

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JOHN BRUGMANN,

Plaintiff and Appellant,

v.

JOHN BUCKINGHAM,

Defendant and Respondent.

G049157

(Super. Ct. No. 30-2009-00117931)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Glenn R. Salter, Judge. Affirmed.

Rogers & Harris and Michael Harris for Plaintiff and Appellant.

Cimino Law Offices, Diana Cimino, Francis P. Licata and Lynn P.

Whitlock for Defendant and Respondent.

* * *

John Brugmann obtained a default judgment in a New York trial court against John Buckingham in December 2008 based on an alleged default on a \$100,000 promissory note. The promissory note provided that it would be interpreted under the laws of the State of New York, and that venue for any action based on the default of the loan would be in Rockland County, New York.¹ The note, however, contains no language in which Buckingham expressly agreed to submit to New York jurisdiction.

Brugmann's New York attorney had the judgment entered in Orange County Superior Court in May 2009. Buckingham moved to vacate the judgment in July of 2013. The trial court granted the motion, noting that under this court's decision in *Global Packaging, Inc. v. Superior Court* (2011) 196 Cal.App.4th 1623, there must be more than just a venue-selection clause in a contract to establish an individual's minimum contacts with a jurisdiction. The trial judge noted the promissory note contained no language consenting to New York jurisdiction. He also made two back-up observations in support of his ruling: Brugmann had used substitute service to obtain the New York default yet had been able to serve Buckingham personally when he sought to domesticate the New York judgment (the implication being Brugmann had pulled a fast one in getting the New York default) and there was evidence Brugmann's New York attorney actually didn't have any authority to act as Brugmann's agent in domesticating the New York judgment. Buckingham has now appealed from the order vacating the New York judgment.² We affirm.

¹ Here is the exact language: "This Note may not be changed or terminated orally and shall be interpreted in accordance with the laws of the State of New York. Venue for any action commenced pursuant to a default in the terms of this note shall lie exclusively in Supreme Court, Rockland County, New York."

² Judge Glenn Salter granted the motion to vacate the New York judgment August 14, 2013. Judge Charles Margines heard a motion for reconsideration and denied it in a minute order dated October 2, 2013. The notice of appeal was filed October 15, 2013, and only identifies the August 14, 2013 order as the target of the appeal. The notice of appeal was easily timely given: (a) the minute order of August 14, 2013 was embodied in a formal, signed order of August 22, 2013 as well as (b) Brugmann's filing a motion for reconsideration within just four days of the August 22, 2013 formal order. (See Cal. Rules of Court, rule 8.108(e).)

Brugmann reasons this way: Contrary to the trial judge’s observation, New York law is not “split” on the topic of whether venue or forum selection clauses in contracts demonstrate that each party to the contract consents to the relevant jurisdiction represented by the venue or selected forum. Rather, New York law is settled on the topic. (See *U.S. Bank Nat’l Ass’n v. Ables & Hall Builders* (S.D.N.Y. 2008) 582 F.Supp.2d 605, 615 [“As discussed above, the forum selection clause contained in the Master Agreement is valid and enforceable under New York law. That fact alone is sufficient to provide this Court with jurisdiction over the defendants under New York law.”], citing *CV Holdings, LLC v. Bernard Tech., Inc.* (App. Div. 2005) 788 N.Y.S.2d 445, 446.) The New York decision which arguably shows the “split” in New York authority, *Oklahoma ex rel. Crawford v. LNP Realty Corp.* (App. Div. 2000) 713 N.Y. Supp. 2d 537, is highly suspect, because its analysis is abbreviated (the whole opinion is just two paragraphs), involved an Oklahoma judgment as distinct from New York judgment, relied on one case that actually stands for the exact contrary proposition³ and relied on another case that didn’t even address the issue.⁴ Further, says Brugmann, the trial court was obligated to interpret the note in accordance with New York law, and since New York law, properly divined, holds that venue and forum selection clauses constitute consents to state jurisdiction, the trial court erred in concluding that Buckingham had not consented to New York jurisdiction. It makes no difference, says Brugmann, that California has a different rule as stated in *Global Packaging*.

³ *National Union Fire Ins. Co. v. Worley* (App. Div. 1999) 690 N.Y.S.2d 57, 59 in fact said: “Further, by agreeing to the forum selection clause in the indemnity agreement, defendant specifically consented to personal jurisdiction over her in the courts of New York and thereby waived any basis to dispute New York’s jurisdiction”

⁴ *Gibson Greeting Cards, Ltd., Div. of C. I. T. Financial Corp. v. Gateway Transp. Co., Inc.* (App. Div. 1973) 343 N.Y.S.2d 608 is another two-paragraph opinion, and, indeed, all it held was that the doctrine of forum non conveniens would apply in a case where a Canadian corporation had no other connection to New York. (*Id.* at p. 608.)

The flaw in Brugmann’s reasoning is its assumption that the question of whether Buckingham consented to New York jurisdiction is a matter of state law. It is not. It is a matter of federal due process. *Global Packaging* doesn’t articulate a mere California rule. This court’s analysis in *Global Packaging* would apply in any state in the union. The point of *Global Packaging* is that there is a significant *constitutional* difference between venue or forum selection clauses on the one hand, and consents to jurisdiction on the other. (See *Global Packaging, supra*, 196 Cal.App.4th at pp. 1632-1633.)

There are significant differences between the two: Plaintiffs opposing a motion to quash based on lack of jurisdiction have an “initial burden of proving facts justifying the exercise of jurisdiction” while parties opposing the imposition of forum selection clauses have an even more difficult burden running in precisely the opposite direction. (*Id.* at p. 1633.) And because jurisdiction is a matter of an individual’s due process right not to have to fight a lawsuit in a jurisdictionally defined territory – such as a state – where he or she does not otherwise have the requisite minimum contacts (see generally *id.* at p. 1630), it is a right “not waived by implication or inference.” (*Id.* at p. 1633.) Accordingly, this court held that a venue selection clause designating Orange County, California as the place for an action did *not* imply “an additional, separate agreement to submit to the jurisdiction of that forum” when personal jurisdiction was not otherwise available. (*Id.* at p. 1632.) There is no implied waiver of due process protections. (*Id.* at p. 1633). Rather, if parties want to establish consent to personal jurisdiction, they must plainly say so in the contract. (*Id.* at p. 1635.)

We have reviewed the New York decisions cited by Brugmann. All of them rely, at their core, on the idea that by agreeing to a venue or forum selection clause a party *necessarily* agrees to submit to the jurisdiction of the venue or forum designated. None, as far as we can tell, confronted the question of whether waiver of due process is a matter that can (or should) be found by implication.⁵ Indeed, the federal case cited, *U.S. Bank Nat'l Ass'n, supra*, specifically eschewed any need to confront a due process question.⁶ *Global Packaging* did just that, and concluded the “due process rights protected by limits on jurisdiction” are too important to waive by mere implication.

For his part Brugmann has not given us any reason to disavow *Global Packaging* and rely on the “necessary implication” logic of the New York cases. The actual language of the note does not say that “jurisdiction will be determined under New York law,” but rather merely *the interpretation of the note itself* will be a matter determined by New York law.

The order vacating the New York judgment was correct – not as a matter of California law, but as a matter of federal due process. We need not express an opinion on the two back-up reasons given by the trial judge, namely the tenuousness of the need to

⁵ Here is the list: *U.S. Bank Nat'l Ass'n, supra*, 582 F.Supp.2d at p. 615 [“Where an agreement contains a valid and enforceable forum selection clause, it is not necessary to analyze jurisdiction under New York’s long-arm statute or federal constitutional requirements of due process.”]; *CV Holdings, supra*, 788 N.Y.Supp.2d at p. 446 [no use of the words “due process” and relying entirely on the implication of consent to jurisdiction found in a venue clause]; *Sterling Natl. Bank v. Eastern Shipping Worldwide, Inc.* (App. Div. 2006) 826 N.Y.S.2d 235 [no reference to “due process” and relying on the implication of consent to jurisdiction found in forum selection clause]; *National Union Fire Ins. Co. v. Worley, supra*, 690 N.Y.Supp.2d 57, 59 [again, no reference to “due process” and relying on the implications of a forum selection clause.]

⁶ *U.S. Bank Nat'l Ass'n, supra*, 582 F.Supp.2d at page 615, relevant language quoted above.

use substituted service under New York law or Brugmann's use of a New York attorney whose representation appears to have already terminated, to domesticate the New York judgment.

Buckingham will recover his costs on appeal.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.