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February 1, 2008

BY HAND

Hon. Jose A. Cabranes, Circuit Judge
Hon. Wilfred Feinberg, Circuit Judge
Hon. Pierre Leval, Circuit Judge
c/o Catherine O'Hagan Wolfe
Clerk of the Court
United States Court of Appeals
for the Second Circuit
United States Courthouse
500 Pearl Street
New York, New York 10007

Re: Ehrenfeld v. Mahfouz, 06-2228-cv

Dear Judges Cabranes, Feinberg, and Leval:

Despite the recent decision by the New York Court of Appeals that CPLR 302(a)(1) does not confer personal jurisdiction over defendant Khalid bin Mahfouz, this Court should find that personal jurisdiction exists or should at least postpone issuing a final decision in this case until the end of the current legislative session. This is so because: (1) federal constitutional issues are involved that are not resolved by the

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state court's ruling, and (2) the State Legislature is currently considering legislation on this precise point.

I. FEDERAL ISSUES NOT CONTROLLED BY STATE COURT

The New York court's answer to the certified question does not resolve this appeal. Although the New York Court of Appeals interpreted CPLR 302(a)(1), it did so as a matter of state law not federal constitutional law. Because federal constitutional questions are embedded in the jurisdictional issues, the state court's ruling is not conclusive on the issues before this Court.

The personal jurisdiction issue still to be decided by this Court in this case involves fundamental constitutional matters. As this Court expressly stated in its prior ruling, "The issue may implicate the First Amendment rights of many New Yorkers." Ehrenfeld v. Mahfouz, 489 F. 3d 542, 549(2d Cir. 2007). "The question is important to authors [and] publishers." Id. In this particular, unusual, limited context, where federal constitutional rights are implicated, a state court's crabbed reading of its long-arm statute does not necessarily resolve the jurisdictional issue. Just as this Court reserved for itself the "ultimate determination" whether long-arm jurisdiction "satisfies constitutional due process," id. at 547, so too it implicitly and necessarily reserved for itself the "ultimate determination"

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whether denial of jurisdiction would violate basic First Amendment rights.

This Court should recognize the importance of the First Amendment that the New York Court of Appeals apparently overlooked in its analysis. It should incorporate the New York court's reasoning only to the extent consistent with the Supremacy Clause of the U.S. Constitution, which "imposes on state courts a constitutional duty 'to proceed in such a manner that all the substantial rights of the parties under controlling federal law [are] protected.'" Felder v. Casey, 487 U.S. 131, 151 (1988) (quoting Garrett v. Moore-McCormack, Co., 317 U.S. 239, 245 (1942)).

Where state court procedures are applied to an action concerning a federal right, that "federal right cannot be defeated by the forms of local practice." Brown v. W. Ry. of Alabama, 338 U.S. 294, 296 (1949). "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." Id. at 298-99 (quoting Davis v. Wechsler, 263 U.S. 22, 24 (1922)); see also In re Tarble, 80 U.S. 397, 407 (1871) ("Such being the distinct and independent character of the two governments, within their respective spheres of action, it

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follows that neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National government to preserve its rightful supremacy in cases of conflict of authority."). Under the Supremacy Clause, the "relative importance to the State of its own law is not material when there is a valid federal law, for any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." Felder v. Casey, 487 U.S. 131, 138 (1988); cf. New York v. United States, 505 U.S. 144 (1992) ("Moreover, the Supremacy Clause makes federal law paramount over the contrary positions of state officials; the power of federal courts to enforce federal law thus presupposes some authority to order state officials to comply.").

In this case, the New York court's reading of CPLR 302(a)(1) impermissibly intrudes on federal rights. Felder is instructive: there, the Supreme Court refused to permit a state court to apply its particularized statute of limitations to a civil rights action concerning a plaintiff's constitutional rights, "because such statutes inadequately accommodate the complexities of federal civil rights litigation," and they thereby "discriminate[] against the federal right." Felder, 487 U.S. at 139-40; Accord Mercantile Nat'l Bank at Dallas v. Langdeau, 371

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U.S. 555 (1963) (federal rather than state venue rules applied to action concerning federal law filed in state court). While state courts surely have the authority to fashion their own rules of procedure, "that authority does not extend so far as to permit States to place conditions on the vindication of a federal right." Felder, 487 U.S. at 147; Accord Mondou v. New York, New Haven & Hartford R.R. Co., 223 U.S. 1, 58 (1912) ("The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the state as to recognize its own laws.").

Just as the Felder Court required the plaintiff's constitutional claims to proceed under the governing federal procedure, so too should this Court permit Dr. Ehrenfeld's claim to proceed. The only jurisdictional limitation on the Court in these circumstances is the Due Process Clause, an analysis this Court expressly held in abeyance pending the certification. See, e.g., Chew v. Dietrich, 143 F.3d 24, 27 n.3 (2d Cir. 1998). Just as the Ninth Circuit found in Yahoo!, this Court can find personal jurisdiction for the reasons already briefed by the parties.

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II. PROPOSED LEGISLATION

If for any reason this Court is not inclined to find that personal jurisdiction exists, then we ask it at least to postpone making a final decision in this unusual and important case until the end of the current session of the New York State Legislature. We make this request because of new legislation that has been introduced to deal with the precise question presented.

In its December 20, 2007 decision, the New York Court of Appeals stated that efforts "regarding the enlargement of CPLR to confer jurisdiction" over defendants such as Mahfouz "should be directed to the Legislature." That is exactly what has happened even in the short time since the New York Court's decision. The New York State Legislature immediately reacted to the New York Court of Appeals' decision. Soon after the New York court's ruling, Senator Dean Skelos and Assemblyman Rory Lancman introduced a bipartisan bill, the "Libel Terrorism Protection Act" (S.6687/A.9652), a copy of which is attached as Exhibit A, that would amend CPLR 302 to state:

(d) The courts of this state shall have personal jurisdiction over any person who obtains a judgment in a defamation proceeding outside the United States against any person who is a resident of New York or, if not a natural person, has its principal place of business in New York, for the purposes of rendering declaratory relief with respect to

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that resident's liability for the judgment, provided:

1. the publication at issue was published in New York, and
2. that resident (i) has assets in New York which might be used to satisfy the foreign defamation judgment, or (ii) may have to take actions in New York to comply with the foreign defamation judgment. The provisions of this subdivision shall apply to persons who obtained judgments in defamation proceedings outside the United States prior to and/or after the effective date of this subdivision.

Because this proposed legislation would confer jurisdiction over Mahfouz, we ask the panel to refrain from immediately issuing a decision in this case and instead give the New York State Legislature a reasonable period of time to consider the bill.

Holding the panel's decision in abeyance for a reasonable time will conserve judicial resources. Were the panel to rule quickly against Dr. Ehrenfeld, and the Legislature then were to pass the proposed legislation, Dr. Ehrenfeld would have to file suit against Mahfouz again. In addition, Mahfouz would suffer no prejudice if the panel were to refrain from quickly issuing a decision in this case. Dr. Ehrenfeld seeks only a declaration as to the enforceability of Mahfouz's foreign libel judgment, which he has not yet tried to enforce, so that the proposed brief delay would not deprive him of liberty or money.

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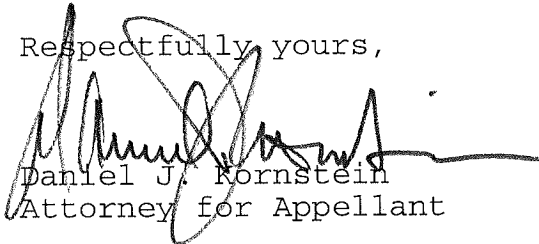
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This Court has already recognized that the issue in this case "concerns important public policy" of New York State. The Court should, as a matter both of federalism and separation of powers, allow the State Legislature to determine exactly what that policy should be.

* * *

For all the above reasons, the Court should find a due process basis for the existence of personal jurisdiction here, or, in the alternative, postpone decision until the state legislature has had an opportunity to act on the pending legislation.

Respectfully yours,



Daniel J. Kornstein
Attorney for Appellant

DJK:mm
Enclosure

cc: Timothy J. Finn, Esq. (via electronic mail)
Jason P. Criss, Esq. (via electronic mail)



Friday, January 25, 2008

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S T A T E O F N E W Y O R K

6687

I N S E N A T E

(PREFILED)

January 9, 2008

Introduced by Sen. SKELOS -- read twice and ordered printed, and when printed to be committed to the Committee on Codes

AN ACT to amend the civil practice law and rules, in relation to enforceability of certain foreign judgments

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

- 1 Section 1. This act shall be known and may be cited as the "libel
2 terrorism protection act".
- 3 S 2. Section 5304 of the civil practice law and rules, as added by
4 chapter 981 of the laws of 1970, is amended to read as follows:
- 5 S 5304. Grounds for non-recognition. (a) No recognition. A foreign
6 country judgment is not conclusive if:
- 7 1. the judgment was rendered under a system which does not provide
8 impartial tribunals or procedures compatible with the requirements of
9 due process of law;
- 10 2. the foreign court did not have personal jurisdiction over the
11 defendant.
- 12 (b) Other grounds for non-recognition. A foreign country judgment need
13 not be recognized if:
- 14 1. the foreign court did not have jurisdiction over the subject
15 matter;
- 16 2. the defendant in the proceedings in the foreign court did not
17 receive notice of the proceedings in sufficient time to enable him to
18 defend;
- 19 3. the judgment was obtained by fraud;
- 20 4. the cause of action on which the judgment is based is repugnant to
21 the public policy of this state;
- 22 5. the judgment conflicts with another final and conclusive judgment;
- 23 6. the proceeding in the foreign court was contrary to an agreement
24 between the parties under which the dispute in question was to be
25 settled otherwise than by proceedings in that court; {or}

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets
{ } is old law to be omitted.

LBD14685-03-7

S. 6687

2

1 7. in the case of jurisdiction based only on personal service, the
2 foreign court was a seriously inconvenient forum for the trial of the
3 action{.}; OR

4 8. THE CAUSE OF ACTION RESULTED IN A DEFAMATION JUDGMENT OBTAINED IN A
5 JURISDICTION OUTSIDE THE UNITED STATES, UNLESS A COURT SITTING IN THIS
6 STATE FIRST DETERMINES THAT THE DEFAMATION LAW APPLIED IN THE FOREIGN
7 JURISDICTION SATISFIES THE FREEDOM OF SPEECH AND PRESS PROTECTIONS GUAR-
8 ANTEED BY BOTH THE UNITED STATES AND NEW YORK CONSTITUTIONS.

9 S 3. Section 302 of the civil practice law and rules is amended by
10 adding a new subdivision (d) to read as follows:

11 (D) THE COURTS OF THIS STATE SHALL HAVE PERSONAL JURISDICTION OVER ANY
12 PERSON WHO OBTAINS A JUDGMENT IN A DEFAMATION PROCEEDING OUTSIDE THE
13 UNITED STATES AGAINST ANY PERSON WHO IS A RESIDENT OF NEW YORK OR, IF
14 NOT A NATURAL PERSON, HAS ITS PRINCIPAL PLACE OF BUSINESS IN NEW YORK,
15 FOR THE PURPOSES OF RENDERING DECLARATORY RELIEF WITH RESPECT TO THAT
16 RESIDENT'S LIABILITY FOR THE JUDGMENT, PROVIDED:

17 1. THE PUBLICATION AT ISSUE WAS PUBLISHED IN NEW YORK, AND

18 2. THAT RESIDENT (I) HAS ASSETS IN NEW YORK WHICH MIGHT BE USED TO
19 SATISFY THE FOREIGN DEFAMATION JUDGMENT, OR (II) MAY HAVE TO TAKE
20 ACTIONS IN NEW YORK TO COMPLY WITH THE FOREIGN DEFAMATION JUDGMENT. THE
21 PROVISIONS OF THIS SUBDIVISION SHALL APPLY TO PERSONS WHO OBTAINED JUDG-
22 MENTS IN DEFAMATION PROCEEDINGS OUTSIDE THE UNITED STATES PRIOR TO
23 AND/OR AFTER THE EFFECTIVE DATE OF THIS SUBDIVISION.

24 S 4. This act shall take effect immediately.

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Friday, January 25, 2008

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S T A T E O F N E W Y O R K

9652

I N A S S E M B L Y

(PREFILED)

January 9, 2008

Introduced by M. of A. LANCMAN -- read once and referred to the Committee on Judiciary

AN ACT to amend the civil practice law and rules, in relation to enforceability of certain foreign judgments

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 Section 1. This act shall be known and may be cited as the "libel
2 terrorism protection act".

3 S 2. Section 5304 of the civil practice law and rules, as added by
4 chapter 981 of the laws of 1970, is amended to read as follows:

5 S 5304. Grounds for non-recognition. (a) No recognition. A foreign
6 country judgment is not conclusive if:

7 1. the judgment was rendered under a system which does not provide
8 impartial tribunals or procedures compatible with the requirements of
9 due process of law;

10 2. the foreign court did not have personal jurisdiction over the
11 defendant.

12 (b) Other grounds for non-recognition. A foreign country judgment need
13 not be recognized if:

14 1. the foreign court did not have jurisdiction over the subject
15 matter;

16 2. the defendant in the proceedings in the foreign court did not
17 receive notice of the proceedings in sufficient time to enable him to
18 defend;

19 3. the judgment was obtained by fraud;

20 4. the cause of action on which the judgment is based is repugnant to
21 the public policy of this state;

22 5. the judgment conflicts with another final and conclusive judgment;

23 6. the proceeding in the foreign court was contrary to an agreement
24 between the parties under which the dispute in question was to be
25 settled otherwise than by proceedings in that court; {or}

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets { } is old law to be omitted.

LBD14685-04-8

A. 9652

2

1 7. in the case of jurisdiction based only on personal service, the
2 foreign court was a seriously inconvenient forum for the trial of the
3 action{.}; OR

4 8. THE CAUSE OF ACTION RESULTED IN A DEFAMATION JUDGMENT OBTAINED IN A
5 JURISDICTION OUTSIDE THE UNITED STATES, UNLESS A COURT SITTING IN THIS
6 STATE FIRST DETERMINES THAT THE DEFAMATION LAW APPLIED IN THE FOREIGN
7 JURISDICTION PROVIDES AT LEAST AS MUCH PROTECTION FOR FREEDOM OF SPEECH
8 AND PRESS AS PROVIDED FOR BY BOTH THE UNITED STATES AND NEW YORK CONSTI-
9 TUTIONS.

10 S 3. Section 302 of the civil practice law and rules is amended by
11 adding a new subdivision (d) to read as follows:

12 (D) FOREIGN DEFAMATION JUDGMENT. THE COURTS OF THIS STATE SHALL HAVE
13 PERSONAL JURISDICTION OVER ANY PERSON WHO OBTAINS A JUDGMENT IN A DEFA-
14 MATION PROCEEDING OUTSIDE THE UNITED STATES AGAINST ANY PERSON WHO IS A
15 RESIDENT OF NEW YORK OR, IF NOT A NATURAL PERSON, HAS ITS PRINCIPAL
16 PLACE OF BUSINESS IN NEW YORK, FOR THE PURPOSES OF RENDERING DECLARATORY
17 RELIEF WITH RESPECT TO THAT RESIDENT'S LIABILITY FOR THE JUDGMENT, TO
18 THE FULLEST EXTENT PERMITTED BY THE UNITED STATES CONSTITUTION,
19 PROVIDED:

20 1. THE PUBLICATION AT ISSUE WAS PUBLISHED IN NEW YORK, AND

21 2. THAT RESIDENT (I) HAS ASSETS IN NEW YORK WHICH MIGHT BE USED TO
22 SATISFY THE FOREIGN DEFAMATION JUDGMENT, OR (II) MAY HAVE TO TAKE
23 ACTIONS IN NEW YORK TO COMPLY WITH THE FOREIGN DEFAMATION JUDGMENT. THE
24 PROVISIONS OF THIS SUBDIVISION SHALL APPLY TO PERSONS WHO OBTAINED JUDG-
25 MENTS IN DEFAMATION PROCEEDINGS OUTSIDE THE UNITED STATES PRIOR TO
26 AND/OR AFTER THE EFFECTIVE DATE OF THIS SUBDIVISION.

27 S 4. This act shall take effect immediately.

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