FILED: APPELLATE DIVISION - 4TH DEPT 11/08/2023 11:39 AM

NYSCEF DOC. NO. 21 RECEIVED NYSCEF: 11/08/2023

To be Argued by:
LEE ALCOTT
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Fourth Department

CAYUGA NATION,

Petitioner-Appellant,

– against –

CARLIN SENECA-JOHN and CARLIN SENECA-JOHN
d/b/a Gramma Approved Sovereign Trades,

Respondents-Respondents.

Docket No.: CA 23-00740

REPLY BRIEF FOR PETITIONER-APPELLANT

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PRELIMINARY STATEMENT

Supreme Court articulated two grounds in its initial Order for denying the Nation's Petition. First, after imposing artificial filing requirements not found in Section 202.71, it determined that the form of the Nation Court Judgment sought to be domesticated was not satisfactory. Second, it purported to find, *sua sponte*, that the Nation had failed to establish that Supreme Court had personal jurisdiction over Respondents.

When presented with a motion for leave to renew and reargue, Supreme Court abandoned the rulings contained in its initial Order and denied the Nation's Petition on new and additional grounds, claiming the Nation Court did not have jurisdiction to issue the Nation Court Judgment and disavowing the existence of the Cayuga Nation Reservation and the legitimacy of the Cayuga Nation's Judiciary and Police Department in the process.

The Nation's Opening Brief details why Supreme Court erred in making each of these rulings. Respondents do not oppose the Nation's arguments with respect to the initial Order, nor do they dispute the continued existence of the Cayuga Nation Reservation, the legitimacy of the Cayuga Nation Judiciary or Police Department, or any of the other arguments asserted by the Nation in its Opening Brief in support of reversing the appealed Order, or otherwise seek to have the Order upheld on its own terms.

Instead, Respondents put forth a number of unpreserved arguments in support of affirming Supreme Court on alternate grounds. All the while, they mistakenly contend that CPLR Article 53 controls proceedings under Section 202.71, when the plain language of the Rule and its history make clear it does not. For the reasons set forth below, each of Respondents' arguments should be rejected, Supreme Court's Order should be reversed, and the Petition should be granted.

ARGUMENT

Because Respondents' Brief fails to address the arguments asserted by the Nation in its Opening Brief in support of reversing the Order, any arguments in opposition to those grounds have been waived. *Lehigh Portland Cement Co. v. Assessor of the Town of Catskill*, 263 A.D.2d 558, 560 (3d Dep't 1999) ("[A] party's failure to raise an issue in its appellate brief is tantamount to abandonment or waiver of the issue." (citations omitted)). At the same time, Respondents now assert a number of arguments in support of denying leave to renew and reargue that they failed to raise in Supreme Court in opposition to the Motion. *Compare* Resp'ts' Br. *with* Resp'ts' Aff. in Opp'n to Mot. (R. 36–37).

"It is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal." *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006); *Snyder v. Newcomb Oil Co.*, 194 A.D.2d 53, 55 (4th Dep't 1993) ("argument was not raised in the trial court and is thus not preserved for

appellate review."); *State Farm Mut. Auto. Ins. Co. v. Pantina*, 255 A.D.2d 592, 592 (2d Dep't 1998) (the "contentions . . . are not properly before this Court, as they were not raised in the Supreme Court." (citation omitted)). Thus, none of those arguments Respondents now make are properly before this Court. And even were this Court to consider Respondents' unpreserved arguments for the first time on appeal, those arguments, in addition to any arguments properly before this Court, are without merit.

I. Respondents' Argument That the Order Is Not Appealable Is Based on a Mistaken Understanding That Supreme Court Denied the Motion for Leave to Reargue When, In Fact, It Is Deemed to Have Granted the Motion and the Order is Appealable as of Right

Supreme Court held, in its July 19, 2022 Decision and Order, that "Petitioner has failed to establish, even at a minimum, that this Court has personal jurisdiction over Respondents" and denied the Petition on those grounds. (R. 18). That holding defies binding precedent from this Court which squarely holds that a party seeking domestication of a foreign judgment need not establish a basis for the exercise of personal jurisdiction. *Lenchyshyn v. Pelko*, 281 A.D.2d 42, 47 (4th Dep't 2001) ("We conclude, however, that a party seeking recognition in New York of a foreign money judgment (whether of a sister state or a foreign country) need not establish a basis for the exercise of personal jurisdiction over the judgment debtor by the New York courts. No such requirement can be found in the CPLR, and none inheres in

the Due Process Clause of the United States Constitution, from which jurisdictional basis requirements derive.").

A motion for leave to reargue is authorized in precisely these circumstances: that is, where the motion is "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion[.]" CPLR 2221(d)(2). The Nation, therefore, made such a motion, which was properly identified and filed within 30 days of the July 19, 2022 Decision and Order as required under CPLR 2221(d)(1) and (3), and specifically identified the binding precedent Supreme Court failed to apply. (R. 19, 21–22). Contrary to Respondents' contention, Resp'ts' Br., p. 13, raising this legal argument on a motion to reargue is not just permissible, it is exactly the point of such a motion. Respondents' argument that "[r]eargument does not allow parties to present new legal arguments not previously offered to the court," Resp'ts' Br., p. 13, is not only illogical but defied by the plain language of CPLR 2221(d).

Supreme Court took up the Nation's Motion and addressed the merits in a three-page Decision and Order. (R. 4) ("Upon Petitioner's Motion to Renew and Reargue this Court's Decision and Order signed July 19, 2022 . . . the Court renders the following Decision[.]"). Indeed, Supreme Court specifically acknowledged *Lenchyshyn* before adhering to the original determination in the July 19, 2022 Decision and Order. (R. 4–6). Yet Respondents now contend Supreme Court actually

denied the motion for leave to reargue, and argue that because "New York law is fundamentally clear that denial of a motion to reargue is not appealable," Resp'ts' Br., p. 4, this appeal must be dismissed. *Id.*, p. 5.

Respondents' argument relies upon a mistaken understanding of what constitutes the grant or denial of a motion to reargue, which is a separate matter from the trial court's determination of the merits of that motion. If rather than flatly declining to hear it, the trial court takes up the motion and opines on the merits, the motion is deemed to have been granted regardless of whether the court adheres to its prior determination or abandons it. *See, e.g., Starzyk v. Heslinga*, 177 A.D.3d 624, 625 (2d Dep't 2019); *Lewis v. Rutkovsky*, 153 A.D.3d 450, 453 (1st Dep't 2017). As such, here, "Supreme Court, in effect, *granted* reargument, since it reviewed the merits of the plaintiff's arguments." *McNeil v. Dixon*, 9 A.D.3d 481, 482 (2d Dep't 2004) (emphasis added) (citation omitted); *Starzyk*, 177 A.D.3d at 625 ("[S]ince Supreme Court reviewed the merits on the branch of defendants' motion which was for leave to reargue, the court, in effect, granted reargument and adhered to its prior determination.") "Therefore, the portion of the order made upon reargument is appealable." *Starzyk*, 177 A.D. 3d at 625.

Supreme Court's statement at the close of the Order "that Petitioner's Motion to Renew and Reargue is denied" does not change that. *Rodriguez v. Jacoby & Meyers, LLP*, 126 A.D.3d 1183, 1184 (3d Dep't 2015) ("As a general proposition,

no appeal lies from the denial of a motion to reargue. Where, however, the court actually addresses the merits of the moving party's motion, we will deem the court to have granted reargument and adhered to its prior decision—notwithstanding language in the order indicating that reargument was denied." (internal citations and quotation marks omitted)).

Thus, the portion of Supreme Court's Order made upon reargument is appealable as a matter of right pursuant to CPLR 5701(a)(2)(vii). *Starzyk*, 177 A.D.3d at 625; *Matter of Gough*, 59 A.D.3d 998, 998 (4th Dep't 2009) ("[W]e note that Supreme Court in fact granted leave to reargue and, upon reargument, adhered to its prior decision, thus rendering the order appealable as of right." (citing CPLR 5701(a)(2)(vii)) (additional citations omitted)). Respondents' argument to the contrary is without merit and, for the reasons set forth more fully in the Nation's Opening Brief, the Order should be reversed and the Petition granted.

II. Respondents' Arguments in Opposition to the Motion for Leave to Renew Are Unpreserved, Based Upon a Faulty Premise, and Contradicted by This Court's Own Precedent

In addition to arguments not asserted in the trial court being unpreserved for appellate review, *Snyder*, 194 A.D.2d at 55, Respondents' arguments with respect to the Nation's motion for leave to renew are based upon a faulty premise as well.

Respondents claim that "CPLR 2221(e)(2) mandates that a motion for leave to renew be based exclusively upon new information," Resp'ts' Br., p. 6, which, they

say, "*must not have been known to the party* seeking renewal." *Id.* (emphasis in original) (citation omitted). But that limitation can be found nowhere in the provision, which states only that "[a] motion for leave to renew . . . shall be based upon new facts not offered on the prior motion that would change the prior determination." CPLR 2221(e)(2). The very next subsection makes clear such a motion may be based on *any* facts, so long as the motion "contain[s] reasonable justification for the failure to present such facts on the prior motion." CPLR 2221(e)(3).

This Court has affirmed that plain reading and explicitly stated that a motion for leave to renew may be based "upon facts which were *known to the movant at the time the original motion was made*" provided "the movant establishes a reasonable justification for the failure to present such facts on the prior motion." *Foxworth v. Jenkins*, 60 A.D.3d 1306, 1307 (4th Dep't 2009) (emphasis added) (citation omitted). Such justification undoubtedly existed here.

Section 202.71 announces the manner in which a proceeding may be brought, and specifically designates the documents that are to be submitted in doing so: "Any person seeking recognition of a judgment, decree or order rendered by a court duly established under tribal or federal law by any Indian tribe, band or nation recognized by the State of New York or by the United States may commence a special proceeding in Supreme Court pursuant to Article 4 of the CPLR *by filing:* [1] *a notice*

of petition and [2] *a petition with* [3] *a copy of the tribal court judgment, decree or order appended thereto in the County Clerk's office in any appropriate county of the state*." 22 N.Y.C.R.R. § 202.71 (emphasis added).

The Nation complied with Section 202.71 to the letter, commencing an action under CPLR Article 4 in the Seneca County Supreme Court and filing: (1) a Notice of Petition (R. 7), and (2) a Petition (R. 8–11) with (3) a copy of the Nation Court Judgment appended thereto. (R. 12). Yet Supreme Court imposed *ad hoc* filing requirements found nowhere in the Rule, claiming "when this Court is usually presented with a Judgment from a court of foreign jurisdiction, [it is] accompanied by a certification of the state or country in which that court sits, the papers are overtly endorsed, stamped and attested to." (R. 17).

The Nation could not have reasonably anticipated that Supreme Court would impose impromptu filing requirements not specified by the Rule. And so the Nation brought the motion for leave to renew, and submitted copy of the Nation Court Judgment bearing a raised and embossed seal (R. 34) and an attestation of the Nation Court Clerk attesting to the validity of the Nation Court Judgment. (R. 33). The Nation also submitted copies of the Nation Ordinance establishing the Cayuga Nation Civil Court (R. 26–31), and the Resolution of the Nation's governing body, the Cayuga Nation Council, adopting the Ordinance. (R. 32).

Consistent with CPLR 2221(e)(3)'s mandate, the Nation further provided Supreme Court with "reasonable justification for the failure to present such facts" in the Petition. First, because it "did not have reason to believe the copies of the orders and judgment submitted to this Court would have to bear a visibly-raised seal or embossment, as such imprimaturs are not contemplated or required by 22 N.Y.C.R.R. § 202.71." (R. 34). And second, because it had previously brought twelve separate Section 202.71 petitions in Seneca County Supreme Court, identical in form to the Petition here—each of which was granted—and not once did the court raise an issue with respect to documentation, let alone the validity of the Nation Court. (*Id.*).

Respondents' argument that the Nation "should have anticipated that, as part of their burden under CPLR 5302(c)," Resp'ts' Br., p. 9, Supreme Court would seek additional documents is belied by the fact that this is a Section 202.71 proceeding to which CPLR Article 53 does not apply. *Compare* Pet'r's Opening Br., Add. A *with* 22 N.Y.C.R.R. § 202.71 (omitting all reference to Article 53 of the CPLR); *Commonwealth of the N. Mar. I. v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55, 62 (2013) ("[W]e cannot read into the statute that which was specifically omitted by the legislature.").

For good measure, Respondents go on to argue that the Nation's filing of the specific documents articulated by the plain language of Section 202.71, and not

filing additional materials not contemplated by the Rule, was a matter a “litigation strategy” and “does not constitute a justifiable reason for failing to file the information earlier.” Resp’ts’ Br., p. 9. That argument is a pure contrivance, and a bad one at that. Doing what Section 202.71 mandates is not a litigation strategy. It is following the law.

Still, after Supreme Court called for additional documentation in its July 19, 2022 Decision and Order, the Nation provided that documentation, and more, without hesitation. But when presented with precisely the documentation it claimed was needed to satisfy Section 202.71, Supreme Court did not even acknowledge it, and denied the motion on entirely new and independent grounds.

That refusal to recognize or consider the documentation and deny the Motion was a reversible abuse of discretion. *Whelan v. GTE Sylvania, Inc.*, 182 A.D.2d 446, 450 (1st Dep’t 1992) (“It was an abuse of discretion for the court to reject GTE’s offer of a non-employee expert agreement when this offer was in direct response to the concerns of the IAS court.” (citations omitted)). For the reasons set forth more fully in the Nation’s Opening Brief, the Order should be reversed and the Petition granted.

III. Respondents' Argument That CPLR Article 53 Applies to Petitions Under Section 202.71 is Unpreserved, and It is Foreclosed by the Rule's Plain Language and Its History

Quoting to a draft version of Section 202.71, Respondents argue that the rule demands "tribal court judgments will only be authorized '[i]f the court finds that the judgment is entitled to recognition under the provisions of Article 53 of the CPLR[.]'" Resp'ts' Br., p. 14 (quoting Pet'r's Opening Br., Add. A, p. 4) (emphasis added). But Respondents' limited interpretation finds no support in even the draft language, which continues "or under the principles of the common law of comity[.]" Pet'r's Opening Br., Add. A, p. 4 (emphasis added). More to the point, the language Respondents quote mentioning Article 53 was entirely omitted from Section 202.71 when it was adopted. *Compare* 22 N.Y.C.R.R § 202.71 *with* Pet'r's Opening Br., Add. A.

Section 202.71, as enacted, provides simply: "If the court finds that the judgment, decree or order is entitled to recognition under principles of the common law of comity, it shall direct entry of the tribal court judgment, decree or order as a judgment, decree or order of the Supreme Court of the State of New York." 22 N.Y.C.R.R. § 202.71 (emphasis added). Gone is any reference to CPLR Article 53, and it cannot be read back into the rule now. *Canadian Imperial Bank of Commerce*, 21 N.Y.3d at 62 ("[W]e cannot read into the statute that which was specifically omitted by the legislature."). In addition to being improperly raised for the first time

on appeal, *Snyder*, 194 A.D.2d at 55, Respondents' argument that CPLR 5302(b)(2) applies to Section 202.71 proceedings and bars the domestication of judgments based upon fines is entirely misplaced. So too is any argument that CPLR Article 53 applies more broadly. *Canadian Imperial Bank of Commerce*, 21 N.Y.3d at 62.

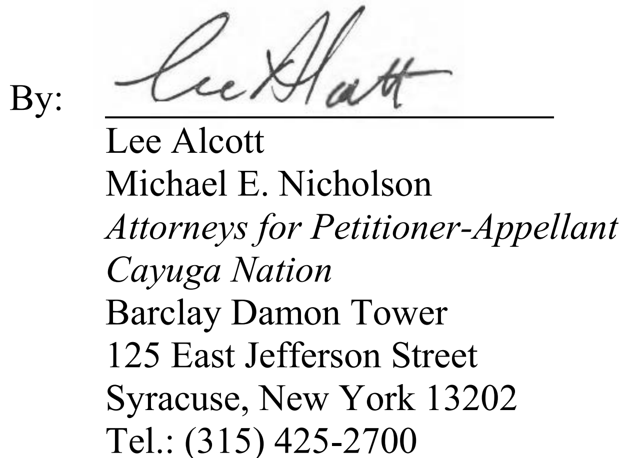
For the reasons set forth more fully in the Nation's Opening Brief, the Order should be reversed and the Petition granted.

CONCLUSION

For the reasons set forth herein, and those set forth more fully in the Nation's Opening Brief, Supreme Court's Order should be reversed and the Nation's Petition granted.

Dated: November 8, 2023

BARCLAY DAMON LLP

By: 

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Name of typeface: Times New Roman

Point size: 14pt

Line spacing: Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service and this Statement is 2,780.