DAI then applied for confirmation with the Connecticut Court, which it received. Although Dr. Shay obtained counsel in Connecticut to object to confirmation, the Connecticut court did not determine the validity of the arbitration agreement in any proceeding. A careful review of the orders shows that the Connecticut court expressly considered no "disputed factual claim" because Dr. Shay would not appear personally in Connecticut. (Conn. Order 6/7/2011).

In short, it is clear from the record no court has determined the threshold issue of arbitrability. Not even the Arbitrator's findings address Shay's challenge in his Award. As the judgment that DAI seeks to enforce is predicated wholly on the

[3] Although not stated in Shay's letter, the Court notes that the arbitration provision contained in the consulting contract does not meet the requirements for validity under South Carolina's Uniform Arbitration Act, § 15-48-10, which provides that "notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration."

Award, it cannot stand. Dr. Shay is therefore entitled to be relieved from the effect of this judgment in South Carolina. Rule 60, SCRCP; *Christianson*, supra.[4]

B. DAI's Request for Attorney's Fees

Lastly, DAI requests it be awarded $13,495.00 for attorney's fees and $440.00 in costs for its South Carolina filing and collection activities.[5] This request is beyond the scope of DAI's action to enroll its judgment. Such claims must be based on either statute or contract. The Uniform Enforcement of Foreign Judgments Act provides for no such relief. If this claim is based on the consulting contract, DAI would (by its own argument) be required to arbitrate this claim.[6]

Based on the above, and on the granting of relief to Defendant, DAI's request is denied.

ORDER

Based on the foregoing, the Court GRANTS Shay's Motion for Relief, and denies DAI's request for attorney's fees.

The Clerk of Court is thus directed to vacate the judgments filed by DAI on July 20, 2011 as against Shay and/or Shay d/b/a Marsch Chiropractic.

AND IT IS SO ORDERED.

Edgar W. Dickson, Judge
1st Judicial Circuit

9/20, 2013
Orangeburg, S.C.

[4] This Court takes no position on the viability of the judgment in Connecticut, but relieves Shay of the prospective effect of the judgment in South Carolina. The Court notes further that, while DAI characterizes the issue as one of personal jurisdiction over Shay, Rule 60 applies in numerous cases where there is no challenge to personal jurisdiction.

[5] The Affidavit of Fees discloses neither the number of hours expended by DAI's counsel nor the hourly rate; thus, the Court could not make a determination of whether same were reasonable even if such fees could be awarded.

[6] The Act itself, §15-35-960, provides that judgments that are contrary to public policy may not be given effect. The purpose of DAI's consulting contract on its face was to simply assist the business in making choices about its yellow page advertising. (See, consulting contract). The fact that this service turned into a claim for more than $50,000.00 (the majority of which is liquidated damages and fees) troubles the court. Also troubling is the fact that, despite the absence of any forum selection clause or choice of laws provision in the consulting contract, DAI filed the arbitration in its home state and thereby obtained relief against Shay. Absent his physical appearance, Shay was not permitted to contest any of the above.

5/5

ATTEST: TRUE COPY
Winnie B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC